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A Noble Ideal Whose Time Has Come

Penny White

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I. THE IDEAL[1]

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[2]

The time was 1986, more than two decades after the promise of *Gideon v. Wainwright*.[3] The defendant, a nonresident of Tennessee, is being arraigned on a felony charge by an east Tennessee general sessions court judge, a non-lawyer.[4] Although no one tells him, the defendant is facing ten years in the state penitentiary for allegedly possessing fireworks.[5] The judge inquires as to the defendant's assets. He admits ownership of an older automobile but candidly tells the judge he has no job and no means of hiring counsel or making bond. His family is several hundred miles away. Based on the ownership of the car, the judge denies the defendant appointed counsel, postpones the preliminary hearing for one week, and returns the accused to the county jail. Following his preliminary hearing, if he can manage to conduct one pro se, the defendant will continue his residence at the county jail awaiting a grand jury indictment.[6] Because the county is only one in a

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1. The "noble ideal [of the right to counsel] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

2. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

3. 372 U.S. 335 (1963). The situations that follow are genuine accounts of criminal proceedings that the author observed while researching this paper.

4. In Tennessee, non-lawyer judges who were in their positions prior to the decision in State *ex rel.* Anglin v. Mitchell, 596 S.W.2d 779 (Tenn. 1980), were grandfathered into continuing service. In the first judicial district, forty percent of the general sessions judges are not lawyers.

The general sessions court in Tennessee is a court of limited criminal jurisdiction. The court determines guilt or innocence in misdemeanor cases and conducts preliminary hearings in felony cases. More than ninety percent of the felonies tried in Tennessee proceed through the general sessions court or a "private-act" court of similar jurisdiction.

5. TENN. CODE ANN. § 39-3-707 (1982).

6. Grand juries return indictments only during terms of court. *See infra* note 7.

several-county judicial circuit in which the criminal court judge must hold court,[7] he will suffer several months further delay awaiting the next "term" of court for the return of the true bill.[8] Then, months following his arrest and months of confinement later, he will appear for arraignment before the criminal court judge who perhaps has heard of *Gideon*'s promise.

A few miles and months away, an eighteen year old, just-turned adult, is arrested on a Thursday evening for failing to return rented video equipment, a felony.[9] The local part-time sessions judge has closed down court for the day. Knowing that court meets again on Monday, the arresting officers choose not to interrupt the judge for an initial appearance but transport the young man to jail. He is unable to produce the scheduled amount of bond,[10] so he remains in jail. Daily the officers come to his cell, remove him to their office, and "talk" with him. During the first interrogation, he protests his innocence. Four days, five officers, and four statements later, the accused has implicated himself in two burglaries, two grand larcenies, eight forgeries, one contributing to the delinquency of a minor, and the initial charge of failure to return rental property.[11] He has signed four statements and a consent to search form. He has never seen an attorney or a judge but is taken for arraignment shortly after he completes his final incriminating statement.[12]

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7. For the most part, the Tennessee criminal court system continues to function as a circuit riding system. With the exception of nine counties, judicial circuits are comprised of several counties each. TENN. CODE ANN. § 16-2-506 (Supp. 1986). This structure requires the criminal court judge to "ride the circuit" holding "terms of court" in each county. TENN. CODE ANN. § 16-2-510 (Supp. 1985) (amended 1988). Even in counties comprising single circuits, the judges sometimes have both civil and criminal duties which require limited terms of court.

8. *See supra* notes 6-7.

9. TENN. CODE ANN. § 39-3-1118 (1982).

10. Clerks of court in Tennessee maintain presumptive bond schedules. Upon arrest, the amount of bond corresponding to the charge is set by the clerk without any consideration of the individual factors in the case. Stack v. Boyle, 342 U.S. 1 (1951) (fixing bail by indictment alone is totalitarian approach). Upon appearance, a motion to amend pretrial release conditions can be considered by the court. *See* TENN. CODE ANN. §§ 40-11-101 to -148 (1982).

11. The defendant's "exposure" had thus increased from three to five years to ninety-six years and made him one offense shy of the habitual offender statute which requires life imprisonment. TENN. CODE ANN. § 39-1-801 (1982).

12. Following a lengthy suppression hearing, the judge allowed the admission of the seized evidence and the statements notwithstanding Tennessee Code Annotated sections 40-10-101-102 and 40-14-102, and Tennessee Constitution, article I, section 9.

Just a few months earlier in a neighboring, less rural county, a motion for new trial is scheduled to be heard by the criminal court judge.[13] The defendant has been convicted following a jury trial and sentenced severely by the judge.[14] Following his sentencing, his attorney was suspended from the practice of law for unrelated reasons. The defendant, incarcerated for some time prior to trial, appears alone at the motion hearing. The judge allows him to argue the motion, denies the motion, and returns the defendant to custody without informing the *pro se* inmate of the procedure to invoke an appeal as of right.[15] Several months later, the defendant belatedly files a notice of appeal. The appellate court must dismiss for lack of jurisdiction.

An attorney whose practice includes criminal defense has just completed a brief matter before the general sessions court in the sixth largest county in the state and turned to leave. The judge, angry at an accused who has appeared for the second time without counsel, summons the attorney to sit down at counsel table. The judge immediately begins the trial of the defendant whom the attorney has never seen before. The attorney interrupts to move for a continuance. The motion is denied. Witnesses to a sworn affidavit of complaint, never before read by counsel or the accused, take the stand. An unprepared and ineffective attempt at cross-examination ensues and the defendant is convicted. Later, counsel learns the conviction is the defendant's first.

A court-appointed attorney, representing a man on first degree murder charges, hires and pays for a private court reporter at the preliminary hearing.[16] The state requests a copy and is granted one by counsel. A less affluent court-appointed attorney, representing a man on a charge of statutory rape, requests that the

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13. The filing of a motion for new trial is required prior to appeal in criminal cases heard before the criminal court. TENN. R. CRIM. P. 33.

14. The defendant received a sentence of seventeen years for gambling. His sins consisted of allegedly allowing the selection of "discount" matchboxes which in turn allowed the purchase of discount stuffed animals at a flea market. In a subsequent post-conviction proceeding, the sentence was invalidated by agreement between the state and defense.

15. A notice of appeal must be filed within thirty days after the court's denial of the motion for new trial. TENN. R. APP. P. 3-4.

16. Tennessee does not have a statewide court reporter service. Criminal courts are provided with court reporters who record and transcribe the proceedings. TENN. CODE ANN. §§ 40-14-301 to -315 (1982). For the most part, general sessions court clerks (or judges) record the proceedings on equipment which is often practically nonfunctional. Defendants can always hire private reporters to record and transcribe the proceedings but no authority exists for this to be done at state expense.

state provide the defense a copy of a preliminary hearing transcript since the state has procured a court reporter. The Assistant District Attorney announces to the court and to counsel that the state will not provide the defense with a copy.[17]

A court-appointed attorney allows a juvenile, his family and friends, the prosecutor, and the judge to believe that the death penalty can be imposed on a juvenile transferred to adult court for a trial on a first degree murder charge.[18] Moments before the court begins the arduous process of death-qualifying the jury,[19] the attorney angrily advises the judge that he has been informed of legislation prohibiting the death penalty on transfer cases.[20] His informant, counsel for a co-defendant, was chastised by the attorney for decreasing his fee from no-maximum to a five hundred dollar cap.[21]

Recognizing that the "methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged,"[22] these scenarios suggest an inferior quality indeed. Denying counsel to those unable to afford counsel, failing to inform the *pro se* accused of procedures once the court has denied assistance, and "hamstringing" counsel after appointment so that their assistance cannot be effective confirm a low appraisal of the quality of justice. Notwithstanding firm Supreme Court[23] and state precedents[24]

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17. The Assistant District Attorney later advised that all court reporter services were paid for by the District Attorney General's Conference which would not allow the requesting prosecutor to provide copies to the defense. Fortunately, a more egalitarian citizen, the court reporter, solved the controversy by offering to provide a copy to the defense free of charge.

18. Tennessee juveniles can be transferred to the criminal court for trial after age fourteen on charges of murder. TENN. CODE ANN. § 37-1-134 (repealed 1984).

19. *See, e.g.*, Wainwright v. Witt, 465 U.S. 412 (1985); Lockett v. Ohio, 438 U.S. 586 (1978); Witherspoon v. Illinois, 391 U.S. 510 (1968).

20. TENN. CODE ANN. § 37-1-134(a)(1) (1982).

21. Prior to October 1986, counsel appointed by the court could receive a maximum of five hundred dollars for services rendered in a non-capital felony case while fees in a capital case were unlimited. TENN. SUP. CT. R. 13; TENN. CODE ANN. § 40-14-207 (1982) (amended 1987).

22. Coppedge v. United States, 369 U.S. 438, 449 (1962).

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures.

Id.

23. *See infra* text accompanying notes 41-103.

24. *See infra* text accompanying notes 117-24.

mandating the assistance of effective counsel for criminal defendants without regard to their economic plight, this noble requirement is far from being a reality in Tennessee. The diverse methods of representation and the ethical and financial constraints placed upon court-appointed counsel serve to deny the indigent defendant the promise of equal justice of which our nation so hypocritically boasts. The poor accused in Tennessee remain without a "lobby"[25] and without the guarantees of due process, equal protection, and effective assistance of counsel.[26]

What appears to be a relatively simplistic constitutional provision—"[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]"[27]—has in fact been complicated by historical interpretation. There is no dispute that the hardy and determined colonists who fled England for a better and more independent way of life sought above all else, liberty, justice, and equality.[28] So important were these desires that they proclaimed their purpose to the world: "We the people of the United States, in order to form a more perfect union, establish justice, . . . and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."[29] Yet, exactly what they meant by the seemingly simple guarantee[30] of counsel is unclear.

Prior to the adoption of the sixth amendment to the United States Constitution, provisions for the assistance of counsel had existed in the constitutions and statutes of twelve of the original

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25. Bird, *Thou Shalt Not Ration Justice*, 13 HUM. RTS. 24, 47 (1985) (quoting Robert F. Kennedy). "Clearly justice is not done when poverty prevents a person from securing effective legal representation for his defense against a criminal prosecution which places his personal liberty, or even his life, in jeopardy." 1964 U.S. CODE CONG. & ADMIN. NEWS 996.

26. *See infra* text accompanying notes 121-248.

27. U.S. CONST. amend. VI (1791) (emphasis added).

28. SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EQUAL JUSTICE FOR THE ACCUSED 34 (1959) [hereinafter EQUAL JUSTICE].

29. U.S. CONST. preamble. "We hold these truths to be self-evident, that all men are created equal, that they are endowed . . . with certain inalienable rights, that among these are . . . liberty." The Declaration of Independence para. 2 (U.S. 1776).

30. Notably, it was the humble demand by an uneducated accused that the words meant just what they said that is responsible for the most significant advancement in the interpretation of the right to counsel. "The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel." Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

thirteen colonies.[31] These provisions reflected an obvious rejection of the English common-law rule long shunned by important commentators.[32] In England, only persons charged with misdemeanors were allowed counsel.[33] Prior to 1695, those charged with treason or felonies were not allowed counsel.[34] In 1695, Parliament relaxed this harsh rule for those accused of treason,[35] but it was not until 1836 that Parliament enacted legislation which allowed individuals facing felony charges the assistance of counsel.[36] This outrageous procedure inspired Blackstone to comment: "Upon what face of reason can that assistance [of counsel] be denied to save the life of a man, which is yet allowed him in the prosecution for every petty trespass?"[37] The New World never accepted this illogical doctrine, at least not in the written law.[38]

The Constitution's framers, many of whom were lawyers and leaders in their individual states, undoubtedly were aware of the alternatives available regarding counsel in the criminal courts. Yet,

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31. Powell v. Alabama, 287 U.S. 45, 64-65 (1932). North Carolina amended its constitution to so provide in 1777. *But see* Betts v. Brady, 316 U.S. 455, 471 (1942) (concludes that statutes and constitutions of thirteen colonies reflect that "considered judgment" of citizens was that assistance of counsel was not a fundamental right required by due process).

32. *See infra* text accompanying notes 37-38.

33. On the right to counsel, the accused had a right to retain counsel for certain misdemeanor charges, while for others, counsel was mandatory absent an accused's admission of guilt. The mandatory counsel misdemeanors were those which provided for little or no punishment. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-14 (1955) [hereinafter BEANEY].

34. *Id.*

35. 7 and 8 William III, c.3 s.1 (1695).

The effective date of the statute, which provided for "assigned" and retained counsel, was not until 1696. That was too late for Mary Stewart, Queen of Scots, who was charged, convicted, and decapitated for treason. Mary requested and was refused counsel notwithstanding the fact that the trial was conducted in English, a language not spoken by Mary. STEWART, TRIAL OF MARY, QUEEN OF SCOTS, 29-30 (2d ed. 1951).

36. 6 and 7 William IV, c.ll4 s.l (1836).

Prior to Parliament's action, courts had further relaxed the rule, on occasion, to allow counsel to argue legal points, and eventually to conduct witness examinations. The lack of legislative authority, however, led to much divergence in practice. *See* BEANEY, *supra* note 33, at 10.

