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Criminal Defense Systems for the Poor

Arthur B. LaFrance

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CRIMINAL DEFENSE SYSTEMS FOR THE POOR

*Arthur B. LaFrance**

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CRIMINAL DEFENSE SYSTEMS FOR THE POOR

It seems a virtual fairy tale that somewhere, at the ends of the earth, an accused person can avail himself of a lawyer's help. This means having beside you in the most difficult moment of your life a clear-minded ally who knows the law.

—A. Solzhenitsyn, *The Gulag Archipelago*

I. Introduction

In 1962, the Supreme Court in *Gideon v. Wainwright*¹ held that indigents charged with felonies were entitled to counsel as a matter of constitutional right. That decision was a long time in coming and the pressure behind it generated an avalanche of decisions in the ensuing decade, extending the right to counsel to interrogations,² lineups,³ preliminary hearings,⁴ and finally in *Argersinger v. Hamlin*⁵ to misdemeanor prosecutions involving a likelihood of imprisonment. These and other Supreme Court and lower court decisions provide a fairly complete constitutional assurance of the effective assistance of counsel in most criminal and many "non-criminal"⁶ settings.

Difficult conceptual questions remain to be litigated, including problems of waiver, competency of counsel, and right to counsel at proceedings such as parole hearings. Even *Argersinger*, the most recent right to counsel decision, raises difficult questions of interpretation.⁷ Eventually, the courts must attempt to grapple with the thorny problem of the consequences of denial of counsel.⁸ These important problems deserve and no doubt will receive scholarly attention.

This article will pursue a vital theme largely ignored in the commentary following *Gideon*. The states opposed Clarence Gideon in part on the ground that there were no resources to implement a right to counsel. Echoes of that argument could be heard ten years later in *Argersinger* and appear in Justice Brennan's reference⁹ to the availability of law school clinics to provide badly needed resources. In the decade since *Gideon*, the Supreme Court has barely acknowledged the vast problems posed by an ever-expanding constitutional guarantee of counsel. However, if troops are not available, the army cannot march. Even more tragic, if the few troops available are ill-supported and

1 372 U.S. 335 (1963).

2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

3 *United States v. Wade*, 388 U.S. 218 (1967); see also *Kirby v. Illinois*, 406 U.S. 682 (1972).

4 *Coleman v. Alabama*, 399 U.S. 1 (1970).

5 407 U.S. 25 (1972).

6 See, e.g., as to juvenile courts, *In re Gault*, 387 U.S. 1 (1967); as to mental commitments, *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098 (E. D. Wis. 1972); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968).

7 For example, concerning how likely punishment must be before counsel may be required. See *Wood v. Superintendent*, 355 F. Supp. 338, 343-44 (E.D. Va. 1973).

8 Convictions without counsel may not be used for recidivist statute purposes, *Burgett v. Texas*, 389 U.S. 109 (1967); or for sentencing, *United States v. Tucker*, 404 U.S. 443 (1972); or for impeaching credibility, *Loper v. Beto*, 405 U.S. 473 (1972). Although these principles are now established, innumerable questions remain unresolved, complicated by the unclear implications of the harmless error rule. See text accompanying note 13 *infra*.

9 407 U.S. 25, 40-41 (1972) (Brennan, J., concurring).

ill-trained, the battle will surely be lost. A decade after *Gideon* the question remains whether we can indeed render effective assistance of counsel.

All too often the issue arises after the fact in a postconviction inquiry into services rendered in a specific case. This approach cannot deal with system-wide resource problems. Indeed, even as to a single case, postconviction relief is woefully limited in scope and efficacy. The inertia, politics, and orderliness of the processes of justice lead to nearly impossible burdens of proof for defendants. A conviction stands unless the defendant shows that the "purported representation by counsel was such as to make the trial a farce and a mockery of justice."¹⁰ The value of hindsight inquiry is further limited by counsel's power to waive rights of the accused, either by strategy¹¹ or permissible bungling.¹² Another limitation is the pervasive doctrine of harmless error, through which prejudice which cannot be shown is often found not to exist.¹³

Any defendant who claims ineffective assistance of counsel thus finds the courts ill-disposed to listen. This may sound unduly harsh but a review of right to counsel decisions during the last decade leaves the firm impression that, *after the fact*, judges tolerate representation they would not approve or abide *before the fact*. Further, these decided cases raise a far more troublesome concern for those cases which do not reach the courts. As to those, nothing will ever be known precisely because postconviction relief is an ineffective tool for shaping effective systems of defense.

These problems of systems, resources, and standards were confronted in *United States v. Chatman*,¹⁴ where prosecutions were dismissed because there were insufficient attorneys to effectively serve the overwhelming caseload in the District of Columbia. The court rejected the postconviction "mockery of justice" standard for determining what is effective counsel, observing that "the trial court's function is certainly more substantial than merely preventing a trial from becoming a farce; a court cannot be blind to injustice occurring in its presence."¹⁵ The court then removed counsel appointed previously since he already had fifty-eight pending cases and had never "demonstrated any particular degree of diligence, legal acumen or perseverance in a host of prior appearances before the court."¹⁶ But the court was frustrated in appointing new counsel, since a standard of effectiveness implies a limitation on maximum caseload, which by District of Columbia Public Defender Service Guidelines had been set at thirty active cases or 120 felony cases annually. This had already been exceeded by each member of the public defender staff. Of a panel of

10 This phrasing has been used countless times. See, e.g., *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949); *Wirth v. United States*, 348 F. Supp. 1137, 1140-41 (D. Conn. 1972).

11 *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973) (affirming conviction although defense counsel "chose" not to call a favorable witness. See opinion of Chief Judge Bazelon).

12 See *United States v. Jansen*, 475 F.2d 312 (7th Cir. 1973) (affirming conviction although defense counsel opened the door for damaging cross-examination); *United States v. Gurtner*, 474 F.2d 297 (9th Cir. 1973) (affirming conviction although defense counsel failed to object early enough to preserve self-incrimination claims).

13 See *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969); and cases cited in note 12 *supra*.

14 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

15 *Id.*

16 *Id.*

thirty-four private attorneys available for that day, only nineteen had appeared; each had already been assigned two or three cases, although the Superior Court coordinator "was unable to say whether any of these lawyers had any criminal trial experience whatever."¹⁷

This is hardly atypical; what is different is that the *Chatman* court discussed the inadequacy of the system and resources openly, rather than masking the problems by *pro forma* appointment of ineffective counsel. Rather than dismiss prosecutions, most courts make such appointments, understanding full well that the defendant is unlikely to be able to raise or prove ineffective assistance of counsel. Even if he could, the standard which must be met is the "mockery of justice" test on postconviction relief—an impossible barrier.

Another tool is needed to police the system and assure that *Gideon* is implemented, not after the fact on a case-by-case basis but prospectively and system-wide. Traditionally this has been approached as a legislative problem. Following *Gideon*, the Allen Report¹⁸ led to the federal Criminal Justice Act¹⁹ providing defender services in the federal courts. The states have followed with varying models. Yet both the state and federal models have largely ignored standards and goals for the quality of the services offered. This is equally true of the American Bar Association Standards for Criminal Justice and the National Advisory Commission's Standards and Goals.

What is missing are administrative criteria to enhance effective representation. Neither courts nor legislatures, however, have addressed the essential administrative rule-making tasks of defining caseload, counsel assignments and qualifications, services, eligibility, and procedure. This must be done for any public service,²⁰ be it welfare, housing, police, or education. Yet the development of administrative rules for criminal defense is curiously stunted.

Reasons are hard to find. Lawyers exercise skills and discretion in a manner similar to other deliverers of public service and all are increasingly subject to administrative controls.²¹ Courts promulgate rules concerning licensing and conduct of attorneys. Perhaps the absence of detailed criteria governing effectiveness of counsel can be explained by the traditional "volunteer" origins of public defense. Perhaps courts still confuse public service with charity.

Concern has been limited to specific cases, as noted earlier, or to deficiencies in legal education. Only in the summer of 1973 did there emerge a different concern: the problems of public defense may flow not only from individual attorneys or legal education but also from the model and method of delivering public defense.

In *Wallace v. Kern*,²² Judge Judd of the United States District Court for

17 *Id.*

18 DEPARTMENT OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963). The Committee was chaired by Professor Francis A. Allen of the University of Michigan School of Law and its Report has been widely referred to and is hereafter cited as THE ALLEN REPORT.

19 18 U.S.C. § 3006A *et seq.* (1970).

20 See, e.g., Cahn and Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Cahn and Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAWYER 927 (1966).

21 See K. DAVIS, DISCRETIONARY JUSTICE (1969).

22 No. 72-C-898 (S.D.N.Y., filed May 10, 1973).

the Southern District of New York entertained a suit against the Legal Aid Society of New York which provides indigent defense services. The issue was whether the Society *could* provide effective services in view of personnel and caseload limitations. Although summarily reversed²³ on the curious ground that such services are not state action,²⁴ Judge Judd's opinion is remarkable as perhaps the first judicial attempt²⁵ to deal prospectively with ineffective assistance of counsel by altering the model and administration of the delivery system.

While the precise elements of the court's ruling will be discussed later, two aspects of the opinion warrant special emphasis. First, the court noted that the limited value of postconviction review justifies—indeed, necessitates—prospective review of defense systems:

None of the reasons which support the imposition of strict standards in postconviction cases is applicable in the posture in which the question of adequate representation is presented here. The hesitancy to indulge in second-guessing previously made decisions is not an obstacle. What is in issue is not how to investigate, what plea to accept, which witnesses to call, what defenses to put forward, how to examine and cross-examine, but whether the Legal Aid attorneys are so overburdened that they cannot even make the necessary decisions.

Although the court has determined that the adequacy of representation by The Legal Aid Society may be measured by a different standard, the postconviction cases are instructive on the components of constitutionally sufficient representation. Lack of preparation, investigation, and consultation are ubiquitous complaints in the adequate representation cases.²⁶

Secondly, the court acknowledged the difficulties in setting manageable standards which could increase the probability of effective representation without being arbitrary or mechanical. Yet it felt obligated to undertake the task and competent to do so:

There are difficulties in fixing a maximum caseload, and what is too high in one county may be manageable in another county. Some cases will require much more time than others and some attorneys will have a different mix of cases than others. Fixing an *average* caseload for Kings County and permitting Legal Aid to make adjustments within that average is an appropriate way to deal with the problem.

The maximum set now may be different from what could be managed if defendants did not stay in jail as long, if there were better facilities for

23 *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973).

24 *See A. LaFRANGE ET AL., THE LAW OF THE POOR* §§ 417-19 (1973). It seems odd, to say the least, that an agency performing a public function for the state and serving the public's constitutionally mandated needs is not acting under color of state law.

25 *Cf. Walker v. Caldwell*, 476 F.2d 213, 221 (5th Cir. 1973), reversing one case of ineffective assistance of counsel after the fact, and criticizing "the highly questionable prevailing practice in the Baldwin Superior Court of routinely appointing a single resident attorney to represent ten or more defendants at every Friday morning plea day without compensation." *See also United States v. Chatman*, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974), dismissing prosecutions because the public defender staff was so overloaded it could not undertake new cases.

26 *Wallace v. Kern*, *supra* note 22, Memorandum Opinion at 37. *Accord, United States v. Chatman*, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

interviews, if there were more adequate supporting services, and if problems of calendar control are resolved. The limit which the court fixes now may be changed in the future if experience or changed circumstances justify.

Determination of the maximum caseload is complicated by the fact that computations have been directed only to cases assigned to Parts, excluding the critical period between preliminary hearing and indictment and the period between guilty plea or verdict and sentence. Effective investigation need not wait for the return of an indictment, and on occasion may even prevent the client from being indicted. With the digital system which has been adopted, it should be possible for Legal Aid to assign a case to an attorney before indictment, so that investigation can proceed while trails and memories are fresh. Excluding cases awaiting sentence from the caseload is inconsistent with the constitutional requirement for advice of counsel at the time of sentence.

. . .

The court is convinced, and finds, that an average caseload of 40 felony indictments pending in a trial part strains the utmost capacity of a Legal Aid attorney under existing conditions, that the present average caseload is substantially in excess of that number, and that acceptances of any additional felony indictments by Legal Aid would prevent it from affording its existing clients their constitutional right to counsel.²⁷

The court also discussed trial preparation and continuity of representation. In each area, it dealt with the essentials of effective representation but did so without impinging upon that realm reserved for the professional judgment of defense counsel. The concern was rather for structure, process, and method, all of which can be dealt with in objective, quantifiable terms. Quite simply, the court in *Wallace v. Kern* acted much like any administrative agency: taking evidence and establishing procedures to implement policy. Such an approach is innovative, yet clearly indispensable to assure the promise of *Gideon* on a system-wide basis.

This article pursues the same approach by delineating the elements of a sound delivery system for public defense services, by presenting and evaluating²⁸ available literature and present practices, and by suggesting areas of further inquiry and financial investment. The objective is to develop effective and manageable criteria for establishing the structure, method, and process of delivering competent defense services. For comparison, this article will review and evaluate the few previous attempts at such standards, including the Model

27 *Wallace v. Kern*, *supra* note 22, Memorandum Opinion at 37.

28 The author is an academic, but hopes that any resulting impediment to his credibility may be reduced by his experience prior to entering law teaching in public defense covering some six years in the urban criminal courts of two states. Three and one half of those years involved full-time representation of indigents in Connecticut on charges ranging from breach of the peace to murder. The author has also been a consultant to the National Legal Aid and Defender Association; to the Office of Legal Services, Office of Economic Opportunity; and to the Center for Criminal Justice at Boston University. Much of the research for this article was done while the author was consulting for the Center. Although the views expressed here are solely the author's, he does wish to express special gratitude for the helpful commentary and criticism of Professor Sheldon Krantz, Director of the Center, and Charles Smith, The Argersinger Project Director of the Center.

Defender Act, the American Bar Association Standards on Defense Services, and the National Advisory Commission on Criminal Justice Standards and Goals.

Most proposals and existing programs are deficient in several respects. First, they are unfortunately tradition-bound, relating defense services to the needs of the courts rather than clients and accepting such legalistic distinctions as limiting services by what is a "felony" or what is "criminal." Second, they adopt the middle-class model of privately retained counsel for defense of the poor, ignoring the vastly different needs and strategies in serving the poor. Thirdly, they view defense services as having only a limited reactive capability and no ongoing obligation to effect law reform. Finally, most proposals and programs are resigned to limited quality flowing from inadequate resources rather than insisting upon the resources necessary for adequate criminal defense.

A concern for resources is particularly significant. With the decision in *Argersinger* has come the need to re-examine the costs of delivering defense services to the poor. This article analyzes and challenges errors and inadequacies in past practices and estimates. The author disagrees sharply with the conservative estimates of most authorities and believes that the annual cost of full and effective services following *Argersinger* will be much higher than anticipated, in fact exceeding one billion dollars.

If this estimate is accurate, its implications are profound. It may dictate finding new resources, such as federal financing, to fund defense in state prosecutions. It may lend further impetus to the already legitimate arguments for decriminalizing traffic, alcohol, and vice offenses. And it may lead to improvement in the criminal justice system by pretrial diversion or elimination of incarceration for petty offenses. If so, the cost of effective representation can be substantially minimized while at the same time reforming the criminal justice system.

The danger is that none of these alternatives will be pursued. Resources may remain inadequate. Services may continue to be ineffective. Errors will continue to be hidden from view. And the system will continue to be masked by the confusion and inefficiency of postconviction, case-by-case, after-the-fact litigation concerning the effectiveness of counsel. This danger can be avoided if courts and legislatures will take the initiative to promulgate standards governing the administration and quality of defense services.

At the same time, the courts must not involve themselves in the minutiae of administering defense services. Such chores as determining eligibility or allocating supporting services may properly be entrusted to a professional staff. The model evolved in this article is similar to that used for delivering civil legal services. The courts should set standards, not deliver services.

The author draws upon several years of full-time public defense work with the New Haven Legal Assistance Association. The Association renders both civil and criminal services through neighborhood offices. This unique experiment has implemented many of the ideas urged in this article, including autonomy to determine eligibility and supporting services, caseload standards, merit hiring and adequate compensation, latitude for the client to select his attorney,

continuity of representation throughout the process, system reform and responsiveness to the client. Much of what has been done in New Haven recommends itself for adoption elsewhere.

In the end, economy for court and counsel can be effected. The criminal process can be made to operate as it should, fairly and expeditiously for prosecution and defense. Most fundamentally, an adequate system of defense services can assure what is now seriously in doubt: the ability of our criminal processes to dispense justice.

II. The Place of Counsel

A. *Fundamentals*

While it would hardly seem necessary to undertake an extensive essay on the value of counsel, its basic importance requires a brief review—largely in the language of the Supreme Court—of the values placed upon and served by counsel. It is not simply that an attorney may get an accused “off.” Rather, counsel is necessary because society has chosen the adversary process to seek truth.²⁹ If this is true of counsel generally, it is compellingly true of counsel representing the poor. The latter are singularly ill-equipped by education and status to represent themselves. This has been recognized consistently by the Supreme Court in cases ranging from *Argersinger* back to *Gideon*:

. . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.³⁰

It has been recognized as long ago as *Powell v. Alabama*:

The right to be heard would, in many cases, be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . 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. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.³¹

Significantly, the guarantee of counsel announced in *Gideon* and *Argersinger* is a due process aspect of the fourteenth amendment. Counsel is im-

29 ABA MINIMUM STANDARDS: PROVIDING DEFENSE SERVICES 2 (Approved Draft, 1968).

30 372 U.S. 335, 344 (1963).

31 287 U.S. 45, 68-69 (1932).

portant because of the right to a fair hearing. The presentation and cross-examination of witnesses are tasks peculiarly for counsel³² and indispensable to the right to be heard. It is this right as an aspect of due process which makes the place of counsel basic to our system of justice: the right to be heard.³³

In *Goldberg v. Kelley*,³⁴ the Supreme Court held that a hearing must be conducted prior to termination of welfare benefits. Mr. Justice Brennan's majority opinion recognized an important relationship between social policy, poverty and the right to be heard:

[T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well being of all persons within its border. We have come to recognize that forces not within the control of the poor contribute to their poverty . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests which counsel the provisions of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.³⁵

These are not only the very functions counsel performs in a criminal trial but also the indispensable requisites of a minimally adequate exploration of facts and contentions in *any* kind of a hearing. Significantly, Justice Brennan in *Goldberg*, a welfare case, relied upon *Powell v. Alabama*, a criminal case, indicating the pervasive quality of the right to be heard and the importance of counsel to that right.

The Supreme Court has said that courts are the central peace-keeping institutions of our society. This is particularly true of our criminal courts which deal directly with breaches of the public order, most often affecting the poor, either as defendants or victims. Alienation of citizens, particularly of the poor, from the values courts represent generates "frustration and hostility toward [the] courts among the most numerous consumers of justice."³⁶ The urban riots of the

32 *Pointer v. Texas*, 380 U.S. 400 (1965).

33 *See Packer, Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11-13 (1964).

34 397 U.S. 254 (1970).

35 *Id.* at 264-65. At a later point, the majority further held:

"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." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. *Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.* *Id.* at 270-71. [Emphasis supplied.]

36 *Mayer v. Chicago*, 404 U.S. 189, 198 (1971).

1960's and the Report of the Kerner Commission³⁷ amply testify to this basic truth.

Access to the courts and the values thus protected presuppose the availability of counsel. Counsel's value, then, is *public* even though he must act in the *private* interest of his client.³⁸

B. Parity of Public and Private Counsel

The Supreme Court has noted many times the obvious point that private individuals hire counsel to protect their interests, as does the public to prosecute its interests. The poor need similar protection. It is thus commonplace for commentators, courts, and statutes to speak in terms of parity between the affluent and the poor when dealing with counsel. The Supreme Court in *Douglas v. California* said that:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel . . . while the indigent . . . is forced to shift for himself.³⁹

As Justice Black observed in a passage frequently quoted from *Griffin v. Illinois*: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁴⁰

Section 2(a)(1) of the Model Public Defender Act provides that "A needy person is entitled to be represented by an attorney to the same extent as a person having his own counsel." He is also to be "counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled . . ." and provided with "necessary services and facilities of representation (including investigation and other preparation)."

Despite this prescription of equality, some are more equal than others. Few seriously urge precise equality between the poor and the affluent. Indeed, there is not even genuine equality among the affluent. In *Douglas v. California*, the Supreme Court added to the language quoted above that "Absolute equality is not required; lines can be and are drawn and we often support them."⁴¹ The Commentary to the American Bar Association Defense Function Standards⁴²

37 REPORT OF THE PRESIDENT'S COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1968). (Hereinafter referred to as the KERNER COMMISSION REPORT.)

38 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 52 (1967). (Hereinafter referred to as TASK FORCE REPORT: THE COURTS.)

The President's Commission on Law Enforcement concluded that:

The importance of counsel also proceeds from values transcending the interest of any individual defendant. Counsel is needed to maintain effective and efficient criminal justice. Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime. Reliance upon the judge or prosecutor to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious defense counsel. *Id.*

39 372 U.S. 353, 357-58 (1963).

