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## THE ECHO OF CLARENCE GIDEON'S TRUMPET

James A. Lake, Sr.\*

*The question is very simple. I requested the court to appoint me attorney and the court refused.<sup>1</sup>*

With these words Clarence Earl Gideon, unaided by counsel, outlined his contention for the Justices of the United States Supreme Court. Counsel could not have improved upon the succinctness of this formulation. The facts of Mr. Gideon's case and the rule laid down by the Court are simple: The conviction of a person tried in a state court upon a felony charge is not valid unless he is represented by counsel, if the accused does not validly waive this right. But many difficulties lurk behind the simple question posed by Mr. Gideon and the narrow answer given by the Court. The echoes of the decision will reverberate to all corners of the nation for some time to come. The importance to Nebraska of the decision, and its echoes, are the theme of this article.

## THE RIGHT TO COUNSEL IN NEBRASKA STATE COURTS

During the reign of *Betts v. Brady*,<sup>2</sup> persons unable to hire their own counsel could be validly convicted of felony charges in some states even though their request that they be aided by an attorney went unanswered. *Betts* held the United States Constitution was violated only if special circumstances showing unfairness were present and state law in these jurisdictions did not provide counsel. Nebraska was *not* one of these. In other words, had Clarence Gideon been tried by the State of Nebraska, instead of by Florida, he would not have been forced to act as his own lawyer. He would have been furnished a lawyer (either one appointed by the court or a public defender), and in either case the attorney would have been compensated from county funds.<sup>3</sup>

From 1873 to the present, Gideon would have been thus treated in Nebraska, for in 1873 the Nebraska Legislature enacted:

The court before whom any person shall be indicted for any

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<sup>1</sup> Reply of Petitioner to Brief in Opposition to Petition for Certiorari, *Gideon v. Wainwright*, 372 U.S. 335 (1963), quoted in LEWIS, GIDEON'S TRUMPET 38 (1964).

<sup>2</sup> 316 U.S. 455 (1942).

<sup>3</sup> NEB. REV. STAT. § 29-1803 (Reissue 1964) (appointed counsel); NEB. REV. STAT. § 28-1804 (Reissue 1964) (public defender).

offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel . . . ; and it shall not be lawful for . . . any county . . . to . . . allow an account . . . presented by an attorney . . . for services performed . . . until said account . . . shall have been . . . allowed by the court . . . : *Provided*, That no such account . . . shall in any case except in cases of homicide, exceed one hundred dollars.<sup>4</sup>

Until a recent enactment this was the law of Nebraska except that the 100 dollars ceiling in nonhomicide cases was raised to 300 dollars,<sup>5</sup> and in 1957 the Legislature added the following provision applicable to capital punishment cases:

In cases . . . when the punishment is capital and the person convicted is not represented by counsel of his own choosing, the judge who presided at the trial shall assign to such person counsel, not exceeding two, to represent such person before the Supreme Court. . . . For services rendered . . . in the Supreme Court, counsel shall be allowed a reasonable fee, in such amount as the district court shall allow . . . which . . . shall be in addition to the amount allowed for representing such person during trial.<sup>6</sup>

Section 11 of Article I of the 1875 Nebraska Constitution provided:

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . .

This language has not been changed by amendment to date.<sup>7</sup>

The fact that for the past ninety years Gideon would have received what he asked for because of Nebraska law, without resorting to the federal constitution, does not mean that his case

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<sup>4</sup> Neb. Gen. Stat. ch. 58, § 437 (1873).

<sup>5</sup> Neb. Laws ch. 104, § 1 (1957).

<sup>6</sup> Neb. Laws ch. 107, § 6 (1957).

<sup>7</sup> The constitution approved February 9, 1866, which served from statehood to November 1, 1875, provided in art. I, § 7: "In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right . . . to have the assistance of counsel."

A proposal in the 1919-20 constitutional convention sought to guarantee counsel "in all criminal prosecutions, *including prosecutions before police magistrates* . . . ." I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, 1919-20, at 597-98. (Emphasis added.) Considerable discussion ensued over the proposal to add the words italicized above, but no change was made by the convention. *Id.* at 598-622. Arguments against the proposal were (1) that it would prove so time consuming that police courts would be unable to keep abreast of their dockets, particularly in Omaha, and (2) that it was unfair and discriminatory to guarantee counsel in "police magistrate" courts and deny counsel in cases before justices of the peace.

and its progeny, some yet unborn, have, and will have, no impact here. Nor does it mean that all the problems involved in furnishing counsel to indigents have been solved.

Prior to the passage of a recent bill by the Legislature,<sup>8</sup> an indigent's right to counsel in the Nebraska state courts was as follows: In all felony prosecutions, indigents were entitled to be represented at their trial by either a public defender or by a court appointed attorney. In the vast majority of cases, the attorney was provided after the information charging a felony was filed and before the indigent pleaded to the charge.<sup>9</sup> Appointment at a later date than this would certainly run a grave risk of failing to stand a challenge under the fourteenth amendment of the federal constitution.<sup>10</sup> Indigents charged with misdemeanors were not provided counsel either at their trial or for appellate review;<sup>11</sup> nor did existing law provide for counsel at the preliminary hearing, even for felony charges.<sup>12</sup>

Counsel appointed in nonhomicide cases were paid a fee for their services, but the statute limited the fee to a 300 dollar maximum. The claim must have been examined, allowed, and certified by the trial court before the county could pay it. While the fee thus judicially certified was not binding upon the county governing board,<sup>13</sup> "it has been the custom to audit and pay such claims when certified and allowed by the trial judge."<sup>14</sup> In homicide cases there was no statutory ceiling.

In capital punishment cases, the language added to the statute in 1957, and quoted above, guaranteed an indigent counsel for his review in the Nebraska Supreme Court, and the same language clearly authorized the district court to award an additional fee for counsel's services in the supreme court.

In noncapital punishment cases, the indigent was provided counsel for supreme court representation, but the right rested upon

<sup>8</sup> L.B. 839, 75th Neb. Leg. Sess. (May 3, 1965).

<sup>9</sup> See *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

<sup>10</sup> See, e.g., *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>11</sup> *Durfee v. State*, 53 Neb. 214, 73 N.W. 676 (1897).

<sup>12</sup> *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963); *Lingo v. Hann*, 161 Neb. 67, 71 N.W.2d 716 (1955); *Roberts v. State*, 145 Neb. 658, 17 N.W.2d 666 (1945); *Adams v. State*, 138 Neb. 613, 294 N.W. 396 (1940); *Van Buren v. State*, 65 Neb. 223, 91 N.W. 201 (1902); *Latimer v. State*, 55 Neb. 609, 76 N.W. 207 (1898).

<sup>13</sup> *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888).

<sup>14</sup> *Moran v. Otoe County*, 95 Neb. 658, 661, 146 N.W. 956, 957 (1914).

court decisions, not upon a statute. In *Moran v. Otoe County*,<sup>15</sup> an attorney was appointed by the District Court for Otoe County to represent an indigent charged with felonious assault. The indigent was convicted, and his court-appointed attorney was awarded fifty dollars for his services at the trial. The same attorney unsuccessfully sought to reverse the indigent's conviction by review in the state supreme court. The trial court then awarded the attorney an additional fifty dollars for his services in the supreme court, but the county commissioners refused to pay. The issue was whether the county was "required to pay the attorney's fee . . . for services in the supreme court . . . ." The court noted that the statute "makes no direct provision for an allowance for services by an attorney in the supreme court." The court reaffirmed an earlier ruling that the supreme court itself was without power to order a fee.<sup>16</sup> Nevertheless, the court held that

[the district] court has the power, which it ought and usually does exercise, to assign . . . counsel. In such case the attorney, being an officer of the court, is required to defend the criminal and accept such compensation, within the limits of the statute, as the court may allow. . . . [T]he trial court should exercise a reasonable discretion in the allowance of such claims, and if he should find, on a conviction of the defendant in the district court, the case is one which should be taken to the supreme court, he should make an allowance to the attorney, within the limit fixed by the statute, for that purpose.<sup>17</sup>

When we turn to proceedings other than a criminal trial or direct review of a criminal conviction, but which nevertheless affect the liberties of indigent persons, we are met with a curious patchwork of state policy. A statute provides that if a court finds that an alleged sexual psychopath is "unable to obtain counsel, it shall appoint counsel for him."<sup>18</sup> There is no provision for payment of a fee, nor any provision for counsel if the indigent desires to exercise his right to appeal to the supreme court the finding that he is a sexual psychopath. An identical, and likewise ambiguous, provision for counsel exists with reference to alleged drug users.<sup>19</sup> There is no state right to counsel in habeas corpus or coram nobis proceedings because they are characterized as "civil."<sup>20</sup> However, under a recently enacted statute establishing

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<sup>15</sup> 95 Neb. 658, 146 N.W. 956.

