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COUNSEL FOR THE INDIGENT ACCUSED IN WISCONSIN*

By John M. Winters**

PART I BACKGROUND AND LEGAL THEORY

1. INTRODUCING THE PARTICIPANTS
   a. The Accused

The growing interest of Americans in a wide range of ills of the less fortunate segments of an otherwise affluent society is specifically reflected in the sphere of law by the growing concern with the right of the indigent criminal defendant to have an attorney supplied without cost to assist in his defense. The public at large,¹ the press, the courts and the bar have evidenced their growing interest in the man who is the object of the entire criminal process—the man accused of a crime. Perhaps this discussion should start with him as a guide to some understanding of why he has been given, and should be given, a right to adequate personal legal representation whether he can afford it or not.

Any type of person may be accused of a crime, and may be convicted of one. But our interest is primarily with the indigent accused whose basic characteristic often might be described as simply one of

*This report is based upon several prior studies by the author. A mimeographed report was submitted to the Wisconsin Judicial Council on February 1, 1963, based upon a study begun under the Council's direction during the summer of 1962. That study was based on replies from judges who hear over eighty-eight per cent of the criminal cases in the state, statistical information supplied by most of the court clerks and personal interviews in three counties. The second study was the Wisconsin part of a nationwide study undertaken by the American Bar Foundation under the direction of Mr. Lee Silverstein. This study produced mail responses from over three-fourths of the judges hearing criminal matters and over three-fourths of the district attorneys as well as from many defense attorneys. Personal interviews were made in seven counties, and detailed docket studies made in five of these. This report is included in substantially complete form in the article Winters, Indigent Accused Persons' Right to Counsel in Wisconsin, 38 Wis. B. Bull. 46 (February, 1965). The report will also be included as part of the second volume of the American Bar Foundation report on the national study. The second volume should be in print by the time this article is. In the summer of 1964 the judges were asked by letter to describe any changed practices within their jurisdictions and about half replied. Illness prevented an earlier publication of the results of the combined studies. However, it is felt that sporadic contacts since the study and current available statistics indicate that the information is still relevant, although the reader is cautioned to watch the dates given on various charts.

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¹A popular and successful presentation of the story surrounding the leading case on the subject is Anthony Lewis' GIDEON'S TRUMPET, Random House (1964.)
complete destitution. The indigent defendant is destitute of material possessions simply by definition, but he often will also be lacking in intelligence, in education, in the rudimentary social graces and common qualities of good behavior or in maturity. He may appear in court unshaven, showing the signs of his alcoholism or in battered clothing.

In the city, the indigent defendant is frequently a transient, looking for a better way of life or escaping the past, or he may be a slum dweller. Not uncommonly he belongs to a minority group and has for that reason been oppressed and less able to adjust. In the rural community he may be a migrant worker or a farm hand displaced by the changed methods of modern farming. The indigent defendant may speak little if any English, or be so illiterate as to speak little of any language.

The crimes for which the indigent may be charged run the gamut and include thefts, attributable in a sense to his very indigency, and other crimes arising out of his environment or his particular cultural standard and mores, or lack thereof. Of course he is by no means always of the general type just described. He may be very personable and likeable, or occasionally well-educated. The crime in question, if he did in fact commit it, may be a one time thing, produced by particular bad luck or unusual pressures which in this one instance he could not bear. But particularly in large city, as the parade of alleged criminals pass through, most present a poor picture. Much more often than not, it is safe to say that the law officer who arrests him, the law officer who investigates the case, the district attorney who prosecutes the case against him, the judge who hears the case, the attorney who defends him, the jury which decides his fate, the parole officer who later works with him, the social worker who seeks to help him to know himself and solve or live with his problems, the minister who advises him spiritually, and you, the reader of this article, would ordinarily not mix with him socially, culturally or in business and know him only because the mentioned function brings you or them in contact with him. As an abstract proposition, the indigent defendant often appeals to us only because he shares a basic, unalterable dignity simply because he is a created human being.

Even if he were not as described before the allegation of crime entered his life, society has suddenly seen fit to judge him, partially at least as a matter of moral judgment. The defendant will probably lose his job if he has one, may lose his friends, and may even have his family alienated by what has happened.

As statistics included in Part II will show, the indigent defendant may not have committed the crime for which he was arrested, or at

2 Unless, of course, some of these same indigent persons are using this article in prison to see if it will help them any.
least he may not be convicted for it (which under our system should be the same thing), but the overwhelming odds are that he actually committed the crime of which he was charged and will very probably be convicted. But the facile assumption that the defendant committed the crime has not in the American system served to prevent his receiving all the protection which the Law in its solemn dignity can supply. In fact at times it seems that the Law in the abstract sense would almost rather see him escape conviction, although again, as later statistics show, in practice few escape once an arrest has been made and the matter first becomes a part of the court record.

But the United States Supreme Court and other courts have decided that it is improper to deal with any of the men described differently because they are impoverished. In considering the indigent's right to an attorney, the courts have proceeded rather rapidly in recent years to accomplish former Justice Jackson's general statements that:

We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constituting an irrelevance, like race, creed or color.  

And in the broad sense, the Court is so correct. As long as the accused may not have committed the crime yet be convicted without the protection of his own attorney, as long as some indigent's arise above or learn to live within their circumstances, as long as the law is to apply equal and adequate protection to all, and as long as the indigent is still a human being, he deserves consideration and protection in his own right.

And most indigents are not remotely capable of protecting themselves because of their lack of basic learning and technical knowledge, and their simple fear of the criminal processes. But with representation, not only is their need for legal advice met, but even their ability to adjust to society may be enhanced by the fact that society was willing to provide a little personal help.

b. The Public

The role of the public as a participant in the criminal processes is most obviously found in the prosecutor whose job it is to demand

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4 The ethic of the prosecutor also includes an obligation to seek only justice from the accused. However, this is only incidental to his obligations and would ordinarily not be considered as a factor in determining whether the accused received adequate representation. Nevertheless, I think that in making the overall evaluation of the accused position, it should be kept in mind that the prosecutor most often does his work conscientiously without much of the outside pressure for conviction which is so popularly presumed to exist.
retribution from the wrongdoer for breaching the peace and to thereby also warn others who might be inclined to so act lest the public be individually harmed again.

But if we really mean that our criminal procedure assumes that a man suspected of a crime is innocent until proven guilty, then the public, society, government or however you want to describe all of us working cumulatively, should be as interested in defending as in prosecuting. And here we are not just considering the fact that abstractly we provide the protection so that if it happens to one of us individually we will be protected. Frankly, neither you nor I are likely to have to worry about the indigent's personal need for counsel since the odds are that neither of us will be in a position to lose this or other constitutional guarantees. Nor are the members of the bar who should help in this area, or the judges, or county supervisors who approve budget allotments, or the legislators, or the newspaper men or anyone else in a position to influence the processes realistic if they approach the need solely because they may need the services some day.

Of course one thing we do want is honest convictions that will stick, so we provide the help for that reason from the prosecution point of view. And we hope the convicted accused will adjust, so we want him to believe and know that he was treated fairly, although he is likely to evaluate results rather than effort and complain while in prison, and then on the average not adjust later on.

But in the grand sense, the public responsibility lies in the reality that a civilization is judged by itself, its contemporaries, and history, not in terms of what the greatest in the civilization have, or even what the average has, but rather in what it can do for its least member.5 Perhaps the idea that no man is an island unto himself cannot be applied so as to say that you are harmed because one lousy bum in a large urban center suffered an injustice, but if many do, or if we are not consciously trying to do better, then as a civilization we are to that extent to be judged unfavorably.

Not that we will ever put as much effort into defending as we do prosecuting. No one seems to advocate this, but token assistance or inadequate budgeting scarcely meets the need. Admittedly, the officials spending the money have many competing and valuable expenditures for other purposes, and persons volunteering their services have many worthwhile outlets for volunteer work. But on the domestic front, no two subjects are more important than crime and poverty, and when they come together in one person, the public should react grandly.

c. The Lawyer

As indicated in Part II, many Wisconsin judges have said that the

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5 For an article on the interest of the public in all legal matters see Snyder, Justice by Means of State Law; Balancing the Interests, 27 BROOKLYN L. REV. 69 (1960).
bar has a responsibility to contribute its services to the indigent accused, and much has been said and written recently affirming this obligation. I suppose the attorney's particular obligation to contribute to the public need and the need of the individual indigent defendant arises out of his peculiar training and position of influence. The canons give an attorney the "Right . . . to undertake the defense of a person accused of a crime regardless of his personal opinion as to the guilt of the accused . . . ."6 and the actual fact of court appointment has been said to impose the specific duty as to the case of appointment. It is clear in Wisconsin that few attorneys refuse appointments, and then only with specific and immediate reasons, although the judges tend to avoid asking specialists or others whose acceptance seems less likely to the court. The attorney is an officer of the court and, perhaps with an integrated bar as in Wisconsin, there is an added basis for supposing an obligation.

Yet the individual obligation seems to be only a moral one, arising out of the possession of legal talents which at least sometimes should be used for other than personal advantage as such, and this is one of the most important ways of using this training in the law. Even the obligation on the bar as a whole is general and moral rather than specific and legal. One can only hope that the need will find a response from attorneys because many of them have a professional standard which causes them to so respond.

To speak of the need for bar assistance is to present what is at least superficially an anomaly. While some would demand this spirit of self-sacrifice from the bar, many, both within and without the profession, look askance at the practice of criminal law. Various commentators7 and some of the persons interviewed for this study surmise that there exists a lower class of lawyers, working among the criminal class with sometimes questionable means, to keep clients out of jail for whatever money they can extract. This lawyer supposedly is looked down on by the other members of the bar, seldom participates in formal bar association activities, and is identified in the press as somehow having the same character as the bulk of his clients. This writer does not personally believe that the generalization is universally true, or even close to it. Yet several judges interviewed alluded to the problem—although never as applied to their own jurisdiction—and there is solid reason for believing that there is this type of attorney. Whether unsavory persons

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6ABA Canon 5.
are more common in criminal practice than in other areas, such as the
debt collectors, one can only guess.

However, the evaluation of the representation supplied under vari-
ous methods of providing attorneys and the effectiveness of any type
of representation, depends in final analysis on the statute of the mem-
bers of the bar. Having said that things are less than perfect, although
to exactly what extent is unknown, I must say that indications are that
the bar in Wisconsin is superior to most for various reasons—including
the high caliber of the law schools which supply most of its attorneys,
the high standing of the integrated bar, the quality of its bench from an
overall point of view and the general climate of the state which makes
the accomplishment of high standards easier than in some other loca-
tions around the country. What defects there are should receive the
constant attention of the bar itself, those in charge of discipline, the
courts, and the law schools. But later in the article there will be dis-
cussion of the legal criteria for determining whether counsel’s repre-
sentation of a given defendant was adequate and still later evaluation
of various methods of selecting attorneys including the appointment
from the bar as a whole will be made. Much of this evaluation de-
pends on one’s individual attitude toward the bar as a whole, and the
criminal bar in particular. Unfortunately this involves unprovable
facts with very few of us able to supply simply from our own experi-
ence a fair and accurate opinion of so many attorneys. It seems to me
that only if we assume the bar is far from hopeless and not to be auto-
matically excluded can a realistic evaluation be made of what has
happened and what should happen in Wisconsin.

d. The Judge

Whatever system of supplying counsel is used, and however much
time he may have to spend with his client, much of the criminal process
depends on the ability and integrity of the judge. His position is always
such that he can mishandle the rights of the defendant and can make
less effective the representation the defendant gets as a matter of right.
The judges’ widespread cooperation and interest in the present subject
was demonstrated throughout the work on this study and with rare
exception, this author would place great confidence in the bench of
Wisconsin. These men are in a position to provide very much of the
protection needed by the accused, and can each give examples of how
they have leaned over backwards to give more protection than either
the prosecutor or the defense attorney in fact had given. But this pro-
duced, particularly in smaller communities, an occasional attitude that
defense counsel was not necessary from a practical viewpoint and
everything was satisfactory as long as the record met the constitutional
standard. In the second part of this article, brief mention will be made
of what has sometimes been called the “game theory” of justice in the
INDIGENT'S RIGHT TO COUNSEL

United States, whereby two antagonists, each committed to a side in a controversy, come together to present their side with every legitimate tool available under the law to win their case before a judge or judge and jury. To the extent that this is a valid method of proceeding and one to be adhered to, the judge cannot think of himself as meeting the need for personal counsel for the defendant regardless of how cut and dry the case seems and regardless of how much confidence the judge has in himself. The only judge who has justified confidence in himself is the one who sees to it that the representation supplied is for the defendant's benefit, not that of the court or the record, and who gives the attorney for the defendant a reasonably free hand in representing the accused. Occasionally an attorney feels that the judge has not so done, yet cannot point to any specific, provable, conduct which is erroneous as a matter of law, nor is the attorney in a position to complain.

2. HISTORY OF THE RIGHT TO AN ATTORNEY

The history of the legal right to have an attorney seems to proceed through three general phases—that during which the right to hire an attorney became established, that during which the basic issue was in which cases was there a right to have representation supplied without cost to an indigent accused, and the very recent phase which concedes a broad category of crimes for which the right to hired or appointed counsel exists while concerning itself with how soon and for how long the right exists and with what constitutes adequate representation during that time. The first phase, that establishing the basic right to an attorney at least if the defendant can find his own, has a long history, and in terms of the whole of history, was only recently settled.

In ancient Greece, the professional lawyer as we know him did not exist, although the leaders of a town would frequently come to the defense of one of the members of the community accused of a crime through the means of a fraternity-type organization which attempted to supply legal counsel and advice to its members. Strangely to us, the rationale for the failure to supply professional legal advice was akin to that of the Russians after the revolution, an idea that the rights of the citizen would somehow be thwarted by the actions of a lawyer seeking to defend him.


In fact after the Russian revolution, the role of all private attorneys was to have been completely abolished in favor of allowing relatives and friends unskilled in the law to appear before the people's courts which would be composed of non-lawyers. As the individuals who appeared in behalf of the parties became better organized, a sort of professional body evolved and was made into a “college” of practitioners who were thus “qualified” for the general practice of law. However, even then, in the initial stages of this evolved system, i.e., shortly after 1918, the attorneys were paid only by the state and, while nominally defenders or accusers, they were nevertheless specifically identified as assistants to the judges and not as representing the interests of the contesting parties. However, through the years the system
Nor does most of the English history of the rights of the accused generally and of the indigent defendants in particular commend itself to a modern sense of justice and humanity. Prior to the revolution of 1688, such rights as the right to confront witnesses, to testify in one's own behalf, to be free from self-incrimination and to have the state bear the burden of proving guilt did not exist. Nor were the punishments any better by present day standards. Ears were cut off, the pillory was in use, nostrils were slit, and executions were accomplished by hanging until partly dead, followed by disemboweling and quartering. Apparently up to that time, the state, or more properly the Crown, was so insecure in its position that to give the accused rights whereby he might escape the severe consequences of his wrongdoing was to risk undermining the very monarchy itself. As a consequence many substantial rights by modern American standards were frequently denied. Since misdemeanors were less of a threat to the Crown's authority, apparently the right to assistance of counsel was granted much earlier, but most commentators have found relatively little evidence of modern type representation of felony defendants. Not until 1695 was counsel allowed to appear in behalf of a person accused of treason, and not until 1835 or 1836 was the right to appear by counsel granted in all felony cases, although more recent students of the subject have found examples where counsel could at least argue the law before that time and was even occasionally appointed for that purpose. During this century the right to appointment of counsel in nearly all types of cases has become firmly established in England so that today the accused is able to select his own Solicitor, and in serious matters his own Barrister, who will be paid from the public treasury if the defendant is unable to supply costs from his own resources. The services paid for by public funds include technical, scientific and medical services and extend through a right of appeal.

Of course the American break from England was caused to some measure by the abuses existing at that time, so it is not surprising that the Bill of Rights sought to guarantee rights specifically not available in England, or to make certain that those only recently or partially available would be complete. Thus under the Sixth Amendment to the United States Constitution it was provided from the beginning that:

“In all criminal prosecutions the accused shall have the right . . . to have the assistance of counsel for his defense.” However, it was not until 1938 in the now famous case of Johnson v. Zerbst\(^{11}\) that it was finally established that for federal crimes in federal courts, inability to compensate an attorney for his representation was not to prevent the abstract right from becoming realized. From the system of appointing individual attorneys without compensation, the federal system started by the Johnson case has recently become one of compensated individually appointed attorneys with optional public defender systems available under some circumstances.\(^{15}\) More will be said of the rights in federal courts later.

Similarly the constitution of twelve of the original thirteen states included a provision guaranteeing to the accused the right to appear by his own attorney, although in several of these the right was limited to capital cases. These basic guarantees have since been extended to all state constitutions. The Wisconsin provision was included in the original Constitution of 1848 and is today Section 7 of Article 1 which provides “In all criminal prosecutions the accused shall enjoy the right to be heard by himself and by counsel . . .” However, in contrast with the late development of the federal rule, the Wisconsin court has practically from the beginning found that, at least in the more serious cases, the guarantee includes the necessity of supplying counsel to the accused who lacks the means to provide his own attorney.

While the purpose of this article is to examine the law and practice in Wisconsin, before turning to the detailed applications arising out of the guarantee of the Wisconsin Constitution and statutes as such, it is necessary to turn to the effect of the federal constitution on state criminal prosecutions. Because of the growing federal involvement in this area, the federal constitutional decisions overshadow those of the state and serve as the principal guidelines for determining what are the minimal constitutional standards. We will return to the Wisconsin law as such later.

3. **Right to be Supplied Counsel Under the Fourteenth Amendment**

Five United States Supreme Court cases concerning the right to counsel are so important to the understanding of the legal history of these rights that their dates and names have to be remembered in order to place other cases and events in proper perspective. One which has already been mentioned is the 1938 case of Johnson v. Zerbst\(^{13}\) which held that in federal crimes being prosecuted under the federal law, the Sixth Amendment required the appointment of counsel for indigent

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\(^{12}\) Criminal Justice Act of 1964, U.S.C. Tit. 18, §3006A.
defendants. Even before that the Supreme Court in 1932 had held in *Powell v. Alabama*\(^\text{14}\) that in state cases where capital punishment was possible there was also an absolute right to be supplied with counsel where the accused was indigent. In the 1942 case of *Betts v. Brady*\(^\text{15}\) it was clearly established that in non-capital cases there was to be a flexible standard applied under all the circumstances to determine if felony defendants had a right to appointed counsel if they were indigent. Thus began the long history of development which culminated in 1963 when the distinctions between applications under the Sixth and Fourteenth were apparently obliterated in the now standard and leading case of *Gideon v. Wainwright*\(^\text{16}\). During this time up until 1963, it was very important to distinguish between cases arising under the Sixth and Fourteenth Amendments, although there was increasing interest in incorporating the federal rule under the Sixth entirely into the Fourteenth to make the rights the same.\(^\text{17}\) The fifth landmark case arising in 1964 is *Escobedo v. Illinois*\(^\text{18}\) discussed in detail in Part II of this article where we will see the Supreme Court giving a right to counsel during interrogation of the accused.

While *Gideon* has in some ways made the *Betts* and *Powell* cases as well as many others since that time principally of historical interest, their study and understanding serves other purposes as well. These cases show what can happen and what has happened within our judicial processes as a constant reminder that mistakes were and are made. A true understanding of the cases lessens the superficial impression that the *Gideon* case represented a sudden and complete turn about by the Supreme Court rather than a gradual build-up to a practically inevitable result. And perhaps most importantly, the problem which the flexible standard of *Betts* was said to create, is still very much with us. Problems surrounding adequacy of the advice and waiver of the right to counsel, of the time of initial appointment, of the adequacy of representation throughout the processes including appeal and post conviction processes as well as other issues, still depend upon standards which are not, and perhaps cannot be absolute, but must depend on an *ad hoc* determination as to just what is "substantial justice" and "fair play." These subjects will reappear from time to time, but here seems to be the place to review just what was happening in the courts in the period from 1932 through 1963.


\(^{17}\) For a "scholarly" presentation of the state of incorporation of the Bill of Rights through about 1961, see Frankfurter, *Memoranda on Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965). Later discussion of cases following *Gideon* will point out that the incorporation of at least the right to counsel part of the Sixth Amendment is for all practical purposes now complete.

a. Pre-Gideon Developments

The defendant's rights in the state courts to appointed counsel begins with *Powell v. Alabama* \(^{19}\) or, as it is now popularly denominated, the *Scottsboro* case. The court appointed all the members of the bar to represent the defendants. An out-of-state attorney appeared briefly in behalf of the defendants, but clearly indicated to the trial court that he was not being paid, that he did not understand Alabama procedure, and that he was merely a friend of persons that were interested. At the trial, a member of the local bar said that he would represent the defendants to the extent that he could under all the circumstances. After noting that the action of the trial court in appointing the entire bar was "little more than an expansive gesture, imposing no substantial or definite obligation on anyone . . .", the court said:

In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.\(^{20}\)

After reviewing the English history on the right to counsel, the court finds that the right to counsel is a fundamental right guaranteed by the Fourteenth Amendment.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Even the intelligent and educated layman has small and sometimes no skill in the science of law.* If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step of the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect . . .\(^{21}\)

\(^{19}\) *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). The defendants in that case were seven Negroes aged thirteen to twenty-one who were charged with and convicted for the alleged rape of two white girls. The seven defendants were tried in three separate trials all completed in the one day and all the defendants were sentenced to death. The alleged acts had taken place on a train. When news of the alleged acts reached Scottsboro before the train arrived, the Negroes were removed from the train and taken to Scottsboro where a large crowd (mob?) had gathered. The militia was called out to prevent a riot, and from then on the defendants were kept under military guard.

\(^{20}\) 287 U.S. at 57, 53 S.Ct. at 59 & 60.

\(^{21}\) 287 U.S. at 68 & 69, 53 S.Ct. at 64. Emphasis added.
In *Johnson v. Zerbst*, petitioners in a federal *habeas corpus* action were serving time in a federal penitentiary for possessing and uttering counterfeit money. Upon arraignment in the original action both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. Of the rights under the Sixth Amendment, the court, speaking through Justice Black said:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty...

The Sixth Amendment clearly withholds from the federal courts the power and authority to deprive an accused of his life or liberty unless he waives the assistance of counsel. The case further made *habeas corpus* the proper procedure for raising the issue and determining whether the convicted prisoner could be released.

In the opinion of *Powell v. Alabama* the Court had said that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law..." In one of those twists of simple words, it later became clear that in capital cases, the right to counsel did not depend on a specific showing that the defendant was particularly incapable of defending himself but in noncapital cases, such a specific showing was to become necessary.

The case establishing the rule for noncapital cases was *Betts v. Brady* in which the petitioner had been indicted for robbery. On being informed by the petitioner that he was indigent and desired the appointment of counsel, the trial court informed him that counsel was appointed only in rape and murder cases. Without waiving any right to counsel which he might have had, the petitioner proceeded of necessity to handle his own case. He pleaded not guilty and elected to be tried without a jury. When offered a chance to take the stand, the petitioner declined to do so. Witnesses were called in his behalf and he examined his own witnesses and cross-examined the State's witnesses, his own witnesses tending to establish an alibi. Convicted by the trial judge, the petitioner sought various state remedies, and eventually came before the United States Supreme Court on an appeal from a state denial of

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23 304 U.S. at 462 & 463, 58 S.Ct. at 1022.
24 304 U.S. at 463, 58 S.Ct. at 1022 & 1023.
25 287 U.S. at 71, 53 S.Ct. at 65.
The court first pointed out that the Sixth Amendment is not included in the Fourteenth, so the right to counsel in a state court is not absolute.