40 351 U.S. 12, 19 (1956).

41 372 U.S. at 357 (1963).

42 § 3.9 (Approved Draft, 1971).

seems often more concerned with preventing defense counsel from doing more for an indigent client than he would for a private client. Society has committed itself to something *less* than what the wealthy can purchase, but the standard for measuring that lesser commitment remains unclear.

At appropriate points later⁴³ in this article, the diminished status of public defense counsel will be reviewed in depth. Public defense counsel usually have less experience and income and fewer staff than their private counterparts. Nevertheless, they have heavier caseloads. Not surprisingly, every study concludes—although the reasons given vary—that public defense clients fare worse than the wealthy: fewer trials, more findings of guilty, and more severe sentences.

This lesser commitment to the poor unfortunately aggravates the pre-existing hazards facing them in the criminal process. Some 30 to 70 percent of all defendants cannot afford counsel.⁴⁴ They often cannot afford bail⁴⁵ and bail reform, in the view of some commentators, has been largely ineffectual.⁴⁶ Those denied bail plead guilty more often, go to jail more often, and stay there longer.⁴⁷ This applies to the poor generally, although to a lesser degree, whether or not released prior to trial.⁴⁸ From arraignment to sentencing, from initial bail to ultimate fine⁴⁹ or imprisonment, the poor cannot afford the price of justice.

Corrective provisions are limited. Most jurisdictions now provide counsel in criminal prosecutions and appeals.⁵⁰ Counsel, on occasion, is also available in federal civil rights actions,⁵¹ in habeas corpus actions,⁵² in actions under the federal *in forma pauperis* statute, 28 U.S.C. § 1915,⁵³ and in some state court

43 See Part IV, Section C *infra*.

44 See Solomon, *This New Fetish for Indigency*, 66 COLUM. L. REV. 248, 261 (1966); Bing and Rosenfeld, *The Quality of Justice: In the Lower Criminal Courts of Metropolitan Boston*, 7 CRIM. L. BULL. 393, 422 (1971). (Hereinafter referred to as Bing and Rosenfeld.)

45 The landmark studies of bail are Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 U. PA. L. REV. 959, 1125 (1965); and Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631 (1964). See also Comment, *Pretrial Release*, 60 CALIF. L. REV. 1339 (1972); Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law*, 43 TEXAS L. REV. 319 (1965).

46 Bogomolny and Sonnenreich, *The Bail Reform Act of 1966: Administrative Tail Wagging and Other Legal Problems*, 11 ARIZ. L. REV. 201 (1969); but see Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 666-78 (hereinafter referred to as Oaks & Lehman), recommending California's citation system; Comment, *supra* note 45; note, *An Alternative to the Bail System: Penal Code Section 853.6*, 18 HASTINGS L.J. 643 (1967).

47 *The Unconstitutional Administration of Bail*, 8 CRIM. L. BULL. 459, 460 (1972). Rice, *Bail and the Administration of Bail in the State of Connecticut*, 4 CONN. L. REV. 1 (1971); Bing and Rosenfeld, *supra* note 44; Comment, *The Bail Reform Act of 1966*, 53 IOWA L. REV. 170, 171 (1967); Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109 (1966).

48 See Summers, *The Tilted Scales of Criminal Justice: The Plight of the Indigent Defendant*, 5 CRIM. L. BULL. 508 (1969).

49 See Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281 (1971); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

50 But see Ross v. Moffit, 414 U.S. 909 (1973), holding that there is no constitutional right to counsel in discretionary appeals to a state's Supreme Court after an appeal as of right to a state's intermediate appellate court.

51 United States v. Steward, 451 F.2d 1203 (2d Cir. 1971) (prisoners' rights); Petet v. Consolidated Freightways, 313 F. Supp. 1271 (D. Tex. 1970) (sex discrimination).

52 See Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971).

53 See Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967); Note, *The Right to Civil Counsel*, 66 COLUM. L. REV. 1322 (1966).

proceedings.⁵⁴ Fees and bonds may be waived for trials⁵⁵ and for criminal appeals.⁵⁶ Transcripts may be provided without charge prior to trial⁵⁷ and on appeal,⁵⁸ at least where alternative means of presenting a point for appeal are unavailable.⁵⁹ Expert or investigational assistance may also be available.⁶⁰ However, in the absence of clear constitutional or statutory authorization, most courts have held that they can do little to help the poor, even to the extent of refusing to waive fees.⁶¹

The message remains clear: the criminal justice system exacts a heavy price of indigent defendants and the limited value of most corrective measures increases the importance of providing effective defense counsel. A minimal touchstone must be parity with retained counsel. In *Wallace v. Kern*, the District Court returned to this theme persistently, criticizing the frequent departures from the procedures of retained counsel with respect to interviewing, counseling, continuity of representation, and caseload. This disparity has been noted elsewhere⁶² and its implications are discussed in detail later.

It is important to emphasize the significance of the Model Defendant Act's seemingly bland prescription of parity. It admittedly does not reflect the present reality but rather calls for revolutionary, fundamental, essential changes. As an operating principle of administration, however, it is clear, concise, and manageable, and emphasizes the seminal concept of counsel's role, whether retained or appointed.

Parity must be the beginning point of any public defense system. This means parity not only in the model of defense services but also in the availability of supporting services.

C. Parity of Defense Services

The Model Defender Act notes the importance of "necessary services and facilities" for public defense. Public counsel need expert services and their higher caseloads compel economy through more extensive use of paraprofessionals and

54 *Oregon v. Jamison*, 251 Ore. 114, 444 P.2d 157 (1968) (parental rights); *In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148 (1968) (civil arrest); *Hotel Martha Washington v. Swinick*, 66 Misc. 2d 833 (Sup. Ct. App. T. 1971) (landlord-tenant).

55 There are rarely trial fees in criminal cases, although filing fees are common in civil litigation. See generally Comment, *Access to the Civil Courts: The Need for Continuing Reform*, 37 ALBANY L. REV. 135 (1972); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968). Waiver may be appropriate under a statute, as with 28 U.S.C. § 1915 or the Constitution. See *Boddie v. Connecticut*, 401 U.S. 371 (1971).

56 *Coppedge v. United States*, 369 U.S. 438 (1962); Blackmun, *Allowance of In Forma Pauperis Appeals*, 43 F.R.D. 343 (1967).

57 *Mayer v. Chicago*, 404 U.S. 189 (1971).

58 *Tate v. United States*, 359 F.2d 245, 255 (D.C. Cir. 1966).

59 *Britt v. North Carolina*, 404 U.S. 226 (1971).

60 Note, *An Indigent's Right to Pre-Trial Technical Assistance*, 8 IDAHO L. REV. 188 (1971); *People v. Watson*, 36 Ill.2d 228, 221 N.E.2d 645 (1966). The Criminal Justice Act makes provision for such assistance, 18 U.S.C. § 3006A(e) (1970).

61 See Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. L. REV. 21 (1967); Comment, *Access of Indigents into the Civil Courtroom*, 49 N.C. L. REV. 683 (1971). But cf. *O'Connor v. Matzdorf*, 76 Wash.2d 589, 458 P.2d 154 (1969); *Martin v. Alameda County Superior Court*, 168 P. 135 (Cal. 1917).

62 See, e.g., *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

investigators. This requires a higher volume of supporting services per attorney and perhaps even more supporting services *per case*. The poor are less sophisticated, are financially less able to assist in investigation and have a higher incidence of emotional or psychiatric disorders.⁶³ Anyone familiar with public criminal defense will attest that the poor bring special problems to the already considerable problems of defense.

The A.B.A. Standards on Defense Services⁶⁴ provide that the defender program should have "investigatory, expert and other services necessary to an adequate defense." The limitation to "necessary" services appears in the Model Defender Act, other proposals,⁶⁵ and the Criminal Justice Act.⁶⁶ The Criminal Justice Act does not limit the accused to an "adequate" defense, as do the A.B.A. Standards, but instead imposes a limit of \$1000, increased from the previous level of \$300. Either approach poses a potentially significant handicap not encountered by the wealthy in preparing a defense.

One possible solution is that adopted by the Model Public Defender Act. It contains the usual provisions concerning assistance. It then adds⁶⁷ that the Defender-General may use any facilities available to the prosecution. This at least assures parity and availability of resources. It falls short, however, in that the prosecution's resources may be inadequate for the defense of a particular case. Further, sharing of resources may cause disclosure of privileged information.

Limiting services to those "necessary" for preparing a defense clearly may be interpreted unsympathetically to the defense. Moreover, what is "necessary" often cannot be predicted. The ultimate value of a line of inquiry may appear only in hindsight. Only a lawyer's intuition or imagination may be available to justify use of experts or investigators. In any event, a judge can hardly decide what is "necessary." He is removed from the raw facts of the developing case and his consideration of defense needs in open court may lead to undesirable disclosure of defense strategy.⁶⁸

In general, the federal courts have been fairly liberal under the Criminal Justice Act in allowing supporting services of counsel.⁶⁹ In contrast, only fourteen states provide for services in addition to counsel.⁷⁰ These impose varying limits as to the kinds of cases or the dollar amounts. Some allow only "reasonable" supporting services.⁷¹ There are, of course, constitutional overtones to limitations on supporting services for public defense counsel. Due process pre-

63 [Footnote omitted.]

64 *Supra* note 29, at § 1.5.

65 See, e.g., § 6(a)(2) of the proposed bill in Anderson, *Defense of Indigents In Maine: The Need for Public Defenders*, 25 ME. L. REV. 1 (1973). (Hereinafter cited as Anderson.)

66 18 U.S.C. § 3006A(e) (1970).

67 Model Public Defender Act § 8.

68 At a minimum, the standard should be that used in *United States v. Pope*, 251 F. Supp. 234 (D. Neb. 1966):

The rule in allowing defense services is that the judge need only be satisfied that they reasonably appear necessary to assist counsel in their preparation, not that the defense would be defective without such testimony. *Id.* at 241.

69 Comment, *Assistance in Addition to Counsel for Indigent Defendants*, 16 VILL. L. REV. 323 (1970); see also *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968) (handwriting expert); *United States v. Tate*, 419 F.2d 131 (6th Cir. 1969) (psychiatrist).

70 Bowman, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 6 CRIM. L. BULL. 491, 495 (1970).

71 *Id.*

supposes effective advocacy. Equal protection presupposes parity. The assurance of counsel assumes some level of *effective* counsel.⁷² The Allen Report, in a much-quoted passage, observed:

It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system . . . It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity.⁷³

Some courts have held that refusal to make experts available to the defense does not violate due process if the state's expert is available.⁷⁴ Other courts have simply denied application for expert assistance, without any attempt at rationalization.⁷⁵ The trend since *Gideon* appears to favor state provision of expert and investigative services. A contrary approach would hardly seem tenable.⁷⁶

Supporting services should generally come from people employed by the defender program. Investigators should be full-time employees while experts, however, may be retained on a case-by-case basis. An optimum ratio would be one investigator for three full-time attorneys and one secretary for two full-time attorneys, to be appropriately adjusted in assigned-counsel systems.⁷⁷ At the present time, it is estimated that 83 percent of all public defenders have no investigators.⁷⁸ Even where state, police, or prosecution agencies provide persons such as psychiatrists, social workers, toxicologists, chemists, and fingerprint and ballistic experts, the defense should be free to purchase *its own* supporting services. This assures the adversarial advantage of partisan experts as well as avoiding such serious problems as self-incrimination and conflicts of interest.

Arguably, supporting services are less necessary with misdemeanor than with felony representation. Yet misdemeanor prosecutions often deal with deviant problems which perhaps should never come into the criminal process. Alcoholics, vagrants, homosexuals, and distraught spouses may need experts to establish defenses or develop diversionary alternatives to prosecution. To the

72 *Id.* at 498-502. See also Comment, *supra* note 69, at 338-46.

73 THE ALLEN REPORT, *supra* note 18, at 10-11.

74 *E.g.*, McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951). See also Lewin, *Indigency—Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 458 (1966), concluding that there is no constitutional right to a partisan expert if the State makes the same expert available to both sides.

75 See Comment, *An Indigent's Right to Pre-Trial Technical Assistance—People versus Watson and the Discretionary Approach*, 8 IDAHO L. REV. 188 (1971) and cases discussed therein.

76 See, *e.g.*, Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967); United States ex rel. Robinson v. Pate, 345 F.2d 691 (7th Cir. 1965); State v. Taylor, 202 Kan. 202, 447 P.2d 806 (1968); People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966). The New Jersey Supreme Court observed in *State v. Horton*, 34 N.J. 518, 170 A.2d 1 (1966):

The constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to a proper defense in addition to the time and professional efforts of an attorney and we have no doubt of the inherent power of a court to require such to be provided at public expense. *Id.* at 534, 170 A.2d at 9.

77 NATIONAL CENTER FOR STATE COURTS, IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE 78 (1974). (Hereinafter referred to as IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE.)

78 NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 70-77 (1974). (Hereinafter referred to as THE OTHER FACE OF JUSTICE.)

extent that misdemeanor prosecutions are used as a means of social control, they pose unique problems for investigators and opportunities for expert witnesses. Of course, many misdemeanors pose the same problems, such as handwriting, ballistics and psychiatry, for experts as do felony prosecutions.

Argersinger, in expanding the right to counsel, has thus posed substantial problems concerning effective counsel to the extent that *effectiveness* requires supporting services. No commentator has attempted to estimate the scope or cost of such services. However, if there are 5,000,000 misdemeanor prosecutions annually and if one third are of the "social nuisance" variety,⁷⁹ a substantial demand is posed for expert assistance from psychologists, psychiatrists and social workers concerning the treatment and treatability of alcoholics,⁸⁰ sexual deviates, drug addicts⁸¹ and other nonconformists. If another third⁸² of misdemeanors consists of property, violence and drug-related offenses, the need for expertise can be expected to be roughly the same as with most felonies.

Courts and legislatures must therefore be particularly alert to the need for supporting services and the procedures for affording them. The most effective approach would be to provide an ample budget to be expended in the discretion of the defender staff or the appointed counsel.⁸³ This is, after all, the approach with the administration of most public services and funds. Defense counsel should not have to apply for supporting services on a case-by-case basis. After the fact accounting, as with any public funds, may be appropriate, but the delays and difficulties in litigating the need for services prior to expenditure militate against a courtroom, adversary inquiry into what is essentially an administrative matter.

The prosecution in reality has no more standing to complain of defense expenditures than does the defense concerning prosecution investment in investigation or retention of experts. Judges have no particular expertise in this area. Too often, hearings on defense needs for services become simply an occasion for harassment or embarrassment of adversaries. A better solution is to recognize the urgent need for supporting services, allocate an appropriate sum to the defender agency, and then assign administrative responsibility to them.

D. Reform of the System

The preceding commentary has presupposed two generally accepted propositions: counsel is needed in the justice system to establish the truth in particular cases and the system unfairly discriminates against the poor from arrest through sentencing. The latter has been the uniform conclusion of the most significant studies of the justice system in the last decade: the Allen Report, the Kerner Commission, and the President's Commission on Law Enforcement. None of these, however, has fully examined the implications for the role of defense counsel for the poor in reforming the system.

79 See TASK FORCE REPORT: THE COURTS at 55.

80 See, e.g., *Powell v. Texas*, 392 U.S. 514 (1968).

81 See, e.g., *Robinson v. California*, 370 U.S. 660 (1962).

82 See TASK FORCE REPORT: THE COURTS at 55-56.

83 See *Mason v. Arizona*, 360 F. Supp. 56, 57-58 (D. Ariz. 1973).

The poor have little voice in the legislative process and lack the funds necessary to control elections. If they are to influence a criminal process which disproportionately affects them, they must be afforded an advocate. Defense counsel therefore assumes unique importance as an instrument of reform for them.

A defense system for indigents cannot simply be defensive. It has affirmative corrective responsibilities within a proper system of justice. It should not simply respond to prosecutions brought by another agency. The defense system has the responsibility to change laws, policies, and practices governing itself and the criminal process. It should propose legislation, take appeals, and bring civil litigation. Initiative should be the style of a defense agency and reform a part of its responsibility. A unit of staff attorneys must be so charged.

Most public defender statutes and the A.B.A. Standards do not recognize this. They simply extend to the poor some of the traditional legal services available to the middle class on a case-by-case basis. They fail to recognize that such services inadequately deal with the massive systemic problems of the poor and that a well-funded, well-staffed defender agency has capabilities and responsibilities beyond those of a private lawyer retained for a single matter.

This is an unfamiliar concept but not wholly new. The Legal Defense Fund of the N.A.A.C.P. in the early 1960's recognized the racial and economic biases of the criminal process and undertook the defense of many criminal cases which had law reform potential. Their success has been substantial, most recently leading to Supreme Court invalidation of the death penalty.⁸⁴ The American Civil Liberties Union has a record of activity and success in defending criminal cases which antedates that of the N.A.A.C.P., in areas ranging from political belief to freedom of expression to, most recently, abortion⁸⁵ and birth control. Historically, from the time of William Penn⁸⁶ to Eugene V. Debs to the freedom riders and the draft-card burners⁸⁷ and down to Benjamin Spock,⁸⁸ defense of criminal prosecutions has been an accepted mode of changing criminal laws.

The need is even clearer today. The past decades have seen an expanding criminalization of previously noncriminal acts involving, among other things, drugs, motor vehicles, and credit arrangements. Simultaneously, police resources and discretion have steadily expanded. At the same time, deviant behavior has proliferated, ranging from political protests to welfare and rent strikes, gay liberation, and the entire drug culture. These developments are all of particular importance, in varying ways, to the poor and compound the old, persistent vices of discriminatory enforcement of vague, duplicative statutes. The resulting need for comprehensive reform is evidenced by the American Law Institute's Model Penal Code and the Reports of the National Commission on Reform of Federal Criminal Laws.

To a limited extent, the law reform potential and responsibility of defense

84 See *Furman v. Georgia*, 408 U.S. 238 (1972).

85 See *Roe v. Wade*, 410 U.S. 113 (1973).

86 See the opinion of Justice Douglas in *Illinois v. Allen*, 397 U.S. 337, 351-57 (1970).

87 See *United States v. O'Brien*, 391 U.S. 367 (1968).

88 See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

counsel have found expression in proposals concerning defense service. For example, the National Advisory Commission on Criminal Justice recently recommended defense services which incorporate both full-time and assigned counsel. The Commission acknowledged that an argument could be made that full-time public defenders are "more likely to work for new laws or procedures to benefit defendants."⁸⁹ The Commission observed that broad participation by the bar might also have salutary consequences in reforming the system.⁹⁰ Similarly, the President's Commission on Law Enforcement concluded:

The significance of having able defense counsel goes beyond the importance of providing effective representation. Experience has shown that when good lawyers are brought into criminal practice, their impact is felt far beyond the cases they handle. They ask questions and put pressure on everyone in the system to examine what he is doing and why. They organize reform and become a meaningful force for change.⁹¹

While most public defender statutes do not reflect a consciousness of the law reform responsibility and potential of public counsel, at least one legislative proposal requires the public defender to prepare reports including "changes in the criminal law, and changes in court rules as may be appropriate to the improvement of criminal justice, the control of crime, the rehabilitation of offenders and other related objectives."⁹²

Yet the view in criminal representation of the poor probably remains that expressed by Chief Justice Burger: "I think we must view the law reform function of public defenders as a very happy and very important by-product but, nevertheless, a by-product."⁹³

This is all in curious contrast to the provision of legal services to the poor in civil cases. The Office of Economic Opportunity early adopted and has consistently pursued a policy recognizing the unique legal problems of the poor and the consequent special responsibility of counsel to change offending laws and practices. This is reflected in the Guidelines for Legal Services Programs, which provide:

Advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program. This may include judicial challenge to particular practices and regulations, research into conflicting or discriminating applications of laws or administrative rules, and proposals for administrative and legislative changes.⁹⁴

This emphasis on law reform has led to some conflict in the political arena⁹⁵

⁸⁹ Commentary to Standard 13.5.

⁹⁰ *Id.*

⁹¹ TASK FORCE REPORT: THE COURTS at 57.

⁹² § 2, Public Defender Bill, Appendix to Anderson, *supra* note 65.

⁹³ Burger, *The Role of Appointed Counsel in Criminal Cases*, REPORT OF THE PROCEEDINGS OF THE NATIONAL DEFENDER CONFERENCE 41, 43 (1969).

⁹⁴ Guidelines for Legal Services Programs, 2 CCH P.O.V. L. REP. ¶ 8700.36 (1973).

⁹⁵ See, e.g., Pearson, *To Protect the Rights of the Poor: The Legal Services Corporation Act of 1971*, 19 KAN. L. REV. 641 (1971); Finman, *OEO Legal Services Programs and the Pursuit of Social Change*, 1971 WIS. L. REV. 1001.

and considerable success in the courts.⁹⁶ This approach would be equally valid in criminal representation.

Law reform need not be at the expense of clients. Indeed, that danger more properly applies to existing conceptions of counsel which pursue defense strictly on a case-by-case basis. The result is a revolving-door approach to justice, with the same problems and the same clients returning time and again because no one takes the responsibility to seek new solutions. Law reform counsel can advocate broad-gauge solutions on behalf of the indigent defendants.

