THIRTY-FIVE YEARS AFTER GIDEON: THE ILLUSORY RIGHT TO COUNSEL AT BAIL PROCEEDINGS

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Sixty-six years ago in Powell v. Alabama, the Supreme Court declared that the pretrial stage from arraignment until trial was "the most critical period" for investigating criminal charges, preparing a defense, and consulting with an attorney. Yet, throughout the country, a majority of states and localities do not provide counsel for indigent defendants when they first appear for a judicial bail determination and for a lengthy period thereafter during the crucial pretrial stage. In this article, Professor Colbert argues that the constitutional right to counsel should apply to bail proceedings to protect an individual's liberty and right to defend against a criminal accusation.

Professor Colbert begins by describing the results of a national survey he conducted, which indicates that, in most jurisdictions, an accused should not expect legal representation when first brought to court before a judicial officer, who decides whether to order pretrial release or bail. He goes on to explain the crucial importance of representation by counsel at the bail determination and provides a Sixth and Fourteenth Amendment analysis for guaranteeing the right to counsel. Moreover, Professor Colbert discusses why jurisdictions are mistakenly applying the constitutional doctrine and denying counsel to indigents at the bail stage, and for many days, weeks, or months thereafter. The author then offers an economic justification for providing counsel by describing the substantial cost savings that would result from representation for bail purposes. Professor Colbert contends that lawyers' early intervention would significantly reduce court congestion and overcrowded jails, thus lowering the public expense for maintaining an un-

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necessarily large pretrial jail population. He concludes by asserting that the professional responsibilities of lawyers, judges, and the legal profession as a whole require that they advocate for representation by counsel at this initial stage of a criminal proceeding.

I. Introduction

[T]he most critical period of the proceedings . . . [is] from the time of . . . arraignment until the beginning of . . . trial, when consultation, thorough-going investigation and preparation [are] vitally important . . . . 1

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. 2

In most state courts in our country, however, the right to counsel is meaningless when it comes to a critical moment in a criminal case: the initial bail proceeding. Consider the following scenario:

You are accused of a crime. You cannot afford a lawyer, but, having watched television, you expect a court-appointed lawyer will represent you at the initial appearance before a judge. First, you need the lawyer's help to obtain release from jail; your family and boss depend on you. Second, there are witnesses who must be interviewed right away.

After waiting in jail for nearly a day, 3 you are brought to a different part of the facility for a bail hearing. You look for your court-appointed lawyer, but find you are alone. The commissioner 4 asks some questions, reads the charges, and then sets bail beyond your means. When you ask about a lawyer, the commissioner says you will be assigned one later on, but first a real judge will review the bail conditions. 5

You remain hopeful. The next day, a judge hears your plea for a lower bail. You speak from a jail cell while the proceeding is broadcast through closed circuit television to the judge's courtroom. Once again,

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3. The scenario is typical of the experience the accused faces in local courts which do not provide court-appointed counsel. In Baltimore, where the author is a clinical law professor, incarcerated indigents are first brought before a commissioner in Baltimore's new centralized booking center, which combines arrest and bail procedures into one facility. See Michael Janofsky, Baltimore Opening High-Tech Central Booking Center, N.Y. TIMES, Nov. 23, 1995, at B16.
4. Following arrest, virtually every defendant's first appearance is before a judicial officer, who may be a judge, a magistrate, or a commissioner. In Maryland, the commissioner is usually a nonlawyer who graduated college and is appointed by the chief judge of the lower district court. The commissioner is responsible for informing the accused of the charges and procedural rights, determining probable cause, and setting bail. See Md. R. 4-213(a).
5. For example, under Maryland law, a bail review must be conducted immediately by a district court judge after the commissioner denies pretrial release or where the defendant for any reason remains in custody for 24 hours after a commissioner has determined conditions of release. See Md. R. 4-216(g).
you are on your own and without a lawyer. You tell the judge about your family and your job. The judge says the bail is reasonable. You remain in jail, without a lawyer, until your next court appearance, thirty days later.\(^6\)

Because you are unable to afford a lawyer, you apply for public defender representation. You qualify, but do not meet your lawyer until your next court date arrives, thirty days later.\(^7\) In court, your lawyer speaks to you briefly and suggests that you seriously consider the prosecutor's "deal"\(^8\) or seek a further postponement.

It is a scene repeated over and over again in local criminal courts across the country. Unlike the federal system, which guarantees appointed counsel at the initial court appearance when bail is determined,\(^9\) most state systems fail to provide legal representation at a bail proceeding. This failure persists despite the critical importance of the judge's decision to free or detain criminal defendants pending trial. After the judicial officer fixes bail,\(^10\) the unrepresented criminal de-

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6. In Baltimore, cases of incarcerated defendants are usually postponed for 30 days. In speaking with public defenders and practicing lawyers from other jurisdictions, the length of delay before an accused meets with counsel ranges from two days to two months. See infra notes 48-50 and accompanying text. National statistics indicate that one out of three incarcerated defendants waits more than two weeks following arrest before speaking with court-assigned counsel. See Steven K. Smith & Carol J. DeFrancis, U.S. Dep't of Justice, Bureau of Justice Statistics Selected Findings, Indigent Defense tbl.7 (Feb. 1996).

7. A paralegal from the Baltimore Public Defender's office interviews incarcerated people shortly after their arrest to determine financial eligibility. Once found eligible, incarcerated prisoners may call the Public Defender's office after 3 p.m. and speak to an available lawyer, although not necessarily the lawyer who will eventually represent them in court. Resource limitations prevent the Public Defender from representing an accused at bail. Interviews with Baltimore Public Defenders (Fall 1996).

8. The professional code of ethics requires lawyers to conduct a thorough factual investigation to enable their clients to make an informed plea bargaining decision. See Standards for Criminal Justice Standard 4-6.1(b) (2d ed. 1980) ("Under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed . . . ."). While aware of this requirement, most lawyers are also interested in exploring whether a case may be resolved favorably at the court appearance following bail. To the lawyer, a good deal may be the prosecutor's agreement to reduce a felony charge or recommend a lighter sentence. Defendants may view the proposal quite differently. They are, after all, asked to trust someone they have never seen or spoken to before, and who usually has done little to prepare a defense against the charge.

Professor Richard Klein has written extensively about defendants' ethical considerations while representing accused indigens. See, e.g., Richard Klein, Court-Induced Ineffective Assistance of Counsel: The Failure of the Judiciary to Safeguard the Defendant's Right to a Fair Trial, 1 Crim. Prac. L. Rev. 517 (1989); Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625 (1986).

9. See Fed. R. Crim. P. 44(a) ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment.").

10. When an accused is without counsel, the bail decision is strongly influenced by a state's attorney's recommendation. In the absence of a prosecutor and a statutory bail schedule, see infra note 51, the judicial officer sets bail by considering the charge, the accused's prior record, and his roots in the community. See, e.g., Md. R. 4-216(f). Judicial officers are under great pressure to set high bail. When they show compassion, they often face public criticism or even
fendant frequently becomes just another body in a pretrial prison system bursting at its seams with poor people awaiting trial. 11

This article focuses upon the accused’s initial appearance 12 in the lower criminal court, where virtually everyone arrested on felony or misdemeanor charges is first brought for a bail determination, but where most are unrepresented. In a majority of localities, the incarcerated indigent defendant will not see an attorney for days, weeks, or months following the bail decision. 13 Justice Scalia vividly described the predicament the unrepresented accused faces after being charged with a crime and entering the system’s maze:

Hereinafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle . . . never once given the opportunity to [have his] 14 counsel] show a judge that there is absolutely no reason to hold him, that a mistake has been made. 15

the loss of their job. For example, after police criticism, the chief judge of the District Court of Maryland summarily fired a veteran judicial commissioner for having released on recognizance a first-time offender who had been charged with felony drug possession. See Peter Hermann, Judge Fires Official for Releasing Suspect, BALTIMORE SUN, Dec. 8, 1995, at 1C.

11. Pretrial detainees are housed in local jails. In 1995, the United States Department of Justice indicated that these jails held slightly over one-half million people. See DARRELL K. GILLARD & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISON AND JAIL INMATES 1995, at 2 (Aug. 1996). Although a fraction were awaiting transfer to other institutions or were serving local sentences, id., this statistic provides a rough estimate of the total pretrial detainee population. Because of overcrowding, many local jails are subject to court monitoring. See generally Kim Taylor-Thompson, Individual Actor v. Institutional Player: Alternating Visions of the Public Defender, 84 GEO. L.J. 2419, 2431-32 (1996); Pamela M. Rosenblatt, Note, The Dilemma of Overcrowding in the Nation’s Prisons: What Are Constitutional Conditions and What Can Be Done?, 8 N.Y.L. SCH. J. HUM. RTS. 489 (1991); Fox Butterfield, Slower Growth in Number of Prisoners, N.Y. TIMES, Jan. 20, 1997, at A10 (referring to 12 states where judges’ orders reduced the prison population).

12. In this article, I use the term “initial appearance” interchangeably with “initial bail hearing.” Each refers to the right to counsel for an accused who is still in custody when first appearing in a judicial proceeding before a judicial officer. See generally supra note 4. Localities may refer to this initial appearance as a first appearance, an arraignment on the warrant, or an initial presentment. See WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.4(h), at 23 (2d ed. 1992). The distinction between lower and upper court arraignment is significant. When indicted and arraigned on a felony in a state’s upper criminal court, an accused’s right to counsel is clearly established. See, e.g., Hamilton v. Alabama, 368 U.S. 52 (1961).

This article recognizes that state bail-setting practices vary. Some localities are unable to provide counsel at the initial determination because of transportation and logistical difficulties, and guarantee counsel at a bail review which is held within the following 24 hours. See infra notes 35, 215-16 and accompanying text. Under this article’s constitutional analysis, such a guarantee would satisfy the jurisdiction’s right-to-counsel obligation. Finally, the article’s right-to-counsel analysis would not apply at an informal initial bail determination, such as at the police station house, where an officer may release an accused subject to a fixed bail schedule or at the officer’s discretion. See MARY A. TOBORG, NATIONAL INST. OF JUSTICE, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 6-18 (1981), reprinted in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 861 (8th ed. 1994).


14. Because the overwhelming percentage of criminal defendants are male, the masculine pronoun is used when referring to the accused. In order to provide contrast, the feminine pronoun describes an accused’s attorney.

Justice Scalia was dissenting in *County of Riverside v. McLaughlin*, which held that it was constitutional to compel a "presumptively innocent"\(^{16}\) incarcerated defendant to wait two days before appearing for a judicial probable cause determination. Justice Scalia's impassioned plea clearly resonates when considering criminal defendants who remain in jail, without counsel, for considerably longer periods.

Most people are skeptical when told that individuals are unrepresented when first appearing for a judicial bail determination. They are familiar with the *Miranda*\(^ {17}\) rule, and picture the accused being deprived of counsel in some other country's criminal justice system—but not in the United States, not in cities such as Baltimore, Buffalo, Charleston, Dallas, Denver, Detroit, Pittsburgh, and Phoenix.\(^ {18}\) Yet, most state courts decline to provide poor people with a lawyer during the first stage of a criminal case when her presence truly matters: at the initial bail determination.\(^ {19}\) More than sixty years ago in *Powell v. Alabama*,\(^ {20}\) the Supreme Court acknowledged this reality when it declared that an accused's trial right to counsel included the "most critical" pretrial stage, that being "from . . . arraignment until the beginning of . . . trial."\(^ {21}\) However, there is no explicit constitutional ruling that *Powell*'s reasoning applies to the first appearance in the lower criminal court where bail is usually determined. Thus, each state is left to interpret the moment when an accused receives counsel.

This article argues that an accused's constitutional right to counsel should be extended to his initial judicial bail proceeding. Indeed, absent counsel's immediate involvement and representation, an accused's Sixth\(^ {22}\) and Fourteenth\(^ {23}\) Amendments right to assistance for trial is illusory. This is true for several reasons. First, a lawyer's intervention at bail is crucial for obtaining the defendant's release and for

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16. See id.
17. Miranda v. Arizona, 384 U.S. 436 (1966). Popular culture has made most people aware of the Supreme Court's decision in *Miranda*, which requires law enforcement officials to inform an arrested individual of his right to consult with a lawyer and to be assigned a court-appointed attorney if unable to afford one. *Miranda*, however, is a Fifth Amendment decision which provides for a lawyer during police questioning, and not for initial appearances in court. See *id.* at 469-73. An accused has no Sixth Amendment right to meet with a lawyer following arrest. See United States v. Gouveia, 467 U.S. 180, 190 (1984).
18. These are representative localities which do not provide counsel for indigent defendants when they first appear in court for bail purposes. In rural and less populated communities, the accused is even more unlikely to be represented. See infra Part II, which analyzes responses from public defenders concerning representation at the bail stage and the extent of delay before an accused meets with court-appointed counsel.
19. See infra Appendix, Table B.
20. 287 U.S. 45 (1932).
21. *Id.* at 57. In *Powell*, the defendants first appeared in court for arraignment on a felony indictment. See infra Part IV.A.
22. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.
23. See generally Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel applies to the states through the 14th Amendment Due Process Clause).
protecting his due process right against an unreasonable denial of liberty during pretrial detention. Lack of representation at the bail stage results in many accused individuals spending substantial time in jail on charges that are later dismissed, not prosecuted, or reduced. At the same time, pretrial incarceration has a severe and often irreversible impact on employment and family relationships.

Second, a lawyer’s representation at the bail proceeding is necessary to preserve the accused’s fair trial rights throughout the pretrial period. The lawyer’s immediate involvement is essential for initiating a timely, thorough investigation and for preparing a meaningful defense. The immediate postarrest period is critical for locating and interviewing witnesses. Counsel’s ethical duty requires that she act promptly in conducting legal research, filing motions, and assessing the case. When court-appointed lawyers are not promptly assigned, many defendants are denied their right to a fair trial. Faced with the choice of being defended by an unprepared lawyer, many opt to plead guilty. They lack confidence in their attorney and fear a longer sentence if convicted of a more serious charge. Thus, pretrial incarceration increases the likelihood that detainees will be convicted and receive a harsher punishment than defendants who were released on bail.

24. See infra note 230.

25. “Many important rights of the accused can be protected and preserved only by prompt legal action.” Standards for Criminal Justice Standard 4-3.6 (2d ed. 1980). The lawyer must consider several motions at the outset of representation, including a motion to dismiss. Id. Standard 4-6.1 also commands that the lawyer promptly investigate a case in order to explore a diversionary, nonjail sentence. See supra note 8. While not minimizing the reality of the overburdened public defender, at least some represented defendants will benefit from their lawyers’ pretrial investigation. See Richard Klein, Court Induced Ineffective Assistance of Counsel: The Failure of the Judiciary to Safeguard the Defendant’s Right to a Fair Trial, 1 CRIM. PRAC. L. REV. 517, 523-27 (1989) (discussing the National Legal Aid and Defenders Association’s proposed standard in which defenders would not represent more than 150 felonies, or 400 misdemeanors, annually). Most public defenders’ caseloads far exceed this limit. See Harold H. Chen, Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis, 45 DUKE L.J. 783, 787 (1996); Klein, supra, at 524 n.27.


27. The American Bar Association Standards Relating to Pretrial Release and studies conducted in Philadelphia, New York, and Washington, D.C., demonstrated the “strong relationship between detention and unfavorable disposition.” State v. Fann, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990) (quoting Standards Relating to Pretrial Release Introduction at 3 (1968)). Earlier studies revealed that incarcerated defendants were much more likely to be convicted and to receive sentences two or three times greater than individuals who were released pending trial. Id. at 1026; see also Ronald Goldfarb, Ransom: A Critique of the American Bail System 36-40 (1965); Charles Ayres et al., The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, 38 N.Y.U. L. REV. 67 (1963); Caleb Foote, The Coming Constitutional Crisis in Bail (pt. 1), 113 U. PA. L. REV. 959, 960 (1965); Caleb Foote, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. PA. L. REV. 1031, 1052 (1954) (comparing defendants charged with violent crimes; 67% of released defendants, and 25% of jailed defendants, were acquitted); Anne Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. REV. 641 (1964) (stating that 64% of defendants jailed received prison sentence com-
This article explores the constitutional basis for extending an accused’s right to counsel to bail. Part II describes the current practice in which most states and localities deny indigent defendants counsel at the initial bail hearing. Based upon responses from public defenders and experienced practitioners in the various states, I conclude that it is the exceptional jurisdiction which guarantees counsel when bail is set. Moreover, significant delay in assigning court-appointed counsel thereafter exacerbates the due process concerns and seriousness of states’ denying counsel at the initial appearance.

Part III discusses the importance of counsel’s presence at the initial appearance where bail is set. First, I describe the liberty and due process interests at risk when an accused is deprived of freedom prior to trial and explain the lawyer’s influential role when arguing for pretrial release. Second, I apply the Supreme Court’s rationale for extending the right to counsel to a preliminary hearing to the initial bail hearing. Because preliminary hearings are rarely held in felonies, and usually do not apply in misdemeanors, the bail proceeding often is the critical opportunity for lawyers to meet with incarcerated defendants after arrest and begin engaging in meaningful “consultation, thorough-going investigation and preparation.”