... Asserted denial [of the right to appoint counsel] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.\textsuperscript{28}

The court noted that the petitioner defended on the ground that he had an alibi. No question was raised as to the happening of the robbery and the State's only case was in identifying the person who committed the robbery. Thus the only issue in the eyes of the court and the simple issue was the veracity of the witnesses of the State and the petitioner. The accused was a man of forty-three and possessed the ordinary ability to take care of his own interests and had appeared once before in a criminal court. Finally the majority of the Court held that there was no violation of the Due Process Clause, saying:

As we have said [before], the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the \textit{common and fundamental ideas of fairness and right}, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.\textsuperscript{29}

Thus it was established that the state and federal courts were to evaluate a state's failure to supply counsel for a particular defendant solely guided by the rule of "the common and fundamental ideas of fairness and right." Needless to say, the various courts applying the rule were to find its application to involve an \textit{ad hoc} determination based upon the particular facts and circumstances of the case, which facts and circumstances might well be looked at differently by different courts, and even by the same court on different days. This possibility was apparent to the three justices who dissented in the \textit{Betts} case. In the dissenting opinion by Justice Black,\textsuperscript{30} joined in by Justices Douglas and Murphy, the justices argued for complete incorporation of the Sixth Amendment right to counsel into the Fourteenth Amendment and objected to the "vast supervisory powers" that would follow under the majority's opinion. The dissenters quoted from the \textit{Powell} case and an old Wisconsin case\textsuperscript{31} and noted that thirty-five states clearly gave such a right

\textsuperscript{28} 316 U.S. at 462, 62 S.Ct. at 1256.
\textsuperscript{29} 316 U.S. at 473, 62 S.Ct. at 1262. Emphasis added.
\textsuperscript{30} 316 U.S. at 474, 62 S.Ct. at 1262.
\textsuperscript{31} Carpenter v. Dane County, 9 Wis. 249-274 (1859). The case is considered in some detail later in the discussion of the Wisconsin law on the subject.
in noncapital criminal cases, that eleven were not clearly one way or
the other, and only two clearly did not give such a right.

Necessarily under the twenty-one year reign of the *Betts* test of
“the common ideas of fairness and right,” the United States Supreme
Court did not ordinarily single out particular circumstances which by
themselves indicated that the standard had been breached. Rather cir-
cumstances tending to show denial of due process were accumulated in
each case and their sum total was used to tilt the scales in favor of the
convicted defendant. Nevertheless it became quite clear that particular
circumstances reoccurred often enough to be specifically identified as
lending weight to a claim of insufficient protection without counsel.

One such factor seemed to be present when the alleged denial of
counsel was entangled with allegations that other constitutional rights
were lacking. This was particularly true with confessions\(^3\) although as
will be discussed later the Supreme Court has now made lack of counsel
during the confession taking error in and of itself under the suspect’s
right to counsel.\(^3\) In any event, the possibility that other constitutional
errors may have been committed in the absence of an attorney was
under *Betts* a relevant factor.

Actual or potential errors in law other than constitutional violations
also bore on the due process aspects of trial without counsel. Of course
as Justice Jackson has pointed out in a concurring opinion,\(^3\) if *habeas
 corpus* proceedings are used to retry the whole case in all aspects, there
is a departure from standard principles of determining what matters are
fully settled by the state proceedings and beyond the scope of appropri-
ate federal review. Extending Justice Jackson’s view to the right to
counsel cases, we could perhaps show (if space permitted a detailed
review of all such cases) that the court raises settled issues by going
through the record to pick out circumstances indicating lack of “sub-
stantial justice.” Particularly where the circumstance is an error of
state law would the issue normally be considered *res adjudicata* after
the time for appeal has passed. Yet the effect of a reversal or a granting
of a writ of *habeas corpus* does mean that, if there is to be a retrial,
an attorney can prevent the same errors of law. After reading a large
number of such cases, one gets the decided impression that the court
was often pretty upset by the “circumstances” they relied upon to find

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\(^3\) See generally Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191 (1957). Lack of
counsel was a factor relevant to determining whether a confession was ad-
missible, sometimes helping to keep the confession out as in Gallegos v.
Colorado, 370 U.S. 49, 82 S.Ct. 1209 (1962); Culombe v. Connecticut, 367 U.S.
1202 (1959) but other times less successful as in Cicenia v. La Gay, 357 U.S.
504, 78 S.Ct. 1297 (1958); Crooker v. California, 357 U.S. 433, 78 S.Ct.
1287 (1958); Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141 (1951); and Lyons v.

\(^3\) See Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964) discussed at
length in the section *infra* on time of appointment.

\(^3\) Brown v. Allen, 344 U.S. 443 at 532, 73 S.Ct. 397 at 423 (1953).
a lack of counsel. Be this as it may, the Court has mentioned as invalidating circumstances the possibilities that an habitual criminal action was erroneous, that defenses such as insanity or mistaken identity were not properly raised, that the state had no jurisdiction because the crime may have been committed on federal lands, that the defense of insanity was not properly raised so as to be considered by the trial court, and that inadmissible hearsay and otherwise incompetent evidence was allowed in without objection. In all likelihood none of these objects could have been directly raised in a collateral attack, yet they were in part effective to get a retrial.

Unquestionably the age of the accused was often considered by the United States Supreme Court in deciding if fundamental fairness has been accomplished under the Betts rule, although it was only one of the factors and may have indicated nothing more than that with youth ordinarily comes lack of experience. For example, in the Scottsboro case the fact that the defendants were between the ages of thirteen and twenty-one was mentioned in such a way as to indicate that age had a considerable bearing on the determination of the counsel issue. Other cases where the Court has held that counsel should have been appointed partly at least because of the age of the defendants, have included defendants who were fourteen, seventeen, eighteen, nineteen, twenty, twenty-one, and in the twenties. In one case involving a sixteen year old the Court did not find for the accused, but


"(1) Considerable inadmissible hearsay and otherwise incompetent evidence was allowed to go without objection by [the defendant]. (2) When petitioner recalled the prosecuting witness Blades for further cross-examination the trial judge accepted the prosecutor's suggestion and made Blade's the petitioner's witness for the purpose of the unfavorable testimony then elicited. Thus he made this testimony binding on the petitioner although the Pennsylvania rule would seem to be that an adverse witness can be so examined and yet remain the witness of the opposing party. (3) Although . . . petitioner attempted to defend himself . . . he was prevented from proving a fact clearly relevant to the defense . . . (5) Finally, when sentencing petitioner the judge used language which, it is claimed, evinced a hostile and thoroughly unjudicial attitude." [footnotes omitted]
only because the issue of the right to counsel could have been raised in a proceeding at which counsel was present; and in another case, the Court found that there was no violation in due process under all the circumstances although the accused was only nineteen.49 But in several cases involving defendants who were thirty,50 thirty-four,51 forty-three,52 forty-eight,53 and fifty-seven,54 the Court seemed to use the older age of the accused as a factor in reaching a conclusion that there was no denial of due process in the failure to supply counsel.

Closely related to the question of age, and frequently included in the cases where the youth had a bearing on the Court's reaching the conclusion that the accused had a right to counsel, was the low mentality of the defendant. Of course in the subsequent discussion of waiver, we will see that the defendant's mental capacity has a large bearing on whether or not he waived his constitutional rights and a single discussion of the accused's mental ability while Betts was still in force tended to indicate both that he had the right to counsel and that he failed to waive the right intelligently. Today mental ability applies only to the issue of waiver.

In the Scottsboro case55 the defendants were called "illiterate." In other cases the accused has been described as confused,56 unable to speak English,57 having little education,58 semi-literate of low mentality,59 having a seventh grade education,60 having a sixth grade education,61 being an uneducated farm boy,62 possibly being mentally ill,63 having the mental capacity of a nine to a nine and one-half year old boy,64 and as illiterate65 either as a matter of proven fact in a case holding that the right to counsel was denied or as an allegation in a case holding that a hearing must be had to determine if counsel was required. The Supreme Court has held that if the accused is found at a later date to have been insane at the time of trial, then he had an absolute right to counsel.66 And finally the fact that the accused had been in-

institutionalized as an "imbecile" was considered in one case\textsuperscript{67} to bear heavily of the question as to whether he had a right to counsel, although the dissent pointed out that the institutionalization had been when the accused was eight years old, while he was convicted of committing a crime at the age of twenty-one, indicating that the dissenters thought that mental capacity was the one crucial issue in the case.

A factor of variable significance, but tending to indicate that counsel need not have been appointed was the fact that the accused had prior contact with the criminal processes and consequently could be presumed to be better able to take care of himself. Thus in Betts v. Brady itself in discussing the accused's ability to take care of himself, the court pointed out that he had been in a criminal court before. In other cases,\textsuperscript{68} the Court had merely pointed out that the defendant was inexperienced in criminal trials as a fact tending to show denial of due process. Despite the admitted relevancy of the amount of criminal experience, one petitioner who had been convicted eight times previously and who had been acquitted nine times, was found because of other factors to still have been entitled to appointed counsel,\textsuperscript{69} although another accused with eight arrests and convictions for crimes of violence was deemed not to need counsel all things considered.\textsuperscript{70}

Under Betts the seriousness and complexity of the charge was a "circumstance." Already pointed out has been the historical fact that, although the Scottsboro case\textsuperscript{71} may not have been thought at the time to have held that in all capital cases the defendant has an absolute right to have counsel appointed if he could not procure his own, the distinction between capital and non-capital cases had become a firm part of the law. Thus if the charge was sufficiently serious to warrant capital punishment, the United States Supreme Court made the right to have counsel appointed absolute and thereby makes a fundamental distinction based on the seriousness of the charge. In addition the Court had indicated that the "seriousness" may have applications other than the capital-noncapital distinction. In one case primarily concerned with whether the accused should have been advised of his right to counsel, but necessarily basing the answer to that question on whether he had the right in the first place, the Supreme Court found that the "number and complexity of the charges against the petitioner, as well as their seriousness create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore, have been advised to his right to be represented by counsel."\textsuperscript{72}

\textsuperscript{67} Palmer v. Ashe, 342 U.S. 134, 72 S.Ct. 191 (1951).
\textsuperscript{68} See e.g., Uveges v. Pennsylvania, 335 U.S. 437, 69 S.Ct. 184 (1948).
\textsuperscript{70} Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948).
\textsuperscript{72} Herman v. Claudy, 350 U.S. 116 at 122, 76 S.Ct. 223 at 226 & 227 (1956). Of course a simple charge of vagrancy in a given case could involve substantially more complicated legal problems than a clear first degree murder case.
This, then, was the status of *Betts v. Brady* at the beginning of 1963. The criteria which were evolving to determine when there was a denial of "common and fundamental ideas of fairness and right" were beginning to sound much like the characteristics discussed near the beginning of this paper as being common among indigent criminal defendants. There had been three dissenters in *Betts* itself and various combinations of three and four judges continued champing at the bit in various cases.\(^7\) Commentators sought its change and predicted its eventual demise.\(^7\) Finally, a case no different than many others produced a writ of certiorari, and a request that the parties consider the issue of whether *Betts v. Brady* should be overruled.\(^7\)

b. *The Effect of Gideon v. Wainwright*\(^7\)

There is little more to say about the *Gideon* case. In 1956 in a case concerning the rights of an indigent to appeal his case,\(^7\) the court had already said that a defendant's rights on appeal were not to depend upon whether he could afford to exercise such rights. Simply put, *Gideon* decided that the right to counsel could not depend upon the accused's practical ability to afford an attorney. It followed obviously that an indigent criminal defendant had to be supplied with representation. After all, the court had clearly established that the right to retain counsel at the defendant's own expense was basically unlimited,\(^7\) and that it was inevitable that the same become true for anyone who could not afford an attorney.

The facts in *Gideon* were surprisingly similar to those of *Betts*, a fact which the court itself noted. Gideon was charged with a felony. He requested that counsel be appointed for him because he was without funds and because, so he argued, "The United States Supreme Court says I am entitled to be represented by counsel." He was refused because appointments were made in Florida only for capital offenses. Gideon handled his own case before the jury, was found guilty and sentenced to five years. Gideon was not young, he had had substantial trial experience because of his past criminal deeds, he was not shown to be lacking in basic intelligence, and his case involved relatively routine questions of fact. His petition for *habeas corpus* to the state courts was denied and then appealed to the United States Supreme Court. Mr. Justice Black writing the majority opinion found in cases prior to


\(^7\) Along with many others, this author so argued and predicted in his original mimeographed report to the Wisconsin Judicial Council.


Betts, including Powell v. Alabama and Johnson v. Zerbst, statements saying that the right to counsel was one of the rights under the Bill of Rights which was so fundamental as to be mandatory upon the states through the Fourteenth Amendment. The opinion pointed out rather briefly the needs of all defendants, and noted that twenty-two states had argued as friends of the court that Betts be overruled while only two joined Florida in seeking to have it retained.

Mr. Justice Harlan concurred in the result itself and in the overruling of Betts but disagreed as to the meaning of cases before Betts and argued strongly against the total absorption of the Sixth Amendment with all of its interpretations into the Fourteenth. Justice Douglas concurred so as to answer Justice Harlan and to express again his view that the Fourteenth includes all of the Bill of Rights. Justice Clark concurred to point out that the capital-noncapital distinction could in no wise be justified under the constitution.

Gideon of course produced dozens of case notes in the law reviews, caused a flurry of writing by law school professors, became the subject of judicial conferences, bar association meetings, and legislative sessions, became the subject of articles in newspapers across the country, resulted in articles in national magazines, and became the subject of at least one popular book. The principal in the case, Gideon himself, became somewhat of a national hero. Some of the most fascinating reading following the case dealt with the jurisprudential aspects of the overruling process. But enough has already been said here about Gideon, for Gideon is only the beginning to the supplying of adequate representation to the accused. All Gideon does is bring a lawyer to the accused primarily for trial purposes. Left unanswered are many questions about how this is to be accomplished as a day to day practical matter across the country. To pose but some of these questions. How does the accused learn of his right, and can he waive it? Who is to be considered "indigent?" How soon must the lawyer be available? How is the lawyer selected? Who pays the costs? What type of performance by the attorney meets the requirement? Does every accused person, even if he is charged with a minor offense such as a traffic violation have the same rights? It is in the answers to these questions that the indigent person described at the beginning of this article will find the type of personal representation which is meaningful in terms comparable to the rights which a person has who can in fact hire his own attorney. Before taking up some of these questions, we should see what Wisconsin has been doing during this time.

4. **Right to be Supplied Counsel under the Wisconsin Constitution and Statutes**

Long before the United States Supreme Court had first decided that the states were required to supply counsel in capital cases and in some noncapital cases, the Wisconsin Supreme Court had decreed that pursuant to the then existing law on the right to counsel, the courts had a duty, at least in all felony cases, to appoint counsel for an accused unable to supply his own. *Carpenter v. County of Dane* \(^{82}\) so decided in 1859, over one-hundred years before the United States Supreme Court was to find the same right guaranteed both by the Fourteenth Amendment in state courts and by the Sixth Amendment in Federal Courts (witnessing perhaps to the State's ability to take care of itself in such matters).

The Constitution of Wisconsin since the entry of Wisconsin into the Union in 1849, has always provided in Section 7 of Article 1 that, "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel . . ." In the *Carpenter* case, the respondents were attorneys appointed to represent a defendant accused of petit larceny. Their claim for legal fees had been disallowed by the County Board, so the respondents brought the action to enforce payment. Noting that the Wisconsin Constitution, and section 2 of Chapter 164, Revised Statutes of 1859, provided that in all criminal prosecutions the accused shall have a right to be heard by himself and counsel, the Court went on to say:

> . . . And would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him.\(^{83}\)

These words are the very ones quoted eighty-three years later in the dissent to *Betts v. Brady* where the dissenters strongly objected to the qualifications placed by the majority on the right to appointed counsel. The words of the Wisconsin Supreme Court in the *Carpenter* case can only mean that the right to have counsel appointed is coextensive with the right to appear by one's own counsel. Moreover, the court held that the county was bound to pay for services rendered pursuant to this statute even without express authority to do so.

When the state legislature passed a bill one year later to eliminate the county liability for such charges,\(^{84}\) the county again refused payment. In the next case\(^{85}\) on the subject, the district attorney argued that

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\(^{82}\) 9 Wis. 249*274 (1859).
\(^{83}\) 9 Wis. at 251 *276.
\(^{84}\) Ch. 35, Laws of 1860.
\(^{85}\) County of Dane v. Smith, 13 Wis. 654 *585 (1961).
attorneys, as officers of the court, could be forced to perform without pay and that, since the charges were state charges, the state should pay if anyone should. The Wisconsin Supreme Court noted that the Judge and District Attorney alone cannot adequately represent the accused, and, that if the courts have the power to appoint, then the county must provide the payment. The court found that the legislature was without the power to force attorneys to perform such services for nothing. The court specifically declined to decide whether or not the legislature could take away the appointive power altogether, thus shifting perhaps from the constitutional basis for such appointment very strongly suggested by the Carpenter case.

The current Wisconsin Statutes concerning the rights of indigent defendants raise a number of issues discussed through other sections of the study. Basically provision is made for an appointment in all felony cases where the accused is without means to employ counsel with payment to be made by the county up to a point.\textsuperscript{86} Except for the problem of misdemeanors which will be discussed next, the statute meets the requirement of the Gideon case in and of itself.

5. Misdemeanors and the Right to Counsel

Although the line drawn between felonies and misdemeanors varies slightly from state to state, the basic difference is one of degree only, one traditional distinction being merely that crimes carrying a maximum sentence of over one year are felonies, while all others are misdemeanors. In Wisconsin there are several methods of distinguishing. Some statutes creating the crime provide for the type of crime. When the statute is silent as to type, those crimes punishable by imprisonment in a state prison are felonies, and all others are misdemeanors.\textsuperscript{87} In the absence of an express place of imprisonment, then the imprisonment is in the state prison for sentences of over one year and in the county jail for those of under one year.\textsuperscript{88} Certainly the possibilities of conviction for a single misdemeanor with a sentence of up to one year, of successive sentences arising out of a number of misdemeanor convictions, or of using the conviction of a misdemeanor for an increased sentence at a later conviction under the habitual criminal statute,\textsuperscript{89} combine to make the conviction for some misdemeanors a serious matter by any standard.

Yet little case law can be found to circumscribe the constitutional rights of a person accused of a misdemeanor. This seems to be particularly true of his right to counsel. Probably few such cases warrant the trouble of appeal to the United States Supreme Court, and if they did, certiorari might well be denied. Gideon v. Wainwright, of course,

\textsuperscript{86} WIs. Stat., §957.26 (1963).
\textsuperscript{87} WIs. Stat., §939.60 (1963).
\textsuperscript{88} WIs. Stat., §959.044 (1963).
\textsuperscript{89} WIs. Stat., §939.62 (1963).
said nothing about how far down the scale of crimes the broad right of the case was to be applied. This is true under both the Sixth and Fourteenth amendments. It has been argued that there should be no distinction at all based upon the degree of seriousness of the crime. As a matter of fact, several recent cases in New York may foretell the inclusion of many lesser charges within the scope of the right to counsel. In one the New York Court of Appeals vindicated a conviction “for stealing about $2.00 worth of apples” because the teen-age defendants had not been advised of their right to counsel. The opinion clearly states that this means assigned counsel must be available for all crimes. The strongly worded dissent pointed out the practical problem of getting enough attorneys to appoint in the mass of minor prosecution. In the other case, the New York court held that traffic violators had to be advised of their right to counsel. The court was concerned with the seriousness of the possible penalty, particularly since a driver’s license might be taken from a person who needed to drive for his livelihood. The court added that it felt this would give rise to no great practical problem since most offenders plead guilty, often by stipulation without even appearing in court.

At the time of the 1962 study for the Judicial Council, the only indication that any misdemeanor cases involved appointed counsel came from six of sixty-three judges answering the question. These said they made an occasional appointment without pay in unusual cases. A Voluntary Defender program in Milwaukee County was begun in 1957 through the cooperation of the Junior Bar Association, the Legal Aid Society, and one of the county judges. Under this plan young attor-

93 Time does not permit a detailed, up-to-date report on this operation, still being carried out. A brief interview with a current participant in the program indicates that there has been very little change in the operation since 1962. A few appointments are now being made. There is also an attempt being made to get federal funds from the poverty program to provide some payments to the attorneys and to expand the representation. The following was included in the original report to the Judicial Council and represents the author’s comments as of 1962:

The Junior Bar Association supplies the attorneys from a list of volunteers originally numbering about seventy-five but reaching 167 by August of 1962. Some of the persons on the list have been on it from the beginning with about 12 appearances being the maximum for any single attorney over the approximately five years of operation, and with many having served six to ten times. Currently, many on the list are averaging two appearances per year, with a few having served three times. The representation is made available through voluntary administrative help and the Legal Aid Society who check the availability of the attorneys and assign them for a given day. A check of a recent eight month period indicated that no attorney appeared at all on only three days. The two or three each month who for one reason or the other are unable to serve, have been able to get a substitute in almost all instances.

The attorney is not actually “appointed,” but rather he works with the consent of the indigent. On the appointed day, the attorney is to arrive at the court at 9:00 A.M. The defender is given the jackets for those cases in-
neys volunteer to work in the court for half days to represent some of the accused indigent defendants for that day. The work is performed primarily in two of the branches of the County Court which try most of the nontraffic misdemeanor cases as well as serving as committing magistrates and hold preliminary hearings on felony matters where a preliminary is not waived.  

When the judges of the state were again contacted in the summer of 1964, it was clear that the practice in regard to misdemeanor appointments was changing rapidly. The reasons for the change are quite clear. The Gideon case had foretold substantial increased federal requirements, but had not set any standard for exclusion of lesser crimes or decided if any were to be excluded. The first practical test from a Wisconsin point of view came from a case not officially reported, but widely discussed in the Federal District Court for the Eastern District involving what is described in the rules as "cases involving felonies, extraditions, and gross misdemeanors." Excluded by this rule are any municipal ordinance violations which are also heard in the same court. Excluded partly as a matter of rule and partly as a matter of practice are such cases as those involving vagrancy, drunkenness, family problems and non-support. These are excluded in part because the services of social workers and the welfare department are deemed better able to help the accused as well as because otherwise there would be too many cases.

Provision is made for the use of a referral service where the defender finds that the accused is not indigent, if the accused upon being advised to procure an attorney indicates he does not know whom to contact. The statistical history of the operations under the voluntary defender system is as follows:

<table>
<thead>
<tr>
<th></th>
<th>Dec. 1957 to Feb. 9 1962</th>
<th>Feb. 9 to May 25, 1962</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of defendants interviewed:</td>
<td>8,307</td>
<td>329</td>
<td>8,636</td>
</tr>
<tr>
<td>Number of indigents represented:</td>
<td>3,691</td>
<td>129</td>
<td>3,820</td>
</tr>
<tr>
<td>Number of defendants advised to retain a private attorney:</td>
<td>2,009</td>
<td>102</td>
<td>2,111</td>
</tr>
<tr>
<td>Number of defendants referred to a panel of attorneys via Milwaukee Bar Association or Legal Aid Society</td>
<td>242</td>
<td>8</td>
<td>250</td>
</tr>
</tbody>
</table>

A report submitted to the Executive Board of the Milwaukee Junior Bar Association in March of 1962, indicates that while the participants in the program are to be commended for their effort, the system itself is defective because it operates only in one of the three criminal branches, because many of the defenders lack the necessary experience, competence and zealfulness, because neither the time nor the facilities are provided for the investigation of facts, and because of the discontinuity of defense. Since the defender assigned for the day assumes responsibility to aid the defendants reaching court on the one morning for which he happens to be assigned, it is obvious that any accused persons whose circumstances indicate a need for a delay or for a protracted proceeding is not adequately supplied valuable continuing assistance, although on occasion a defender does handle the case beyond his obligations under the rules. It is also obvious that a system which involved an average of almost two thousand interviews per year and six or seven on a typical day, but several times that on a busy day, does not supply the typical individual accused with anything more than a hurried check to see if the charges appear in order and a short interview which must cover the determination of indigency as well as all the factual problems which may be involved in the case, with little, if any, time for legal emphasis. The actual processes were not observed for sufficiently long time by the author for him to evaluate the quality of the services rendered by the defenders.