A law reform orientation would require a new structure, similar to that of the civil legal services programs, which can develop ongoing policies, with its autonomy limited only by responsibility to its clientele not to court bureaucracies or outmoded concepts of the roles of lawyers. A defense system must serve clients, not "handle cases." This means abandoning the distinction between civil and criminal and providing a full range of legal services to an eligible client through one office⁹⁷—preferably through one attorney. This means earlier and sufficient legal services for each client across a broader spectrum of inter-related problems. It assures a more satisfying role for the attorney and a higher degree of client confidence.⁹⁸ Again, the New Haven neighborhood office approach of rendering both civil and criminal services through an autonomous, nonprofit agency recommends itself.

The role of the courts and legislatures in this area is crucial. They must first recognize and develop effective administrative structures for delivering defense services. This can be done in part by court rule-making but also requires the cooperation of legislative and budgetary bodies. Secondly, the courts must withdraw from actual administration. The professionals themselves must determine such matters as eligibility, the need for supporting services, preparation of defenses, and allocation of resources, including those for law reform. The courts should supervise the framework and screen the results but not themselves deliver the services. Law reform presupposes independence from the system to be changed.

III. Forms of Defense Systems: Assigned Counsel and Public Defenders

It is customarily said that there are two modes of delivering legal services to the poor: public defender offices and assigned counsel.⁹⁹ While this is a useful distinction, it is important to note that each type has endless variations. Most criticisms of each type are consequently simplistic and do not relate to inherent unavoidable deficiencies.

⁹⁶ See, e.g., LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487; LaFrance, *Federal Litigation for the Poor*, 1972 L. SOC. ORDER 1. The courts have not viewed law reform efforts with a wholly sanguine eye, however. See Stumpf & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1072 (1969).

⁹⁷ This is done in a number of communities through varying mechanisms. New Haven is an example. See J. CASPER, *AMERICAN CRIMINAL JUSTICE* (1972). (Hereinafter cited as CASPER.)

⁹⁸ See CASPER, *supra* note 97.

⁹⁹ See, e.g., TASK FORCE REPORT: THE COURTS at 59.

Assigned counsel systems are in use in approximately two-thirds of the counties of the United States.¹⁰⁰ These systems usually involve court appointment of counsel, sometimes from attorneys in court but preferably from systematically established panels. When a panel is involved, the client is occasionally given a choice as to the attorney who will represent him.¹⁰¹ Public defender offices, in contrast, are staffed by attorneys who devote their full time to criminal defense of the poor. Court appointment is frequently not necessary and staff selection is done by the governing agency, often a court or board of directors.¹⁰²

Most studies conclude that assigned counsel systems are appropriate, if at all, in communities of less than 400,000.¹⁰³ Above that figure, problems of appointment, supervision and expense, it is said, argue for a full-time defender office.¹⁰⁴ Even those who favor assigned counsel systems concede the need for improved administration, supervision and evaluation.¹⁰⁵ Those who criticize assigned counsel systems, apart from reasons of cost, usually do so on the basis that administrative involvement of judges is at best unwieldy,¹⁰⁶ permitting discrimination and favoritism, and leading to inexperienced or inept representation.¹⁰⁷

Criticisms concerning inefficiency and cost, however, often fail to withstand analysis. For example, one criticism of assigned counsel systems is that they assign only one case to an attorney. This may lead to several attorneys waiting in court instead of just one or two.¹⁰⁸ This need not lead to an increase in cost, however, if a fixed fee per case is paid. Further, this criticism ignores the very real value of having several attorneys present in a criminal courtroom, as witnesses to what occurs and what needs changing. It ignores the problem faced in most jurisdictions where a public defender might have to be in several courts at one time; public defender offices, consequently, frequently adopt "assembly-line" approaches. The ability of assigned counsel systems to assure that only one attorney handles a particular case through all stages may be a distinct virtue.¹⁰⁹

Another frequent criticism of assigned counsel systems is cost. However, below a certain level there may not be enough cases to occupy an attorney's full talents or time. A public defender system would then be more expensive

100 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES* 15 (1965). (Hereinafter referred to as SILVERSTEIN.)

101 TASK FORCE REPORT: *THE COURTS* at 59.

102 See Part IV, Section C *infra*.

103 TASK FORCE REPORT: *THE COURTS* at 59; SILVERSTEIN, *supra* note 100, at 18-23, 27-28, 63; N.L.A.D.A., *New Standards*, 24 LEG. AID BRIEFCASE, 61, 66 (1965).

104 TASK FORCE REPORT: *THE COURTS* at 60; SILVERSTEIN, *supra* note 100, at 63; Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 KY. L.J. 478, 517-30 (1965); Comment, *Legal Aid for Indigent Criminal Defendants*, 18 VAND. L. REV. 837 (1965).

105 See, e.g., Summers, *Defending the Poor: The Assigned Counsel System in Milwaukee County*, 1969 WIS. L. REV. 525, 537.

106 See, e.g., Lewin, *A Tale of Two Districts*, 14 WAYNE L. REV. 528, 556 (1968); REPORT OF THE PROCEEDINGS OF THE NATIONAL DEFENDER CONFERENCE 89-97 (1969).

107 See Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 596 (1963); IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 38-41.

108 See REPORT OF THE PROCEEDINGS OF THE NATIONAL DEFENDER CONFERENCE 98 (1969). (Hereinafter cited as DEFENDER CONFERENCE REPORT.)

109 See Part IV, Section B *infra*.

than assigned counsel. For example, one study has recommended that a full-time public defender would be inappropriate in a federal district which has fewer than 300 appointments per year.¹¹⁰ Where volume is high enough to justify either an assigned counsel or public defender system, several commentators favor the latter upon considerations of cost. A study in North Carolina found that public defender systems were less expensive in districts where caseloads exceeded 250.¹¹¹ Below that point, assigned counsel were less expensive per case.

Another study of a system in a different state found the cost per case was \$150 for assigned counsel, but only \$50 for public defenders.¹¹² In New Jersey, the cost per case for public defender services is reportedly \$175, but for assigned counsel it is \$278.¹¹³ A study for the state of Maine concluded that an adequate defender system might cost \$400,000, but that an assigned counsel system would cost nearly \$600,000.¹¹⁴ It has been estimated that assigned counsel systems would lead to a national cost of \$30,000,000 to \$40,000,000 annually for all indigent felony defendants.¹¹⁵ Public defenders might cost approximately \$20,000,000.¹¹⁶

These studies are of dubious value since the methodology and data are often unreliable. The comparisons often fail to note, for example, that the higher figure for assigned counsel includes overhead expenses, while the figures given for a public defender often do not. Nor do these comparisons note that in mixed public defender-assigned counsel systems, such as New Jersey, assigned counsel are used only because the cost of public defenders (e.g., in rural areas) would be far greater. More importantly, the lower cost per case in public defender programs is achieved by dividing their caseloads into their cost, an approach which ignores the excessively high caseload level and the resulting low-quality level. If defender caseloads were cut in half, as recommended later in this article, the cost per case would be roughly equivalent to that in assigned counsel systems. By comparison, the most that can be said after five years of intensive debate over *civil* legal services to the poor is that the costs per case of assigned counsel ("Judicare") and full-time counsel are so close as to make the cost dispute virtually irrelevant.¹¹⁷ That observation would seem equally true of defense services.¹¹⁸

The real issue then is not cost but quality. There have been some attempts to evaluate the relative performances of assigned counsel and public defenders.

110 See Oaks, *The Criminal Justice Act in the Federal District Courts—A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 217-18 (1969).

111 See Comment, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C. L. REV. 705, 709-12 (1971).

112 Partman, *The Necessity for an Organized Defender Office*, DEFENDER CONFERENCE REPORT at 55.

113 THE OTHER FACE OF JUSTICE at 36.

114 Anderson, *supra* note 65, at 17.

115 Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1263 (1970).

116 *Id.*

117 See Preloznik, *Wisconsin Judicare: An Experiment in Legal Services*, 57 A.B.A.J. 1179 (1971); Robb, *Alternate Legal Assistance Plans*, 14 CATH. LAWYER 127 (1968).

118 These and other aspects of client service are considered in the following portions of this discussion.

As might be expected, the results are inconclusive due to the multitude of factors which comprise effective representation in criminal cases.¹¹⁹ Some raw statistics suggest that assigned counsel clients plead guilty less often than public defender clients, but disparity of averages within assigned counsel systems is great and results are inconsistent.¹²⁰ Oaks and Lehman's study in Cook County indicated that dismissals were obtained by retained counsel in 29 percent of their cases, in 8 percent by the public defender, and in 6 percent by assigned ("committee") counsel; similar results obtained with guilty pleas.¹²¹ In another study in Milwaukee, assigned counsel did better in terms of dismissals, guilty pleas, trials, and sentencings than public defenders in Minneapolis.¹²² A study in North Carolina found public defenders to be more effective than assigned counsel in terms of dismissals, acquittals, sentences, and trials.¹²³

Such studies are of marginal value. Often the differences between assigned counsel and public defenders are statistically insignificant and may flow from causes other than the type of system involved. For example, the differences in results between assigned counsel and public defender systems are no greater than the differences between different *applications of each system*. Some assigned counsel systems are better than others, and some are clearly as good as public defender offices. The reverse is also true. One study not surprisingly indicates that an assigned counsel system can deliver excellent services if it is free from political influence, pays an adequate rate, affords adequate time for preparation and—perhaps surprisingly—draws from the general bar.¹²⁴ In this study, a county system lacking these qualities rendered significantly poorer services in terms of dismissals, acquittals, trials and sentencings.¹²⁵

The problems of defining and reporting results also raise serious questions as to the validity of comparisons across jurisdictions using different defense systems. Even more basic, studies framed in terms of dismissals, acquittals, sentencing and the like may ignore other values of defense systems, such as broad-based involvement of the bar and reform of the criminal justice system. Assigned counsel systems offer the potential of broad involvement of the bar and direct tapping of the full pool of legal resources. Public defender systems hold the potential for flexibility and expertise. Both systems appear desirable, and most proposals suggest a combination of the two.¹²⁶ This is true of the Model Defender Act¹²⁷ which establishes a system of full-time defenders, complemented by assigned counsel, with a further option for contracting with private legal services programs. It is truer still of the National Advisory Commission on Criminal

119 See, e.g., SILVERSTEIN, *supra* note 100, at 70-73.

120 *Id.* at 23-25, 70-73.

121 Oaks and Lehman, *supra* note 46.

122 Summers, *Defending the Poor: The Assigned Counsel System in Milwaukee County*, 1969 WIS. L. REV. 525, 536.

123 Comment, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C. L. REV. 705, 714-15 (1971).

124 Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 IND. L.J. 90 (1970).

125 *Id.* at 104.

126 See, e.g., Anderson, *supra* note 65; Note, *Implementing the Right to Counsel in New Jersey—A Proposed Defender System*, 20 RUTGERS L. REV. 789, 819-20 (1966); IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 45-47.

127 Sections 10 and 13.

Justice, which urges that a panel of private attorneys work with full-time defenders and assume a "significant" percentage of the caseload.¹²⁸ The allocation is calculated to "encourage significant participation by the private bar in the criminal justice system."¹²⁹ The New Jersey Public Defender Act emphasizes the role of full-time attorneys but also provides a place for appointed counsel. It allows for retention of private counsel to provide "some special experience or skill not available on the professional staff" or to meet caseload or conflict of interest demands.¹³⁰

It should be emphasized that courts and other planning agencies are already familiar with both assigned counsel and public defender systems. To a large extent, courts are in a position to dictate which system will be used. For example, a rule requiring that only one attorney represent a client throughout his case will necessitate *some* use of assigned counsel. In contrast, a rule authorizing public representation prior to presentment in court necessitates a semiautonomous public defender office. Significantly each rule relates to both the quality *and* the administration of service. In light of these dual implications of rule-making, courts should consider the factors developed in the next section.

What becomes apparent is that the debate concerning assigned counsel and public defenders obscures other issues concerning what characteristics should be embodied in *any* defense system. These will be determined in part by the private interest of clients in results but also by the public interest in costs, law reform, and adequate service. Effectuating these interests requires less attention to the form and more attention to the elements of defense systems.

IV. Elements of Defense Systems

A. *Statewide Uniformity*

The studies previously discussed concerning assigned counsel systems uniformly emphasize the lack of uniformity. While this may be a healthy form of diversity, more often it is simply the product of a lack of standards. Differing criteria may be employed within a single jurisdiction—indeed, within a single court—on such important matters as eligibility, the time of appointing counsel, and the availability of supporting services. A statute *should* provide for a statewide administrative board to set uniform, state-wide standards concerning such matters as eligibility, caseload, systems, and resolution of grievances. The A.B.A. Commentary¹³¹ does not emphasize state-wide standards, although it calls

128 See Commentary to Standard 13.5.

129 *Id.*

130 N.J. STAT. ANN. § 2A: 158A-9 (1971). Significantly, the Act adds that:

To achieve a proper balance between the services to be provided pursuant to this act and the efficiency of the operation as a whole, as well as to stimulate the continual development of professional experience and interest in the administration of criminal justice, the Public Defender shall divide the case workload of the office between the professional staff and the trial pool or pools. *Id.*

131 Section 1.3 of the ABA STANDARDS OF DEFENSE SERVICES provides for uniformity only within local subdivisions of a state:

By statute each jurisdiction should require the appropriate local subdivision to adopt a plan for the provision of counsel. The statute should permit the local sub-

for a state-wide statute. Some role for local administration is necessary but allocation of resources and setting of standards is best done upon a uniform state-wide basis. This is coming to be the experience and approach in other vital public services, such as education and welfare. Defense services in response to a state-wide system of criminal laws and procedures should be rendered pursuant to state-wide standards, funding, and administration.

This may not be self-evident. Views of the responsibilities and duties of defense counsel vary widely among the bench and bar and any system which does not limit such variety is open to prejudice and caprice. Such issues as financial eligibility, time and mode of appointment, the need for experts, and the adequacy of representation are often the subject of bitter courtroom disagreements with judges or prosecutors. The result may vary from judge to judge, depending upon each one's social philosophy. Rural courts often take quite different approaches from urban courts. In states where judges "ride circuit," policies within one judicial district or even one courtroom may vary from day to day or month to month. Without state-wide standards there is little opportunity for control or administrative review.¹³²

The right to counsel is too important to be left to low-visibility discretion. To the extent judges, clerks, prosecutors or defenders determine the meaning of counsel, their conduct should be subject to review. The more diffused the responsibility, the greater becomes the need for standards. A public defender system may achieve some degree of consistency by state-wide office directives; an assigned counsel system clearly needs rule-making by a board or other administrative body.

B. Program Autonomy

Program autonomy is clearly an important element of defense services. It would make uniform standards and central administration possible, thereby eliminating one of the major failings of assigned counsel systems. It would also reduce apparent identity with the state which prosecutes the accused, a persistent criticism of public defender systems.¹³³

It is difficult for an accused to believe that the authority prosecuting him can also defend him.¹³⁴ The public defender must deal with the same court system and often the same personnel daily. He cannot afford to alienate them. Casper, in *American Criminal Justice*, observes:

[T]he court system is itself a *social system*. The public defender "lives" with prosecutors and judges. He deals with them week in and week out, talking with them about cases, bargaining, perhaps socializing. His relationship to

division to choose from the full range of systems a method of providing counsel which is suited to its needs and consistent with these standards and should allow local subdivisions to act jointly in establishing such a plan.

132 This is particularly acute in defining indigency and eligibility, as discussed in Part V, Section B *infra*. See IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 8, 38-41; THE OTHER FACE OF JUSTICE at 41.

133 See, e.g., Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219, 221 (1956).

134 CASPER, *supra* note 97, at 103-07.

any one client is transient; his relationship to prosecutors, judges and other court personnel is "permanent." Whether he gets on well with them or has an acrimonious relationship can significantly determine whether his job is enjoyable or full of conflict and frustration.¹³⁵

Professionally and socially the defense counsel must function within the system. However, there is great danger that his role as adversary will be sorely compromised and the instances are legion of defense counsel "trading off" cases or favors or "copping out" clients rather than assiduously urging a client's case. This is particularly true in a plea bargaining context, where much depends upon personal and professional position or style, without the scrutiny of the public courtroom. It is equally true in the open courtroom where the adversary role is often compromised under the pressures of judges who are unsympathetic to the pleadings and trials of vigorous advocacy.

Oftentimes the failure of advocacy may be attributed to individual counsel who do not believe in or fail to assert their role. Yet the pressures tending toward such compromise are formidable. A defender whose very employment, whose assignment to a case, and whose trial resources and scheduling are all dictated by a single judge or prosecutor is at a severe disadvantage in attempting to challenge a system on behalf of a client. To assure at least the possibility of vigorous advocacy, most proposals and the better public defender systems establish the defender agency—be it assigned counsel or public defender—as a semiautonomous entity.¹³⁶

The Model Public Defender Act would establish an office of the Defender-General as an executive—not judicial—agency of the state.¹³⁷ He would be appointed by the governor for a period of six years. The Defender-General would be empowered to hire his own staff.¹³⁸ He would have full latitude in representing defendants, even to the point of filing federal court proceedings when appropriate.¹³⁹ A similar proposal appears in the National Advisory Commission Courts Standard 13.8. Section 1.4 of the A.B.A. Standards on Defense Function provides, with respect to autonomy:

One means for assuring . . . independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of particular cases.

The program should establish standards whereby each attorney should then determine, for example, eligibility and the need for supporting resources (such

135 *Id.* at 103.

136 *See generally* IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 13. A full-time autonomous public defender would seem to be preferred by most judges, prosecutors and defense counsel. *See THE OTHER FACE OF JUSTICE* at 55-59.

137 Section 10.

138 Section 12.

139 Section 17.

as investigation or expert witnesses), with review in the governing board, not the trial court. In particular, eligibility should never be at issue in the court trying an accused. Review by the board should not interfere with the handling of a particular case, unless a client seeks to have the staff attorney replaced. Otherwise, the board should allow an attorney to proceed to conclusion, although it may then discharge him. In so doing, a full, if informal, hearing may be appropriate, but it should not include review of the client's folder without his consent.

The A.B.A. Commentary is consistent with these observations, although there is little emphasis upon state-wide administration. However, the Commentary does emphasize the importance of independent boards in assuring the independence of staff attorneys. The Commentary wisely excludes prosecutors and judges from the board but would also exclude all others except lawyers. No reason is given. Experience in civil legal services establishes the value and wisdom of placing members of the client population on the board to afford bridges for communication and to assure the responsiveness of the agency. Similar diversity has proven beneficial in other areas of social services, such as health and welfare programs. No good reason appears for insulating a defender board from the community it serves.

C. Selection of Attorneys

Selection of attorneys in assigned counsel systems or for public defender offices is of crucial importance. Salary, caseload, administration—all of these affect the quality of services rendered. None of these, however, is as important as hiring responsible attorneys who are responsive to the needs of their clients. This has been the single most critical factor in civil legal services to the poor.¹⁴⁰ It is no less important for criminal defense.

1. Full-Time Public Defenders

Experience has established that part-time attorneys in public defender offices are undesirable. Their private practices compete with their public clients, who in consequence receive poorer services.¹⁴¹ Yet it is equally true that the limited salaries available to full-time staff may be insufficient to attract extremely competent attorneys. For this reason, part-time staff positions—it has been argued—are desirable, making it possible to attract attorneys of high quality.¹⁴² The real answer, of course, is to raise salaries and make a full-time staff possible.

The National Advisory Commission has recommended a selection method for full-time public defenders. The chief public defender should be nominated by a selection board and appointed by a governor or a jurisdiction's Judicial

¹⁴⁰ See Finman, *OEO Legal Services Programs and the Pursuit of Social Change*, 1971 Wis. L. Rev. 1001, 1074-75.

¹⁴¹ See, e.g., NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, Commentary to Standard 13.7; ABA STANDARDS ON THE DEFENSE FUNCTION § 3.2 (Approved Draft, 1968); IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 15.

¹⁴² See Jones, *The Minnesota Plan*, DEFENDER CONFERENCE REPORT 82, 86-87.

Nominating Committee for a term of four years.¹⁴³ The objective would be to assure as much independence "as any private counsel who undertakes the defense of a fee-paying criminally accused person" possesses.¹⁴⁴ Discipline would lie with the Judicial Nominating Commission,¹⁴⁵ to be applied in cases of "permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful and persistent failure to perform public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice."¹⁴⁶

Most proposals concerning staff of defense systems are opposed to tenure or civil service status for staff attorneys. This is the position of the National Advisory Commission on Criminal Justice, which argues that staff may rely upon "professionalism" for protection from retaliation, while curiously maintaining that a newly appointed public defender should remain free to assemble a new staff "best suited to his needs."¹⁴⁷ Civil service status is indispensable to this goal, with possible exceptions for probationary staff and for the director.

