

FINANCIAL SCREENING IN CRIMINAL CASES— IMPRACTICAL AND IRRELEVANT

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Judge Price was irritated. In April he had given Billy and Danny Cowart a second continuance on assault and battery charges to give them time to earn money to hire a lawyer. At that time he had questioned them and found them to be able-bodied, unmarried, and not in school. There was no reason why they could not get jobs and earn money for a lawyer, and Judge Price had made it clear that they were not going to get free counsel in his court: "I will not require some lawyer to come in here and work for nothing for you when you have those two good arms (both of you) and are able to get out and work. You can dig ditches; you can carry coal, or you can do something else. . . . Next term of court . . . we will try [you] with or without a lawyer."

But here it was, the September term of court, and Billy and Danny again stood before the bench without a lawyer. Without giving the boys a chance to explain, Judge Price lashed out: "I told you that there are people (and I told you this before) who are dying for just labor in this county. And if you haven't gone out and made money and retained counsel, it is because you are either too lazy, or do not want to work. And you will get convicted or acquitted on your own. I will not appoint counsel for you." And the judge did not appoint counsel and the Cowarts were convicted.

Why was Judge Price irritated? The charges were fairly minor and Billy and Danny clearly should have been able to earn and save enough money for a modest fee in the five-month period between terms of court. After conviction they petitioned for habeas corpus and Judge Price held a hearing, found them to have been "able-bodied and capable of earning a living . . . , not indigent . . . and not entitled to Court appointed counsel," and denied the writs. On appeal, Billy and Danny won a new trial.¹ The Supreme Court of South Caro-

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1. *State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968).

lina sympathized with Judge Price's annoyance at the Cowarts' conduct but pointed out that the test is not whether the defendant *should* have been able to employ an attorney but whether he is *in fact* able to do so. Judge Price had not inquired into the defendants' present ability to retain counsel at the September term, and at the hearing on the petition for habeas corpus the defendants testified that they had scarcely worked during the April to September period and had no way of raising the \$300 fee of the attorney they had contacted. In short, the Cowarts could not at the time of trial afford an attorney and Judge Price should have appointed one.

If an identical case came before Judge Price after the appellate court's decision in *State v. Cowart*, what would his options be? Suppose it is again the April term and before the bench stand two unemployed but employable men accused of aggravated assault. The judge will have two alternatives: appoint counsel and proceed to trial or continue the case on the bluff of trying the defendants next term "with or without a lawyer." It is likely he will choose to continue the case with an accompanying lecture on the self-esteem which accompanies hard work and paying one's own way in society, unless he knows from past experience that there is little chance of these defendants being affected by homily or threat. Judge Price would agree that it is unfair that the man who believes the threat or accepts the moral of the homily will spend his own money for an attorney while recalcitrant defendants like the Cowarts ultimately receive free counsel. But what else can a judge do? An obvious answer is to be honest at the first hearing and tell the defendants that a continuance is being ordered to give them a chance to employ an attorney, but that if they are unable to do so counsel will be appointed. Then those who earn and save money and hire a lawyer will be doing so because they feel they should, not because they believe they will be tried without counsel if they do not. But this is hardly a satisfactory answer to a judge who believes that those who should be able to pay must, if possible, be made to do so.

Public support of criminal legal aid in the United States has always been theoretically conditioned on acceptance, by those who appoint counsel, of Judge Price's premise: those who can contribute to the cost of their defense must do so.² Legislatures have recently pro-

2. Four reports are extremely important to an understanding of the history of criminal legal aid in the United States: (1) POVERTY AND THE ADMINISTRATION OF

vided tools for exacting contribution from defendants, notably provisions for contribution by the defendant as a condition of appointment of counsel³ and for recoupment of defense costs after trial.⁴ If South

FEDERAL CRIMINAL JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963) [hereinafter cited as ALLEN REPORT]. This report was the product of a two-year study by a blue ribbon committee chaired by Professor Francis Allen of the University of Michigan. The committee's study of legal assistance in criminal cases in federal courts sparked the passage of the Federal Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified at 18 U.S.C. § 3006A (1970)); (2) SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 90TH CONG., 2D SESS., THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS (Comm. Print 1969) [hereinafter cited as OAKS REPORT]. Professor Dallin Oaks of the University of Chicago was commissioned by the Senate Judiciary Committee to study the operation of the Criminal Justice Act. His report served as the basis for the 1969 amendments to the Act and contains a wealth of information about the administration of the federal criminal justice system; (3) L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965) [hereinafter cited as SILVERSTEIN]. In 1962 the American Bar Foundation undertook to study the status of criminal legal aid in the United States. The study, headed by Lee Silverstein of the Foundation staff, culminated in a three-volume report in 1965; (4) AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DEFENSE SERVICES (Approved Draft, 1968) [hereinafter cited as ABA REPORT]. Drawing heavily on Silverstein's findings, the ABA Advisory Committee on Prosecution and Defense Functions, chaired by Warren Burger, promulgated standards for defense services in 1967 and the standards were approved by the ABA House of Delegates in 1968.

These four reports, which constitute the major sources of the present public position on criminal legal aid, accept the premise that counsel ought to be made available at public expense only for those who cannot afford to hire an attorney. See ABA REPORT 53-55; ALLEN REPORT 40-41; OAKS REPORT 6, 23-43; SILVERSTEIN 105, 115-16. The *Allen Report* and *ABA Report* acceptance of this premise may, however, represent only a working hypothesis that financial screening is compatible with the social need for a defense attorney. See notes 6 & 34 *infra* and accompanying text. See also NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 257 (1973): "An individual provided public representation should be required to pay any portion of the representation that he is able to pay at the time."