<sup>16</sup> *Edmonds v. State*, 43 Neb. 742, 62 N.W. 199 (1895).

<sup>17</sup> *Moran v. Otoe County*, 95 Neb. 658, 660-61, 146 N.W. 956, 957 (1914).

<sup>18</sup> NEB. REV. STAT. § 29-2902(2) (Reissue 1964).

<sup>19</sup> NEB. REV. STAT. § 83-702(2) (Supp. 1963).

<sup>20</sup> See, e.g., *Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944).

a new post-conviction remedy, we find:

The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29-1803, Reissue Revised Statutes of Nebraska, 1943.<sup>21</sup>

### FINANCING THE INDIGENT'S LEGAL SERVICES

One of the echoes of Clarence Gideon's request that "the court . . . appoint me attorney" is: Who is going to pay for Mr. Gideon's legal services? This issue faces us whether we provide Mr. Gideon legal aid under the prodding of the fourteenth amendment, or because state law provides for it. For proceedings in state courts, the answer is clearly not the federal government (or more accurately, the federal taxpayers). Within the state we also may someday face the question of whether the cost should be a state or a county charge, and in the latter case, *which* county? But those issues we are not now canvassing. Let us focus attention upon the more basic issue of whether the financial burden should rest upon the shoulders of some group other than what, for want of a better term, we shall call the general taxpaying public. One "other group" might be the members of the bar who provide the services either gratuitously or for less than a reasonable fee.

It is obvious from Mr. Kutak's article that some of the burden of providing legal counsel for *federal* indigents will remain with members of the federal bar even under the Criminal Justice Act. For example, attorneys in federal courts in habeas corpus proceedings, in proceedings to vacate sentences under section 2255 of title 28 of the United States Code, and in any other proceeding collateral to the original prosecution, go uncompensated.<sup>22</sup> Likewise, under the Criminal Justice Act members of the bar will subsidize the program of representation for indigents to the extent that the monetary ceilings written into the act prevent a full fee for the attorney.

From 1873 until the passage of L.B. 839, Nebraska statutes have also contained monetary limitations restricting the compensation of appointed attorneys in nonhomicide cases. Prior to 1957, the limitation was 100 dollars; then, 300 dollars. Recently, the author aided the American Bar Foundation in its state-by-state survey of the indigent's right to counsel in state courts. I am

<sup>21</sup> L.B. 836, § 4, 75th Neb. Leg. Sess. (April 12, 1965).

<sup>22</sup> See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964 (1965) (hereinafter cited as REPORT).

grateful to the Foundation for that opportunity and for permission to use data secured in that Nebraska project in this article.<sup>23</sup>

A prime area of investigation in the study was the adequacy of compensation for appointed attorneys in Nebraska, certainly a basic problem upon which reasonable men may espouse deeply felt and differing views. Many, even within the bar, strongly maintain that attorneys have a "duty" to provide this service gratuitously; others that attorneys should be paid "something" for their efforts; and others that the attorney is entitled to be paid a fee commensurate with what he would charge a moderately well-to-do client for similar services.<sup>24</sup> The Foundation survey did not seek to ascertain the views of individuals upon this policy issue, but, probably somewhat ambiguously, asked judges and county attorneys whether they considered the compensation "adequate."<sup>25</sup> Seventeen judges answered this question: Eleven stated that the compensation was adequate; one that it was "probably" adequate; and five characterized the amount as inadequate. Fifty-five county attorneys answered the same question. Thirty-eight considered the compensation adequate; fifteen did not; one said it "varied"; and one stated that appointed attorneys were "more than adequately" compensated.

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<sup>23</sup> All future citations to the "Foundation survey" or "survey" will mean the survey of state indigents conducted by the American Bar Foundation for the American Bar Association in 1963. A preliminary report was made available for the August, 1964 meeting of the House of Delegates of the American Bar Association [see SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS, A PRELIMINARY SUMMARY (1964)], and a fuller report, SILVERSTEIN, DEFENSE OF THE POOR (1965), has been published. Whenever this article refers to "Preliminary Summary," the preliminary report is meant.

<sup>24</sup> Arguments concerning compensation for appointed attorneys have ranged over many other areas. For example, it has been argued that uncompensated counsel do not meet the requirement of the federal constitution. See Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435 (1963). See also Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559, 596 (1951). And one court held an attorney appointed by a federal court in a proceeding under 28 U.S.C. § 2255 (1958) entitled, by virtue of the fifth amendment, to a judgment against the United States for the reasonable value of his service plus reimbursement for the expenses incurred. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964) *rev'd on appeal* — 33 L.W. 2673 (9th Cir. 1965). Cf. *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897). *Contra*, *Nabb v. United States*, 1 Ct. Cl. 173 (1864).

<sup>25</sup> The question is ambiguous not only because of mixing the "duty" aspect of a lawyer's aid to the poor, but also because "adequacy" itself depends upon a variety of factors which the question did not posit.

A selected group of appointed counsel were asked whether they considered the present system "fair to the lawyers" and what changes they would recommend. Twenty-two appointed counsel answered the questionnaire, and they split evenly over whether the system was fair to counsel. But four who considered the system "fair" and ten of the eleven who considered the system "unfair" would change the system by paying "lawyers more for their service."

Appointed counsel were asked what fee they would have charged "a client who retained . . . [them] for . . . services in . . . [the] case." Excluding the two homicide cases, sixteen attorneys answered, and the average fee for these cases would have been 529 dollars. If we assume that each attorney received the maximum permitted under the statute (*i.e.*, 300 dollars), these attorneys gratuitously contributed a considerable part of their labor. Personal interviews with judges in four districts indicated that they seldom awarded the full 300 dollars except where there was a trial. An attorney appointed in one of the homicide cases reported that he would have charged 3500 dollars if retained; counsel in the other homicide case reported he would have charged two or three times what he was awarded.

The law recently enacted (L.B. 839) provides that in all cases (not just in cases of homicide) the court "shall fix reasonable fees." Assuming that administration under this language results in appointed counsel receiving the same fee they would have received if retained for the case, then we will have adopted a state policy of placing upon the taxpaying public the financial burden of counsel for indigents. This is not to say, however, that the attorney who is appointed will not suffer financially; he may, for example, be forced to turn down more remunerative employment in order to serve as appointed counsel. This sacrifice is not something which may be conveniently measured and considered in awarding compensation. This law should eliminate many of the objections to the present Nebraska appointive system previously noted.

Two counties in Nebraska employ a public defender to represent indigents,<sup>26</sup> and any county in Nebraska might do so "upon approval of the county board."<sup>27</sup> The Foundation survey revealed nothing critical of the quality of the representation by public defenders. In fact, all of the persons questioned either approved

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<sup>26</sup> Douglas and Scottsbluff.