37. 4 W. BLACKSTONE, COMMENTARIES 355 (14th ed. 1803).

"One cannot read without horror and astonishment the abominable maxims of law which deprived persons accused and on trial for crimes of the assistance of counsel." C. BECCARIA, ON CRIMES AND PUNISHMENTS, 398-99 (1764).

38. BEANEY, *supra* note 33, at 15-26; *See* Betts v. Brady, 316 U.S. 455, 466-472 (1942); Powell v. Alabama, 287 U.S. 45, 58-62 (1932); Holden v. Hardy, 169 U.S. 366, 386 (1898). Beaney cautions that the written law tells us nothing about actual practice. BEANEY *supra* note 33, at 15.

it was in "an atmosphere of silence concerning [their] intentions"[39] that they adopted the sixth amendment right to counsel provision. Given their dedication to the independence of the states, the framers most likely deemed the provision insignificant in light of the minor role they expected the federal government to play in the criminal justice system.[40]

Notwithstanding this hands-off expectation, the Supreme Court found itself squarely facing the issue in the context of what due process of law required. In *Powell v. Alabama*,[41] the Court transformed this insignificant provision into a right "so vital and imperative" as to be one of the "immutable principles of justice which inhere[s] in the very idea of free government"[42] The essential nature of the right, though vigorously stressed by the majority,[43] was reduced by the Court's limitation of the right to capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense."[44]

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39. BEANEY, *supra* note 33, at 25.

40. *Id.* at 27; *see also* Steele, *The Doctrine of the Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 490 (1969) (suggesting framers gave "no careful thought" to the breadth of the right to counsel). Congress had dealt with the issue of counsel prior to the adoption of the sixth amendment. The Judiciary Act of 1789 contained a provision allowing parties to "plead and manage" their own cases or to allow counsel to do so. 1 Stat. 73, § 35 (1789). Another provision passed after the proposal but prior to the adoption of the sixth amendment provided for "assignment" of counsel in felony and treason cases, comparable to the English Act. 1 Stat. 118 (1790). *Compare with supra* note 35. Beaney argues that these provisions prove that the sixth amendment was not intended to be relevant to the right to appointed counsel. BEANEY, *supra* note 33, at 28. Notwithstanding this arguable position, federal judges began a practice of providing counsel in certain cases. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

41. 287 U.S. 45 (1932).

42. *Id.* at 71 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

43. *Id.* at 69-75.

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

Id. at 68-69.

44. *Id.* at 71. The defendants were "young, ignorant, illiterate" minorities charged

Ten years later, the Court retreated from its profound position to declare that the fourteenth amendment due process clause did not incorporate the specific guarantees of the sixth amendment.[45] The majority sanctioned a totality of the circumstances approach which required the appointment of counsel in state cases only when to deny it would deny "fundamental fairness" and be "shocking to the universal sense of justice."[46] To hold otherwise, the Court insisted, would require counsel in all cases.[47] Admittedly, the Court said, the right had been regarded as "fundamental,"[48] and even "sacred,"[49] but there existed no "inexorable command" to provide counsel in all state criminal prosecutions.[50]

The totality of the circumstances approach proved more difficult to administer[51] than expected, and the Court effectively whittled away at this standard until it had carved out a new rule altogether. The case of Clarence Earl Gideon provided the justices with the opportunity to redefine the sixth amendment. Gideon was a Florida inmate who had appealed his felony conviction *pro se* to the United States Supreme Court.[52] He had been denied counsel by the Florida courts due to the nature of his charge.[53]

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with raping white women and confronted with mob-like violence. Interestingly, following the Court's reversal of their death sentences, the case was re-tried and reversed for excluding minorities from the jury. Norris v. Alabama, 294 U.S. 587 (1935). On the second re-trial, the defendants were spared the death penalty. *Compare with infra* note 57.

45. Betts v. Brady, 316 U.S. 455 (1942).

46. *Id.* at 462. According to the Court, the defendant was "not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests . . . and was not wholly unfamiliar with criminal procedure." *Id.* at 472. *Compare supra* note 44. The Court looked at the early state constitutions to determine what was the "considered judgment of the citizens." *Id.* at 465. The conclusion was quite different from that reached ten years earlier in Powell. *Compare* Powell v. Alabama, 287 U.S. 45, 60-65 *with* Betts v. Brady, 316 U.S. 455, 465.

47. This "fear" expressed by the Court was easily reconciled a few years later. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). *See infra* text accompanying notes 63-75.

48. Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936).

49. Avery v. Alabama, 308 U.S. 444, 447 (1940) (right to counsel has a "peculiar sacredness") (citing Lewis v. United States, 146 U.S. 370, 374-75 (1982)). *See* Smith v. O'Grady, 312 U.S. 329 (1941).

50. 316 U.S. at 473.

51. *See, e.g,* Chewning v. Cunningham, 368 U.S. 443 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960); Chandler v. Fretag, 348 U.S. 3 (1954). *See also* Gideon v. Wainwright, 372 U.S. 335, 338 n.2 (1963).

52. *See* 372 U.S. at 337 n.1.

53. At the time, Florida law provided for appointed counsel only in capital cases. Gideon was charged with the felony of breaking and entering with intent to commit a misdemeanor. *Id.* at 337.

The Supreme Court granted certiorari "[t]o give this problem another review."[54] Drawing upon the sweeping language in *Powell v. Alabama*[55] and the "fundamental" incorporation doctrine,[56] the Supreme Court again declared the primacy of the right to counsel and restored principles "established to achieve a fair system of justice."[57]

> [I]n 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. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [We] have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[58]

Thus, *Gideon*'s idea that the sixth amendment "meant what it said" reversed years of judicial interpretation and established the now well-known right of indigent defendants charged with felonies to have counsel's assistance even if they cannot afford it.

Gideon's promise of equal justice for accused felons quickly became difficult to fulfill. Although the societal interest[59] in the equality of the adversary system required a real and functioning defense system,[60] the states were hesitant to take the steps

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54. *Id.* at 338.

55. 287 U.S. 45, 68 (1932).

56. 372 U.S. at 341-344. *See* Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (immunities against federal government which are "implicit in the concept of ordered liberty" are "brought within the Fourteenth Amendment by process of absorption").

57. 372 U.S. at 344. On re-trial, with counsel, Clarence Earl Gideon was acquitted.

58. *Id.* at 344.

59. Former Chief Justice Burger, as well as others, has often stressed the importance of a fair criminal justice system to society as a whole. "Surely an effective system of justice is as important to the social, economic, and political health of the country as an adequate system of medical care is to our physical health." Burger, *Has the Time Come?*, 55 F.R.D. 119, 123 (1972). *See, e.g.*, ATTORNEY GENERAL'S COMMITTEE, POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 34 (1963); GIDEON UNDONE - THE CRISIS IN INDIGENT DEFENSE SPENDING (J. Moran ed. 1982) [hereinafter GIDEON UNDONE].

60. "That purpose [of effective assistance of counsel] is not . . . to 'shift the balance'

necessary to "remove the pocketbook from the scales of justice."[61]

In the minds of many of the already resistant states, the Court's decision to expand the right to counsel nine years later made the promise even more impossible.[62] In *Argersinger v. Hamlin*,[63] an indigent Floridian, unrepresented by counsel, found himself imprisoned after a judge convicted him of a misdemeanor charge.[64] The Supreme Court granted certiorari to consider whether the right to counsel was necessary to a fair trial in misdemeanor prosecutions.[65]

The Court recognized the impact that an expansion of *Gideon* would have. Estimating that four to five million people were prosecuted annually for misdemeanors,[66] the Court reflected on the misdemeanor process:

> An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. . . . "[I]t becomes clear that for most defendants in the criminal process, there is scant regard for them as

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against the 'peace forces' in favor of the 'criminal element.' It is to assure that our adversary system of justice really is adversary and really does justice." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 1-2 (1973) [hereinafter Bazelon].

The adversarial system assumes that its goal of truth will be met when each side, equally well balanced, meets and presents its case to the factfinder. An unbalanced system greatly reduces the ability of the factfinder to make a reliable determination of truth.

> In a healthy adversary system of criminal justice, both the prosecution and defense are well represented so that the guilty are convicted and punished and the innocent protected. When the adversary system does not function effectively—when criminal defendants are not adequately represented, the risk of wrongful conviction is increased enormously.

GIDEON UNDONE, *supra* note 59, Comments of Norm Lefstein, at 5.

61. O'Brien, *Implementing Justice: The National Defender Project*, 1 VAL. U.L. REV. 320 (1967). *See* Mayer v. City of Chicago, in which former Chief Justice Burger cautioned "[a]n affluent society ought not be miserly in support of justice, for economy is not an objective of the system. . . ." 404 U.S. 189, 201 (1971). Other warnings have included that of Learned Hand: "If we are to keep our democracy, there must be one commandment! Thou shalt not ration justice." *See generally* GIDEON UNDONE *supra* note 59; Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (Summer 1986) [hereinafter *Emperor*].

62. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 125-35 (1965).

63. 407 U.S. 25 (1972).

64. Jon Richard Argersinger was charged and convicted of carrying a concealed weapon. The punishment for the offense was up to six months imprisonment and a $1,000 fine. The defendant received a ninety day sentence. *Id.* at 26.

65. *Id.* at 33.

66. *Id.* at 34 n.4; *id.* at 37 n.7.

> individuals. They are numbers on dockets, faceless ones to be processed and sent on their way."[67]

With an emphasis on the assurance of a fair trial[68] and a serious doubt as to the states' inability to cope financially with the expansion,[69] the Court declared that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."[70] Thus, the Court redrew the assistance of counsel line to include those actually imprisoned for misdemeanors.[71] The Court reaffirmed the actual imprisonment line seven years later in *Scott v. Illinois*.[72] Holding that loss of liberty by incarceration is a punishment "different in kind from fines or the mere threat of imprisonment,"[73] the Court declared the issue settled.[74]

While the Court was establishing the bounds of what types of cases required appointments and at what stage the right attached,[75] indigents were encountering new barriers in their attempt to receive equal justice. Their poverty made it impossible for them to

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67. *Id.* at 34-35 (quoting Dean Edward Barrett quoting Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEFCASE 151, 152 (1970)).

68. *Id.* at 35-37. The Court noted an ACLU study which found counseled defendants to be five times more likely to have their cases dismissed (at the police court level) than uncounselled defendants. *Id.* (citing AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT (1970)).

69. *Id.* at 37 n.7 (citing Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1260-61 (1970) (estimating that it would require between 1,575 and 2,300 full-time defenders to provide service to indigents charged with misdemeanors from a pool of 355,200 attorneys in the country)). *Contra* 407 U.S. at 56-57 (Powell, J., concurring) (indicating that figure of 355,200 available attorneys is misleading due to lack of statistics regarding number actually in practice and qualified to provide criminal defense services).

70. 407 U.S. at 37.

71. In stressing the importance of counsel's guidance in misdemeanor cases, the Court noted the impact that any loss of liberty, no matter how brief, might have on the accused's career and reputation. *Id.* at 37, 48-49. The Court noted that the right to counsel had expanded beyond that known to common law, but that no reason in history or in case decisions indicated that the sixth amendment was "intended to embody a retraction of the right in petty offenses wherein the common law . . . did require that counsel be provided." *Id.* at 30. *Compare with supra* text accompanying notes 32-38.

72. 440 U.S. 367 (1979).

73. *Id.* at 373. Petitioner Scott had been convicted of shoplifting by an Illinois Circuit Court judge. Although Illinois law allowed the imposition of a five hundred dollar fine and a year in jail, petitioner was fined only fifty dollars and given no jail sentence. *Id.* at 368.

74. *Id.* at 373-74.

75. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961).

experience equality in obtaining pretrial release,[76] in receiving punishment alternatives,[77] in exercising the right to appeal,[78] and in acquiring the necessary tools to defend their cases.[79] Reversing case after case that attempted to limit indigents' rights, the Court established that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . . Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[80] This required equality was not based upon the nature of the defendant's loss, the seriousness

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76. *See* Stack v. Boyle, 342 U.S. 1 (1951) (setting bail on basis of charge in indictment alone is unreasonably arbitrary). Notably, some courts have equated the ability to make bail with a lack of indigency, refusing to appoint counsel for defendants released prior to trial. *Contra* State v. Gardner, 626 S.W.2d 721 (Tenn. Crim. App. 1981).

77. *See* Tate v. Short, 401 U.S. 395 (1971).

On a Friday, a few weeks before completing this project, the writer observed the following colloquy during a court observation visit to a rural Tennessee county, now paraphrased:

PROSECUTOR: Your Honor, each defendant will receive a one-year sentence in the county jail beginning on Monday if they haven't paid the designated amount by then.

JUDGE: (addressing two *pro se* defendants charged with felonies): Do you understand that? How are you going to get the money?

DEFENDANTS: I don't know.

JUDGE: Well, the agreement is if you don't get it by Monday, you go to jail and serve this entire sentence. Understood?

DEFENDANTS: Yes, Sir.