For a comprehensive analysis of the state of criminal legal aid, see NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973) [hereinafter cited as OTHER FACE OF JUSTICE]. This report is the product of an intensive field study in twenty randomly selected jurisdictions and a comprehensive mail survey of all 3110 counties in the United States. *Id.* at 1. The report takes no position on whether the defendant *should* be made to pay, commenting only that "the social cost of denying adequate representation to an accused may ultimately outweigh the savings which accrue from the occasional exclusion of one who could afford to obtain these services." *Id.* at 62.

3. Criminal Justice Act of 1964, § 6, 18 U.S.C. § 3006A(f) (1970, Supp. II, 1972).

4. KY. REV. STAT. § 31.050 (1972); N.J. REV. STAT. § 2A:158A-17 (1971); ORE. REV. STAT. § 161.665 (1971), construed in *State v. Fuller*, — Ore. —, 504 P.2d 1393 (1973).

Carolina were to provide Judge Price with these tools he might employ them against future defendants who rejected the value of working to pay a lawyer's fee. He might, however, find the tools to be ineffective and impractical, as have other courts.⁵ What Judge Price and a decreasing number of judges who share his priorities believe is that it is more important that the defendant pay his own way than that he be represented at trial. Increasingly, however, the judiciary (appellate judges, some trial judges, and those who purport to speak for or on behalf of the judiciary) believe that it is far more important that the defendant have an attorney at trial; it has become axiomatic that the interests of society and the criminal justice system require that in all but the most routine cases the defendant be represented.⁶ What

5. Contribution provisions have generally not been used because of the administrative burden on the courts. See text accompanying note 25 *infra*. Recoupment provisions have been generally criticized as ineffective and, if made a condition of probation, harsh and perhaps unconstitutional. See 56 MARQ. L. REV. 551 (1973) (criticizing *State v. Foust*, 14 N.C. App. 382, 185 S.E.2d 718 (1972), which upheld reimbursement of defense costs as a condition of probation). The California Supreme Court held the reimbursement provision of that state's statute to be an unconstitutional impediment to counsel. *In re Allen*, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969). See also Note, *Eligibility and Reimbursement under the New Jersey Public Defender Statute*, 7 HARV. J. LEGIS. 449, 459-66 (1970), for a criticism of the lien and reimbursement provisions of the New Jersey statute. On the practical side, as the commentator points out, *id.* at 464, in the first two years of operation the revenue from reimbursement was less than 1% of the budget.

6. The Supreme Court's concern that the defendant be represented is evidenced in many cases, most notably *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Powell v. Alabama*, 287 U.S. 45 (1932). The Court's concern for the defendant is nowhere better expressed than in Justice Sutherland's opinion for the Court in *Powell*:

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 have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 69. Of late, expressions of the need for defense counsel stress the social need for representation. *E.g.*, ALLEN REPORT 10:

In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth- and seventeenth-century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community. The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interests in the crucial areas

has gone largely unnoticed and unarticulated is the conflict between this overriding consideration and the historic premise of legal aid, reflected in almost all legal assistance statutes, that an attorney will be appointed only for those defendants who cannot afford their own.⁷ If it is in the interest of society that the defendant have an attorney, then society should not refuse to appoint counsel because the defendant can afford to hire a lawyer but has not done so. If the conflict has largely gone unnoticed, however, the actions of both trial and appellate courts reveal that the conflict does exist and that it is almost always resolved in favor of representation.

The first point of conflict is at the defendant's initial court appearance for arraignment or preliminary hearing. The court will typically have many cases to hear and will be concerned with expediting a

of penal regulation. As such, it makes essential and invaluable contributions to the maintenance of the free society.

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions.

The *ABA Report* states that the fundamental premise of the standards relating to defense services "is that representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." ABA REPORT 3. Finally, Chief Justice Burger, commenting on the standards in 1970, remarked:

Another thing emerged very early and that was that a system of criminal justice must be regarded much as we would regard a tripod or three-legged stool. It must have three parts, and they must all be strong. The one obvious part, of course, is the judge. No one has ever questioned the need for a prosecutor. But until the last twenty or twenty-five years, there was some doubt about whether this third leg [defense counsel] was essential. We concluded very quickly that that third leg in this context was as essential as the third leg of a stool. We have not quite said that it ought to be *jurisdictional* that you have three parts to this enterprise but we have come very, very close to it.

Proceedings of the Thirty-First Annual Judicial Conference of the District of Columbia Circuit, 51 F.R.D. 25, 40 (1970) (emphasis added) [hereinafter cited as *31st D.C. Judicial Conference*].

7. There is evidence that the ABA Advisory Committee on Prosecution and Defense Functions saw the conflict. Herman Pollock of the Philadelphia Defender Association and a member of the Committee, has remarked:

The question to which the committee was not ready to address itself is whether the obligation of Government is fully met if free defense services are not made available to all who wish to have them without regard to financial considerations. Implicit in this concept is the recognition that financial status is indeed an irrelevancy and that society benefits from a system of criminal justice in which defense, no less than prosecution, is deemed to be a public obligation available to all.