<sup>27</sup> See NEB. REV. STAT. § 29-1804 (Reissue 1964).



or praised this method of counseling indigents. Nationwide, there are 109 defender offices serving 171 counties. Nationwide, the opinion of most judges and county attorneys was that public defenders were as "able as assigned counsel and . . . often more experienced,"<sup>28</sup> and that public defenders generally compare favorably with prosecutors in "experience and ability." Regrettably, the Criminal Justice Act does not utilize the public defender type of service, although this was in the original proposal and may subsequently find its way into the federal law by way of future amendment.<sup>29</sup>

Focusing attention upon a more mundane aspect of the defender program, let's look at some cost figures. The American Bar Foundation survey found that the cost of operating any system (defender or assigned counsel) depends "more on the size of the population being served than on the system that is chosen."<sup>30</sup> The following table compares the two systems:

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<sup>28</sup> PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 15.

<sup>29</sup> See REPORT, *op. cit. supra* note 22; REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 146 (1963).

<sup>30</sup> PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 19.

TABLE I<sup>31</sup>

County Population (Thousands)	PUBLIC DEFENDER SYSTEM			ASSIGNED COUNSEL SYSTEM					
	Costs per County (Thousands of Dollars)			Costs per County (Thousands of Dollars)			Costs per Capita of population		
	Lowest	Median	Highest	Lowest	Median	Highest	Lowest	Median	Highest
Less than 50				\$ 0.1	\$ 0.7	\$ 7.3	\$ .002	\$ .030	\$ .171
50 to 99				0.1	2.7	25.9	.001	.035	.203
100 to 399	\$2.5	\$ 9.4	\$ 46.8	\$ .019	\$ .045	\$ .119	.014	.037	.160
400 to 999	7.0	29.5	164.3	.011	.042	.254	.018	.062	.349
1000 or more				77.7	174.7	295.6	.075	.086	.111

<sup>31</sup> *Id.* at 20-22. See also SILVERSTEIN, DEFENSE OF THE POOR 63-66 (1965).

Many persons questioned in the Nebraska phase of the Foundation survey felt that the county mentioned in their discussion could not "afford" to adopt a public defender program because not enough "business" existed to make it economically feasible. This is obviously true, if we continue to think of the public defender as an officer for a single county. Nebraska probation officers are not county officers in the sense that their duties are restricted to the boundaries of an individual county.<sup>32</sup> Nor is there any reason to restrict public defenders to individual counties. We should think in terms of a public defender serving a wider geographical area such as the present district court districts or maybe the entire state, exclusive of Douglas and Lancaster Counties.

Even if public lethargy or tradition or some reasoned or unreasoned premise demands that we have ninety-three counties, each with a full slate of government officials such as county attorney, sheriff, and judge, there is still no reason to apply an unwieldy, expensive, and duplicative system to new government officers demanded by twentieth century conditions. Felony punishments, including imposition of the death sentence, are not carried out in county jails by county officials, and have not been for many years. The burden of representing the state in criminal cases shifts to a state officer once the trial phase is concluded, and frequently "special prosecutors" assist the county attorney in prosecuting difficult or important cases. State officials often aid in the collection of evidence and preparation of the prosecution's case. Nothing but a blind failure or refusal to apply common sense to the solution of this "can't afford" problem prevents the inventiveness and ingenuity of the twentieth century body politic from creating public defender services for a state with population distributions like those in Nebraska.

## RIGHT TO COUNSEL AND THE TYPE AND STAGE OF THE PROCEEDINGS

### A. BEFORE AND DURING TRIAL

Before L.B. 839 became law, counsel was provided felony indigents in Nebraska after an information was filed, but before arraignment. Appointing counsel at no earlier stage than this, under some circumstances, does not satisfy the demands of the United States Constitution. Thus, if the preliminary hearing is, or may be, a critical stage of the proceeding, counsel at that stage is

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<sup>32</sup> See NEB. REV. STAT. § 29-2227 (Reissue 1964).

constitutionally required.<sup>33</sup> And confessions of persons denied counsel may not be admitted at their trials without violating the United States Constitution if procured after "the process shifts from investigatory to accusatory . . . ."<sup>34</sup>

The Foundation survey asked several questions of judges, county attorneys, and appointed counsel dealing with the time of appointment. Appointed counsel were asked whether their appointment came "in time to represent the accused person adequately." Twenty answers were received: seventeen said "yes"; two said "no"; and one stated he would have "preferred" to have been appointed earlier. Sixteen would change the present Nebraska system to require appointment earlier. Seven identified the earlier time as "prior to the preliminary hearing"; four as "before arraignment upon the warrant"; one as the "first appearance before a judge"; and one as "immediately."

The state district judges and the state's county attorneys were asked what time an appointment would be made in an "ideal system." The following table shows their opinions.

TABLE II  
"IDEAL" STAGE FOR APPOINTMENT

	Judges	County Attorneys
Between Arrest and First Appearance		
Before a Magistrate	4	23
At First Appearance Before a Magistrate	2	13
Between First Appearance and Preliminary Hearing	3	7
At Preliminary Hearing	1	4
After Preliminary Hearing but Before the Filing of an Information	0	2
After Filing the Information but Before Arraignment (Present State Law Stage)	7	8
At Arraignment on Information	2	7
After Arraignment	0	0
At Trial	0	0
Totals	19	64

As this table shows, just a little over half the judges (ten out of nineteen answering) defined an "ideal system" to be one pro-

<sup>33</sup> *White v. Maryland*, 373 U.S. 59 (1963); *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

<sup>34</sup> *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

viding counsel earlier than under the then existing state law. Four of the ten deemed the lack of an earlier appointment "unfair"; three considered it unfair "sometimes"; and three did not view the lack of earlier appointment unfair.

Likewise, the table shows that seventy-six per cent of the county attorneys (forty-nine out of sixty-four) described an "ideal" system as one providing counsel at an earlier stage than then given by Nebraska law. Twenty-one of the forty-nine deemed the lack of earlier appointment unfair; nine thought it was sometimes; and fifteen did not think the lack of earlier appointment unfair.

The Criminal Justice Act provides for appointment by a United States Commissioner, and L.B. 839 provides that when an indigent accused of felony files with a "magistrate an affidavit of his inability to procure counsel, the magistrate shall forthwith certify that fact to the district court . . . [and the] district judge shall forthwith appoint an attorney . . . to represent the accused . . . before the magistrate . . . ." Under these provisions counsel is provided before a preliminary hearing. This is a long needed change at the state level, and, as seen above, meets with the approval of a great many judges and county attorneys presently serving.

There is no Nebraska statute, or proposal, which grants counsel earlier than the preliminary hearing stage. A provision in state law authorizing appointment of counsel to represent a person "in the police station," after the suspect passes under the protection of the *Escobedo* ruling, would seem futile from the police standpoint, because the appointed lawyer would most certainly call a halt to the interrogation by advising his client to say nothing, and *Escobedo* probably adequately protects the suspect by ruling inadmissible evidence procured by the police, although many issues about the adequacy of the protection remain to be litigated.<sup>35</sup> What is needed here is not so much an earlier counsel appointment, but some enforcement teeth put in our present rule that persons in custody "be brought before the magistrate . . . as

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<sup>35</sup> *E.g.*, the admissibility of evidence discovered by following leads secured in a police station in violation of *Escobedo* will soon appear, as well as the scope of protection, if any, *Escobedo* gives to a defendant whose conviction rests upon evidence secured by the police through interrogating, unconstitutionally, a third person. Certainly *Escobedo* protects indigents who do not have counsel they can identify, as well as affluent criminals with counsel on retainers.

soon as is practical under the existing circumstances."<sup>36</sup> As pointed out in an article in this *Review*, the first appearance before a magistrate, and hence the date of appointment of counsel, can be purposefully delayed, unless there is some disadvantage attached to the practice.<sup>37</sup> We have judicial recognition of Nebraska cases with eight days and twenty-five days elapsing before the defendant was produced for his preliminary hearing,<sup>38</sup> and the Foundation study turned up one case where a defendant spent 103 days in a county jail after his first appearance before a magistrate and before counsel was appointed.