94 As shown in Part II, most felony defendants waive the preliminary hearing.
of Wisconsin. Under the then and still existing Wisconsin Statute, provision was made for appointment and payment of counsel only in felony cases. It happens that worthless check charges individually carry maximum possible sentences of one year but are identified by the statute as misdemeanors. In Melvin v. Burke the petitioner in the federal habeas corpus action had been convicted on nine counts of issuing worthless checks and sentenced for eight concurrent and one consecutive one year sentences, the two years to be served in the Wisconsin State Prison. Petitioner had been advised that counsel could not be supplied for him under Wisconsin law. The federal court has no trouble finding that Gideon applied any time that a defendant was faced with a substantial sentence, and that this was indeed an example of a substantial sentence.

The Wisconsin Supreme Court's only occasion to consider the misdemeanor problem has involved similar circumstances. In State ex rel Barth v. Burke on petition for habeas corpus to the Wisconsin Supreme Court it appeared that the defendant had been faced with nineteen worthless check charges, was originally sentenced for one year plus probation, violated the conditions for probation, and was sentenced to five years in the state prison. The court, without citation of any authority, said that the petitioner was obviously entitled to counsel, and released the petitioner to the custody of the sheriff on the ground that the trial court had erroneously determined that the petitioner was not indigent.

It is possible to argue that there is a right to appointed counsel in misdemeanor cases under Wisconsin law without the aid of federal decisions. The Wisconsin court has held that a prosecution for a misdemeanor is a "criminal prosecution" for the purposes of the Guarantee of Article I, Section 7 of the Wisconsin Constitution which provides in part that "In all criminal prosecutions the accused shall enjoy the right to . . . demand the nature and the cause of the accusation against him . . ." The words excluded from the quote as given are "to be heard by himself and counsel." Since the case held that the provision as quoted, included misdemeanors within the meaning of the term "criminal prosecutions," it seems almost absolutely necessary that the words mean the same thing if the excluded words are included. Since we have already seen that as applied to felonies the court has concluded that this provision of the constitution applies so as to guarantee appointed coun-

98 State ex rel Barth v. Burke, 24 Wis. 2d 82, 128 N.W. 2d 422 (1964).
sel, it is difficult to see how they could have avoided so holding as to misdemeanors.

The 1964 correspondence with the judges indicated that the practices now vary widely across the state, but that as a bare minimum, whenever a sentence of one year or more is possible, even though the charge is only a misdemeanor, counsel will be made available. Some courts are appointing for those cases involving sentences of six months or more and several said they were drawing the line at ninety days. One judge said he would appoint whenever the accused might lose his driver's license. At the same time some judges said that they have refused to make appointments for misdemeanors so far, because the legislation does not authorize payments for such appointments. In at least one county, the county board, on the advice of the county auditor, has refused to pay for any such appointments. Various proposals have been discussed around the state for including at least some misdemeanors, but none seem to seek to include all. One such proposal would not set a specific criteria, but rather provide that payment was authorized under all circumstances where appointment was constitutionally required. This latter would permit the trial judge to not appoint in the many routine cases without issue of fact or law where no confinement is likely, or where the confinement is likely to be very short.

Should legislation ever be passed which did not authorize payments, the courts may have to fall back on what was said by the Wisconsin Supreme Court over a century ago. In several cases mentioned earlier in this article, the court held that the right to counsel is so important to the accused that he cannot in effect be deprived of the right by legislation which does not permit payment to his attorney. The court also made it clear that the attorney could not be forced to take an appointment without pay. Since that time, legislation has generally set a standard for payment, and the courts have followed it. But in any showdown, which is actually not likely, the court could very well decide, based upon these earlier cases, that the supplying of counsel, with adequate pay, is a function for the court which is ultimately immune from legislative interference.

Supplying of full representation for the misdemeanor case is fraught with practical difficulties.

Statistics from the 1963 Biennial Report of the Judicial Council disclose that in the preceding period there were approximately twenty-five

100 In Wisconsin, a case involving the violation of a municipal ordinance is not a criminal case, but rather is a civil case involving a forfeiture. State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W. 2d 345 (1947). For a detailed consideration of the distinction and its implications in traffic cases, see Conway, Is Criminal or Civil Procedure Proper for Enforcement of Traffic Laws?, 1959 Wis. L. Rev. 418 and 1960 Wis. L. Rev. 3.
101 Carpenter v. County of Dane, 9 Wis. 249 *274 (1859); County of Dane v. Smith, 13 Wis. 654 *585 (1861).
times as many auto violations as felonies and ten times as many other misdemeanors and ordinance violations. While the vast bulk of these produce fines, or simple forfeitures, many have a potential jail sentence either directly or upon failure to pay the fine.

Even the accused able to pay the costs of hiring an attorney will not ordinarily want to spend great sums when only a fine may be involved. And governments are also not likely to want to spend any large sums to supply fully compensated attorneys for advice. It has been suggested that some fairly extensive representation is being supplied, even for those close to indigency, by young attorneys willing to take such cases for relatively low fees. Whatever may be the truth of such a suggestion, it is not likely that the services rendered are adequate to meet the need. Particularly if the view that the violation of a municipal ordinance should be made a misdemeanor, or at least should give rise to the same safeguards as if it were a criminal case\textsuperscript{102} were to be followed, would the bulk of misdemeanor or equivalent cases loom large indeed. The effort to supply the accused in such cases, including the myriad of traffic cases, with adequate legal advice would have to be substantial, to say the least. Ultimately the fully adequate supplying of counsel is not ever achievable even to the extent that it might be in felony cases. The substitute may have to be continuing vigilance over the system itself, rather than the supplying of complete individual protection. Thus the defender system operating in the county court of Milwaukee, or any other system, should also be evaluated for its conscious or unconscious effect on the overall administration of criminal justice. Any system of supplying diverse counsel makes a large segment of the bar aware of the processes and enhances the opportunity for improvement. The judges know that more lawyers know what is happening, and the formal organization supplying the service can use its organizational strength in a way individuals cannot to improve the situation. Thus the problem is a continuing one requiring diverse efforts for improvement.

One of the crimes specifically excluded from the service of the Voluntary Defender System in Milwaukee might be used to demonstrate the seriousness of the legal problems which may be involved in a relatively common misdemeanor case. Consider the crime of vagrancy which exists in almost all states\textsuperscript{103} including Wisconsin.\textsuperscript{104} To begin with, the crime itself punishes the very fact of being indigent when it allows imprisonment for up to six months of "A person, with the physical ability to work, who is without lawful means of support and does

\textsuperscript{102} See article, supra note 100.
\textsuperscript{103} See generally, Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality, 37 N.Y. U. L. Rev. 102 (1962). Ensuing comments are based on this note.
\textsuperscript{104} Wis. Stat., §947.02 (1963).
not seek employment;” as well as a “person who derives part of his support by begging.” It has been suggested that such laws are frequently unconstitutional as void for vagueness and as including an unreasonable classification. It has likewise been suggested that such statutes are used for unconstitutional reasons, such as allowing an arrest on suspicion of a different crime, a practice which has been rumored to arise in Wisconsin. Whatever may be the constitutional questions involved, to say nothing of the applicability of such statutes if constitutional to the particular accused, the individual protection of one’s own counsel is totally lacking for the indigent person accused of vagrancy in the vast bulk of cases. And no readily apparent method of supplying such service has appeared on the horizon.

To this point, we have considered the federal and Wisconsin coverage of the basic question of the right to counsel. We now turn to a detailed consideration of some of the basic questions which arise under the right to counsel as a functioning device. In ensuing discussions the legal rules under both federal and state law will be presented and the past and existing practices to the extent that they are known will be compared to that law.

PART II THE FUNCTIONING OF THE SYSTEM—ITS THEORY AND PRACTICE

1. The Appointive System in Wisconsin

As materials contained in the balance of this Article show, Wisconsin operates basically under an appointive system of supplying counsel to the indigent criminal defendants. It is such a system which is presumed by Section 957.26 of the Wisconsin Statutes which provides:

Counsel for indigent defendants charged with felony; advice by court.

(1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order, pursuant to §256.49, as compensation and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warranty to the county treasurer to make such payment.

(1m) In all cases involving indigent defendants the county shall be liable for only the first $10,000 of costs arising from the trial of such case. The state shall be liable for any additional costs and shall reimburse the county out of the appropriation provided by §20.260(2). Upon completion of the trial and compilation of the costs of a case, the clerk of court shall file with the administrative director of the courts the county claim for reimbursement of court costs which shall include the following items:
(a) Costs of preliminary hearing.
(b) Court expenses prior to trial.
(c) Jurors.
(d) Bailiffs.
(e) Witnesses, expert witnesses and medical expenses.
(f) Extra help in office of clerk of courts, and supplies.
(g) State crime laboratory charges.
(h) Attorney fees.
(i) Meals, lodging and mileage for attorneys.
(j) Transcript fees.
(k) Total costs to sheriff's department of prisoner's expenses and other items.

(l) Any other expenses related to the case.

(2) Upon arraignment and before plea, the court shall advise any person charged with a felony of his right to counsel and that if he is indigent the court will appoint counsel at his request. A record of such advice and of the defendant's reply, if any, shall be made in the docket or in a transcript of the proceedings.

(3) If appointment of counsel has not been so made as to include services upon appeal or writ of error, or if no counsel was appointed in the trial court, the supreme court or the chief justice, upon timely notice to the district attorney and upon being satisfied that review is sought in good faith and upon reasonable grounds (or if the appeal or writ of error is prosecuted by the state) may appoint counsel to prosecute or defend such appeal or writ of error. If no counsel was appointed in the trial court, the defendant shall be required to show his inability to employ counsel. Upon the certificate of the clerk of the supreme court the county treasurer shall pay the attorney such sum for compensation and expenses as the supreme court allows.

(4) Under like circumstances counsel may be appointed and compensated for representing prisoners upon writs of habeas corpus.

To facilitate the reading of the balance of the article, the author has chosen to refer to his study for the Wisconsin Judicial Council and the surveys performed in preparation thereof as the 1962 survey since the work was mostly performed during the summer of 1962. The author's work as reporter for the American Bar Foundation on study of the subject is referred to as the 1963 study since most of the work for that study was done at that time. The results of the 1963 study are published at 38 Wis. B. Bul. 46 (Feb., 1965). An additional letter to all the judges was sent out in the summer of 1964 to find out what changes had taken place, if any. That letter and its results are referred to as the 1964 study. Because of the general nature of the materials included in them, three charts are set out here to give an overview of the functioning system in Wisconsin. Reference to these charts will be made from time to time in the balance of the Article.
TABLE I—SAMPLE COUNTIES—1963 SURVEY

<table>
<thead>
<tr>
<th>County</th>
<th>Population in 1,000s</th>
<th>Circuit</th>
<th>Branches</th>
<th>Location in State</th>
<th>Characteristics</th>
<th>County Seat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clark*</td>
<td>32</td>
<td>17th</td>
<td>1</td>
<td>Central</td>
<td>Dairying, recreation</td>
<td>Neillsville</td>
</tr>
<tr>
<td>Douglas*</td>
<td>45</td>
<td>11th</td>
<td>3</td>
<td>Northwest</td>
<td>Lake port—depressed</td>
<td>Superior</td>
</tr>
<tr>
<td>Milwaukee*</td>
<td>1,035</td>
<td>2nd</td>
<td>12</td>
<td>Southeast</td>
<td>Commercial, industrial</td>
<td>Milwaukee</td>
</tr>
<tr>
<td>Racine</td>
<td>142</td>
<td>21st</td>
<td>4</td>
<td>Southeast</td>
<td>Manufacturing</td>
<td>Janesville</td>
</tr>
<tr>
<td>Rock*</td>
<td>114</td>
<td>12th</td>
<td>4</td>
<td>South central</td>
<td>Agricultural</td>
<td>Janesville</td>
</tr>
<tr>
<td>Sheboygan</td>
<td>86</td>
<td>4th</td>
<td>2</td>
<td>Eastern</td>
<td>Dairying, woodworking</td>
<td>Oshkosh</td>
</tr>
<tr>
<td>Winnebago</td>
<td>108</td>
<td>3rd</td>
<td>3</td>
<td>East central</td>
<td>Lumbering, paper</td>
<td></td>
</tr>
</tbody>
</table>

*Counties where a detailed sample docket study made.

2. THE ACCUSED'S RIGHT TO BE ADVISED OF HIS RIGHT TO COUNSEL

In point of time, the first event which must take place if the accused is to enjoy an effective right to counsel is for him to learn of the right. Thus the court must inform him and appoint counsel unless he very clearly and intelligently intends to waive the right. These two items, advice and waiver, occur almost simultaneously, if at all, and in a particular case may become intertwined in the court's attempt to determine the fairness with which the accused has been dealt.

State courts have in the past indicated that there is a presumption that the accused waived his right to counsel unless he specifically asked for an attorney, and the United States Supreme Court cases have not fully answered the question as to whether advice is an absolutely necessary part of the right itself. In several cases during the pre-Gideon era the court had included the failure of the trial court to advise the accused of his generic right to appear by counsel in the enumeration of those factors existing in the case tending to show lack of due process, although the failure to give advice was not necessarily singled out as crucial. In *Bute v. Illinois* the advice question was discussed at some length, but again the decision is not conclusive since the court's determination that the failure of the record to show that the accused was advised of his rights was not defective was based in part on the determination under pre-Gideon law that under all the circumstances of the case, the accused had no right to have counsel appointed in any event. In that opinion, Justice Douglas, joined by Justices Black, Murphy and Rutledge very clearly indicate their view was that the accused must be affirmatively and clearly advised of his right to counsel. In another pre-Gideon case the Supreme Court indicated that numerous prior trials involving this accused prevented the lack of evidence that advice was given from being a denial of due process. At least one case had held that the accused has the burden of proving that

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105 See *Rice v. Olsen*, 324 U.S. 786, 65 S.Ct. 989 (1945) and the later discussion of that case in *Carter v. Illinois*, 329 U.S. 173, 67 S.Ct. 216 (1946) in which the Court places a greater emphasis on the right to be given advice, distinguishing two cases specifically on this ground.


TABLE II—FELONY CASES—SAMPLE COUNTIES—DURING 1962
PER 1963 SURVEY

<table>
<thead>
<tr>
<th></th>
<th>Clark</th>
<th>Douglas</th>
<th>Milwaukee</th>
<th>Racine</th>
<th>Rock</th>
<th>Sheboygan</th>
<th>Winnebago</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceedings before bindover</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary waived</td>
<td>14</td>
<td>56</td>
<td></td>
<td>114</td>
<td>114</td>
<td>83</td>
<td>66</td>
</tr>
<tr>
<td>Preliminary held and bound over</td>
<td>3</td>
<td>2</td>
<td></td>
<td>9</td>
<td>42</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td><strong>Total bound over</strong></td>
<td>17</td>
<td>58</td>
<td></td>
<td>123</td>
<td>156</td>
<td>87</td>
<td>82</td>
</tr>
<tr>
<td>Preliminary held, no probable cause</td>
<td>7</td>
<td>7</td>
<td></td>
<td>5</td>
<td>47</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Dismissed before bindover</td>
<td>6</td>
<td>1</td>
<td></td>
<td>3</td>
<td>10</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Held open or pending</td>
<td>5</td>
<td>3</td>
<td></td>
<td>2</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Guilty plea to a misdemeanor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total arrests for felonies</strong></td>
<td>17</td>
<td>65</td>
<td></td>
<td>134</td>
<td>213</td>
<td>104</td>
<td>86</td>
</tr>
<tr>
<td>Appointed attorney before bindover, case dismissed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Representation after bindover</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retained attorney</td>
<td>3</td>
<td>14</td>
<td>451</td>
<td>61</td>
<td>75</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>Appointed attorney</td>
<td>1</td>
<td>11</td>
<td>644</td>
<td>29</td>
<td>44</td>
<td>16</td>
<td>15</td>
</tr>
<tr>
<td>No attorney</td>
<td>13</td>
<td>34</td>
<td>112</td>
<td>44</td>
<td>35</td>
<td>41</td>
<td>37</td>
</tr>
<tr>
<td><strong>Total cases bound over</strong></td>
<td>17</td>
<td>59</td>
<td>1,207</td>
<td>134</td>
<td>154</td>
<td>87</td>
<td>82</td>
</tr>
<tr>
<td>Holdings on cases bound over</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilty plea</td>
<td>16</td>
<td>47</td>
<td>793</td>
<td>113</td>
<td>127</td>
<td>83</td>
<td>72</td>
</tr>
<tr>
<td>Guilty finding by court</td>
<td>115</td>
<td>1</td>
<td></td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Guilty finding by jury</td>
<td>20</td>
<td>3</td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Guilty plea to lesser charge</td>
<td>5</td>
<td>56</td>
<td></td>
<td>18</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No discharge for sex deviate</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total for sentencing</strong></td>
<td>17</td>
<td>48</td>
<td>1,002</td>
<td>115</td>
<td>130</td>
<td>86</td>
<td>75</td>
</tr>
<tr>
<td>Not guilty by jury</td>
<td>2</td>
<td>2</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not guilty by court</td>
<td>8</td>
<td>174</td>
<td></td>
<td>4</td>
<td>23</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dismissed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not guilty by reason of insanity</td>
<td>2</td>
<td></td>
<td></td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Held open</td>
<td>3</td>
<td>25</td>
<td></td>
<td>3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total cases bound over</strong></td>
<td>17</td>
<td>59</td>
<td>1,207</td>
<td>123</td>
<td>154</td>
<td>87</td>
<td>82</td>
</tr>
<tr>
<td>Sentences</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State penitentiary</td>
<td>2</td>
<td>14</td>
<td>391</td>
<td>72</td>
<td>66</td>
<td>22</td>
<td>31</td>
</tr>
<tr>
<td>County jail (includes Huber)</td>
<td>19</td>
<td>8</td>
<td>8</td>
<td>7</td>
<td>18</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Sentence withheld—probation</td>
<td>11</td>
<td>21</td>
<td>417</td>
<td>20</td>
<td>48</td>
<td>29</td>
<td>18</td>
</tr>
<tr>
<td>Sentence stayed—probation</td>
<td>12</td>
<td>3</td>
<td>103</td>
<td>8</td>
<td>11</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Fined</td>
<td>1</td>
<td>2</td>
<td>32</td>
<td>1</td>
<td>1</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Sex deviate commitment</td>
<td>5</td>
<td>18</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>51</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total sentenced</strong></td>
<td>17</td>
<td>48</td>
<td>1,002</td>
<td>115</td>
<td>130</td>
<td>86</td>
<td>75</td>
</tr>
<tr>
<td>Total paid for appointed attorneys</td>
<td></td>
<td>$1,872</td>
<td>$77,723</td>
<td>$6,944</td>
<td>$6,118</td>
<td>$1,847</td>
<td>$2,801</td>
</tr>
</tbody>
</table>

Note: Some overstatement in the numbers given above exists because in many cases multiple complaints against the same defendant result in multiple docket pages for matters actually disposed of as one case. Most of these were combined if noticed, but a few were probably missed resulting in slightly differing counts from different records. Milwaukee figures pertain only to matters in the circuit court. A few felonies are tried in county court.

*In Racine county, court commissioners hold any preliminary hearings on remand. The numbers used to show number of attorneys appointed and retained includes cases dismissed or held open by the commissioners.

he lacked knowledge of his right, or at least that the court considered lack of such evidence in the record as precluding a defect on this basis. As might be expected in several of these cases in which the majority had held that the accused's rights had not been violated, the dissenting opinions considered the lack of advice as tending to show

TABLE III—SUMMARY OF STATISTICS FOR THE YEAR 1961
(Taken From the 1962 Report to the Judicial Council)

<table>
<thead>
<tr>
<th>Size or name of county (1960 census)</th>
<th>No. of felonies</th>
<th>No. of appts.</th>
<th>%</th>
<th>Total fees</th>
<th>Ave. fee</th>
<th>No. attys. apptd.</th>
<th>Max. appts. one atty.</th>
</tr>
</thead>
<tbody>
<tr>
<td>In 18 of 25 counties of up to 20,000</td>
<td>347</td>
<td>65</td>
<td>19%</td>
<td>$8,036</td>
<td>$124</td>
<td>36</td>
<td>5</td>
</tr>
<tr>
<td>In 21 of 25 counties with 20 to 50,000</td>
<td>743</td>
<td>178</td>
<td>24%</td>
<td>$21,251</td>
<td>119</td>
<td>92</td>
<td>9</td>
</tr>
<tr>
<td>In 9 of 10 counties with 50 to 90,000</td>
<td>985</td>
<td>171</td>
<td>17%</td>
<td>$18,876</td>
<td>110</td>
<td>80</td>
<td>11</td>
</tr>
<tr>
<td>In 6 of 7 counties with 100 to 160,000</td>
<td>1,178</td>
<td>225</td>
<td>19%</td>
<td>$32,795</td>
<td>145</td>
<td>148</td>
<td>21</td>
</tr>
<tr>
<td>Dane County (222,095) (est.)</td>
<td>240</td>
<td>29</td>
<td>12%</td>
<td>$6,527</td>
<td>225</td>
<td>19</td>
<td>3</td>
</tr>
<tr>
<td>Milwaukee County (1,036,041)</td>
<td>1,400</td>
<td>771</td>
<td>55%</td>
<td>$88,691</td>
<td>115</td>
<td>281</td>
<td>50</td>
</tr>
<tr>
<td>Actual totals</td>
<td>4,893</td>
<td>1,439</td>
<td>29%</td>
<td>$176,176</td>
<td>$122</td>
<td>656</td>
<td>96</td>
</tr>
<tr>
<td>Adjustments</td>
<td>594</td>
<td>121</td>
<td></td>
<td>$15,530</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estimated Totals</td>
<td>5,487</td>
<td>1,560</td>
<td>28%</td>
<td>$191,706</td>
<td>$123</td>
<td>732</td>
<td></td>
</tr>
</tbody>
</table>

lack of due process. A more recent pronouncement by the United States Supreme Court occurred in 1962 in Carnley v. Cochran. In that case the Florida Supreme Court imputed to the defendant the waiver of counsel on the ground that, if the record indicated that the accused did not have counsel, the court would presume that he had waived his right. In the majority opinion by Justice Brennan it is said that “The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.” But Justice Harlan concurred without opinion, Justices Frankfurter and White took no part in the decision, Justice Black, joined by the Chief Justice and Justice Douglas, concurred on the theory that Betts v. Brady should be overthrown without their discussing specifically the advice question and Justice Douglas concurred separately emphasizing the particular violations of due process involved where the accused was so illiterate and the record so replete with errors. The combined effect of the decisions is apparently to make advice concerning the right to have counsel appointed a part of the due process requirement in any case where the right itself exists. Under the Sixth Amendment the right to advice was a part of the basic guarantee and is now included in Rule 44 of the Federal Rules of Criminal Procedure making it mandatory that any defendant who appears without counsel be advised of his rights.


111 369 U.S. at 516, 82 S.Ct. at 890.