"[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Morris v. Schoonfield, 399 U.S. 508, 509 (1970).

78. *See* Anders v. California, 386 U.S. 738 (1967) (overruled California procedure that allowed appointed counsel to make determination as to merits of appeal and to refuse to appeal after advising the court of no merit); Draper v. Washington, 372 U.S. 487 (1963) (overruled Washington procedure that required judicial finding of non-frivolity prior to allowing indigent a transcript which was required to appeal); Douglas v. California, 372 U.S. 353 (1963) (overruled California procedure that required judicial determination of merit prior to appointment of counsel on appeal); Smith v. Bennett, 365 U.S. 708 (1961) (overruled statutory filing fee prerequisite on *habeas corpus* appeals).

79. *See* Mayer v. City of Chicago, 404 U.S. 189 (1971) (invalidated procedure denying transcript for indigents on non-felony appeals); Roberts v. LaVellee, 389 U.S. 40 (1967) (overruled New York law requiring payment for preliminary hearing transcript); Lane v. Brown, 372 U.S. 477 (1963) (overruled Indiana law providing that only public defenders, and not the indigent defendant, could procure transcript as required for writ of error *coram nobis* appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (overruled Illinois law which required payment for required transcript on appeal).

80. 351 U.S. at 17 & 19. Justice Black quoted the Bible and the Magna Carta in his majority opinion. "To no one will we sell, to no one will we refuse, or delay, right or justice." *Id.* at 16 n.10. Four members of the Court strongly dissented with the majority finding. *Id.* at 26. (Burton and Minton, JJ., dissenting).

of his case, or the great financial impact upon the state. It was implicit in the concept of justice in our society. "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The state's fiscal interest is . . . irrelevant."[81] The Court made it clear that the analysis was not a comparative weighing of the state's and defendant's interests,[82] but rather a restriction against the "imposition by the State of financial barriers . . . for indigent criminal defendants."[83] "[T]he Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."[84] To allow differences in treatment to be based upon wealth would deny individuals the fourteenth amendment's guarantee to equal protection of the laws because of their poverty,[85] a condition largely beyond their control.[86]

In addition to establishing and equalizing the right to counsel in accordance with constitutional principles, courts have been faced with deciding exactly what the right entails. Since the recognition of the right, it has been noted that a mere formal appointment does not satisfy the due process or, arguably, the equal protection requirements of the right to counsel.[87] The promise of *Gideon* is a mere illusion if counsel is not competent. The sixth amendment right to assistance of counsel implicitly carries with it the right

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81. 404 U.S. at 197. The Court noted that while the states might, on paper, save dollars and cents, the risk of creating frustration and hostility toward the courts "among the most numerous consumers of justice" was a risk far greater than the financial one. *Id.* at 197-8.

82. *Id.* at 196-97. *But see* 372 U.S. at 359. (Clark, J., dissenting) ("With this new *fetish* for indigency the Court piles an intolerable burden on the State's judicial machinery.") (emphasis added). *See also* Ross v. Moffitt, 417 U.S. 600, 616 (1974) ("The duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly.").

83. Burns v. Ohio, 360 U.S. 252, 258 (1959).

84. 365 U.S. at 714. By definition, however, the term "criminals" should be used only to refer to those convicted of crimes and not to those facing criminal trials.

85. *Id.*; *see supra* notes 76-85.

86. *See* Edwards v. California, 314 U.S. 160, 174-75 (1941) (task of providing for the poor is society's problem). *But see* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 103, 142-43 (1837), *rev'd*, Henderson v. Mayor of New York, 92 U.S. 259 (1875) (allowing impoverished people to be banned from port because of their "moral pestilence").

87. Powell v. Alabama, 287 U.S. 45 (1932). Here the Court held that the appointment of all the members of the bar on the morning of trial did not afford the right to counsel "in any substantial sense." *Id.* at 58. *See* Evitts v. Lucey, 469 U.S. 387, 395 (1985); McKeldin v. State, 516 S.W.2d 82 (Tenn. 1974).

that such assistance be effective. Only when effective assistance is rendered can the adversary system truly test the guilt or innocence of the accused.[88] The state prosecutes the accused by means of a professional attorney who by reason of his specialization should be an expert in criminal law and procedure. The prosecutor is assisted by law enforcement agencies, state labs, well-trained experts, and, for the most part, cooperative witnesses.

> [T]he law enforcement agency is often at the scene of the crime shortly after its commission. While at the scene, the police have better access to witnesses with fresher recollections. They are authorized to confiscate removable evidence. In addition, the financial and investigatory resources of law enforcement agencies permit an extensive analysis of all relevant evidence. [For the defense,] [w]itnesses may be less accessible; their recollections will probably be less precise. Indeed they may choose not to cooperate at all with the defendant's investigator. However, it may all be irrelevant if, as is often the case, the defendant is unable to afford an investigator or is incarcerated pending trial.[89]

At the very least, in order to balance the "excessive disparity between the State and the accused,"[90] competent defense counsel must be provided for those defendants unable to afford private counsel. If the state fails to provide competent counsel[91] or interferes with the right so as to render it ineffective,[92] the sixth amendment guarantee is rendered meaningless.

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88. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment . . . envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . who *plays the role* necessary to ensure that the trial is fair.") (emphasis added).

89. Britt v. North Carolina, 404 U.S. 226, 236-37 n.7 (1971) (Douglas, J., dissenting) (quoting Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 11, 13-14 (1970).

90. 404 U.S. at 236 n.7 (Douglas, J., dissenting).

91. *See* Cuyler v. Sullivan, 446 U.S. 335, 343 (1980); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). When a state obtains a criminal conviction through ineffective appointed counsel, the state has violated the defendant's rights. 516 S.W.2d at 85-86 (Tenn. 1974).

92. Geders v. United States, 425 U.S. 80 (1976) (barring consultations with client during night recess); Herring v. New York, 422 U.S. 853 (1975) (barring closing argument in bench trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (requiring defendant to be first defense witness); Hamilton v. Alabama, 368 U.S. 52 (1961) (disallowing attorney at arraignment, which was the only time an insanity plea could be entered); Glasser v. United States, 315 U.S. 60 (1942) (appointing same counsel for co-defendants); Hembree v. State, 546 S.W.2d

What constitutes effective assistance of counsel has evolved from a standard requiring only that counsel's assistance not make a "sham, farce, or mockery"[93] of the proceedings to a standard of representation within the "range of competence demanded of attorneys in criminal cases."[94] A divergence of opinion grew between those who felt that enumerated duties should be set forth for defense counsel[95] and those who felt that such an approach would mechanize the attorney-client relationship.[96] As the debate continued, the stage was set for the Supreme Court to determine which approach should be followed in two grants of certiorari. In *United States v. Cronic*[97] and *Strickland v. Washington*,[98] the Court laid to rest the conflicting standards and held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[99] The Court went on to say that it was impossible to enumerate guidelines[100] for every situation and that

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235 (Tenn. Crim. App. 1976) (forcing counsel and jury to continue trial beyond midnight though counsel informed court he could no longer think clearly); Poindexter v. State, 183 Tenn. 193, 191 S.W.2d 445 (1946) (appointing counsel on day of trial). *But see* United States v. Cronic, 466 U.S. 648 (1984) (giving 25 days to prepare complicated check kiting scheme case to young real estate lawyer who had never tried a case did not interfere with effective assistance); Huskey v. State, 688 S.W.2d 417 (Tenn. 1985) (awarding maximum fee of five hundred dollars for more than 180 hours spent on robbery and felony murder trial did not interfere with effective assistance); State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App.), *perm. to appeal denied*, 603 S.W.2d 747 (Tenn. 1980) (refusal to appoint fingerprint expert to assist court-appointed defense counsel did not interfere with fundamental right to counsel).

93. *See, e.g.*, Frand v. United States, 301 F.2d 102 (10th Cir. 1962); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). Judge Bazelon correctly noted that this standard of effectiveness "requires such a minimal level of performance . . . that it is itself a mockery of the sixth amendment." Bazelon, *supra* note 60, at 28.

94. McMann v. Richardson, 397 U.S. 759, 771 (1970). Numerous courts took different approaches prior to the *McMann* decision which are not detailed here and which are outside the scope of this Article.

95. *See* Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (setting forth ABA standards for defense counsel as a guide, but not equating them to effective assistance); United States v. Decoster, 624 F.2d 196, 266 (D.C. Cir. 1976) (Bazelon, J., and Wright, C.J., dissenting).

96. 624 F.2d at 216.

97. 466 U.S. 648 (1984).

98. *Id.* at 668.

99. *Id.* at 686.

100. *Id.* Although the Court noted the existence of "prevailing norms of practice," it said the sixth amendment's promise relied upon counsel's ethical fulfillment of an attorney's

an attempt to do so "could distract counsel from the overriding mission of vigorous advocacy."[101]

Our Constitution guarantees the rich and the poor defendants in criminal cases the assistance of legal counsel[102] whose performance is sufficient to establish confidence in the reliability of the trial.[103] This outcome determinative test arguably structures the standard for effective assistance of counsel such that only the innocent are allowed its benefits. The only cases reversed on ineffectiveness claims are those in which counsel's deficient performance prejudiced the defense. The defendant must first show

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role and that "[m]ore specific guidelines are not appropriate." *Id.* at 688. Nonetheless, the Court did list six "basic duties" of defense counsel: the duty to assist the defendant; the duty of loyalty; the duty of advocacy; the duty to consult with the client on important decisions; the duty to keep the client informed of developments in the case; and the duty to exercise skill and knowledge as will produce a fair trial. *Id.*

101. *Id.* at 689.

Commentators have expressed surprise that Chief Justice Burger did not use these cases as his long-awaited opportunity to assail again, and perhaps impact, the quality of legal services. *Emperor*, *supra*, note 61, at 639-47. He had, for many years, preached our legal system's dire need for effective advocacy. *See, e.g,* Burger, *The Special Skills of Advocacy*, 3 J. CONTEMP. L. 163 (1977); Burger, *The Special Skills of Advocacy*, 42 FORDHAM L. REV. 227 (1973); Burger, *"A Sick Profession,"* 5 TULSA L.J. 1 (1968); *infra* note 102.

Even more disturbing, in light of his accusations, is his opinion in Morris v. Slappy, 461 U.S. 1, 13-14 (1983), in which the Burger Court held that an indigent defendant is not entitled to a "meaningful relationship" with his lawyer. The Court affirmed the substitution of counsel on the day of trial for an indigent whose previously appointed counsel had been hospitalized. A more profound analysis of this glaring contradiction cannot be found than that set forth below:

> [T]he client is "hostage" to the attorney, who must lead the helpless defendant through a maze of arcane legal proceedings. Indeed, she must utterly control the defense, making critical choices for the client, often in the absence of any discussion—not to speak of a "meaningful relationship." But just who is this professional to whom, because of her vaunted expertise, the system entrusts such responsibility for protecting the ignorant and vulnerable client? Apparently, a presumptive incompetent, an agent all too frequently unfit to discharge her high obligations to her principal!

Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 11 (1986). *But cf.* Evitts v. Lucey, 469 U.S. 387 (1985), in which the Court held that nominal inadequate representation on appeal did not fulfill the guarantee of the sixth amendment: "Today, the Court . . . adds another barrier [that of effective assistance of counsel on appeal] to finality and one that offers no real contribution to fairer justice." *Id.* at 406 (Burger, C.J., dissenting).

102. Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AMER. CRIM. L.Q. 2, 6 (1969) ("[D]efense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer.").

103. *See generally* Berger, *supra* note 101; S. Slonim, *How Effective Does a Criminal Defense Have to Be?* 69 A.B.A. J. 1030 (August 1983).

unprofessional errors and then must establish that the errors undermined the reliability of the results. Consider the guilty defendant whose counsel makes glaring unprofessional errors. So long as his guilt is clear, the errors, no matter how improper (nor how degrading to the profession and the fair administration of justice), cannot require a reversal. This approach ignores the importance of a fair criminal justice system to society as well as to the accused.

II. THE REALITY

"[U]nless a massive commitment is made . . . to the goals of equality and fairness, we will not in our lifetime witness the day when any American, regardless of wealth, has the ability to adequately defend his liberty if called before the bar of justice."[104]

The right to effective assistance of counsel is "the most pervasive [right], for it affects any other rights [the defendant] may have" and safeguards "fundamental human rights."[105] Yet, every major study[106] that has been conducted has concluded that the right remains to a large degree unfulfilled. "[M]illions of persons in the United States who have a constitutional right to counsel are denied effective legal representation . . . as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattended."[107] "[T]he battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify. . . . They are the persons being represented

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104. NATIONAL LEGAL AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 70 (1973) [hereinafter THE OTHER FACE OF JUSTICE].