Part IV reviews Supreme Court decisions which established the right to counsel as a fundamental trial and pretrial right. For most of this country’s history, there was no constitutional right to counsel for people unable to pay for an attorney. African Americans’ struggle for equality provides the historical backdrop for the Supreme Court’s recognition in 1963 of the indigent defendant’s Sixth and Fourteenth Amendments right to court-appointed counsel in felonies and later in misdemeanors where a jail sentence was imposed. Later Supreme Court rulings recognized that the right to assigned counsel also applied to pretrial stages of lower court proceedings considered “criti-

pared to 17% who were released). But cf. Gerald R. Wheeler & Carol L. Wheeler, Bail Reform in the 1980s: A Response to the Critics, 18 CRIM. L. BULL. 228 (stating that a causal relationship between detention and conviction may be statistically insignificant). In general, jailed defendants will find it more difficult to prepare a successful defense and are more likely to plead guilty the longer they await trial in jail. See John S. Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American Justice 84-85 (1979) (reporting on a Washington, D.C. study by David McCarthy and Jeanne Wahl).

28. See LaFave & Israel, supra note 12, § 1.4(i), at 24. Felonies prosecuted in the upper criminal court may result in even longer delays. Though an accused is entitled to representation at a preliminary felony hearing, see Coleman v. Alabama, 399 U.S. 1 (1970), prosecutors often bypass such a proceeding by presenting evidence directly to a grand jury. Consequently, in many jurisdictions the actual right to a court-appointed lawyer’s assistance may not commence until arraignment after indictment. This prevents defense lawyers from intervening until indigent defendants have spent lengthy periods in detention throughout the lower court proceedings.

cal."32 However, in *Gerstein v. Pugh*,33 the Court declined to extend the right to counsel to the judicial probable cause determination, based upon a Fourth Amendment reasonableness analysis. Following the *Gerstein* decision, many state practices simply combined bail with the probable cause determination, thereby eliminating the lawyer’s presence at the initial judicial proceeding. Part V, then, reviews the few reported state court cases which have considered a state constitutional right to counsel at the bail stage and suggests that local practices which deny representation are ripe for challenge under a state’s constitution.

Part VI provides an economic justification for legal representation during the initial judicial bail proceeding. The social and economic costs of maintaining a burgeoning pretrial prison population, and the potential savings that would result from a defense lawyer’s early participation and involvement in criminal cases, are considered. From a practical perspective, legislators concerned with fiscal austerity could justify these additional costs of representation based on the savings to be realized by releasing unfairly detained prisoners.

Part VII examines the ethical responsibility of defense lawyers, prosecutors, judges, and the legal profession to ensure that indigent persons are represented at the initial bail proceeding. I conclude by highlighting each group’s common interest in speaking against the overflow of prisoners held in pretrial detention and in lobbying for additional funding, particularly for public defenders, to staff the bail court.

II. LOCAL PRACTICES IN PROVIDING COURT-APPOINTED COUNSEL FOR THE INITIAL BAIL APPEARANCE

Throughout the United States, indigent defendants should not expect legal representation when they first appear for bail before a judicial officer. Research findings34 indicate that there is a widespread failure to recognize the right to counsel at this stage; only eight states

32. The Court’s Sixth Amendment critical stage analysis identified two criteria for requiring counsel’s presence: “whether potential substantial prejudice to the defendant’s rights inheres in the particular confrontation” and whether counsel can “help avoid that prejudice.” *Wade v. United States*, 388 U.S. 218, 227 (1967) (holding a postindictment lineup to be a critical stage); *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that a felony preliminary hearing met the critical stage standard). In *United States v. Ash*, 413 U.S. 300, 309 (1973), the Court’s critical stage analysis focused upon whether the pretrial proceeding confronted an unrepresented defendant with the “intricacies of the law and the advocacy of the public prosecutor.”


34. I was unable to locate articles which provided a national picture of whether states are affording an accused counsel at the bail determination. In an effort to obtain this information, I mailed the following questionnaire to public defenders or their equivalent in all 50 states:

(1) Are indigent defendants represented by court-appointed counsel at the initial court appearance when bail is set?

(2) In your jurisdiction, are court-appointed counsel primarily (a) Public defenders or legal aid lawyers; (b) Private panel attorneys; or (c) Other?
and the District of Columbia guarantee that an accused has the assistance of counsel. Moreover, the practice of assigning counsel varies widely between, and within, states. From the available data, there emerges a striking lack of uniformity—locally, regionally, and nationally.

For example, while Florida’s statute provides legal representation at the initial bail determination, other southern states do not. In the mid-Atlantic region, only Delaware guarantees counsel, in most of neighboring New Jersey or Pennsylvania, the accused is unrep-
represented when first appearing for bail. The same pattern appears in the Midwest, the Rocky Mountain states, and the Far West. Only Wisconsin, North Dakota, and California follow the Federal Rule and provide for the right to a lawyer at the bail hearing. In short, nonassignment of counsel at the initial appearance is commonplace throughout the nation. Beyond the eight states that provide an accused with counsel at the bail-setting stage, the remaining states in-

represent the accused when bail is first determined. Telephone Interview with Yvonne Smith Segars, Essex County Public Defender (Aug. 1, 1996). In other New Jersey localities, such as Camden, Mt. Holly, Cape May, and Trenton, the accused is unrepresented. See infra Appendix, Table B. Philadelphia is the only jurisdiction in Pennsylvania where the accused is represented for bail. Public defenders there staff the courthouse 24 hours daily. Telephone Interview by Alan Wagman with John Packel, Public Defender (Mar. 1995). The accused is unrepresented in Pennsylvania courtrooms in Pittsburgh, Montgomery County, York, Wilkes-Barre, and Scranton. Telephone Interview by Alan Wagman with John O’Rourke, Montgomery County Bail Director (Apr. 1995); Telephone Interviews with anonymous public defenders. See infra Appendix, Table B.

39. Wisconsin provides a statutory right to counsel at the bail proceeding. The public defender is charged with making an indigency determination “as soon as practical” after detention or arrest, and then represents eligible defendants when bail is set. Wis. Stat. Ann. §§ 967.06, 970.02 (West 1985). Although Minnesota does not provide for a statutory right to counsel, see Minn. R. Crim. P. 5.01(b), the executive director of the public defender’s office indicated that his lawyers currently provide representation for bail in two-thirds of the state, and he hopes to extend representation to every county. Telephone Interview by Carrie Ricci-Smith with John Stuart, Executive Director, Minnesota Public Defender (Nov. 5, 1995).

Other Midwest states do not provide counsel for the accused when they first appear for bail. Illinois’ statutory right to counsel commences only after an accused enters a plea or when defendants are unable to post bail. See 55 Ill. Comp. Stat. 5/3-4006 (West 1993); 725 Ill. Comp. Stat. 5/109-1 (West 1992). Consequently, poor people are unrepresented at bail and remain without counsel for 10-20 days in Clairsville and Carlinville counties; in Belleville, the usual delay is 20-30 days. See infra Appendix, Table B. In Indiana, the right to counsel commences 20 days after the bail determination. See Ridenour v. Indiana, 639 N.E.2d 288 (Ind. Ct. App. 1994). In Detroit and Ann Arbor (Kent County), Michigan, an accused first meets with counsel two weeks later at the preliminary hearing. See infra Appendix, Table B. Although Ohio’s statute permits a defendant to seek a postponement to obtain a court-appointed lawyer, few make such a request in practice. Outside of Cleveland, Ohio, courts invariably set bail without legal representation. See id.

40. North Dakota provides that “every indigent person is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal . . . in all felony . . . and non-felony cases [involving imprisonment].” N.D. R. Crim. P. 44. Most other Rocky Mountain states conduct bail hearings without counsel present. See infra note 44. In Idaho, the court first sets bail and then appoints counsel. See Idaho R. Crim. P. 5(b). In Libby, Montana, the public defender does not represent the accused for bail, but is usually notified of the arrest and speaks to the accused before his initial appearance. See Montana v. Dieziger, 650 P.2d 800 (Mont. 1982) (holding that the initial appearance is not a critical stage); infra Appendix, Table B. Public defenders in Salt Lake City, Utah, and Las Vegas and Missoula, Nevada, also indicate the accused is unrepresented for a bail determination. See infra Appendix, Table B.

41. Public defenders in San Jose, San Francisco, Los Angeles, and Yreka confirm that the statewide public defender office represents poor people at the initial bail appearance, although not necessarily for misdemeanors prosecuted in San Jose and San Francisco. See infra Appendix, Table B. Other Far West states, such as part of Washington and most of Oregon and Hawaii, do not provide counsel. See infra Appendix, Table B; Wash. Super. Ct. Crim. R. 3.1(b). Portland, Oregon and Honolulu, Hawaii appear to be the only localities in their states which guarantee counsel at the bail stage. See infra note 51 (referring to Hawaii’s bail schedule); Haw. Rev. Stat. § 802-1 (1994).

42. See supra note 35.
interpret the right to counsel more restrictively. In nineteen states, the accused is unrepresented when a judicial officer first decides whether to order pretrial release or set bail.43 Except for one or two urban centers, the remaining twenty-three states do not provide appointed counsel at bail hearings.44 Consequently, whether someone is arrested in New York City or upstate Buffalo, New York; Philadelphia or Pittsburgh, Pennsylvania; Alexandria or Richmond, Virginia; or Tucson or Phoenix, Arizona will often determine whether he is represented by counsel at the bail proceeding.45

In addition to the right to counsel varying among and within states, localities follow different practices in assigning counsel to indigent defendants who are unrepresented at bail. Sometimes, judicial officers appoint a lawyer at bail proceedings;46 in other jurisdictions, they merely direct the accused to apply for a court-appointed lawyer, and if he is found eligible, one will eventually be assigned.47 Depending upon the length of delay in the assignment of counsel, incarcerated

43. Based upon lawyers' responses and a review of the applicable right-to-counsel statutes, an accused is unrepresented when first appearing before a judicial officer for a bail determination in the following states: Alabama; Hawaii; Idaho; Indiana; Maine; Mississippi; Michigan; Montana; Nevada; New Mexico; North Carolina; Ohio; Oklahoma; Rhode Island; South Carolina; Tennessee; Texas; Utah; and Washington. See infra Appendix.

44. A remarkable contrast exists within states in deciding whether to provide indigent defendants with legal representation at bail hearings. Public defenders across the nation commented about the divide that exists between a state's main urban centers and its less populated cities and rural communities. Their observations suggest that in the following states, an accused will find counsel's assistance at his initial appearance only in designated cities. Examples include: Anchorage, Juneau (sometimes), but not in rural ALASKA; Tucson, but not in Phoenix, Bentonville, or Bisbee, ARIZONA; Little Rock, ARKANSAS, but apparently nowhere else; Boulder and Colorado Springs, but not in Denver or Fort Collins, COLORADO; Atlanta, but nowhere else in GEORGIA; Chicago, but not in the rest of ILLINOIS; Fort Madison, but not in Des Moines, IOWA; Topeka, but not in Norton or Lawrence, KANSAS; Lexington, Louisville, Shelby, sometimes in Barren, but not in Franklin, Kenton, or Harlan Counties in KENTUCKY; New Orleans, but not in Baton Rouge and only about a third of the time in Shreveport, LOUISIANA; Montgomery and Harford Counties, but not elsewhere in MARYLAND; St. Louis and Kansas City, but not elsewhere in MISSOURI; Lincoln (felonies only), but not in most other NEBRASKA counties; in Concord, but not in Stratton or elsewhere in NEW HAMPSHIRE; Newark, but not elsewhere in NEW JERSEY; New York City, Long Island, and Albany, but not in Buffalo or Syracuse, NEW YORK; Cleveland, but not in rural St. Clairsville or elsewhere in OHIO; Portland, but not in Eugene or Bend, OREGON; Philadelphia, but not elsewhere in PENNSYLVANIA; Sioux Falls, but not in other counties in SOUTH DAKOTA; Montpelier, but not in other parts of VERMONT; Alexandria, but not anywhere else in VIRGINIA; in Cody, but not the rest of WYOMING. See infra Appendix, Table B.

45. An initial appearance at an urban local court does not guarantee that an accused will be represented by counsel. People arrested in Baltimore, Buffalo, Detroit, Phoenix, Pittsburgh, Richmond, or Trenton, to name but a few metropolitan cities, are unrepresented for bail purposes. See infra Appendix, Table B.

46. States that do not provide an accused with counsel for bail purposes, see supra note 44, may determine financial eligibility at the initial appearance and immediately appoint a lawyer to represent an accused person. Oregon courts first inform the defendant of his right to counsel and appoint counsel after financial eligibility has been determined. See OR. REV. STAT. §§ 135.045, .050 (1993). When counsel is not present in court to accept the assignment, there will be additional delay in the appointment and in the lawyer actually meeting with her client.

individuals will wait for days, weeks, or months before a lawyer appears and provides assistance. In many courtrooms, an accused does not consult with counsel until his next scheduled court appearance; in some localities, counsel first appears at felony indictment, or at the trial date for a misdemeanor charge.

The bail proceeding itself also is different depending upon the state and the locality within a state. In some courtrooms, a prosecutor is present and argues for high bail. In others, only a judicial officer and the defendant are present. The judicial officer may determine bail with the assistance of a pretrial release report, by following a bail schedule, or by exercising discretion. An unrepresented defendant may speak in an effort to regain his freedom and then make incriminating statements. On other occasions, a judicial officer will warn the accused that his statements can be used against him, and the accused will heed the warning and remain silent, despite knowing that the bail set will ensure continued incarceration.

48. In some localities which do not provide representation at the initial bail proceeding, court-appointed lawyers meet with clients within the first few days following the bail hearing. For example, in Vermont or Juneau, Alaska, there is a one-day delay; in Decatur, Georgia, it is two days; in Bend, Oregon, three days; in Lynchburg, Virginia, one to four days; in Washington State, two to six days; and in Greenville, Mississippi, five to seven days. In other jurisdictions, the initial attorney-client meeting occurs sometime within the first 10 days from arrest. These jurisdictions include Bisbee, Bentonville, and Phoenix, Arizona; Lihue, Hawaii; Pittsburgh, Pennsylvania; Richmond, Virginia; and Salt Lake City, Utah. See infra Appendix, Table B.

In other jurisdictions, the delay is more substantial. In Detroit, Michigan, Baton Rouge, Louisiana, and Santa Fe, New Mexico, an accused felon usually waits 10-20 days to see his court-appointed attorney at a scheduled preliminary hearing; in Belleville, Illinois or Charleston, South Carolina, 20-30 days pass; while in Montgomery, Alabama, Baltimore, Maryland, or Trenton, New Jersey, defendants meet their attorney at a scheduled court proceeding 30 days later. In some localities, an incarcerated defendant waits even longer. In Cleveland, Ohio, an accused does not see his attorney until 30-45 days after his initial appearance, and in Greensboro, North Carolina, where the state’s attorney controls the scheduling of cases, incarcerated defendants wait 60 days on average before learning whether they face charges and meeting their court-appointed attorney. See infra Appendix, Table B.

49. See Gilchrist v. State, 585 So. 2d 165, 168 (Ala. Crim. App. 1991) (holding that the right to counsel attaches at the filing, or arraignment, of indictment); Ridenour v. Indiana, 639 N.E.2d 288, 291 (Ind. Ct. App. 1994) (holding that the defendant was not entitled to counsel at his initial bail appearance but only at arraignment, scheduled 20 days later). In Trenton, New Jersey, incarcerated defendants who were indicted without having a preliminary hearing wait more than one month before seeing their court-appointed lawyer. Telephone Interview with Dale Jones, New Jersey Office of the Public Advocate (Aug. 1, 1995).

50. This occurs, for example, in Casper, Wyoming and Baltimore, Maryland. See infra Appendix, Table B.

51. Hawaii is one of several states that follows a fixed bail schedule, depending upon the offense charged. The appellate circuit court's schedule permits the judicial officer to revise the amount, either higher or lower, "where special circumstances exist." The appellate court "invites" the judicial officer to contact it first before revising the recommended amount. Order Amending Haw. R. Penal Proc. 5, Circuit Court of the Fifth Circuit, State of Hawaii, Lihue, Hawaii (June 22, 1982) (copy on file with the University of Illinois Law Review). In Monroe, Alabama, a public defender declared that having a lawyer "won't get you out on bail because judges follow a bail schedule to the letter." Telephone Interview with George Elbrecht (Nov. 9, 1995). Other states that follow a bail schedule include Mississippi and Rhode Island. See infra Appendix.

52. See infra note 78.
In sum, the point when an accused's right to counsel is recognized depends upon the state, and frequently the locality where someone is arrested. Additionally, bail practices also vary. These two factors contribute to a pervasive lack of guaranteed representation at a bail hearing, despite the defense lawyer's critical role at such time. That role is discussed in part III.

III. THE LAWYER'S CRITICAL ROLE AT THE INITIAL BAIL APPEARANCE

The lawyer's role at the initial bail appearance is critical to providing indigent defendants a meaningful right to counsel throughout the pretrial stage. From the moment a lawyer accepts representation, she is charged with being a zealous and competent advocate. Seeking to build the client's trust and confidence in her, the attorney must be diligent in her many roles as advocate, fact-gatherer, counselor, negotiator, and trial lawyer. These roles should commence at the bail hearing, when the accused first appears before a judicial officer and seeks to regain his precious right of freedom.

The importance of the bail determination cannot be overstated. A judicial officer's decision to set high bail will ensure that indigent defendants remain in jail while charges are pending. The bail decision also impacts the final disposition of the charges and sentencing: incarcerated defendants invariably receive more severe sentences than individuals released on recognizance or affordable bail. Because the individual liberty interests at stake are so high, a lawyer's immediate assistance often becomes the crucial difference between the judicial officer deciding to release or detain an accused.