Programs which have discriminated against hiring client populations in the past should undertake programs of affirmative action to correct any existing imbalance. People charged with crime are not randomly selected from society. They usually reflect the minority groups of the jurisdiction: poor, black, brown, red, yellow—rarely white and middle class. To the fullest extent possible, these minorities should be represented in the staff and management of defender programs to assure effective communication with minority clients and faith by them in that representation.

Compensation will be discussed later but some mention is relevant here. The minimum level of compensation should be that paid by law enforcement agencies for persons of similar competence and responsibility. In addition, certain other factors argue for higher pay to full-time public defender staff: their disfavored status in the courts and among the bar generally, the favored status of prosecution career patterns, the present lack of qualified defense attorneys, and the attractive salary schedules of private law firms. The need for a favorable compensation schedule is heightened if civil service status is denied.

2. Assigned Counsel and the "Indigent" Bar

Selection of assigned counsel involves competing values: the desire to avoid favoritism by random selection and the need for selectivity based on

143 Courts Standard 13.8. The majority of public defenders are now hired by judges or county boards. *THE OTHER FACE OF JUSTICE* at 19.

144 Courts Standard 13.8.

145 See Courts Standard 7.4.

146 Courts Standard 13.8.

147 Courts Standard 13.10. Such an approach hardly is calculated to encourage career service, a value espoused by the ABA Standards:

A defender plan should be designed to create a career service. Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, ethnic and other considerations extraneous to professional competence. The tenure of the defender and his staff should be protected similarly. The defender and staff should be compensated at a rate commensurate with their experience and skill, sufficient to attract career personnel, and comparable to that provided for their counterparts in prosecutorial offices. § 3.1.

experience. A further consideration is the need to provide broad involvement of the bar in reform of the criminal process. In assigned counsel systems, training and supervision may allow a broad base of selection encompassing both criminal specialists and less experienced attorneys. In public defender systems, a broad base can be developed by using a panel of private attorneys to supplement the full-time staff and by involving private attorneys in the governing body of the program.

Some fairly broad-based, systematic distribution of assignments is desirable to avoid favoritism. One study in Kentucky indicates the range of problems in appointment systems. Some judges appointed on a strict rotation system; others picked from attorneys in the courtroom.¹⁴⁸ Some attorneys, in consequence, might be appointed to represent an accused once a year. Others were appointed as frequently as twenty times per year.¹⁴⁹ Similar diversity and disparities appeared from county to county in appointment of counsel in Oregon¹⁵⁰ and Maine.¹⁵¹ In Chicago, another study¹⁵² indicated that two attorneys received forty-seven of one hundred forty-six fees paid for appointment cases. A study in Milwaukee¹⁵³ indicated that only 11 percent of the bar participated in court appointments and of these a handful were assigned more than one third of all the cases. One attorney received \$14,000 for fifty-eight cases; another received \$25 for one case. Some were appointed exclusively and extensively by a single judge. Such concentration on a few attorneys may lead to cronyism, on the one hand, or overburdening of the more experienced members of the bar, on the other.¹⁵⁴ Neither is desirable.

Broad selection from the bar is a critical factor in rendering effective legal services. The reasons are not clear, but in one study of two counties using assigned counsel systems, significantly better service was rendered in the county which appointed systematically from the entire bar.¹⁵⁵ The best way to assure results comparable to those obtained by private counsel may well be to involve private counsel in public defense.

Most studies of effectiveness conclude that private counsel plead clients guilty less often than both assigned counsel and public defenders. Indigents also go to jail more often and for longer periods of time. Silverstein suggests this may be in part at least a consequence of poverty, not of the quality of representation.¹⁵⁶ It may as well be a product of the status and independence enjoyed by private counsel and extended to their clients. If so, a broad-based system of

148 Boid, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 KY. L.J. 508, 511-14 (1965).

149 *Id.*

150 Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 266 (1965).

151 Anderson, *supra* note 65, at 7-8. As to the District of Columbia, see United States v. Chatman, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

152 Oaks & Lehman, *supra* note 46, at 698.

153 Summers, *Defending the Poor: The Assigned Counsel System in Milwaukee County*, 1969 WIS. L. REV. 525, 528-29.

154 Note, *Implementing the Right to Counsel in New Jersey—A Proposed Defender System*, 20 RUTGERS L. REV. 789 (1966).

155 Kittel, *Defense of the Poor: A Study in Public Parsimony and Private Poverty*, 45 IND. L.J. 90 (1970).

156 SILVERSTEIN, *supra* note 100, at 53-55.

assigning cases would tap that reservoir of benefits for the poor, rather than limiting them to defendants who retain private counsel.

The President's Commission on Law Enforcement has observed that the criminal bar is generally not well regarded by the remainder of the bar.¹⁵⁷ Criminal practice is not widely sought, whether because of the clients, the courts, or the nature of the practice. By experience, an attorney in criminal practice must expect to lose more cases than he will win.¹⁵⁸ He must do so at a depressed level of income in a depressing court setting. The result, the President's Commission concluded, is that "in many of our cities there is a distinct criminal bar of low legal and dubious ethical ability."¹⁵⁹

A study¹⁶⁰ in Oregon of the "indigent bar" revealed some significant insights into the quality and status of lawyers serving the poor. Attorneys who were appointed were rarely privately retained, suggesting that they were viewed with disfavor on the open market. Relatively few represented the majority of indigents. In one district court, four attorneys represented some 50 per cent of indigents.¹⁶¹ Four lawyers of wide experience were asked to rate the "indigent bar" and attorneys from the general bar. The former were uniformly viewed as inferior.¹⁶² When the appointment panel was broadened to include the entire bar, a dramatic improvement in services could be seen in dismissals, pleas, trials and sentences.¹⁶³

A broader-based system of selection will inevitably draw upon less experienced, younger attorneys. This is in contrast to public defender staff attorneys, who are generally more experienced.¹⁶⁴ In assigned counsel systems, there is a danger that the younger attorneys may thus acquire experience at the expense of the poor.¹⁶⁵ Involving the younger attorneys may nevertheless be worthwhile if they are given support and supervision in order to capitalize upon their freshness and dedication. The simple fact is that experience is not necessarily the critical factor in producing results.¹⁶⁶

Several studies have indicated that it is also possible to involve older members of the bar in court appointment systems.¹⁶⁷ Where this has been done, results have improved substantially. The experience and prestige of older members of the bar can be of value to individual clients. More importantly, change in the criminal justice system can be effected best if the most respected members of the bar are motivated to seek it. This motivation can come from direct involvement in representing clients.

157 TASK FORCE REPORT: THE COURTS at 57-58.

158 *Id.*

159 *Id.* at 57. See also *United States v. Chatman*, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

160 Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255 (1965).

161 *Id.* at 273.

162 *Id.* at 280-82.

163 *Id.* at 286.

164 SILVERSTEIN, *supra* note 100, at 16; Lewin, *A Tale of Two Districts*, 14 WAYNE L. REV. 528, 541 (1968); *THE OTHER FACE OF JUSTICE* at 54-59.

165 Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. CRIM. L. 73 (1968).

166 *See State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 444 (1966).

167 Note, *Adequate Representation for Defendants in Federal Criminal Cases: Appointment of Counsel Under the Criminal Justice Act of 1964*, 41 N.Y.U.L. REV. 758 (1966).

Consequently, a broad-based system can and should involve both the old and the young. In so doing, it must to some extent match experience with the difficulty of a particular case. It has been suggested that selection on the basis of experience is not possible in court appointment systems.¹⁶⁸ In fact, quite the opposite is true. Judges do appoint selectively, sometimes on the basis of merit or experience¹⁶⁹ and sometimes on the basis of favoritism. In the latter case, it is a fair criticism of appointment systems that they are *too* selective. The selectivity urged here would have the appointment administrator, preferably *not* a judge,¹⁷⁰ assign cases in a systematic sequence with limited discretion to match experience with the difficulty of the case. To do this, all that is needed is a better set of criteria.¹⁷¹

To a large extent, the initiatives for involving the general bar in the criminal process must come from the courts. They can assure effective counsel and broad-based involvement by their rule-making. If, contrary to the A.B.A. Standards, they continue to appoint only counsel physically present in court, they assure—as the author can attest from his own experience—inept representation. Anything less than a broad-gauge, neutral system of selection will perpetuate the disreputable, ineffective, “indigent” bar.¹⁷²

The improved criteria urged here are consistent with involving the general bar, despite its inexperience. “Inexperience” is a misleading term: the specialties of corporate, real estate, tax and securities practices do not disqualify an attorney for the criminal courtroom. They demand from him the same imagination, analysis, interviewing, counsel, persuasion and advocacy required in the criminal process. It is important also that young—albeit inexperienced—attorneys be eligible for assignment.¹⁷³ If further specific education or assistance is needed, it can be built into the system and provided by full-time staff.¹⁷⁴

The New Haven program conducted an extended experiment involving a

168 See DEFENDER CONFERENCE REPORT at 97.

169 See, e.g., Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 266-70 (1965).

170 See ABA STANDARDS ON THE DEFENSE FUNCTION § 2.2 (Approved Draft, 1968) which provides for random selection except “where the nature of the charges or other circumstances required.” An attorney may then be chosen because of his “special qualifications.” IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 43-47.

171 Oaks, *The Criminal Justice in the Federal District Courts—A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 214-15 (1969). Section 2.1 of the ABA Standards concerning Defense Services provides:

An assigned counsel plan should provide for a systematic and publicized method of distributing assignments. Except where there is need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. If the volume of assignments is substantial, the plan should be administered by a competent staff able to advise and assist assigned counsel.

172 See Part IV, Section C, subsection 5 *infra*.

173 *Contra*, SILVERSTEIN, *supra* note 100, at 17-19.

174 Section 2.3 of the ABA STANDARDS ON DEFENSE SERVICES provides:

As nearly as possible assignments should be made in an orderly way to avoid the appearance of patronage and to ensure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his special qualifications to serve in the case, without regard to the established sequence.

panel of private attorneys compensated for serving clients who chose them from a list in preference to full-time defenders. The author administered this system for some six months. The private attorneys achieved results which were often as good as or better than those of full-time defenders. While the cost per case was somewhat higher, the panel system amply demonstrated the importance of two values previously mentioned: involvement of the private bar and choice by the client. The panel was the equivalent of an assigned counsel system and the freedom of choice by the client operated to assure in large measure that experienced, effective counsel were most frequently chosen with a high degree of client satisfaction. Where experience was lacking, the panel administrator was available for consultation.

What is being urged here is adoption of better criteria in order to involve the entire bar in the criminal process as a powerful force for reform. Chief Judge Bazelon has observed, in considering whether time is "reasonably expended" for compensation under the Criminal Justice Act, that:

Involving attorneys who would not ordinarily appear in a criminal case in the day-to-day administration of criminal justice in the District of Columbia may well have significant advantages, not only to the particular defendant, but to the criminal justice system itself. Frequently, those whose daily task it is to administer criminal justice become accustomed to things as they are and overlook shortcomings which are obvious to an outsider. A fresh view not infrequently brings into focus defects which others have not seen. If this be deemed important, and I am inclined to think that it is, then it may be entirely consistent with the purpose of the statute to deem the time it takes such a lawyer to become familiar with basic principles to be "reasonably expended." On the other hand, appointment, on a rotation basis, of attorneys not familiar with the criminal justice system may result in their client's bearing the cost of their inexperience. While the inexperienced lawyer is not to be condemned for an error bred of this lack of familiarity with criminal law or procedure, it must be remembered that the client is entitled to the *effective* assistance of counsel.¹⁷⁵

3. Preference of the Defendant

Selection of counsel is a matter of considerable consequence. It takes different forms in assigned counsel and public defender systems, but each shares the common question of whether the accused should have any voice in selection. This is administratively feasible and is done with *Judicare*.¹⁷⁶ It has also been done with a court appointment system in Illinois.¹⁷⁷ Presumably, it could be done as well and more easily with a public defender system, yet it is usually not done.¹⁷⁸ In fact, one study in Oregon which polled judges found two-thirds opposed to the accused having any voice in selecting his public counsel.¹⁷⁹ A

175 *United States v. Thompson*, 361 F. Supp. 879, 884 n.12 (D.D.C. 1973).

176 *See* TASK FORCE REPORT: *THE COURTS* at 59.

177 *Oaks & Lehman, supra* note 46, at 694-96.

178 *See United States v. Thompson*, 361 F. Supp. 879, 887-89 (D.D.C. 1973).

179 Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 267 (1965).

substantial minority, however, felt that participation would enhance trust in the attorney-client relationship.

Casper's study¹⁸⁰ indicates that freedom to choose counsel is an important factor in an accused's feelings concerning counsel and the criminal justice system. The prisoners interviewed uniformly preferred retained counsel. They would also prefer "private" defenders (that is, those on the staff of an autonomous program like New Haven's) to public defenders. The reason, to the extent it could be established, appeared to be that freedom of choice is simply not available in the Connecticut public defender system. In consequence, rightly or wrongly, many defendants are dissatisfied with the representation they receive.

Arguably, this imposes a needless burden on the administration of defense systems. However, the burden is *not* needless; freedom of choice may enhance the effectiveness of a system. The burden need not be great; the client's choice should be honored only to the extent it does not overburden any particular attorney, whether assigned or full time.

The model used by civil legal services for the poor throughout the country permits free choice by indigents of the attorney who will represent them. The traditional model for delivery of privately retained legal services offers a similar choice. Indeed, the Bar emphasizes this as a major virtue of its Judicare service to the public.¹⁸¹ There is no reason to think there is less value in allowing indigent criminal defendants a similar choice.

Most cases opposing freedom of choice involve belated, frivolous complaints concerning appointed counsel. When these arise, as they often do, on the eve of trial, refusal to substitute new counsel is administratively reasonable.¹⁸² At the same time, the refusal is clearly undesirable if it leads to *pro se* representation with its inevitably inept and disruptive defenses.¹⁸³ Substituting counsel when administratively feasible is preferable to *pro se* representation and may even be a logical corollary of the constitutional right¹⁸⁴ to undertake a *pro se* defense.

An adequately staffed, autonomous defense program should be well able to allow defendants broad latitude in their choice of counsel. The New Haven program has done so with both its full-time and panel attorneys, incurring little administrative difficulty. Such an approach has meant that courts need not face the "eve of trial" complaints from defendants who are dissatisfied with counsel forced upon them. Freedom of choice thus *minimizes* administrative problems, rather than exacerbating them.

As with earlier matters, this is a subject for court rule-making. Courts can provide that, within broad ranges, defendants shall have a choice as to public counsel. Such rules are well within judicial competence concerning the sixth amendment's provision of counsel or the court's superintendence over admission of counsel. The failure of the courts to act in the past has doubt-

180 CASPER, *supra* note 97.

181 See Brakel, *The Case for Judicare*, 59 A.B.A.J. 1407, 1409 (1973).

182 See, e.g., *United States v. Price*, 474 F.2d 1223, 1226 (9th Cir. 1973); *Good v. United States*, 378 F.2d 934 (9th Cir. 1967).

183 See *United States v. Dougherty*, 473 F.2d 1113, 1123-24 (D.C. Cir. 1972).

184 See cases at notes 82-83 *supra*; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

less been a source of the very complaints which may make them reluctant to adopt such rules.

4. Continuity of Representation

Assigned counsel systems, and to a lesser degree public defender offices, can assure that a single attorney will represent a client at all stages of the process, on a one-to-one basis and without having to divide a case into stages.¹⁸⁵ This assures uniformity in dealing with the prosecutor's office in a single matter. It heightens the professional status and skills of staff.¹⁸⁶ And it reduces the probability that defenses and cases will be lost as they are passed from one staff attorney to another.¹⁸⁷ Section 5.2 of the A.B.A. Standards on Defense Service therefore provides that counsel initially appointed should continue to represent the defendant through all stages of the proceedings.

A division of function should not be attempted at the trial level. A number of defender offices limit particular attorneys to appearances in designated courts. A client who goes from one court to another may thus be served by several attorneys, as in many felony prosecutions which may be bound over from a lower to a higher court. The same may be true of de novo review of misdemeanor trials. The result is a reduction in client confidence and an increase in attorney inefficiency. Both should be avoided.

While counsel should ordinarily remain with the client throughout the process, full-time defender agencies may have counsel who specialize in post-conviction procedures. Unless the client objects, it may be appropriate and indeed wise to afford a client the fresh perspective and valuable expertise of new counsel. If the client objects, his trial counsel should remain with the case.

There is relatively little case law concerning an accused's right to continuity of counsel.¹⁸⁸ In *Wallace v. Kern*, discussed earlier in this article, the district court severely criticized the Legal Aid Society practice of having different attorneys handle different phases of a case from interview to plea through trial and disposition. The court relied upon three separate studies criticizing this practice and commented:

An acceptable one-to-one relationship between client and attorney has yet to be developed. At present attorneys are assigned to court parts rather than to individual cases. Although this is a necessary budget-saving device, it hampers the intimate attorney-client relationship available to those who can retain private counsel. Moreover attorneys are unfamiliar with a case

185 Steward, *Coordinated Assigned Counsel Systems in Large Jurisdictions*, DEFENDER CONFERENCE REPORT 48, 52.

186 Comment, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448 (1969):

The advantages of the man to man system are considerable. In addition to the obvious benefit to the client, such a system is of considerable psychological benefit to the attorneys involved: their image of themselves as professional men with individual clients is naturally improved. *Id.* at 451.

187 [Footnote omitted.]

188 See *Chambers v. Maroney*, 399 U.S. 42 (1970); *United States v. Smallwood*, 473 F.2d 98 (D.C. Cir. 1972); *United States v. Estes*, 485 F.2d 1078, 1080 (D.C. Cir. 1973).

until it is assigned to them in court. There is no time to order investigations or to fully prepare case arguments. . . Clients are reinterviewed as they pass from court part to part, from one attorney to another. The rapport between attorney and client suffers in this process, impinging adversely on plea-bargaining, trial strategy and sentencing decisions.¹⁸⁹

A client may request that counsel be replaced. Such a request should be discussed with the client and, if persisted in, granted. The reasons may not be clear, since defendants by education or situation are often inarticulate. Even if clear, the reasons may appear merely personal or otherwise unpersuasive to counsel or court. Nevertheless, the request should be granted in order to assure an appearance and sense of justice, unless replacing counsel unduly impedes court processes or serving other clients.

A related problem is that of counsel requesting leave to withdraw. This is obviously inconsistent with the need for continuity of representation. The A.B.A. Standards on Defense Services, section 5.3 state:

Once appointed, counsel should not request leave to withdraw unless compelled to do so because of serious illness or other incapacity to render competent representation in the case, or unless contemporaneous or announced future conduct of the accused is such as to seriously compromise the lawyer's professional integrity.

The importance of continuous representation cannot be overemphasized. In the author's experience, it is crucial to effective representation. As such, it bears special attention by the courts. Certainly, their general authority over cases and counsel permit rule-making requiring continuity. Such rules should be adopted.

D. Role of the Constituency

Public criminal defense services for those unable to obtain private counsel serve an identifiable segment of society. By definition, such people are economically deprived. By common experience, the poor in our society are identifiable by other forms of deprivation involving education, employment, housing, and race. Such people frequently depend upon the state while being largely alienated from the greater society. This is the constituency, the client population, of legal services for the poor.

If this article were devoted to describing the needs of the poor, perhaps the preceding paragraph would warrant extensive amplification and supporting documentation. However, the needs of indigents have been widely discussed elsewhere, leading to the broad expansion of the right to counsel noted earlier in this article. What remains is to implement that right to meet the needs of the client constituency. To accomplish this, the concept and the administration of defense services must be appropriately tailored.

The client population must participate in the defense program. They should

189 *Wallace v. Kern*, *supra* note 22, Memorandum Opinion at 30.

be hired as staff attorneys, investigators, secretaries, translators, receptionists, or aides. This facilitates providing competent counsel and disseminating knowledge about the availability of legal services. Of course, hiring the poor also uplifts the economic well-being of those hired. All of these reasons argue for special efforts to prefer the target or client population in staffing a defense program.

Further, members of the program's constituency should be in policy-making positions and should have training and coordinating responsibilities. Programs serving the poor often reflect or are controlled by middle-class values. This impairs the effectiveness of the services and does violence to basic concepts of human dignity and diversity. A policy-making role not only serves as a corrective to class bias but also provides means of communication between the program and the community.

This has certainly been the experience of civil legal services programs. With respect to the client constituency, the comment to the N.L.A.D.A. Standards concerning civil legal services programs provides:

The community served should be consulted before deciding the order of prior ties as it affects caseload. Although this is an extremely difficult task, efforts can be made to encourage their expression in many ways, i.e., neighborhood meetings, discussion with recognized leaders or representatives, polls, even door-to-door surveys. Results realized may not be an exact reflection of a totally reasoned decision by the community; however, such techniques can significantly affect and inform the decision that the organization finally makes on caseload and other questions.¹⁹⁰

The role of the client constituency in defender programs was noted in passing by the President's Commission on Law Enforcement in dealing with positions which might be filled by laymen. The Commission said: "Residents of the poor neighborhoods who are knowledgeable about the backgrounds and social problems of the people involved in many cases are a promising source of manpower for these jobs."¹⁹¹

Proximity to the client constituency is important. A majority of criminal defendants live in urban areas, a majority of them are poor and a majority of them are crowded into high-density squalor. Locating public defense offices in these neighborhoods is an effective way to serve them. It can thus add an element of stability and hope, providing palpable evidence that abstractions concerning justice have reality.