The extra burden imposed upon the lawyer by appointment for the preliminary hearing will be light if history is any indication of the frequency with which full-dress preliminary hearings are held in this state. County attorneys in five counties, Douglas, Lancaster, Dodge, Hall, and Cheyenne, questioned personally about the frequency of preliminary hearings in felony cases, gave the following estimates:

TABLE III  
FREQUENCY OF PRELIMINARY HEARINGS (FELONIES)  
COUNTY ATTORNEY INTERVIEW

	Cases where Punishment Might be Capital	Other Felony Cases
Douglas	Usually Held	Held in a Few
Lancaster	Held in Some	Held in Very Few
Dodge	Usually Held	Held in Quite a Few
Hall	Usually Held	Not Usually Held
Cheyenne	Usually Held	Held in a Few

A selective sampling of the dockets in three counties, for the year 1962, showed the following:

<sup>36</sup> *State v. O'Kelly*, 175 Neb. 798, 812, 124 N.W.2d 211, 219 (1963); cf. NEB. REV. STAT. § 29-504 (Reissue 1964).

<sup>37</sup> Broeder, *Wong Sun v. United States, A Study in Faith and Hope*, 42 NEB. L. REV. 483, 609 (1963).

<sup>38</sup> *Gallegos v. State*, 152 Neb. 831, 43 N.W.2d 1 (1950) (25 days); *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641 (1944) (8 days).

TABLE IV  
FREQUENCY OF PRELIMINARY HEARINGS (FELONIES)

## DOCKET STUDY

County	Total Sample	Hearing Held		No Hearing Held		No Data	
		Number	Per cent	Number	Per cent	Number	Per cent
Douglas	93	12	17	60	83	21	23
Lancaster	44	0	0	33	100	11	25
Dodge	20	7	44	9	56	4	20

Weighted averages for these three counties were: preliminary hearings held in twenty-one per cent; preliminary hearing not held in seventy-nine per cent.

The burden upon counsel, regardless of the stage of the appointment, is affected by two other factors: (1) the frequency of waiver of counsel; and (2) the extensiveness of the representation.

The district judges of Nebraska varied in their estimate of the per cent of waiver from ten per cent to ninety-five per cent. The median estimate was seventy-five per cent. The mean given by the county attorneys was fifty per cent, with estimates ranging from zero to one hundred per cent. This waiver rate appears to be well within national statistics, although there are great differences from state to state and even from judge to judge upon the same court.<sup>39</sup> The incidence of waiver is closely tied to the manner in which the defendant is told that he has a right to counsel. Fortunately, both the Criminal Justice Act and L.B. 839 require that the defendant be informed that his right to counsel includes representation *at public expense*.<sup>40</sup>

The Foundation survey of three counties, for 1962, showed the following disposition of felony cases:

<sup>39</sup> PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 28-30; SILVERSTEIN, DEFENSE OF THE POOR 32 (1965).

<sup>40</sup> Information that an accused is "entitled to counsel" or has a "right to a lawyer" may be interpreted by the accused to mean that he may employ counsel, and the Foundation survey found that in some instances defendants understood the word "counsel" to mean a "sort of adviser like a family counsellor." PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 29.

TABLE V  
DISPOSITION OF FELONY CASES, 1962

County	Total Sample	Plea: Guilty	Plea: Lesser Offense	Dismissed	Trial: Found Guilty	Trial: Acquitted	Other
Douglas	93	60	11	10	4	4	4
Lancaster	44	39	0	3	1	0	1
Dodge	20	13	4	2	0	0	1

For these three counties, seventy-one per cent (weighted average) of the felony cases ended in guilty pleas.

Thus, representation in a great many cases does not require defending the accused at a trial.

#### B. AFTER TRIAL AND CONVICTION

As we have noted, prior to L.B. 839 Nebraska statutory law drew a distinction between capital and noncapital cases insofar as the right to counsel at public expense for direct review purposes is concerned. Under L.B. 839 this is no longer true and counsel is provided at public expense in all felony cases "for all proceedings before the magistrate, in the district court, and in the Supreme Court . . . ." The district court will establish a "reasonable" fee for "services performed." This will include payment for services in connection with a review in the state supreme court.<sup>41</sup>

If the felony defendant desires to pursue his case beyond the highest court in the state, either by appeal or certiorari in the United States Supreme Court, the right to counsel at public expense will have to be found in some federal law or federal court rule. The Criminal Justice Act does not appear to cover this, although it does not expressly exclude it either, and it seems that the intricacies of United States Supreme Court practice and the importance of careful draftsmanship, whether the proper filing be a jurisdictional statement or a petition for certiorari, should require the appointment of counsel. As a practical matter, the accused's need for counsel at this stage seems just as great as the need for counsel after jurisdiction has been noted or certiorari granted.<sup>42</sup>

<sup>41</sup> Under *Douglas v. California*, 372 U.S. 353 (1963), counsel for appeals to the Nebraska Supreme Court by indigent Nebraska felons would be constitutionally required.

<sup>42</sup> Mr. Gideon drafted and filed his Petition for Certiorari and his Reply to the Response of Florida Opposing Certiorari without the aid of counsel. The Supreme Court of the United States appointed counsel



Any time a state-convicted felon's proper remedy is in the federal court by way of habeas corpus, then his right to counsel

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for Mr. Gideon only after certiorari was granted; the clerk had suggested in a letter to Gideon that upon request the Court would appoint a lawyer, and Gideon "moved" that this be done. Mr. Gideon, unrepresented, failed to include the required poverty affidavit in his first certiorari petition, but did better after the clerk "enclosed a copy of the rules and a sample affidavit to help him . . . ." See LEWIS, *op. cit. supra* note 1, at 6, 46, 48.

Drafting and filing a "Petition for Certiorari" (or papers seeking review by way of "appeal") is an area where the skill of competent counsel is vital, particularly in view of time limits which are jurisdictional, and the proper phrasing of questions. See, e.g., 28 U.S.C. § 2101(c)-(d) (1958); U.S. SUP. CT. R. 22, 53(5); STERN AND GRESSMAN, SUPREME COURT PRACTICE § 6-1, at 201-02 (3d ed. 1962); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

In one indigent criminal case, the author unsuccessfully sought to obtain from a United States Circuit Justice an appointment of counsel to assist the prisoner in preparing his certiorari petition, but the Justice took no action. In later years, others have been no more successful in getting a state court to appoint counsel for the preparation of the petition for certiorari. See *United States ex rel. Coleman v. Denno*, 313 F.2d 457 (2d Cir. 1963).

Anyone who, like the author, has read a couple of term's output of *in forma pauperis* petitions for certiorari can attest to the fact that counsel would be of immense service to prisoner and court alike in stating issues in understandable fashion, because as Justice Frankfurter has said, they are "almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding." LEWIS, *op. cit. supra* note 1, at 33.

United States Supreme Court Rules provide for reimbursing the appointed "to the extent of first-class transportation from . . . [the attorney's] home to Washington and return . . . ." (Rule 53 (7)). Almost every week the Supreme Court sits, scores of attorneys are admitted to its bar, and the "duty to the court" argument seems sufficient base upon which to predicate appointing some of these "certificate-holders" to aid prisoners struggling to draft papers for carrying their cases to the highest court in the land. If the "duty" argument will not go this far, then the Criminal Justice Act principle of paid counsel should be applied, in order that we no longer have a prisoner denied counsel for drafting technical papers for filing with the Court which, through the years, has carefully outlined the right to counsel in all the other courts in the land.