105. Comment, *Continuing Echoes of Gideon's Trumpet, The Indigent Defendant and the Misdemeanor; A New Crisis Involving the Assistance of Counsel in a "Criminal Trial,"* 10 S.TEX. L.J. 222, 226-27 (1968) (quoting Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)) [hereinafter *Gideon's Trumpet*]

106. *See, e.g.*, GIDEON UNDONE, *supra* note 59; LEFSTEIN, CRIMINAL DEFENSE SERVICE FOR THE POOR (May 1982) [hereinafter LEFSTEIN]; THE OTHER FACE OF JUSTICE, *supra* note 104; NATIONAL STUDY COMMISSION ON DEFENSE SERVICE, GUIDELINES FOR LEGAL DEFENSE SERVICES IN THE UNITED STATES (1976) [hereinafter GUIDELINES]; TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL: A REPORT OF THE BLUE RIBBON COMMISSION ON INDIGENT DEFENSE SERVICE (1978); U.S. DEPT. OF JUSTICE NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (September 1986) [hereinafter DEFENSE SYSTEMS STUDY].

107. LEFSTEIN, *supra* note 106, at 2.

In 1971, of over seven million adult felony and misdemeanor arrests, excluding traffic cases, almost 3.4 million required appointed counsel. *Id.* at 3 n.4. In 1976, modest estimates increased the percentage of defendants requiring appointed counsel to sixty-six percent. GUIDELINES, *supra* note 106, at 7 n.9. The latest report indicates that on an average, fourteen indigent cases are reported for every one thousand residents.

all too often by 'walking violations of the Sixth Amendment.' "[108] Why does this long-established pervasive and fundamental guarantee remain unfulfilled? Most of those who have tried to answer this question attribute the failure of the guarantee to become more than just an illusion to the government's refusal "to put the money where the mouth is."[109] "Evidently, there is a difference between advocating equal justice and paying the cost."[110]

Indigent defense spending represents less than three percent of all justice spending.[111] Of the state and local dollars spent on the criminal justice system, police are given 53.2%; corrections, 24.7%; judiciary, 13.1%; and prosecution, 5.9%. The money spent by state and local governments on indigent defense systems is approximately one-fourth that given to prosecutors,[112] or 1.5% of the total amount.[113] This governmental indifference toward the quality of criminal defense provided to the poor has resulted in a "crazy quilt"[114] system throughout our country in which the

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108. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811-12 (1976) (quoting Bazelon, *supra* note 60, at 2).

109. GIDEON UNDONE, *supra* note 59, at 3. *See supra* note 106. "The trumpeting of equal justice in the criminal courts which sounded so clearly from *Gideon v. Wainwright* in 1963 has been muted by insufficient funding and inadequate resources." *Id.* at 15; Fairlie, *Gideon's Muted Trumpet*, 69 A.B.A. J. 172 (Feb. 1983).

110. GIDEON UNDONE, *supra* note 59, at 15.

111. DEFENSE SYSTEMS STUDY, *supra* note 106, at 27. This percentage is based on a per capita basis and equals approximately a $2.76 expenditure on indigent defense as compared with $1.01 for justice spending otherwise. These figures represent a 1979 Bureau of Justice study and have undoubtedly been affected by inflation.

Only 2.9 percent of all government spending was for the criminal and civil justice systems in 1965. Compare this figure with the following percentages in other areas:

Social insurance	20.8
Defense and international relations	18.3
Education	13.0
Debt interest	10.9
Housing and the environment	6.8
Public welfare	6.0
Hospital and health	4.0
Transportation	3.6

One-fourth of the total criminal and civil justice expenditures is for corrections. TENN. SENTENCING COMMISSION'S REVIEW, JUSTICE EXPENDITURES 2 (July 1987).

112. This comparison is somewhat misleading because much of the prosecution's expenses such as investigation, expert witnesses, and analysis of evidence are included in the police budget. Thus, the disparity is even greater than it appears.

113. DEFENSE SYSTEMS STUDY, *supra* note 106, at 27.

114. "If one attempted to color a country map of the United States to show the variations [in criminal defense systems], it would look like a huge crazy quilt. [These differences] among states and even within them [raise] questions of equal protection for indigent defendants." L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICA STATE COURTS, Vol. I, 16-17 (1965) [hereinafter DEFENSE OF THE POOR].

adequacy of one's representation depends upon the state of the prosecution.[115] Even within the same state, the method and quality of indigent defense systems often vary considerably. When the type of justice a defendant gets depends not only on the "size of his pocketbook" but also on the place of his prosecution, our oft-proclaimed motto of equal justice for all is only an unattained dream.[116]

Nowhere is the dream of equal justice further from attainment than in the Volunteer State.[117] Although Tennessee has recognized the right to counsel for more than fifteen years,[118] many indigent defendants continue to be either unrepresented or underrepresented because of their geographic location.[119] Even as a whole, the state has very little to be proud of as it recently has been ranked fiftieth in total per capita expenditures for indigent services.[120] The system for providing justice to indigent criminal

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115. *Id.*; *See also* GUIDELINES, *supra* note 106, at 260.

116. Comment, *Implementing Justice: The National Defender Project*, 1 VAL. U.L. REV. 320 (1967).

117. Throughout history, Tennessee attorneys have lived up to the state motto. It was, of course, a Tennessee barrister named Roddy who traveled to Alabama to volunteer his services to the Scottsboro boys when the right to counsel was in its embryonic stages. Powell v. Alabama, 287 U.S. 45 (1932). Tennessee lawyers responded in full force when one judge appointed the entire bar for a difficult case as had the Alabama jurist in *Powell*. The lawyers filed so many motions that the judge almost never completed the case. *See* DEFENSE OF THE POOR, *supra* note 114, at 692.

118. The Constitution of Tennessee provides that "in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel." TENN. CONST. art. I § 9. Since 1834, the statutes have provided that "[e]very person accused of any crime or misdemeanor whatsoever, is entitled to counsel in all matters necessary for his defense, as well to facts as to law. If unable to employ counsel, he is entitled to have counsel appointed by the Court." TENN. CODE ANN. §§ 40-14-102 to -103 (1982).

Notwithstanding these seemingly clear statutes, studies have shown that Tennessee did not provide counsel to those accused of misdemeanors prior to Argersinger v. Hamlin, 407 U.S. 25 (1972). Haemmel, *The Poor Man Before the Bar of Justice in Tennessee—Legal Aid and Services, Public Defenders, and The Criminal Indigent Defendant Act*, 38 TENN. L. REV. 33, 43-46 (1970) [hereinafter *The Poor Man*].

119. *The Poor Man*, *supra* note 118, at 52. "It is readily apparent that when the mere happenstance of residency gives rise to disparate treatment, a most fundamental question of equal justice arises." *Id.* This geographic disparity in treatment remains today, some seventeen years following Professor Haemmel's observations.

Tennessee is a trapezoid-shaped state consisting of approximately 42,000 square miles made up of 95 counties and inhabited by 4,762,000 people. The State has traditionally been divided into three sections, the eastern mountainous area, the central basin, and the western plateau. The four most populated cities are Knoxville (east Tennessee), Chattanooga (east-central Tennessee) , Nashville (middle Tennessee), and Memphis (west Tennessee).

120. DEFENSE SYSTEMS STUDY, *supra* note 106, at 25.

Tennessee was ranked 50th in per capita indigent costs and 35th in per capita justice

defendants in Tennessee accused of a crime is a maze of uncoordinated, haphazard, county-based programs. Prior to 1986 only three counties[121] had public defender programs, the clearly preferred method for providing counsel.[122] The majority of the remaining ninety-one Tennessee counties administer justice to indigent defendants through an *ad hoc* appointment system, the most condemned and "least desirable" method for providing services.[123]

> Unorganized appointment of individual practitioners tends toward unfair allocation of burdens and may leave undue opportunities for venality and patronage. . . . More important, the goals of protecting the integrity of the adversary system and of ensuring fairness to the accused cannot be satisfied when counsel is appointed without regard to professional competence and without supervision or assistance in the performance of his duties.[124]

This diverse system breeds a feeling of unfair and unequal treatment among defendants[125] and raises serious questions as to whether

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spending. Generally, the two are correlated so that states ranking high on overall justice spending generally rank high on indigent defense spending and vice versa. For example, Arkansas ranked lowest in per capita defense spending and in overall justice spending. Alaska ranked highest in overall justice spending and second in defense spending. This correlation is not true of Tennessee, which means that the disparity in resources for the prosecution and the defense is even greater than normal.

121. Conversation with Georgia Wilson, Office of Executive Secretary to the Supreme Court (July 1987); *contra* DEFENSE SYSTEMS STUDY, *supra* note 106, at 10, table 6. At one time, Law Enforcement Assistance Administration funds allowed additional defender programs.

122. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICE § 5.1-2 (1979) (recommends full time defender and supplemental coordinated assigned counsel system in each jurisdiction) [hereinafter referred to as STANDARDS]; GUIDELINES, *supra* note 106, § 2.1; National Legal Aid and Defender Ass'n, Standards for Defense Services § 2.

The benefits of having the legal profession as a whole involved in the public defense of indigents leads the major organizations to recommend full-time public defender offices, supplemented by a coordinated appointment system, with assignment of conflict of interest cases to other participating attorneys.

123. GUIDELINES, *supra* note 106, at 123, 137-42. In the 1970's, 72 percent of all counties utilized this system and 80 percent of rural areas with populations of less than five thousand used the approach. THE OTHER FACE OF JUSTICE, *supra* note 104, at 38. As of 1982, *ad hoc* systems still dominated the country, comprising sixty percent of all systems. In the South, *ad hoc* systems are present in seventy-two percent of the counties, the highest percentage in the country.

124. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 59-60 (1967).

125. STANDARDS, *supra* note 122, § 5.12. Every criminal defense lawyer has heard

the indigent defense systems in Tennessee are violating the accused's right to equal protection of the law, due process, and effective assistance of counsel.[126]

Since 1917, three years[127] after the first public defender office in this country was established,[128] indigents accused in Memphis-Shelby County have enjoyed the right to representation by the Shelby County public defender's office.[129] This office, complete with a chief public defender, approximately forty full and part-time assistants, two paralegals, and approximately eight investigators, represents thousands of poor Shelby County residents each year.[130] Their numbers allow them to enter the system early, appearing soon after arrest in felony and misdemeanor cases. Their expertise assures that defendants are being counseled and advised properly. They are, for the most part, like their prosecutor counterparts, "specialists," practicing only criminal law.[131] Those who

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defendants categorize lawyers as public defenders or "free lawyers" and "real lawyers." This appraisal of the type of representation one gets if he is indigent reflects a distrust which only hampers the system's effectiveness.

126. Although this proposition constitutes the thesis of this author's paper, research indicates that its suggestion is not entirely original. Twenty-seven years ago a business professor who studied the Tennessee indigent defense system cautiously suggested the same conclusion. *The Poor Man*, *supra* note 120, at 53-54. Five years earlier, as a part of Silverstein's Defense of the Poor Study, Professor Charles Miller had reached similar conclusions. DEFENSE OF THE POOR, *supra* note 114, at 700-01. *See Gideon's Trumpet*, *supra* note 105.

In his concurring opinion in *Argersinger*, Justice Powell noted the equal protection problem which might arise from the ruling. "[A]n accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel." 407 U.S. at 54 (Powell, J., concurring). "The ability of various States and localities to furnish counsel varies widely. Even if there were adequate resources on a national basis, the uneven distribution of these resources—of lawyers, of facilties, and available funding—presents the most acute problem." *Id.* at 59.

127. *The Poor Man*, *supra* note 118, at 44.

128. The Los Angeles Public Defender Office was created in 1914. DEFENSE OF THE POOR, *supra* note 114, at 41. This book contains a detailed history of the development of defender systems.

129. *Id.*; Conversation with April Ferguson, Assistant Public Defender, Shelby County (August 1986). Shelby County is the 30th judicial district.

130. Conversation with April Ferguson, Assistant Public Defender, Shelby County (July 1987). In 1971, Shelby County public defenders handled fifty-five percent of all felony cases in Shelby County. The staff consisted of three full-time defenders, seventeen part-time defenders, two full-time investigators, and had a budget of two hundred thousand dollars annually, only one-quarter of which came from the state. The office handled 9,397 cases last year. Conversation with Administrator, Shelby County Public Defender's Office (July 1987); *The Poor Man*, *supra* note 118, at 45.

131. *See* Bazelon, *supra* note 60, at 12.

In spite of the myth that all lawyers are generalists, criminal defense is a

serve as public defenders in Shelby County are assigned to a particular division in which they learn and perfect their individual duties before rotating to another position.[132] At their disposal are investigators, paralegals, a social worker, an administrative staff, an up-to-date library, and a research bank, not to mention decades of experience shared by the senior defenders.[133]

The private bar in Shelby County is also used to provide defense services for the indigent when conflict situations arise.[134] These bar members are assigned to cases by the judges and are compensated as court-appointed counsel in other districts.[135] While the private and public defenders are paid for their services by the Executive Secretary of the Supreme Court,[136] the public defenders'compensation is paid into a general fund which, along with at least matching county funds, is used for its operations.[137]

Smaller, but similar in function, ability, and service, is the Metropolitan Government of Nashville-Davidson County Public Defender Office. First established in 1961,[138] the Nashville-Davidson County Public Defender Office operates with a staff of thirty, including a chief defender, twelve assistants, and five

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> specialty. It requires a skilled trial advocate who is familiar with the criminal justice system, including not only the criminal code but also police and prosecutorial practices, the availability of local experts and private crime labs and the informal norms of the criminal courts. Certainly any self-respecting prosecutor would be familiar with these aspects of the system. Is it fair to saddle a defendant with counsel who is not?