As elaborated below, early representation is critical, not only to increase the likelihood of release pending trial, but to enable an effective case investigation and trial defense. Unfortunately, an indigent

53. The ABA Model Code of Professional Responsibility (Model Code) provides that a lawyer's duty "both to his client and to the legal system is to represent his client zealously within the bounds of the law." Model Code of Professional Responsibility Canon 7-1 (1980). In 1983, the ABA Model Rules of Professional Conduct (Model Rules) modified the zealous representation language and requires a lawyer to "act with reasonable diligence and promptness in representing a client." Model Rules of Professional Conduct Rule 1.3 (1997). The commentary explained that this Rule mandated that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client." Id. at cmt. 1.

54. Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Professional Conduct Rule 1.1 (1997). The Model Code DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it," and also requires "preparation adequate in the circumstances." Model Code of Professional Responsibility DR 6-101(A)(2) (1980).

55. See supra note 53 (referring to Model Rule 1.3).

56. See supra note 27.
defendant’s first legal “consultation” with his overburdened court-appointed lawyer often occurs after he has been in jail for many days or weeks. What is worse, the lawyer cannot seriously discuss the trial option because she has not yet had an opportunity to investigate the charges and frequently uses this initial meeting to attempt to persuade the client to plead guilty.\textsuperscript{57} Lacking the leverage to challenge the state’s case, many incarcerated clients offer little resistance, particularly after having spent a significant period in jail awaiting trial.

\textit{A. The Bail Hearing}

To the impartial observer, the contrast between a lawyer’s presentation and that of a pro se defendant in the bail procedures is obvious. For no matter who the defendant is, “an unaided layman ha[s] little skill in arguing the law or coping with an intricate procedural system.”\textsuperscript{58} An accused who has been incarcerated for many hours or days waiting to appear for bail purposes is hardly able to present himself in the best possible light. He will be compromised emotionally and physically. For most, the jail experience induces fear, frustration, and anger.\textsuperscript{59} Rather than presenting a persuasive argument for release, his statement to the judicial officer may appear disingenuous, rambling, or even incoherent. The unrepresented will be unsure what to say and what not to say to the judicial officer. Sometimes, the accused provides too much information, which can prove damaging for pretrial release and can facilitate the prosecution’s case against him.\textsuperscript{60} Other defendants choose a different strategy. They heed the judicial officer’s warning to remain silent. By saying too little on their own behalf at the bail hearing, they may provide an insufficient factual basis for a favorable outcome.

A well-prepared lawyer fully appreciates the nature of the expedited bail proceeding and is aware of the information which a judicial

\textsuperscript{57} In \textit{Powell v. Alabama}, 287 U.S. 45, 57 (1932), the Supreme Court characterized the stage from the defendant’s arraignment until the beginning of trial as “the most critical period of the proceedings,” because it is at this pretrial stage “when consultation, thorough-going investigation and preparation” are essential for guaranteeing an accused’s due process right to a fair trial.


\textsuperscript{59} Corey Steinberg described the “inhumane” conditions which pretrial detainees may experience:

Both guilty and innocent arrestees are subjected to deplorable conditions in overcrowded cells, which often place the accused at risk of loss of life or limb at the hands of other inmates. Faced with the possibility of being raped, beaten, or even murdered by their fellow detainees, many arrestees attempt suicide before they are even arraigned.


\textsuperscript{60} See infra note 78 and accompanying text.
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officer seeks. In arguing for pretrial release, the lawyer's courtroom advocacy, and familiarity with the accused and the charges, usually results in a persuasive argument for setting reasonable bail conditions. The lawyer can corroborate important factors in the accused's background, such as residence, community ties, and employment, which demonstrate that he is a good risk to return to court when required. The attorney is able to explain or mitigate unfavorable information about her client's past criminal record. She may provide information about the charges which allows the judicial officer to view them less seriously than the accusation suggested. The attorney may arrange for family members or community leaders to be present in court to attest to the defendant's reliability. When bail is set, the lawyer explains the procedures for posting bail and expedites the release process.

The saga of Thomas Layzell of Billings, Montana, is typical and underscores the need for a lawyer's early representation in instances when judges use bail improperly. Charged with two traffic violations, Mr. Layzell failed to appear in Billings City Court on three occasions. When arrested and brought to court on the warrants, Mr. Layzell was not provided a lawyer. The judge set bail at $300, despite knowing that Layzell only had $47, and scheduled trial more than two months later. For the next thirty days, Mr. Layzell remained in jail without a lawyer.

Sympathetic to Layzell's plight, the Montana Supreme Court chastised the trial court's "inappropriate exercise of judicial power to

61. Bail hearings are generally conducted in a speedy, assembly-line manner, particularly when defendants are unrepresented. Public defenders and local court-appointed lawyers, however, are familiar with a judicial officer's bail practices. In the brief time allotted, they can focus their argument for pretrial release to the judge's preference for knowing that a defendant has strong community ties, is currently working, has no felony (or recent) convictions, or has never missed a court appearance. To make an effective bail argument for the many defendants they will represent, a minimum of two appointed lawyers is required: while one speaks to the judge, the other prepares cases which will be heard thereafter. See infra Part VII.

62. See Billings v. Layzell, 789 P.2d 221 (Mont. 1990). Sitting in Baltimore district court, one observes a pattern of high bail set for similar traffic offenses. Offenders unable to post bail remain in custody for one or two months before they meet their attorney at the scheduled trial date.

63. Id. at 221-22; see State v. Dieziger, 650 P.2d 800 (Mont. 1982) (holding that a defendant was not entitled to a lawyer at the initial appearance where bail is determined).

64. Ultimately, Layzell obtained the assistance of Montana Legal Services and gained his release by filing a successful writ of habeas corpus. See Layzell, 789 P.2d at 222-23.

65. The Montana Supreme Court referred to the harmful effects of pretrial detention: "The defendant . . . loses any opportunity for gainful employment[,] . . . he cannot pay his fines or his bills. He may lose whatever property he owns in inadequate attempts to satisfy creditors." Id. at 224. For Mr. Layzell, the court described him losing the only job opportunity he had been offered "in a long time," being evicted from his home, and having his personal property confiscated. See id. at 223. The court also described "other consequences" which resulted from Layzell's pretrial detention. "When he is in jail, the state must bear the cost of maintenance and detention. When he is [later] released, he may become an even greater burden on the state's social service." Id. at 224 (citing Bandy v. United States, 81 S. Ct. 197, 197-98 (1960), where Justice Douglas remarked: "Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.").
punish" by setting a bail which it had “determined that Layzell would not make . . . and set[ting] an excessively late trial date, in effect sentencing [him] to [serve] a sixty-five-day jail [sentence before trial].”

Had Mr. Layzell been represented when bail was set, his lawyer likely would have secured his release from jail much sooner. If not successful, the lawyer could have applied for a writ, argued for recognizance or a lower cash bail, and advised Mr. Layzell how to meet the bail conditions. At the least, the lawyer would have obtained an earlier trial date.

In brief, a lawyer’s immediate assignment and representation at the initial bail proceeding increases the likelihood that the accused will be judged fairly. Without a lawyer, the judicial officer finds it much easier to justify detention based on the charges’ seriousness, a computerized criminal history, outstanding warrants, apparent insufficient roots in the community, or public pressure to side with the prosecution. When an accused is represented, counsel frequently counters these factors and provides information otherwise not available. She may succeed in suggesting an alternative bail procedure which is within her client’s financial means. The ultimate decision becomes a closer call.

66. Layzell, 789 P.2d at 225. When criminal charges are ultimately dismissed, pretrial detention becomes a jail sentence for individuals who were never convicted of a crime. In Maryland, more than half of the nearly 180,000 arrests in 1995-96 never resulted in conviction. See infra note 230. Sometimes, individuals who cannot post bail remain in jail even longer than the maximum sentence allowed. See Ivan Penn, Jail Court Operation in Dispute, BALTIMORE SUN, June 1, 1997, at 1B (describing an individual charged with public intoxication who had already served time beyond the 30-day maximum sentence).

67. Though expressing sympathy for Mr. Layzell, the Montana Supreme Court affirmed his conviction by finding that he lacked standing to challenge the constitutionality of the judge’s actions. Noting that Mr. Layzell was three dollars short of obtaining a bail bond and had not asked a friend or relative for help in securing a bail bond, the court declared: “By failing to even attempt to procure the difference, Layzell assured his continued incarceration . . . [H]is own unwillingness to borrow three dollars caused his injury.” Layzell, 789 P.2d at 225. The court’s conclusion leaves many unanswered questions. If Mr. Layzell wanted to remain in jail, why would he have pursued a writ of habeas corpus and accepted the assistance of Montana Legal Services? Why did the court assume that Mr. Layzell was familiar with bail bond procedures or that he had friends or relatives willing to help? Is not the procuring of a bail bond an area in which counsel could advise and provide assistance? The court assumed it was Layzell’s unwillingness, rather than his indigency, which prolonged his incarceration. Yet, no state official testified that Layzell refused anyone’s offer to loan him three dollars.

68. The Montana Supreme Court found it “incredible” that the trial court could not have scheduled an earlier trial date for “these simple traffic violations” and noted the “remarkable coincidence” between Layzell’s habeas petition and the court rescheduling his trial on the third day after the writ was heard. Id. at 225.

69. Computerized criminal records are notorious for being difficult to interpret and for excluding important information, such as the eventual disposition of a case. As such, a person’s record may appear worse than it actually is. For example, an arrest may have not resulted in a conviction, a serious felony charge may have been reduced to a misdemeanor crime, a prior warrant for failing to appear in court may be explainable. By presenting this information accurately, the defense attorney minimizes the risk that a judicial officer will place unfair weight on these factors.

70. Lawyers are aware that a state’s bail statute presumptively favors pretrial release, or requires that a judicial officer impose the least onerous bail conditions, such as a 10% cash
The lawyer’s presence at the bail proceeding may also provide the defense with an opportunity to learn more about the state’s evidence and to evaluate the charges,\(^\text{71}\) which often results in cases being resolved more efficiently. When a prosecutor also is present, informal discussions between the defense and prosecution, or a prosecutor’s sympathetic response to a defense contention that the charge is less serious than appears, may lead to an earlier negotiated plea or decision not to prosecute.\(^\text{72}\)

The lawyer’s early assignment and representation at the initial court proceeding is closely tied in other ways to her pretrial responsibilities of investigating the charges, preparing a defense, and advising the accused of the best course of action to pursue.

B. Investigation

For the accused represented by counsel, the initial interview provides the first opportunity to inform the lawyer about essential facts for evaluating the state’s case. When this interview is conducted soon after arrest, the lawyer is most able to be a diligent defender and provide effective assistance.\(^\text{73}\) When the lawyer’s first interview is conducted many days or weeks after arrest, and where the accused remains incarcerated, the odds of successfully challenging the state’s evidence shift more decidedly against the defendant.

A prompt investigation is crucial to locate and interview witnesses and to obtain the proof necessary to build a successful defense. The more time that passes between arrest and investigation, the more likely that important witnesses will be unavailable or unwilling to speak. An accused may provide names or identify potential witnesses, but the investigation will produce the best results only when he is free and able to assist.\(^\text{74}\) Most defense lawyers have experienced the dif-

\(^{71}\) In some states, the initial appearance is the proceeding where the prosecution must provide notice of statements made by the defendant which it intends to use at trial, and pretrial identification evidence. See, e.g., Md. Ann. Code art. 27, § 616 1/2(b)(2) (1996); Md. R. 4-216(d)(4)(b); infra note 232.

\(^{72}\) The earlier that opposing counsel are assigned to cases and communicate their positions to one another, the sooner weaker cases can be weeded from the clogged criminal justice system and more attention paid to more serious crimes. See infra notes 230, 236. The greater the delay in counsel’s appearance, the more serious the consequences to the accused.

\(^{73}\) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in possession of the prosecution and law enforcement authorities.

\(^{74}\) See Kinney v. Lemon, 425 F.2d 209 (9th Cir. 1970) (holding that it would be a violation of the defendant’s due process right to a fair trial to continue holding him in pretrial custody when he was the only individual who could identify potential defense witnesses). In Kinney, the Court recognized the serious limitations of lawyers conducting a successful factual investigation without their client’s assistance. Id. at 210.
ference between appearing alone in an unfamiliar neighborhood looking for a prospective witness and arriving with a client who can dispel people's suspicions. Poor people, who often lead transient lives, will be difficult to locate without the defendant's active participation. Many potential witnesses also are likely to hesitate to reveal information to an unknown person, who may come from a different race and class background.

Thus, when the accused remains in jail, the lawyer's ability to conduct a thorough investigation is impaired. Conducting an early and thorough factual investigation permits the accused to make intelligent and informed decisions at the early stages of a criminal prosecution. These decisions include whether to testify on his own behalf at a grand jury proceeding, whether to plead guilty to reduced felony charges prior to indictment, and whether to refuse to plead and to fight the charges. Consequently, early assignment of counsel and the decision to release an accused impacts the likelihood of a fair outcome.

Finally, the attorney's representation at the initial appearance minimizes the possibility that an accused will utter inculpatory or harmful statements, which is more likely to occur when defendants are unrepresented. Even when these statements are not admissible at trial, the state's certainty of guilt usually will have adverse conse-

75. When a prosecutor decides to present evidence of a felony crime before a grand jury, an accused effectively forfeits his right to testify when unrepresented during the initial appearance and early stages of a criminal proceeding. Though most lawyers view the grand jury as a nonfriendly forum for defendants to testify, there are instances where such an option is sensible and should be pursued. New York City Legal Aid lawyers achieved excellent results while representing clients who testified at grand jury proceedings during 1972-1983, when I practiced there—approximately 80% of criminal charges were either dismissed or reduced. Of course, this strategy was employed selectively, but is unavailable for the defendant without counsel during the postbail, pretrial stage.

76. In many felony cases, an accused will be asked to decide whether to plead guilty to a reduced felony or to a misdemeanor charge while the case is still pending in the lower criminal court, that is, preindictment. In Agersinger v. Hamlin, 407 U.S. 25, 34 (1972), discussed infra Part IV.B, the Court recognized that such an important decision requires counsel.

77. In Gerstein v. Pugh, 420 U.S. 103, 123 (1975), the Supreme Court conceded that incarcerated defendants were hampered in conducting a full investigation of facts and preparing for trial: "To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense." See also GOLDFARB, supra note 27, at 40-43.

78. Court rulings leave open the possibility that an unrepresented defendant's statements at a bail hearing may be admissible at trial. In United States v. Dohn, 618 F.2d 1169 (5th Cir. 1980), an appellate court suppressed the defendant's statement, but indicated it may have ruled differently had the defendant been properly "Mirandized." Cf. United States v. Johnson, 516 F. Supp. 696, 699 (E.D. Pa. 1981) (suppressing the statement "of a confused, uncounseled defendant," based on his Sixth Amendment federal right to counsel at bail). State courts seem more inclined to admit such statements. See Bailey v. State, 490 A.2d 158 (Del. 1984) (admitting for impeachment purposes an unrepresented defendant's spontaneous statement at bail); Schmidt v. State, 481 A.2d 241 (Md. Ct. Spec. App. 1984) (admitting an unrepresented defendant's statement at bail, uttered in response to a judge's inquiry, despite the judge failing to provide Miranda warnings); State v. Patten, 631 A.2d 921 (N.H. 1993); People v. North, 439 N.Y.S.2d 698 (N.Y. App. Div. 1981) (admitting statements of an unrepresented defendant who had been given Miranda warnings); cf. State v. Williams, 343 A.2d 29, 33 (N.H. 1975) (suppressing such state-
quences for these individuals who did not maintain silence and allow their lawyer to speak for them.

C. Consultation

The likelihood is greatest for developing a collaborative and trusting relationship when a lawyer is able to interview a client shortly after arrest and represent him at the initial bail proceeding. Most lawyers and clients understand the importance of a close relationship before trial. Creating such a relationship, however, is never easy. Clients often distrust court-appointed attorneys and doubt their commitment to providing zealous representation. The best attorney-client relationships usually develop when clients observe their lawyers’ efforts on their behalf. Lawyers assigned to represent a client at the initial bail hearing can make an immediate favorable impression by arguing skillfully for release. Thereafter, the lawyer’s dedication becomes obvious when she submits motions, interviews and prepares witnesses for court, serves subpoenas, retains experts, and otherwise conducts herself as a zealous advocate. When the important decision—whether to go to trial or plead guilty—is made after pretrial preparation has been completed, the consultation process results in an informed and real choice for the client.

Lawyers who meet their client long after arrest have a formidable barrier to overcome in gaining the client’s confidence and obtaining a favorable result. Frequently meeting the client in court for the first time, the lawyer is usually unprepared to evaluate the state’s case. Congested court calendars mean that the initial conversation will frequently be hurried and will focus on a client’s willingness to plead guilty. The lawyer is often unable to present any real trial option. Under these circumstances, the client may equate the right to court-appointed counsel with official individualized pressure to plead guilty.

D. Trial Preparation

As explained by the investigation section, because pretrial detention without counsel handicaps the defense investigation, the accused will often be deprived of the ability to mount an effective evidentiary defense for trial. The delay in representation damages the attorney-client relationship and makes it more difficult for the client to trust his lawyer’s assessment to exercise his trial rights, even when there is a good chance of gaining an acquittal or dismissal.79 Clients who have seen their lawyer’s persistence in gathering information and arguing

pretrial matters will have a concrete basis for concluding that their advocate is skillful and sufficiently committed to risk going to trial. Defendants who lack confidence in their lawyer are more likely to refrain from serious consideration of the trial option because they realistically anticipate a much harsher sentence after conviction at trial than the sentence offered upon pleading guilty much earlier in the criminal proceedings.