Admittedly the problem of providing counsel for the drafting and filing of documents is a problem in both state and federal courts. The drafting and filing stage is crucial, and if the right to counsel (whether granted by the fourteenth amendment or the sixth amendment) includes the right to effective assistance at all stages of the proceedings, counsel should be provided indigents in many instances where, today, the indigent must depend upon his own resources of intellect, or upon the advice of cellmates or fellow jail dwellers. There are signs that the right to counsel will soon include aid in the

will have to be found in federal law.<sup>43</sup> However, if the defendant's remedy is some state post-conviction procedure, then his right to counsel in these will depend, in the first instance, upon state law. Nebraska procedure now offers three different post-conviction remedies: Habeas corpus, coram nobis, and a new statutory remedy provided by L.B. 836.<sup>44</sup> As previously noted, the latter contains an explicit guarantee of public-compensated counsel at the district court level, and probably also for purposes of appealing any adverse ruling of the district court to the Nebraska Supreme

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preparation of papers and the filing of legal documents. In *Chase v. Page*, 343 F.2d 167 (10th Cir. 1965) a state prisoner successfully contended that constitutional rights are violated where an indigent fails to secure an appellate review of his conviction because a *pro se* filing did not meet state law requirements. The prisoner secured the defective paper as follows: "[I] went out to the yard and found a guy that knew how to make up a pauper's oath and he said he would make me one up, and he gave it to me, two or three days later, and I filed it . . . ." 343 F.2d at 169. Interestingly enough, and this points up the commonness of the problem to both branches of our dual system of courts, both prisoner Chase and Clarence Gideon stumbled over the proper drafting and filing of a pauper's oath.

<sup>43</sup> The right to counsel in federal habeas corpus cases is omitted from the Criminal Justice Act. Whether there is a constitutional requirement that counsel be appointed is uncertain. Lower federal courts, like Nebraska state courts, have denied counsel upon the argument that habeas corpus is a "civil remedy." See *Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964) (citing many cases); *Carpenter v. Gladden*, 223 F. Supp. 612 (D. Ore. 1963); cf. *United States ex rel. Marshall v. Wilkins*, 338 F.2d 404 (2d Cir. 1964): "Because habeas corpus is nominally civil in nature, the Sixth Amendment does not apply. But this and other courts have held that sound discretion, perhaps deriving from the Fifth Amendment, requires that counsel be appointed for petitioners, at least in some cases." *Id.* at 406. However, language in *Smith v. Bennett*, 365 U.S. 708, 712-14 (1961) indicates that the United States Supreme Court will not be content to deny counsel because the proceeding is labeled "civil" for solution of some other legal issue. Thus, in the *Smith* case the Court held unconstitutional, as denying a prisoner equal protection of the law, an Iowa statute requiring an indigent to pay a \$4.00 filing fee before an application for habeas corpus would be docketed and decided. The opinion characterized habeas corpus as the "freedom writ" and as the "highest safeguard of liberty" and stated: "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." *Id.* at 712. See SOKOL, *FEDERAL HABEAS CORPUS* § 31 (1965).

<sup>44</sup> See NEB. REV. STAT. §§ 29-2801 to -2824 (Reissue 1964) (habeas corpus); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949) (coram nobis); *Carlsen v. State*, 129 Neb. 84, 261 N.W. 339 (1935); *Newcomb v. State*, 129 Neb. 69, 261 N.W. 348 (1935); *State v. Boyd*, 117 Neb. 320, 220 N.W. 281 (1928); L.B. 836, 75th Neb. Leg. Sess. (April 12, 1965).

Court. But at the same time that we provide counsel for this species of post-conviction litigation, we deny an indigent counsel for either of the other two proceedings, *coram nobis* and habeas corpus. The lack of counsel in habeas corpus and in *coram nobis* cases certainly runs the gravest of risks that such refusal conflicts with the fourteenth amendment to the United States Constitution.<sup>45</sup> And aside from the question of federal constitutional compulsion, it seems pertinent to ask: Why is it good policy, fair to indigents, and not unduly burdensome to the public to provide counsel at public expense to represent a person seeking to test the validity of his incarceration by way of the procedure established by L.B. 836, and fail to provide similar representation for cases brought by way of *coram nobis* or habeas corpus?

Counsel in habeas corpus cases would be provided in an "ideal" legal system by sixty-five per cent of the fifty-eight county attorneys registering their opinions in the Foundation survey; and by fifty per cent of eighteen judges surveyed. Table VI, which follows, shows that a large percentage of the judges and county attorneys also deemed the failure to provide counsel "unfair."

TABLE VI

	WOULD "IDEAL" SYSTEM PROVIDE COUNSEL IN HABEAS CORPUS PROCEEDINGS?			WOULD LACK OF COUNSEL BE UNFAIR?		
	Yes	No	Sometimes	Yes	No	Sometimes
Judges	9	7	2	8	8	1
County Attorneys	38	20	0	29	20	0

The shibboleth that habeas corpus, and probably *coram nobis*, is a "civil remedy" and that counsel is not required in "civil cases" possesses little persuasiveness when the Great Writ is employed to test the validity of a man's confinement and is drained of even that vestige of support by the provision in the new post-conviction act that: "Proceedings under the provisions of this act shall be civil in nature."<sup>46</sup> It would seem that what is good policy sauce

<sup>45</sup> *La Faver v. Turner*, 231 F. Supp. 895 (D. Utah 1964); cf. *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); see note 43 *supra*.

<sup>46</sup> In *La Faver v. Turner*, *supra* note 45, the clerk of the Supreme Court of Utah informed a prisoner seeking court-appointed counsel to appeal his state court denial of an application for habeas corpus to the Utah Supreme Court: "[I]nasmuch as this appeal is from a denial of a writ of habeas corpus, it is a civil case and there is no obligation for

for the goose should serve likewise for the gander, and that counsel should be provided for habeas corpus and coram nobis applicants by statute.

The Nebraska Supreme Court had occasion recently to comment upon its ability to perceive the issues and understand the argument of a prisoner who briefed and argued *pro se* his appeal from a district court order dismissing his application for a writ of habeas corpus:

It may be stated that the petition and the argument of the plaintiff is itself vague and difficult to follow, probably because he is not a lawyer. We have endeavored, however, to ascertain his contentions.<sup>47</sup>

The appointment of counsel for habeas corpus (and coram nobis) applicants would render such "endeavoring" unnecessary and be a great aid to the court in its desire to deal fairly with the issues raised. It seems preferable, too, to handle this matter of state criminal law at the state level rather than to delay until the command for counsel appears in federal court pronouncements.

The provision for counsel under L.B. 836 ambiguously reads as follows:

The district court may appoint an attorney . . . to represent the prisoners *in all proceedings under the provisions of this act* . . . .<sup>48</sup>

What remains unclear is whether counsel may be appointed to assist the prisoner in drafting and filing his "verified motion," or whether the prisoner must muddle through this stage of the procedure unrepresented and secure counsel only after he has successfully negotiated the drafting and filing himself. Advice and

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appointment of counsel except in appeals in criminal cases.'" 231 F. Supp. at 898. The district court answered: "The blanket application . . . of the proposition that . . . counsel in a habeas corpus proceeding, being a 'civil case' is not necessary . . . [impinges the] constitutional rights of the petitioner." 231 F. Supp. at 898-99. See also note 43 *supra*.

The exact meaning of the provision "proceedings under the provisions of this act shall be civil in nature" is obscure. It could cover many issues, including such items as: Right to confront witness; procedure to be applied; weight and location of burden of proof; liability for costs; and many more. Such ambiguous draftsmanship is extremely unwise from many standpoints.

<sup>47</sup> Case v. State, 177 Neb. 774, 775-76, 131 N.W.2d 191, 191-92 (1964), *vacated and remanded*, 85 Sup. Ct. 1486 (1965).

<sup>48</sup> L.B. 836, § 4, 75th Neb. Leg. Sess. (April 12, 1965). (Emphasis added.)

legal skill at the drafting and filing stage seems most critical in view of the fact that the procedure under L.B. 836 "is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state" and the provision that "the court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."<sup>49</sup> Hopefully this will not be interpreted to empower a district court to deny counsel the right to amend the "verified motion" after he has been appointed.