Id.

132. Conversation with April Ferguson, Assistant Public Defender, Shelby County (July 1987).

133. *Id.* On the downside are the defenders' astronomical caseloads. Presently, many defenders are being hired by the better-compensated prosecutor's offices.

134. *Id. See supra* note 122.

135. *Id.*

136. TENN. CODE ANN. §§ 40-14-208 to -209 (1982). These statutes provide for court-appointed counsel to apply with the court wherein services were rendered for payment. The public defender offices must submit a monthly report of activities to the Executive Secretary who "shall compute an estimate as to the amount which the state would otherwise have had to pay for counsel for indigent persons in such county, metropolitan government or municipality." TENN. CODE ANN. § 40-14-208 (1982).

137. The state cannot provide by statute more funds for indigent defense systems than are provided locally. TENN. CODE ANN. § 40-14-209 (1982). In reality, the state provides much less, leaving the burden on the local level. *The Poor Man*, *supra* note 118, at 47. This approach is greatly questioned because of its inefficiency. *See, e.g.*, STANDARDS, *supra* note 122, § 5-1.5; GUIDELINES, *supra* note 106, § 2.4; STANDARDS FOR DEFENDER SERVICES, *supra* note 122, § 3.

138. *The Poor Man*, *supra* note 118, at 44.

investigators.[139] Like its Shelby County counterpart, this office provides early entry defense service, beginning in most cases prior to arraignment. Each assistant is assigned to a particular division where he or she works for an established time period.[140] The office's resources include motion and brief files, expert witness sources, and investigators.[141] In 1986, the Davidson County Public Defender estimated that the program, which provides services to accused felons and misdemeanants, costs eight hundred sixty thousand dollars annually, one hundred eighty thousand of which comes from the state.[142]

Prior to September 1, 1986, all but one[143] of the remaining ninety-three counties in Tennessee provided counsel for indigents through an appointment system.[144] Some of these counties appoint counsel only at felony arraignments; others call in counsel at the general sessions level when it "became necessary;" others call upon counsel present in the courtroom when the need arises; and still others use sign-up calendars for appointment.[145] The person responsible for making the appointments throughout these counties is almost exclusively the judge.[146] All too often, these

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139. Conversation with Lynn Porter, Office Manager, Davidson County Public Defender Office (July 1987). The office has a separate juvenile division with two attorneys and one investigator. In 1971, this office consisted of 3 full-time and 3 part-time lawyers, a secretary, a typist, and one investigator. Vanderbilt University law students assisted on a volunteer basis. *The Poor Man*, *supra* note 118, at 45.

140. Conversation with Lynn Porter, *supra* note 139.

141. *Id.*

142. HOUSE JUDICIARY COMM., Tenn. H.R. 1787 (March 4, 1986) (statement of James Weatherly, Davidson County Public Defender). For comparison purposes, in 1970 the budget was approximately $62,000, $8,300 of which came from the state. In 1986 the office closed 10,267 non-juvenile cases and had a county budget of $74,000. Conversation with Lynn Porter, *supra note 139*.

143. Conversation with Georgia Wilson, Office of Executive Secretary of the Supreme Court (July 1987). Sevier County, a rural county in the Fourth Judicial District, has an individual who serves as public defender. The remaining counties in this district use an *ad hoc* assignment program. The lawyers must each appear on opening day of the criminal term when the judge "distributes" indigent cases. Conversation with Charles Sexton, Sevier County Public Defender (July 1987).

144. DEFENSE SYSTEMS STUDY, *supra* note 106, at 10. *The Poor Man*, *supra* note 118, at 46; Conversation with Georgia Wilson, *supra* note 143.

145. DEFENSE OF THE POOR, *supra* note 114, at 689-93; *The Poor Man*, *supra* note 118, at 48-52.

146. DEFENSE OF THE POOR, *supra* note 114 at 689-93. For a criticism of this approach, see STANDARDS, *supra* note 122, §§ 5-1.2 & 5-1.3; GUIDELINES, *supra* note 106, at § 2.17. Allowing the judge to make appointments of counsel reduces the independence and equality which the defender system should offer.

Retained lawyers are neither chosen nor approved by the courts, and there

"administrators"[147] make the right to appointed counsel an arduous and embarrassing chore and the right to waive counsel a quick and simple task.[148] For example, judges in non-public defender counties may divide their docket as follows: first, those with hired lawyers; second, those who want to plead guilty; third, those who want to apply for appointed counsel; fourth, those with appointed counsel who want to plead guilty; and finally, those with appointed counsel who want a trial.[149] Often, the judges will not explain to those who wish to plead and get it over with that they have a right to consult with counsel prior to entering the plea.[150] The clear message in a number of court-appointed defender counties is that the easiest and most efficient thing to do is to proceed without counsel on a plea of guilty. Oftentimes the "word around town" is that the court-appointed lawyers will not do anything anyway,[151] so the accused, already confused by a system he is not trained to understand, frequently opts for the most direct route of removing himself from the uncertainty. This is especially

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> are no compelling reasons for defenders and private assigned counsel to be treated continuous appointments . . . there may be a strong temptation to compromise clients' interests in ways that will maximize . . . future case assignments.

STANDARDS, *supra* note 122, § 5.13 commentary.

THE OTHER FACE OF JUSTICE noted the incongruity in providing defendants with "advocates, who are often hand-picked by the same authority which pronounces their sentence." THE OTHER FACE OF JUSTICE, *supra* note 104, at 70. *See* Bazelon, *supra* note 60, at 16.

147. In Tennessee several of the general sessions court judges are non-lawyers. *See supra* note 4.

148. This conclusion is drawn from the author's personal observations after five years of Tennessee practice. In support of these observations, see *The Poor Man*, *supra* note 118, at 45-49; DEFENSE OF THE POOR, *supra* note 114, at 90-92; GIDEON UNDONE, *supra* note 59, at 3; Bazelon, *supra* note 60, at 10-11.

149. In one criminal court in the state, the judge constantly announces to the attorneys (and defendants) in his courtroom, "Pleas take precedence over all other matters." In another court, the judge arraigns defendants by asking first, "How do you plead?" and *then* advising of the right to counsel. *See supra* note 148.

150. *See supra* notes 148 & 149; DEFENSE OF THE POOR, *supra* note 114, at 691.

> The goal of mass production justice is rapid processing of cases. The most common mechanism to satisfy this goal is the guilty plea. . . . There is no way to assure that the defendant's interests have been served unless the plea has resulted from proper preparation and analysis of the case by counsel.

Bazelon, *supra* note 60, at 16-17.

151. Defendants tend to equate quality of representation with rate of pay. The individual perceives a relationship "between [the] compensation of an attorney and the quality of legal representation afforded him." Note, *Uncompensated Appointments of Attorneys for Indigent Criminal Defense: The Need for Supreme Court Standards*, 14 SW. U.L. REV. 389, 399 (1984) [hereinafter *Uncompensated Appointments*]. Indigents greatly doubt that those who do not pay still receive that which is promised to all—equal justice. *Id.*

true in misdemeanor cases where the risks are somewhat lower and the judge's sentencing practices are generally known.[152]

Those defendants who opt to have counsel appointed more often than not will have their case postponed so they can confer with counsel. After receiving the name of their court-appointed counsel, the defendants must attempt to contact and advise counsel of the appointment. Often times, due to the lack of an appointment administrator,[153] the client's call will be the first notice the appointed counsel has of the appointment. The client who has already been to court at least once must then wait for his case to be heard when the appointed counsel is ready and can fit it into his schedule.[154] This delay causes the client additional anxiety, particularly if it is his first arrest. The client may avoid this delay in jurisdictions where counsel who are in or around the courtroom are appointed immediately for representation on his misdemeanor charge. The trade-off for the lessened anxiety and uncertainty is representation by a lawyer who cannot possibly fulfill his obligation to investigate the facts and law of the case.

Some of the problems of the appointed system are avoided by designating counsel for indigents in advance. This is the method used in some counties where lawyers sign up for court dates up to one year in advance. Although the pre-determination of counsel eases some of the difficulties in an appointed system, it carries with it some additional problems that create serious doubts about the commitment to provide effective assistance of counsel.[155]

As of September 1, 1986, three more judicial districts in Tennessee had abandoned the court-appointed counsel system. Three "pilot public defender projects"[156] were created by legislative enactment "to provide services and protection to indigent defendants."[157] The legislation began as a vehicle which created a statewide, state-funded public defender system,[158] but was quickly

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152. *See supra* notes 148 & 149.

153. *See supra* note 146.

154. *See* TENN. CODE ANN. § 40-14-202 (Supp. 1988).

155. This system of defender services is discussed in detail at text accompanying notes 238-50 *infra*.

156. 1986 Tenn. Pub. Acts 909 (amending TENN. CODE ANN. §§ 8-14-101 to -109 (1986); repealing § 8-7-108; and amending § 16-21-107 (Supp. 1986)).

157. *Id.*

158. Tenn. H.R. 1232 and Tenn. S. 1588, section I originally stated that "[t]here is hereby created a public defender system for the State of Tennessee for the purpose of providing legal counsel for certain indigent persons as is in this Act provided." On April 9, 1986, the bill was amended entirely to provide instead for the creation of the pilot project.

amended to provide for only three public defender programs, one in each grand division of the state.[159] The justification for the program was the "absolute crisis" in indigent defender services in rural counties,[160] which had resulted in a deprivation of constitutional guarantees. Unfortunately, the focus quickly shifted from the constitutional crisis to the burden on the state treasury.[161] Somewhat surprisingly, its sponsors[162] were able to get the bill passed by adjusting the pilot program's life from eight to four years[163] and by reducing the compensation for the district defender from one hundred percent to seventy percent of the district attorney's salary.[164]

As a result of Tennessee Public Acts, chapter 909, three Tennessee judicial districts were originally created with district public defenders, district investigators, and assistant public defenders.[165]

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159. The initial bill as amended created pilot programs in the twenty-third, twenty-seventh, and seventh judicial districts. The twenty-third borders middle and west Tennessee and consists of Dickson, Humphreys, Cheatham, Houston, and Stewart counties; the twenty-seventh is in West Tennessee and consists of Weakley and Obion Counties; and the seventh, in east Tennessee, consists of Anderson County.

160. House Session, Tenn. H.R. 1232 (April 9, 1986) (statement of Congressman Mike Murphy).

161. In the Senate Finance Ways and Means Committee, in discussion of Tenn. S. 1588, Senator Rochelle characterized the bill as "expanding [the] bureaucracy."

> You're getting into something that's almost as deep as health care. Once this program starts at State expense in any part of the State, it's going to continue on. Once any part of the State has it, it's going to then naturally expand. Once it expands and the folks get their jobs and then begin to follow the precedent set by other similar officials, then it's a continual *hassle*.

SENATE FINANCE, WAYS AND MEANS COMM. S. 1588 (April 8, 1986) (statement of Senator Rochelle) (emphasis added). The Senator closed by suggesting that the legislature fund lobbyists for the pilot program who could annually request more funding.

162. The sponsor in the Senate was Senator Riley Darnell from Clarksville, Tennessee. The sponsor in the House was Congressman Mike Murphy from Nashville.

163. The first amendment of Tennessee House Bill 1232 reduced the term of each pilot project from eight to four years.

164. The third amendment of House Bill 1232 adjusted the district public defender's salary to seventy percent of that received by the district attorneys general. Congressman Murphy explained to the House session that the reduction was necessary since public defenders do not defend all those charged with crime but only the indigents. While this observation is obviously correct, it assumes that all other resources are equal between the offices, thereby requiring a reduction in salary so as not to undercompensate the district attorney. In reality, none of the resources are equal. The district attorneys have larger clerical and professional staffs, have access to state facilities, and depend on law enforcement officers for a great deal of their investigation and preparation of cases. Defenders must assume all of these responsibilities themselves.

165. TENN. CODE ANN. §§ 8-14-101 to -109 & 16-21-107 (Supp. 1986) (as amended by 1986 Tenn. Pub. Acts, 909).

Their appointment and reappointment are controlled by the judicial council as are requests for additional personnel.[166] Their responsibilities include representation of all "indigent persons for whom [they are] appointed . . . by the court" as counsel, through trial and on appeal.[167] Thus, their services, like the services of *ad hoc* appointed counsel, must await the court's determination of indigency and the court's order of appointment.[168]

During the committee hearings on the legislation, the issue of selecting the judicial districts for the pilot programs arose. The sponsors informed the legislature that the areas chosen were those in which the judges and district attorneys had asked for the program because of difficulty in finding representation for indigent defendants.[169] This implied "seek and ye shall find" selection criteria resulted in the addition of another pilot project effective in September 1987 in four additional districts.[170] With the implementation of the second pilot project, the number of Tennessee counties having public defender programs (at least temporarily)[171] increased to twenty-seven, and the number of districts to nine. If the programs are truly there for the asking, which undoubtedly

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166. *Id.* The judicial council, established in Tennessee Code Annotated section 16-21-101, is a council of judges, lawyers, and elected officials. The appointment of pilot public defenders is only one of their duties, which include surveying and studying the judicial department, receiving suggestions, simplifying judicial procedure, and reporting court statistics. According to the Executive Secretary's office, applicants for the position were allowed to make a written or oral presentation before the Council and to present others to speak in their behalf.