31st D.C. Judicial Conference 44-45.

crowded docket. If the defendant does not have an attorney, it serves the system to appoint one (often an assistant public defender is present in the courtroom) for the limited purpose of representation at the hearing. An inquiry into the defendant's financial resources would not only delay the immediate proceedings but might result in a continuance of the case. Routine misdemeanor and juvenile cases are likewise expedited by appointment of the public defender without inquiry into ability to pay. These cases may often be heard immediately, and a continuance solely to force the defendant to hire his own attorney seems ill-advised if for no other reason than the inconvenience to the witnesses who have been called to testify.⁸ What evidence there is suggests strongly that in routine misdemeanors and juvenile cases, and in preliminary hearings in felony cases, the courts, which need to expedite cases to keep the system working, do not attempt to screen out defendants who could hire a lawyer.⁹

The second point of conflict is in the nature of the inquiry into ability to pay if one is made. The premise that those who can afford to contribute must contribute contemplates much more than the simple question, "Do you have funds with which to employ an attorney?" Detailed questioning and select investigation of assets and liabilities, resources, and expenditures is necessary before an informed decision can be made whether the defendant should pay for all or part of his

8. Dallin Oaks has described the process in Boys' Court in Chicago as follows: The branches to which the municipal defenders were assigned are relatively informal high volume operations. Both the prosecution and the defense are conducted with little or no preparatory work outside the courtroom. Many of the cases fit into familiar factual patterns, such as the teenagers one frequently sees brought into Boys Court for riding in a "borrowed" automobile. The repetitive factual situations in many of the cases and the high volume invite mass production methods by the prosecution and the defense. The defenders typically waited in an anteroom to the court, or at the bar, until a case was called in which their service was needed. Except in an unusual case, the defender proceeded to trial on the spot, after only a moment or two of hurried conversation with the defendant. Although the defenders did not want cases that might deprive a practicing lawyer of a fee, representation was frequently undertaken without either formal judicial inquiry into indigency (the absence of retained counsel apparently being taken as the equivalent of indigence) or formal court appointment.

D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 123-24 (1968).

9. In a 1961 California field study it was concluded that to expedite the docket, judges in metropolitan areas may appoint the public defender over the accused's protests that he is able to retain counsel or that he has retained counsel. Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 *STAN. L. REV.* 522, 546 (1961).

defense. It is possible to generalize about the inquiry which should be made if there is to be a good faith attempt to screen out those defendants who can afford an attorney. The concept of "affording" involves three variables: resources, the cost of the desired item, and the cost of what must be purchased before the desired item is purchased. When the desired item is an attorney for one's defense in a criminal trial, it might be concluded that there is no expenditure more important—that is, that there is nothing which must be purchased first. A humane system will not, however, require an accused to deprive his family of the necessities of life to hire a lawyer, and recent verbalizations of the test of eligibility take into account personal and family needs.¹⁰ The inquiry should quantify *resources* and *necessities* to arrive at available resources, which can then be compared with the *cost* of an attorney.

Is it practical for a court to make such an inquiry?¹¹ To arrive at a sum representing resources, there must be a calculation not only of cash but of convertible real and personal property, valued after subtracting debts secured by liens, at the estimated price the goods would bring at a forced sale. While the court cannot take into account prior earnings in estimating resources,¹² it would be proper to include prospective earnings to the date of trial. In calculating what must be sub-

10. The wording differs, but the meaning is identical in Oaks' test and the ABA test: "A defendant is 'financially unable to obtain counsel' . . . when the value of his income expected prior to the anticipated date of trial [is] insufficient, after he has provided himself and his dependents with the necessities of life, to permit him to retain a qualified lawyer." OAKS REPORT 6; "Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family." ABA REPORT 53.

11. The factors which can be considered are listed in *Morgan v. Rhay*, 78 Wash. 2d 116, 119, 470 P.2d 180, 182-83 (1970):

- a) seriousness of the charge
- b) prevailing and applicable bar association fee schedules
- c) availability and convertibility of any personal or real property owned
- d) outstanding debts and liabilities
- e) accused's past and present history
- f) earning capacity
- g) living expenses
- h) credit standing in the community
- i) family and dependents
- j) any other circumstances which may impair or enhance his ability to hire a lawyer

For an excellent analysis of these factors in the context of the Louisiana legal assistance statute, see Comment, *Balance Sheet of Appointed Counsel in Louisiana Criminal Cases*, 34 LA. L. REV. 88 (1973).

12. *People v. Griffin*, 22 Mich. App. 101, 177 N.W.2d 213 (1970).

tracted from resources as representing necessities of the defendant and his family, the court should set apart to the defendant, as a minimum, real or personal property declared by statute to be "necessities of life" and exempt from execution.¹³ The court should subtract from prospective earnings what the family needs to subsist—as a minimum, the percentage of earnings declared by federal or state statute to be exempt from execution. After subtracting necessities from resources, the court should estimate the cost of the legal services that the defendant will require.¹⁴ If the costs exceed available resources, the defendant "qualifies for legal aid;" that is, the state must assist him in paying for his costs of counsel. The judge, or the court functionary making the inquiry, should not only obtain an affidavit from the defendant but should selectively check, or cause to be checked, the accuracy of the information elicited.¹⁵

Does the process described appear workable? If so, the description has successfully concealed the variables which make the inquiry, if conscientious, at least as exhaustive as the examination for approval of a wage earner's plan under chapter 13 of the Bankruptcy Act.¹⁶ In evaluating resources and necessities, what is to be done about installment debts? What is to be done with overdue bills, and does it matter that the creditor is not pressing for payment or that the expenditure was originally for a luxury? In evaluating prospective earn-

13. In *Arroya v. Baker*, 427 F.2d 73 (10th Cir. 1970), the Tenth Circuit held unconstitutional, under *Gideon v. Wainwright*, 372 U.S. 335 (1963), a New Mexico state judge's requirement that a defendant be a pauper—a man without any money or means—in order to be eligible for appointment of counsel. In *James v. Strange*, 407 U.S. 128 (1972), the Supreme Court held a Kansas statute providing for recoupment of defense costs unconstitutional, under the equal protection clause, because the statute did not afford the defendant the same exemptions he would have had in an ordinary civil action. Cf. *Gaston v. State*, 106 So. 2d 622, 623-24 (Fla. App. 1958). In the analogous matter of providing the costs of appeal, the Florida court held that under a test of "insolvency" the defendant was not required to "subject the homestead or the reasonable furnishings of the family home to sale or pledge to provide the costs of appeal." *Id.* at 624.