Again, this has been the experience with civil legal services programs. The A.B.A. Standards on Defense Services, section 3.3, provide a curiously bureaucratic contrast in stating that "Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession." In contrast is the N.A.C. Courts Standard 13.13(2), which provides that the public defender should seek office locations to avoid being "excessively identified" with courts and police, preferably "within the neighborhoods from which his clients predominantly come." There should of

¹⁹⁰ Comment to Standard 6.

¹⁹¹ TASK FORCE REPORT: THE COURTS at 59.

course be a central office which will in most communities be near the courts. Proximity to the courts is of value only to the extent that it aids rendering defense services. The defender agency is not a *court* agency. Indeed, studies indicate that public acceptance of—and therefore the effectiveness of—a defender program depends in part upon its ability to distinguish itself from the taint of police-welfare-courts associations which often attaches to all public agencies.¹⁹²

To the extent that image and appearance are psychological aids to counseling, defender offices should seek not only a “professional” appearance but also one which identifies the office and service with the client community. At a minimum, privacy, dignity, and minimal comforts are needed. Beyond that, decor should be calculated to encourage clients—particularly those of an identifiable ethnic group—to identify with the attorneys. Above all, the physical surroundings of the defender office should neither convey an association of welfare or police surroundings nor reflect dilapidation, decay, despair, or disinterest.

Much of this commentary may appear comprised of vague and unimportant bromides. However, anyone who has ever observed a typical public defender office will appreciate the importance of these concerns. Urban public defender offices are frequently of a piece with the jails and courts: old, dirty, cramped, and offensive to both human dignity and a due sense of justice. Neither counsel nor clients, as the court in *Wallace v. Kern* observed, can rise very far above the place left them in the scheme of justice.

V. Procedures of Defense Systems

A. *Early Contact with the Client*

One major criticism of assigned counsel systems is that they do not make possible early contact between client and attorney.¹⁹³ Administrative delay, particularly appointment by a judge, may lead to delays of days or weeks.¹⁹⁴ The same may be true in public defender systems.¹⁹⁵ The point is that delay is undesirable in any system and inherent in none. An assigned counsel system can be devised in which client contact and eligibility can be established at or shortly after arrest, with subsequent review by the court.

As the President's Commission noted, it is extremely important that counsel be afforded early in the criminal process.¹⁹⁶ This early availability of counsel may help in investigation and preparation. The Commission also emphasized other factors, such as helping with bail and employment, as well as the possibility of diverting the matter at an early stage from the criminal process. The National Advisory Commission on Criminal Justice has identified¹⁹⁷ four functions counsel

192 See CASPER, *supra* note 97.

193 SILVERSTEIN, *supra* note 100, at 29-32.

194 See, e.g., Note, *Implementing the Right to Counsel in New Jersey — A Proposed Defender System*, 20 RUTGERS L. REV. 789, 808-12 (1966) (noting an average delay of 35 days between arrest and initial client contact).

195 See, e.g., *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C. L. REV. 705, 712 (1971).

196 TASK FORCE REPORT: THE COURTS at 53-54.

197 Standard 13.1.

may perform by early contact with an accused. First, counsel may preclude waiver—effective or otherwise—of constitutional rights. Second, counsel can begin prompt investigation. Third, plea bargaining is often affected and even initiated during the booking process. Finally, early entry into the case by counsel facilitates better representation in the preliminary stages of the process, such as arraignment, the setting of bail, and the conduct of preliminary motions or hearings.

When necessary, the decision as to eligibility should be deferred in favor of providing prompt representation. The vice—representation of ineligible defendants—can be cured later, leaving subsequent private representation unimpaired. The benefit of protecting the accused's rights will be assured. Indeed, early presence of counsel may expedite police processing since the accused is thereby made available for interrogation or lineup purposes.

Early notice and prompt attention are particularly appropriate with many misdemeanor prosecutions. Many cases involving credit or marital matters, for example, can be diverted from the criminal courts if approached promptly. Since bail may be arranged more easily in misdemeanor cases, efforts to secure it should be prompt. Finally, waiver is a particularly acute problem in misdemeanor matters and counsel should make initial contact with the accused as early as possible. As Justice Douglas observed in *Argersinger*, the volume of misdemeanor cases, "far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."¹⁹⁸ The President's Commission on Law Enforcement observed that:

An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure.¹⁹⁹

The Model Public Defender Act therefore provides that the custodian of a person shall advise him of his right to free counsel and notify the public defender of the person's presence.²⁰⁰ The Commentary says unequivocally that representation prior to court appearance need not turn upon eligibility or await such a determination. Any determination of need is to be deferred until a later court appearance,²⁰¹ but counsel is to be afforded in the interim to protect the rights of the accused. An accused shall have counsel "beginning with the earliest time when a person providing his own counsel would be entitled."²⁰²

¹⁹⁸ 407 U.S. 25, 34 (1972).

¹⁹⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 128 (1967).

²⁰⁰ Section 3(a)(2).

²⁰¹ Section 4(a).

²⁰² Section 2(b)(1). One of the most frequent causes of complaints concerning ineffectiveness of counsel has been late appointment. For varying treatments compare *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970); *Garland v. Cox*, 472 F.2d 875, 877 (4th Cir. 1973); *Rastrom v. Robbins*, 440 F.2d 1251 (1st Cir. 1971); *Frates v. Bohlinger*, 472 F.2d 149 (1st Cir. 1973); *Walker v. Wainwright*, 350 F. Supp. 916 (M.D. Fla. 1972).

In a similar vein, the New Jersey Public Defender Act provides:

[I]f it [the court] shall subsequently determine that the defendant is ineligible it shall so inform the defendant, and the defendant shall thereupon be obliged to engage his own counsel and to reimburse the office for the cost of the services rendered to that time.²⁰³

Early notice may be defeated by administrative delays. Court rules should require arresting officials to notify the defender agency *directly* when an accused is taken into custody. This should be done in every case, even where the accused will probably not be financially eligible for public defense but does not have an attorney whom he can call immediately. The defender staff may then provide initial representation and make its own determination of eligibility, subject to later review by the court.

B. Eligibility

1. Who Decides

Determination of eligibility in different jurisdictions may in some instances require participation or approval by the court, prosecutor, or public defender.²⁰⁴ This may be time-consuming due to court calendars, procedures or the nature of the case. If so, it is important that the accused be afforded counsel *during the delay*.²⁰⁵ The importance of early contact with the client was discussed in the preceding section. If such contact is to be effected, eligibility determinations cannot await formal court action.²⁰⁶ Either counsel must be afforded *before* eligibility is determined by a judge or eligibility must be determined by someone other than a judge. The latter is preferable.

Use of public defenders to determine eligibility has the virtues of speed and expertise. It is the approach taken by civil legal services programs which do not require affidavits or even full financial statements for routine determinations of eligibility.²⁰⁷ By statute in California, either the public defender or the court may determine financial eligibility and a finding of *eligibility* by the public defender is not subject to review.²⁰⁸ A finding of *ineligibility*, of course, is and should be reviewable.

In the federal courts, procedures vary somewhat. Generally it appears that counsel is appointed at arraignment by the United States Commissioner, with only minimal financial screening.²⁰⁹ Speed is thereby favored over thoroughness, with the result that "as a practical matter, counsel is always appointed under the act for an accused not represented by retained counsel."²¹⁰ This procedure

203 N.J. STAT. ANN. § 2A: 158A-14 (1971).

204 SILVERSTEIN, *supra* note 100, at 105-06.

205 Sections 3(a) and 4(a).

206 See IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 54-55.

207 See 2 CCH P.O. L. RPT. ¶¶ 9300.141, 9300.28 (1973).

208 Ingram v. Justice Court, Lake Valley, 69 Cal. 2d 832, 447 P.2d 650 (1968).

209 Timbers *et al.*, *Judicial Perspectives on the Operation of the Criminal Justice Act of 1964*, 42 N.Y.U.L. REV. 55, 57 (1967).

210 *Id.* at 56-57.

has been criticized,²¹¹ but is sensible in the light of the large percentage of indigent defendants in the criminal courts.

The A.B.A. Standards provide that eligibility should be determined by a judge or court official, but that the preliminary determination should be made as early as possible,²¹² perhaps as part of the booking process. Other proposals provide for notification and provision of counsel upon "commencement of detention," with the public defender determining eligibility at that time.²¹³ Decisions could later be reviewed by the court. The notification to the public counsel could come routinely as part of the booking process or, as the National Advisory Commission has suggested,²¹⁴ by direct contact from the accused or a friend.

The preferable mode of determining eligibility would be by "an officer of the court" and no sound reason exists to exclude the public defender from this category. Eligibility for most services, such as welfare and education, is determined by the administrators of the service. To involve any other court officer in the eligibility determination implies a lack of confidence in the public defender; no similar review is made of office decisions by prosecutors. It reflects as well a "welfare" or "dole" mentality concerning the right to public counsel.

Indeed, good reason exists to exclude virtually all other court functionaries including the judge. All of these have a function other than defense, whether it be clerking, supervising probation or serving as a judge. Determining eligibility may involve decisions which would influence those other responsibilities. That influence is a risk not assumed by affluent defendants; it is inequitable to impose it on the poor. Further, the information concerning eligibility may be routinely gathered by the public defender while preparing the defense; it is simply more efficient for him to determine eligibility.

The dangers when a judge participates in the eligibility decision were underscored by Bing and Rosenfeld's study of the Boston courts.²¹⁵ The standards and procedures varied widely with individual judges. In addition, some traded lenient sentences for waiver of counsel. Statistics indicated that those *without* counsel received lighter sentences. The emphasis earlier in this article on independence is critical to the determination of eligibility.

In misdemeanor cases, eligibility under *Argersinger* may necessitate some prediction as to the likelihood of imprisonment.²¹⁶ This should not be undertaken by the trial judge, since doing so might prejudice him or indicate to a later judge that the appointment of counsel reflects a judgment that imprisonment is appropriate.²¹⁷ If anyone else undertakes such a prediction there may be resulting error, indicating that such a criterion should not be employed.²¹⁸ If such a

211 See, e.g., Connally, *Problems in the Determination of Indigency for the Assignment of Counsel*, 1 GA. B.J. 11, 14 (1964).

212 ABA MINIMUM STANDARDS: DEFENSE SERVICES § 6.3 (Approved Draft, 1968).

213 §§ 7(b) and 8(c) of proposed bill in Appendix to Anderson, *supra* note 65. See also Part V, Section A *supra*.

214 Courts Standard 13.1-13.3.

215 Bing and Rosenfeld, *supra* note 44.

216 See *Wood v. Superintendent Caroline Correctional Unit*, 355 F. Supp. 338, 343-44 (E.D. Va. 1973).

217 See *THE OTHER FACE OF JUSTICE* at 63-64.

218 As to the general difficulty posed by considering imprisonment as a criterion for appointing counsel, see *IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE* at 8.

prediction is necessary, the public defender is in the best position to make an informed judgment as to the likelihood of imprisonment. He alone knows the issues and facts of the defense and can fully evaluate the claims of the prosecution. Indeed, he must do so routinely as a basis for advising his client.

2. Financial Standards

There is no clear rule as to financial eligibility; a range of factors is usually considered. A typical formulation appears in the Model Public Defender Act:

In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person.²¹⁹

Usually, the test is framed as being one of "indigency." That term has been soundly criticized by the President's Commission on Law Enforcement:

[T]ests based on the concept of indigency fail to recognize that defendants of limited means may have some money but not enough to pay for an adequate defense. They also afford no protection for a defendant who may have sufficient money to retain a lawyer at the outset of the proceeding but whose funds are exhausted before the end of a long trial. The need for socially provided services arises whenever any aspect of adequate representation is financially out of reach of a defendant, even though he is able to bear some expenses of his defense.²²⁰

Obviously, this is a relative concept, depending upon the court, community, and accused's view of the value of representation, the availability of an individual's limited resources and—indeed—the meaning of "poverty." This was succinctly noted by Oaks and Lehman when they observed that "The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means."²²¹ If indigence is the inability to obtain adequate representation, the question of what is "adequate" is also inevitably raised and Oaks and Lehman comment that "perhaps this is a question best not asked."²²² With respect to *Griffin's* dictum, noted earlier, concerning justice not turning upon wealth, Oaks and Lehman comment: "The next logical step, unless we are to concede that we will settle for less than 'equal justice,' is to deny all criminal defendants the right to use any private resources in their own defense."²²³

Implicit in any definition of financial eligibility is a sliding scale of economic hardship. This might be better acknowledged as a system allowing partial eligibility rather than an absolute "indigency" standard so that a person who can

219 Section 4(b).

220 TASK FORCE REPORT: THE COURTS at 61.

221 Oaks & Lehman, *supra* note 46, at 716.

222 *Id.*

223 *Id.* at 717.

pay part of the cost of representation is not totally denied counsel. Such a structure would "safeguard against the danger that a defendant with some but limited means will be held ineligible for the benefits of the Act and thus be driven into the arms of an inexperienced or inept lawyer . . ." ²²⁴ The defendant should be provided counsel and be required to pay into the system whatever he can afford. ²²⁵ This is the conclusion of the N.A.C. and the A.B.A. Standards on Defense Services. ²²⁶

Rather than a partial eligibility standard, most courts use instead the indigency standard of the Supreme Court in *Adkins v. E. I. DuPont Co.*, ²²⁷ an *in forma pauperis* civil action. The statute involved permits waiver of costs for a person who is "unable to pay such costs" and by amendment in 1910 was made applicable to both civil and criminal cases. ²²⁸ In *Adkins*, the Supreme Court held that destitution was not necessary to qualify as "indigent." The plaintiff was allowed to proceed, although her attorney might have had resources to pay costs and although she had a home valued at \$3,450, the rent from which supported her:

We cannot agree with the courts below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for costs . . . and still be able to provide" himself and dependents "with the necessities of life." ²²⁹

Earlier cases had taken an antagonistic, absolutist approach to eligibility for counsel. In using the term "indigency," they had implied a requirement of destitution. ²³⁰ This was rejected by the Supreme Court in *Adkins* and by the Allen Report. ²³¹ The Criminal Justice Act, a product of the Allen Report, sedulously and studiously avoided using the term indigency because of its absolutist connotations. ²³² Instead, the test adopted was simple inability in a specific case to retain counsel, a test adopted as well by the National Advisory Commission, ²³³ the American Bar Association, ²³⁴ the National Legal Aid and Defender Association, ²³⁵ and the Office of Economic Opportunity. ²³⁶

²²⁴ Oaks, *The Criminal Justice Act in the Federal District Courts — A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 213 (1969).

²²⁵ See N.J. STAT. ANN. § 2A: 158A-16 (1971).

²²⁶ § 6.2 (Approved Draft, 1968); Courts Standard § 13.2.

²²⁷ 335 U.S. 331 (1948).

²²⁸ Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1273-74 (1966).

²²⁹ 335 U.S. 331, 339 (1948).

²³⁰ See Solomon, *This New Fetish for Indigency*, 66 COLUM. L. REV. 248, 255-56 (1966).

²³¹ DEPARTMENT OF JUSTICE, REPORT OF THE ATTORNEY-GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF JUSTICE 8 (1963): "Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means."

²³² See Note, *Judicial Problems in Administering Court-Appointment of Counsel for Indigents*, 28 WASH. & LEE L. REV. 120, 122 (1971); Note, *supra* note 167, at 770; Carter and Hauser, *The Criminal Justice Act of 1964*, 36 F.R.D. 67 (1964).

²³³ Courts Standard § 13.2.

²³⁴ ABA MINIMUM STANDARDS: DEFENSE SERVICES § 6.1(a) (Approved Draft, 1968).

²³⁵ N.L.A.D.A., *New Standards*, 24 LEG. AID BRIEFCASE 61 (1965), emphasizing at page 66 the need to avoid creating by too stringent a standard a class of unrepresented defendants; N.L.A.D.A. HANDBOOK FOR STANDARDS #5 (1970) (financial eligibility for civil legal services programs).

²³⁶ See *OEO Guidelines for Legal Services Programs*, 2 CCH Pov. L. RPT. ¶ 8700.35

Such tests, as with the Model Public Defender Act, typically emphasize income, assets, and probable expense of retaining private counsel. This emphasis on the specific case is important since the cost of representation may vary greatly depending upon, for example, whether a misdemeanor, an unpopular cause, or law reform potential is involved. The cost of private counsel is thus a substantial source of uncertainty in determining whether to appoint public counsel, as indicated by the following attempt at a standard for compensating *appointed* counsel:

In determining the amount of the fee in a criminal case it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation and ability of the lawyer and the capacity of the client to pay the fee.²³⁷

The emphasis on inability to retain private counsel only serves to increase the vagueness of the indigency standard. The nature of the test leaves much room for discretion and variance, particularly at the less visible levels of the criminal process. As noted earlier, Bing and Rosenfeld found substantial variation in the appointment of counsel in misdemeanor cases.²³⁸ Some judges withdraw counsel as punishment; others trade a lenient sentence for waiver²³⁹ and those *without* counsel may receive lighter sentences.²⁴⁰ In some courts, bail may be revoked when public counsel is provided.²⁴¹ This variety in factors and value judgments is particularly crucial and prevalent in assigned counsel systems, in which differing judges set standards unto themselves.²⁴²

Of all the factors which are frequently emphasized in denying counsel, the posting of bail seems the least defensible. This is clearly true of those defendants who borrowed money to secure their release and cannot borrow further. This is equally true of defendants who chose to spend their own money to obtain

(1972) to the effect that "The standard should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter." This same test appears in several state public defender statutes such as New Jersey's:

Need shall be measured according to the financial ability of the defendant to engage and compensate competent private counsel and to provide all other necessary expenses of representation. Such ability shall be recognized to be a variable depending on the nature, extent and liquidity of assets and on the disposable net income of the defendant on the one hand, and on the nature of the charge, the effort and skill required to gather pertinent information, render advice, conduct trial or render other legal services and probable expenses to be incurred, on the other hand. N. J. STAT. ANN. § 2A:158A-14 (1971).

See Note, 3 SETON HALL L. REV. 214, 224 (1971).

²³⁷ ABA STANDARDS ON THE DEFENSE FUNCTION § 3.3(a) (Approved Draft, 1971). See Note, *Eligibility for Appointed Counsel in Criminal Cases*, 18 DEPAUL L. REV. 243, 254-60 (1968).

²³⁸ Bing and Rosenfeld, *supra* note 44, at 422.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ SILVERSTEIN, *supra* note 100, at 107-08; Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 264 (1965); Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 28 (1963).

²⁴² See THE OTHER FACE OF JUSTICE at 41.

release and are left with no assets to retain counsel. Denial of counsel would improperly force an accused to choose between two equally valuable constitutional rights,²⁴³ both necessary to proper preparation for trial.²⁴⁴ It is difficult to conceive of any social value to be served by forcing such a choice on an accused, particularly since requiring money bail of an accused is itself a largely discredited practice. Both the Criminal Justice Act and the American Bar Association Standards²⁴⁵ clearly contemplate appointing counsel for those released on bail.

It seems equally improper, in considering an accused's resources, to consider assets of others.²⁴⁶ It is generally not clear that there is any legal duty to provide counsel for others, even between parent and child. Even if the contrary were true, imputing resources not available in reality would deny due process.²⁴⁷ In any event, such an approach serves to discourage use of counsel, a result inconsistent with public policy. Most states²⁴⁸ and the American Bar Association Standards²⁴⁹ therefore ignore assets of others in determining eligibility.

Equally irrelevant are future or potential assets or income. Every poor person could earn or acquire more property in order to employ counsel. While doing so might provide income for an attorney, it might at the same time disrupt lives or simply lead to unrepresented defendants. Thus any financial test for provision of counsel should properly relate to presently existing resources.²⁵⁰ The potential for earning income may be relevant only as a basis for doubting protestations of present poverty.²⁵¹

Finally, merit is an improper consideration in appointing counsel. Some trial courts may use counsel as either punishment or reward, depending on who is and who is not viewed as "deserving." Subjective good faith, the Supreme Court has held,²⁵² is irrelevant in *in forma pauperis* appeals; a fortiori, it should play no part in providing counsel. While an *in forma pauperis* criminal appeal

243 As Silverstein observes, *supra* note 239, some jurisdictions quixotically revoke the bond of defendants before appointing counsel. See *United States v. Scharf*, 354 F. Supp. 450, 452 (E.D. Pa. 1973).

244 See Note, *supra* note 167, at 771-72.

245 ABA MINIMUM STANDARDS: DEFENSE SERVICES § 6.1(c) (Approved Draft, 1968).

246 The former practice with *in forma pauperis* civil litigation of considering the assets of the plaintiff's attorney has been rejected. *Adkins v. E. L. DuPont*, 335 U.S. 331 (1948); *Isrin v. Superior Court*, 63 Cal. 2d 153, 403 P.2d 728 (1965); *Duniway, The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

247 See *United States Department of Agriculture v. Murry*, 410 U.S. 924 (1973); *Bell v. Burson*, 402 U.S. 535 (1971); *King v. Smith*, 392 U.S. 309 (1968).