When the accused has been without counsel during the critical first days or weeks after arrest, his decision whether to plead guilty at his initial court appearance is rarely well informed, free, or voluntary. The lengthy period of incarceration while unrepresented tends to weaken the client's resolve to defend himself against the criminal accusation. The client has already experienced the state's frightening power to deprive him of liberty, and an unprepared attorney can rarely offer sufficient reason for believing that the State will not continue to prevail.

In *Coleman v. Alabama*, the U.S. Supreme Court identified counsel's critical importance at the preliminary hearing stage in order to protect the accused against an improper prosecution, to confront prosecution witnesses, and to influence the determination of bail and other pretrial matters. Like the preliminary hearing, the accused's initial bail hearing requires an attorney's assistance, for similar reasons. First, by reviewing the formal charges, the lawyer can identify weaknesses in the accusatory document, which would prevent an unlawful or unjust prosecution. The attorney's strong advocacy may convince the prosecutor to reduce, dismiss, or forego prosecution of the charge at the initial appearance or shortly thereafter at the next court appearance. Consequently, the defense lawyer's immediate intervention means that improper prosecutions can be identified and eliminated. Second, like representation beginning at the preliminary hearing, representation commencing at the bail hearing allows for an immediate opportunity to conduct a thorough investigation in a manner which serves the same general purpose: to evaluate witnesses' credibility and assess the strength of the state's case. By speaking to witnesses and obtaining sworn statements, "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." The longer the delay in counsel's representation, the more likely the ac-

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80. 399 U.S. 1 (1971); see infra Part IV.D.
81. In supervising clinical law students, I am often surprised at their high success rate in challenging the legal sufficiency of an accusatory instrument. When examining criminal complaints, students discover that some are poorly drafted; other complaints simply fail to allege sufficient facts to constitute a crime. Students' motions to dismiss based on legal insufficiency usually result in a favorable outcome—dismissal of charges or release of their clients from jail. By exposing legal deficiencies at the initial bail proceeding, these same results should occur much sooner in the proceedings.
82. *Coleman*, 399 U.S. at 82.
cused will be denied the opportunity to mount a successful defense. Third, counsel’s advocacy at the initial courtroom appearance will mean that many accused indigents will avoid unnecessary pretrial detention. By corroborating essential information about the accused and identifying weaknesses in the accusation itself, defense lawyers are able to influence bail determinations and thereby secure the accused’s pretrial release. Although it is not possible to calculate the number of “innocent” people who are unjustly imprisoned while awaiting court-appointed counsel, it is safe to assume that, with counsel’s assistance, individuals’ liberty interests will receive much greater protection during the course of a criminal case.

In sum, the lack of representation at bail proceedings contravenes the constitutional principle and spirit underlying Supreme Court decisions establishing the right to counsel at critical stages before trial, as explained in part IV.

IV. THE FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL

Beginning in Powell v. Alabama and continuing with Gideon v. Wainwright and its progeny, Supreme Court decisions have consistently recognized that “[i]n our adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.” Court rulings make clear that while the centerpiece of counsel’s Sixth Amendment “[a]ssistance” is protection of fair trial rights, counsel’s pretrial role “is often a requisite to the very existence of a fair trial.” Court decisions have frequently reaffirmed Powell’s declaration that the “most critical period of the proceedings . . . [is] the time of . . . arraignment until the beginning of . . . trial when consultation, thoroughgoing investigation and preparation [are] vitally important.” By acknowledging a lawyer’s essential pretrial role, the Court fully recognizes that the constitutional right to counsel extends beyond a pure trial model. But the Justices have struggled with identifying the exact stage when an accused is entitled to representation.

The following subparts A through E examine Supreme Court rulings which firmly establish that once adversarial judicial proceedings

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83. As described in infra notes 183-93, 202-04, many states’ initial judicial proceeding involves the determination of probable cause and the setting of bail. An accused meets his court-appointed lawyer at the next court appearance, which may be days, weeks, or even months later. See supra notes 48-52 (describing the various delays in defendants seeing their lawyers for the first time).

84. 287 U.S. 45 (1932).


88. See supra note 22.

89. Argersinger, 407 U.S. at 31.

90. Powell v. Alabama, 287 U.S. 45, 57 (1932); see supra notes 86-87.
have commenced, an accused’s right to counsel “attaches.” These decisions, however, require the state to provide an accused with representation only at “critical” judicial pretrial proceedings. Accordingly, the analysis compares Court rulings which have identified critical pretrial stages where counsel’s presence was required—the defendant’s arraignment on a felony indictment, appearance at a preliminary hearing, and out-of-court confrontations with a state agent—with decisions identifying instances when representation is not required. Though the Court has not yet ruled whether bail is a critical stage, this analysis demonstrates that a judicial bail determination would fit the Court’s critical stage criteria.

A. Powell v. Alabama

The right to counsel’s “rich historical heritage” began just sixty-three years ago in Powell v. Alabama. In Powell, the Court first recognized that the Fourteenth Amendment due process right to a fair trial meant that poor people who had been indicted for a capital offense were entitled to be represented by a court-appointed lawyer at their formal arraignment. In describing the “fundamental character” of the right to counsel, the Court emphasized that a lawyer’s ability to provide effective representation at trial depended upon the opportunity to prepare a defense and conduct a full investigation.

91. See Kirby v. Illinois, 406 U.S. 682, 689 (1971) (referring to proceedings commencing “by way of formal charge, preliminary hearing, indictment, information or arraignment”).
94. See United States v. Wade, 388 U.S. 218 (1968) (recognizing a postindictment lineup confrontation as a critical stage); Massiah v. United States, 377 U.S. 201 (1964) (recognizing a solicitation with a government informant as a critical stage).
95. See Gerstein v. Pugh, 420 U.S. 103 (1974) (holding that a judicial probable cause determination is not an adversarial proceeding requiring counsel); United States v. Ash, 413 U.S. 300 (1973) (holding a postindictment photograph array not to be a critical stage); infra Part III.E.
96. Ash, 413 U.S. at 306 (Blackmun, J.) (“The right to counsel in Anglo-American law has a rich historical heritage.”). The American colonies rejected the British common-law tradition against providing a right to counsel for an accused. They viewed a defense lawyer as necessary to balance the individual’s liberty interest against the government prosecutor. Following the American Revolution, states constitutionalized the right to counsel in the national constitution, and in most state constitutions as well. See Powell v. Alabama, 287 U.S. 45, at 60-64 (1932). The “right” to a lawyer, however, did not require a state to provide counsel for a poor person—only that an individual had “the right to retain counsel of one’s own choice and at one’s expense.” Alfredo Garcia, The Right to Counsel Under Siege: Requiem for an Endangered Right?, 29 AM. CRIM. L. REV. 35, 42 (1991) (quoting William Merritt Beaney, The Right to Counsel in American Courts 21 (1955)).
97. 287 U.S. 45 (1932).
98. See Powell, 287 U.S. at 67. The Court also stated: “The . . . right involved is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” Id. (citing Hebert v. Louisiana, 272 U.S. 312, 316 (1930)).
In Powell, nine African Americans accused of raping two white women had avoided death by a lynch mob.\textsuperscript{99} The question then became whether they would receive a fair trial. As the nation witnessed,\textsuperscript{100} the Scottsboro defendants were without an attorney from the moment they first appeared in court and pled not guilty, until their trial date \textit{four} days later.\textsuperscript{101} On the day of trial, a Tennessee lawyer appeared in the Alabama courtroom and informed the trial judge that he was interested in representing the accused if given the opportunity to prepare a defense and become familiar with local procedure.\textsuperscript{102}

\textsuperscript{99} See id. at 51. Following the withdrawal of federal troops from southern states in 1877, lynch mobs acted with virtual impunity from criminal prosecution. Between 1883 and 1932, the year Powell was decided, whites lynched approximately 5,000 people. Less than one percent of those responsible were ever successfully prosecuted. See Robert L. Zangrando, The NAACP Crusade Against Lynching, 1909-1950, at 6-8, 10 (1980). Beginning in the 1920s, state-imposed execution replaced the lynch mob as the preferred official response to black defendants who were convicted of serious crimes against whites. See William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 55-56, 59 (1984). For an understanding of the all-white jury's role in imposing death sentences in interracial capital cases, see Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 86-88 (1990).

\textsuperscript{100} The racially charged trial received unusual national and international attention. Officials of the Communist Party USA were present in court from the outset. During the last day of the trials, the Party referred to the trial as "a legal lynching . . . a frame-up from start to finish," and voted to provide new counsel through the International Labor Defense Committee (ILDC). See James Goodman, Stories of Scottsboro 25 (1994). The Communist Party USA viewed the trial as an opportunity to expose American injustice and engaged in mass protest actions which publicized the case nationally. See id. at 26-28. The NAACP also entered the case and persuaded Clarence Darrow to defend the Scottsboro defendants. But the defendants opted for the ILDC attorneys, who succeeded in gaining a new trial in Powell. For a full account, see Dan T. Carter, Scottsboro: A Tragedy of the American South (1969).

\textsuperscript{101} The Supreme Court's seven-to-two majority opinion concluded that "until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants." Powell, 287 U.S. at 56. The defendants had been arrested on March 27, 1931, and arraigned on the indictment on April 2. At arraignment, the trial judge appointed "all the members of the bar" for purposes of arraignment, \textit{id.}, but when the first trial began four days later, the defendants still had no assigned counsel. See infra note 102. The Powell majority criticized the trial court's failure to guarantee the accused legal representation: "Whether [the members of the bar] would represent the defendants thereafter, if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." \textit{Id}.

\textsuperscript{102} See id. at 55. Stephen Roddy, a lawyer from Chattanooga, Tennessee, had been retained by friends of the defendants. Roddy attended, but did not participate in, the defendants' arraignment where he witnessed a tense courtroom in which 30 National Guardsmen maintained order. Roddy returned to Scottsboro on the day of trial. Upon entering the courthouse, Roddy was greeted by the curses of an angry crowd. He had a reputation as an alcoholic. A special assistant to the prosecution described him on the morning of trial as "so stewed he could scarcely walk straight." See Carter, supra note 100, at 19, 22. Roddy told the trial judge he would assist local counsel, but would not represent the defendants by himself. "[T]hey have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama." Powell, 287 U.S. at 55. The trial judge refused to appoint a lawyer. Eventually, local attorney Milo Moody agreed to serve as counsel with Roddy. Observers characterized Moody as "an ancient Scottsboro lawyer of low type and rare practice," Goodman, supra note 100, at 41, and a "doddering, extremely unreliable, senile individual who is losing whatever ability he once had," Carter, supra note 100, at 18.
The court denied the adjournment request and directed that the trials proceed immediately.\textsuperscript{103}

In reversing the defendants' convictions, the Supreme Court majority focused on the State's failure to protect the defendants' due process right to a fair trial when the "designation of counsel . . . was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid."\textsuperscript{104} The Court attributed the sham trials to the trial court's refusal to assign counsel sufficiently in advance of trial to allow the attorney to conduct "a prompt and thorough-going investigation . . . as to the facts . . . No opportunity to do so was given."\textsuperscript{105} Instead, the defendants "were immediately hurried to trial . . . [and] not accorded the right of counsel in any substantial sense."\textsuperscript{106} The Court stressed that an accused's right to a trial lawyer was virtually meaningless when counsel's appointment was delayed "during perhaps the most critical period of the proceedings . . . the time of . . . arraignment until the beginning of . . . trial."\textsuperscript{107} It was when the Scottsboro defendants first appeared in court and were formally accused, the Court concluded, that they needed a lawyer's representation to investigate the charge, prepare a defense, and consult. Consequently, the Powell Court declared that the defendants "were as much entitled to such aid [of counsel] during that [pretrial] period as at the trial itself."\textsuperscript{108}

In defining the parameters of an accused's protected right to due process of law,\textsuperscript{109} the Court focused on counsel's advocacy role:

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

\textsuperscript{103} The first of four consecutive trials began on Monday, April 6, against defendants Clarence Norris and Charley Weems. By early Tuesday afternoon, the all-white male jury had begun deliberations. The trial judge immediately impaneled a second jury, and the trial against defendant Haywood Patterson commenced. During the prosecution's case against Patterson, the first jury returned and announced its guilty verdict and death sentence against Norris and Weems. A crowd of 1500 roared its approval at the verdict. Patterson's trial then resumed; by Wednesday morning, Patterson's jury left to deliberate. Within 15 minutes, a third jury had been selected and began hearing evidence against defendants Ozie Powell, Willie Roberson, Andy Wright, Eugene Williams, and Olen Montgomery. The second jury returned with a guilty verdict and death sentence against Patterson. That same afternoon, the trial concluded against the five defendants, and the jury began deliberations. A fourth trial then began against 13-year-old Roy Wright. By noon on Thursday, April 9, the third jury returned guilty verdicts and death sentences against the five defendants. The judge eventually declared a mistrial in Roy Wright's case. See Carter, supra note 100, at 22-48.

\textsuperscript{104} Powell, 287 U.S. at 53. "[I]t is the duty of the court, whether requested or not, to assign counsel . . . as a necessary requisite of due process of law . . . ." Id. at 71.

\textsuperscript{105} Id. at 58.

\textsuperscript{106} Id. The two dissenting Justices praised the defense lawyers' representation, stating that they conducted "[a] very rigorous and rigid cross-examination . . . . A reading of the records discloses why experienced counsel would not travel over all the same ground in each case." Id. at 75.

\textsuperscript{107} Id. at 57.

\textsuperscript{108} Id.

\textsuperscript{109} See id. at 71.
intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad... He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹¹⁰

By highlighting counsel’s “vital and imperative”¹¹¹ pretrial role beginning at the defendant’s arraignment, the Powell Court reminded trial judges that an accused “must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”¹¹²

B. Gideon v. Wainwright, Argersinger v. Hamlin

Three more decades passed before the Supreme Court, in Gideon v. Wainwright,¹¹³ applied these Fourteenth Amendment due process principles to the indigent defendant’s Sixth Amendment right to counsel when facing felony charges in state court.¹¹⁴ Nearly a decade later, the Court’s ruling in Argersinger v. Hamlin¹¹⁵ extended the accused’s right to court-appointed counsel to misdemeanors involving jail sentences.

In Gideon, the Supreme Court built upon Powell’s doctrinal underpinning, that the pretrial right to counsel was fundamental to a fair trial, to overrule prior precedent¹¹⁶ and mandate that states provide court-appointed counsel for indigent persons charged with felony offenses. Decided when the civil rights movement was challenging racial and class injustice, Gideon emphasized that a lawyer’s representation was needed to achieve “a fair system of justice.”¹¹⁷ The opinion revived Powell’s declaration that, in an adversarial sys-

¹¹⁰  Id. at 68-69 (emphasis added).
¹¹¹  Id. at 71.
¹¹²  Id. at 59.
¹¹⁴  After Powell, Johnson v. Zerbst, 304 U.S. 458, 463 (1938), held that the Sixth Amendment right to counsel guaranteed indigent persons court-assigned representation in a federal prosecution. But four years later in Betts v. Brady, 316 U.S. 455, 464 (1942), the Court concluded that Powell did not require states to provide counsel for indigent defendants in a state felony prosecution. The Betts Court rejected a fundamental due process right to counsel analysis. Instead, the Court would treat the denial of counsel “by an appraisal of the totality of facts in a given case” and determine whether the denial of counsel was “shocking to the universal sense of justice.” Id. at 462.
¹¹⁵  407 U.S. 25 (1972); see also Scott v. Illinois, 440 U.S. 367 (1979) (stating that the Sixth Amendment right to counsel in state misdemeanor cases applies when defendants receive jail sentences).
¹¹⁶  See Betts, 316 U.S. 455; supra note 114.
¹¹⁷  Gideon, 372 U.S. at 344 (“[E]very defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”).
tem, an accused’s due process right to be heard included “the right to
the aid of counsel”118 in order to ensure fair process and just outcome.
*Gideon* incorporated this guarantee within the Sixth Amendment
right to counsel.119 “[A]ny person haled into court, who is too poor to
hire a lawyer, cannot be assured a fair trial unless counsel is provided
for him.”120 By emphasizing the substantial inequities between re-
sources provided to the government and the accused indigent, the
*Gideon* Court concluded, as had the *Powell* Court, that the individual
defendant “requires the guiding hand of counsel at every step in the
proceedings”121 to ensure that the trial right is meaningful. Lawyers,
said the Court, “are necessities, not luxuries”,122 they are needed to
“prepare and present . . . defenses.”123

Eight years later, in *Argersinger v. Hamlin,*124 the Court ad-
dressed the flip side of counsel’s pretrial role: when defendants
choose to plead guilty. The *Argersinger* Court found that, in that con-
text, the lawyer’s early intervention is necessary to ensure that the
decision to waive the right to trial was voluntary and intelligent.125 In
*Argersinger,* a unanimous Supreme Court extended the *Powell-
Gideon* right to counsel to misdemeanors involving the loss of individual
freedom. Providing an accused with counsel had universal “rele-
vance to any criminal trial, where an accused is deprived of his
liberty.”126 The Court compared counsel’s pretrial role in such misde-
meanor cases to a lawyer’s responsibilities when charged with defending
juvenile defendants: the defense lawyer must “cope with problems of
law, . . . make skilled inquiry into the facts, . . . insist upon regularity
of the proceedings, and . . . ascertain whether he has a defense and . . .
prepare and submit it.”127

*Argersinger’s* right to counsel analysis, however, embraced more
than a misdemeanor’s right to a lawyer at trial. By addressing the
reality of lower courts’ “assembly line justice”128 system of plea bar-

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118. *Id.* at 343 (citing *Powell v. Alabama,* 287 U.S. 45, 68 (1932)).
119. See *id.*
120. *Id.* at 344.
121. *Powell,* 287 U.S. at 69.
122. *Gideon,* 372 U.S. at 344.
123. *Id.*
125. See *id.* at 37.
126. *Id.* at 32. The Court characterized counsel’s presence as a sine qua non to protecting an individual’s freedom. “The denial of the assistance of counsel will preclude the imposition of a jail sentence.” *Id.* at 38 (quoting *Stevenson v. Holzman (In re Stevenson,* 458 P.2d 414, 418 (Or. 1969))).
127. *Id.* at 33 (quoting *In re Gault,* 387 U.S. 1, 36 (1967) (extending an accused’s right to counsel to juvenile proceedings)).
128. *Id.* at 36. The Court expressed concern with the legal representation provided to people accused of committing misdemeanors. Citing from a 1968 Report by the President’s Commission on Law Enforcement and Administration of Justice, the Court referred to the “[i]nadequate attention . . . given to the individual defendant,” to “[d]efense lawyers . . . having had no more than time for hasty conversations with their clients,” and how “for most defendants in the criminal process, there is scant regard for them as individuals.” *Id.* at 35.
gaining, the Court emphasized the importance of a lawyer when defendants must decide whether to plead guilty or go to trial. For Gideon's "noble ideal" of equal justice to be achieved, the Court opined that "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."\textsuperscript{129} The Argersinger Court recognized the value of representation at this pretrial stage: it cited one misdemeanor study in which defendants with counsel were five times as likely to have their cases dismissed as those who went unrepresented.\textsuperscript{130} Though concerned about the increased burden Argersinger placed on lower courts, the Justices called upon the legal profession to reach "the goal . . . [of] expand[ing] as rapidly as practicable the availability of counsel so that no person accused of crime must stand alone if counsel is needed."\textsuperscript{131} Argersinger's application of the Powell-Gideon rationale guaranteed that every person who could be deprived of his freedom\textsuperscript{132} would be represented by counsel at trial and during pretrial plea negotiations.