14. This is a particularly thorny problem. *Bolds v. Bennett*, 159 N.W.2d 425 (Iowa 1968), indicates that a court should be guided by the prospective fee of the attorney the defendant would choose but, as pointed out in *State v. Sands*, 2 Ore. App. 575, 580, 469 P.2d 795, 798 (1970), this would permit any defendant to "postpone the day of reckoning by seeking counsel who would require more cash in advance than the client had in the bank." Oaks concluded that eligibility must be tied to average costs and standard billing practices in the district. OAKS REPORT 25.

15. ABA REPORT 57-58; OAKS REPORT 39-43.

16. 11 U.S.C. § 1001 *et seq.* (1970).

ings, is the court to assume the defendant will not be laid off? Few defendants will hold jobs in which there is job security even for those who are not facing criminal charges. How is the court to evaluate the prospective earnings of one who is unemployed at the time of inquiry? Should the capacity to borrow be assessed as a resource and, if so, should the court require a defendant to encumber himself beyond a future trial date?¹⁷ In forecasting the cost of the attorney's fee, is the court to assume that the case will be plea-bargained or tried? What is the court to assume about investigation and preparation, and about the billing practices of the as-yet-unnamed attorney of a defendant's choice?

If a judge or court administrator were to decide to devote the time necessary for a detailed inquiry and spot investigation, and if the treatment of the variables above could be standardized to produce consistent results, what would those results be? The pool of interviewees would be those accused of felonies or serious misdemeanors who had not retained an attorney prior to the interview and who said that they could not afford to hire an attorney. Of this group it is submitted that a high percentage—at least 60%—would have no available resources and would thus qualify for representation at the expense of the state. Most of those remaining—at least 30% of the original group—would have some available resources but not enough to pay the cost of counsel. These defendants would qualify for state help but would be required to contribute to their defense. The remaining group—10% at the most—would be denied legal assistance and told that they must employ their own attorneys.¹⁸

17. Credit standing was specifically listed in *Morgan v. Rhay*, 78 Wash. 2d 116, 119, 470 P.2d 180, 182-83 (1970), as a factor to be taken into account. See note 11 *supra*.

18. Informed estimates of the percentage of criminal defendants in need of assistance have been around 50% to 60%. *E.g.*, SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 38-39 (1959) (60%); OTHER FACE OF JUSTICE 71 (felons—47%; misdemeanants—65%); SILVERSTEIN 10 (66%); *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 397 (1966) (at least 50%) [hereinafter cited as *Legal Manpower Needs*].

These estimates, however, should be updated to take into account more liberal concepts of need, particularly the effect of excluding property declared to be exempt from execution. The Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.* (1970, Supp. II, 1972), exempts three-fourths of a wage earner's wages from garnishment. *Id.* § 1673. Many states have amended their garnishment statutes to provide protection substantially similar to that provided in the federal act. See *id.* § 1675. The clear implication of *James v. Strange*, 407 U.S. 128 (1972), is that the defendant cannot be required to use exempt earnings to defend himself.

The court's job would not, however, be over after the initial qualification.¹⁹ Any order of eligibility or noneligibility would be subject to modification on a showing of changed conditions. The court would have to inquire periodically of those who had been denied counsel to attempt to persuade or coerce them to hire a lawyer before the trial date. The court would have to administer the contributions from those adjudged to be partially eligible, dunning those who had missed installments.

Courts simply do not do these things. In his study for the American Bar Association completed in 1965, Lee Silverstein found that

The estimates do not reflect the high cost of defense counsel. What competent criminal lawyers charge is rarely studied; what studies there are indicate that fees in felony cases are beyond the means of most people. For example, the fees for defending a Dyer Act charge, as reported in the Oaks study, varied from \$1000 to \$5000 in New York and Chicago to about \$250 in western Wisconsin. OAKS REPORT 25. The Michigan State Bar Schedule was used in the 1969 Report to the National Defender Conference to illustrate that criminal defense fees are beyond the means of the middle class. The minimum fee for a felony was \$750, or \$300 per day for court time plus \$30 per hour for consultation and preparation. NATIONAL DEFENDER PROJECT OF THE NATIONAL LEGAL AID AND DEFENDER ASS'N, REPORT TO THE NATIONAL DEFENDER CONFERENCE 48 (1969) [hereinafter cited as REPORT TO THE NATIONAL DEFENDER CONFERENCE].

The latest statistics of the Director of the Administrative Office of United States Courts show that for fiscal 1972 there were 47,043 original criminal filings in the district courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 133 (1972) (Table 29). The same report indicates that in fiscal 1972 there were 5496 cases assigned to federal public defenders, *id.* at 486, 1550 cases assigned to community defender organizations, *id.* at 487, and 24,812 cases assigned to private attorneys. *Id.* at 489-93 (Table 83, subtracting from the total of adult and juvenile defendants the number of appointments in the superior and juvenile courts of the District of Columbia). There were thus 31,858 appointments in the district courts, representing 67% of original filings. The economic profile of the federal defendant is assumed to be substantially higher than that of the state defendant because of the selective nature of federal criminal jurisdiction. The *Allen Report* found in 1964 that one-third of federal defendants required assistance, while 60% of state defendants were estimated to be "indigent." ALLEN REPORT 16. The increase in the percentage of federal defendants receiving appointments from one-third in 1964 to two-thirds in 1972 illustrates the effect of a liberal standard and liberal administration on the concept of need and provides a basis on which to assert that if similar concepts were applied to state systems over 90% of defendants would be found to require assistance. The 1973 estimate of the NLADA that 47% of felony defendants and 65% of misdemeanor defendants require assistance is based on the returns from judges, returns which reflect, to some extent, conservative standards for the granting of counsel. See OTHER FACE OF JUSTICE 60-61.