The federal courts other than the Supreme Court have made it clear particularly in decisions rendered since *Gideon* that an accused must know of his rights under either the Sixth or Fourteenth Amendments if they are to mean anything to him. This means that at any time that an accused appears at a proceeding without an attorney, the court has a duty to inform the accused of his rights if it has not already done so.\(^{113}\) It is not enough standing alone that the defendant had had prior experience with criminal trials and should have known of his rights,\(^ {114}\) nor does the right depend upon the accused's asking for it.\(^ {115}\) If a defendant has a retained attorney during the proceedings up to a point and then becomes financially unable to continue to retain the attorney, he has no affirmative duty to ask for an appointed attorney, and if he is without advice, he has been deprived of his constitutional guarantees.\(^ {116}\) It now seems clear that the mere fact that the defendant has pleaded guilty, or intends to plead guilty, does not deprive him of his right to be informed.\(^ {117}\) As we shall discuss later, the right has now been found to extend sometimes almost from the moment of suspicion, through trial and into at least sentencing, and then through appeal and even post conviction proceedings. It has even been held that where a defendant waived his right to counsel at an earlier stage of the proceeding, he may under the circumstances have to be advised again at later crucial stages.\(^ {118}\)

Under Wisconsin Statutes the district attorney is supposed to inform prisoners at least ten days before each term of their right to counsel.\(^ {119}\) The surveys have produced no indication one way or the other as to whether this advice is in fact given, although in any event, it would help only those who happened to be prisoners at the right time. On the other hand, some district attorneys indicated either that they usually advise a defendant of his right to counsel, or at least do so under some circumstances. More important, the Wisconsin statutes indicate that the court must upon arraignment and before plea advise the accused of his right to counsel with a mandatory record to be made of the fact of the advice and the reply, if any, of the defendant.\(^ {120}\) As to the making of the record, it had been held in *State v. Greco*\(^ {121}\) that the old statute on the subject was mandatory and that the affidavit by

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\(^ {113}\) Johnson v. U.S., 333 F. 2d 371 (10th Cir. 1964).
\(^ {118}\) Williams v. State of Alabama, 341 F. 2d 777 (5th Cir. 1965).
\(^ {120}\) Wis. Stat., §957.26(2) (1963). The duty to advise under general circumstances is still necessary. See State ex rel. Eastman v. Burke, 25 Wis. 2d 676, 131 N.W. 2d 370 (1964).
\(^ {121}\) 271 Wis. 54, 72 N.W. 2d 661 (1955).
the district attorney that proper advice was given did not suffice to show compliance with the statute.

However, in the 1965 case of *Van Voorhis v. State*, the court was faced with a situation where the advice as to the right to appointed counsel did not appear of record, but the court hearing the application for leave to withdraw an earlier plea of guilty found from ample evidence that no advice was needed. The defendant had in fact been advised of his right to appointed counsel if he was indigent in prior cases in 1949, 1951 and 1958 and had written to the District Attorney shortly after sentencing indicating that he knew of his right to appointed counsel if he were indigent. The court makes it clear that earlier indications that lack of record on the subject would produce automatic reversal are no longer binding. It should be clearly noted, however, that the court held that the burden was on the state to show that the accused in fact knew of his rights. First of all, this means that the holding may be limited to such a clear showing. Secondly, this does not go to the question of whether evidence off the record can be introduced to show that the defendant was in fact informed of his rights during the proceedings in question. This latter is different than the actual showing that no advice need have been given, although it is hard to see why if general knowledge of the right can be shown by evidence off the record, specific knowledge of the right related to the case in question but not on the record should not be also admitted into evidence.

The Wisconsin cases and federal cases have made it clear that a mere perfunctory statement of the right is inadequate and that “it is the duty of the trial court to ascertain whether the accused understands such statement, and especially that part which informs him of his right to counsel provided at the county expense, if he is indigent.” “The court should determine the accused understands he is entitled to be represented by counsel, and if he does not have the funds to employ one the court will appoint counsel to represent him at public expense if he requests it.” Thus it is quite clear that the mere telling to the defendant that he has a right to counsel is inadequate unless the accused also clearly understands that this means not only that he can procure his own counsel but that counsel will be provided without cost to the indigent accused if he so desires. Nor will an accused be presumed to know of his rights. In addition the spirit of the constitu-

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125 *Casper v. Burke*, 7 Wis. 2d 673 at 677, 97 N.W. 2d 703 at 706 (1959).
126 *State v. Greco*, 271 Wis. 54, 72 N.W. 2d 661 (1955). The exchange between the Court and the accused set out in the case of *State v. Harrison*, 260 Wis. 89, 50 N.W. 2d 38 (1951) would appear almost inadequate under later cases. Likewise what was found to have been done in the trial court in the Federal case of *U.S. v. Corn*, 54 F. Supp. 307 (E.D. Wis.) (1944) would appear to be inadequate today.
127 *State ex rel. Drankovich v. Murphy*, 248 Wis. 433, 22 N.W. 2d 540 (1946).
tional provision giving the right to counsel\textsuperscript{128} requires that the court explain to the accused the seriousness of the charge and the consequences which would follow the entering of a plea of guilty.\textsuperscript{129} Thus it would seem that in Wisconsin the court must not only inform the accused that he has a right to counsel and a right to counsel at county expense if he is indigent, but the court must preface its advice by a warning as to the seriousness of the charge and the consequences which could flow from conviction and the court must make sure that the accused understands what the court means by its advice. Presumably the fact that the accused says nothing means that the court must restate the advice, ask if the accused understands and otherwise seek to clarify the situation.\textsuperscript{130} Obviously a sullen accused cannot remain silent forever, but the court must try to elicit a response indicating understanding.

The 1962 survey of judges indicated that all judges advise the accused of their right to counsel. The advice is usually given at the arraignment, although perhaps one-third of the county judges indicated the advice was also given at the first appearance before the committing magistrate. A few read the statute to the accused, and at least one quotes an appropriate case concerning the subject. Otherwise the 1962 survey could not cover the varying methods of actually giving the advice, other than reflecting generally that the judges say they respond to the particular circumstances. One thing which was brought out by the 1962 survey was that while nearly all judges indicated that the accused was specifically informed of the charge against him, a substantial number also tell the accused what the maximum sentence might be, although some of these describe the crime merely as a felony for which the accused could be imprisoned at a state penitentiary.

The docket studies in 1963, since they covered only five counties in detail, do not give a full picture of how the advice is in fact given throughout the state, but several things observed should be mentioned. In many cases the verbatim transcripts of the advice being given show that the judge would give the advice to each man in a number of ways, and sometimes even have the defendant say in his own words what the advice he had been given meant. In these, and in fact on most of the many records checked, the advice seemed to be well within the spirit of the rules. But at least some records as they stood in the individual files did not include a detailed account of the advice given, including instead on the docket sheet either a preprinted, or a typed in, standard statement that the accused had been adequately advised of a listed number of rights, including the right to counsel at county expense if the defendant

\textsuperscript{128} Wis. Const., Article 1, §7.  
\textsuperscript{129} Ailport v. State, 9 Wis. 2d 409 at 417, 100 N.W. 2d 812 at 816 (1960).  
\textsuperscript{130} In Ailport v. State, 9 Wis. 2d 409, 100 N.W. 2d 812 (1960) the record showed that no response was made to the rendering of advice, so the advice was held inadequate.
was indigent. And in one county, at least the individual record including both the docket sheet and the related complete file of the case itself did not include any notation that advice had been given, although both the District Attorney and the judge assured the author that each informed the defendants at various times, including the first hearing. Until Van Voorhis v. State\textsuperscript{131} it would have been clear that the entire lack of record was potentially fatal. Moreover, if the court is going to insist that the defendant be assured of his rights, regardless of how ignorant he is, then a simple ledger entry is not enough evidence of what took place and one would question whether oral testimony of what happened would ever be adequate for this type of problem. The only answer seems to be a verbatim transcript, with all comments, questions, and answers recorded. By hindsight, the conscientious judge will always assume he did things correctly unless he would happen to remember the specific conversation, an unlikely happening. Of course the missing evidence of advice may be elsewhere in the records, such as with the proceedings for the given day, but inclusion with the record of the individual defendant's record would be better. One might add parenthetically, that even the judge who might not agree with the spirit of all the constitutional protections of the accused might at least realize that he must make a proper record if he is to have his cases stand up under the various methods of review. Of course, this author believes the judges should learn to believe in the spirit of these rules as well.

3. **THE RIGHT OF THE ACCUSED TO WAIVE HIS RIGHT TO COUNSEL**

Simply put, even though a given accused has a right to appointed counsel under the Fourteenth Amendment, counsel need not be supplied if the accused freely and intelligently waives the right.\textsuperscript{132} Although the right to counsel itself has become an absolute right no longer dependent upon the circumstances of the particular case, the evaluation of whether there was an adequate waiver of the right to counsel depends upon a given court's notions of fundamental justice and consequently involves a balancing of circumstances similar to what was happening under the Betts rule itself. A number of rules, however, are fairly clear. The right does not depend upon the accused asking for counsel in the first instance, so no waiver ordinarily would arise out of the defendant's mere silence.\textsuperscript{133} Even an attorney does not automatically waive his right to have counsel appointed simply by failing to request the appointment.\textsuperscript{134} Ordinarily the mere absence of any at-

\textsuperscript{131} Van Voorhis v. State, 26 Wis. 2d 217, 131 N.W. 2d 833 (1965).


\textsuperscript{133} Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884 (1962); Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989 (1945); U.S. ex rel. Durocher v. LaVallee, 330 F. 2d 303 (2nd Cir. 1964) cert. denied 377 U.S. 998, 84 S.Ct. 1921 (1964). It is assumed that the apparent dicta of the contrary in Whitus v. Balkcom, 333 F. 2d 496 (5th Cir. 1964) was an oversight.

\textsuperscript{134} Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942).
torney at the trial does not justify a presumption that the right to counsel was waived, although state courts used to so hold.\textsuperscript{135} Despite state court holdings to the contrary,\textsuperscript{136} a plea of guilty does not by itself eliminate the role for the attorney,\textsuperscript{137} and a guilty plea standing alone does not constitute a waiver\textsuperscript{138} although it may have probative value in showing that a waiver did in fact take place.\textsuperscript{139}

On the other hand, the defendant does have to make up his mind one way or the other and cannot stand idly by forever and refuse to get an attorney or waive his right. Thus a federal circuit court has held that a defendant who has had three weeks to get an attorney but waited until a few days before trial to get one was not incorrectly refused a delay under the circumstances.\textsuperscript{140} If an attorney is appointed, the defendant may not be able to reject him without showing due cause,\textsuperscript{141} and if an accused discharges both a hired attorney and an appointed attorney\textsuperscript{142} or dismisses two attorneys despite the judge's telling him not to,\textsuperscript{143} he may be found to have waived his rights. If a defendant waits seventy days without getting an attorney, he has been held to have to accept the one finally appointed by the court so that the trial can go on.\textsuperscript{144}

More difficult to analyze under the federal cases are the questions concerning the "intelligence" of the waiver. In the typical case before Gideon made the right absolute, the question of waiver was intermingled with the question of whether the right itself existed, and the youth, illiteracy, confusion and so on of the accused would be mentioned to show deprival of the right to counsel without clearly distinguishing whether there was an inadequate waiver or an inadequate offer of counsel. At that time, of course, the two ideas came together because the defendant who was unable to appreciate his predicament and to analyze the law and facts of his case would for the same reason be unable to intelligently waive his right to counsel. If the court under the older Betts idea were to clearly face up to a waiver question, it would have to have said that the defendant had a right to counsel because he did not know what was happening and then turn around and

\textsuperscript{135} Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884 (1962). In an earlier case, Quicksall v. Michigan, 339 U.S. 660, 70 S.Ct. 910 (1950), the burden of proving lack of waiver was apparently put on the accused.

\textsuperscript{136} See Annot., 71 A.L.R. 2d 1160 for a detailed consideration of the state cases involving waiver by minors. See Meadows v. Maxwell, 175 Ohio St. 213, 192 N.E. 2d 781 (1963).

\textsuperscript{137} In a later section the role of counsel in the sentencing process will be discussed.


\textsuperscript{139} Sandoval v. Tinsley, 338 F. 2d 48 (10th Cir. 1964).

\textsuperscript{140} U.S. v. Redwitz, 328 F. 2d 395 (6th Cir. 1964).

\textsuperscript{141} U.S. v. Curtiss, 330 F. 2d 278 (2d Cir. 1964).

\textsuperscript{142} Leino v. U.S., 338 F. 2d 154 (10th Cir. 1964).

\textsuperscript{143} U.S. v. Johnson, 333 F. 2d 1004 (6th Cir. 1964).

say that despite his inability to understand, he was still able to decide intelligently to go ahead not understanding without an attorney. As indicated even after Gideon the Supreme Court has indicated that waiver is possible. Presumably the federal rule is to do as the state courts have in the past and consider such factors as age, mental capacity, confusion at the time of the alleged waiver, absence of advice from relatives, speed of decision, and even the seriousness of the charge. The Wisconsin Supreme Court has had occasion to consider waiver in a number of decisions and has held that the waiver must be intelligent and voluntary, and that a guilty plea does not waive the right.

In early 1964 in State ex rel Burnett v. Burke, the Wisconsin court chose to spell out something of the needs for advice and to indicate the dialogue which must accompany the rendering of advice if waiver is to be adequate. The court said:

We recognize that before accepting a plea of guilty the trial court must be careful not to require an accused to make admissions or to acknowledge previous crimes. However, by appropriate questions and simply phrased comments, it is feasible for the trial court to do the following:

1. To determine the extent of the defendant's education and general comprehension.
2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.
3. To ascertain whether any promises or threats have been made to him in connection with his refusal of counsel and his proposed plea of guilty.
4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.
5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.

Finally, the trial judge should be certain that the record itself reflects the fact that careful consideration was given to the foregoing propositions.

Since the adequacy of the advice as to the right to counsel and the adequacy of the waiver are ad hoc determinations, the surveys could not produce definitive results. After all, any judge asked simply whether the advice he gives and the waivers he accepts are constitutionally valid will say yes simply because of his human nature. In the 1962 survey

145 See supra note 132.
147 See Annot., 71 A.L.R. 2d 1160.
148 James v. State, 24 Wis. 2d 467, 129 N.W. 2d 227 (1964); State ex rel. Casper v. Burke, 7 Wis. 2d 673, 97 N.W. 2d 703 (1959); State ex rel. Wenzlaff v. Burke, 250 Wis. 525, 27 N.W. 2d 475 (1947).
149 State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N.W. 2d 540 (1946).
150 State ex rel. Burnett v. Burke, 22 Wis. 2d 486, 126 N.W. 2d 91 (1964).
151 22 Wis. 2d at 494, 126 N.W. 2d at 95 & 96.
the judge's responses as to how many waived who might have been indigent varied from five percent up to one hundred percent, with the bulk assuming that between fifty and ninety percent actually waived their right to counsel. The number appearing without attorneys in counties other than Milwaukee in the Table II bear out the fact that a large number of defendants do in fact appear without counsel. In Milwaukee county as tables II and III indicate, over half the criminal defendants receive appointments. This is probably attributable to the quite different criminal setting, where the defendant is more likely to know of and appreciate the value of his rights.

Of course some of the differences are attributable to different attitudes on the part of the judges. Spot checking in the 1963 docket studies indicates that some records show a relatively simple giving of advice. Some judges responding in 1962 said that they simply read from the statute to the defendants, while one said he read from a leading case on the subject. On the other hand some records seen were masterpieces from the point of view of being unimpeachable records where the judges made completely sure that the accused knew what they were doing. As indicated earlier, however, some records were sparse indeed.152

But there were some very bothersome incidents which raise serious questions about whether or not in practice the entire concept of right to counsel might in the hands of some judges and district attorneys be only so much window dressing—an attempt to get a good record and a conviction without too much cost to the public. For example, in one of the interviews, the discussion of the advice given and the waiver question was very standard, with the judge indicating he knew what had to be done, and did it willingly. But as the conversation proceeded, he kept talking about the defendants who insisted on their right to counsel. By the time the interview was over it was clear that he did not like to have to appoint counsel and thought the Supreme Court had gone much too far in protecting criminals.153

Along the same line, what of the possibility of tougher treatment by the court if the accused decides not to waive his right to counsel? This allegation was made in one of the Wisconsin cases where the court found, not threats by the district attorney as alleged, but simply inadequate advice.154 Others who have raised the question have been less successful.155 For example, in a recent case a writ of habeas corpus to the Wisconsin Supreme Court was returned to the circuit court for finding of fact as to whether petitioner's waiver of the right to counsel had been induced by threats or other statements by the district attor-

152 See discussion in immediate proceeding section on advice.
153 And communists in his opinion.
154 State ex rel. Burnett v. Burke, 22 Wis. 2d 486, 126 N.W. 2d 91 (1964).
ney. It was the petitioner’s word against that of the former district attorney who could not remember the specific case since it had occurred nine years earlier, but who testified that he never did the type of thing alleged during his ten years in office. Of course the trier of fact believed the district attorney and the Supreme Court accepted the trier of fact’s opinion. Were the trial court not to so decide, every prisoner that wanted to could make the same allegation, even though in fact untrue, and perhaps be released. Yet can such a thing ever really be tried to get at the true facts? A trial judge can scarcely hold against a district attorney who denied doing such a thing. Clearly this author is not suggesting that the case in question was erroneous on the facts, nor do I suggest that this is true of any similar reported cases. Yet I have seen on records in my limited spot checking, in places other than the county where the last mentioned case arose several situations where the defendant was very adequately advised of his right to counsel and said he wanted an appointed attorney. The record disclosed that the district attorney immediately moved for a recess. Within fifteen minutes the record shows the proceeding reconvened and the first question asked by the court was whether the accused still wanted an attorney appointed, and the record shows he did not.

Or perhaps the same possibility can be looked at from another point of view. It seems to be oftentimes accepted as a matter of criminal practice that in a routine case, if the accused asked for a jury trial and is found guilty, his sentence will be larger, apparently because he has wasted the judge’s time and the county’s money. Several judges have indicated privately that this is their practice. If it is justified at all in simple cases without issues of fact, it certainly is questionable in cases where it is clear that the accused was the one involved, but as to a crime of passion, for example, there is room for doubting the extent of involvement by or the consent of the complaining witness. Or in a crime of violence, there may be a real question about premeditation, or self-defense is raised but just who contributed how much to the inevitable scuffle is at best uncertain. Certainly the accused should have his chance at the jury in such cases without fear of greater punishment if he loses. Does the same thing happen with questions of appointing counsel; that is, do the allegations made by some of the prisoners that they were told their sentences would be lighter have any foundation in fact? The extent of representation now constitutionally required for indigents makes such practices totally inexcusable, if they do exist. It is one thing for an attorney to assist his client in deciding whether to ask for a jury trial and to take into account a possible higher sentence. It is another thing to pressure that same defendant into waiving his right to an attorney when he has no attorney. As we will see in a later section, the

156 State ex rel. Kline v. Burke, 27 Wis. 2d 40, 133 N.W. 2d 405 (1965).
right to counsel extends through many proceedings other than the trial or guilty plea and neither the court, or the defendant under pressure from the court, is able to say the case is that simple and that cut and dry. One of the places where an accused now has a right to counsel is at the sentencing. Since some Wisconsin judges do not show all or some attorneys the presentence report, and since the accused does not see it as such, the need of an attorney at that time is perhaps relatively useless to the mind of the judge who has no intention of letting the attorney know much of what serves as the basis for sentencing. Assuming the judge is opposed to preliminaries unless there is in his mind something to be gained, opposed to jury trials, and unwilling to accept any help from the attorney at sentencing, and we have a judge who might go tougher on a defendant who simply refuses to waive his right to counsel.

Again, if such practices do exist, they are in all likelihood very limited, but that they might exist points out the need for continuing surveillance and constant self-examination to avoid abuses in the system.

4. The Court's Right to Insist That the Accused Accept Counsel

Clearly the last two sections have indicated that an accused must be advised of his right to counsel and counsel must be supplied to the indigent accused unless he voluntarily and intelligently waives the right. The next question is whether an accused who has met the waiver requirement can be supplied with counsel against his express wishes.

One would have supposed a few years ago that the accused had a right to represent himself if he so desired. And in fact the Wisconsin Supreme Court in Dietz v. State had held back in 1912 that if the accused desired to represent himself he has the constitutional right to do so, and cannot later be heard to complain of a lack of adequate representation. The 1962 survey showed that at least some judges view this as meaning that counsel could not be forced upon an unwilling defendant. This seems clearly what the court meant in Dietz when it said:

Every person sui juris, who is charged with crime, has the right to try his own case if he so desires. The constitution guarantees him the right to be heard "by himself" as well as by counsel . . .

The trial court would not have been justified in imposing counsel upon the defendant against his will, unless indeed it ap-

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157 Discussed in detail infra.
158 See generally Annot., Right of defendant in criminal case to conduct defense in person, or to participate with counsel, 77 A.L.R. 2d 1233 (1961); Tompa v. Com. of Va. ex rel. Cunningham, 331 F. 2d 552 (4th Cir. 1964).
159 149 Wis. 462, 136 N.W. 166 (1912).
160 To same effect see Bortozek v. State, 186 Wis. 644, 203 N.W. 374 (1925).
peared that he was mentally incompetent, or not *sui juris* at the
time of the trial.\textsuperscript{161}

A few state courts have mitigated this right of representing oneself
by indicating that the actual right which the defendant has is to assist
in his own defense.\textsuperscript{162} And a recent Court of Appeals case has suggested
that the defendant's right to a "fair and meaningful" hearing may be
defeated by complying with his request that he not be represented by
counsel.\textsuperscript{163} In mid 1964, the Wisconsin Supreme Court had on appeal
the case of *Browne v. State*\textsuperscript{164} in which the trial court had refused to
permit the defendant to represent himself after he had objected to three
different appointed attorneys. The Supreme Court indicated that since
the *Dietz* case a substantial body of law had developed concerning both
an extensive right to counsel and the right to waive that right. The
court then draws a close line between the capacity to waive of itself and
what might be called the capacity to know whether to waive. If that
does not seem to make sense, consider the court's own words:

Here, where the court denied a defendant's request to re-
present himself, the relevancy of the waiver doctrine to the *Dietz*
principle is seen more clearly. The fundamental purpose of the
right to counsel is to insure reliable guilt determination. It is
clear that as a general proposition, a defendant's position is more
secure if represented by counsel. But, due process also requires
that throughout the criminal process the state must treat a de-
fendant as a person possessing human dignity (after all it is the
defendant who is going to suffer if he makes the wrong decision
and forgoes a lawyer) and, in most instances, a defendant would
be denied this treatment if counsel were imposed upon him
against his wishes.

However, in approaching the problem of waiver, it is highly
important to consider that many persons lack the capacity to
evaluate intelligently their circumstances during the course of a
criminal prosecution.

In determining whether a defendant who was represented by
counsel appointed by the trial court on the specific request of the
defendant was denied his constitutional right to act as his own
counsel, the critical question is not whether, as a matter of law,
he lacked the capacity intelligently to waive his counsel. Rather,
the critical question is whether, under the circumstances, the

\textsuperscript{161} 149 Wis. at 479, 136 N.W. at 173.

\textsuperscript{162} See *People v. Burson*, 11 Ill. 2d 360, 143 N.E. 2d 239 (1957) for a case
affirming the defendant's right to represent himself under most circum-
stances and the duty to impose an attorney while the defendant is exercising
his right to conduct his own defense. The court recognizes both rights, but
was nearly prepared to let the attorney take over in what was a good ex-
ample of a bad example of what a defendant can do to his own case and
to the dignity of the courtroom. See also *State v. White*, 86 N.J. Super. 410,
207 A. 2d 178 (1965) permitting a defendant who is intelligent and coopera-
tive to assist in his own defense.

\textsuperscript{163} *Juelich v. U.S.*, 342 F. 2d 29 (5th Cir. 1965).