167. TENN. CODE ANN. § 8-14-105(a) (Supp. 1988).

168. The lack of early entry of counsel into the accused's case is one of the biggest problems in defender systems. DEFENSE OF THE POOR, *supra* note 114, at 75-86; GIDEON UNDONE, *supra* note 59, at 17; GUIDELINES, *supra* note 106, at 48-71; STANDARDS, *supra* note 122, at § 5-5.1. "Effective representation of the accused requires that counsel be provided at the earliest possible time. . . . [U]nless the impecunious accused is provided counsel at the earliest possible time, an invidious discrimination is present between the poor defendant and the defendant of financial means." *Id.*, commentary. *See also supra* text accompanying notes 10-12.

169. House Session, Tenn. H.R. 1232 (April 9, 1986) (statement of Congressman Murphy). Congressman Murphy told the House that the chosen districts were those where the district attorney and judges wanted the program and those which the District Attorney's Conference supported. Discussions with judges and assistant district attorneys in the author's district did not produce anyone who knew that the opportunity to have a program had existed.

170. TENN. CODE ANN. § 8-14-101(b) (Supp. 1988). All of the districts receiving pilot programs are in west Tennessee. *See supra* notes 159-61.

171. According to Senator Darnell, the pilot programs will automatically terminate upon their expiration dates unless the law is changed. Senate Session, Tenn. S. 1588 (April 11, 1986) (statement of Senator Darnell).

they are not, Tennessee's indigent defense system could be cured of its constitutional impurities quite soon.[172]

All indications are that the pilot projects, though underfunded, are faring quite well. Although the impact of tightening appropriations to achieve adoption of the project is being felt by those selected to run the programs,[173] the recognition by the legislature that the state has an obligation to provide and fund indigent defense systems is a significant stride.[174]

It was not long ago that Tennessee, like many states, felt that representing the indigent defendant was a duty the legal profession impliedly accepted as a by-product of licensure.[175] Attorneys provided the services with no compensation and no reimbursement for expenses.[176] Even in capital cases, when society attempted to exact the ultimate punishment on the accused, counsel was expected to perform without pay.[177] The state provided no defense funds whatsoever except for transcripts in capital cases and rarely even provided a court reporter.[178] As a result, counsel was rarely appointed in misdemeanor cases, on guilty pleas, or prior to arraignment in criminal court.[179] The state refused to face up to its obligation to provide effective legal assistance to the poor accused and chose to place that responsibility on judges and attorneys. The judges transferred the responsibility to the members of the bar, who had little choice when confronted with a directive from their local presiding judge to provide free legal services.[180]

A few attorneys dared, in the "more removed" appellate courts, to challenge the taking of their time and advice[181] without

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172. During one of the senate sessions on the bill, Senator Darnell explained that Tennessee has implemented the "big-city" public defender program and now needed to experiment to see if the system would work in rural counties. He insinuated that if it worked, more districts would be added. Senate Session, Tenn.S. 1588 (April 16, 1986) (statement of Senator Darnell).

173. Conversation with Georgia Wilson, *supra* note 143.

174. *See infra* text accompanying notes 175-84.

175. House v. Whitis, 64 Tenn. 690 (1875); Wright v. State, 50 Tenn. 256 (1871). *See, e.g.*, BEANEY, *supra* note 33, at 135-37; DEFENSE OF THE POOR, *supra* note 114, at 16-17; EQUAL JUSTICE, *supra* note 28, at 48-49.

176. DEFENSE OF THE POOR, *supra* note 114, at 691.

177. *Id. Compare with infra* note 232.

178. DEFENSE OF THE POOR, *supra* note 114, at 691.

179. *Id.*

180. *Id.* at 690.

181. A quote attributed to Abraham Lincoln, "A lawyer's time and advice are his stock in trade," seems applicable.

compensation.[182] These courts consistently held that, as licensed professionals, counsel must accept the burden of "these honorary obligations"[183] without pay. That no other licensed professionals and no other members of the criminal justice system were expected to work without pay was unimportant. The courts required lawyers to do so. Eventually, however, the courts suggested that the resolution of this issue was more properly the responsibility of the legislature.[184]

Finally, in 1965, the legislature acted, amending the statutes, effective July 1 of that year, to provide for payment to assigned counsel in *felony* cases.[185] The statutes allowed "reasonable compensation"[186] under the rules of the Supreme Court of Tennessee,[187] but added that reasonable compensation could not exceed five hundred dollars.[188]

Fees were established at the rate of twenty-five dollars for guilty pleas, thirty-five dollars for up to one-half day of trial, and fifty dollars for a full trial day.[189] Fees approved by the judge were sometimes reduced by the Executive Secretary of the Supreme Court of Tennessee.[190] Reimbursement for expenses, though specifically authorized by statute,[191] was rarely paid.[192]

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182. *See* House v. Whitis, 64 Tenn. 690 (1875); Wright v. State, 50 Tenn. 256 (1871). The author notes that these cases focused upon the loss of income suffered by the attorney who provided free legal services as an unconstitutional taking without just compensation rather than focusing on the real losers in the situation—the indigent accused and society. None of the cases used a due process, equal protection, or denial of effective assistance approach to demonstrate the constitutional deprivations to the *defendant.* None of the cases discussed the cost to *society* when "ineffective defenders produce more people in prison," more appeals, and more *habeas corpus* and post-conviction reviews, not to mention the intangible costs of a system that is inherently unfair and prejudiced against the poor. GIDEON UNDONE, *supra* note 59, at 12; LEFSTEIN, *supra* note 106, at 2.

183. Scott v. State, 216 Tenn. 375, 392 S.W.2d 681 (1965); *see supra* note 175.

184. 216 Tenn. at 388, 392 S.W.2d at 687.

185. TENN. CODE ANN. §§ 40-14-201 to -210 (amended 1988) (emphasis added).

186. TENN. CODE ANN. § 40-14-207 (amended 1986).

187. TENN. CODE ANN. § 40-14-206 (amended 1988).

188. TENN. CODE ANN. § 40-14-207 (repealed 1982). The maximum amount did not apply to capital offenses.

189. These fees were set in June, 1965, by the Judicial Conference. While rule-making history is sparse, it appears that the supreme court did not act until after 1970. *The Poor Man, supra* note 118, at 47-48 n.24.

190. *Id.* Even today, the judge who must approve the application will sometimes reduce the fee. *See supra* note 148.

191. TENN. CODE ANN. §§ 40-14-207-208 (1982).

192. *The Poor Man, supra* note 118, at 47-48.

Eventually, the supreme court promulgated rules regarding compensation.[193] The old fee schedule was discarded for one based upon hourly rates. In adult felony cases, attorneys were paid twenty dollars per hour for preparation and preliminary hearings[194] and thirty dollars per hour for in-court time. These amounts were subject to the legislative cap of five hundred dollars per case and one hundred dollars per day.[195]

The rules and statutes, though a considerable improvement over the no compensation system, bred discontent.[196] Most attorneys considered the hourly rates to be insufficient to enable them to adequately defend the poor.[197] The statutory maximum on all but capital cases seemed unjust and made it difficult for practitioners to invest their time in appointed cases.[198] The disallowance of any fee for cases disposed of in the sessions court discouraged the prompt resolution of cases.[199] The limit of payment in felony cases perpetuated the no compensation rule in thousands of cases. The lack of substantive provisions for furnishing resources to defenders hampered the complete investigation, preparation, and presentation of the case.[200]

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193. TENN. SUP. CT. R. 13(2).

194. Attorneys who were successful at the preliminary hearing and whose clients' charges were dismissed could not be compensated at all. *See infra* text accompanying notes 214-24.

195. TENN. CODE ANN. § 40-14-207 (amended 1988).

196. *The Poor Man*, *supra* note 118, at 49-52; *see supra* note 147.

197. *Id.* Many of us have experienced the hardship detailed by Chester Fairlie in his article, *Gideon's Muted Trumpet*, 69 A.B.A. J. 172 (Feb. 1983), although perhaps not to as great a degree.

198. *See supra* text accompanying notes 18-21. This phenomenon has been described by former California Supreme Court Chief Justice Rose Bird as the "exodus" of private lawyers from the defender system leaving the chore to "a group of overworked and underpaid" attorneys. R. Bird, "*Thou Shalt Not Ration Justice*," 13 HUM. RTS. L. REV. 24, 27 (Nov. 1985).

"[A] system of substandard or no compensation tends to attract the least-experienced or least-competent members of the bar." Amicus Brief of NLADA 27, Allen v. McWilliams, No. 86-10-I (Davidson Equity) [hereinafter Amicus Brief] (citing DEFENSE OF THE POOR, *supra* note 114, at 16). "[P]erformance and productivity are directly related to the adequacy of compensation." Amicus Brief, *supra* at 26 (citing LAWYER, PAY AND ORGANIZATIONAL EFFECTIVENESS (1971)).

199. This problem sparked a lively debate in the 1986 legislature between those who saw the problem as an inequity for successful lawyers and those who saw a change in the law as a reward for unethical ones. One Senator commented during the Finance, Ways and Means Committee hearing on the bill proposed to change the law as follows: "The thing that bothers me is to pay lawyers more because lawyers are prevalent in disobeying the code of ethics." SENATE FINANCE, WAYS AND MEANS COMMITTEE, S. 1864 (April 3, 1986).

200. While it is true that the Tennessee Supreme Court Rules allow reimbursement for

Attempts were made to convince the legislature to remedy the problems.[201] Attorneys, aggrieved by the low fee schedule, attempted to get judicial resolutions.[202] In 1985, twenty years after the implementation of compensation for felony representation,[203] and thirteen years after the Supreme Court of the United States had mandated counsel for accused misdemeanants,[204] the festering issues of inadequate representation came to a head. An attorney appealed a denial of a claim by Davidson County Chancery Court challenging the statutory fee ceiling on criminal cases and alleging an unconstitutional taking.[205] The attorney had represented a defendant charged with felony murder and robbery against whom the death penalty was not sought. He had expended 102.9 hours in the trial court and 78.3 hours on out-of-court preparation for trial; he had received five hundred dollars for each representation. The court disallowed relief based upon a procedural loophole.[206] However, this case prepared the justices, undoubtedly, for an even greater dispute which soon came before them.

Two Anderson County attorneys had filed claims for services rendered to indigent defendants charged with felonies.[207] All of the cases had been disposed of either by dismissal following the

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"other expenses" for which "prior authorization" has been obtained, placing that authority solely within the trial judge's discretion practically nullifies the rule.

> To the extent that the lawyers who represent indigent defendants are dependent for their livelihood on [the] judges, there is a great incentive for them not to rock the boat. . . . [M]any judges are looking for a . . . "sweetheart" lawyer. They just do not want lawyers to present a lot of motions or to put on a lengthy trial.

Bazelon, *supra* note 60, at 15.

Furthermore, Tennessee courts have ruled that "there is no due process or equal protection requirement" that a criminal defendant be provided with resources, except for counsel. State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App.), *perm. to appeal denied*, 603 S.W.2d 708 (Tenn. 1980). Even worse is the situation created by giving trial judges the discretion to approve fee requests, "[W]hen defense counsel's earnings flow from the pen of a trial judge, the principle of independent advocacy that is essential to the adversary system of justice is undermined." Bazelon, *supra* note 60, at 16.

201. *The Poor Man*, *supra* note 118, at 51.

202. Huskey v. State, 688 S.W.2d 417 (Tenn. 1985). *See infra* note 207.

203. *See supra* notes 185-88 and accompanying text.

204. *See supra* notes 63-74 and accompanying text.

205. Huskey v. State, 688 S.W.2d 417 (Tenn. 1985).

206. The court held that the attorney had no independent cause of action when dissatisfied with a fee, but would have to request permission to appeal via Rule 11 of the Tennessee Rules of Appellate Procedure. *Id.* at 419.