19. The administrative burdens of the Criminal Justice Act of 1964 are described in OAKS REPORT 159-68. In districts with large caseloads the administrative burden of simply checking forms and attorney vouchers is substantial.

many judges resorted to litmus tests for eligibility, the most prevalent of these tests being to deny counsel if the defendant has posted bond.²⁰ Although most judges claimed they took into account many factors, the overall impression from Silverstein's study is of a lack of system and standards and a prevalence of arbitrary decisions.²¹ In a 1973 study of the National Legal Aid and Defender Association it was found that over one-half of reporting judges still use the defendant's ability to post bond as a precluding factor in at least some cases, and that the judges varied greatly in their assessment of the importance to be attributed to selected factors in the questionnaire.²² Other studies suggest, however, that, perhaps because of the lack of system and standards, courts tend to err on the side of appointing counsel.²³ Judges might thus resort to the practical test of telling the defendant he is not qualified in order to determine if he is able to hire a lawyer, but ultimately appointing a lawyer if the defendant does not retain counsel.²⁴ If it is not practical to conduct the kind of inquiry and

20. SILVERSTEIN 108-09. Refusing to appoint counsel because the defendant is out on bond has without exception been damned by appellate courts confronted with the issue. *Williams v. Superior Court*, 226 Cal. App. 2d 666, 38 Cal. Rptr. 291 (1964); *People v. Eggers*, 27 Ill. 2d 85, 188 N.E.2d 30 (1963); *Sizemore v. Commonwealth*, 450 S.W.2d 497 (Ky. 1970); see ABA REPORT 53-55; SILVERSTEIN 116.

21. SILVERSTEIN 105-09. The absence of standards has been recently noted in an ABA monograph: "The absence of uniform standards, particularly in determining eligibility and in selecting counsel, means there is a substantial diversity in the quality, quantity, and adequacy of service provided." B. CURRAN, *LEGAL SERVICES FOR SPECIAL GROUPS* 3 (1972).

22. OTHER FACE OF JUSTICE 60-61.

23. In a 1962 study of appointments in the federal courts it was found that in more than three-fourths of the districts there was no investigation of indigency beyond perfunctory questioning by the judge. Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 585 (1963). Writing on the Criminal Justice Act in 1967, Judge William Timbers of the District of Connecticut stated that "invariably, in every case of an accused without retained counsel, at least at the onset, discretion is exercised liberally in favor of the accused by determining that he is financially unable to obtain counsel." Timbers, *Judicial Perspectives on the Operation of the Criminal Justice Act of 1964*, 42 N.Y.U.L. REV. 55, 56 (1967). That counsel is appointed approximately 67% of the time in federal courts, see note 18 *supra*, strongly suggests that the federal courts are liberal in appointing counsel.

In a 1972 field study in Alabama, it was found that the basic standard for determining indigency was for the judge to accept the defendant's word on the matter. Only 3% of the entire sample of judges, attorneys, and prosecutors polled responded that investigations were ever conducted, and only 9% of the sample responded that judges even questioned defendants on their ability to pay. Note, *The Echoes of Gideon and Reverberations of Argersinger: Legal Representation of Indigent Criminal Defendants in Alabama*, 25 ALA. L. REV. 229, 253 (1972).

24. Oaks noted that a few United States Commissioners apply this practical test

investigation which would, with a high degree of accuracy, screen out the non-needy—and it is submitted it is not practical—courts will continue to make uninformed decisions, ultimately resolving doubts in favor of appointment.

A third point of conflict, suggested by the discussion above, is the use (or nonuse) of the provisions in legal assistance statutes for the defendant to contribute to the cost of his defense. It is assumed that there are many defendants who could contribute something to the cost of their defense, and most of the recently enacted legal assistance statutes contain a provision for contribution.²⁵ These provisions simply have not been utilized, possibly because no one wants to bother with collecting installments from the defendant. Propriety seems to require that this be done by the court rather than the appointed attorney or defender, and the courts have not been willing to undertake the task. The Federal Criminal Justice Act has contained a contribution provision since 1964.²⁶ The reports of the Administrator of Courts show

by denying the defendant's application but leaving the way open for the defendant to reapply if he cannot retain an attorney. OAKS REPORT 32.

25. Criminal Justice Act of 1964, §§ 4, 6, 18 U.S.C. §§ 3006A(d), (e) (1970). For typical state statutes, see note 4 *supra*.

26. See note 24 *supra*. The legislative history of the Act indicates that the contribution provision was to be utilized. Attorney General Robert Kennedy's letter accompanying the bill concluded:

Finally, the proposal limits the benefits of the statute to persons financially unable to obtain an adequate defense. The term "indigency" is avoided because of its implication that only an accused who is destitute may need appointed counsel or services. Experience demonstrates that many persons have resources sufficient to defray part but not all of the expenses of their defense. In order that representation may be furnished to the extent of each defendant's need, we have proposed that partial payments may be required and that the statute shall become operative at whatever stage of the proceeding the accused is found financially unable to obtain counsel or services necessary to an adequate defense. At the same time the requirement of an "appropriate inquiry" to determine the defendant's financial need is intended to assure that the court, by hearing, affidavit or other suitable investigation, will scrutinize all applications for representation.