\textsuperscript{164} *Brown v. State*, 24 Wis. 2d 491, 129 N.W. 175, 131 N.W. 2d 169 (1964).
trial court had reasonable grounds for a good-faith belief that the defendant lacked the capacity to appreciate his circumstances and thus to conduct his own defense and to waive intelligently his right to counsel. The determination of intelligent waiver is a matter of law (or constitutional fact) which this court may independently determine, giving very careful consideration to the determinations made by the trial court, and applying the legal standards outlined above. Where the trial court, as in the case at bar, concludes that the defendant lacked the capacity to intelligently waive, then it would be unreasonable to reverse the conviction solely because this court determined that the defendant possessed the capacity to waive.\(^{165}\)

It seems to me that a case where under the old Betts rule counsel would be a constitutional right under the circumstances, the Wisconsin court is coming close to saying that if the trial court decides to supply counsel against the express wishes of the accused he cannot object. Such a rule probably complies with the practice which sometimes existed at the time of the 1962 survey, although not necessarily supported by Dietz. A majority of judges said that they could imagine situations in which they would in fact appoint against the express wishes of the accused, although many of these mentioned such things as the youth or mental ability of the accused as reasons for so doing, reasons which would perhaps make the waiver effective. But some judges said that they would appoint against the accused's wishes when the charges were serious, a factor which actually does not go to the ability to waive, unless under the just quoted passage from Brown v. State.\(^{166}\)

A majority of the judges in the 1962 survey indicated that they often recommended to particular defendants that they accept appointed counsel, a claim borne out in some of the records seen in the 1963 survey. In addition, from all the judges surveyed, only about half a dozen jury cases could be recalled from all their experience in which an accused had not been represented by an attorney. And of these, two judges said they would never do it again, one pointed out that it was extremely difficult, one said he tried to appoint an attorney but the accused absolutely refused to accept one, and one said that the accused had convictions all over the country and was able to take care of himself in the courtroom.

Unless the appeal courts and the federal courts in habeas corpus proceedings are willing to leave much discretion to the trial courts here, particularly in regard to permitting the trial courts to find that counsel must be appointed regardless of what the accused says, the trial court is presented with a rather difficult theoretical problem. At one point in the spectrum of mental ability and circumstances we switch over from

\(^{165}\) 24 Wis. 2d at 511 & 511a, 129 N.W. 2d at 184 & 185. (Emphasis added).

\(^{166}\) Supra note 164.
those cases in which the accused has a right to appear *pro se* without an attorney to those in which he can in no circumstances waive his right to be represented by counsel. If appeal courts look too closely at such decisions, the trial court has to be exactly right, and as our analysis of the type of person who is indigent shows, and as the many cases under *Betts* show, many indigent defendants fit somewhere in the middle ground. Perhaps the answer is to drop *Dietz* altogether and use the Constitution as it is written in the conjunctive sense—"the accused shall have the right to be heard by himself *and* counsel . . ."167 Then the trial court could appoint where he thought it necessary despite a waiver, but the accused could make his own wishes known from time to time in the proceedings. If this latter seems to mean that the trial itself would be rather disorderly, this is no more so than if the defendant tries to represent himself.

5. **The Right to Counsel at Various Stages of the Proceedings in the Trial Court.**

At various junctures in this article, it has been suggested, particularly as supported by what the United States Supreme Court said in *Griffen v. Illinois*168 that no accused person should be deprived of a right he would otherwise have merely because he is financially unable to take advantage of that right. Carried through to its logical conclusion this would mean that the right to counsel exists in all criminal prosecutions and that the right to appointed counsel extended forward and backwards in time throughout all the proceedings at which the person able to employ counsel would be allowed the assistance of his own attorney. Thus the right could commence during investigations before any arrest is made or at least by some time after or perhaps even contemporaneously with the arrest, and extend through the various phases of the questioning and general investigation, inquest, John Doe proceeding, grand jury (assuming as to these last two that hired attorneys have rights at John Doe proceedings and during a grand jury and that they are criminal proceedings), the arraignment, deposition taking, pre-trials, trials, sentencing, appeal, parole and probation proceedings, and even subsequent habeas corpus or coram nobis proceedings as well as any other steps which might exist in the criminal process.

Necessarily the indigent accused could never get the breadth and depth of representation which is available to the man who can afford to make every conceivable use of his staff of hired attorneys, particularly if cost is not a factor. At the same time, as the courts move in the direction of providing to the indigent more of the assistance that is available to the man who can afford it, the indigent may become better off than the man who can afford an attorney, but cannot afford to take

advantage of all possible help from the attorney because the costs would eventually become prohibitive.

Now that *Betts* has finally been overruled, the most important single question, one which the Supreme Court has begun to answer in what was described earlier as the fifth of the key cases on the right to counsel—the case of *Escobedo v. Illinois* is what rights to counsel does the indigent defendant have prior to his arraignment?

**A. Time of Initial Appointment**

*(1) Rights During Formal Judicial Proceedings Before Trial*

Under Section 957.26 of the Wisconsin Statutes provision is made for appointment of counsel at the time of the arraignment but early enough to be present at the taking of any deposition. If applied literally, ordinarily the first time advice would be given and an attorney made available would be after the preliminary hearing on the question of probable cause had either been held or waived and the defendant bound over for the arraignment which is the first time the accused would be asked to enter a plea. But even in 1962 the survey showed that a slight majority of the judges in the state were making at least some appointments prior to the bind-over for the arraignment and that compensation was often being paid for the attorney's time prior to the arraignment, either by counting the time as time in preparation or by actually paying for earlier appearances as such. This practice did not exist in Milwaukee county and was most common in the smaller counties. Of course in many situations, particularly in the smaller counties, the same judge served as committing magistrate for purposes of the initial appearance, handled the preliminary hearing, or much more commonly the waiver of a preliminary, and then bound the case over to himself for the arraignment. As table II shows, the bulk of the cases are handled by waiver of a preliminary hearing followed by a guilty plea at the arraignment. In many counties the single county judge will handle such routine matters himself rather quickly. For example in the 1963 sample one judge had handled seventeen felony matters during a one year period, all on a guilty plea. Twelve of these were completed in a single day and in each case a very short sentence or probation was given. One might add that in only one of the seventeen was an attorney appointed, while three had retained attorneys.

The most common time for the appointment according to the 1962 Survey, that is, when the accused appears for the arraignment, may take place anywhere from five minutes up to a month before the accused is actually asked to make his plea to the charge. Unfortunately, the question in the 1962 Survey directed to this subject was unsatisfactorily

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170 At the beginning of Part II.
answered in some questionnaires and the results were generally difficult to analyze. However, some practices can be gleaned from the overall survey. Where appointments are made of attorneys in the courtroom at the time or when attorneys are otherwise appointed while the accused is before the court, it is not uncommon to allow the attorney to discuss the matter in the back of the courtroom or in an adjacent room for as long as the attorney wants, but this may be only a matter of minutes. Or the case may be adjourned until the afternoon at which time the accused will be expected to either plead or seek a continuance. In other cases the plea may be set over for a day or two, or a not guilty plea may be entered automatically. In any event, some of the judges interviewed indicated that the attorney could successfully move for a stay if he so desired but that frequently the attorney was willing to proceed very quickly. On occasion the plea may not be made for up to a month or even more, but certainly the majority of the pleas are made within minutes, hours or at most a few days. This is not so surprising when it is recognized that the judges' estimates of the percentage of guilty pleas varied from twenty to one hundred percent, the larger number of the judges estimated them at over fifty percent and estimates above seventy-five percent were very common. The figures in table II show that in the sample counties, guilty pleas were common indeed.

Many of the shorter proceedings involved such things as non support or bad check felony charges, where the conviction and sentence for probation alone or with a short jail sentence is probably intended to cure a continuing problem. Even where an appointment was not made until after a bindover, an appointed attorney very commonly would be almost automatically given a right to remand the proceedings for the holding of a preliminary hearing. Such a remand is discretionary with the court under statute but some judge will always remand if requested where there was no attorney at the time the preliminary was waived, some doing so because they felt the right to counsel probably made this mandatory, even in the Betts era. Some courts will advise the defendant of this possibility at the time of the first appearance and encourage the defendant to waive the preliminary initially, have an attorney appointed before the arraignment, and let the attorney help decide whether a preliminary hearing is technically desirable.

The 1963 survey showed a growing concern on the part of the judges and district attorneys with the time of initial appointment and a belief that appointments should be made earlier. When the judges were asked, "Under an ideal system, at what state of a criminal case do you think the indigent person should first be provided with an attorney if he wants one?" and, "Do you think it is unfair if an indigent person does not get a lawyer at this stage?" they replied as follows:

171 Wis. Stat., §955.18(2) (a) (1963).
Between arrest and first appearance before the magistrate
At first appearance before a magistrate
Between first appearance and preliminary hearing
At preliminary hearing
After preliminary hearing but before filing of an information
After filing of an information but before arraignment thereon
At arraignment on information

The District attorneys replied to the same questions as follows:

In addition, about one-third of the attorneys contacted for the 1963 Survey indicated that in cases in which they were appointed, they were appointed too late to adequately represent their indigent clients.

The 1964 survey indicated that the practice around the state was already moving towards earlier appointment, limited of course to the extent that, where judges make individual appointments for particular indigent defendants, the first possible time for appointment is the first appearance before the judge. This is ordinarily by the day after the arrest, commonly on the day of arrest, and apparently never later than the time between arrest and the next normal day of court.

Ignoring for the present the role of the United States Supreme Court in Escobedo and Massiah we can see why the Wisconsin judges were reflecting the growing constitutional mandates up to that time.

Under the Betts rule the questions as to time of initial appointment would obviously be handled on a balancing basis and some actual or potential harm arising out of lack of counsel at an early stage would be necessary if the courts were to find error. The usual rule was that the appointment was timely if no legal rights were lost up to the time of appointment. Thus where the defense of insanity was unalterably lost at the arraignment, the Supreme Court held that appointment must be made by that time\(^{122}\) and if the objection to the jury had to be made prior to the indictment, then by that time the attorney had to be ap-

pointed. But if a prior unasserted right could still be asserted at the time of appointment, then appointment was timely in that regard. Thus if the plea of insanity could still have been raised after the appointment by amending the pleadings, then the appointment was held timely.

While the Wisconsin court had very early indicated its view that the right to counsel could not be impaired by lack of funds, the legislative provisions setting the time of initial advice giving and appointment had not been questioned. In a statute relatively unique to Wisconsin, provision is made for a fine of not less than one hundred or more than one thousand dollars or imprisonment for not less than ten days or more than six months, or both, for any person holding another in custody who denies the other person his right to consult with or be advised by an attorney at law hired at his own expense, whether that person is charged with a crime or not. The statute has not been interpreted, but its grant of a remedy of sorts to a person who can hire an attorney seems out of step with the equal treatment the courts now are seeking for indigents.

But even before Gideon had made it clear that the United States Supreme Court was going to expand the right to counsel, the Wisconsin court was beginning to point toward a right to counsel before the preliminary hearing. In a United States Circuit Court case arising out of Wisconsin, the court has held that in Wisconsin at that time the accused had no right to counsel at the preliminary hearing, a view concurred in by a Wisconsin Attorney General's opinion the next year. Yet the following year, in 1962, the Wisconsin court, after saying that neither the federal nor state constitutions demanded a right to counsel prior to the preliminary hearing, went on to add in its per curiam opinion: "However, while not constitutionally necessary, the practice of

174 Carpenter v. County of Dane, 9 Wis. 249 *274 (1859) discussed in detail supra at note 82.
175 Wis. Stat. §946.75. See comment, Criminal Procedure—Right to Counsel Prior to Trial, 44 Ky. L. J. 103 (1955) describing a similar California statute in 1955 as being the only such statute in existence at that time.
176 Odell v. Burke, 281 F. 2d 782 (7th Cir. 1960). For similar holdings in other jurisdictions as to the effect of a preliminary as long as no plea is taken, or the accused merely plead not guilty, see Hunter v. U.S., 339 F. 2d 425 (9th Cir. 1964); U.S. ex rel. Cooper v. Reincke, 333 F. 2d 608 (2d Cir. 1964); Delano v. Crouse, 327 F. 2d 693 (10th Cir. 1964); Latham v. Crouse, 320 F. 2d 120 (10th Cir. 1963); Ronzio v. Sigler, 235 F. Supp. 839 (D. Neb. 1964); Application of DeToro, 22 2F. Supp. 621 (D. Md. 1963); State v. Osgood, 266 Minn. 315, 123 N.W. 2d 593 (1963); State v. O'Kelley, 175 Neb. 798, 124 N.W. 2d 211 (1963). But see Alden v. State of Montana, 234 F. Supp. 661 (D. Mont. 1964). Even an arraignment in a given jurisdiction may produce the same result if no prejudicial matter takes place or if the court merely enters a not guilty plea; Johnson v. U.S., 333 F. 2d 371 (10th Cir. 1964); DeToro v. Peppersack, 332 F. 2d 341 (4th Cir. 1964); U.S. ex rel. Combs v. Denno, 231 F. Supp. 942 (S.D. N.Y. 1964); State v. Perra, 266 Minn. 545, 125 N.W. 2d 44 (1963).
appointing counsel prior to the preliminary hearing is to be encouraged.\textsuperscript{178}

Important as \textit{Gideon} and the other cases decided that day were, none of them solved the question under consideration. But six weeks later the Supreme Court in \textit{White v. Maryland},\textsuperscript{179} relying on pre-\textit{Gideon} cases held \textit{per curiam} that the defendant had had an absolute right to counsel at the preliminary hearing without any need to show lack of counsel was prejudicial in any sense because at the preliminary he had made admissions used against him after he later pled not guilty and was tried. The court held that because of such admission, the preliminary hearing was for this defendant "a critical stage in a criminal prosecution."

Although some trial courts have taken pleas at the preliminary in Wisconsin, this is clearly erroneous and as long as no plea is taken it would seem that the Wisconsin practice would have escaped the rule in \textit{White v. Maryland} absent error by the committing magistrate. But in April, 1965 the Wisconsin Supreme Court in the case of \textit{Sparkman v. State}\textsuperscript{180} held that as a matter of public policy, appointments would henceforth be made in Wisconsin before the preliminary hearing unless the right was waived. The court used \textit{White v. Maryland} to conclude that in Wisconsin the right is not absolute because no rights similar to that in the \textit{White} case were lost nor need the accused enter a plea or make admissions. The opinion points out, however, that two Justices on the Wisconsin court would reach the constitutional question and hold the right absolute. Surprisingly, the court ignored \textit{Escobedo}, in the \textit{Sparkman} case; but unfortunately we cannot. I say unfortunately, because \textit{Escobedo} is impossible to analyze. Perhaps my reasons for so stating can be best understood if we turn briefly to the problems of the criminal processes which take place outside of the courtroom.

(2) Rights Prior to or Independent of Judicial Proceedings

So far in the article, and to a large extent in the courts up to the time of \textit{Escobedo}, the right to counsel concerned itself with the right to be present and to represent an accused at formal court proceedings. We shall see in a later section that these representations must be effective; that is, the attorney must have time to prepare for these proceedings as such, and may thus have a constitutionally protected right to a delay so he can prepare before he has to appear to represent the accused. This right and these proceedings, are based upon what I somewhat facetiously choose to call the "gamesmanship" theory, for which, I might add, I have great respect. Under this theory, two antagonists represent on the one side the people, on the other the accused. What is

\textsuperscript{178} State ex rel. Offerdahl v. State, 17 Wis. 2d 334 at 336, 116 N.W. 2d 809 at 810 (1962).

\textsuperscript{179} White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050 (1963).

\textsuperscript{180} Sparkman v. State, 27 Wis. 2d 92, 133 N.W. 2d 776 (1965).
INDIGENT'S RIGHT TO COUNSEL

important is the manner of formal presentation to the trier of fact, be it judge or jury, and to the trier of the law.181 The rules are set, and each does all that is possible to present his side in the most favorable light. Of course the television image of this process is unreal but dramatic, in that the reality of the criminal practice is that rarely does an accused have a trial as such. It's difficult for law students, and I suppose some law professors, to realize that in the vast bulk of the cases, as Table II indicates, there is no head on clash before either a judge or jury, but rather nearly everything but the sentencing182 is settled outside of court. In most such instances where the accused has legal representation, the attorney can properly make the tactical judgment that taking into account the chances of an acquittal, as against his bargaining power with the district attorney (statistically also surprisingly unsuccessful), the risk of a larger sentence if the case is tried, and perhaps a notion that nothing is to be gained, the best course is a quick guilty plea plus an effort to keep the sentence down by getting the district attorney to seek a lighter sentence and by arguing to the sentencing court.

But wholly aside from the time in court, the accused undergoes a process which is said to be much more important to what is eventually going to happen to him. For before the accused ever sees a judge, and then later outside of judicial scrutiny, someone has been seeking evidence, making searches, asking questions, making arrests, trying to get confessions and admissions and generally doing the detailed investigation work which will eventually produce any conviction. Now under the "gamesmanship" theory as earlier described, the defense attorney will try constantly to find constitutional and other errors in this earlier process so as to "win" for his client. His job then, is to try to cross-examine the investigating officers to make their evidence either inadmissible or weak, on rare occasion to put the accused on the stand to allege facts making the evidence obtained inadmissible, and to otherwise break through the prosecution’s presentation, either at the trial, or more commonly as a tool in negotiating with the District Attorney to lessen the charge or get a dismissal. Escobedo raises, but scarcely begins to answer the question, of what are the indigent defendant’s rights to counsel during this investigatory time. After all, the suspect or accused who has a hired attorney available, can make effective use of an attorney

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181 In Escobedo itself in the dissenting opinion of Justice Stewart, 378 U.S. 478 at 493, 84 S.Ct. 1758 at 1766 (1964) something like my "gamesmanship" theory is explained and a right to counsel only during the court proceedings advocated. He wrote:
Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial. Among those guarantees are...the guarantee of the assistance of counsel.

182 And when an attorney pleads his client guilty, he probably hopes at least to be able to judge what the sentence is likely to be.
for his own purposes during this time when the investigation itself is taking place.

The answer to this depends in part upon what happens during this time, and this author, after much typical legal research as well as personal soul searching, has decided that nobody knows, or at least nobody is sure enough to be completely relied upon. That there are unconstitutional practices, including beatings, must be true, but just how much? There are occasionally corrupt judges too, but we have never decided for that reason to throw out courts, or to undo all decisions by a judge found to be corrupt in a given instance. As far as the Wisconsin courts are concerned, how much should be done depends on just what the problem is right here in Wisconsin. And one wonders whether the United States Supreme Court should judge this subject without detailed knowledge of what is going on, or whether they should make universal judgments based upon knowledge or guesses about some poor law enforcement operations which may be more prevalent and more dramatic in other parts of the country.

Some things seem obvious. Any group of persons composed of as many persons as the law enforcement agencies of the state will include some sadists, some sincere persons who do not believe in the rights the courts seek to guarantee for the accused, some who are simply corrupt, and a majority who most of the time try to do what they understand they are supposed to do, although not always efficiently or intelligently. If the group of persons happens to be underpaid, to be a natural place for those who seek out authority for its own sake and not always to be highly regarded by their peers then you know that once in a while, at least, somebody gets pushed around, even forced to confess. And of course in present times this will produce racial implications.

The courts have in the past dealt with the problem most obviously in regard to confessions, and have tried to keep out any forced confessions, partially on the ground that they were inadmissible as unreliable, and perhaps partly on the ground that these were breaches of the right against self-incrimination. But this is a question of fact, and one side is likely to disagree with the other in the upcoming “game,” and it’s awfully hard for the accused to win the game in any setting where it is obvious that one side or the other is lying. The district attorney and

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183 For brief discussion on the reputation of the police among the general public, see Falk, The Public’s Prejudice Against the Police, 50 ABAJ 754 (1964) and the answering article LeGrande, A Re-examination of the Public Prejudice Against the Police, 51 ABAJ 465 (1965). One of the more strongly put articles on the type of person who becomes a policeman and why he thus commits acts of brutality is included in the hard hitting article Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483 (1963) esp. at p. 581 ff. where he gives information based upon various other studies. If one accepts his views on police reputation and conduct, it would produce strong support for the extension of the majority opinion in Escobedo.
the police are simply more likely to be believed. But even before *Gideon*, one factor in deciding that confessions were inadmissible was the lack of counsel or the refusal to permit hired counsel in during the interrogation that produced the confession.\(^{184}\) Then along came *Massiah v. U.S.*\(^{185}\) and came very close to saying that once an accused had hired an attorney, confessions obtained in the absence of the attorney, or without his consent, were just plain inadmissible and that was that.

A pre-*Gideon* consideration of the right to counsel other than at formal judicial proceeding arose in the now famous case *In re Groban's Petition*,\(^{186}\) where the fire marshall had investigated the causes of a certain fire, having subpoenaed the appellants as witnesses. The fire marshall refused to allow the appellants to have counsel during the investigation since the statutes allowed him to make completely secret investigations. The appellants refused to be sworn and testify, upon which refusal and pursuant to statute, the fire marshall committed the appellants to county jail until they would testify. Denied all *habeas corpus* remedies, by the Ohio courts, the appellants appealed to the United States Supreme Court, alleging solely that the denial of counsel amounted to a deprival of due process under the Fourteenth Amendment. The majority denied this claim, basing their decision in part on the fact that the appellants had the protection of the privilege against self-incrimination which they could evoke. The dissent by Justice Black, joined in by the Chief Justice and Justices Black and Brennan, found in the compulsion to testify in secret before a law enforcement official a violation of due process, arguing that any time a person is compelled to give testimony which may be instrumental in his prosecution and conviction, that person should have the right to counsel. The dissent took particular dislike to the majority's suggestion that to allow counsel might hinder the investigation.

Now for a look at *Escobedo v. Illinois*.\(^{187}\) Petitioner had been picked up without a warrant, questioned, and released pursuant to a state writ of habeas corpus obtained by petitioner's attorney without making any statement. Some eleven days later he was again picked up after another suspect had implicated petitioner in the death of petitioner's brother. Testimony tended to show that petitioner was not formally charged, but was in custody and could not leave. Petitioner testified, without contradiction, that the detectives said that the case was clear and that petitioner

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might as well confess. Petitioner requested that he be permitted to talk to his attorney but the request was denied. This attorney was on the premises seeking to see petitioner but not permitted to do so by the various persons at the police station, including the chief of police. Eventually the interrogations produced admissions of first hand knowledge of the crime in question and finally an Assistant State's Attorney was called in to take a confession. The Court said, "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment.'" Answering yes to the question for the five justice majority, Mr. Justice Goldberg said:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a program of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment" . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The majority goes on to say that in its view this is not a break with prior cases concerning when the right to counsel exists, but merely an application of the rule that the right depends upon whether under all the circumstances the suspect or the accused was fundamentally prejudiced by the lack of counsel so that his later trial lacked fundamental fairness, citing numerous pre-Gideon cases. Thus again, the Betts ad hoc type determination of fairness under the circumstances finds continued perpetuation for other purposes.

Compared with other right to counsel cases, the legal and practical problems raised by Escobedo are much greater. For example, a footnote of the majority opinion says that "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial." The dissenting opinion by Justice Stewart notes that the majority opinion has said that the suspect must be advised of his constitutional rights before he confesses, and argues that the Court has never before dic-

188 378 U.S. at 479, 84 S.Ct. at 1759.
189 378 U.S. at 490 & 491, 84 S.Ct. at 1765.
190 378 U.S. at 490, 84 S.Ct. at 1765.
tated that the police must so advise a person. The discussion earlier in this article makes it clear that in a court proceeding the actual words used by the trial judge and the accused require close scrutiny to determine if the accused knows his rights and then intelligently waives such rights. How can a court ever determine if the advice given by the police is adequate and the waiver intelligent when there is no verbatim record and the stories of what happened will vary widely in many cases? Of course one possible way to handle this is to include the knowledge on the waiver on the face of the confession, make sure it would stand up if the same words were used in a trial court's advising of the right, and perhaps even have the accused sign the waiver separately. The difficulty with this technique is that if the confession itself would in any way be subject to attack, particularly as to involuntariness, anything on the same or separate pieces of paper would also be subject to the same problems of coercion and so on, with the inevitable competing evidence. Perhaps a tape recording of the proceedings would take care of the problem of proof, but one wonders what effect this would have on the manner and effectiveness of the interrogation.