If the appointed attorney resides close to the court which sentenced the defendant (and this would likely be true), then the attorney often may reside hundreds of miles from his client, thus making consultation and interviewing difficult from a practical standpoint. Whether the appointed attorney will be paid from public funds for his time and expenses to travel to the penal complex to talk with his client is not resolved. If such time and expenses are not compensable, then the provision in the act empowering the district court to "entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held" seems unfair and maybe even unconstitutional by fettering the prisoner's right to consult with his attorney.<sup>50</sup>

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<sup>49</sup> Although not directly related to the right to counsel, one more observation should be made about the wisdom of the provision that the new remedy is "cumulative and . . . not . . . concurrent" with other Nebraska post-conviction remedies. For many years, Nebraska criminal procedure has been vexed by doubts about the scope of habeas corpus and coram nobis. Sixteen years ago the *Nebraska Law Review* noted that "even the legal profession finds it difficult to discover which is the proper remedy in many cases." Note, *The Judicial Obstacle Course*, 29 NEB. L. REV. 445, 449 (1950). The Note suggested that the state needed "an express and simple post-conviction procedure." *Id.* at 450. (Emphasis added.) Now, sixteen years later, we finally have a post-conviction act, but whether it is "simple" in view of its requirement that it apply only where habeas corpus and coram nobis will not lie is doubtful. The disaster of choosing the wrong writ, which disappeared in many places with the adoption of modern civil procedures, is perpetuated in an area where we should not be emphasizing procedural niceties, but instead reaching the merits of the constitutional grievance as soon as possible. The only safe and economical way for Nebraska prisoners to exhaust their state remedies is to file three proceedings concurrently, all alleging the same grievance: One labeled "habeas corpus" with the district court of the district where the applicant is held in custody, one labeled "coram nobis", and one labeled "new post-conviction remedy," the latter two being filed in the district where the applicant was convicted.

<sup>50</sup> We should also note that since the sixth amendment's right to be confronted with the witness against the accused is applicable to state

Lastly we should notice the issue of counsel for misdemeanants. That is, apart from the scope of *Gideon*, should counsel be appointed to represent indigents charged with crimes less than felonies? The Criminal Justice Act provides compensated counsel in "every criminal case in which the defendant is charged with a felony, or a misdemeanor, other than a petty offense," although the maximum compensation in misdemeanor cases is 300 dollars, not the 500 dollar figure which is applicable for felony representation.

Counsel for indigent misdemeanants is not provided by any present, or proposed, Nebraska law or court decision. Possibly a few are represented by the public defender in Douglas County, but this is on a selective basis. Across the nation "counsel is not usually provided in misdemeanor cases."<sup>51</sup> There are some variations in this practice from state to state, and even within states.

Nebraska county attorneys and judges were quizzed about whether an "ideal" system would provide counsel for misdemeanor cases. The tabulation of responses follows:

TABLE VII  
COUNSEL FOR MISDEMEANOR CASES

	"IDEAL" SYSTEM			IS IT UNFAIR TO DEFENDANT IF COUNSEL IS NOT FURNISHED?		
	Would Provide	Would not Provide	Sometimes Would Provide	Yes	No	Sometimes
Judges	2	17	1	1	16	1
County Attorneys	11	43	1	7	39	3

Handling the misdemeanor problem is a most difficult matter, even excluding issues concerning the scope of constitutional compulsion under *Gideon*. Quite frequently Nebraskans responding to the Foundation survey stated that there should be "some" representation for indigent misdemeanants, but when pressed to define the need in definite terms they were forced to resort to suggestions such as: "in serious cases," "in juvenile cases," in "special cases," "when there is a need in order to do justice," or "if the defendant

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proceedings (*Pointer v. Texas*, 85 Sup. Ct. 1065 (1965); *Douglas v. Alabama*, 85 Sup. Ct. 1074 (1965) ), a hearing which proceeds in the absence of the prisoner may well be unconstitutional in this regard, too.

<sup>51</sup> PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 36; SILVERSTEIN, DEFENSE OF THE POOR 123-35 (1965).

demands it and is not able to defend himself." One suggested that counsel should be provided if a jail sentence is imposed, but obviously this is not practical because the right to trial counsel cannot turn upon the sentence imposed after conviction. The scope of the problem also is staggering for, while we have 300,000 persons in the United States charged annually with state felonies, we have 4,500,000 persons charged with misdemeanors.<sup>52</sup> Assuming that the magnitude of the problem is affected only by the number of defendants, the financial burden of counsel for indigent misdemeanants becomes so large that no one can criticize the failure of a statute to provide blanket coverage for all misdemeanors at the present time.

### ADEQUACY OF DEFENSE AND COMPETENT COUNSEL

Many convicted defendants consider the adequacy of their defense and the competency of their counsel to be synonymous. Their facile reasoning frequently concludes that their defense failed to persuade a judge or jury because their advocate was incompetent. No doubt we could fill a thousand pages documenting instances where defendants, after conviction, turned upon their attorneys—particularly where counsel was court-appointed, and in this sense "provided" rather than "selected"—and sought freedom or a new trial by alleging their confinement resulted from "incompetent counsel."<sup>53</sup> No attorney enjoys being attacked in this fashion, even by attackers of such ilk as convicted felons, and fear of this unpleasantness plays some role in the reluctance of attorneys to look with favor upon court appointments. But notwithstanding the fallacious reasoning of convicted persons, there is a difference between an "adequate" defense and "competent" counsel, although of course the two ideas are related.

The adequacy of a fair opportunity to meet the challenge of a criminal charge may be impeded in many ways even though the accused is represented by the most zealous and competent defense counsel in the country. If counsel for the accused is appointed, or employed, too late to prepare a defense; if counsel lacks funds for "investigative, expert, or other services necessary

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<sup>52</sup> PRELIMINARY SUMMARY, *op. cit. supra* note 23, at 35-36.

<sup>53</sup> See, e.g., *Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949); Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15, 52-54 (1951). One attorney interviewed in the Foundation survey told of receiving in the mail from an inmate of the penal complex an item of wearing apparel commonly associated with locomotive engineers, evidently symbolic of the inmate's opinion that the attorney, the inmate's own defense counsel, had "engineered" his trip to the complex.

to an adequate defense;"<sup>54</sup> or if vital evidence or witnesses are unavailable for a variety of reasons; the defense may still fail to meet the standard of "adequate."<sup>55</sup> If the events, circumstances, or occurrences which hinder making an adequate defense in the foregoing sense are foreseeable and remediable by societal action through legislation or court action, there is a grave risk that the failure to foresee and remedy will result in an unconstitutional conviction. The Criminal Justice Act of 1964, as pointed out in Mr. Kutak's article, provides for "reasonable compensation" for "services other than counsel." On the other hand, existing Nebraska law does not mention public coverage of a defendant's expenses for services other than counsel. Nor does L.B. 839 expressly provide for such payment. Thus, it is appropriate to inquire whether indigents are, or will be, provided these services in Nebraska.

Nineteen attorneys assigned to represent indigents in 1962 in five Nebraska counties were asked the following question in the Foundation survey: Were you repaid for your out-of-pocket expenses? Six answered "no"; twelve answered "yes"; one reported he "did not have any."

No pattern existed within a county. For example, in Lancaster and Dodge counties some attorneys were paid their expenses and some were not. Likewise, there seemed to be no pattern judged by the crimes involved. One attorney appointed to defend an accused murderer was reimbursed for his expenses—another attorney appointed to defend a person similarly charged was not. The author knows of other instances in the state where appointed counsel were reimbursed for part, or all, of their investigation expenses. Thus, from the Foundation survey, and other information, it is evident that sometimes appointed counsel have been paid part, or all, of the expenses incurred in investigation and preparation, and that this has occurred without the aid of a statute expressly authorizing such reimbursements. Such expenses have been subsumed under the statutory language of sec-

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<sup>54</sup> Criminal Justice Act of 1964, 18 U.S.C.A. § 3006A(e) (1964).

<sup>55</sup> "The appointed lawyer must be armed with means to undertake adequate pre-trial preparation and investigation if witnesses are to be discovered, scientific aids and testimony utilized, and cross examination effectively conducted." REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 12 (1963). See EQUAL JUSTICE FOR THE ACCUSED, REPORT OF A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID ASSOCIATION 58-60 (1959).



tion 29-1803, allowing public payment of an "account, bill or claim . . . presented by an attorney . . . for . . . services . . . ."