207. Attorneys William Allen and James Barrett had served six indigent defendants by judicial appointment. Allen v. McWilliams, 715 S.W.2d 28, 28-29 (Tenn. 1986).

preliminary hearing or by plea bargaining to a reduced charge.[208] None of the services had been rendered in "courts of record" as the term is generally used in Tennessee.[209] The Executive Secretary denied compensation on each of the claims.[210] The attorneys then instituted an action seeking a declaration that "Tennessee law requires reimbursement" in such a situation.[211] Totally ignoring the procedural defect similar to the one they had confronted a year earlier,[212] the court concluded that compensation was intended "for counsel for indigents at all stages of felony proceedings."[213] Focusing on the initial rather than the resulting offense allowed the court to avoid the issues of sufficiency of compensation and compensation in misdemeanor cases.[214]

While the Tennessee Supreme Court was carefully avoiding the issue, the General Assembly had taken a much needed and long delayed step in improving the indigent defense system.[215] A bill, camouflaged by a recoupment provision in the opening section, was presented by the Metropolitan Nashville-Davidson County Public Defender's Office. The bill introduced as House Bill 1787 expanded recoupment by the marginally indigent in Section 1,[216] but more importantly, proposed to compensate counsel for misdemeanor offenders[217] and to increase the maximum amounts allowed by law.[218]

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208. *Id.*

209. Page v. Turcott, 167 S.W.2d 350, 354-55 (Tenn.1943) (meaning circuit, criminal, or chancery court). Since Tennessee Code Annotated section 40-14-202 allowing appointment of counsel requires that the appointment be "denoted by an entry upon the minutes," *id.*, it was held that "court," in the appointment statute, must refer to courts that keep minutes or courts of record. 715 S.W.2d at 30-31.

210. 715 S.W.2d at 29.

211. Allen v. McWilliams, Complaint at Paragraph 1 (Davidson Equity No. 86-10-1).

212. Allen v. McWilliams, 715 S.W.2d 28 (Tenn. 1986). Because the case involved an issue "of great importance," the court decided to circumvent the procedural error and treat the case as a petition to modify the rules. *Id.* at 29.

213. *Id.* at 31.

214. Both issues were urged by *amici*. Amicus Brief, *supra* note 198, at 21-22. [T]he "claim that appointed attorneys practicing in General Sessions Court have a duty to provide gratuitous services has the practical effect of transferring the public burden of financing indigency representation to private defense attorneys." *Id.* at 22. *See supra* note 198.

215. 1986 Tenn. Pub. Acts 878 (amending TENN. CODE ANN. §§ 40-14-202 to -210 and 37-1-150 (Supp. 1986)).

216. Section one of the bill amended Tennessee Code Annotated section 40-14-202 by allowing an order that the accused defray the costs of his counsel be made a condition of probation. TENN. CODE ANN. § 40-14-202(e) (Supp. 1986). 1986 Tenn. Pub. Acts 878. The desirability of a recoupment provision is beyond the scope of this paper.

217. Section two amended Tennessee Code Annotated section 40-14-206 to provide that

In a partially threatening,[219] partially pleading[220] presentation, the sponsors educated the General Assembly as to the inequities which presently existed in the state. Some counties paid for misdemeanor representations while others did not.[221] Some had enough lawyers to run an appointed system while others did not.[222] Although the bill did not completely solve the problem—a problem that would not be solved until a state-wide defender program was implemented[223] —its sponsors suggested that it would "begin to do away with some of the inequities."[224]

Doing away with the inequities[225] would prove an expensive task. Indeed, the real fiscal implications were difficult to

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compensation is available for appointed counsel "in all cases where appointment of counsel is required by law." TENN. CODE ANN. § 40-14-206 (Supp. 1986). 1986 Tenn. Pub. Acts 878.

218. Sections three, four, and five were amended by the third amendment to increase the daily caps to two hundred dollars and the noncapital case caps to one thousand dollars, amending Tennessee Code Annotated section 40-14-207. 1986 Tenn. Pub. Acts 878.

219. "[We are] running some serious jeopardy where the Constitution requires appointments for misdemeanor cases. . . . I think we're treading on dangerous grounds there unless we allow that compensation for misdemeanors." HOUSE FINANCE, WAYS AND MEANS COMM., Tenn. H.R. 1787 (March 19, 1986) (statement of Congressman Murphy).

220. In the Senate Finance, Ways and Means Committee, the presenter told the Committee members that no one could "come close" to operating an office at the present rates of pay. Reminding the legislators of the emergency session necessitated by the prison overcrowding problem, he suggested that the issue "permeates all areas of the justice system." SENATE FINANCE, WAYS AND MEANS COMM., Tenn. S. 1864 (April 3, 1986) (comments of James Weatherly).

221. HOUSE JUDICIARY COMM., Tenn. H.R. 1787 (March 4, 1986). For example, Knox County, which has an appointment system, paid attorneys a fixed amount for each misdemeanor case with county funds. Davidson County, which has a public defender system, received no state funds for misdemeanors though they handled 5,619 misdemeanor cases in 1963, compared to 992 felonies. Washington, Unicoi, Carter, and Johnson Counties paid no compensation to attorneys who handled misdemeanors prior to the passage of the bill.

222. SENATE FINANCE, WAYS AND MEANS COMM., Tenn. S. 1864 (April 3, 1986). Tennessee Bar Association President Simms told the Committee that the present system was running lawyers out of counties in fifty of the state's counties. The burden of representing indigents for such a low amount of compensation was felt most by attorneys in small rural counties. *Id.*

223. HOUSE JUDICIARY COMM., Tenn. H.R. 1787 (March 4, 1986) (statement of Congressman Mike Murphy). "Until we get a state-wide public defender system, we're going to have continuing problems with the amount of money lawyers are paid in appointed cases." SENATE FINANCE, WAYS AND MEANS COMM., Tenn. S. 1864 (April 3, 1986). "A state-wide public defender system may be more expensive than this bill but [we are] moving toward [it] by necessity." *Id.* (comments of James Weatherly).

224. SENATE FINANCE, WAYS AND MEANS COMM., Tenn. S. 1864 (April 3, 1986).

225. HOUSE JUDICIARY COMM., Tenn. H.R. 1787 (March 4, 1986).

Two glaring examples of the inequitable treatment of attorneys were given. The Metropolitan Nashville-Davidson County Public Defender suggested that it was no more equitable

estimate.[226] The state had no statistics which would enable the tallying of indigent misdemeanants. An annual report collected totals of trial and appellate case filings and dispositions,[227] but neither the state nor most counties kept records which would allow a determination of the number of court appointed attorneys for felony and misdemeanor cases.[228] The records of the Executive Secretary revealed only the number of felony cases for which compensation was sought.[229] The growth in that expenditure alone[230] led many legislators to fear the financial repercussions of the proposed legislation.[231]

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to underpay (or not pay at all) attorneys than it would be to underpay judges, bailiffs, court reporters, and prosecutors. "[The defense attorney] is not under any really greater obligation to this State [to work for free] than are the other people but that is the system that we seem to have developed." *Id.*

Senator Darnell, a barrister, became outraged at a cohort's suggestion that we had to pay lawyers in general sessions court to keep them from being unethical. *See supra* note 199.

> We don't tell a doctor if you come in and a guy has his arm cut, "If its [sic] not cut off, we're not going to pay you for it." We have [an indigent care] system—it's called medicaid—[it] pays doctors and hospitals and pharmacies. But when it comes to lawyers, they say you need to do that for nothing and if you don't like the system, you're in violation of the code of ethics. The State shouldn't ride for free on the backs of lawyers no more than they should [ride] on the backs of others providing services.

SENATE FINANCE, WAYS, AND MEANS COMM. S. 1864 (April 3, 1986) (statement of Senator Riley Darnell).

226. The original fiscal note commented only that the impact would be greater than $100,000.

227. 1986 Annual Report, Executive Secretary, Supreme Court of Tennessee.

228. Conversation with Georgia Wilson, *supra* note 143.

229. *Id.* As a practice, many lawyers accept court-appointments and by either choice or neglect never request compensation. *See supra* note 148.

230. Since 1977, the appropriations for indigent defense expenditures have more than tripled. With the passage of the proposed legislation, the appropriations were four-fold those of nine years earlier. According to Georgia Wilson, five hundred sixty thousand dollars was appropriated for administering the pilot projects, see *supra* notes 159 & 170, paying for misdemeanor appointments, and increasing the maximum fee. Conversation with Georgia Wilson, *supra* note 143.

231. During the discussions in the House Finance, Ways and Means Committee, one Congressman exclaimed: "There are *no* personnel in this department and the budget is [already] $3,723,000.00!" HOUSE FINANCE, WAYS AND MEANS COMM., Tenn. H.R. 1787 (March 19, 1986) (emphasis added). The budget used to finance "no personnel" actually paid 1,402 attorneys to provide services in 15,335 cases involving adult and juvenile felons and mental commitments in 1985. Since over 37,000 felony cases were disposed of in Tennessee that year, and given the average percent of accused felons who are indigent, see *supra* note 107, it is obvious that countless cases were handled by these "non-personnel" for free. And in every year prior to 1986, every misdemeanor case in which the accused requested counsel and was indigent was handled pro bono.

Eventually the legislature passed an amended form of the bill[232] and the Executive Secretary revised the rules regarding compensation to increase the case and daily maximums and to award payment in misdemeanor cases.[233] Because the amended bill omitted a provision for increased hourly rates, neither the legislature nor the judiciary made any change regarding the hourly rate.[234]

Although the legislature and judiciary in Tennessee have reduced some of the financial inequities and professional burdens for court-appointed lawyers, very little headway has been made toward fulfilling the promise of *Gideon* and *Argersinger—equal* justice under law. While it is certain that judges will be able to get licensed "warm bodies" to act as counsel for defendants in

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232. 1986 Tenn. Pub. Acts 878 (amending TENN. CODE ANN. §§ 40-14-202 to -210 & 37-1-150 (Supp. 1986). An increase in litigation tax as well as an expected business tax "justified" the expenditure.

233. TENN. SUP. CT. R. 13(2)(b). The fee structure is for hourly rates in and out of court and daily and case maximums are as follows:

Case Type	*Hourly*	*Daily*	*Case*
Adult and Juvenile Misdemeanor	$20 out $30 in	$60	$100
Adult and Juvenile Contempt	$20 out $30 in	$100	$250
Juvenile Felony	$20 out $30 in	$100	$500
Adult Felony	$20 out	$100	$500
Sessions and Municipal Court	$30 in		
Adult Felony (Noncapital Trial Court)	$20 out $30 in	$200	$1,000
Appeals (Noncapital)			$1,000
Early Release— (suspended sentence)	$20 out $30 in	$100	$500
Post-conviction (habeas corpus)	$20 out $30 in	$100	$500
Probation Revocation	$20 out $30 in	$100	$500
Capital Cases	$20 out $30 in	$200	None

234. *See* TENN. SUP. CT. R. 13; TENN. CODE ANN. § 40-14-207 (Supp. 1986). *But see* Tenn. H.R.J. Res. 209 (1987) ("[a] resolution to request the Tennessee Supreme Court and Tennessee Judicial Council to study indigent defense counsel compensation" which suggests an increase in hourly rate is necessary).

felony and misdemeanor cases with the prospect of some compensation, the appointment method perpetuates a second-rate criminal justice system for the indigent accused.[235] Even with dollars to pay lawyers for services, the appointment system suffers serious drawbacks which make it the most highly criticized and most suspect method of providing counsel to the accused.[236] These handicaps[237] are best explored by looking at them in light of the effect they have within a particular criminal justice system.[238]

The first judicial district in Tennessee consists four counties, over 1,000 square miles, and 175,000 people.[239] Each county has a general sessions court responsible for conducting misdemeanor trials and felony preliminary hearings. Washington County, the largest and most populated, has two full-time sessions court lawyer judges and a part-time municipal lawyer judge. Unicoi County has a part-time sessions court lawyer judge and the remaining counties, Johnson and Carter, have part-time sessions court non-lawyer judges. The criminal court for each county was, until August 1988, presided over by one circuit court judge who holds terms of court in each county.[240] Each county has separate court clerks' offices and separate city and county law enforcement officers.

The district's criminal cases are prosecuted by an elected district attorney general who is assisted by six full-time assistant district attorneys, two full-time investigators and witness coordinators, and four full-time administrative assistants. The district attorney has a main office, as well as satellite offices in every county courthouse but one. The majority of the cases prosecuted

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235. "Just as we assume our medical responsibility is met when we provide poor people a hospital, no matter how shabby, undermanned and underfunded, so we pretend to do justice by providing an indigent defendant with a lawyer, no matter how inexperienced, incompetent or indifferent." Bazelon, *supra* note 60, at 4; *Uncompensated Appointments*, *supra* note 151, at 397 (discussing belief in dual system for rich and poor).

236. GUIDELINES, *supra* note 106, at 142.

237. The handicaps include (1) reliance on inexperienced counsel; (2) no means of quality control; (3) unavailability of sufficient number of lawyers to handle appointments; (4) inadequate compensation; (5) lack of training, education, and supervision; (6) inability to develop a skilled and vocal defense bar; (7) failure to have investigative and support services; and (8) inefficient use of resources. *Id.*

238. The information which follows was gathered by the author over the last few years through observation, direct experience, and conversations with judges, clerks, assistant district attorneys, defenders, and clients.

239. 1986 Annual Report: Executive Secretary, Supreme Court of Tennessee.

240. TENN. CODE ANN. § 16-2-506 (Supp. 1986) (amended 1988). *See supra* note 7. TENN. CODE ANN. § 16-2-506 (Supp. 1988) (adding a second judge).

are brought to the district attorney's office for presentation to the court following an investigation and arrest by one of seven local law enforcement agencies or the Tennessee Bureau of Investigation. All evidence gathering and testing is generally conducted by the law enforcement agency prior to turning the case over to the prosecutor or, at their direction, thereafter. Often the district attorney's office will seek assistance from a state laboratory, federal agency, or local hospital. All of these resources are available to the state for the asking.