Letter from Robert F. Kennedy to President John F. Kennedy, March 6, 1963, *appended to* H.R. REP. No. 864, 88th Cong., 2d Sess. (1964).

The failure of the federal courts to use the contribution provision has been criticized by Professor Oaks on several occasions. Commenting in 1969 on the administration of the Act, he indicated that "there is almost no evidence that courts and commissioners are making the Act work as intended for defendants who are 'marginally eligible'—defendants who can pay some but not all the costs of their defense." Oaks, *Improving the Criminal Justice Act*, 55 A.B.A.J. 217, 219 (1969). In his report Oaks classified the problem of the partially eligible defendant as a matter of paramount importance because of the necessity for obtaining the wholehearted cooperation of the bar. OAKS REPORT 7.

that the greatest amount received from federal defendants in a fiscal year was \$14,636 in 1967; this compares to an outlay of almost \$2,300,000 in the same year to appointed counsel.²⁷ Some districts have *never* used the contribution provision.²⁸ Few reports are available on the use of state contribution provisions, but it is likely that even less use will be made of such provisions at the state level, both because of the lower economic status of state defendants and the heavier criminal caseloads of the judges.²⁹ Also, many states employ basically a defender system in which it is difficult to calculate the cost of defending any one person for the purpose of assessing that person's fair contribution to his defense.

27. The *Annual Reports* of the Director of the Administrative Office of United States Courts for 1970 and 1971 contain data on reimbursements by defendants for fiscal 1970 and 1971. In addition, the 1970 *Annual Report* contains reimbursement data for fiscal 1966, 1967, 1968, and 1969. The 1972 *Annual Report*, which is the latest report available, contains no reimbursement data. The data for the period 1966-1971 in the district courts are:

<u>Fiscal Year</u>	<u>Disbursements to Attorneys</u>	<u>Reimbursement from Defendants</u>
1966	\$1,872,740	\$14,427 ^b
1967	\$2,365,482	\$14,636 ^c
1968	\$2,873,077	\$13,094 ^d
1969	\$3,145,288	\$ 8,199 ^e
1970	\$3,817,249	\$10,738 ^f
1971 ^a	\$2,011,748	\$ 3,376 ^g

a. As of June 30, 1971.

b. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 371 (1970) [hereinafter cited as 1970 ANNUAL REPORT].

c. *Id.* at 367.

d. *Id.* at 363.

e. *Id.* at 359.

f. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 436 (1971) [hereinafter cited as 1971 ANNUAL REPORT].

g. *Id.* at 441.

28. In the Eighth Circuit, for example, the tables show no reimbursements received in the Eastern District of Missouri, Western District of Arkansas, Northern District of Iowa, or District of South Dakota in the fiscal years 1966 to 1971. 1970 ANNUAL REPORT 358, 362, 366, 370; 1971 ANNUAL REPORT 434, 440.

The data in footnotes 26 & 27 *supra* is somewhat misleading, as money paid directly to attorneys appointed under the Criminal Justice Act of 1964 is not reflected in the Administrator's reports of reimbursements. This information is not available and it is not known in what districts money was paid directly to counsel. The total contributed by defendants in this fashion is assumed to be relatively small, certainly not enough to detract from Oaks' assertion that little use is being made of the contribution provision of the Act. See note 24 *supra*.

29. Only 8% of the over 2000 judges who responded to the 1973 NLADA questionnaire reported that legal aid in criminal cases was anything but an all or nothing proposition. OTHER FACE OF JUSTICE 62, 75.

The fourth point of conflict is the judge's appointment of counsel at the time of trial for a defendant who has been judged ineligible for appointed counsel but has not obtained his own attorney. The judge is commanded by the statute, and the social ethic behind the statute, not to appoint counsel. But the judge must try the case and he does not want to try the man without counsel. He cannot hold the defendant in contempt or revoke his bond.³⁰ The only way he can punish the defendant for his failure to do what he should have done is to try him without an attorney. But this is an unacceptable solution for several reasons. First is the judge's fear of disruption and, short of that, dislike for a proceeding which does not conform to the settled modes of adversary proceedings. Neither judge nor prosecutor likes to be put in the position of protecting a defendant who is ignorant of the rules and strategies of trial practice. Secondly, there may be genuine concern that an injustice will be done because the layman lacks the ability to present his proof properly or because the jury will react adversely to the defendant's extemporaneous statements. Thirdly, the judge will be reluctant to try a man without counsel for fear that, in so doing, he will be providing the defendant with colorable grounds for collateral attack on any conviction obtained. Finally, a judge who has all or part of the responsibility for the decision—either the sentence alone or the verdict and sentence—will recoil at the thought of sending someone to the penitentiary who has not had the benefit of counsel. He may then overreact and give a sentence which is lighter than the elicited facts warrant.³¹ For these reasons courts

30. Silverstein found manipulation of bail to assure representation. In Memphis and Philadelphia if the defendant did not employ an attorney his bond was revoked and the defender appointed. From a city in Minnesota it was reported that one of the judges deliberately set bond so high that the defendant would not be able to obtain a release. In a rural county in Oregon the judge would not permit anyone to be bonded who did not have a lawyer! SILVERSTEIN 108.