248 See SILVERSTEIN, *supra* note 100, at 109. See also *State v. Owen*, 339 P.2d 663 (Ariz. 1965); *Lawrence v. State*, 76 So.2d 271 (Fla. 1954).

249 ABA MINIMUM STANDARDS: DEFENSE SERVICES § 1.1(b) (Approved Draft, 1968).

250 Cf. *Williams v. Field*, 394 F.2d 329, 332 (9th Cir. 1968) (stating that *in forma pauperis* prisoners' suits should not be allowed unless exceptional circumstances preclude deferring suits). See also *Earls v. Superior Court of San Luis Obispo County*, 98 Cal. Rptr. 302 (Cal. Super. Ct. 1971). See Rothstein, *Criteria for Appointment of Counsel in Massachusetts Criminal Cases*, 6 SUFFOLK U. L. REV. 855, 858 (1972).

251 See, e.g., *Roberts v. I-T-E Circuit Breaker Co.*, 316 F. Supp. 133, 134 (D. Minn. 1970):

There is something incongruous in an application [for an *in forma pauperis* appeal] by one who has earned as much as did plaintiff during his last five years of employment and who claims now he is unable to earn anything. . . . His earning ability and capacity in the court's opinion should be sufficient to enable him, if he is sincere in his belief, to garner sufficient earnings to finance the cost of his appeal.

252 See *Duniway, The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1283 (1966); *Coppedge v. United States*, 369 U.S. 438, 444 (1962); *Ellis v. United States*, 356 U.S. 674 (1958); *Lovelace v. Haskins*, 474 F.2d 1254, 1255 (6th Cir. 1973).

may be denied if frivolous,²⁵³ counsel may not be so conditioned. The role of counsel is that of advocate, not *amicus curiae*.²⁵⁴ Only after counsel is provided can an accused's case be evaluated and presented, however inadequate it may be.²⁵⁵ If this is true of appellate counsel, after a full trial, it is clearly true of trial counsel prior to *any* exploration or development of the defendant's position.

Financial eligibility is perhaps the single area in which courts have most fully exercised the rule-making power urged in this article. The confusion and abuses in this area are therefore significant for court rule-making in other areas of defense services. Essentially, difficulty has arisen because the courts did not allow the rules to be administered by the responsible professionals. Instead, judges often administer the standards in an adversary setting, injecting irrelevant values on a scanty record to deny counsel.

Public defense is a public service, like welfare, education, or civil legal aid, best administered by those responsible for the service. The prosecution and the courts have no exclusive interest or expertise in denying counsel. The courts should help to establish the criteria; certainly they should provide review for anyone aggrieved. But their rule-making responsibilities should not extend to case-by-case administration. As with civil legal services programs, administration can be entrusted to the board and staff of the defense program.

3. Misdemeanor Cases

The preceding sections concerning who makes the eligibility decision and by what standards have made several references to the Supreme Court's decision in *Argersinger v. Hamlin*, requiring counsel in misdemeanor cases where imprisonment seems likely. That holding has many implications, two of which warrant further exploration here. The first relates to the financial eligibility standard which should be employed in misdemeanor appointments. The second involves the difficulty of predicting the "probability" of imprisonment early enough to appoint counsel in time to be effective.

One factor which has assumed particular importance since *Argersinger* is the smaller attorney's fee usually charged misdemeanants. The obvious inference is that an accused may be able to afford misdemeanor counsel when, with the same resources, felony counsel could not be retained.²⁵⁶ This would lead to a more restrictive extension of counsel in misdemeanor cases.

253 See 28 U.S.C. §§ 1915, 2253 (1970); Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 347, 360 (1967).

254 *Ellis v. United States*, 356 U.S. 674, 675 (1958); *Leser v. United States*, 335 F.2d 832, 833 (9th Cir. 1964); *Anders v. California*, 386 U.S. 738 (1967); ABA STANDARDS ON THE DEFENSE FUNCTION (Approved Draft, 1971).

255 Thus in *in forma pauperis* appeals, even where the district court certifies there is no merit, counsel must be appointed to challenge the certificate. 28 U.S.C. § 1915 (1970); *Coppedge v. United States*, 369 U.S. 438, 446 (1962); *Hardy v. United States*, 375 U.S. 277 (1964); *Ellis v. United States*, 356 U.S. 674, 675 (1958); *Johnson v. United States*, 352 U.S. 565 (1957); *Moon v. United States*, 422 F.2d 692 (D.C. Cir. 1969); *Tate v. United States*, 359 F.2d 245 (D.C. Cir. 1966). See Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

256 See Comment *The Right of the Indigent Misdemeanant to Appointed Counsel*, 16 S.D. L. REV. 400, 410 (1971); Note, 3 SETON HALL L. REV. 214, 231 (1971); *People v. Letterio*, 16 N.Y.2d 307, 315, 213 N.E.2d 670, 674 (1965) (Desmond, C.J., dissenting). See IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 8.

A number of factors argue the contrary. The basic premise of *Argersinger* is that counsel is necessary in base-line trial courts to bring justice to the lower levels of justice. The only exposure to the criminal process for the majority of Americans is in misdemeanor courts and prosecutions. That exposure is often a rude shock, involving shabby facilities and procedures.²⁵⁷ For those familiar with low-level mass justice machinery, the uniform impression is that mass injustice is the uniform result.

As with lineup and interrogation procedures, a massive infusion of counsel is needed not simply as an aid to individuals but as a corrective to the system. Such an approach is also necessary to prevent wholesale and unwitting waivers of valid defenses, and the American Bar Association Standards²⁵⁸ require consultation with counsel before counsel can be waived. This is especially important in mass justice courts where, as noted earlier, Mr. Justice Douglas has observed there is an "obsession for speedy dispositions, regardless of the fairness of the result."²⁵⁹ The President's Crime Commission in 1967 reached a similar conclusion.²⁶⁰ This very "obsession with speed" makes speed imperative in providing counsel. There may not be time to seek private counsel; indeed, there may be—as many judges have observed—no time even to investigate financial eligibility fully. There may barely be time to appoint counsel in order to enable the accused to survive the whirlwind pace of the treadmill of justice.

Quite apart from this, a financial eligibility standard based on the distinction between felonies and misdemeanors rests on uncertain ground. Such distinctions have been rejected in other contexts concerning transcripts and changes of venue.²⁶¹ The felony-misdemeanor distinction does not govern in jury cases under the Sixth Amendment.²⁶² It is not an appropriate measure of the need for counsel, for as Justice Douglas observed in *Argersinger*,²⁶³ the complexity of the law and facts of a case have little relationship to the felony/misdemeanor dichotomy.

Indeed, one could argue that the greater seriousness of felonies has led to greater care by lawmakers, prosecutors, and judges. The greatest need for reform of the law to protect civil liberties would then be in the misdemeanor area. The brief of the Legal Aid Society of New York in *Argersinger* reviewed their extensive experience in representing misdemeanants and concluded tersely

257 See generally Bing and Rosenfeld, *supra* note 44; THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 199.

258 ABA MINIMUM STANDARDS: DEFENSE SERVICES (Approved Draft, 1968).

259 *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

260 THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 199, at 128:

An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed is often substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant whether in protecting his rights, sifting the facts at trial, deciding the social risks he presents, or determining how to deal with him after conviction. The frequent result is futility and failure.

261 See *Mayer v. Chicago*, 404 U.S. 187 (1971) (holding that *in forma pauperis* transcripts could not be denied misdemeanants); *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (changes of venue cannot be prohibited in misdemeanor prosecutions).

262 *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970).

263 407 U.S. 25, 34 (1972).

that they knew "that the prevalence of legal insufficiency and outright innocence is far greater in the lesser offense category."²⁶⁴ Misdemeanor prosecutions are often used to control deviance, marital discord, social unrest, and defiance of authority. In many instances, they offer an effective vehicle for personal harassment and discriminatory law enforcement. Counsel may curb these practices or promote changes in the law that makes them possible.²⁶⁵ The importance of these functions to basic concepts of liberty has little to do with either the term "misdemeanor" or "felony." The appropriate conclusion would be that financial eligibility standards in misdemeanor cases should be at least as expansive and inclusive as in felony cases.

The Supreme Court in *Argersinger* added the further eligibility requirement that counsel need be afforded only in those misdemeanor cases involving a risk of imprisonment. This necessitates a prediction prior to trial as to the likely outcome of a case.²⁶⁶ Such predictions may be beyond the competence of many defense attorneys, prosecutors, or judges. Even if not, there is always a risk of error if the decision is made by someone other than a judge and a risk of prejudice if a judge makes it.²⁶⁷ If the judge denies counsel, in effect he has forfeited a valuable right for elimination of incarceration; if counsel is appointed, the judge may thereby stigmatize the accused as fit for imprisonment, thus prejudging the case. These risks, coupled with the general value of counsel, argue for providing counsel in any case where imprisonment is *possible* by law.²⁶⁸

Defender services should embrace as well prosecutions which cannot lead to incarceration but which are nevertheless of considerable significance. It is important to emphasize here that provision of defense services for prosecutions leading to incarceration is the minimum range of desired services. This would be true whether the offense was denominated "petty," "misdemeanor," or "traffic."

The need for representation may flow from collateral consequences to a particular defendant, as where conviction may mean the loss of employment or driver's license or the establishment of civil liability in a collateral proceeding (e.g., bastardy or nonsupport). It may inhere in the nature of the offense. Sex cases may involve unwarranted stigmatization and vagrancy cases may provide a tool for police harassment. Finally, a prosecution not leading to incarceration may nevertheless be significant because it involves proceedings which particularly and unfairly oppress the defender client population, as with many petty vice matters, welfare fraud, bad debt prosecutions, and breaches of

264 Brief for the Legal Aid Society of New York as Amicus Curiae at 16-17, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

265 See Part II, Section D *supra*, with respect to law reform.

266 See generally *Gilliard v. Carson*, 348 F. Supp. 757 (M.D. Fla. 1972).

267 See discussion in Part V, Section B, Subsection 1 *supra*; *THE OTHER FACE OF JUSTICE* at 63-64, where appointment of counsel because imprisonment seems likely is described as attaching a "red flag" to a defendant.

268 ABA MINIMUM STANDARDS: DEFENSE SERVICES § 4.1 (Approved Draft, 1968) provide otherwise:

Counsel should be provided in all criminal proceedings for offenses by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.

the peace involving either domestic quarrels or disputes with creditors or landlords.

In all of these cases, imprisonment may not be at stake. The stigma of the word "felony" may not be involved. Yet important interests of indigent defendants may be in jeopardy. The defender program must view itself as providing social services, as being accountable to a specific constituency, and as having as its mandate the responsibility of relieving the criminal aspects of poverty. Certainly court supervision of defense services does not require limiting defense services to the minimum mandated by the sixth amendment.

4. Eligibility: A Further Range

The preceding comments have summarized the practices and proposals concerning eligibility tests for indigent defense. They present at best a standard in disarray. On the one hand, the constitutional rhetoric has extolled the central place of counsel in a due process scheme which emphasizes adversary development of the truth. At the same time, the courts in practice have shown a recurring and begrudging disinclination to provide counsel. Vague and arbitrary tests of indigency and merit, limitations to felony prosecutions or those leading to incarceration, imposition of court review on appointment, denial of experts, investigators, and transcripts—all of these bespeak a practice and a reality curiously inconsistent with the rhetoric.

The vagueness and inadequacy of standards and the frequency of abuse argue for abandonment of the old approaches and for a broader, simpler test of eligibility. Quite simply phrased, it would afford counsel and supporting services *whenever* the state proceeds against an accused without regard to his financial ability or the merit of his defense. This approach would increase the price of prosecution, requiring the state to consider more carefully whether to make acts criminal or to proceed with a prosecution in a particular case. It would decrease the penalty imposed by way of counsel fees upon the innocent and make the litigation of innocence far more attractive. A saner system of criminal justice and laws would result.

Affording public counsel in every case would remove many anomalies which occur daily in the criminal courts. It would mean that the artificial distinction between the complainant, who is represented by the prosecuting counsel, and the defendant, who must seek counsel, would vanish. In prosecutions of auto accidents, rape, assault, domestic breach of peace, and many other offenses, it is often unclear whether the "victim" is the accuser or the accused. Yet only the accused must pay the price of counsel. In these cases, the party who wins the race to the courthouse is provided counsel—the prosecutor—by the state. Counsel is arbitrarily denied the person who is slow afoot.

Affording public counsel to all defendants would also operate to relieve injustice in those cases where there *are* no victims. Prosecutions for alcohol-related offenses, drug offenses, gambling, and petty vice offenses do not deal with "wrongs" so much as the basic notion that a benevolent state has an obligation to rehabilitate the accused, to protect him from himself. The public

interest in an addict is not in punishment, but in salvage. Why then must he bear the cost of the public interest? That cost, the cost of counsel, is more properly borne by the public.

Further, many prosecutions never lead to rehabilitation or treatment. The reason is simply that facilities and methods often do not exist for dealing with those, such as addicts, deviants, or simple nonconformists, who are prosecuted for deviant acts. Such prosecutions are frustrated *ab initio*. It is strange indeed for the state to force an individual to the expense of trial and retaining counsel when the ultimate defense is that the state failed—at the outset—to provide the very prerequisites which might ultimately have made conviction worthwhile.

Finally, recent history documents the price which must be paid by those who would express dissent against the policies of a political regime which uses prosecution as punishment. The cost of defending prosecutions has priced the first amendment out of the marketplace of free ideas, which it was intended to preserve. In a free society, rejection of ideas is the appropriate penalty for the wrongheaded. Instead, in this decade at least, to this penalty has been added the fearful burden of defending political trials, including the heavy cost of counsel. Relief from that cost would encourage free expression of ideas.

There are fundamental reasons for providing counsel to the accused as well as the accuser as a precondition to prosecution. The only counterargument is cost. This argument is not so much a statement of fiscal responsibility as a rephrasing of value judgments. Those who say there is no money only mean that it would be ill-spent, that the accused somehow deserve to be punished for presumed misdeeds, that they do not merit public counsel, and that they must bear the penalty of the cost of prosecution. Such views are out of touch with low-level, mass-production criminal courts where justice and injustice are often difficult to distinguish. They are equally inconsistent with the lofty theoretical structures of a jurisprudence which presumes innocence and imposes penalties only after expensive due process.

The logic of providing counsel to all seems unimpeachable. The structures, however, do not presently exist and the resources, though available, may never be allocated. The idea is admittedly visionary. Until its time comes, as did the time for *Gideon* and *Argersinger*, the courts as administrative rule-makers must confine themselves to what is now possible. Accordingly, this article turns to the question of what services should be provided to those deemed eligible for public defense counsel.

C. Case Services

1. Trials and Review Proceedings

The simplest description of services to be rendered by public defense systems is that adopted by the Model Public Defender Act. In its Prefatory Note, the Act adopts the model of parity discussed earlier, without detailing the contours of required services, by providing that "whatever the Supreme Court says it consists of for persons of adequate means, the needy person is entitled to the

same protection . . . and to have it paid for by the state."²⁶⁹ The Act provides further that a needy person is entitled "to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled."²⁷⁰

The Model Act, A.B.A. Standards, and N.A.C. Standards, as well as most defender programs, all provide trial-level services: presentment, bail, preliminary hearing, arraignment, and sentencing. Appeals are also appropriate for public defense counsel. While there may be no due process right to an appeal, the Supreme Court has held that an indigent must not be denied access to appellate remedies open to the affluent.²⁷¹ The expenses of fees, transcripts, and counsel must be borne by the state if necessary to enable an indigent defendant to appeal.²⁷²

Counsel for the poor are usually available from the earliest time retained counsel would be available. It is at the end of the process that distinctions are drawn between the wealthy and the poor.²⁷³ Many statutes condition *in forma pauperis* appeals upon merit.²⁷⁴ This should be permissible only if the wealthy appellant faces the same obstacle.²⁷⁵ In the federal courts at least, the indigent accused must have the assistance of counsel to help him make his showing of merit.²⁷⁶ Counsel must function as an advocate, not *amicus curiae*.²⁷⁷

Appellate services should not be conditioned on the subjective "good faith" of the defendant.²⁷⁸ In the federal courts, it is clear that *in forma pauperis* appeals may not be so conditioned.²⁷⁹ As the Supreme Court said in *Ellis v. United States*:

[This] applicant's good faith is established by the presentation of any issue that is not plainly frivolous. [Citations omitted.] The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant . . . the

269 Prefatory Note, p. 270.

270 Section 2(b)(1).

271 See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956).

272 See, e.g., *Anders v. California*, 386 U.S. 738 (1967); *Eskridge v. Washington State Bd. of Prisons and Paroles*, 357 U.S. 214 (1958); *Lane v. Brown*, 372 U.S. 477 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Smith v. Bennett*, 356 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959). But see *Ross v. Moffitt*, 414 U.S. 909 (1973), holding that there is no constitutional right to counsel in discretionary appeals to a state's supreme court or to the United States Supreme Court, after an appeal as of right to a state's intermediate appellate court.

273 See § 6(b) of Proposed Bill, Appendix to Anderson, *supra* note 65.

274 See, e.g., 28 U.S.C. § 1915 (1970).

275 See, e.g., *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

276 *Hardy v. United States*, 375 U.S. 277 (1964); *Tate v. United States*, 359 F.2d 245 (D.C. Cir. 1966).

277 *Ellis v. United States*, 356 U.S. 674, 675 (1958):

Normally, allowance of an appeal should not be denied until an indigent has had an adequate representation by counsel. . . . In this case, it appears that the two attorneys appointed by the Court of Appeals performed essentially the role of *amici curiae*. But representation in the role of an advocate is required.

278 *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962), construing 28 U.S.C. § 1915 (1970), which requires good faith as a condition of allowing an *in forma pauperis* appeal.

279 See generally Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1967); Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

request of an indigent for leave to appeal *in forma pauperis* must be allowed.²⁸⁰

In effect, the subjective good faith test has been eliminated from *in forma pauperis* appeals, a test of substantive frivolity having been substituted.²⁸¹

As to transcripts, the Supreme Court in *Britt v. North Carolina*²⁸² has held that a state must provide transcripts where needed for appeals. An alternative means would suffice, as where the accused might arrange for the reporter to read back his notes. But the indigent defendant need not rely upon his own memory²⁸³ or the notes of counsel.²⁸⁴ *Griffin v. Illinois*²⁸⁵ requires a "record of sufficient completeness to permit proper consideration of claims."²⁸⁶ This is true whether the case is a misdemeanor or felony prosecution²⁸⁷ and applies both to trials and preliminary hearings.²⁸⁸

While transcripts—or adequate substitutes—are generally available for appeals, the law relating to collateral attack may be somewhat different. In *Smith v. United States*,²⁸⁹ the Sixth Circuit in a § 2255 case said:

In general, indigents are not accorded a right to a free transcript. The basis of this rule being to prevent the wasting of court time on frivolous appeals. It is assumed that, absent special circumstances, a man in custody can recall sufficiently the circumstances of a non-frivolous error to frame an appropriate motion to vacate sentence.

Such a view seems untenable, particularly when compared with the relative availability of transcripts on appeal when the trial events are relatively fresh in the defendant's memory. In contrast, postconviction relief may be sought months or years later, increasing rather than diminishing the need for a transcript. Nevertheless, as to collateral attack it is frequently said that a "particularized need" for a transcript must be shown,²⁹⁰ relating to evidentiary challenges of arguable merit.²⁹¹

Limitations concerning merit in appeals and collateral attack proceedings are inexplicably inconsistent with defense services at trial, which are not similarly conditioned. Rejecting such limitations, Section 4.2 of the A.B.A. Standards on the Defense Function provides:

Counsel should be provided in all proceedings arising from the initiation of a criminal action against the accused, including extradition, mental competency, post-conviction and other proceedings which are adversary in

280 356 U.S. at 674-75 (1958).

281 Duniway, *supra* note 279, at 1283.

282 404 U.S. 226 (1971).

283 Gardner v. California, 393 U.S. 367, 369-70 (1969).

284 Eskridge v. Washington State Bd. of Prisons and Paroles, 357 U.S. 214, 215 (1958).

285 351 U.S. 12 (1956).

286 Mayer v. Chicago, 404 U.S. 189, 194 (1971). See also *Alvarez v. Carpenter*, 347 F. Supp. 597 (D. Col. 1972); *United States v. Young*, 472 F.2d 628 (6th Cir. 1972).

287 Mayer v. Chicago, 404 U.S. 189, 195 (1971). See also *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969).

288 As to preliminary hearings, see *Roberts v. LaVallee*, 389 U.S. 40 (1967).

289 421 F.2d 1300 (6th Cir. 1970).