C. Triggering the Right to Counsel: Development of the Critical Stage Analysis

Court decisions subsequent to Powell, Gideon, and Argersinger wrestled with the thornier issue of deciding the precise initial stage of a criminal proceeding which required states to assign counsel. Recognizing that Powell established, and Gideon-Argersinger confirmed, that the right to counsel included the period from felony arraignment until trial, Supreme Court decisions developed a two-prong critical stage analysis for determining whether a lawyer's presence was mandated during an earlier pretrial stage. First, the Court explored when the right to counsel attached. Did it commence at indictment, or was it triggered at the moment the accused faced a criminal accusation in the lower criminal court? Once the right attached, the Court required fulfillment of a second prong before counsel would be assigned: whether the pretrial proceeding was "critical" for protecting an accused's fair trial rights.

\textsuperscript{129} Id. at 34.
\textsuperscript{130} Id. at 36 (citing ACLU, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)); see also supra note 27.
\textsuperscript{131} Argersinger, 407 U.S. at 66 (Powell, J., concurring). Chief Justice Burger recognized that Argersinger would "add large new burdens on a profession already overtaxed" but believed that "the dynamics of the profession have a way of rising to the burdens placed on it." Id. at 44. Justice Burger opted for the appointment of more defense lawyers in order that the "system . . . for the defense be as good as the system which society provides for the prosecution." Id. at 43 (emphasis omitted) (citing ABA Project on Standards for Criminal Justice Providing Defense Services 1 (Approved Draft 1968)).
\textsuperscript{132} In Scott v. Illinois, 440 U.S. 367, 373-74 (1979), the Supreme Court clarified Argersinger to apply in misdemeanor cases where the defendant received a jail sentence.
In *Kirby v. Illinois*, the Court answered the first prong of the critical stage analysis by drawing a bright line for attachment of the Sixth Amendment right to counsel: it was triggered when an adversarial judicial proceeding commenced, whether "by way of formal charge, preliminary hearing, indictment, information, or arraignment." Because Mr. Kirby had been arrested, but not formally charged with a crime, he was not entitled to counsel at the time his preindictment lineup was conducted. The Court declared it was not backtracking from "the Powell case [which] makes clear that the right attaches at the time of arraignment." Rather, the Court emphasized the significance of the "initiation of adversary judicial criminal proceedings." At that point, the Court reasoned, "the government has committed itself to prosecute . . . the adverse positions of government and defendant have solidified . . . [and] a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

Once the first prong was satisfied, Court decisions delineating when counsel was mandated analyzed whether the pretrial proceeding fit the "critical stage" standard. The Court's earliest rulings in *Hamilton v. Alabama* and *White v. Maryland* confirmed Powell's reasoning that the accused's arraignment on a felony indictment was critical because "[w]hat happens there may affect the whole trial." In *Hamilton*, the Court held that counsel's presence at the arraignment proceeding was necessary for preserving a trial defense. The Court in *White* ruled that a lawyer was required to counsel an accused who was confronted with the criminal procedural system at his initial arraignment and who was expected to enter a plea.

In *United States v. Wade*, a post-*Gideon* case, the Court articulated the criteria for determining when a pretrial stage was consid-

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134. Id. at 689.
135. Id. at 688.
136. Id. at 689.
137. Id.
139. 368 U.S. 52 (1961). The Court referred to Alabama's arraignment procedure as a "critical stage" for the accused's defense in a capital case. "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." Id. at 55. Decided before *Gideon* extended the right to counsel to felony cases, the decision indicated that a court-appointed lawyer was required when the accused entered his plea. "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." Id.
140. 373 U.S. 59 (1963) (noting that the State offered evidence at trial of an uncounseled defendant's plea of guilty at his initial court appearance).
141. *Hamilton*, 368 U.S. at 54.
142. 388 U.S. 218 (1967).
143. Four years earlier, in *Massiah v. United States*, 377 U.S. 201 (1964), the Court extended an accused's right to counsel to the postindictment stage and suppressed incriminating statements which an informant elicited from a represented defendant. In finding that the government
ered critical: whether counsel’s assistance was essential “to help avoid . . . potential substantial prejudice to defendant’s rights,” in order “to assure a meaningful ‘defence.’” In suppressing identification evidence obtained from a postindictment police lineup, the Wade Court elaborated upon the lineup’s potential for creating substantial prejudice to the defendant’s trial rights and viewed the lawyer’s presence as necessary to deter the use of suggestive police procedures. The Wade Court identified the full parameters of an accused’s right to counsel: “It is central . . . that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”

Five years later, in United States v. Ash, the Supreme Court’s critical stage analysis shifted its focus to an examination of the lawyer’s function at “trial-like confrontations,” where counsel was needed “to act as a spokesman for, or advisor to, the accused.” In reviewing the Court’s prior rulings, Ash affirmed that an accused’s constitutional right to counsel at trial “would be less than meaningful” if it also did not include counsel’s representation at certain pretrial stages, such as an arraignment, a preliminary hearing, and an interrogation. The Court considered each of these pretrial events to be a trial-like confrontation because “the function of the lawyer remained essentially the same as his function at trial,” namely to guarantee that

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violated the defendant’s right to counsel, the Court ruled that an indicted defendant was “clearly entitled to a lawyer’s help . . . in a completely extrajudicial proceeding.” Id. at 204. The Massiah Court referred to the accused’s need for “effective representation by counsel at the only stage when legal aid and advice would help him,” id. (citing Spano v. New York, 360 U.S. 315, 326 (1959)), but delayed further elaboration upon the critical stage analysis until Wade.

144. Wade, 388 U.S. at 227; see supra note 33.
146. Wade identified the postindictment lineup as an example of “today’s law enforcement machinery involv[ing] critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial to a mere formality.” Id. at 224.
147. The Wade Court indicated that legal representation was needed because eyewitness identification was unreliable, there was a risk of suggestibility during the lineup confrontation, and it would be difficult to reconstruct the lineup confrontation for cross-examination purposes at trial. See id. at 228-39.
148. Id. at 226.
149. 413 U.S. 300 (1973).
150. Id. at 312.
151. Id. at 310.
152. See id. at 312 (referring to counsel’s critical role as advisor when the accused enters a plea by informing him of available defenses) (citing Hamilton v. Alabama, 368 U.S. 52 (1961), and White v. Maryland, 373 U.S. 59 (1963)).
153. See id. at 311; see also Coleman v. Alabama, 399 U.S. 1 (1970) (referring to the lawyer examining witnesses, probing for evidence, and making legal arguments); infra notes 162-73 and accompanying text.
the accused had "counsel acting as [her] assistant."155 Reaffirming Powell's reasoning, the Ash Court concluded that a pretrial judicial proceeding would trigger the right to counsel in circumstances where the "unaided layman had little skill in arguing the law or in coping with an intricate procedural system."156 Ash also emphasized that a lawyer's presence was critical to balance "any inequality in the adversarial process"157 for the unrepresented defendant.

In Ash, the Supreme Court held that an accused's right to counsel did not extend to a photographic display because the defendant had not been present, and did not have the right to be present, at the out-of-court identification procedure. Consequently, there was "no possibility . . . that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary."158 The Ash Court also expressed concern that requiring counsel at this type of out-of-court confrontation would create a slippery slope for mandating a lawyer's presence at other investigation stages of the prosecution's case.159

Following the Ash-Kirby-Wade decisions, Supreme Court rulings firmly established that once judicial criminal proceedings had commenced in the lower criminal court, an accused could invoke his right to counsel to suppress evidence obtained during critical out-of-court confrontations with law enforcement officials.160 But these decisions

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155. Id. at 312.
156. Id. at 307.
157. Id. at 319.
158. Id. at 317. The Court distinguished defense counsel's role at a Wade lineup, see supra note 145, from a photographic identification procedure, where the defense had access to the photos, could reconstruct the procedure, and cross-examine witnesses at trial. Id. at 318-21. The Court also believed a defense attorney's presence was not needed to deter abuses in the identification procedure; prosecutors' ethical responsibility would adequately safeguard the defendant from unfair prejudice. Id. at 320 & n.16.
159. Stating that a right to counsel at the photographic identification represented a "substantial departure from the historical test," the Court indicated its "unwilling[ness] to go so far as to extend the right to a portion of the prosecutor's trial preparation interview with witnesses." Id. at 317.
160. In Brewer v. Williams, 430 U.S. 387 (1977), a five-to-four majority suppressed statements the police had obtained from a represented defendant following his lower court arraignment on an out-of-state warrant. "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." Id. at 398; see also Maine v. Moulton, 474 U.S. 159, 168-70 (1985) (emphasizing that an accused's right to counsel during an out-of-court police confrontation is "indispensable to the fair administration of . . . justice" and that "depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself").

In Michigan v. Jackson, 475 U.S. 625 (1986), the Court held that the right to counsel attached for an unrepresented defendant who had requested, at his initial judicial appearance, that counsel be assigned. In suppressing statements on grounds that the defendant's right to counsel had attached before a custodial interrogation, the Court dismissed as "untenable" the State's argument that a lower court arraignment on criminal charges did not initiate formal proceedings. "[A]fter a formal accusation has been made[] and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment," id. at 632, an accused is constitutionally entitled to the assistance of counsel.
left unanswered whether the defendant’s initial lower court appearance where bail was determined was a critical stage that required the State to provide court-appointed counsel for accused indigents. Interestingly, the high court seemed to assume that indigent defendants were typically represented by court-appointed counsel or would be promptly assigned a lawyer.161

D. Coleman v. Alabama: The Pretrial Preliminary Hearing Is a Critical Stage

In Coleman v. Alabama,162 the Supreme Court’s first application of the Wade critical stage analysis, the Court concluded that counsel’s presence at the felony preliminary hearing163 was critical to ensure that the defendant’s fair trial right was not an “empty formality.”164 The Coleman Court explicitly rejected Alabama’s argument that, because the accused suffered no prejudice, counsel was not constitutionally required.165 Instead, the Court combined the principles of Powell and Gideon with the Wade criteria and declared that, at a preliminary hearing, “the guiding hand of counsel” was necessary to avoid “potential substantial prejudice to defendant’s rights.”166 Assigning counsel at the preliminary hearing “safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused and the state the expense and inconvenience of a public trial.”167 In addition to seeking dismissal of charges before trial, counsel assigned at the preliminary hearing is needed to intelligently guide a defendant’s decision whether or not to plead guilty. The preliminary hearing provided defense counsel with the opportunity for examining prosecution wit-

161. See McNeil v. Wisconsin, 501 U.S. 171, 180-81 (1991) (“The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at that time and ordinarily requested.”) (emphasis added)). Defendant McNeil had been represented by a Wisconsin public defender during his initial appearance when bail was set. See id. at 173; see also County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991) (describing the defendant’s initial appearance as one in which “[r]ecords will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined” (emphasis added)). See also infra notes 191-92. In Part II, supra, I challenge the belief that state courts provide court-appointed counsel for accused indigents at the initial appearance where bail is set.


163. At a preliminary hearing, a judicial officer determines whether there is probable cause to believe that the defendant committed the crime charged. See supra note 28. In Alabama, like most states, the accused does not have the right to a preliminary hearing. The prosecuting attorney may instead avoid a public proceeding by presenting evidence to a grand jury. See infra notes 172-73.

164. See United States v. Miranda, 384 U.S. 436, 466 (1966) (ensuring that trials for indigent defendants were not “empty formalities . . . where the most compelling evidence of guilt . . . would have already been obtained at the unsupervised pleasure of the police”).

165. Under Alabama criminal procedure, the state was precluded from offering at trial any preliminary hearing evidence against a defendant who was unrepresented at the hearing. In addition, the unrepresented defendant did not waive any trial defenses. See Coleman, 399 U.S. at 8.

166. Id. at 7.

167. Id. at 8 n.3.
nesses, which could "expose fatal weaknesses"\textsuperscript{168} or be used for impeachment purposes at trial. Significantly, the Court also appreciated that counsel's representation would "be influential . . . in making effective arguments for the accused on . . . bail."\textsuperscript{169} The Court concluded by noting the "inability of the indigent accused on his own to realize these advantages of a lawyer's assistance."\textsuperscript{170}

In deciding to extend an accused's right of counsel to the critical stage of the preliminary hearing, the \textit{Coleman} Court relied on the central theme of the right to counsel: the constitutional right to the effective assistance of a lawyer at trial depends upon counsel engaging in meaningful, and immediate, pretrial preparation.\textsuperscript{171} The Court viewed the preliminary hearing as essential for ensuring that the accused's right to a fair adjudicative process was protected. However, preliminary hearings are not constitutionally required\textsuperscript{172} and are not required to be conducted in the regular course of a criminal proceeding.\textsuperscript{173} As a result, \textit{Coleman}'s guarantee of counsel at that stage has little meaning for most defendants. Indeed, many states reacted to \textit{Coleman} by eliminating the preliminary hearing, thereby creating the present system where the typical incarcerated defendant can spend weeks and months in jail before his constitutional right to counsel becomes a reality.

\section*{E. Gerstein v. Pugh}

In \textit{Gerstein v. Pugh},\textsuperscript{174} decided four years after \textit{Coleman}, the Supreme Court concluded that a lawyer's presence was not constitutionally required at a probable cause determination. In \textit{Gerstein}, a five-to-four decision, the Court distinguished the accused's Sixth Amendment right to representation at a preliminary hearing from the Fourth Amendment's standard of reasonableness in deciding that an accused is not entitled to counsel to challenge a judicial officer's probable cause finding.\textsuperscript{175} The \textit{Gerstein} Court, in dicta,\textsuperscript{176} concluded that

\begin{itemize}
  \item \textsuperscript{168} \textit{Id.} at 9. The Court added that "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." \textit{Id.}
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} "A criminal prosecution certainly does not start only when the trial starts. If [it did], then indigents would likely go to trial without effective representation by counsel. Lawyers for the defense need time to prepare a defense." \textit{Id.} at 14 (Douglas, J., concurring).
  \item \textsuperscript{172} \textit{See} Lem Woon v. Oregon, 229 U.S. 586 (1913).
  \item \textsuperscript{173} In felony cases, a prosecutor may present evidence directly to a grand jury and altogether bypass the adversarial hearing. In misdemeanor cases, preliminary hearings are rarely even permitted; a prosecutor invariably proceeds directly to trial. \textit{See supra} note 28.
  \item \textsuperscript{174} 420 U.S. 103 (1975).
  \item \textsuperscript{175} \textit{See id.} at 120.
  \item \textsuperscript{176} Four Justices indicated that the Court should not have considered the right to counsel issue. "Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta . . . ." \textit{Id.} at 126 (Stewart, J., concurring, joined by Douglas, Brennan & Marshall, J.J.).
\end{itemize}
the probable cause determination was not a critical stage which required counsel's appointment for indigent defendants.

In Gerstein, the Supreme Court found that Florida's procedures for permitting a judicial determination of probable cause were an unreasonable restraint on an individual's personal liberty. The Fourth Amendment, said the Court, entitled every arrested person to a prompt determination of probable cause, by a "neutral and detached magistrate." While acknowledging the "stakes are . . . high" in deciding whether to release or detain a suspect, the Court concluded that the Fourth Amendment's standard of reasonableness did not require adversary safeguards, such as the assignment of counsel.

The Court's analysis focused on the fairness of the state's probable cause determination procedures to justify depriving a person of his freedom. The Gerstein majority was reluctant to mandate uniform procedures for probable cause determinations, preferring to encourage "flexibility and experimentation by the States." In deferring to federalism concerns, the Court suggested that individual states might choose to make the probable cause determination either "at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail." This reasoning led the Court, in dicta, to conclude that the

177. Florida's criminal procedure law, permitting prosecutors to file an information, resulted in defendants remaining in jail for 30 days or more without a judicial determination of probable cause. "As a result," said the Court, "a person charged by information could be detained for a substantial period solely on a prosecutor's decision." Id. at 106.