Justice Harlan's short dissenting opinion in Escobedo as well as the dissenting opinion of Justice White, joined in by Justices Clark and Stewart, express the view that giving a right to counsel during the investigation will interfere with the normal police processes and prevent at least some convictions. Here is the inevitable claim of those approaching from the police point of view. For the dramatic writers who make broad generalizations about the terrible practices of the police, the voice of the dissenters is lost, and they delight in the broad implications of Escobedo. But as indicated before, I distrust the sweeping condemnations and can only say that if Escobedo is as broad based as some feel, its effect on the police's ability to obtain confessions, and thus convictions, may be relatively great, although again it is impossible to know what percentage of convictions would not be had without confessions.

191 378 U.S. at 493, 84 S.Ct. at 1766.
192 In Horwath v. Burke, 236 F. Supp. 674 (E.D. Wis. 1965) a habeas corpus action by a Wisconsin prisoner was unsuccessful partly because the accused had in the confession itself indicated that he was informed of his constitutional rights and had waived his right to counsel.
193 One of the most strongly worded articles attacking those who defend the police practices is Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 CORNELL L. Q. 436 (1964). Along the same line see Broedew Wong Sun v. United States: A Study in Faith and Hope, 42 NER. L. REV. 483 (1963). Most of the current writing on the right to counsel during the investigation and related topics seems to be very critical of police practices and favors rights to the suspect and the accused. See e.g., Herman, The Supreme Court and Restrictions on Police Interrogation, 25 OHIO ST. L. J. 449 (1964); Comment, An Historical Argument for the Right to Counsel During Police Interrogation, 73 YALE L. J. 1000 (1964); Note, The Coming of Massiah: A Demand for Absolute Right to Counsel, 52 GEO. L. J. 825 (1964); Note, Right to Counsel During Police Interrogation, 16 RUTGERS L. REV. 573 (1962) reprinted at 2 AM. CRIM. L. Q. 11 (1963).
Justice White's dissenting opinion notes that "Although the [majority] opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel. . . ." If this is so, it must mean that an indigent defendant either must waive his right to counsel or he cannot make any usable confessions until he appears in court for a determination that he is indigent and counsel is made available by the judge. Or perhaps automatic representation could be made available either by a public defender or an attorney appointed for the day who is either at the police station or available on call. Even then, the questioning which might take place on the scene of a crime, during a search with a warrant, before an arrest, in the police car after an arrest, or otherwise before reaching at least a local station might well be productive of constitutionally inadmissible admissions or confessions. Only having a lawyer traveling with the police would take care of these possibilities. Of course the dissenters to Escobedo suggest that perhaps the majority is seeking effectively to bar all use of admissions and confessions, presuming that once an attorney is available there will be none.

The validity of Justice Jackson's famous statements in a concurring opinion will be well tested if the results of Escobedo are as suggested. He said:

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.196

The process of determining just what rights the suspect has is now well under way. Various courts before and after Escobedo have dealt with the problems of representation outside of formal court proceedings with varying results. Several courts have held that once an attorney makes it known to the police that he represents an accused or the police otherwise know of the fact, no confession can be taken without the attorney's having been able to assist his client.196 Under these cases almost any statements taken after an attorney has been requested by the suspect seem to be inadmissible. One circuit court has held that where the defendant had requested an attorney and was questioned in the hospital in the absence of an attorney, the conviction was vitiated even

194 378 U.S. at 495, 84 S.Ct. at 1767.
though no self-incrimination took place which counsel could have prevented.\textsuperscript{197}

On the other hand, one circuit has noted that \textit{Escobedo} and \textit{Massiah} are not to be applied automatically, and that a voluntary confession procured prior to the time when the accused requested an attorney but after he had been warned of his right to silence, was admissible.\textsuperscript{198} Yet some opinions have centered on the idea that once the investigation centers on the accused, he has an absolute right to counsel, others saying that once an indictment is had, the right becomes complete.\textsuperscript{199} In addition, failure to ask for an attorney may prevent raising lack of counsel as a defense to a confession.\textsuperscript{200}

The Wisconsin Supreme Court has considered \textit{Escobedo} itself, or problems raised by it, a number of times in recent years. The court has clearly indicated that it feels that \textit{Escobedo} depends upon the entirety of the circumstances surrounding a given confession at which counsel was neither present nor requested and moreover that there is in this respect no absolute requirement that the suspect be apprised of his constitutional right to remain silent.\textsuperscript{201} Similarly, the court recently relied heavily upon the fact that the defendant’s attorney did not object to the admission of an earlier confession when it was submitted at the trial as preventing the prisoner from raising the objection in a later \textit{habeas corpus} action.\textsuperscript{202} More importantly perhaps, the court has accepted rather clearly the view that whatever might be the admissibility of a given confession and the denial of rights attached to the taking of the confession, a subsequent guilty plea with the advice of counsel waives any right to object to what happened during the investigatory processes\textsuperscript{203} a result supported by the United States Supreme Court in the recent case of \textit{Henry v. State of Mississippi}.\textsuperscript{204} If this latter rationale holds up, it may foretell the material weakening of \textit{Escobedo} as an effective way of attacking collaterally state convictions at any time where counsel failed to raise the objection at the arraignment or trial.

The discussion of rights before formal court proceedings necessarily ends without being completed, because of the already alluded to lack of provable information as to just how necessary the right is, and because of lack of adjudication of how much protection is in fact going to be applied. There is room for arguing for an absolute right, which

\textsuperscript{197} Stovall v. Benno, F.2d (2d Cir. 1965).
\textsuperscript{199} Wright v. Dickson, 336 F. 2d 878 (9th Cir. 1964); Miller v. Warden of Maryland, 338 F. 2d 201 (4th Cir. 1964); Fugate v. Ellenson, 237 F. Supp. 44 (D. Neb. 1964).
\textsuperscript{201} Brown v. State, 24 Wis. 2d 491, 129 N.W. 2d 175, 131 N.W. 2d 169 (1964); State v. Strickland, 27 Wis. 2d 623, 135 N.W. 2d 295 (1965).
\textsuperscript{202} State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965).
\textsuperscript{203} Brown v. State, 24 Wis. 2d 491, 129 N.W. 2d 175, 131 N.W. 2d 169 (1964).
may make confessions impossible. But one can also argue for an ad hoc balancing of all the circumstances to add some protection in confession cases beyond trying to prove whether or not they were voluntary. If the right is relatively absolute, the next question will be just what are the rights of the attorney. Is it enough if he merely has a chance to advise his client, or may he participate in the questioning, objecting to improper questions and arguing against the facts as alleged by the questioner? Perhaps his presence makes it presumed that the suspect will not be questioned, or perhaps the attorney is there so that if coercion is present, his more believable testimony will be available. The fact of the matter is that a traditional approach to the functioning of an attorney makes any position between no right to counsel at all during investigation, and an absolute exclusion of admissions and confessions, impossible of analysis along traditional lines.

One final comment before going on. Whereas traditional cases on the right to counsel do not affect evidence as such and permit the prosecution to retry the case with whatever evidence it had available at the original proceeding—less anything lost simply by passage of time—the application of the right to counsel to confession and admission cases should make not only the confessions and admissions unavailable on any retrial of the case, but may well make anything obtained through means of the confession and admission also unavailable for a retrial. This means that the effect of a reversal may in fact be much greater under the Escobedo situation than under Gideon. This also remains to be seen.

B. Counsel at the Sentencing

Since the right to counsel now arises at least in all felony cases at the time of either a plea or a trial at the very latest, and usually before any of these, the issue of whether there is right to counsel at sentencing is less likely to arise. In one pre-Gideon case, the United States Supreme Court held that whatever might have been the right to counsel at earlier stages, there was a right at the sentencing in view of the fact that the trial court had apparently erroneous information about the defendant's past record of convictions. Other cases merely considered lack of counsel at the sentencing along with everything else in applying the Betts rule. In view of the various holdings concerning appointment at "critical" stages, counsel should no doubt be available for the sentencing under most circumstances.

In 1965 the Wisconsin Supreme Court had occasion to review the various cases on the subject and come up with a very good analysis of

205 See Irwin v. U.S., 338 F. 2d 770 (1964) holding that no rights under the Sixth Amendment were lost since the defendant's own attorney was present during questioning by the postal inspector.

how this right now stands. In *State v. Strickland*, the accused had been represented at various proceedings involving several different charges and the court found that whatever rights to counsel he may have had in earlier proceedings, they were deliberately waived by his attorney at the original sentencing on some of the charges and the defendant was bound by the waiver. But as to three of the sentences, counsel was not present and the record was silent as to whether defendant was apprised of his right to counsel at public expense if he was indigent, including his right to counsel at the sentencing. The court reversed and remanded the proceeding for resentencing on the three causes. The opinion notes that not all courts have so held, but found in the various cited federal cases, a mandate to consider sentencing a “critical stage” at which advice as to the right to counsel must be given if no attorney is present. It seems likely that this also means that even if counsel is waived at other times, the offer may have to be given at this time as well.

In Wisconsin the 1962 Survey indicated that the attorney who is appointed for the arraignment ordinarily represents the accused at least through sentencing. In this connection the 1962 Survey discovered that the practice in supplying the attorney for the accused with information from the pre-sentence report varies widely across the state. Some judges ordinarily refuse to give any of the information to the attorney; others read excerpts from the pre-sentence report; others give information only when the attorney seems to lack accurate information. Some let the attorney see the report if it is thought that he can be trusted not to convey the information to others, and some let the attorney see the report as a matter of routine. None of the judges seem to let the accused see the report, and most forbid the attorney’s telling the accused what it contains. Presumably the judges who give all or any information to the attorney feel that the attorney for the defendant has a proper role in sentencing processes. Certainly to the extent that this is so, the attorney has responsibility in the sentencing process to protect the interest of his client.

The cases on waiver have not sought generally to distinguish waiver of counsel generally from waiver for the sentencing. However, although the accused may know he is guilty and that the prosecution has his confession and thus see no advantage in having counsel, what happens at the sentencing may be quite crucial to him. The difference between ten and twenty years in jail is not as important, perhaps, as the difference between an acquittal and a ten year prison term, but the added ten years in the former case is still sufficiently significant that the indigent’s rights during the sentencing process are important. The sentencing in larger counties is usually based on a pre-sentence report,
prepared professionally by the department of public welfare and relied on, sometimes almost completely, by the judge. This report would be hearsay and inadmissible at a trial on the merits. Yet if there is no attorney present, or if the court will not permit the attorney to see the report, then the added ten years in the example above may be based on a type of information insufficient to sustain a verdict on the crime itself. One suspects that neither the attorneys nor the accused appreciate the significance of the sentencing process, although it has been argued that the right to counsel at this time is as important as the right at the trial. And the waiver by the accused is likely to have been made with little appreciation of the effect of lack of counsel at the sentencing. This suggests that adequate advice to permit an intelligent waiver might best include not only the maximum possible sentence, but some indication that the presence of an attorney might affect the length of the sentence as well.

The rights of an accused to counsel on appeal and in other post conviction proceedings has been excluded from this article, but the reader is referred in the footnotes to several of the leading cases and other Wisconsin material on the subject generally.

(6) Determination of Indigency

Unquestionably the constitutional right of an accused to have an attorney appointed at public expense presumes that the accused is financially unable to procure his own attorney. Particularly is this apparent from the fact that the advice which must be given to the accused includes the fact that the court will supply an attorney if the accused cannot afford to get one himself. Moreover the cases are replete with statements concerning the courts' belief that the right to counsel as well as all other constitutional rights should be the same for the rich as well as the poor. Yet there is no statutory definition of what criteria are to be used to determine who is entitled to the right to appointed counsel, the statute merely using "without means to employ counsel"
and "indigent."²¹² In addition there seems to be little if any federal case law on the subject to guide the state courts and there is but one Wisconsin case and it is of only limited help.

_**State ex rel. Barth v. Burke,**²¹³ concerned a petitioner in a _habeas corpus_ proceeding in which one of the issues was the trial court's determination that petitioner was an indigent. The petitioner had been sworn by the trial court, asked if he had any property, and answered that he had a lot worth maybe $1,500 with about $500 indebtedness against it. The trial court held that he was not a "pauper." Petitioner pleaded guilty, was sentenced on one count to a year in county jail under the Huber law. Sentences on eighteen other counts were withheld and he was placed on probation for four years. At a later hearing before the trial judge on alleged probation and Huber law violations, the petitioner said he could not live up to the judge's terms for probation. So the judge sentenced him for five consecutive one year sentences. The Supreme Court found that the accused had not been adequately advised that counsel could be supplied for him at no cost if he were a pauper.

The court further held:

> The trial court's inquiry into his indigency was at best cursory. . . . Upon the record in the instant action the trial court's finding that Barth was not indigent was arbitrary and was made upon an inadequate determination of the facts.²¹⁴

Justice Hallows, dissenting and joined in by Chief Justice Currie, argued the finding was inadequate, and that if the accused wished to object to that finding it was up to him to come forward with more information.

The one possibility of help from the United States Supreme Court seems to be a non-criminal matter where the issue was whether the appellant in a civil action was able to appeal in _forma pauperis_. In her affidavit the petitioner has alleged possession of a home appraised at $3,450 and a little income from the rental of parts of the home, and the costs of appeal would ordinarily be around $4,000. The Court said in part:

> We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be able to provide" himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the cate-

²¹³ _State ex rel. Barth v. Burke, 24 Wis. 2d 82, 128 N.W. 2d 422 (1964)._ ²¹⁴ _24 Wis. 2d at 86, 128 N.W. 2d at 424 & 425._
gory of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution.\textsuperscript{215}

Two considerations of value to this study could be drawn from this quotation. It would seem that to force an accused to make himself destitute by forcing him to dispose of every asset which he has to conduct his own defense, particularly if he has other persons dependent upon him, is short-sighted. The public treasury, probably in a short time, will be supporting those dependent on the accused or the accused himself if he is later free and unable to provide for his own support. Thus the accused who uses his automobile in the only business he knows, or who has a little equity in his home and nothing else, might well not be sufficiently "indigent" for present purposes. Often the individual will be put on probation, or paroled within a comparatively short period of time, and will either have to have some basic assets to start off with or have to be put on relief. Similarly, his family is likely to face relief if deprived of all their means of support.

The second possible lesson from the quotation is that the forcing of an individual to dispose of everything which he has may cause him to decide not to seek counsel, but to proceed on his own in the hopes that whatever he has will be usable either by himself or his dependents. Obviously many might not be so altruistic under the circumstances, but if the accused fails to fully appreciate the need for counsel he may decide not to sell all to obtain counsel, thus being effectively deprived of his right to counsel because the application of a strict rule forces the accused to do that which an honest man might easily find the more honorable, to waive his rights and save the money for his family.

The 1962 survey of the judges' practices in making the determination of indigency provides clues to the proper practices even though the earlier cited Wisconsin case\textsuperscript{216} standing alone as it does, is only a starting point, and the federal case adds perhaps even less in terms of workable criteria. A clear majority of the judges have the accused swear to his indigency before an appointment is considered, either by a sworn affidavit or by a statement under oath in court. In a majority of courts, if there is any question in the mind of the judge, there will be an examination in open court, usually by the judge but sometimes by the district attorney. A number of judges pointed out that in smaller counties the judge frequently knows many or most of the local people and thus knows whether the particular accused is actually indigent.

\textsuperscript{216}Supra note 213.
Some basis exists, however, for assuming that frequently any examination is very brief, and perhaps little more than an attempt to frighten the accused in case he is not being candid. On occasion the courts do rely on someone's making an investigation of the accused's financial condition. Thus some judges expect the district attorney to have checked the accused's financial condition, some have the county welfare department check to see if the accused has been on relief or is otherwise known to be indigent, and on occasion the sheriff's office or the police may do a little checking. It is apparent, however, that these investigations, like the examinations in court, may not be very detailed, and the judge may merely expect the police to know enough about the accused from their investigation of the alleged crime to know if he has any money.

The 1963 survey bore out the findings of 1962 and indicated that the courts were still functioning without any detailed criteria. In one of the survey counties, where an accused claims to be indigent, the proceedings are adjourned and the accused is told to sign a waiver so that the police can undertake an investigation of his financial condition. This will produce more detailed and specific information about such things as checking accounts, savings accounts, jobs and so on than is probably available in most counties.

The criteria used in determining if the accused is indigent as claimed were not spelled out in the various questionnaires in great detail, so at best all that can be supplied is some observations based primarily upon what was verbally mentioned by some of the judges interviewed, judges, who by talent or temperament probably do at least as well and perhaps better than most in preserving the legal rights of the accused while protecting the county's interest. These judges indicated that they usually asked about specific assets such as banking accounts, cash, securities, and cars in particular, and on occasion they checked for sporting equipment, tools and the like to determine if the accused had anything not needed in his business or by his family and worth enough to make its sale worthwhile. Also checked were any real estate holdings which might include enough equity in them to make their sale or mortgaging worthwhile. In all events, the needs of dependents were usually considered, but the fact that dependents were without other means of support did not necessarily prevent a determination of non-indigency. About one-half of the judges did say in the questionnaire that they considered the wealth of the parents of a minor in determining indigency, but verbal interviews indicated that this practice may not involve the application of any absolute standard, but rather the parents, if in court, might be encouraged to supply help, or the accused might be told to contact his parents to find out if they will help. An incidental item, covered only in a few interviews, indicated
that the fact that an accused was out on bail tends to show that he is not indigent, but that it might not necessarily mean that the accused would for that reason alone not be considered indigent. Although not much was gathered concerning the role of county boards and other officials in keeping costs down, it became obvious that some officials, including the district attorneys, exerted what pressures they could to keep them down. Presumably this had some effect in discouraging the judges from finding indigency where it does not exist.

While the type of approach set out here assumes that the courts do make realistic determinations of who is indigent, there is reason to believe that most matters are handled very quickly and that, in anything but an unusual case, it is almost easier to appoint counsel than spend very much time investigating. In fact the random checking of the docket studies produced no example of a court actually holding that an accused was not indigent and then forcing him to proceed even though he persisted in saying he could not afford an attorney. In addition there was only an example or two of an accused who was held by the court not to be indigent, and who then procured his own attorney.

One added problem in this area concerns the possibility that an accused may not be technically indigent, but may be only able to pay a limited amount to an attorney, which amount proves inadequate. One federal district court has held that when the accused's funds become exhausted, as of that time he has a right to be advised and to get free counsel.\(^2\)\(^1\)\(^7\) There have been several cases in Wisconsin in prolonged and expensive litigation where the accused has paid part of the attorney's fees and the county the balance. Since the bulk of the fees are between fifty and one hundred and fifty dollars, not too many examples of divided payment could be expected. This writer was told by several judges that they felt once a hired attorney undertook to represent an accused, he assumed a responsibility which could not be paid for by the county. On the other hand, there are examples of attorneys representing an accused for some proceedings, and then being appointed for the balance.

7. Quality of the Representation

Here the discussion is directed not at which basic method of selecting the attorney as between ad hoc appointments and full or part time defenders is the better, but at the legal objections which can be made because of the representation actually supplied. We will also look at how the Wisconsin judges select the attorney for the particular accused.

A. Time to Prepare

An attorney during the course of the original proceedings or the accused in later attacks on the proceedings, will sometimes allege that the time made available by the court was inadequate if the representa-

tion was itself to be of any value. Needless to say, adequate time must be available if the representation is to mean anything. Such a determination involves again a balancing of the entirety of circumstances and there is no way to say precisely how much time is needed for specific circumstances. Necessarily this means that the attorney must be given enough out of court time to prepare,218 and two days may be sufficient for a simple matter,219 two weeks for a more complex matter.220 In a given situation, an attorney may be held to have had an absolute right to a continuance because of something which suddenly arose and needed time for preparation.221

B. Competency of the Attorney Himself

While time of initial appointment, particularly as to the period of police investigation has stirred up the most writing and case law since Gideon, once that issue becomes solved as well as the issue as to what crimes are covered by the right to counsel, the one issue which will inevitably not be subject to exacting rules, will be the competency of the attorney in the particular case. The cases in federal courts in which the question has arisen since Gideon appear to outnumber the federal cases on any given subject covered by this article by a wide margin for all subjects but time of appointment, and they outnumber these only by a small margin. Yet the United States Supreme Court has not recently ruled on the subject, and the recent writing has been very limited222 compared with that in other areas concerning the right to counsel. Perhaps the reasons lie in the fact that the allegation of incompetent counsel is so commonly made by the convicted prisoner who looks to results rather than abstract competence and so commonly rejected by the courts which, whatever might be the merits in a given case, are likely to find it difficult to chastise fellow members of the bar.

Where a defendant on appeal or a prisoner raise the issue of competency of counsel, it is clear that a hearing on the issue is in order. But is also clear that a court will place a "heavy burden" upon the person raising the objection to show that the representation was so poor and inadequate that it amounted to a "farce," a "mockery of justice shocking to the court's conscience" and the like.223 It is not enough to

218 See Annot., 54 A.L.R. 1225 (1928) for older state cases.
219 De Roche v. U.S., 337 F. 2d 606 (9th Cir. 1964).
223 Reid v. U.S., 334 F. 2d 915 (9th Cir. 1964); Scott v. U.S., 334 F. 2d 72 (6th Cir. 1964); Brubaker v. Dickson, 310 F. 2d 30 (1962); Peek v. U.S., 321 F. 2d 934 (9th Cir. 1963); U.S. v. Gonzales, 321 F. 2d 638 (2d Cir. 1963).
show merely that the attorney was young and inexperienced.\textsuperscript{224} Typically the courts simply refuse to accept the alleged incompetency based upon general lack of experience, unskillfulness, lack of preparation, lack of interest, mistakes, errors in judgment, poor advice, poor trial strategy and the like.\textsuperscript{225} The only sure way seems to be to convince the court, as one prisoner did, that the record clearly showed that the conviction itself was in error because the evidence was inadequate.\textsuperscript{226}

In the early history of the question, the tendency of the court was to speak of the hired attorney as the agent of the accused, and consequently his alleged incompetence was in no way the responsibility of the court. There has been some suggestion that even if this were true, the appointed attorney, as selected by the court, is thereby an agent of the state and to be judged accordingly.\textsuperscript{227} Any such formal distinctions seem unreal to me, and the better view to be that which holds that the criteria are the same whether the accused hires or selects his own attorney or whether the court hires and selects him.\textsuperscript{228}

We have already discussed my "gamesmanship" theory of representation.\textsuperscript{229} It supposes a duty to do the most permitted by the rules to protect your client against either conviction or high sentences. As one court has put it, "Such appointed counsel are not to serve as \textit{amicus curiae}, but as advocates."\textsuperscript{230} At the same time, a Circuit Court has pointed out that the attorney "has no duty to use devious means to secure an acquittal of a guilty person or to harass a court with unwarranted objections and motions."\textsuperscript{231} Of course if the appointed attorney is to adequately represent the accused he must not have had prior direct contact with the proceedings from a prosecution point of view, but there is no problem if he had no contact with the particular case.\textsuperscript{232} This latter is important in Wisconsin because in smaller counties many of the appointed attorneys may have been district attorneys at one time. In fact a number of judges pointed out that where the charge was serious, they often deliberately picked former district attorneys because of their greater experience. Obviously this is proper only where the former district attorney is sufficiently divorced from the case to which he is appointed.