Contrast the district's defender system. It consists technically of 160 lawyers[241] located in four counties. There are no offices, no staffs, no investigators, no witness coordinators, and generally no funding for any of these. The police have neither the time nor the inclination to assist the defenders, and state and federal agencies jealously save their services for the "good guys" or the "bad guys" with money. The defender must investigate, research, prepare, and present his client's case with no help, no resources, and often in an atmosphere of hostility and resentment due to his client's alleged wrongdoing.

In the first judicial district, defender services in the general sessions courts vary from county to county. In Unicoi County, the judge randomly appoints lawyers in cases in which he finds it necessary. Due to the limited number of available attorneys, he sometimes has to appoint an out-of-county attorney.[242] The court meets regularly two times a week but makes itself available twenty-four hours a day as necessary.[243] Defendants charged with felonies are frequently appointed counsel, but many charged with misdemeanors proceed without counsel on pleas of guilty.

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241. This is the approximate number of practicing attorneys in the four-county area. Compare this number of potential counsel to the 42 who received compensation for criminal court appointments in 1985. Figures provided by Georgia Wilson, Executive Secretary's office (July 1987).

242. Conversation with Attorney William Lawson, Member of Unicoi County Bar (July 1987). The author has been appointed twice to defend cases in this county. In one case, a Mexican farm worker was charged with assault with intent to commit murder. None of the witnesses or the defendant spoke English. The author's Spanish was lacking. The county offered to provide a police officer or a retired school teacher to interpret at trial. Due to unavailability of resources, the author eventually had to hire and pay for independent interpreters for the investigation. The charges were dismissed, but the defendant had been incarcerated for more than a month awaiting a preliminary hearing.

243. Statement of Judge R.O. Smith, Unicoi County General Sessions Court (June 1987).

The procedure in the Johnson County Sessions Court is similar to that in Unicoi County. General sessions court meets only one day a week for criminal cases, and since there is no district attorney satellite office in Johnson County, called sessions are rare. As a result, defendants can spend up to a week in jail prior to a court appearance. Out-of-town lawyers are appointed to assist with indigent cases, resulting in a hardship for both the client and counsel.[244]

Both Carter and Washington Counties (including the Johnson City Municipal Court) use a calendar court-appointed system. Attorneys sign up each year for days on which they will provide services to all indigents. To the extent possible, all indigent cases are scheduled for those days. The result, in Washington County at least, is that the attorney handles an average of fifteen cases on that day in court. Some clients have not contacted the attorney prior to their court appearance. Some cases have been set late and the attorney is unaware of the case until he arrives in court. While the courts are very indulgent in allowing continuances for good cause, the prospect of another delay for the indigent client unable to make bail is not an adequate solution.

Under the appointed systems described above, early entry of defense counsel is rare. Most of the time, counsel is appointed at the initial appearance but not notified until some time later. None of the sessions courts in the first judicial district have court reporters. Instead, the proceedings are taped on equipment, the quality of which varies greatly. Defense counsel are allowed to check out the tape recording, but no provisions are made for transcribing the proceedings. Often the tape is inaudible and counsel must rely on his notes of the proceedings. With the exception of competency testing, the sessions courts have no means of providing expert, investigative, or evidentiary services to the indigent. Expert testimony for the defense is generally unheard of.

This "queen for the day" system[245] (as it has come to be known in Washington and Carter County) and the *ad hoc* appointment

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244. The author was appointed by this court to handle a case that no local attorney would take. The trip from Washington County to Johnson County is approximately 50 miles over a winding, mountainous road. Visiting the client, interviewing witnesses, and traveling to court were difficult and generally required at least a full day.

245. This affectionate name was coined prior to October, 1986, when counsel would handle 20 cases a day for eight hours, win every case, and not be compensated. *See supra* text accompanying notes 207-32.

systems in other counties realistically involve a handful of attorneys who "make the system work."[246] Because the burden of providing legal services "falls on a small number of attorneys, the quality of representation suffers."[247]

The system also unfortunately acts as a "training ground for the seasoning of trial practitioners."[248] Often, new attorneys assume the responsibility to acquire trial practice experience. While the constant infusion of new ideas and new faces is important to the criminal justice system, individuals' lives and liberty should not be used as a practice run for fledgling lawyers simply because those individuals cannot afford to hire experienced counsel.

Following the sessions court proceedings, accused felons in the first judicial district are bound over for indictment by the grand jury. Following indictment, which may be several months away,[249] the indigent defendant appears alone before the criminal court for arraignment. He is traditionally told that he has three choices: He can "hire a lawyer, have a lawyer appointed, or be his own lawyer." If he indicates a desire to have counsel appointed, he must prepare an "affidavit of indigency" for the court. If the court finds him indigent, the defendant is generally asked who his attorney was at the sessions level. Most often, that attorney is reappointed.[250] In the smaller counties, the next court appearance, known as a "plea bargain deadline," may be months away because of the court's circuit schedule.[251]

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246. Conversation with Washington County General Sessions Judge Stewart Cannon (July 1987). Judges Cannon and Kiener share the philosophy of former California Supreme Court Chief Justice Rose Bird: "[U]ltimately flesh-and-blood lawyers, not theoretical concepts . . . give the right to counsel form and substance." Bird, *supra* note 198, at 24.

247. Conversation with Washington County General Sessions Judge John Kiener (July 1987). The judges and assistant district attorney estimate that fifteen lawyers regularly take appointed case days in the Washington County General Sessions Court. *See supra* note 240; Conversation with Assistant District Attorney Teresa Murray (July 1987).

248. Conversation with Washington County General Sessions Judge John Kiener (July 1987). Both Judge Kiener and Assistant District Attorney Murray admit that they have witnessed ineffective representations in the Sessions Court. *Id.*; Conversation with Assistant District Attorney Teresa Murray (July 1987).

249. *See supra* notes 7 & 239.

250. Some attorneys generally view their appointment as lapsing after the sessions judge's finding of probable cause until the reappointment in criminal court. While it is true that the criminal court judge must find indigency on the record prior to formal criminal court appointment, this suspension of representation by an attorney is neither justified nor appropriate. Clients have very genuine needs during the interim period, and the appointed attorney has an obligation to provide services and to continue in the investigation and preparation of the case.

251. *See supra* note 7.

Once the defendant has received appointed counsel at the trial level, his defense is hampered much the same as it was in the lower court. His attorney generally has received appointments on all the cases he handled at the lower level, which the attorney must research, investigate, prepare, and present during the term of court in addition to his "paying" cases. The attorney has no one to assist in the investigation, no resources to hire or consult experts, and no lobby to procure assistance from law enforcement or state agencies. If he is inexperienced, he often has no other attorney to consult with about the case. The indigent accused must face alone the threat to his liberty alone, assisted only by an overworked, underpaid, inexperienced attorney while his opposition is aided by many resources.

Thus, the problems in fulfilling the promise of equal justice for all are several. Too few lawyers assume the responsibility to represent the indigent accused.[252] Those who do assume the responsibility are often too young, too inexperienced, or too indifferent to represent the client effectively. Because of the court's need for "flesh-and-blood" lawyers, disqualifying attorneys from representation is rare. The volunteer attorneys often lack the time and resources to investigate the case. State funds for investigation or expert assistance are non-existent, and compensation for the attorney is at best woefully inadequate.[253] Hence, the system suffers. Delays caused by often overworked, underpaid, unassisted, and inexperienced counsel thwart the courts' efficiency[254] and beget

252. Washington County has approximately 115 attorneys. Twenty-five sought compensation for court-appointed cases last year. Of that number, two attorneys provided services in thirty-eight percent of the cases. Unicoi County has approximately twelve attorneys. Four sought compensation for court-appointed cases last year. Johnson County has approximately eight attorneys. Three sought compensation for court-appointed cases last year. Carter County has approximately twenty-four attorneys. Twelve sought compensation for court-appointed cases last year.

In 1985, the Executive Secretary's office processed 15,335 claims for court-appointed work filed by 1,402 attorneys. Fourteen thousand, one hundred seventy-three of those claims were less than the statutory maximum. Eight hundred eighty-three of the attorneys made more than six hundred dollars on appointed work that year. There are more than 11,000 attorneys in Tennessee. Of course, none of these figures can include the number of attorneys who provide appointed services and do not seek compensation.

253. The aspects of indigent defense that suffer most are the preparation and the investigation of cases. *Emperor*, *supra* note 61, at 664. Another problem with the present system is the unfettered discretion of trial judges to reduce fee requests. Some judges simply do not advocate paying an attorney to investigate the case of an "obviously guilty" defendant.

254. Bazelon, *supra* note 60. Conversations with Assistant District Attorney Teresa Murray and Washington County General Sessions Judges Cannon and Kiener (July 1987).

criticism and cynicism in victims, witnesses, and spectators. The attorneys suffer. Representation without adequate investigative and support resources insults their professionalism and breeds doubt about the fairness of the system.[255] Society suffers. A mechanistic, wealth-biased adversary system indifferently churns cases through, prompting distrust and despite. But most of all, the accused suffers. Being denied the most pervasive right of effective assistance of counsel because he is poor reduces him to nothing.[256]

III. THE SOLUTION

> The last line of defense rests with the bar. If we as lawyers waiver in our commitment to equal justice for all, we surely put at risk the Constitution itself. . . . [W]e have to stand up for the Constitutional guarantee of the right to counsel and equal protection of the law.[257]

More than twenty years ago, a commentator on Tennessee's indigent defense system candidly remarked: "[T]he State must face up to its obligation and the legal profession assume its professional responsibility"[258] to provide effective representation to indigent defendants. Five years later, another observer noted "[i]f we are not to ration justice, the irregular [Tennessee] system must give way to a uniform one."[259]

Today, years later, we in Tennessee face the same problem, magnified by the growing criminal dockets and the increase in poverty. What will it take to make the state fulfill the promise of *Gideon*? Is it not enough that our state has been faced with the problem for more than two decades and has continually postponed its responsibility to the poor? Is it not enough that our crazy-quilt system hammers out justice differently from county to county? Is it not enough that our system violates every respected standard regarding defender systems, our own state laws and state

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255. Conversation with attorney Anthony Lee (July, 1987); *Emperor*, *supra* note 61, at 682.

256. Bazelon, *supra* note 60, at 45; C. SILVERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978). "Nothing would contribute more to respect for law—and indirectly thereby to a reduction in crime—than to provide defendants with the 'effective assistance of counsel' guaranteed them by the Constitution." *Id.* at 307.

257. GIDEON UNDONE, *supra* note 59, at 11; Bird, *supra* note 198, at 48.

258. DEFENSE OF THE POOR, *supra* note 114, at 700.

259. *The Poor Man*, *supra* note 118, at 52.

constitution, and the fourteenth amendment to the United States Constitution?

Tennessee must institute a state-wide public defender system in each judicial district. The offices should be managed by district public defenders who are assisted by an ample number of assistant public defenders to afford effective representation to the indigent accused in every court in the district. Private counsel should be used in conflict situations and at other times when necessary to provide effective indigent defense. When needed, private counsel should be named by the public defender's office from a list of individuals who are not only willing but qualified to provide defense services. Appointed counsel should be paid in accordance with established guidelines throughout the state. Private counsel should have access to the resources of the public defender's office when allowing access would not create an ethical problem. Novice attorneys in the private bar should be "broken in" to the system. They should be required to "second-chair" cases with veteran public defenders prior to being given appointments. All defense counsel, private and public, should be required to participate periodically in seminars. With the continuing legal education requirement, private counsel who want to represent those whose very liberty is challenged should be willing to devote a reasonable number of hours of continuing education time each year to insure their ability to effectively represent the indigent accused.

In addition to lawyers, the public defender's office must have sufficient resources to investigate, research, prepare, and present cases. Full-time investigators should be hired as well as paralegals and administrative assistants who can assist with researching issues, filing documents, and coordinating witnesses. Sufficient funds must be provided to allow public defenders to consult with and hire experts in necessary cases and to have independent analyses done of crucial evidence. Court reporters should be provided for each court by the state. Their responsibility should be to the court, but transcripts should be provided to the defense and the prosecution upon request. If the adversary system is to test the truth, both sides must be adequately prepared for the examination.

The representation of indigent defendants on appeal should be handled by a state-wide office or division similar to that of the prosecution. The trial public defender could assist the appellate public defender to the extent necessary, but the two would be trained for different jobs. Forcing a litigator to write an appellate argument is ineffective and inefficient.

Finally, the state should be completely responsible for the financial administration of the public defender system. Shirking fiscal responsibilities and leaving them to the counties would perpetuate the unequal protection of poor defendants. Budgets should be allocated annually and should be expected to increase, just as in other departments, in order to function effectively.

Certainly the fiscal implications of such a proposal for the state are grave. But the constitutional implications of a system that sanctions disparate treatment of the poor are more grave. It is time for the state to live up to its obligations to the poor and to the United States Constitution. It is time to give meaning to the noble ideal of equal justice for all.