178. Sixteen years later, in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Supreme Court clarified "prompt" to mean that a probable cause determination must be made within 48 hours after arrest.


180. Id. at 114. The Court recognized the "serious" consequences that resulted from prolonged pretrial detention: it may unjustly "imperil the suspect's job, interrupt his source of income, and impair his family relationships." Id.

181. See id. at 122. The Court added: "This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases." Id. at 121-22. But the Court was satisfied that a probable cause finding did not require counsel for the accused because it involved "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 121 (citing Brinegar v. United States, 338 U.S. 160, 174-75 (1949)). The Court's Fourth Amendment analysis concluded: "In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause." Id. at 122.

182. Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." Id. at 124-25.

183. Id. at 123.


186. See supra note 176. In Gerstein, neither party briefed the Sixth Amendment right to counsel, or critical stage analysis, in their written argument to the Supreme Court. Nor did the lower state court opinion address this issue. Four Justices rejected the majority's Sixth Amend-
probable cause determination was not a "critical" stage triggering the Sixth Amendment right to counsel. The Court's analysis differentiated the importance of counsel during a preliminary hearing from the probable cause finding. "The Fourth Amendment probable cause determination is addressed only to pretrial custody," whereas the preliminary hearing's function "could mean that [the defendant] would not be tried at all." The Court distinguished counsel's role as a cross-examiner during the preliminary hearing, where it confronted prosecution witnesses, from counsel's lesser responsibilities at the probable cause determination.

Recognizing that some detriment would be caused to an accused's trial rights while detained and unrepresented by counsel, the Gerstein Court presumed that the detriment to trial rights would not be substantial, because the delay in obtaining counsel would be minimal. The reality, however, is quite different: individuals charged with crimes often appear, without counsel, at their initial judicial appearance and remain without counsel for long periods.

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187. The Gerstein Court defined critical stage as a pretrial procedure "that would impair defense on the merits if the accused is required to proceed without counsel." Id. at 122; cf. supra notes 139-40.

188. Gerstein, 420 U.S. at 123. A judge's finding of no probable cause has the same result as a decision finding that the prosecution failed to offer sufficient evidence at a preliminary hearing: the charges are dismissed. In both situations, a court-ordered dismissal does not prevent the prosecution from resubmitting new charges upon finding additional evidence of the defendant's culpability.

189. The Court contrasted this "informal" determination with a judge's ruling at a preliminary hearing, which involved "the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands." Id. The legal standard, however, is basically the same for both: reasonable cause to believe that a crime was committed. In addition, credibility determinations appear to be at least as significant when a court reviews sworn allegations in a charging document and when it considers sworn testimony at a judicial proceeding. See Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 New Eng. L. Rev. 1, 32 (1993).

190. "To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in Wade and Coleman." Gerstein, 420 U.S. at 123.

191. In the opinion, the Court referred to a proposal being considered under the Uniform Rules of Criminal Procedure which would have guaranteed an accused legal representation, within five days of arrest, at a combined probable cause/bail hearing. Following that, the Court described the American Law Institute Model Code of Pre-Arraignment Procedure's plan, which provided for counsel's assignment within two days following the accused's first appearance before a magistrate. Id. at 124-25 n.25. In County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991), the Court made a similar reference to its belief that the "appearance of counsel [would be] arranged" at an accused's initial appearance for arraignment, bail, and a probable cause determination. See also supra note 161.

192. See supra Part II.
F. Recap: The Federal Constitutional Analysis Applied to Bail

Guaranteeing indigent defendants counsel at the bail-setting stage would be in harmony with the Supreme Court's critical stage and due process analysis. Powell's reasoning that counsel is necessary when the defendants first appear for arraignment on an indictment is equally compelling in the more ordinary situation when arrestees initially appear for bail in the lower court. Each proceeding presents counsel's first opportunity to advocate for her client's liberty. It is also the appropriate time to commence an investigation and evaluation of the State's charges. Kirby recognized the similarity between bail and formal arraignment by declaring that an accused's right to a lawyer attached once the government had committed itself to prosecution, whether by indictment or by the filing of charges.

Wade's critical stage analysis recognized that a lawyer's presence was essential at certain pretrial proceedings "to help avoid [potential substantial] prejudice" to the unrepresented defendant, including his right to prepare a meaningful defense. Applying Wade, the Coleman Court unanimously agreed that counsel's representation at the preliminary hearing was constitutionally required. But the right to counsel at a preliminary hearing is illusory because prosecutors usually avoid such hearings. Coleman's guarantee of counsel could be made real by requiring that it apply at the accused's initial appearance when bail is first determined.

For many defendants, legal representation at bail is the only opportunity for convincing the judicial officer to order freedom and to find the accusation meritless, before returning to jail for a substantial period of time. Mandating counsel at bail would minimize the potential for inflicting substantial prejudice upon these individuals, who often experience lengthy delays before being assigned, and meeting with, their appointed attorney.

Many scholars agree that requiring counsel at bail would meet the critical stage analysis first announced in Wade and later modified in Kirby and Ash. Ash's requirement of a trial-like confrontation

195. In their treatise on criminal procedure, Professors LaFave and Israel conclude that "[b]ecause counsel for the defendant can make such an impact at the bail hearing, there is much to be said for the contention that the Sixth Amendment right to counsel applies at that time." LaFave & Israel, supra note 12, § 12.1(c), at 599. LaFave and Israel add: "Such a conclusion is certainly consistent with the general notion, as the Supreme Court has put it, that this right comes into play upon 'the initiation of adversary judicial criminal proceedings,' at which time the 'defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" Id. (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972)). Professors Charles Whitebread and Christopher Slobogin use similar references in their criminal procedure text in suggesting that an accused's right to counsel includes a pretrial release hearing under a federal preventive detention law. "A post-arrest bail hearing appears to meet both of these requirements [for appointed counsel]." Whitebread & Slobogin, Modern Criminal Procedure 502, 849 (3d ed. 1993); see also
presents a more difficult evidentiary burden for the accused. But unlike Ash, who was not present at the photographic display, the accused always appears at the initial bail hearing and is “confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.”196 Consequently, when a prosecutor also is present, Ash would require counsel to protect the accused from being “overpowered by his professional adversary.”197 When the prosecuting attorney is absent from the bail hearing, a narrow reading of Ash might not guarantee counsel because a lawyer would not have been needed “to produce equality in a trial-like adversary confrontation.”198 Such a hearing could be regarded as neither adversarial nor trial-like.

But when the prosecuting attorney chooses to be absent from the bail hearing, the accused still must stand alone before a judicial officer and confront “the intricacies of the [substantive and procedural] law.”199 Providing legal representation would “protect the defendant from errors that he himself might make if he appeared in court alone.”200 It also would be consistent with Powell’s long-held principle that underlies the Gideon-Argeringer constitutional right to counsel: whenever an individual’s liberty is at stake, fair process requires a lawyer’s presence.201

Gerstein held that an accused was not entitled to counsel at the judicial probable cause determination. Because many states have applied Gerstein to bail hearings, the Supreme Court’s ruling should be revisited because it rested on two questionable assumptions. First, the Court majority believed that appointed counsel would soon represent the accused during the first appearance or bail proceeding. As discussed earlier, many jurisdictions deny representation at the bail stage and continue to deprive individuals awaiting trial access to a lawyer during the pretrial stage. Second, the Gerstein Court expressed reluctance to assign counsel at the probable cause determination because of its concern that a lawyer’s presence would further clog an “already overburdened” criminal justice system: “[T]he early stages of prose-

Kamisar et al., supra note 12, at 872 n.8 (suggesting that a bail hearing, like a preliminary hearing, perhaps should be considered a critical stage at which there is a constitutional right to counsel).

197. Id. at 317.
198. Id.
199. Id. at 309.
200. United States v. Ash, 461 F.2d 92, 101 (D.C. Cir. 1972), rev’d and remanded, 413 U.S. 300 (1973). See supra note 78, referring to errors of commission which occur when the accused’s remarks are self-incriminating or errors of omission caused when the defendant remains silent.
201. The procedural due process argument could be based on the three-prong analysis set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The accused’s liberty interest at stake when bail is determined would first be considered and then balanced against the value which counsel’s presence could have in reducing erroneous bail decisions. Each factor would then be weighed against the government’s burden and cost of guaranteeing counsel as an additional safeguard for the accused. But see Medina v. California, 505 U.S. 437, 443 (1992) (stating that the Mathews analysis is not appropriate for evaluating state criminal procedure rules).
cution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay."202 These statements suggest that the Court believed that mandatory representation was impractical, considering states’ limited resources and the anticipated additional costs.

Time has proven that the criminal justice system has become more burdened by denying counsel at the initial appearance where bail is decided and thereafter during pretrial detention. As discussed below, a lawyer’s early intervention should lead to a more efficient, inexpensive, and less overcrowded criminal justice system by diminishing the pretrial detainee population.203 Localities, however, continue to rely upon Gerstein’s dicta to deny appointed counsel at bail determinations. They could argue that if defense counsel was thought to cause delay and expense at probable cause determinations, the same could be predicted for bail hearings.

In sum, although Supreme Court decisions provided the foundation for a right to counsel at bail, two erroneous factual assumptions in Gerstein suggest reconsideration is appropriate. As the following part explains, state constitutional jurisprudence may be an additional source for extending the right to counsel to bail.

V. STATE COURTS’ TREATMENT OF BAIL AND THE RIGHT TO COUNSEL

Although Supreme Court rulings in Coleman v. Alabama204 and Kirby v. Illinois205 created the basis for extending the right to counsel to the initial bail hearing, relatively few state courts have addressed this issue. Those that have, reached different conclusions. Several appellate courts rejected the right to counsel argument by emphasizing counsel’s necessity at trial, not before trial. Collectively, these decisions indicate that, for reversal, they would require a showing that counsel’s absence at the bail hearing prejudiced the accused’s fair trial rights.206 In comparison, the only published pretrial court decision, a

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203. See infra Part V.
204. 399 U.S. 1, 9 (1970). See supra Part IV.D.
205. 406 U.S. 682, 689 (1972). Subsequent Court decisions identified the defendant’s initial judicial appearance after arrest as triggering the defendant’s right to counsel’s assistance. See supra notes 160-61.
206. In Green v. State, 872 S.W.2d 717 (Tex. Crim. App. 1994), Texas’s Court of Criminal Appeals stated that although a failure to appoint counsel at a critical stage could be reversible error, nothing had “occurred . . . [that] required the aid of counsel to cope with any legal problem or assist in meeting the prosecutorial adversary.” Id. at 721; see also State v. Williams, 210 S.E.2d 298, 300 (S.C. 1974) (concluding that there was “no showing in [the] record, nor does appellant contend, that anything occurred at the bail hearing which in any way affected or prejudiced his subsequent trial or that was likely to do so”); see also, e.g., United States v. Hooker, 418 F. Supp. 476 (M.D. Pa.), aff’d, 547 F.2d 1165 (3d Cir. 1976); Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994); Hebron v. State, 281 A.2d 547 (Md. Ct. Spec. App. 1971); State
1990 New Jersey case, *State v. Fann*, 207 extended the right to counsel to the initial bail hearing by focusing upon the serious consequences which pretrial detention could inflict on defendants’ liberty and property interests. 208

*Fann* is worth a close look. Ruling that constitutional protection existed under federal and state constitutional law, *Fann* reviewed bail procedures for incarcerated defendants awaiting trial in Burlington County who had been unrepresented when bail was originally set. 209 Holding that the bail determination was a critical stage under the Sixth Amendment, the court examined the state constitutions of New Jersey and thirty-seven other states which had recognized a right to bail in noncapital cases. 210 The *Fann* Court concluded that bail was a “fundamental right founded in freedom and human dignity, reflected in the everpresent presumption of innocence and requiring firm articulation in the [State] Constitutions.” 211 A lawyer’s presence was essential when bail was decided, said the court, because pretrial detention had serious consequences for incarcerated defendants. The *Fann* court described the devastating impact on the defendant’s liberty and property interests; 212 the ways in which the opportunity to

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v. Dieziger, 650 P.2d 800 (Mont. 1982); *supra* note 204. To constitute reversible error, these appellate courts applied a harmless constitutional error standard, which required the defendant showing that, absent the error, the outcome would have been different. *See* Chapman v. California, 386 U.S. 18 (1967); *Hebron*, 281 A.2d at 550 n.5 (“[I]f there was error, it was harmless beyond a reasonable doubt.”).

But demonstrating prejudice does not ensure that a state court will regard the initial bail hearing as a critical stage. In *Hayre v. State*, 495 N.E.2d 550 (Ind. Ct. App. 1986), the defendant appeared unrepresented at his bail hearing wearing a ring, which the State confiscated and later used as evidence at his trial. *Id.* at 551. Reasoning circularly, the court explained that for an indigent defendant to obtain court-appointed counsel, he must appear in court and be found eligible. *Id.* at 552. Because Indiana law did not permit a judge to provide counsel before the defendant appeared at the initial proceeding, this appearance was pro forma and could not be considered a critical stage. *Id.* Thus, concluded the Court, the defendant was not prejudiced. *Id.*

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208. *See id.* at 1030.

209. One of the two defendants who argued for a right to counsel was Terry Johnson, who was in custody awaiting trial on two misdemeanors—possession of a weapon and theft—because he could not afford a $100 cash alternative bail. *See id.* at 1024-25. In my experience as a criminal defense lawyer for more than 20 years, I have observed many defendants who remained incarcerated because they were unable to post bail in amounts between $100 and $1000. *See Bar Ass’n of Baltimore City, The Drug Crisis and Underfunding of the Justice System in Baltimore City: Report of the Russell Committee* 33 (1990) [hereinafter Drug Crisis] (indicating that “almost half of the [city’s pretrial] jail population had a bail of $1000 or less”). In my first jury trial, my client, who was charged with petty theft, remained in custody because he could not afford $50.

210. In *State v. Johnson*, 294 A.2d 245 (N.J. 1972), New Jersey’s Supreme Court held that the right to bail was a statutory right which had been incorporated in the state’s 1844 and 1945 constitutions, article I, paragraphs 11 and 12 (“All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.”).

211. *Fann*, 571 A.2d at 1026.

212. Judge Haines reasoned that for the individual facing a loss of freedom, the personal consequences “cannot be overstated. The effect on family relationships and reputation is ex-
prepare a defense was severely hampered; and finally, the increased likelihood that incarcerated defendants would be convicted and would receive harsher sentences. Taking into account the logistical difficulties of Burlington County providing counsel at the initial bail determination, the New Jersey court held that the lawyer's presence at the bail review hearing the following day would satisfy the constitutional mandate.

In contrast to Fann, some appellate courts in other jurisdictions have considered the issue and affirmed convictions where defendants failed to meet the high standard of establishing that the lawyer's absence prejudiced the trial outcome. As the Texas Court of Criminal Appeals declared in Green v. State, these courts view the "core purpose of the counsel guarantee" as "fairness and the effective assistance of counsel at trial." Avoiding any reference to the lawyer's role in advocating for pretrial release or in investigating the charges and preparing a defense, the Texas court described the bail proceeding formalistically: it was merely the stage when a magistrate informed the defendant of the charges and of his rights. As such, the court concluded, bail was not a critical stage, because the defendant "stood to gain nothing by the presence of, and risked losing nothing in the absence of, an attorney at his side." Insofar as his right to

tremely damaging. Failure of pretrial release causes serious financial hardship in most cases. Jobs and therefore income are lost." Id. at 1030. The court referred to the "grave" results of pretrial detention: "Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life . . . . Equally important, the burden of his detention frequently falls heavily on the innocent members of his family." Id. at 1026 (quoting Standards Relating to Pretrial Release Introduction at 2-3 (1968)).

213. "The opportunity to consult with counsel, to find witnesses, to obtain evidence and, in general, to prepare a defense is clearly restricted when a defendant is kept in jail." Id. at 1030. The court also referred to "[t]he jailed defendant . . . [being] prevented from contributing to the preparation of his defense." Id. at 1026 (quoting Standards Relating to Pretrial Release Introduction at 3 (1968)).

214. See supra note 27.

215. In the county, bail arrangements frequently were made when a prosecutor or defense attorney telephoned a duty judge. Requiring defendants to be present with an attorney would delay the setting of bail, and would be "impractical and unfair to defendants." Fann, 571 A.2d at 1032.

216. New Jersey Rule 3:4-2 provides for a superior court judge to set bail, or to review bail previously set by a municipal court judge or clerk, at the defendant's next appearance the following weekday.

217. See supra note 208.


220. See Green, 872 S.W.2d at 721. The Texas court described the defendant's preliminary initial appearance (PIA) as the proceeding where the magistrate made a probable cause determination, provided the defendant with Miranda warnings, automatically entered a plea of not guilty, informed him of the right to counsel, and set bail. See id. at 726; see also Tex. Crim. P. Code Ann. § 15.17(a) (West Supp. 1997). The Green court distinguished the PIA from the arraignment on an indictment, where the defendant entered a formal plea.