\textsuperscript{225} See generally Annot., \textit{Incompetency of Counsel Chosen by the Accused as Affecting Validity of Conviction}, 74 A.L.R. 2d 1390 (1960). Some of the general statements in the text are taken from this annotation.
\textsuperscript{226} Harris v. Thomas, 341 F. 2d 560 (6th Cir. 1965).
\textsuperscript{227} Harris v. Thomas, 341 F. 2d 560 (6th Cir. 1965). This case does seem to give the indigent defendant an advantage for this reason. For a contrary holding on in a different setting see People v. Coe, 36 Mis. 2d 181, 232 N.Y.S. 2d 944 (1962).
\textsuperscript{228} Randazzo v. U.S., 339 F. 2d 79 (5th Cir. 1964).
\textsuperscript{229} See supra section on Rights Prior to or Independent of Judicial Proceedings.
\textsuperscript{230} Leser v. U.S., 335 F. 2d 832 at 833 (9th Cir. 1964).
\textsuperscript{231} Hickock v. Crouse, 334 F. 2d 95 at 101 (10th Cir. 1964).
\textsuperscript{232} McIntosh v. U.S., 341 F. 2d 448 (8th Cir. 1965).
The United States Supreme Court has considered the question in a number of cases before *Gideon*. In *Hawk v. Olsen* the accused was held incommunicado in the jail except for some fifteen minutes during which time he conferred with the Public Defender and his assistant. The accused pled not guilty at the arraignment and asked for a twenty-four hour delay to confer with counsel, but the request was denied and the Public Defender with an assistant handled the case, allegedly without any further consultation with the accused. The court held that if the allegations were true, the accused was denied a fair trial.

In *Von Moltke v. Gillies* the question of effectiveness of counsel was intertwined with the Court's consideration of the right to counsel itself. The accused was represented at the arraignment by an attorney who happened to be in the courtroom and who conferred with her for five minutes. Two lawyers were sent by the husband of the accused to confer with her before the trial, but the two did not intend to represent her as such. She also had advice from a government attorney. The Court held that there was a denial of Due Process under the circumstances. The case also points out another facet of the right to counsel problem. The accused was charged with conspiring to collect and deliver information to German agents during World War II. Conceivably the lack of counsel was attributable at least in part to the fact that the defense of the accused would be generally unpopular. At times, perhaps the right to have counsel appointed should be extended beyond mere indigency in those circumstances where effective counsel is unavailable for the defense of politically or otherwise unpopular cases. At least if appointed by the court, the attorney may suffer fewer adverse reactions, although he should in any event be willing to run the risk under some circumstances.

But most of the prisoners are unsuccessful. It is not enough that the court find that there might have been errors in judgment. Tactics at the trial are up to the attorney for the accused and failure to raise possible defenses may not be fatal where the court can find a tactical reason for not raising the defense. In some cases the things done of which the prisoner was complaining were specifically considered by the court to arise out of the bargaining with the district attorney and not to be subject to a holding of incompetency. The attorney need not

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236 Lyons v. U.S., 325 F. 2d 370 (9th Cir. 1963).
search out evidence on each and every fact alleged by the accused in his own defense.\textsuperscript{240}

No Wisconsin cases were noted where the issue was discussed other than to be summarily dismissed.\textsuperscript{241} Of course the surveys of the judges could not produce any adequate evaluation of existing Wisconsin practices, since no judge is likely to admit that an attorney he appointed in fact did a poor job, although several such instances were referred to in the personal interviews with the judges. The judges did show that on rare occasions they provided a different attorney because the accused was dissatisfied, and also occasionally when an attorney indicated he simply could not get along with the particular accused.

As will be mentioned in the later section on fees, once in a while a judge feels that an attorney spent too much time on a given case, or spent time which was wasted, and thus the judge refused to pay for this time. Of course this does not go to competency as such. Some of the comments in the next section will reflect further on the judges' views about the competency of appointed attorneys.

C. The Methods of Selecting the Attorney to be Appointed in Wisconsin

Nothing is said in either statutory or case law in Wisconsin about how the attorneys to be appointed are picked from the various possible members of the bar. The various surveys indicated no radical changes in the last three years, and in fact one or two experiments have fallen by the wayside.

The methods of selection are characterized by informality. For obvious reasons in the smaller counties, or at least those with relatively few felony cases and with relatively few attorneys, the pattern is for the judge to attempt to rotate the appointments through the few members of the local bar whom he knows and whom he thinks would be willing to accept the appointments and could do a commendable job. In these counties, the dozen or fewer appointments per year typically involve very short proceedings and relatively small fees so there is little possibility for either over-burdening an attorney against his will or using the fee system as a form of "cracker barrel." In only a handful of the counties did any attorney receive over $1,000 during 1961, indicating something of the effect of the appointments from an economic point of view.

Almost all judges, except some of those in the larger counties, indicated that they had direct knowledge of all attorneys whom they appointed. Even where this was not the case, indications were that the judge often received a recommendation by some attorney whom the judge knew before appointing an unknown attorney, although this was not always the case. Only about one-quarter of the judges used any

\textsuperscript{240} U.S. ex rel. Boucher v. Reincke, 341 F. 2d 977 (2nd Cir. 1965); Eubanks v. U.S., 336 F. 2d 269 (9th Cir. 1964).
\textsuperscript{241} See, e.g., Wilson v. State, 273 Wis. 522, 78 N.W. 2d 917 (1956).
formal list through which they attempted to rotate the appointments. Of course where the county seat has six attorneys, for example, the use of a formal list would be of no value for obvious reasons. A few judges operate with a volunteer list. Some use a list of all local attorneys, going through the list in order. A few use the same list for all types of appointments, some eliminate from their lists such persons as those who request not to be on the list, those specializing in non-trial areas, and those no longer in the active practice of law.

Nearly half the judges indicated that, whatever their method in selecting attorneys for most cases, they at times sought to get the more qualified attorneys for the more serious cases. Several judges indicated that this meant that they tried to get former district attorneys for major crimes. One judge pointed out in this connection that all the attorneys available in his area for appointments had been prior district attorneys and he personally thought any one of them could handle any case which arose.

Fewer than one-half the judges indicated that they ever made appointments of attorneys who happened to be in the courtroom when the need for the services of an attorney arose, and of those who did so, a number indicated that such practices were rare, that this was done only when the one who would have been appointed anyway or that this would not be done if that was why the attorney was there. As one judge put it, he rotates the appointments between the two members of the local bar and will appoint one of them if he happens to be in the courtroom.

A question of concern to numerous judges is that of whether the accused should be allowed to select the attorney to be appointed. Several of the interviews indicated that the judges were concerned with the possibility of unethical practices, including direct solicitation of clients, being encouraged if the accused is able to make the selection. For this reason a few judges indicated that they would never appoint an attorney whose name was submitted by the defendant. At the other extreme, in response to the simple question, a few judges indicated that they always appointed an attorney who was requested, as long as he was a member of the local bar.\footnote{It has been held that an accused is not deprived of his right to counsel if the court refuses to appoint an attorney specifically requested by the accused. \textit{Nash v. Reincke}, 325 F. 2d 310 (2d Cir. 1963); \textit{U.S. ex rel. Allen v. Rundle}, 233 F. Supp. 633 (E.D. Pa. 1964).} This latter limitation was frequently added by the judges answering the questionnaire, to the point where it can probably be said that in the vast majority of cases, in fact in almost all of them, the judges appoint only attorneys practicing within the jurisdiction. Indications were that attorneys in some of the more populous areas had reputations extending beyond the counties in which they prac-
Among those judges who did not indicate either that they always or never appointed the attorney requested by the accused, the division between those who said they did it occasionally and those who said they did it usually was more or less equal. The gratuitous remarks made in answer to this question indicated some strong feelings. One mentioned that he would not want an accused who happened to be indigent to be able to select an attorney who might otherwise be available only to the wealthier criminal defendants. Yet another judge felt strongly that the right to counsel included a right to be satisfied with the representation and to have a substantial role in the selection of the attorney. This judge noted that the paying defendant had a right to select whom he wanted and that the same should be true of the indigent defendant, if both are to receive comparable rights.

Where an attorney had represented an accused at the preliminary hearing, some judges will appoint him at the arraignment. Since some appointments are made for the preliminary hearing, the same attorney may handle the entire proceedings because of this practice. In some cases, the accused apparently either has enough money to hire an attorney only for the preliminary hearing, or the attorney is willing to take part in the preliminary hearing on the assumption that he will be appointed later. There was some suggestion that on occasion the attorney who agreed to defend an accused and later found out that the accused was without funds was able to get the appointment and thereby collect. In fact, several sources indicated that at times the actual appointment was made after the proceedings were completed, or at later stages for earlier proceedings, so that the attorney would be paid for services originally rendered on the expectation that the accused would be able to pay. Such charges were not directly substantiated and can only be classified as rumors as far as the survey showed. In contrast, some judges refuse to appoint a requested attorney when they suspect that the attorney had originally agreed to take the case and then found that the accused had no money. As one judge put it, an attorney in any civil action runs a risk of being unable to collect his fee and includes this risk in fixing his charges. The judge thought that the same risk is involved in taking a criminal case and that the county should not guarantee payment for services rendered to criminal defendants.

Whenever a judge interviewed responded that, at least some of the time, he did appoint an attorney requested by the accused, the judge added, as did some of those responding to the questionnaire, that he would not appoint the requested attorney if he had any reason to suspect that the attorney had approached the accused to get the request, or if any law enforcement official provided the attorney’s name, or
sometimes if any other prisoners suggested the name. Several judges limited the selection power to those situations in which the accused had had prior contact with the requested attorney in other cases or where the attorney had been contacted by members of the accused's family but subsequently not hired because of lack of funds. There was also some indication that if a requested attorney had prior knowledge of the facts; as, for example, if he had handled a prior related case involving either the same or a different accused, then he might be appointed because his familiarity with the case would facilitate his handling of the matter and perhaps save the county money.

Some tendency to appoint younger members of the bar exists. This is less likely in the counties hearing fewer cases, since here the entire practicing bar is used without raising many problems. In larger counties, the appointments tend to be made from a somewhat younger group of attorneys, as witnessed by the fact in Milwaukee County some of the appointments are made off the list of attorneys from the Junior Bar Association participating in the Volunteer Defender Association operated in county court. However, many judges specifically refuse to appoint attorneys until they have appeared in trial court on their own. Thus the attorney out of school a year or two does not ordinarily get appointed unless he is actively engaged in some trial work. Since some judges do not allow an attorney to request appointments as such, but add names as persons become members of the bar, or as the persons are called to the judges' attention by having matters before the court, there is probably less use of the appointment process as a training ground than has been suggested to be the case in other states. Thus the appointments tend to be made among those with less than the average amount of experience, but not among those with only a year or two of experience.

D. Appointments for Codefendants

The attorney appointed for any defendant must not have interests adverse to those of the defendant for whom he is appointed. Thus any conflict of interest between two or more defendants makes the appointment of a single attorney to represent them insufficient to comply with any constitutional mandate that the court supply the accused with counsel.

In a leading federal case arising under the Sixth Amendment before Gideon, that of Glasser v. United States, the accused in question was one of five being tried for mail fraud. The attorney originally appointed for one of the defendants turned out to be unsatisfactory to him, so that defendant was represented by the same attorney as defendant.

243 Annot., Duty of Court When Appointing Counsel for Defendant to Name Attorney Other Than One Employed By, or Appointed For, a Codefendant, 148 A.L.R. 183 (1944).
244 315 U.S. 60, 62 S.Ct. 457 (1942).
Glasser. Glasser, through the appointed attorney, expressed dissatisfaction with the arrangements and pointed out certain inconsistencies which might arise. The Supreme Court found that these objections were never waived by Glasser and noted that the lower court should have protected jealously the essential rights of the accused. The Court noted that the attorney was obviously acceding to what he thought was the trial judge’s wish in the matter and held that Glasser was not adequately supplied with counsel. But the Court went on:

There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel’s effectiveness.246

The Court seemed to say that the bare fact that defendant requested separate counsel was sufficient to give him the right and, even more strongly, that any appointment of single counsel may be too great a burden. However, other courts have not treated the right to separate counsel as absolute. Thus they tend to demand that there be some affirmative showing of prejudice246 and the defendant’s failure to object during the course of the proceedings may be used against him when the issue is raised later.247 On the other hand, cases have held that the objection can be made even where the attorney in question was hired by the defendant rather than appointed.248

Although Wisconsin does permit consolidation of charges against different defendants at the discretion of the trial court,249 yet there is little case law on the subject as such. Results of the 1962 survey indicated that about forty percent of the judges had, in fact, had occasion to appoint separate counsel for codefendants, most of them indicating that they had done so upon a specific finding that there was an actual or a potential conflict of interest. One judge said that he always appointed separate counsel regardless of the circumstances, and nearly all indicated their awareness of the conflict of interest problem by saying they would appoint separate counsel if a conflict arose.

8. Costs of the Present Wisconsin System of Supplying Counsel

Most of the information gathered concerning the costs of the appointive system in Wisconsin is dependent upon the 1962 survey for its details. For that study there were sixty-five responses from judges

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245 315 U.S. at 75, 62 S.Ct. at 467.
246 U.S. v. Dardi, 330 F. 2d 316 (2d Cir. 1964); Peek v. U.S. 321 F. 2d 934 (9th Cir. 1963); U.S. v. Bentvena, 319 F 2d 916 (2d Cir. 1963).
249 Cullen v. State, 26 Wis. 2d 652, 133 N.W. 2d 284 (1965).
on the particular subject of how they determined the amount to be paid to the attorneys. While the statutory standard has not changed since that time, there is increasing indication that the practical standard for payment is becoming more uniform. The statutory standard is "in such sum as the court shall deem proper, and which compensation shall be such as is customarily charged by attorneys in this state for comparable services." While the growing practice was to interpret this in terms of some fraction of the minimum bar fee, the Wisconsin Supreme Court has given some meaning to the words which should be taken into account in evaluating the relevance today of the results of the 1962 survey.

In *State v. Kenney*, the attorney submitted a bill to the trial court for over seven thousand dollars, basing the bill upon actual days in trial, appearances, and time for travel and time for preparation, and using the minimum bar fee rate plus actual expenses of nearly eight hundred dollars. The trial court disallowed the attorney's use of half days for appearances because the appearances were all very short, disallowed much of the travel time and some research time, and, after deducting these items, allowed payment on the balance at two-thirds of the minimum bar fee, the computation resulting in a court award of $1,716.90 or under one-fourth of what the attorney had requested. Relying on *Conway v. Sauk County* the court said that the ultimate responsibility of determining the amount of research, investigation and preparation to insure an adequate defense is upon the trial court. It is to be expected that the defense attorneys and the trial judges will sometimes differ, but the court should not use its advantage of hindsight but should view the matter by putting itself in the place of the defense attorney at the time. "The test is not how the trial judge would have tried the case for the defense, but whether the time spent was reasonably necessary for an adequate defense." The court allowed the travel expenses in part, argued strongly in favor of the appointment of local counsel unless some reason suggested not doing so, but permitted some payment here because of a misunderstanding. The court permitted payment for some time which was disallowed by the trial court for various reasons, but sustained the trial court's determination that one-third of the time spent in preparation was unnecessary and duplicitous. Most important in terms of the general standard was the Supreme Court's handling of the application of two-thirds of the minimum bar schedule for the allowed time. The court said:

We do not construe this section as requiring the application of the full minimum rates of the State Bar of Wisconsin. The going rate for representation of indigents in Rock county is

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251 24 Wis. 2d 172, 128 N.W. 2d 450 (1964).
252 19 Wis. 2d 599, 120 N.W. 2d 671 (1963).
253 24 Wis. 2d at 177, 128 N.W. 2d at 453.
two-thirds of the minimum bar rates. Such practice is prevalent in other parts of Wisconsin and is used as a guide line in allowing compensation to counsel appointed by this court for indigents. We find no error in the rate used by the trial court.254

The Kenosha County Bar Association in its *amicus curiae* brief argued that the court should use the bar schedule as a minimum fee, and preferably allow more. For coming forward as a group and arguing for full payment without contribution of services for aid to the indigent, the particular bar association in question was in effect told:

In answer, we point out that in the tradition of the bar some of the most effective and successful defenses have been rendered without compensation and motivated only by counsel's sense of duty to his profession and the public and Wisconsin is one of the minority of states which seeks to compensate court-appointed counsel and does not call upon the legal profession for full contribution . . . we believe the lawyers of this state are and will be devoted to their duty to render adequate and efficient service to indigents whether or not they receive compensation comparable to private practice.255

The 1964 survey indicated that a few more judges were turning to a system of applying a fee based upon a fraction of the bar schedule, and two-thirds was the most common fraction in use. Yet various circumstances make the determination peculiarly that of the trial court, and what the judges said in 1962 is still largely relevant. The following comments are based upon answers to the questionnaire sent out at that time. Many judges, particularly where appointments are rare, had no definite standard, or at least were not willing to admit to any. The indefiniteness of standard, or at least the judge's reluctance to give any information on the subject, is demonstrated by such answers as those given by seven judges who could be characterized as saying that the costs varied with the factors involved, the six who said they considered a "rule of thumb," the one who said he paid what was "fair," the one who pays what was "reasonable" or the one who "tries to keep it down." Six of the judges indicated that the fees were fixed at a conference between the judge and the attorney, apparently with the judge in some instances pointing out that the attorney should not expect the normal fee for similar work from a paying client with the same problem.

Other judges answered in terms of what they thought an attorney would get for similar services rendered for a paying client. A half a dozen judges said that the attorneys were paid what the judge thought a paying client would ordinarily be charged for similar services. One qualified this by describing the standard as what the attorney would

254 24 Wis. 2d at 180, 128 N.W. 2d at 455.
255 24 Wis. 2d at 180 & 181, 128 N.W. 2d 455.
charge for the same services for someone just able to pay for the services. Yet another judge fixed the fee at what he thought was about seventy-five percent of what would usually be paid for the same service by a paying client.

Others approached the problem by reference to the minimum bar fee schedule of either the local or state bar association. A dozen reported that they followed the minimum bar fee; but some of these, plus one who clearly so indicated, may be following local bar fee schedules rather than that of the State Bar Association. Others use a percentage of the minimum bar fee or use it in combination with some other scheme. Thus one said he “tries” to charge one-half the minimum bar fee except in unusual cases, three indicated that they used two-thirds of the minimum bar fee, one said he used two-thirds to three-fourths of the county bar schedule and one uses the minimum bar fee in court but ten dollars an hour for all other work.

Although the above-mentioned statute was passed in 1957 and even though this statute was incorporated by reference in 1961 into the statute providing for appointment of attorneys for indigent defendants, many courts were still applying the old statutory limit or some variation of it. Until the changes just mentioned took place, the statute in question provided for compensation not to exceed twenty-five dollars for one-half day in court and not to exceed fifteen dollars for one-half day of preparation for up to five days and fifteen dollars for one-half day taking depositions. Five of the judges said they were still paying under this schedule and another five said that they were paying under this schedule except or serious or unusual cases. A single judge said he was paying about one and one-half times what the old statute allowed, while another judge said he was paying seventy-five dollars a day for trial and thirty dollars a day for preparation. And one judge said he paid twenty-five or thirty dollars for a guilty plea, fifty dollars for a half day trial, and seventy-five dollars per day in trial and preparation for a more serious case. Another judge indicated that he used the bar schedule for trial and the old statute for preparation. Finally one judge said that he let the attorney and the district attorney get together and discuss the fee problem and he would usually pay whatever they agreed upon.

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256 Supra, note 250.
257 Ch. 500, Laws of 1961.
259 Since the district attorney in many counties handles civil as well as criminal matters personally, he will be the one to advise county boards what their legal obligations are, including how much they should pay appointed counsel. Where judges indicated that the district attorney had any role in setting the appointed attorneys’ fees, it could be questioned whether this involved a conflict of interest on the part of the district attorney, whose power in this regard might have some effect on how the appointed attorney handles the defense.
The above information is, of course, based upon the judges' own answers to generic questions and at times is likely to be misleading to say the least. For example, although no complete survey was made on the subject, apparently in some, or perhaps many or most courts, an appearance is equivalent to a half day in court. As indicated earlier, the whole process may take a matter of minutes or a few hours. Thus the service which is paid for as involving one-half of a day may take a matter of hours. Likewise, a "not-guilty" plea may take minutes only, the motion to amend to "guilty" may take minutes, and the sentencing may take only a matter of minutes, yet each constitutes a separate appearance and counts as one-half a day under the standard applied in at least some courts. Also it could happen that the same attorney receives several appointments and thus can make consecutive appearances in different cases during the same half day and be paid accordingly. This possibility was brought up in several of the interviews, and in each case where mentioned, the judge or the clerk indicated that the clerks were under very specific instructions not to allow this to happen.

Another possibility of deceptive applications of the criteria above is in the method of determining how much time was spent in preparation. This is frequently based upon the time submitted by the attorney to the court. In response to a question concerning this subject, approximately two-thirds of the judges said that they had not had occasion to question the amount of time which the attorney claimed to have spent. Undoubtedly some judges do reduce the claimed time either because they thought the attorney was not being fully candid or because the attorney was wasting time doing legal research not justified by the facts or the seriousness of the case. One judge pointed out that most indigent defendant cases did not justify long hours of research on complicated constitutional law questions and so he limited the time allowable. Another indicated he would never allow more than ten days in preparation regardless of the seriousness of the charge.

One question on the survey concerned the payment of costs for investigation by the attorney. Rather obviously the lay concept of a private investigator unrevaling facts to save the accused has no real counterpart in the defense of the indigent. Over one-fourth of the judges indicated they had never allowed any expenses for investigation. Several more indicated that the question had never even been raised, while several more said expenses were very rarely paid. Another small group indicated that the only allowable expenses were for telephone and transportation, frequently to the county jail or the state penitentiary to interview the accused, and four indicated that no expenses other than the very small one would be paid unless the court was to give its permission in advance. Although the Wisconsin Stat-
allow the presiding judge to use the State Crime Laboratory for the same services as are available to the prosecution, and to have the information kept confidential, indications are that the service was almost never used by anyone.\textsuperscript{261} The service is not specifically limited to indigent defendants, but could no doubt on some occasion be used for an indigent unable to pay for the same type of services.

As Table III indicates, the average fee in the state in 1962 was just under $125. At that time, the minimum bar fee provided for a fee of one hundred and fifty dollars pay day of trial in a criminal case other than traffic violations and minor criminal proceedings, the charge per appearance was seventy-five dollars and the hourly rate eighteen dollars. Since that time the respective amounts\textsuperscript{262} have been increased to two hundred dollars per day in court, twenty dollars per hour in preparation, and the rate per appearance left at seventy-five dollars. To the extent that the bar schedule or a fraction thereof is used, the change in the fee schedule would automatically escalate the cost per case. At the same time, in many areas the judges' relatively great control over fee fixing would produce only a gradual change. Also, since the bulk of the cases do not result in a trial, but only various appearances, the increase would be only slight in this regard. On the other hand, the trend toward earlier appointment, and the presumed increase in knowledge on the part of accused persons of their right to counsel, can be expected to decrease the number of waivers of the right to counsel. All of which is by way of saying that the pattern shown in Table III probable holds true today as long as a gradual inevitable increase is taken into account.

Various legislative proposals have sought to get at the question of fees, but so far the only thing accomplished since the fees were put largely at the discretion of the trial judge to pay what was normal under all the circumstances, has been legislation directed not at attorneys' fees as such, but to the overall cost, including attorneys' fees, whereby any trial costing over $10,000 is to be paid for by the state to the extent of the excess amounts.