31. For a colorful exposition of one trial judge's antipathy toward a trial with an unrepresented defendant, see Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245, 247 (1964):

Piero Calamandrei recites that he once saw a boy pull off the antennae of a black beetle which was then placed at the edge of a road. Deprived of his exploratory organs, the mutilated insect swayed from side to side, turned in circles and became overturned by blades of grass. "This picture," said Calamandrei, "is recalled to me whenever I think what the judicial process would become if, as some people suggest, the lawyers, those sensitive antennae of justice, were eliminated." The author of this statement might easily have used for his illustration the lawyerless, pointless, hodgepodge trial of the Knave of Hearts for the larceny of tarts, but he would, perhaps, have found a more poignant answer to his implied concern had he been present at an

are increasingly reluctant to proceed to trial with the defendant unrepresented.³²

Is it possible to reconcile appointment of counsel at the time of trial with an earlier denial of counsel on the basis of the defendant's means? Many lawyers and judges apparently feel that the defendant has a duty to society to hire his own lawyer, which justifies an initial denial of counsel on the bluff that the defendant will "be tried next term of court with or without a lawyer."³³ They would accept the proposition that the defense lawyer is a necessary ingredient of the criminal justice system but would say that the defendant is obligated to defray, if possible, the cost to society of his defense. It is a premise of our accusatory system, however, that the defendant owes no duty to society to cooperate in his own prosecution beyond giving nontesti-

American trial of a self-represented defendant charged with crime.

Laub likens the trial judge who lacks the ability to control the trial because of the outbursts of a *pro se* defendant to "a corpse at a funeral, a necessary item to make the affair a success but unable to fashion the proceedings to his liking." *Id.* at 248. "[M]any a trial judge supplements his crier's opening prayer with a muttered supplication of his own, '. . . and, please, God, let there be no unrepresented defendants in court today.'" *Id.* at 246.

32. In a series of recent cases the California courts have forced defendants who wished to proceed *pro se* to accept the services of the public defender or appointed counsel. *People v. Rhinehart*, 9 Cal. 3d 139, 507 P.2d 642, 107 Cal. Rptr. 34 (1973); *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), *cert. denied*, 410 U.S. 944 (1973); *Magee v. Superior Court*, 34 Cal. App. 3d 201, 109 Cal. Rptr. 758 (1973). *See generally* Note, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U.L.Q. 679. The California electorate voiced its distaste for *pro se* defenses by amending the California constitution to permit the legislature to require the defendant to be represented. CAL. CONST. art. 1, § 13. The legislature in the meantime had passed a bill, to become effective with the effective date of the constitutional amendment, requiring counsel in all capital cases. CAL. PENAL CODE § 686.2 (Supp. 1973). The legislative history is capsulized in *People v. Sharp*, *supra* at 460, 499 P.2d at 499, 103 Cal. Rptr. at 243: "The Legislature also expressly found that 'persons representing themselves cause unnecessary delays in the trials of charges against them; that trials are extended by such persons representing themselves; and that orderly trial procedures are disrupted.'"

The NLADA report expressed the societal interest in an orderly trial in this way: "Counsel for the accused is essential to maintaining the integrity of the judicial process, avoiding delay and preserving orderly procedures. The fundamental interest which the public has in maintaining the orderly administration of criminal justice may thus compel society to insure its preservation." OTHER FACE OF JUSTICE 62.

33. This theme runs throughout Oaks' report, in which those defendants of means who seek appointed counsel are referred to as "abusers" and "cheaters." OAKS REPORT 33-43. The quotes appearing in *id.* at 34 and SILVERSTEIN 109-10 are from a sampling of lawyers and judges who are morally affronted by the defendant who does not want to spend his own money for a lawyer.

monial evidence³⁴ and being orderly while in the courtroom.³⁵ Furthermore, it would be anomalous to say that a defendant owes to society the duty of defraying defense costs when society will not reimburse him for these costs if he is found innocent.

It is possible to conclude that there is no social need for representation until the time of trial. On this theory it would not be inconsistent to deny counsel at the preliminary stages or on pleas of guilty, although this rationale, if sound, *would* require judges to tell defendants that counsel would be appointed for them for trial. The rationale *is* sound, however, only if the social need for representation is narrowly defined. The broader and more accepted view of the social need for representation is that a free society requires that the accused have an effective means to challenge the prosecution at every critical stage of the proceedings.³⁶ Ours is an adversary system and if the defendant is not represented, erroneous decisions may occur for which society as a whole must share the blame. The judge, of course, assumes the immediate responsibility that the decision be fair, and he will usually be reluctant to accept a guilty plea from an unrepresented defendant. Courts routinely appoint counsel for the purpose of advising a man concerning a contemplated plea of guilty, without regard to his resources.³⁷ To require the defendant to hire an attorney would delay

34. *Schmerber v. California*, 384 U.S. 757, 760-65 (1966), sets out the basic rationale of the Court's position that to require the defendant to participate in blood tests, voicegraphs, lineups, and the like does not violate the self-incrimination clause of the fifth amendment.

35. *Illinois v. Allen*, 397 U.S. 337 (1970).

36. This concept is well expressed in the *Allen Report* in an excerpt quoted in note 6 *supra*. See also ALLEN REPORT 40: "[S]olution of these problems is not essentially a charitable enterprise undertaken to attain welfare objectives. On the contrary, these problems involve fundamental issues of justice to the individual accused and the larger public interests involved in the proper and vigorous operation of the adversary system."

37. OAKS REPORT 82. To expedite the proceedings the court may appoint a lawyer to advise the defendant even if the defendant says that he wants to plead guilty and does not need a lawyer. There is a strong presumption against waiver of constitutional rights and the Supreme Court has set out standards for waiver which should deter trial judges from permitting an unrepresented defendant to plead guilty. In *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1947), the Court held that a valid waiver of the right to counsel on a guilty plea requires that the defendant must understand the "charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." If reviewed, the record must affirmatively show this understanding. *Boykin v. Alabama*, 395 U.S. 238, 242 (1968).

the disposition of the case and result in a very small fee to the retained attorney. It is in the best interests of the system to appoint counsel for the purpose of advising the defendant on his plea; the case can be expedited while protecting society's interest that the defendant's plea of guilty come after a lawyer's evaluation and advice.