290 See, e.g., *Bozeman v. United States*, 354 F. Supp. 1262, 1263 (E.D. Va. 1973).

291 See, e.g., *Draper v. Washington*, 372 U.S. 487, 495-96 (1963).

nature, regardless of the designation of the court in which they occur or classification of the proceedings as civil in nature.

Perhaps the appropriate approach here should be that taken in *In re Gault*²⁹² with juveniles or with parole hearings in *Gagne v. Scarpelli*:²⁹³ weigh the due process need of and consequences for the state and the citizen in a particular proceeding. Counsel should then be provided, even if not constitutionally mandated, when the state has deprived the individual of something of value. In a similar analysis, the right to retained counsel was found to attach in civil contexts such as welfare and consumer matters.²⁹⁴

Appointment of counsel is as vital to liberty at the time of habeas corpus or coram nobis as at the very beginning of the criminal process. Indeed, the complexity of criminal law becomes compounded by the procedural difficulties of collateral relief when a prisoner seeks—years after the fact—to challenge a conviction. His need for counsel and related services at that time becomes proportionately greater.

Most proposals and defense systems extend representation of defendants to postconviction collateral attacks.²⁹⁵ This is true of the Model Public Defender Act.²⁹⁶ The National Advisory Commission of Criminal Justice has advocated that public defense counsel undertake appeals, collateral attack proceedings, and parole or probation revocation proceedings.²⁹⁷ While this is not constitutionally required,²⁹⁸ it is justified by the complexity of the proceedings, their relationship to the criminal process, and their importance to successful imprisonment:

Extending the availability of representation to inmates involved in matters other than attacks upon convictions would tend to lessen the dehumanization process of the penitentiary. It would provide the inmate with someone from outside the institutional setting who would take a personal interest in him.²⁹⁹

Defense services of such scope seem clearly appropriate, though they may go beyond the constitutional minimum. The role of counsel in assuring justice at the beginning of the criminal process is no less vital at the end. The challenge thus posed must be met jointly by the courts and legislatures: to structure a defense system with services coterminous with the system of prosecution.

2. Civil Actions of Defendants in Custody

A defendant represented by assigned counsel or a defender program who becomes incarcerated should be afforded representation on matters related *and* unrelated to his custody, so long as he remains in custody. Litigation concerning

292 387 U.S. 1 (1967).

293 411 U.S. 778 (1973).

294 See *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971).

295 See, e.g., proposed bill in Appendix to Anderson, *supra* note 65.

296 Section 2(b)(1).

297 Courts Standard 13.4.

298 See *Johnson v. Avery*, 393 U.S. 483 (1969).

299 Courts Standard 13.4.

his sentence and conditions of confinement should be undertaken, regardless of the forum. Assistance concerning other matters, such as family or credit problems, should also be provided.

Such services vitally affect a defendant's life. The experience and rehabilitation of incarceration are negatively influenced if the prisoner believes himself unfairly committed or unfairly treated while in confinement. Prisons are part of the criminal justice system and legal services should extend into the prisons. Similarly, it is difficult to adjust to prison life if outside problems depress an already troubled existence. This is particularly true of misdemeanants, for whom custody may flow from marital, social, or financial problems which have *sequelae* while the offender is in custody.

The proposal is that public defenders and assigned counsel represent their clients after they enter custody. Neither the A.B.A. nor N.L.A.D.A. has made similar recommendations, perhaps because such representation is not considered "criminal" or is thought to be offered by civil legal services programs. The former reflects a formalistic superficiality; the latter ignores the importance of total client service and continuity of representation. In addition, many prisons are deliberately located in rural areas and are not presently reached by civil legal services.

The language quoted earlier³⁰⁰ from the National Advisory Commission to justify appellate, collateral, and parole representation also warrants representing prisoners on other legal problems. The Commission in section 2.2(5) of Standards on Corrections urges legal services to include "civil legal problems relating to debts, marital status, property or other personal affairs of the offender." The case for providing civil representation to prisoners was also succinctly stated at the National Defender Conference in 1969 as follows:

I truly think it is futile to provide a defendant with an effective counsel in a criminal case while permitting his home or other property to be taken away from him because he has no representation in a civil case.³⁰¹

Much prisoners' litigation, of course, relates to conditions of custody. In presenting such suits, public counsel may encounter considerable resistance. Although the number of federal suits by state prisoners has risen astonishingly in the past decade, a high percentage are dismissed. The federal courts often have dismissed such suits on the threshold application to proceed *in forma pauperis*,³⁰² thus denying any adversary hearing or the assistance of counsel.³⁰³ Some courts, in dealing with prisoners' litigation, have imposed more demanding standards than those faced by the wealthy.³⁰⁴ Where the prisoner seeks to proceed *in forma pauperis*, the application has been denied although a cause of

300 See note 297 *supra*.

301 Statement of Attorney General Mitchell, DEFENDER CONFERENCE REPORT at 12.

302 See, e.g., *Williams v. Field*, 394 F.2d 329 (9th Cir. 1968).

303 See, e.g., *Boag v. Boies*, 455 F.2d 467 (9th Cir. 1972); *Reinke v. Walworth County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Davison v. Joseph Horne & Co.*, 265 F. Supp. 750 (W.D. Pa. 1967).

304 *Conway v. Fugge*, 439 F.2d 1397 (9th Cir. 1971): "The district courts have especially broad discretion to decline to entertain civil actions *in forma pauperis* by prison inmates against their wardens and other prison officials."

action is alleged.³⁰⁵ In adopting this approach, the Ninth Circuit commented:

[I]t is not inappropriate to consider, along with other circumstances, the fact that the appellant is a state prisoner undertaking to recover money from his custodian, a state official, and that, in the prosecution of his suit, he seeks a special statutory privilege, namely, the financial support of the federal government.³⁰⁶

Contrary to these views, prisoners' litigation should be freely encouraged and fully considered. At a minimum, it should not be subject to a more stringent standard simply because it often proceeds *in forma pauperis*. In *Lockhart v. D'Urso*,³⁰⁷ the Third Circuit Court of Appeals reversed a refusal to allow an *in forma pauperis* prisoner's suit:

[W]hile there may be extreme circumstances where such a right should be denied for plain lack of merit, we think that, particularly in pro se cases, the right to proceed in forma pauperis should generally be granted where the required affidavit of poverty is filed. This approach minimizes, to some extent, disparity in treatment based on economic circumstances. An attack on the truth of such affidavit or the sufficiency of the complaint should be left for appropriate disposition after service has been made on the defendants.

The Third Circuit's approach finds clear support in Supreme Court decisions which have held that prisoner litigation is to be held to a lesser standard of pleading in order that prisoners' *pro se* complaints might be heard.³⁰⁸ Of course, the discussion at the beginning of this article concerning parity becomes relevant here. It is contrary to fundamental notions of equal protection for courts to discriminate against classes of litigants in the belief that conditions of poverty or custody deprive their complaints of merit.

A comprehensive defender service would undertake prisoners' litigation by following its clients into jail or prison. As with the model of the O.E.O. legal services program, the services would be rendered to a total client, not to a "case" or even a legal category of services such as "criminal." Prisoners would receive legal services related to their convictions, such as appeals or collateral challenges, and services related to their personal situations, such as marital or debtor-creditor matters. The constituency and the responsibility are coterminous and the human needs of prisoners should be served.

D. Caseload and Effectiveness of Counsel

There is a vast amount of litigation concerning the effectiveness of counsel. As noted at the beginning of this article, most of it inquires into services rendered in a particular case. Such inquiries often focus on the point in the proceeding at which counsel was appointed, the amount of time he spent with his client or

305 *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963).

306 *Williams v. Field*, 394 F.2d 329, 332 (9th Cir. 1968).

307 408 F.2d 354, 355 (3d Cir. 1969).

308 *Haines v. Kerner*, 404 U.S. 519 (1972).

in preparation, his advice prior to plea, or his advocacy during trial. Convictions are rarely reversed since reversal requires a finding of ineffectiveness or incompetence. Courts are loathe to make such findings, since standards are unclear and after-the-fact evaluations involve second-guessing difficult judgments, stigmatizing an attorney, and forcing a retrial. Thus postconviction review is a poor device for ensuring the effective assistance of counsel and protecting indigent defendants.

A better method would be to take the prospective approach urged in this article and to establish standards which would provide "counsel reasonably likely to render *and rendering* reasonably effective assistance of counsel."³⁰⁹ By far the most important single factor would be to establish caseload standards. The uniform conclusion of those familiar with the criminal courts and public defender systems is that the generally poor quality of defense services results largely from excessive caseloads. With a light caseload, even a minimally competent attorney can function well. But the best attorney cannot render even minimally competent services under the caseloads faced by many public defenders.

Not surprisingly, the District Court in *Wallace v. Kern* focused on caseloads³¹⁰ in attempting to provide an effective delivery of services by the New York Legal Aid Society. It noted that many clients were never seen while in custody, that each defendant often saw a different attorney at each court appearance, that attorneys rarely did investigations, and that counseling and advice were hurried or nonexistent.³¹¹ Testimony indicated that these shoddy services were due to an average caseload of ninety cases per attorney. Private attorneys testified, in contrast, that adequate services required a maximum caseload of twenty-five to thirty active cases.³¹² The court, in exasperation, noted:

Citywide officials of Legal Aid oppose the setting of maximum caseloads because cases are not all alike and attorneys differ in ability. . . . One citywide executive said he could prepare ten felony cases in a week. The statement, if true, would be an extreme example of accommodation to an unsatisfactory system. The court gives it no credence.³¹³

The district court then summarized the findings of three separate studies of the defense services in New York's criminal courts. Each had contrasted the public defender services with those of private attorneys and found the former wanting and caseloads too high.³¹⁴ The court concluded that a caseload of 100 was intolerable, and ordered that a maximum average active caseload throughout the program be forty cases. This would allow some individual fluctuation and flexibility, yet if a felony case took an average of four months from start to finish, it would mean an average of 100 cases *per year* rather than at any one time as had been the practice.

309 *West v. State of Louisiana*, 478 F.2d 1026, 1033 (5th Cir. 1973).

310 *See also Walker v. Caldwell*, 476 F.2d 213, 221 (5th Cir. 1973); *United States v. Chatman*, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

311 *Wallace v. Kern*, *supra* note 22, *Memorandum Opinion* at 9-14.

312 *Id.* at 7-10.

313 *Id.* at 14-15.

314 *Id.* at 26-29.

Wallace v. Kern is the first case to take such an approach and the first authority to set such a low maximum for caseload. Yet it did so in the light of three extensive studies and direct testimony. It did so as well without compromising because of cost, politics, or "practicality," basing its findings solely on the experience of its experts—certainly consistent with the author's own experience—concerning the minimum requisites for effective counsel. In contrast, other studies or proposals concerning case load are curiously ambiguous and ambivalent, torn by the "politics" of choosing between what is needed and what is available.

As to caseload, the A.B.A. Standards provide simply that "A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation."³¹⁵ While this is a useful hortatory declaration, it provides no guide for an administrator to determine how to divide a caseload among his staff. Caseload maxima have been prescribed by others but are hardly more helpful. One study suggests that there should be full-time public defenders when 300 appointments are made annually in a district court.³¹⁶ The President's Commission on Law Enforcement estimated that an attorney could undertake three to four hundred serious misdemeanors, twelve hundred social nuisance matters, or six hundred middle-range misdemeanor cases,³¹⁷ requiring 6,300 to 9,200 attorneys nationwide.³¹⁸ The National Advisory Commission on Criminal Justice has formulated caseload maxima per attorney as follows: 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals.³¹⁹ It recommends that if a public defender finds that more cases "might reasonably lead to inadequate representation in cases handled by him," he should request the court not to assign further cases to him.³²⁰ The Airlie House Conference in 1966 had suggested maxima of 150 felonies or 300 to 1000 misdemeanors per attorney.³²¹

It may be of some value to note that in 1970, N.L.A.D.A. revised its civil caseload guidelines, providing that "the caseload of the legal staff of the organization should allow each lawyer to give to every client the time and effort the case requires."³²² The Comment suggests a maximum of 500 civil cases per attorney annually on an estimate that 20 percent will involve litigation and 40 percent may be terminated after the initial interview. Curiously, the N.L.A.D.A. guidelines say nothing as to criminal caseloads.

The recent study by N.L.A.D.A., *The Other Face of Justice*, sought national caseload statistics. On the average, public defenders undertake 173 felonies or 483 misdemeanor cases annually. This is well above the N.A.C.

315 ABA STANDARDS ON THE DEFENSE FUNCTION § 1.2(d) (Approved Draft, 1971).

316 Oaks, *The Criminal Justice Act in the Federal District Courts—A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 217-18 (1969).

317 TASK FORCE REPORTS: THE COURTS at 56.

318 See also Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1258-61 (1970).

319 Courts Standard 13.12.

320 *Id.*

321 *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 393 (1966).

322 Courts Standard 6.

Standards. But the respondents all indicated that even those standards were too high and that a maximum felony caseload should be in the area of 80 to 140 cases annually.³²³ This accords with the experience of the author and the experts who testified in *Wallace v. Kern* as noted earlier.

Such caseload figures leave many questions unanswered. The meaning of "case," for example, may or may not include preliminary hearings or appeals. The services rendered may vary and in some estimates often exclude preliminary hearings and motions or jury trials. The bald figures, without more, often impeach themselves. If the private practitioners in *Wallace v. Kern* could undertake only thirty active cases, how can anyone believe that any attorney can undertake two, three, or four hundred? What is being lost in the process?

A study of the Philadelphia defender office indicates that major sex cases took an average of 10.5 hours, major violence cases took an average of 5.5 hours, other major felony cases took an average of 3.75 hours, and minor or misdemeanor matters averaged 3.3 hours.³²⁴ "Economies" were being effected so that such minimal times could be spent. The study criticized the defender assembly-line methods used in such representation. These were precisely the practices rejected in *Wallace v. Kern*, and which could be justified only on the ground that they were dictated by the pressures of time.

Such "economies" are often effected. Pretrial investigations may be conducted by nonprofessionals; indeed, they may conduct the client interviews. Pretrial motions may be foregone; and preliminary hearings may be waived. Cases may be claimed for bench trials to avoid the time consumed before the jury. Appeals may be foregone. Cases may be traded off against each other; plea bargaining may become mass production.

A better name for such "economy" is ineffective assistance of counsel. This was the point in *Argersinger*: high-volume justice may be no justice at all. The danger is particularly acute with misdemeanors, where the stakes and visibility are relatively low. It becomes tempting then to estimate that an attorney can represent twice as many misdemeanor as felony clients,³²⁵ since the uniform assumption is that misdemeanors involve less work than felony cases.³²⁶ The *reductio ad absurdum* of this approach is the President's Commission's incredible estimate that attorneys can represent as many as 600 to 1,200 misdemeanor defendants.

The term "represent" loses all meaning in such a statement. An attorney cannot interview 1,200 clients per year; it would require more than one-half of his 2000 working hours. Even if he could conduct interviews, he cannot investigate such a volume of cases. He cannot develop them fully before trial; he cannot try even a handful. Appeals would not be possible. The President's Commission, by its caseload figure, would convert defense counsel into paper-shuffling clerks.

323 THE OTHER FACE OF JUSTICE at 29.

324 Comment, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 456 (1969).

325 Brief for N.L.A.D.A. as Amicus Curiae at 11-13, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); Allison and Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 88 (1971) (based on N.L.A.D.A. survey).

326 See Part V, Section B, Subsection 2 *supra*.

The standard justification for figures such as those discussed in the previous section is that resources are inadequate to allow for smaller caseloads. However, raising caseloads to intolerable heights is not the answer. Instead, selective limitation of caseloads by eliminating certain kinds of cases is a preferable alternative. The Supreme Court did this in *Argersinger* by excluding cases not involving a risk of imprisonment. The 1970 N.L.A.D.A. Standards urge that in civil legal services programs such limitations be made openly and with full participation by the client constituency.³²⁷ Since "adequate professional legal services are divisible only to the point where they are no longer adequate professional legal services,"³²⁸ the means of selection might include residence, finances, categories of cases, specialization of services, and caseload manipulation. Certainly one appropriate approach would be to select those cases having greatest concern or law reform potential for the poor.³²⁹

Limiting caseloads can be effected along quite different lines, each of which may have a different rationale or affect quite a different segment of the population.³³⁰ Cases involving vagrancy and public intoxication usually involve different people and problems from drug-related or domestic relations matters. Prosecutions involving housing, credit, and welfare uniquely affect the poor. Cases with potential for decriminalization or screening of offenses may have quite a different impact on the system from routine property offenses. Again, offenses typically used for harassment or discrimination have unique impact and significance for the poor. Any of these or other criteria might be chosen to include or exclude cases in a way to increase service to the poor while still reducing caseload.³³¹

The soundest approach to caseload problems remains that taken in *Wallace v. Kern*, prescribing an average maximum likely to assure effective counsel. It is not enough to say that caseload is only one factor and caseload capabilities vary depending upon counsel and case. The New York experience is typical, not

327 Comment to Standard 6, N.L.A.D.A. STANDARDS (1970). See Part IV, Section D *supra*.

328 Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URBAN L. 217, 223 (1969).

329 *Id.* at 245:

[P]rofessional standards of adequate legal services must include attention to the maximization of benefit to the client community as a whole for the available resources, as well as safeguards to assure that such objectives do not conflict with the lawyer's responsibility to his individual client.

330 See, e.g., Bellow, *Reflections on Caseload Limitation*, 27 LEG. AID BRIEFCASE 195 (1969); Getzels, *Legal Aid Cases Should Not Be Limited*, 27 LEG. AID BRIEFCASE 203 (1969).

331 Comment to Standard 6, N.L.A.D.A. STANDARDS (1970). The N.L.A.D.A. Standards for civil legal services programs suggest emphasis upon the cases which:

- a. deal with a problem or grievances shared by a large number of persons served by the organization or about which such persons feel strongly;
- b. offer the possibility for enhancing the ability of the persons served by the organization to participate in the solving of neighborhood or community problems;
- c. offer the possibility of increasing community understanding of a problem or issue and of advancing the knowledge of the persons served by the organization with respect to their legal rights and responsibilities;
- d. foster or assist the development of leadership among the persons served by the organization;
- e. offer the possibility of enhancing the income potential and economic growth of the persons seeking assistance or of the area in which the persons served by the organization reside;
- f. offer the possibility of eliminating a practice or rule that affects a large number of the persons generally served by the organization.

unique. Caseload guides *can* be estimated and established and *can* be the most effective pressure point for assuring that counsel will see clients, interview witnesses, use pretrial alternatives, try cases, and—in short—be effective. Such guides are well within the competence and responsibility of courts to prescribe, as part of their general rule-making and supervisory powers. If society will not provide the requisite resources, then the appropriate judicial response is to dismiss the prosecution; that was the course chosen in *United States v. Chatman*.³³²

VI. The Financing of Defense Systems

A. Compensation of Counsel

For years, public counsel were not compensated for their services. This was rationalized in terms of a "duty" owed by the attorney. It should have been self-evident, as the President's Commission observed, that the "duty" concept imposed "a stigma of inferiority on the defense of the accused."³³³ Undoubtedly many uncompensated counsel gave unstintingly of their time and rendered excellent services, but reliance upon unsupervised and unpredictable charity is hardly a firm foundation for systematically meeting a societal obligation.

The truth is that appointment without compensation constituted invidious discrimination against both counsel³³⁴ and accused. Inadequate compensation penalizes the attorney, of course, but it also impinges upon the Sixth Amendment guarantees to defendants. It means that they oftentimes receive the services of inexperienced counsel or experienced counsel who feel they cannot justify time expenditures at unacceptable levels of compensation.³³⁵ Of course, undercompensation may also mean services by incompetents.³³⁶

In some jurisdictions, in addition to receiving no compensation, counsel have been required to assume the costs of defense. Even where compensation may be adequate, judges may be reluctant to reimburse counsel for expenses incurred in defending the indigent.³³⁷ As noted earlier, such expenses are often essential to an adequate defense and denial of reimbursement raises constitutional questions concerning effectiveness and adequacy of counsel.

The law probably remains that counsel may be required to serve without compensation. In *United States v. Dillon*, the Ninth Circuit stated the prevailing view:

An applicant for admission to practice law may justly be deemed to be

³³² See 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

³³³ TASK FORCE REPORT: THE COURTS at 61.

³³⁴ See *State v. Rush*, 46 N.J. 399, 412, 217 A.2d 441, 448 (1966), where the Supreme Court of New Jersey voided appointment without compensation as an unconstitutional taking of property and as leading to inadequate services to defendants. See also *Matter of Bedford*, 22 Utah 2d 12, 447 P.2d 193 (1968).

³³⁵ See Note, 45 TEX. L. REV. 571, 572-73 (1967).

³³⁶ *Id.* at 574-76. See Moore, *The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 271 (1965).

³³⁷ See Part II, Section C *supra*.

aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."³³⁸

An overwhelming number of state courts have denied claims for nonstatutory just compensation;³³⁹ only three states have held the contrary.³⁴⁰ The constitutionality of such holdings is highly questionable, but has been largely avoided because of the uniform adoption of legislation which, in varying degrees, provides at least partial compensation.