221. Green, 872 S.W.2d at 720-21. The court added that "the possibility that a lawyer might have contested bail at the PIA does not elevate that proceeding to the level of a critical stage." Id. at 722.
bail was concerned, the court suggested that the defendant could have applied for a writ of habeas corpus.\footnote{222}

The paucity of right-to-counsel state court decisions invites defense attorneys to test local practices which deny indigents' representation at the bail-setting stage. Using \textit{Fann} as the model, federal and state constitutional challenges can be made to trial courts during the earliest stage of a defendant's pretrial detention when the need to prepare a trial defense and a successful negotiation strategy is strong. For example, one wonders how the Texas Criminal Appeals court would have ruled in \textit{Green} had the defense presented a different factual record. Unlike defendants who obtained counsel's assistance shortly after bail was initially determined,\footnote{223} those victimized by a state's significant delay in assigning counsel will frequently be burdened by an impaired ability to locate crucial witnesses. The longer the delay, the stronger the due process argument that the accused was deprived of his right to prepare a defense.\footnote{224} In appropriate cases, therefore, a defense lawyer's bail argument should include the necessity of the accused being released to assist finding a witness otherwise unavailable. Defense lawyers also might demonstrate that the absence of counsel at bail affected clients' willingness to assert their trial rights. A prosecutor's or trial judge's intimidating statements or conduct at the bail proceeding may convince unrepresented defendants that they have little to gain, and much to lose, by challenging the state's evidence. Additional pretrial delay in assigning counsel may cause the accused to lose faith in the system's ability to provide a fair trial and may persuade him to plead guilty, even when it is not in his best interest.

When viewed from this perspective, more courts are likely to appreciate the extent to which the unrepresented indigent defendant stands to gain, and how much he risks losing, "in the absence of an attorney at his side."\footnote{225} Consequently, a state constitutional argument would focus both on the lawyer's role in preparing a meaningful defense and on the state's historic and deep-rooted protection of citizens' liberty interests as reflected in its right to bail guarantee.

\footnote{222} Although an accused has the right to file a habeas corpus petition alleging that his detention was unlawful based on the excessiveness of bail, there is no established constitutional right to counsel at such a proceeding. \textit{Cf.} Pennsylvania v. Finley, 481 U.S. 551 (1987) (stating that there is no right to counsel in state habeas collateral proceedings). Moreover, even in jurisdictions which provide for a statutory right to counsel, substantial delay may occur before the defendant's petition is heard. In Baltimore, for example, delays of between three and six weeks are common before a habeas petition receives a court hearing.

\footnote{223} In \textit{Green}, 872 S.W.2d at 722, the defendant had been unrepresented when bail was originally set but was assigned a lawyer the following day. In \textit{State v. Williams}, 210 S.E.2d 298, 300 (S.C. 1974), the defendant obtained counsel after having appeared for bail without a lawyer and was able to post bail "some time later."

\footnote{224} See supra note 74.

\footnote{225} \textit{Green}, 872 S.W.2d at 721; see supra note 222.
VI. THE ECONOMIC JUSTIFICATION FOR GUARANTEEING THE RIGHT TO COUNSEL

In addition to the constitutional basis described above, there is an important economic justification for guaranteeing an accused's right to counsel at the initial bail-setting stage. Previous sections suggested that providing counsel for accused indigents at bail would advance Gideon's "noble ideal" of equal justice and achieve Argerisinger's hope that from the moment judicial proceedings commence, the accused "know[s] precisely what he is doing . . . [and] is treated fairly by the prosecution."226 Lawyers' representation decreases the likelihood of a judicial officer setting bail unreasonably or punitively,227 and is more likely to secure clients' release from jail before trial.228 Implicit in these arguments is the firmly held belief that when lawyers fulfill their client responsibilities, fewer people will remain trapped in pretrial detention unnecessarily.

Is this ideal of representation for defendants appearing at their initial bail proceeding one that is likely to be achieved? Will legislators provide the funding necessary to hire additional court-appointed attorneys?229 Few public officials want to be associated with a proposal the public perceives as pro-defendant. But the pro-defendant perspective is too narrow. Guaranteeing counsel at bail benefits more than the accused. It also allows the criminal justice system to function more efficiently and economically, and thus benefits taxpayers.

In our funnel-shaped system, most arrests enter through the funnel's large opening. However, relatively few are found sufficiently serious to merit felony indictment and prosecution at the funnel's narrower end.230 Without legal representation at bail, far too many

227. See supra Part III.
228. Sometimes an accused's family is unable to raise the full amount until after the initial appearance. On other occasions, the family has a substantial portion of the bail, but less than the full amount. At the next court appearance, the attorney may succeed in persuading the trial court that the amount raised is adequate to secure the defendant's future appearance.
229. At a Maryland law school faculty colloquium, on November 13, 1996, several colleagues expressed skepticism about the funding issue, see infra notes 233-35 and accompanying text, based on their assumption that the constitutional argument would succeed.
230. The media present a distorted view of the criminal justice system. By focusing upon violent and serious crimes, they create the impression that most people awaiting trial are dangerous and require high bails. Relatively few criminal charges, however, are prosecuted in the felony court. During 1995-96, for example, Maryland prosecuted only five percent of 178,935 arrests in its upper felony court. Most arrests, whether originally felonies or misdemeanors, are resolved in the lower criminal court. Lower court charges usually do not involve allegations of violence, but represent the usual garden-variety type that one finds on a crowded criminal court docket: drug possession; loitering; theft; destruction of property; unauthorized use of a vehicle; trespass; disorderly conduct; driving under the influence or with a suspended license; and technical violations of probation. During 1995-96, more than half of Maryland's arrests (178,935) resulted in dismissal (54,253) or were placed on the inactive calendar and not prosecuted (36,270). District Court of Maryland, Criminal Filing and Disposition Statistics, July 1995-June 1996. Because public defenders usually meet their incarcerated clients after they have spent 30 days in jail, lawyers achieved remarkable results once they commence representation. In Baltimore, the
people languish in jail throughout pretrial proceedings. Like many cities, Baltimore’s detention facilities are usually filled to capacity and sometimes go beyond the maximum population permitted.\textsuperscript{231} Bails vary, of course, depending upon the judicial officer, the individual defendant, and the crime charged. But without a lawyer’s presence at the initial determination, there is little to prevent a judicial officer from setting an unreasonable bail, or refusing to impose a ten-percent cash alternative,\textsuperscript{232} or ordering long postponements for incarcerated defendants. As a result, large numbers of people are deprived of their freedom, simply because they are poor.\textsuperscript{233}

Taxpayers pay substantial costs for maintaining an unnecessarily large pretrial prison population. Nationally, it costs about fifty dollars daily for each individual who is held in pretrial detention.\textsuperscript{234} Because

average time for final disposition was 47 days from arrest. See generally Kate Shatzkin, 

\textit{Attorneys for Lockup Lacking}, BALTIMORE SUN, Apr. 14, 1995, at 1B (describing a lack of funds to put Baltimore City prosecutors in the new high-tech jail facility).

\textsuperscript{231} On any given day, more than three thousand people await trial in Baltimore’s pretrial detention centers because they were unable to post bail. On December 18, 1996, for example, the Baltimore City Detention Center (BCDC), built in 1801, held 2428 detainees; in addition, there were 729 detainees in the new high-tech Centralized Booking Center. Telephone Interview with Margaret Boulware, BCDC Court Compliance Office (Dec. 17, 1996). Following two decades of litigation, a 1993 consent decree required that BCDC’s pretrial population not exceed 2933. On occasion, it has surpassed this number. See Kate Shatzkin, 

\textit{Judge Chastises Jail Officials for Overcrowding}, BALTIMORE SUN, May 10, 1995, at 1B (reporting that BCDC held 3400 people and that jail officials faced contempt charges).

\textsuperscript{232} Like many states’ bail policy, Maryland’s statute favors pretrial release. “A defendant charged with [a noncapital offense] \textit{shall} be released . . . on personal recognizance unless the judicial officer determines that that condition of release will not reasonably ensure the appearance of the defendant as required.” Md. R. 4-216(d) (emphasis added). When bail is required, the statute directs the judicial officer to impose “the least onerous” conditions: a bond without collateral security, a 10% cash alternative or a larger percentage, or the full bond amount. Md. R. 4-216(d)(4)(A)-(D); see supra note 69.

\textsuperscript{233} An extremely high percentage of pretrial inmates are incarcerated because they are unable to post relatively low cash bails. See \textit{Drug Crisis}, supra note 209, at 33 (indicating that “almost half of the [25,000 people who comprised Baltimore’s 1988 pretrial] jail population had a bail of $1000 or less”). A Department of Justice national study indicated that about one-third of a sample of states’ pretrial felony populations were jailed on bail of under $2500. See Brian A. Reaves \& Jacob Perez, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, \textit{Pretrial Release of Felony Defendants}, 1992, at 4 (Nov. 1994). For other examples of bail’s discriminatory impact upon the poor, see William M. Landes, \textit{An Economic Analysis of the Courts}, 14 J.L. \& ECON. 61 (1971); Anne Rankin, \textit{The Effect of Pretrial Detention}, 39 N.Y.U. L. REV. 641 (1964); Hans Zeisel, \textit{Bail Revisited}, 1979 AM. B. FOUND. RES. J. 769 (1979).

\textsuperscript{234} Costs of pretrial detention will vary according to jurisdiction and can only be approximated. In Baltimore, prison officials estimated that they spend $50.59 per day for each pretrial inmate. Telephone Interview with Barbara Cooper, Public Information Officer for the Maryland Division of Pretrial Detention and Services (Apr. 1996). Nationally, the $50 per day amount also appears to represent an accurate yardstick. Every five years, the U.S. Department of Justice conducts a national jail census, which provides detailed information about local jails, i.e., those operated by counties and municipalities. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, \textit{JAILS AND JAIL INMATES} 1993-1994 (Apr. 1995). The last complete census, which was conducted in 1993, revealed that local jails held 459,804 people, most of whom were awaiting trial, \textit{id.} at l, and spent about $9.628 billion dollars, \textit{id.} at 9, tbl.15. About 70% was spent on operating expenses (salaries, wages, food, supplies), and the remainder was used for capital expenditures (repairs, new buildings). See \textit{id.} In 1995, the local jail population, overwhelmingly pretrial detainees, had increased by over 10% and included 507,044 inmates. Hunter
many of these charges are eventually dismissed or not prosecuted, immediate representation would reduce significantly these detention costs. Although an exact accounting of the fiscal savings gained is beyond the scope of this article, they are likely to be substantial.

Together with these fiscal costs, pretrial incarceration also incurs a hefty price on society generally. If the accused is employed, he will often face the loss of a job because of his involuntary absence. In a hard-pressed economy, where jobs are difficult to obtain and keep, this punishment is often more severe than any imposed by the lower court. If the accused is the breadwinner or contributes financially to his family, his dependents may require emergency or sustained governmental assistance. Families unable to pay rent or make mortgage payments may be evicted when deprived of the accused’s income. During pretrial imprisonment, many families and children are dislocated. When the accused remains in jail, emotional repercussions for the defendants and their loved ones can be incalculable. When the charges upon which a person is detained are eventually dismissed or not prosecuted, the economic, social, and emotional consequences incurred cannot be justified nor remedied.

Many of the problems described above would be alleviated by providing counsel to indigent defendants at bail hearings. The sooner serious charges are identified, the more efficiently the system functions. Lawyers’ early representation means that weaker cases can be diverted from the system sooner, thus allowing prosecutors to appropriately focus their limited resources. Rather than waiting several weeks until a lawyer first appears, these weaker charges can be identified at the outset, allowing judges and prosecuting attorneys to avoid


235. By reducing the pretrial population, there should be a corresponding reduction in operating expenses, such as salaries, overtime, hiring additional personnel, food, transportation, health care, and utility costs. An accountant’s allocation of savings would reflect the reduced structural and daily costs of maintaining a smaller jail population. Additionally, similar savings should result in the criminal courts in areas of personnel and maintenance.

236. I assume here that Baltimore is typical of many localities’ pretrial population, where many detainees are held on low bail, or on charges that were ultimately dismissed or not prosecuted. See supra note 233. By identifying these cases and multiplying the daily cost of detention by the number of days that individuals were detained, one can gain an approximation of the overall potential savings (less the costs of providing counsel, see infra note 240). For example, during 1988 Baltimore housed 25,000 people in its pretrial detention jails. The average length of stay for each inmate was about 47 days. See supra note 230. Because 55% of Baltimore’s pretrial population were eventually released without having been convicted of a crime, as many as 13,750 people had been incarcerated for crimes eventually dismissed or not prosecuted. At an average daily cost of $50, multiplied by the average incarceration of 47 days, the savings would be considerable. If lawyers succeeded in gaining release for one out of five individuals at the bail stage, the savings would be almost $6.5 million ($2350 per inmate multiplied by 2750 inmates); if they gained pretrial release for two out of five defendants, the savings would be about $13 million. In other instances, lawyers might not succeed in gaining their clients immediate pretrial release but would be able to establish the weakness of the charge or the unreasonableness of bail. Additional savings would result from the anticipated reduction in the current average 47-day period of incarceration. See supra note 230.
squandering valuable time on them. With lawyers' active involvement, congested court dockets and prison overcrowding would become more manageable.

Beyond fiscal and social cost considerations, our criminal justice system suffers other immeasurable losses. Maintaining an unnecessarily large pretrial population, consisting overwhelmingly of poor people unable to afford bail, jeopardizes the system's claim to integrity and fairness. When counsel's assistance is delayed, many detainees lose faith that the system will treat them fairly. Moreover, detaining individuals who would otherwise be freed if they had legal representation turns the presumption of innocence on its head: it presumes that people accused of a crime are guilty and therefore ought to be detained, unless they can prove their innocence.

In sum, several ingredients are important for developing an economic argument concerning the potential savings generated from counsel's representation at the initial court appearance. By closely examining the pretrial population's bail conditions, each locality could identify those who are being held unreasonably or unnecessarily. Localities could learn more about their pretrial population by gathering data about the percentage of cases which conclude without prosecution or imposition of a jail sentence, particularly offenses prosecuted in the lower criminal court. In considering the fiscal and social costs of pretrial incarceration, localities would be able to evaluate the dual savings that result from providing the accused with counsel during the initial appearance of a criminal case. First, early representation would permit many arrestees to return to their homes and jobs, rather than remaining in custody while charges are pending.

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237. See supra note 230.
238. Some economists have tried to assess the social benefit from pretrial liberty by weighing the gains to defendants released on bail against the costs and gains to the rest of society. See William M. Landes, The Bail System: An Economic Approach, 2 J. LEGAL STUD. 79 (1973) (proposing compensation to detained defendants who are acquitted or whose charges are ultimately dismissed). I look forward to seeing an economic analysis that evaluates the net gains derived from counsel representing the accused at the initial court appearance.
239. For example, Baltimore's Russell Committee heard testimony about the effects of institutionalizing state's attorneys' immediate review of charges at the bail stage following arrest. In the opinion of Baltimore's administrative judge, "one-third of all District Court criminal cases which are dismissed at trial could be eliminated at the point of arrest." Drug Crisis, supra note 209, at 31. Although the state's attorney for Baltimore City disagreed with this assessment, id. at 32, the committee apparently never considered the potential savings which would result from defense lawyers' representation at this initial stage of criminal proceedings.
240. To provide effective representation in a high-volume urban court, a minimum of two court-appointed counsel would be needed to represent individuals at the initial appearance. While one lawyer addressed the court, the second attorney would prepare to represent other defendants. Law students or paralegals also could provide valuable assistance, interviewing defendants and corroborating information. The costs of hiring additional public defenders is not prohibitive when balanced against the potential savings in reducing an overcrowded prison population; a Maryland Public Defender's starting salary, without benefits, is $36,891; a New York City Legal Aid attorney's starting salary is $34,460. Interview with Teresa Schmiedeler, Assistant Director of Public Interest and Judicial Clerkship Programs at the University of Maryland School of Law Career Development Office (Apr. 10, 1998).
Second, by devoting prosecutorial and judicial resources to serious cases and persistent offenders, it would facilitate a more efficient criminal justice system. The justice system’s pretrial population would be reserved for individuals whose detention was necessary to ensure their future cooperation or because they violated the conditions of pretrial release.

VII. PROFESSIONAL RESPONSIBILITY

Ethical considerations guiding the conduct of the defense attorney, prosecutor, the presiding judge, and legal profession generally call for the guarantee of counsel at the bail hearing stage. When significant numbers of people are unrepresented at the initial court appearance and remain incarcerated without counsel, it severely tests the individual lawyer’s, and the legal profession’s, ethical responsibility to ensure justice to accused indigents.

A. Defense Lawyers

The professional responsibilities of the defense lawyer would be served by initiating representation at the bail hearing stage. Indeed, it would be difficult to meet those responsibilities without ensuring that lawyers—particularly those who represent indigents—meet clients when adversarial criminal proceedings commence.

Most criminal defense lawyers are aware that their professional responsibility requires that they act “zealously” and “with reasonable diligence” in defending a client’s liberty. They know that competent representation means thorough preparation, prompt action, and regular communication. Lawyers strive to meet these ethical responsibilities. They know that the standards do not depend upon the client’s resources; rich and poor alike are entitled to competent representation.

Public defenders and court-appointed lawyers for the poor are generally a dedicated and committed group of professionals who

243. Id. Rule 1.1.
244. See id. Rule 1.3.
245. Rule 1.4 states: “COMMUNICATION. (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Id. Rule 1.4.
246. See Standards for Criminal Justice Standard 4-1.2 (2d ed. 1980); see also Standards for Criminal Justice Providing Defense Services Standard 5-1.1 (3d ed. 1992) (“The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel . . .”).
247. Public defender and legal aid organizations remain the primary means for representing indigents in criminal matters. A 1973 survey counted approximately 650 defender systems throughout the United States serving almost two-thirds of the nation’s population. See National Legal Aid & Defender Ass’n, The Other Face of Justice 13 (1973). Where there is no public defender organization, localities contract with individual or groups of private attor-
know what is needed to provide competent representation for their clients. However, their task is daunting.\textsuperscript{248} Shrinking public funds and growing prison populations dictate that defenders' offices must represent more accused people with fewer lawyers and less back-up resources, making it more difficult to meet ethical responsibilities to clients.