L.B. 839 makes no specific provision for reimbursement for investigation or preparation expenses, and it refers to the sum to be received by the attorney as a "fee for services performed" and as an "account, bill or claim . . . for services performed . . . ." Since this language is so much like that of section 29-1803, district judges should continue to possess power under the new statute to award sums for investigation and other expenses.

Several arguments support handling this matter in the manner employed by the Criminal Justice Act—that is, by expressly authorizing such expenditures. First, it assures uniform handling of the matter for all defendants, and in all state courts, and eliminates the patchwork of practice which varies from defendant to defendant, from judge to judge, and from court to court within the state. Second, it provides some guidelines for lawyers and judges to define what expenditures would be paid from public funds. The Criminal Justice Act has three built-in protections against unreasonable defense expenditures. First, the statute requires that the services be "necessary to an adequate defense." Second, the statute ordinarily requires court authorization as a prerequisite to public financial contribution. Finally, the statute directs that the compensation for "services" (as distinguished from "reimbursement" for expenses) shall be judicially established as "reasonable" and subject to a 300 dollar ceiling. The ceiling seems unduly restrictive, because the requirement that the compensation for services shall be "reasonable" adequately protects public funds. Elimination of the ceiling on compensation for "services" likewise would render unnecessary any fine distinction concerning what constitutes a "service rendered" and what is an "expense incurred."<sup>56</sup>

Any scheme to reimburse investigative expenses, whether it be a statute expressly providing for their payment as under the Criminal Justice Act or the current Nebraska method which leaves the issue to judges for decision without statutory aid, faces an important issue of administration in segregating those expenses which are "necessary" from those which are "unnecessary" for an adequate defense. The Criminal Justice Act is too new to throw light on what federal judges think is "necessary"

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<sup>56</sup> The Criminal Justice Act, in providing reimbursement for the attorney's expenses plus a fee with a ceiling (\$500 in felony cases), will require some fine distinctions, too, as to what expenses are "covered" in a fee payment. See REPORT, *op. cit. supra* note 22.

for an adequate defense. Some Nebraska cases have come to the author's attention, outside the Foundation survey, where Nebraska state judges made the issue of reimbursement turn on whether any evidence usable to the defendant was secured by the expenditure, or, in other instances, whether the defense actually used at the trial evidence secured by the expenditure. Such a test is unrealistic and unduly restrictive. It encourages trial counsel to explore only those avenues of inquiry which he can foresee will prove fruitful, when every attorney knows that a good lawyer-like job of investigation often entails turning many stones, some yielding nothing usable for the defense. Likewise, perfectly legal defense strategy may be impeded by a rule which requires evidence turned up in an investigation to be used before reimbursement will be forthcoming. Much more preferable would be a rule which authorizes public payment for any investigation which would be undertaken by a diligent attorney proceeding in a lawyerlike way to prepare a defense for his client, and permits a judge to approve the expense upon finding that the proposed search appeared to be reasonably necessary for this purpose.

Failure to provide these expenses from the public purse means either (1) a grave risk that the conviction of an indigent defendant denied these investigative expenses is unconstitutional under the fourteenth amendment,<sup>57</sup> or (2) that his attorney will furnish the funds for such investigation and thus subsidize the adequate representation of an indigent.

Important as services other than counsel are to an adequate defense, they are secondary to the fact that an adequate defense rests primarily upon a single person, the defense counsel. Across the country the evidence is mounting that the competency of this key individual is becoming a matter of prime concern. Thus, the public was recently admonished by Dean Griswold of the Harvard Law School on nationwide television that all too frequently the lawyer appointed to represent an indigent secures the appointment because he has nothing else to do, and that the appointee has nothing to do because paying clients judge him incompetent to represent them. Professor James Vorenberg, director of the newly formed Office of Criminal Justice, recently spoke as follows:

[T]he most basic problem . . . is the vital need for improving the quality of the criminal bar. Criminal law has too long been the poor and not quite respectable cousin in the legal family; too many

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<sup>57</sup> The rationale of *Griffin v. Illinois*, 351 U.S. 12 (1956), casts doubt upon the validity of such a conviction.

criminal lawyers are the outcasts, the failures, the unscrupulous and the incompetent of the legal world. Venal and self-seeking practices, ignorance and neglect make mockeries of the rights which it is the duty of the lawyer to protect.<sup>58</sup>

Even if we discount these gloomy comments at a substantial rate, they still admonish us to watch what is going on in the day-to-day appointment of defense counsel.<sup>59</sup> Thus, a prime object of the Foundation survey of Nebraska representation of indigents was to ascertain facts concerning the experience and ability of the attorneys being appointed.

Twenty-two attorneys appointed in 1962 to represent indigents in four selected counties (Dodge, Hall, Lancaster and Cheyenne) were surveyed. These appointees represented felons charged with crimes ranging from assault to murder. Ten appointees had been admitted to the bar nine years or less; eleven had been admitted ten years or more. One appointee who defended a charge of carrying a concealed weapon had been admitted only one year; two appointees (one in a forgery case and the other in an assault case) had been admitted two years. On the other hand, the three lawyers appointed to represent two persons charged with murder and one charged with rape were each at least ten-year veterans of the practice of law. Every appointee had handled at least one criminal case prior to his appointment; ten had handled three or more criminal cases before their appointment. This would indicate that Nebraska appointments are not as subject to the criticism that the appointees are "often young attorneys who lack experience in criminal law"<sup>60</sup> as is true in other states surveyed in the Foundation project.

Length of time at the bar and involvement in prior criminal cases are not guarantees, nor sometimes maybe even very good gauges, of the competency of appointees. In this age of rapidly changing precedent, particularly at the federal constitutional level, and the enactment of hundreds of laws with each session of the legislatures, competency depends not only upon experience and age, but upon counsel's desire and ability to keep pace with change. The Foundation survey in Nebraska sought the opinions

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<sup>58</sup> Address by Professor James Vorenberg, Director of the Office of Criminal Justice, Governor's Conference on Bail and the Right to Counsel, Jan. 23, 1965, in *HARV. L.S. BULL.*, March 1965, p. 5, 7. See also *Time*, June 11, 1965, p. 60.

<sup>59</sup> See Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 *HARV. L. REV.* 1434 (1965); Note, *Effective Assistance of Counsel*, 49 *VA. L. REV.* 1531 (1963).

<sup>60</sup> *PRELIMINARY SUMMARY*, *op. cit. supra* note 23, at 7.

of the judges of the state district courts about how appointees compared in experience and ability with retained defense counsel and with the county attorney. And all the state's county attorneys were asked their opinions about the experience and ability of appointed counsel as compared to retained counsel.

Sixteen judicial replies compared appointed counsel with retained counsel. Eleven rated them as "equal"; one "about equal"; two as "favorable"; one as "O.K."; and one stated appointed counsel were "not as experienced." Seventeen judicial replies compared the appointees with the county attorney. Ten considered them "equal"; one stated the comparison was "O.K."; one rated the appointees "equal or better"; three rated the appointees as "better" or "more able" than the county attorney; one rated the appointees "not as good"; and one ranked the county attorney as "better." The value of a comparison between the county attorney and appointees to test the ability of the latter may prove little in view of the comment by one judge that his appointments were "superior to the district attorney . . . [and that the] district attorney is usually the least able member of the bar," and several other judicial comments that the county attorney was usually "young" and often "not too experienced in criminal law."

Fifty-one county attorneys rated the appointed counsel against retained counsel. Forty-two rated them as "equal" in ability and experience and one rated appointees as "equal or better." Three rated appointed counsel as better and a like number considered appointed counsel "not equal." One county attorney stated that the comparison "varied" and another that "sometimes" there was equality. This evidence indicates that the Nebraska appointive system is working fairly well.