The standards governing compensation are often unclear. With respect to assigned counsel, the A.B.A. Standards provide:

Assigned counsel should be compensated for time and service necessarily performed in the discretion of the court within limits specified by the applicable statute. In establishing the limits and in the exercise of discretion the objective should be to provide reasonable compensation in accordance with prevailing standards.³⁴¹

In practice, compensation of assigned counsel is generally conceded to be substantially less than that of retained counsel. In one study, it was estimated to be only about 40 percent of the compensation earned by retained counsel.³⁴² The Supreme Court of New Jersey in *State v. Rush*³⁴³ has required that compensation for appointed counsel be at least 60 percent of the minimum fee schedule. In some states, it has been as low as \$25 for a plea of guilty in a misdemeanor case or \$50 per day for trial.³⁴⁴ Maine is perhaps above the norm in providing \$15 per hour for out-of-court time and \$150 per day for in-court services in Superior Court, but below tolerable limits in allowing only \$35 per case in District Court.³⁴⁵

With respect to full-time public defense counsel, the National Advisory Commission on Criminal Justice has recommended that salaries for public defenders should be "comparable to that of attorney associates in local private law firms."³⁴⁶ At another point in the Standards, the National Advisory Commission suggested treating the chief public defender's salary "in a similar manner to"

338 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

339 See *Tyler v. Lark*, 472 F.2d 1077, 1079 (8th Cir. 1973).

340 *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940); *Hall v. Washington County*, 2 Iowa 473 (1850); *County of Dane v. Smith*, 13 Wis. 654 (1861). In both Iowa and Wisconsin it was subsequently held that appointed counsel would be compensated only on the basis of statutory fee schedules. *Samuels v. County of Dubuque*, 13 Iowa 536 (1862); *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N.W. 549 (1902).

341 ABA MINIMUM STANDARDS: DEFENSE SERVICES § 2.4 (Approved Draft, 1968).

342 *Oaks, The Criminal Justice Act in the Federal District Courts—A Summary and Postscript*, 7 AM. CRIM. L.Q. 210, 219 (1969).

343 46 N.J. 399, 412, 217 A.2d 441, 448 (1966).

344 *Moore, The Right to Counsel for Indigents in Oregon*, 44 ORE. L. REV. 255, 270 (1965).

345 *Anderson, supra* note 65, at 7-9.

346 Courts Standard 13.11.

that of prosecutors or the chief judge of the highest trial court.³⁴⁷ The Model Public Defender Act, in contrast, says nothing as to compensation of public defenders.³⁴⁸ The reality is that full-time public defenders generally are paid less than prosecutors, with approximately half of them earning under \$21,000 per year.³⁴⁹

At a minimum, compensation should be equal to that earned by a prosecutor of similar experience and responsibility. The mathematics may be imprecise. However, if a case assigned to an attorney involves unusual risk, experience, and time, then it would ordinarily be tried by a more experienced prosecutor, earning perhaps \$24,000 per year. The assigned counsel should receive equivalent compensation.

This approach rejects the Criminal Justice Act approach of a flat hourly rate and it rejects bar association fee schedules. Further, it is only a *minimum* approach. The assigned attorney in the above case might be paid more to compensate for lost income since substantial incursions on the time of private practitioners may damage their practices. At a minimum, any approach must assure economic parity of prosecution and defense, thus making possible parity of expertise.

Any reference to "prevailing standards" should be carefully evaluated. In some cases, the defender plan may be trying to improve prevailing standards of criminal defense; the prevailing standards of compensation would thus be inapposite. As to routine cases being used to challenge prevailing law, higher standards of compensation may be appropriate for the higher skill required.

The A.B.A. Commentary makes no mention of law reform considerations, although it notes the varying systems of compensation now in use. Because of the dangers inherent in flexibility, the Commentary opts for prescription by a court of hourly minima and maxima. The Commentary proposes compensation only for services "necessarily performed," determined by reference to private practice. The result may, in some instances, stifle the incentive for creative advocacy urged elsewhere in this article. That incentive can best be enhanced if compensation is left flexible and in the hands of a governing board, not the courts, as with full-time defender programs and civil legal services programs.

Flexibility is indispensable in compensating misdemeanor assignments. Bar association fee schedules customarily allow only minimal fees for misdemeanors. Yet a case may take on great importance in terms of the complexity of the issues raised, the impact on an accused or large segments of the population, or basic considerations of justice. Misdemeanors may lead to fines, loss of jobs, and loss of children; they may involve discriminatory laws or enforcement. All of these may fall unfairly upon an identifiable segment of society. A defender office should be free to weigh such considerations in assigning and compensating counsel.

Creative advocacy is not inexpensive. The most competent counsel can command premium compensation. If, as this article urges, defense systems are

347 Courts Standard 13.7.

348 Section 13.

349 THE OTHER FACE OF JUSTICE at 18; IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE at 15-17.

to fulfill their public responsibilities, the courts must liberally interpret or even create standards of compensation. Defendants and society at large cannot long afford the sorry spectacle of a system in which one of the nation's leading jurists parsimoniously reckons hundred dollar accounts, denying compensation for necessary travel and waiting time,³⁵⁰ while district courts routinely grant attorneys hundreds of thousands of dollars at \$50 and \$80 per hour for patent³⁵¹ and stockholder derivative suits.³⁵² This incongruity makes intolerable a system of defense which remains embarrassingly wedded to outmoded concepts of charity in what has become a crucial form of public assistance and constitutional right.

B. Cost of Systems

Inevitably, social welfare proposals, of which defense systems are only one example, encounter the problems of cost. This article has urged an increase in quality and an expansion in scope of defense services. Even if the scope is restricted to felony, misdemeanor and collateral services—excluding prisoner litigation—the cost will be substantial. Any estimate is necessarily approximate, but must begin with a consideration of the volume of cases needing services.

In 1965, 314,000 defendants were charged with felonies in state courts and 24,000 in federal courts.³⁵³ There are some four to five million nontraffic misdemeanor prosecutions³⁵⁴ and some forty to fifty million traffic offenses annually.³⁵⁵ It is estimated that some 60 percent of state felony defendants need public counsel,³⁵⁶ although the percentage receiving counsel ranges from 20 to 60 percent.³⁵⁷ Of the 5,000,000 misdemeanor defendants, some 70,000 were reported in 1967 as going to prison annually³⁵⁸ and some 1,250,000 are estimated as indigent.³⁵⁹ In traffic cases, one study showed that only 10 percent involved a risk of imprisonment.³⁶⁰

It is difficult to estimate how many misdemeanor or traffic cases need counsel since it depends on the character of the case. Of the four to five million misdemeanor prosecutions annually, not including traffic cases, the President's Commission estimated that 30 percent may be felony-related and require substantial amounts of attorney time. Forty percent may be "social nuisance" cases such as drunkenness, disorderly conduct, and vagrancy which require less time. Thirty percent would be comprised of a middle range of miscellaneous

350 See Chief Judge Bazelon's opinion in *United States v. Thompson*, 361 F. Supp. 879, 890-92 (D.C. Cir. 1973).

351 See *Chromalloy American Corp. v. Alloy Surfaces Co., Inc.*, 353 F. Supp. 429 (D. Del. 1973).

352 See *White v. Auerbach*, 363 F. Supp. 366 (S.D.N.Y. 1973).

353 TASK FORCE REPORT: THE COURTS at 55. See also Note, 55 IOWA L. REV. 1249 (1970).

354 TASK FORCE REPORT: THE COURTS at 55.

355 Note, 55 IOWA L. REV. 1248, 1261 (1970).

356 SILVERSTEIN, *supra* note 100. See THE OTHER FACE OF JUSTICE at 70-77.

357 SILVERSTEIN, *supra* note 100.

358 *Id.* at 10.

359 Allison and Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 86 (1971).

360 Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 711 (1968).

cases, involving gambling, prostitution, or weapons.³⁶¹ It is estimated that although 60 percent of felony defendants are indigent, the figure is only 25 percent of those charged with misdemeanors³⁶² because misdemeanors can be disposed of more quickly and private counsel, discussed earlier, can be retained for a lesser fee. "Therefore a large percentage of misdemeanor defendants will be able to hire their own counsel."³⁶³

Attorneys would thus be needed for some 1,250,000 misdemeanor defendants. 150,000 felony defendants might qualify for public counsel. Of the 40,000,000 traffic offenses annually, it is estimated that less than 25 percent, or 10,000,000, might need counsel.³⁶⁴

Any proposal for defense services must consider the availability of resources. It is customarily estimated that there are between 2,500 and 5,000 attorneys practicing criminal law more than "occasionally" in a bar consisting of some 225,000 practicing attorneys.³⁶⁵ The President's Commission on Law Enforcement concluded that there are presently not enough experienced criminal attorneys even for those financially able to retain counsel.³⁶⁶ If this is so, the breadth of need just sketched by the preceding statistics suggests a crisis of national proportions.

A total of nearly 12,000,000 cases annually must be serviced. If the average caseload is 250 cases, involving a range of petty and serious matters, 48,000 attorneys are needed full time. If each represents an expense of \$20,000, salary and overhead,³⁶⁷ the total cost is approximately one billion dollars. To this should be added the cost of attorneys for the expanded range of services discussed earlier, estimated to include some 500,000 juvenile cases, 300,000 mental illness cases and a range of appeals, warranting some 8,000 more attorneys or \$160,000,000 per year.³⁶⁸

This cost is within national resources, if properly allocated. There *are* enough attorneys, although presently they do not practice criminal law. Burgeoning law school enrollments and an increasing interest in criminal law will add to this reservoir of talent. The national economy, emerging from a recent, highly expensive war, could afford the necessary expenditures. Education, welfare, and highways annually consume far more than the amount here indicated as necessary for defense services.

Yet there is little to indicate a national readiness to assume the full cost of adequate defense services. Present expenditures are far less. In 1970, the National Legal Aid and Defender Association reported that nearly 720,000

361 TASK FORCE REPORT: THE COURTS at 55-56.

362 Note, 55 IOWA L. REV. 1249, 1259 (1970). But see THE OTHER FACE OF JUSTICE at 70-77, estimating national indigency rates at 65% for felony cases and 47% for misdemeanors.

363 *Id.* at 1260.

364 *Id.* See also Note, 3 SETON HALL L. REV. 214, 231 (1971).

365 Note, 55 IOWA L. REV. 1249, 1262 (1970).

366 TASK FORCE REPORT: THE COURTS at 57.

367 As noted earlier, half of the full-time public defenders earn under \$21,000. THE OTHER FACE OF JUSTICE at 18. For each should be added 1/3 of the cost of an investigator and 1/2 of the cost of a secretary. IMPLEMENTING ARGERSINGER: A PRESCRIPTIVE PROGRAM PACKAGE. This easily amounts to \$6,000. In two model budgets, the National Center for State Courts estimated the cost per attorney as being in excess of \$20,000 per year. *Id.* at 24-32. Hence the figure in the text is conservative.

368 These figures are partially derived from THE OTHER FACE OF JUSTICE at 70-79.

criminal cases were serviced by member agencies. The total cost was \$39,600,000, or approximately \$55 per case.³⁶⁹ The latest study by N.L.A.D.A. indicates a national cost per case of \$122.³⁷⁰ A study of the Chicago defender program reflected a cost per case of \$115 in 1966, \$103 in 1967, \$107 in 1968, and \$62 in 1969.³⁷¹ This compares with national averages of \$138, \$129, \$123, and \$97 in each of those years.

This article thus proposes a twentyfold increase in national expenditures for defense services. Other proposals, projecting less adequate services, have projected dramatic, although lesser, increases. One study estimates the cost for indigent felony representation to be \$30,000,000 to \$40,000,000 annually with assigned counsel or \$20,000,000 with 1,000 public defenders.³⁷² Misdemeanor representation at \$50 per case is placed at \$50,000,000 to \$60,000,000 with assigned counsel or \$31,000,000 to \$46,000,000 with 1,500 to 2,300 public defenders. Representation of traffic offenders is estimated to be \$312,000,000 for assigned counsel or \$208,000,000 with 10,417 public defenders. Total cost for representing all indigent defendants is projected to be \$400,000,000 with assigned counsel or \$270,000,000 with public defenders.³⁷³

A smaller scale approach for calculating the cost of a defense system is that used by Anderson for Maine.³⁷⁴ Excluding traffic cases, some 27,000 misdemeanor cases would be processed annually, of which 50 percent were estimated to come within *Argersinger*. Of this 13,500, approximately 35 percent might be indigent. 4,500 defendants would thus need public counsel, at \$50 to \$75 per case, for a total of approximately \$250,000. If seven attorneys at \$25,000 each could handle 600 cases, the cost might be \$175,000 annually. A total defender system, felony and misdemeanor, might cost \$375,000 to \$450,000 annually; assigned counsel might cost as much as \$600,000.³⁷⁵

Silverstein estimated the cost of defense in two ways: per case and per attorney.³⁷⁶ If it costs about \$150 to \$200 to provide criminal defense in a felony, then 28 to 38 million dollars would be needed for the 60 percent of state felony prosecutions (188,000 to 314,000) involving indigents.³⁷⁷ A higher figure of 84 to 158 million dollars would be required if it is assumed that 8,300 to 12,000 attorneys are needed to represent all defendants and one-half of these are needed for indigents, at a rate (salary and overhead) of some \$20,000 to \$25,000 annually.

The National Legal Aid and Defender Association's most recent survey, *The Other Face of Justice*, undertakes by far the most comprehensive and realistic attempt to estimate the full cost of effective counsel. It excludes traffic representation but adds juvenile cases, concluding that some 4,000,000 cases would annually require the services of assigned counsel or public defenders. Some

369 N.L.A.D.A. 1970 STATISTICS OF LEGAL AID AND DEFENDER WORK.

370 THE OTHER FACE OF JUSTICE 31. The average cost in New Jersey is approximately \$175 per case for public defender services and \$278 per case for assigned counsel. *Id.* at 36.

371 MacCarthy, *The Chicago Federal Defender Program*, 8 AM. CRIM. L.Q. 156 (1970).

372 Note, 55 IOWA L. REV. 1249, 1263 (1970).

373 *Id.* at 1264.

374 Anderson, *supra* note 65.

375 *Id.* at 17.

376 SILVERSTEIN, *supra* note 100, at 56.

377 *Id.* These figures were largely accepted by the President's Commission on Law Enforce-

17,000 public defenders and the equivalent of 4,000 public defenders through assigned counsel would be required. More would be needed for traffic cases, and some 3,000 more for mental health and nondelinquency juvenile matters. N.L.A.D.A. concludes that the cost of full-range services may exceed \$800,000,000 at a cost per case of \$121 (which N.L.A.D.A. notes may be too low) with the National Advisory Commission caseload standards (which N.L.A.D.A. notes may be too high).³⁷⁸

These studies support the conclusions in this article. The estimates are based, however, on the systems projected. Most previous studies and commentary presuppose excessive caseloads, overworked staff, inadequate funding, and limited services. The estimates proposed by this article, in contrast, presuppose a full and adequate service. A full, effective national system of criminal defense for all indigents facing felony, misdemeanor, juvenile and serious traffic offenses would and ought to cost in excess of one billion dollars. Instead of requiring only some 12,000 attorneys, 48,000 might be a better estimate.

There are sources for finding adequate funding. Anderson's study in Maine, which estimated a cost of roughly \$400,000 for an adequate defender system, noted that the district court system there generated an annual surplus of \$476,000.³⁷⁹ In Oregon, fines annually yield \$6,000,000, of which the Bar Association noted only 3.5 percent would be needed to fund an adequate system of public counsel.³⁸⁰ In New Jersey, some 2,800,000 traffic complaints annually generate fines of \$21,000,000. Only \$6,500,000 of this is needed for court operations.³⁸¹ The rest would or could be available to fund an adequate system of public defense.

Another source of adequate funding is through federal financing. The Law Enforcement Assistance Administration had a budget of nearly \$700,000,000 in fiscal 1972. Only \$15,000,000 went to the entire justice system, and only \$1,500,000 of that went to defense.³⁸² Basic value judgments seem awry when a nation invests so heavily in policing and prosecution, without a countervailing concern for the defense needs of its citizens.

In addition to increased funding, there are many ways to resolve the need for manpower in defending the poor. One of these is to use nonlawyers, among whom might be law students. The subjects of clinical legal education and student practice are properly discussed elsewhere.³⁸³ But it should be noted that Mr. Justice Brennan, concurring in *Argersinger*, said:

Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. . . . Given the huge increase in law school enrollments over the past few years, . . . I think it is plain

ment. See TASK FORCE REPORT: THE COURTS at 56.

378 THE OTHER FACE OF JUSTICE at 70-79.

379 Anderson, *supra* note 65, at 17.

380 Allison and Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 85 (1971).

381 Note, 3 SETON HALL L. REV. 214, 230 (1971).

382 N.L.A.D.A., THE DOLLAR AND SENSE OF JUSTICE 26 (1973).

383 See the imaginative and thoughtful opinions of Justice Douglas in *Hackin v. Arizona*, 389 U.S. 143 (1967) (dissenting from dismissal of an appeal) and in *Johnson v. Avery*, 393 U.S. 483, 491-98 (1969) (concurring).

that law students can be looked to to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.³⁸⁴

The figure of one billion dollars simply brings into stark relief the hidden costs of overcriminalization. We have become a nation of accusers and accused. One of ten children will be a defendant in juvenile court, one of four adults annually will be in traffic court. This is De Toqueville's dictum run wild—he said only that every question in America ultimately finds its way into the courts, not every person. Less criminalization and better diversion and screening are long overdue.

There are many good reasons for decriminalization and the cost of an adequate defense system is one of them. Some 40 percent of the nontraffic arrests in the United States are alcohol-related and many of these lead to custody. Eliminating such cases from the system would ease enormously the strain upon already overtaxed resources. Some 78 percent of all criminal offenses in California's district courts are traffic-related; the National Advisory Commission has urged disposing of these administratively to release resources for other purposes. Domestic disputes have no place in the courts. Creditor fraud claims should be settled outside the criminal courts. Narcotics should lead to treatment, not arrest and incarceration. Processing of youth offenders can be accommodated by expansion of juvenile court jurisdiction. These are not new proposals, but their relevance to caseload and cost warrants emphasis here.

In dismissing prosecutions because there were no publicly provided attorneys to represent the defendants, the Superior Court for the District of Columbia observed that "In a criminal justice system plagued by scarce resources, it is sheer folly to squander what little is available on wholesale prosecution of victimless crimes."³⁸⁵ That court thus confronted and acknowledged the basic truth urged here: the price of prosecution is defense. If society lacks the resources for the latter it is because of profligacy in the former.

VII. Conclusion

This article has proposed some new directions for providing defense services to the poor. No one of these ideas, however, is without precedent or analogue.

It is important to view the right to counsel as not simply a constitutional principle but as a form of entitlement to public assistance. In that light, the recent revolution in concepts concerning welfare becomes relevant. Gone are concepts of privilege, the dole, and charity. In their place are doctrines of "new property" and entitlement.

The implications of such thinking for right to counsel cases are profound. The traditional view that indigent counsel somehow function at the pleasure of the court whose responsibility includes protecting the economic base of the private bar must be abandoned. The traditional mode of administering defense services by after-the-fact postconviction relief must be supplemented. The end

384 407 U.S. 25, 40-41 (1972).

385 *United States v. Chatman*, 42 U.S.L.W. 2593 (D.C. Super. Ct. May 7, 1974).

result must be an administrative structure assuring better quality service to the poor across a full spectrum of representation.

As novel as these ideas may appear, they nevertheless tap existing resources. Courts now have rule-making powers concerning indigent representation and licensing of attorneys. They must take the initiative and adopt rules to implement existing case law as to effectiveness of counsel. By these rules, courts may create—or compel the creation of—adequate defense services. The model for administering such services is now in existence in most communities in the form of civil neighborhood legal services programs.

Perhaps the most startling conclusion in this article is the cost of full, effective, expanded defense services. A figure of one billion dollars per year is indeed dramatic. However, here too existing concepts are directly relevant. An expansion of services is inevitable in the light of *Argersinger* concerning the types of cases requiring counsel, and in light of other cases relating to quality of counsel. The heightened cost of counsel, from another perspective, is simply an open acknowledgement and by-product of the growing problems of over-criminalization and inefficiency of our justice system. The cost of defense can be reduced by such urgently needed reforms as decriminalizing motor vehicle, alcohol, and drug-related offenses, adopting pretrial diversion and more effective police techniques, streamlining court processes and administration, and developing effective institutions and services for treating, rehabilitating, and training those convicted of crime.

If all these reforms were adopted, the cost of effective defense systems would be substantially reduced. The need for such systems, however, would remain. We are still a long way from implementing the fundamental values of *Gideon* and *Argersinger*. The price of our societal failure and neglect has grievously fallen, as it so often does, upon that segment of society least able to bear the cost: the poor.

It seems appropriate to recall the words of Chief Justice Harlar, over half a century ago:

A petty tyrant in a police court, refusals of a fair hearing in minor civil courts . . . there is work for lawyers. The Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster.³⁸⁶