Early cases\textsuperscript{263} had indicated that the legislature could not take away the right of appointed attorneys to compensation, but later it appeared that the court was willing to limit payment to what the statute allowed.\textsuperscript{264} Now that the legislature has adopted a broad standard with little specific as a guide, it appears that the Supreme Court is encouraging the use of two-thirds of the minimum bar schedule, while leaving much to

\begin{itemize}
\item \textsuperscript{260} WIS. STAT., §165.04(1) (1963).
\item \textsuperscript{261} Per letter of August 10, 1962 from the State Crime Laboratory.
\item \textsuperscript{262} State Bar of Wisconsin, Schedule of Minimum Fees for Attorneys and Related Materials, Rev. March, 1963.
\item \textsuperscript{263} See County of Dane v. Smith, 13 Wis. 654 *585 (1861) and Carpenter v. Smith, 9 Wis. 284 (1859). Both cases were discussed in detail \textit{supra}.
\item \textsuperscript{264} Green Lake County v. Waupaca County, 113 Wis. 425, 89 N.W. 549 (1902).
\end{itemize}
the discretion of the trial court. Conceivably, if the legislature seeks to set a standard of its own, the court may return to its earlier idea that the setting of fees and the effective administration of the criminal processes is peculiarly within the province of the courts.

9. Conclusions and Recommendations

The last three years in Wisconsin have seen an expanding right to counsel which has by and large kept pace with the requirements of the federal courts, largely because Wisconsin recognized the indigent's rights long before it became necessary to do so as a matter of federal constitutional law. Some of the improvements recommended by this author in his original report to the Judicial Council and some of those recommended by the Wisconsin committee working in conjunction with the national study by the American Bar Foundation have in fact now been implemented. Counsel is made available before the preliminary hearing. At least some misdemeanor defendants are given a right to counsel if they are indigent. The state has assumed some responsibility for the costs of the longer cases, efforts have been made to get more attorneys willing to accept appointments, and the fees to be given have been stabilized to some extent at two-thirds of the bar rate. These improvements have all come in that time, and were to some extent recommended three years ago.

On the other hand, some areas still need improvement. The method of determining who is indigent could be looked into further. Investigation facilities and costs still do not seem adequate. But to my mind, three subjects still deserve particular attention, perhaps in some ways beyond what can be said here. They are what is to be done, if anything, about the full implications of Escobedo, how can the interest and enthusiasm of the bench and bar for the rights of the accused be preserved and increased, and finally, should the appointive system be set aside in favor of some other basic system?

A. The Continuing Implications of Escobedo

Enough was said earlier about Escobedo and all that should be done here is to emphasize its possible profound implications. We may have to change the traditional idea that the right to counsel and the function of counsel is in the courtroom, presenting the best side of his client's case. If the attorney provided for the accused is to have broad functions before and beyond this, then traditional ideas of how and when to provide the attorney have become inadequate. The broad implication of Escobedo may be that the Federal Court has decided that a broad right to counsel from the first moment of suspicion is the only practical way

265 State v. Kenney, 24 Wis. 2d 172, 128 N.W. 2d 450 (1964).
266 The completed report, the Wisconsin part of which served in part as a basis for this article, will be published very shortly.
to overcome the tremendous advantage that some say is the state's.268

The legal rules as to burden of proof and the right not to incriminate oneself would be meaningful in a new sense. Keep an eye on the subject in the future to see what develops.

B. Maintaining Continuing Interest of the Bench, Bar and Public

As the rules for supplying counsel have become more exacting, except as just mentioned in the immediately preceding section, the true effectiveness of the right to counsel depends less and less on rules and more and more on people. We began with a look at the parties to the criminal process. It is ultimately in the people who are the participants in determining his fate that the indigent defendant will receive protection within the spirit and letter of the law. Only with constant personal vigilance by all concerned can the spirit be maintained. The law schools, continuing legal education, judicial organizations, bar associations, district attorney groups, police departments, the press, and all interested formal groups must continue and grow in their genuine interest in the indigent defendant, and their programs simply must take into account the present subject if rights supplied are to accomplish intended results.

C. The Available Alternatives

This writer had consistently in the past recommended that the appointive system be continued, but improved in its functioning in Wisconsin. Recent increases in costs caused a few judges in the 1964 survey to recommend changes to a public defender system. Since interest in the subject is at its height, Wisconsin is at the crossroads in this respect. As a parting contribution to a significant decision to be made by the state, it seems appropriate to summarize what has been said before by many persons about how to select an attorney for the indigent accused.

Obviously a number of methods of supplying the attorneys for the accused persons are available and in use in various parts of the country. These have been the subject of extensive comment and probably little analysis that can make the evaluations anything other than personal expressions of opinion. The ultimate question—which system supplies the indigent accused with the most satisfactory legal representation in terms of supplying him with the maximum desirable protection consistent with costs which are not excessive—cannot be answered with empirical certainty by anyone or any group of people, nor has any evaluation escaped the preconceived notions of the evaluator. No single individual or group has enough experience to observe fully the differences in the representation supplied by the various systems, for even the person familiar with different systems in different places cannot be sure that the differences are attributable to the system rather than the per-

sonnel who happen to be involved. There is no assurance that a system working one place would work the same way or as well or as poorly in another. Even comparisons before and after a change depend upon personality factors which cannot be isolated. Nor do comparative statistics supply much aid, for raw statistics as to the number of additional cases handled do not indicate the enthusiasm for the interests of the accused which were manifested over a period of time. The purpose of this section is to describe generally the systems which are in use in the United States with sufficient regularity and attention that they deserve separate classification. At the same time, all discovered arguments for and against these various systems will be summarized with frequent citation to the source from which the evaluations were taken. Since this evaluation covers much law review material for a twenty-three year period plus a number of complete books on the subject or on closely related subjects, it is hoped that all the arguments currently being discussed will be presented here. The author also has the accumulated ideas of the interviews and the survey through which an even more complete list of arguments can be made.

The systems available were summarized and evaluated in the report entitled EQUAL JUSTICE FOR THE ACCUSED.\textsuperscript{269} The classification of systems and some of the evaluations will be taken from that study. However, despite the fact that that book presents by far the best available material, at least prior to the soon to be released study by the American Bar Foundation, it also includes some bias, particularly insofar as it so strongly favors the public defender system. This is not to say that its views are right or wrong, but rather to point out that it has a "message" to put across, and the message is not wholly inconsistent with that which might have been predicted would arise out of a study conducted in part by the National Legal Aid Association. In any event, the study was not directed specifically at Wisconsin nor does it purport to deal with problems which might be peculiar to a given state. It is of course "must" reading for anyone interested in the problem in Wisconsin and is the work which this author most highly recommends for reading on the subject.\textsuperscript{270}

For purposes of this study, the available systems to be categorized separately will be those used in EQUAL JUSTICE FOR THE AC-

\textsuperscript{269} EQUAL JUSTICE FOR ACCUSED, A Report on the provision of counsel for indigent defendants by a Special Committee of The Association of the Bar of the City of New York and The National Legal Aid Association (1959). This report is referred to hereafter as E.J.F.T.A.

\textsuperscript{270} For persons wishing to do more extensive reading on the subject, also to be recommended are: Brownell, LEGAL AID IN THE UNITED STATES (1951); Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 86th Congress, 1st Session, Serial No. 13, May 6 and May 14, 1959; and The Right to Counsel, A Symposium, 45 MINN. L. REV. 693 (1961).
CUSED—the assigned-counsel system, the public defender system, the voluntary-defender system, and the mixed private system.

To form some continuity to the evaluation, the ensuing sections will in part apply an evaluation based upon that used in EQUAL JUSTICE FOR THE ACCUSED, adding other standards as their application appears. The standards set out are as follows:

1. The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction.
2. The system should afford representation which is experienced, competent, and zealous.
3. The system should provide the investigatory and other facilities necessary for a complete defense.
4. The system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal.
5. The system should assure undivided loyalty by defense counsel to the indigent defendant.
6. The system should enlist community participation and responsibility.271

**1. The Assigned Counsel System**

This is the system presently in use in Wisconsin and described specifically throughout the report. A principal variant is that put into operation in 1950 in New Jersey involving appointment alphabetically, but with some opportunity for variation, from a list of all the members of the bar of the state.272 The appointed attorneys then serve without compensation. The assigned counsel system, with or without compensation and with or without formal rules for the selection of the attorney is the system still used in this country in the majority of states and the system which supplies more representation than all other systems combined.273

The assigned counsel system has met with almost universal criticism by the writers, as the numerous citations to this section will bear out. Necessarily the prevailing system to the extent that it has faults is likely to be heavily criticized, particularly when compared with a less used or a hypothetical system whose defects have not yet become obvious. In fact if the appointment system worked as poorly as the commentators say it does, in view of the fact that it is administered heavily within the broad discretionary powers of the trial courts, the indictment would seemingly encompass not only lawyers as a group but the criminal trial judges as well. In this case the rights of the accused would seem to be

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271 E.J.F.T.A. at p. 56.
seriously jeopardized regardless of how counsel is supplied since those who hired their own attorneys would be unsatisfactorily represented by the same attorneys who are appointed, and even those few who were supplied with adequate counsel would be faced with an incompetent judge. Thus the sweeping and universal condemnation should probably be accepted as overstatements of the problems of the type frequently espoused by theorists and academicians. While such overstatements may eventually be necessary if change is to be accomplished once change is decided on, it would seem that necessarily the question is not all one sided and is in fact a close one which can be decided only with deliberate and mature evaluation, not with sweeping condemnations.

Among the advantages sometimes attributed to the assigned counsel system are these. In an adversary system, the use of an individual attorney concerned primarily with the interests of the accused and not generally obligated to either the court or the district attorney specifically nor to the state generally is more likely to supply the requisite loyalty to the cause of the accused. This system, at least on occasion, may supply the accused with a zealous amateur, rather than a bored professional. In rural areas the assigned counsel system is allegedly the only one which can give swift service without undue costs.

Also allegedly in favor of the assigned counsel system is the fact that a greater percentage of the bar is involved and thus necessarily made aware of the various problems in the administration of criminal justice and in the defense of indigents in particular. The assumption of responsibility by the Bar in turn may help public good will if the facts are made known, but only to the extent that the public does not think the attorney is doing the work for exorbitant fees.

The list of objections to the system is much longer. One of the most frequently raised concerns the scope of coverage. Typically the appointive system makes no provision for providing representation in juvenile and domestic relations courts nor does it usually cover the inferior criminal courts. It also is alleged to come into operation too

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For a strong article against the appointed counsel system saying that it is "the discredited practice of court-appointed counsel," see the article by the then president of the National Legal Aid and Defender Association, Grossett, Making Paper Rights Worth Something, 49 A.B.A.J. 641 (1963). For collections of strong criticisms over long periods of time see Browne, op. cit. supra note 270 at pp. 136 to 142; and Kadish and Kimball, Legal Representation of the Indigent in Criminal Cases in Utah, 4 Utah L. Rev. 198 (1954).

See Trebach, A Modern Defender System for New Jersey, 12 Rutgers L. Rev. 289 at 294 (1957). The article favors a different system, however.

See Comment, Appointment of Counsel for Indigent Accused, 28 Texas L. Rev. 236 at 249 (1949).


Ibid.

late in the proceedings\(^{281}\) frequently supplying the counsel appointed with inadequate time to prepare.\(^{282}\) It is also claimed that the system allows little if any payment for investigation, either by the attorney himself, or more important, by specialists trained in such matters.\(^{283}\)

Another set of objections has to do with the competency of the attorney appointed. It has been suggested that particularly in the larger cities, the prosecutors have become too competent in criminal matters to be challenged by an attorney unskilled in such matters.\(^{284}\) The appointed attorney is very frequently described as lacking in experience in criminal matters.\(^{285}\) At the same time the professionals in criminal law have been described as being of low caliber.\(^{286}\) And it is alleged that the appointments are usually not made on the basis of competence\(^{287}\) but rather appointments are made of attorneys who are inexperienced\(^{288}\) and of generally poor quality.\(^{289}\) The practice of using appointments to train the young attorney has been severely criticized.\(^{290}\)

Where the system is run on a non-fee basis, it is criticized for this reason,\(^{291}\) but when payments are made, the appointment system is criticized as costing too much for the services rendered.\(^{292}\) It has also been suggested that in many places the operation is such that only a few members of the bar are actually being appointed\(^{293}\) and at the same time the general public is not taking its proper role.\(^{294}\) These criticisms, of course, are based upon allegedly existing facts and should for this reason be compared with the facts as developed in the survey.

\(^{281}\) E.J.F.T.A. at 66, Brownell, op. cit. supra note 270 at 140; Comment, supra note 277 at p. 505; Kadish and Kimball, supra note 274 at p. 207.

\(^{282}\) Potts, Right to Counsel in Criminal Cases: Legal Aid or Public Defender, 28 Texas L. Rev. 491 at p. 504 (1950).

\(^{283}\) E.J.F.T.A. at 66; Trebach, supra note 276 at 303; Kadish and Kimball, supra note 274 at 207.

\(^{284}\) Kadish and Kimball, supra note 274 at 206.

\(^{285}\) E.J.F.T.A. at 65; Rossmore, The New Jersey Assigned Counsel System, 17 Law. Guild Rev. 134 at 135 (1957); Trebach, supra note 276 at 293; Report of Junior Section Committee on Indigent Criminal Representation, 80 N.J. L. J. 237 at 242 (1957); Kadish and Kimball supra note 274 at 218.

\(^{286}\) Kadish and Kimball supra note 274 at 207. Brief mention of the reputation of those practicing criminal law was made supra. The view that was there expressed was found implicitly or impliedly in numerous articles cited in this section. Some judges made similar statements during the course of the survey.

\(^{287}\) See Potts supra note 282 at 503.

\(^{288}\) Kadish and Kimball supra note 274 at 206.

\(^{289}\) See Potts, supra note 282 at 503.

\(^{290}\) See Brownell, op. cit. supra note 270 at 139. Kadish and Kimball, supra note 274 at 218.

\(^{291}\) See report cited supra note 285 at p. 242.

\(^{292}\) See Trebach, supra note 276 at 296; Kadish and Kimball, supra note 274 at 218.

\(^{293}\) E.J.F.T.A. at 68.

The Public Defender System

Just as the literature seeking to evaluate various methods of supplying counsel to indigent criminal defendants is replete with resounding condemnation of the appointive system, it asserts with equal vigor the unqualified merits of the public defender system, although not without dissents being made. However, much of the approval is based upon asserted weaknesses of the appointive system so that the inherent reasons for the public defender system's being better are seldom articulated, whereas the few who have criticized the system share with all critics, the fundamental willingness to tell why they feel as they do. Much of the defense of the public defender system comes from the public defenders themselves, who frequently give examples of accomplishments rather than show why the particular system is in any way accountable for the success or why other systems could not also show occasional spectacular successes. The legal aid organizations have been involved directly or indirectly in the studies and the articles which are the sources for much of the criticism. Without in any way evaluating the work of the various legal aid organizations, it can again be pointed out that legal aid societies represent organized representation for the indigent and could be expected to favor the organized public defender office. Whatever may be its value, the instigation of the public defender system has been frequently attributed to the weaknesses of the assigned counsel system.294

The public defender in a general way performs his role in much the same manner as the district attorney or prosecuting attorney while functioning on the other side of the scales of criminal justice. Typically the individual lawyers, or the staffs of lawyers, who perform the function of public defenders, are paid from public funds for representing substantial segments or all of the indigent defendants appearing before particular courts and not waiving their right to counsel. The public defender may exist in large or small communities, or may even be statewide, but typically he serves in some of the larger metropolitan areas.

While the use of the public defender need not necessarily be limited to a full-time employee of the government, typically the operation involves at least one full-time attorney with some clerical help. Larger offices involve staffs of attorneys and a very few have some investigative personnel. Presumably the office is similar in many ways to the district attorney's office in its day to day operations and comparisons could readily be made between the one-man operations of district attorneys and those of public defenders. Similarly the larger public defender offices could be compared with larger prosecutors' offices.

The individual who is the public defender, and who in the larger cities may direct a staff of attorneys, can be selected in one of several ways. He may be an elected official, as in Omaha where he is elected
for four years\textsuperscript{295} or he may be appointed by a judge or by a group of judges as he is in Chicago, where he serves at the judge's pleasure,\textsuperscript{296} and as in Virginia\textsuperscript{297} and Minnesota.\textsuperscript{298} In California the public defender may be elected for a period of four years or appointed by the County Board of Supervisors after a civil service examination which is not completely conclusive,\textsuperscript{299} while in Connecticut one year appointments are made by the judges of a public defender to serve the entire state.\textsuperscript{300} The public defender may be paid on a fee basis, or his office may be a normal part of the local budget as is the more common practice.

The advantages most frequently alleged for the use of the public defender, particularly as preferable to the appointed counsel system, include the following. The public defender can—although studies indicate he frequently does not—come into the proceedings at a much earlier stage,\textsuperscript{301} being theoretically in a position to aid indigents any time after arrest or arrival at a police station or other normal detention facility. Thus the public defender can enter the case before the first contact that any judge has had with the accused, the initial contact with some judge being the first time in which an appointment could ordinarily be made under an appointive system. This allegedly gives the public defender more time to prepare\textsuperscript{302} for his defense—as much time as the district attorney has since the two can be brought into the case at the same time. It could also make him available during the investigation.

The public defender is allegedly more experienced in his work than the typical appointed attorney.\textsuperscript{303} In a larger office, the newer members of the staff can be trained through formal programs which include starting by observing senior members of the staff, then by trying misdemeanor cases and the more routine felony cases so that the defense of difficult cases is left to the more experienced members of the staff. It is claimed that the public defender is in a position to negotiate on a more realistic basis with the district attorney\textsuperscript{305} and may be able to discourage unwarranted "not-guilty" pleas.\textsuperscript{306}

\textsuperscript{295} See Rubin, \textit{supra} note 294 at 895.
\textsuperscript{297} See Rubin, \textit{supra} note 294 at 896.
\textsuperscript{298} Forts, \textit{Right to Counsel in Criminal Cases: Legal Aid or Public Defender}, 28 Texas L. Rev. 491 at 512 (1950).
\textsuperscript{299} See field study, \textit{supra} note 294 at 533.
\textsuperscript{303} Ibid.
\textsuperscript{304} See field study \textit{supra} note 294 at 564.
\textsuperscript{305} Brownell, \textit{LEGAL AID IN THE UNITED STATES} at 145 (1951).
\textsuperscript{306} See Rubin, \textit{supra} note 294 at 894.
Also alleged is the ability of a public defender system to supply a type of investigative facility which is unlikely under any appointive system, although again this is not apparently frequently provided. An incidental investigation service which the public defenders might supply would arise if he were also to determine which defendants were actually indigent. Conceivably the public defender office could also set up the procedures for making such determinations.

Sweeping claims of cost saving have been made. The use of a single defense office for a substantial segment of the criminal case load would allegedly allow for a more expeditious handling of such cases and would allegedly facilitate the overall handling of cases without the typical delays sought by private attorneys, even those sometimes made solely for self-serving purposes.

On a broader front it is sometimes alleged that the public defender is in a substantially better position to work with the other welfare agencies interested in the same indigent defendants. It is also claimed that the public defender, through his acquired experience in the criminal processes, can evaluate the system as a whole and can recommend various improvements in the general administration of criminal justice both as it affects the indigent accused and as it affects all persons accused of a crime.

Those attacking the use of a public defender system frequently start by pointing out that while the sum and substance of the common law adversary system is to have the opposing parties represented as different interests, the use of the district attorney for the prosecution and the public defender for the defense puts the same party on both sides of the controversy, leaving little of the safeguards traditionally felt to be protected only through the adversary system. For those so arguing it is fundamentally improper for the state to undertake both to prosecute and defend the same individual. The practical application of this general theme is, to some, the likelihood that the two governmental agencies will as a matter of fact cooperate to keep the public from being upset. Closely aligned with this reasoning is the objection that the public defender will trade cases with the prosecutor, getting one defendant to plead guilty to one charge in exchange for a reduction in the charges against another.

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307 See Brownell, op. cit. supra note 305 at 144.
308 E.J.F.T.A. at 73 & 74.
309 See Rubin supra note 294 at 894.
310 See Brownell, op. cit. supra note 305 at 144; Rubin, supra note 294 at 894; Freeman, supra note 302 at 76; Field study, supra note 294 at 532 and 564; Kefauver, Public Defender—Pro. 1 VA. L. WEEKLY DICTA COMP. 64 (1949).
311 See Kefauver, supra note 340 at 66.
312 See Brownell, supra note 305 at 144.
313 See Freeman, supra note 302 at 76.
314 See Potts, supra note 298 at 509.
315 See, for an example of some general evaluations the article by Robinson supra note 300.
in charge or a dismissal on the charge of another defendant. The close working together of the departments is also alleged to make it easy for the public defender to pass on information gained from the accused.

Another alleged reason for the failure of the public defender to be able to adequately represent the accused is loyalty which may be felt towards the persons who control the appointment or the "purse." If the appointment of the public defender is made by the judges, then the defender has been called an agent for the judge who owes his primary duty to that judge. Likewise if appointed by the County Board or some other governmental agency not within the court system then his loyalty may be to that agency, possibly the same agency for whom the district attorney works. And if the public defender is elected, it is alleged that his election chances are not enhanced when he obtains an acquittal. Apparently the popular notion that convictions elect district attorneys is considered by some to have its counterpart in the election of public defenders.

Where one person might point out that, if indigency is not carefully determined to avoid claims by persons not really indigent, the public defender system will encroach on the private practice of law, apparently others call the entire scheme "socialistic" and summarily brand it as undesirable. It has also been alleged that in practice, sufficient funds are not given so the public defender is not able to cope with the case load.

Finally some have suggested that the routine of handling case after case involving the criminal elements generally and the many cases of indigent defendants in particular will eventually wear on the career public defender so that in the long run he cannot maintain sufficient interest in the frequently abstract legal rights of the accused to perform the function as it should be performed.

(3) The Voluntary Defender System

This system is characterized by an organized office engaged in defending indigent accused and supported totally by private funds and managed fully through private agencies. The staff may be full time and engaged solely in representing indigent defendants or it could be on a part time and sometimes voluntary basis. Some of these organizations are conducted in conjunction with the local legal aid organizations and some are independent. Such organizations may be supported through the community chest or through independent drives, or some combination of sources. The Criminal Courts Branch of the New York Legal...
Aid Society, the Philadelphia Voluntary Defender Association and the Voluntary Defenders Committee, Inc., of Boston are frequently held out as the examples of such organizations.

Since this system contemplates an organized office with long term staff appointments, many of the arguments for and against the Public Defender System are equally applicable to either system and will not be set out here. However some specific points of difference produce some differing arguments.

This system has the advantage of being independent of the government and thus avoiding the objection that the loyalty becomes divided. It also has the advantage of bringing in the support of the whole community through its fund raising activities. The major drawback would arise from the same factor, since its resources depend solely upon the public's willingness to provide adequate funds. The ability of such a system to supply adequate representation may fluctuate with the economic times and such a system may never become successful in supplying counsel at early stages of the procedure or for lesser crimes because the money is never made available.

(4) The Mixed Public-Private System

This system is of recent origin and has had little written about it. It is in existence in Rochester and Buffalo, New York and received favorable comment in EQUAL JUSTICE FOR THE ACCUSED. Basically the system involves a voluntary defender system supported at least in part by governmental funds. The control, however, is left to a private board. Presumably the advantage over other systems includes the ability to separate the representation of the accused from the control of the same government which is prosecuting him while overcoming the financial limitations so frequently felt by the strictly voluntary defender organizations. Presumably in areas other than finance and control, the objections and favorable comments would be much like those made in regard to the public defender system and the voluntary defender system.

323 For a description see Pollock, The Voluntary Defender Association—A Social Audit, 18 The Shingle 111 (1955).
324 For a brief description see Criminal Law Reform Committee, Voluntary Defenders in Massachusetts, 17 Law. Guild Rev. 131 (1957).
325 E.J.F.T.A. at 52-53, 76 & 93.