How many cases can any lawyer accept before the duty to provide zealous representation for each client becomes hollow rhetoric?\textsuperscript{249} At what point does it become difficult, if not impossible, for public defenders to comply with professional standards in every case and for every client? Under present circumstances, the conscientious public defender must exert a herculean effort to reach her professionalism standards. Surprisingly, many seem to do so. But often, they must choose among competing clients and may decide to devote more time to those who face serious charges, who potentially have stronger defenses, or whose cases or personal circumstances seem more appealing.\textsuperscript{250}

When a client is incarcerated for days, or weeks, before meeting with his lawyer, the conscientious public defender is hard pressed to provide competent representation. She has been excluded from the


\textsuperscript{249} \textit{See supra} note 25 (discussing a proposed national caseload standard for public defenders).

\textsuperscript{250} Most public defenders share the assessment of Kim Taylor-Thompson, formerly director and staff attorney with the Washington, D.C., Public Defender, that public defenders, managing heavy caseloads, "prioritize[] cases and issues. While I may have attempted, and at times publicly claimed, to give one hundred percent of the effort possible to every case, the reality of juggling thirty-five or more active cases simply did not permit such an allotment of time or effort." Taylor-Thompson, \textit{supra} note 11, at 2433. Many public defenders juggle a considerably heavier caseload. \textit{See} Richard C. Teissier & Kathryn E. Smith, \textit{Less Than A Hope and Little More Than a Prayer: The Orleans Parish Indigent Defender Program} (unpublished manuscript) (on file with author); \textit{supra} note 25. Taylor-Thompson also referred to the ongoing problem which managing attorneys face in supervising an office caseload: "Limited funds necessitated choosing cases and issues to which resources would be devoted or from which they would be denied." Taylor-Thompson, \textit{supra} note 11, at 2434; \textit{see also} Martin Guggenheim, \textit{Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney}, 14 N.Y.U. Rev. L. & Soc. Change 13 (1986).
bail determination and has forfeited an important opportunity to influence the judicial officer's view of her client. She has been critically delayed in her case investigation and must now encounter the added difficulty of representing new clients who are in jail awaiting trial.\textsuperscript{251} Accustomed to playing catch-up and receiving the client's case file the day before, or the day of, the client's scheduled court appearance, she must decide which of these new cases she will try to prepare. For those she identifies,\textsuperscript{252} she knows there is little time to conduct a thorough factual investigation\textsuperscript{253} and that it is probably too late to research the charges, file any relevant motions, or subpoena information. The conscientious public defender is consoled only by knowing that she has represented others facing similar charges under similar circumstances, and her representation was then considered adequate.\textsuperscript{254}

What will the public defender do at this later stage when she meets her new client? If experienced, she will make a quick assessment. If the accused is interested in contesting the charge, she will ask for a postponement and try to meet the "thorough and well-prepared" standard for the next court appearance, even though this will add to the pretrial time her client spends in jail. If there is an attractive plea offer, she will present it carefully, making sure the client makes an informed choice and considers the trial option as well.\textsuperscript{255} Other public defenders will concentrate on persuading their clients to accept the plea bargain offered.

These are the realities of public defender practice in jurisdictions where representation does not commence at the initial bail appearance. The difficulty of the individual lawyer meeting her professional responsibilities will vary, depending upon the public defender organization or lawyer group which is responsible for defending the poor. Although most public defender directors would prefer that their lawyers represent the accused for bail, they face limited resources in implementing such a policy and must make hard staffing decisions about where to place their lawyers. Should they create a special group that handles only capital cases? Should they assign the "best" and most

\textsuperscript{251} See supra Parts III.B, III.C.

\textsuperscript{252} In public defender offices which do not provide representation at bail, paralegals frequently conduct initial interviews to determine financial eligibility. During this interview, the accused's statement concerning the offense charged may attract the lawyer's attention.

\textsuperscript{253} See supra note 8.

\textsuperscript{254} She also realizes that motion practice and formal discovery are discouraged in the lower criminal court. Some colleagues try to reassure her that clients would fare worse in ultimate outcomes if they were aggressively represented from the commencement of charges. They suggest that many judges and prosecutors treat defendants more leniently after they have spent significant time in jail without counsel actively challenging the charges against them. See infra note 258.

\textsuperscript{255} As explained in Part III, when a client has spent time in jail without counsel, his ability to objectively assess the trial option is severely compromised. Even for clients with viable defenses, the defender's task of making this choice available is greatly impaired.
experienced lawyers to felonies generally; to serious persistent felony offenders only; or mix the experienced with the inexperienced attorney and assign both to handle misdemeanors? Are there enough lawyers to represent individuals at the initial bail appearance? The choices are not easy, and administrators respond differently.

Where statewide public defender offices exist, the likelihood is greatest that the accused will be represented when first appearing in court.256 Where the public defender exists only in individual counties within a state, it will be the rare supervising attorney who requires that her staff attorneys represent defendants at bail. One who does explained that "people work longer days, but that's the way it goes. By avoiding unnecessary postponements, it's a great money-saver, and we believe it affords clients more effective representation."257

Not all public defenders agree. At least some believed that providing representation at bail was not necessary.258 When asked about their limited time to prepare cases for trial, several experienced lawyers indicated that the delay in assigning clients did not affect their representation, because most of the cases were straightforward and did not require extensive investigation.

There is, of course, no way of convincing these lawyers that prosecutors would not pursue some cases more vigorously if defendants had legal representation at the initial appearance and thereafter. Additionally, these lawyers are aware that a delay in the prosecution will benefit some detainees, who will receive a better plea offer. But as previously argued, appointed counsel's immediate representation benefits most detainees and enhances the system's overall efficiency—it allows prosecutors and judges to identify weaker cases and unreasonable bail sooner, thereby reducing overcrowded court dockets. In addition, when criminal defense lawyers sit on the sidelines after criminal proceedings have commenced, the adversarial system suffers a severe blow. Our system's integrity depends upon placing a high value on every person's personal freedom. When defense lawyers fail to mount

256. Of the eight states that provide for representation at bail, seven have a statewide public defender office. Other statewide offices appear committed to represent indigent defendants at the bail stage, but must consider resource limitations. "We are now present at the initial bail hearing in two-thirds of the state," Minnesota Public Defender's Executive Director John Stuart explained. "Our goal is to have a defender present in every court." Interview by Carrie Ricci-Smith (Nov. 5, 1995); see also Jeffrey H. Rutherford, Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders, 78 MINN. L. REV. 977, 981-86 (1994) (describing Minnesota public defenders' high caseloads and limited staffing).

257. Telephone Interview with Melinda Douglas, Public Defender of Alexandria, Virginia (Nov. 3, 1995). Ms. Douglas assigns each of her staff attorneys, on a rotating basis, to represent defendants at the bail reviews, which are conducted within 48 hours of their first appearance. Alexandria is the only county to provide such representation in Virginia. See id.

258. Some felt that a lawyer's presence was unnecessary in states which set bail according to a fixed schedule. One defender suggested that even when bail was discretionary, his drug or alcohol-dependent defendants avoided committing new crimes and "cleaned up their acts" after serving two to three months in jail.
a zealous defense, beginning at the bail stage, they deliver a clear message: either their indigent clients are guilty and deserve to be in jail, or poor people's freedom is less important than their own. Each creates a de facto system of prejudice which operates against the poor and threatens the system's claim to even-handed justice.

B. Prosecutors and Judges

The burden of ensuring that indigent defendants receive counsel's immediate assistance for bail does not fall solely upon public defenders and court-appointed lawyers. Prosecutors and judges also assume crucial roles. Each is charged with a duty of fairness to the accused, with upholding the Constitution, and with safeguarding the integrity of the judicial system. Each realizes something is askew when individuals appear without counsel for a bail determination or meet their lawyer for the first time after a lengthy pretrial detention.

During bail hearings, in which the prosecutor is asked to make a bail recommendation, her ethical responsibility to "seek justice" may be sorely tested when a defense lawyer is not present to challenge her assertions or to provide contrasting, favorable information about the accused. Prosecutors may justify their bail recommendations on a variety of factors, and judges will give their legal position great weight. In exercising "sound discretion," prosecutors should consider the unrepresented accused's financial means and recognize factors which suggest that he is a good risk for pretrial release. They also should appreciate that when unrepresented defendants cannot post bail, many will remain in jail for long periods without counsel. In fulfilling their ethical responsibility, prosecutors should avoid the temptation to use bail punitively. They have a special responsibility as "administrator[s] of justice" to protect an unrepresented indigent defendant's rights. Ethical reminders aside, prosecutors have a practical reason for opposing long adjournments for incarcerated defendants and supporting counsel's representation at bail: it would free limited jail space for those who require pretrial detention and permit their limited resources to be devoted to more serious cases.

Judicial officers have an even stronger ethical duty to protect the rights of the unrepresented defendant. Indeed, the presiding judge is

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259. Not surprisingly, when I asked those who rationalized nonrepresentation what they would want if arrested—the immediate assistance of a lawyer or a favorable outcome after spending a lengthy period in jail—they never hesitated. "Give us a lawyer, please, and no jail."

260. Standards for Criminal Justice Standard 3-1.1(c) (2d ed. 1980).

261. For example, a prosecutor wanting to keep a defendant incarcerated may concentrate on the weaknesses of the defendant seeking recognizance or low bail and ignore factors which would suggest he was a good risk for pretrial release.

262. Standards for Criminal Justice Standard 3-1.1(b) (2d ed. 1980).

263. See id.

264. Telephone Interview with Michael Wims, Assistant State's Attorney, Salt Lake City, Utah (Dec. 3, 1997).
ultimately responsible to ensure that justice is achieved in each case.\textsuperscript{265} It would be hard to consider that an accused was treated justly when he pleads guilty because his lack of legal representation at bail and subsequent time spent in jail without a lawyer has obliterated hope of locating witnesses and presenting a defense.

Specific judicial ethical standards also warrant providing counsel at bail proceedings. The Code of Judicial Conduct requires that judges remain impartial when determining bail\textsuperscript{266} and demonstrate fairness toward the accused. Counsel's advocacy would aid courts in making better informed and fairer decisions. When applicable, judicial officers should rely on legislative mandates which favor pretrial release and direct that the "least onerous conditions" be fixed to ensure the accused's future court appearance.\textsuperscript{267} Because there is strong public pressure against pretrial release, judges must resist the temptation of "go[ing] forward with the haste of the mob"\textsuperscript{268} and setting bail that they know indigents cannot afford. They are well aware of the serious disadvantages unrepresented criminal defendants face in the courtroom, having witnessed many people who spent long periods in pretrial detention before their cases were dismissed or not prosecuted. They also know that an accused's right to effective assistance of counsel requires that counsel prepare adequately and conduct a thorough investigation in a criminal case.\textsuperscript{269} In promoting fair bail determinations and a more efficient criminal justice system, judges should support administrative and legislative measures that would guarantee

\begin{itemize}
\item \textsuperscript{265} Standards for Criminal Justice Standard 6-1.1 states that the trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.

\item \textsuperscript{266} "A judge shall perform judicial duties without bias or prejudice." Md. R. 16-813, Canon 3(A)(9).

\item \textsuperscript{267} See supra note 232.

\item \textsuperscript{268} Powell v. Alabama, 287 U.S. 45, 59 (1932); see also Md. R. 16-813, Canon 3(A)(2) (stating that "[a] judge should be unswayed by partisan interests, public clamor or fear of criticism"); William G. Blair, \textit{State Court Officials Recommend Creation of 28 More Judgeships}, N.Y. Times, Mar. 2, 1986, at 41 (describing New York City judges spending 3.4 minutes on each scheduled case and Nassau County, New York, judges averaging 4 minutes per case). In the fast-paced bail proceeding, judges can be expected to spend even less time for each new case.

\item \textsuperscript{269} In an American Bar Foundation survey, a majority of judges ranked a lawyer's pretrial preparation as the most important factor in ensuring competent representation. See Dorothy Linder Maddi, \textit{Trial Advocacy Competence: The Judicial Perspective}, 1978 AM. B. FOUND. RES. J. 105, 144. Most experienced trial judges agree with the Standards for Criminal Justice, which emphasize the importance of a lawyer's factual investigation.

\item [The realist knows that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented at trial. Where the necessary evaluation and preparation are foreclosed by lack of information, the trial becomes a pursuit of truth and justice only by chance rather than by design, and generates a diminished respect for the criminal justice system, the judiciary, and the attorney participants.

\item \textsuperscript{269} Standards for Criminal Justice Standard 11-1.1(a) cmt. (2d ed. 1980).
indigent defendants legal representation at the bail stage, and should revive the call to make more lawyers available to the poor.270

C. The Legal Community at Large

Finally, the legal community at large has an essential role in securing poor people's immediate right to counsel in criminal cases. Our legal profession prides itself on fairness. Its rules of professional conduct urge members to "be mindful of deficiencies in the administration of justice and of the fact that the poor . . . cannot afford adequate legal assistance."271 When tens of thousands of citizens are deprived of their freedom without legal counsel, this is sufficiently serious to mobilize the legal community to action. Bar associations and law schools272 will have a special role in this regard. For instance, a bar association resolution which recognized a right to counsel at bail could be helpful in persuading a state legislative body to provide additional resources.273 It might also encourage the bar membership to fulfill its pro bono obligation by representing persons when they first appear in court.

Through a united effort, lawyers and law students would identify weaker criminal cases more quickly. Fewer people would spend unnecessary time in jail, and taxpayers would be left with a less expensive bill covering pretrial detention. Although the efficiency argument is a strong one, ultimately the greatest value in providing representation at the earliest stage of a criminal proceeding is to preserve the presumption of innocence and to safeguard the legal profession's standard of fairness and equal justice, two bedrocks of our democracy.

VIII. Conclusion

In practical terms, an accused's right to counsel has little meaning when it does not begin at the bail-setting stage. Without a lawyer's timely advocacy, the unrepresented defendant will be hard pressed to regain his freedom. Pretrial detention goes beyond the immediate loss of individual freedom. Incarcerated defendants are much more likely to be convicted and to receive longer jail sentences.

Defense counsel's immediate assistance at the bail stage also is critical for protecting an accused's fair trial rights. To ensure a mean-

270. See supra note 131.
272. Law students would gain an excellent learning experience in representing poor people at bail proceedings, while also fulfilling their public service responsibilities. Both volunteer groups could work closely with understaffed public defender offices and assist them in conducting a thorough pretrial preparation.
273. The Board of Governors of the Maryland State Bar Association endorsed such a principle at its 1997 annual meeting. State bar associations also should consider supporting administrative or legislative remedies to ensure that an accused receives counsel's assistance at the initial court appearance. See Theodore A. Gottfried, As Public Defenders, Short On Resources, Strive to Aid the Indigent, Chi. Daily L. Bull., Apr. 23, 1994, at 6.
ingful defense, lawyers must promptly investigate and thoroughly prepare to meet the accusation. When counsel arrives too late in the proceedings, the accused loses the opportunity to be judged fairly.

Sixty-six years ago, the Supreme Court’s decision in *Powell v. Alabama* recognized that an accused needs the assistance of counsel when first appearing at the initial arraignment proceeding. *Powell* condemned the basic unfairness of an accused appearing without counsel and of a court delaying counsel’s actual appointment until the day of trial.

Today’s typical indigent defendant experiences a less dramatic first appearance than the *Powell* defendants; few face death sentences before a hostile mob. Yet most still face criminal charges unrepresented by a lawyer when first charged and bail is determined. Those unable to post bail experience the same indefinite\(^{274}\) and frequently long delay in learning the identity of their appointed counsel and receiving her assistance throughout the pretrial stage. Under these circumstances, counsel’s tardy appearance on behalf of indigent defendants violates the accused’s right to due process because, like *Powell*, it too “amount[s] to a denial of effective and substantial aid”\(^{275}\) for the accused.

Supreme Court decisions in *Gideon* and *Argersinger* emphasized that the guarantee of counsel is fundamental to the fairness of our justice system. Subsequent rulings extended the Sixth Amendment right of representation to critical pretrial proceedings. Although the right now attaches from the moment when criminal charges are filed, the Court has never explicitly ruled that accused indigents are entitled to legal representation at the first judicial proceeding when bail is determined. It is now time that the Court did so. We must make real what is now merely a false impression: indigent defendants should have counsel’s assistance when their liberty interests are at stake. For many, this will be their only occasion to prepare a defense and consult with a lawyer for weeks, and sometimes months. Until the Court acts, lawyers, judges, and bar associations should marshal their forces and convince states to provide more legal protection than current interpretation of the U.S. Constitution mandates. By providing counsel at bail proceedings, states will achieve efficiency and significant cost savings in our bursting criminal justice system, while also improving the likelihood that lawyers and judges meet their individual ethical duties and preserve defense counsel’s vital role in our adversary criminal justice system.


\(^{275}\) *Id.*
## Appendix
### Table A

**State Statutes Addressing Representation of Counsel at Bail Proceedings**

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<td>WIS. STAT. ANN. § 970.02 (West 1985 &amp; Supp. 1996)</td>
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**Table B**

**State and Local Practices Regarding Representation at Bail Proceedings—Survey Results**

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<td>Lawrence Schneider</td>
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* Yes = representation; No = no representation
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