Since the selection of the person for appointment rests with the judge (and this is also true under the Criminal Justice Act), he will play an important role in securing competent counsel. Neither the Criminal Justice Act, the existing Nebraska statutory law, nor the recently enacted L.B. 839 contains any provision establishing a method of judicial selection. Suggested federal district court plans to implement the federal law use a panel of "competent" attorneys, usually made up of names suggested by legal aid agencies, bar associations, and the federal district judges.<sup>61</sup> To date, the judges of the state district courts have not used this technique. The Foundation survey asked Nebraska

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<sup>61</sup> See some of the suggested plans in *REPORT, op. cit. supra* note 22, Appendix 2.

judges what system they employed to obtain attorneys for appointments. Fifteen replies were received. Eight judges stated they used a "roster of all attorneys admitted to practice, subject to exceptions for age, infirmity, state agency employment, etc." Four replied they used "their own list" but did not explain how they constructed the list. One judge stated that he needed no lists because he knew every lawyer in his district personally. Obviously, the method of selecting appointees will vary from district to district within the state because of widely varying conditions, particularly with regard to population.

The survey also showed that many state district judges are aware of the desirability of spreading the workload over many lawyers in order that the representation of indigents not burden a few attorneys. Since L.B. 839 has eliminated the ceiling upon the attorney's fee, the necessity of "passing the burden around" may be eased somewhat. Although the survey did not turn up any complaints on behalf of attorneys that they suffered under a cumulative burden of federal and state appointments, this might occur in counties where an unfortunate attorney, extremely competent and zealous in criminal defenses, would find his name upon a federal "panel" and also a state judge's "list."<sup>62</sup> Some federal-state cooperation in this regard, administered by a bar association committee, might be a wise solution to this problem if it occurs.

State district judges have found very little difficulty in securing attorneys to serve by appointment. Thirteen answers stated that no difficulty was encountered. Four reported they experienced some difficulty, especially in capital punishment cases. Six replies listed "never" or "rare" in answer to the query: What per cent ask to be excused? Five answered the same question with figures less than ten per cent; three estimated the figure to be between ten and twenty-nine per cent; and one judge set the figure at between thirty and forty-nine per cent (if he included capital punishment cases). The vast majority of judges who answered the survey questionnaire excuse an attorney if he "has a good reason." Several judges noted they considered it unfair to the defendant to assign him counsel unwilling to serve; but one judge stated he would not excuse a lawyer unless the case involved the possibility of capital punishment. Several judges frankly admitted that, when they thought the excuse frivolous, they had a "heart to heart" talk with the attorney asking to be

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<sup>62</sup> This has occurred elsewhere. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF AD HOC COMMITTEE ON REPRESENTATION OF INDIGENT DEFENDANTS ACCUSED OF CRIME IN THE UNITED STATES COURTS.

excused, "lectured" him on "his duty as an officer of the court," and if the lawyer then persisted in his request, either gave him one more chance to serve in another case at a later date or immediately made a mental note to pass over the attorney when considering lawyers for jobs as "referees, etc." It is quite clear that Nebraska judges do not look with favor upon requests to be excused. This stern judicial attitude is commendable. Without it the appointive system would no doubt flounder.<sup>63</sup>

Appointments to represent those charged with heinous crimes and to defend persons holding unpopular views remain troublesome, and several judges indicated problems in securing attorneys to serve in these instances. Some of the reluctance of attorneys to serve in these cases arises because they fear the attitude of the general public toward their role in representing such clients. Solid bar support of the duty to serve in such cases and education of the general public in this regard would do much to eliminate problems in this area.<sup>64</sup> If the crime charged involves a long prison sentence or death as punishment, the survey showed Nebraska judges take more care in considering their appointments. This extra care takes various forms, such as appointing two counsel or appointing more experienced, older, more "adequate," or "more competent" counsel.<sup>65</sup>

### CONCLUSION

Criticism and suggestions for additional improvements contained in the foregoing discussion cannot, and should not, obscure the fact that progress has been made in the areas touched upon in

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<sup>63</sup> The judicial attitude also affects the "adequacy" or "competency" (in short, the quality) of representation. By emphasizing the "duty to the court" aspect of bar membership, judges buttress the attorney's devotion to his client's cause, and the end result is more careful investigation and preparation, both as to law and facts. This devotion is particularly important and in greater need of support in cases of criminal defendants charged with crimes which arouse great public indignation. See SACKS, *DEFENDING THE UNPOPULAR CLIENT* (1961).

<sup>64</sup> Many bar associations publicly take stands strongly supporting the right of an unpopular person charged with crime to have counsel, and the duty of bar members to represent the charged individual with skill and devotion. See SACKS, *op. cit. supra* note 63, at 24. While we have few criminal cases in Nebraska of this type, some have occurred in the past and the chance for the bar to educate the public and support the appointee went unused.

<sup>65</sup> The quoted words were those of Nebraska district court judges, and their use demonstrates that the judges do not consider bar members fungible.

this article. Progress in the area of counsel for indigents has been made on the state and federal levels, and the right to due process and equal protection of the law are more meaningful today than at any previous time in the history of the United States. The Federal Criminal Justice Act, the enactment of L.B. 839 and L.B. 836 are shining examples compared to criminal procedures a century ago. Chafe and dissatisfaction stem only from the slowness of the pace of change, the incompleteness of handling problems, and the source and strength of pressures needed to generate changes. And maybe the evolutionary pace is normal in view of the slowness of growth in law generally and considering that, in the particular area under discussion, the individuals whose rights are involved cannot vote, have no organized pressure group to sponsor their complaints, possess no funds to hire advocates and draftsmen, and are considered by many to be entitled to less attention and resources than they now receive.<sup>66</sup>

But one cannot help but regret that the pressure inducing the changes has not generally emanated from the "grass roots," nor from the halls of the state legislatures or the offices of the states' chief executives, nor usually, initially, from the conferences and opinions of state judiciaries. It has come about primarily because of prodding from the Supreme Court of the United States, and we might say to Nebraska, and some other states too, what that Court said to our sister state, Iowa:

[I]t . . . [ill-behooves] this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrongs: "Go to the federal court."<sup>67</sup>

It is time for Nebraska, and the other states, to tend to the states' business of handling criminal matters with efficiency, dispatch, and fairness, and in keeping with the trend and tone of decisions from *Betts*, through *Gideon*, and on to whatever lies beyond *Escobedo*. It is time for Nebraska to secure these aims by recognizing and extending the right to counsel beyond those areas now covered and by ridding state criminal procedures of

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<sup>66</sup> See, e.g., the attitude of a newspaper on the issue of using public funds to support a defender organization which at the time was defending a person accused of shooting a policeman, in *EQUAL JUSTICE FOR THE ACCUSED*, *op. cit. supra* note 55, at 139, n.11: "It certainly should not be a function of the Red Feather. Contributors to this laudable agency of mercy don't give to help hoodlums like those who shot Officer Connolly, even on the civil rights dodge."

<sup>67</sup> *Smith v. Bennett*, 365 U.S. 708, 713 (1961).

the uncertainties which mildly perplex lawyers, but entirely confound the unrepresented.

Very shortly after Nebraska became a state its lawmakers designed a Great Seal for the new polity, and emblazed upon that seal "in capital letters, the motto, 'EQUALITY BEFORE THE LAW'."<sup>68</sup> Certainly those draftsmen who verbalized such a noble ideal envisioned a more important future for it than serving merely as the adornment of state papers, the subject of commencement addresses, and a concept to praise at Law Day observances. The concept has been growing. It remains for Nebraskans to mature it to a point where Nebraska law "weighs the interests of rich and poor criminals in equal scale, and [extends] . . . its hand . . . as far to each."<sup>69</sup>

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<sup>68</sup> Neb. Laws 1867, § 1, at 57; NEB. REV. STAT. § 84-501 (Reissue 1958).

<sup>69</sup> Smith v. Bennett, 365 U.S. 708, 714 (1961).





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