Both the actions of trial courts and the decisions of appellate courts support the generalization that there is an overriding social need for the defendant to be represented at all critical stages of the proceeding. The actions of trial courts in routinely appointing counsel at critical stages have been noted.³⁸ Few appellate courts have flatly stated that the defendant must be represented, but appellate courts are prone to reverse in cases in which there was no representation and, in so doing, set standards for the denial of counsel which as a practical matter trial courts cannot meet.³⁹ It then becomes obvious to the trial courts of the jurisdiction that the appellate court does not want a defendant tried without counsel.⁴⁰ This reinforces the natural inclination of the trial judge to appoint counsel and further undermines the assumption that counsel are appointed only for "indigents."

Criminal defense work is now largely socialized, and the practical

38. See notes 8 & 9 *supra* and accompanying text.

39. The appellate courts reverse where there is a summary proceeding and, in so doing, require an in-depth inquiry in which doubtful questions are resolved in favor of the applicant—the kind of inquiry this Article contends to be inherently impractical. In *Wood v. United States*, 389 U.S. 20 (1967), the Court reversed per curiam a conviction where the trial court had denied appointment under the Criminal Justice Act of 1964 after questioning the petitioner on his affidavit. The Court held that the record did not convincingly show an adequate inquiry into the defendant's financial ability to retain counsel. In *State v. Owen*, 97 Ariz. 250, 399 P.2d 660 (1965), the court held that the trial judge could not elect to disbelieve the defendant's affidavit and sworn testimony in the absence of evidence to the contrary. In *People v. Gillespie*, 41 Mich. App. 748, 201 N.W.2d 104 (1972), the court reversed a conviction and directed that counsel be appointed for a defendant who had been making \$7000 per year but was on sick leave and drawing only \$80 per week at the time of the hearing. The record showed the defendant to be married without children and in the process of obtaining a divorce. He was free on a \$1500 bond. The appellate court held that the record was ambiguous and that ambiguities had to be resolved in favor of the defendant. Rather than remand for a hearing to resolve the ambiguities, however, the court ordered the trial court to appoint counsel. One judge dissented on this point. Other cases in which an appellate court has reversed for the failure of the trial court to hold a comprehensive inquiry are *United States v. Cohen*, 419 F.2d 1124 (8th Cir. 1969), and *State v. Harris*, 5 Conn. Cir. 313, 250 A.2d 719 (1968).

40. In *People v. Chism*, 17 Mich. App. 196, 169 N.W.2d 192 (1969), the appellate court flatly held that one charged with murder who asked for the assistance of counsel could not be forced to trial *in propria persona*.

operation of our criminal justice system would hardly be altered if it were acknowledged that the state will provide an attorney for anyone who wanted one. The total criminal caseload would be the same. The percentage of cases defended at public expense would increase somewhat, but costs should not increase accordingly, because it could be expected that the admission that criminal defense work had become socialized would result in more defender offices and fewer appointed counsel systems. Defender offices are more efficient than appointive systems in all but the most sparsely populated parts of the country.⁴¹ The admission that the defender was available to everyone would injure the private practitioner somewhat, but not as much as might be expected. Few private attorneys derive a substantial part of their income from criminal law,⁴² and of those who do it is fair to say there are two types: a highly skilled elite and a group of hangers-on more skilled in extorting a fee from their clients than in anything else.⁴³ The elite, because of skill, reputation, and personal attention to their clients, will always be retained by those who can afford them.⁴⁴ The hangers-on would be injured, but it is widely assumed that a defendant in the hands of one of these lawyers not only is paying for his representation but also is receiving counsel of a substantially lower quality than is afforded by the public defender's office. Private attorneys who take criminal cases rarely might suffer some loss of income, although it can

41. Silverstein postulated that the defender system becomes more economical at a population level of 400,000. SILVERSTEIN 63. The figure should be much lower today because of the extension of the right to counsel to misdemeanants. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The evidence is that defender systems are more economical because of specialization and the elimination of waiting-time duplication. *Legal Manpower Needs* 406-07. A North Carolina survey showed the per-case cost of assigned counsel to be roughly twice that of the public defender. 49 N.C.L. REV. 705, 709 (1971).

An attractive feature of a defender system is the availability of the defender at the early stages of a case. OAKS REPORT 134. The sooner counsel is appointed, the greater the possibility that an appropriate case can be diverted out of the criminal system. REPORT TO THE NATIONAL DEFENDER CONFERENCE 23.

42. In 1966 it was estimated that only between 2000 and 5000 lawyers of the nation's 300,000 lawyers served more than occasionally as retained defense counsel. *Legal Manpower Needs* 394.

43. ABA REPORT 25; REPORT TO THE NATIONAL DEFENDER CONFERENCE 33.

44. It is assumed that a person of means would pay to be represented by a private attorney of his choice rather than be represented by a competent but impersonal defender. Oaks suggests that a highly successful defender organization could develop a reputation superior even to highly skilled private practitioners and that defendants would then opt, if possible, for the defender, monetary considerations aside. OAKS REPORT 186.

be argued that the attorney who is only rarely consulted on a criminal case should refer the case to a specialist. The impact on this type of practitioner should not be substantial, as the vast majority of criminal defense cases are handled by appointed counsel or private practitioners specializing in criminal work.

In 1970 Chief Justice Burger, commenting on the work of the ABA Advisory Committee, compared the criminal justice system to a three-legged stool, one leg the judge, the second leg the prosecution, and the third leg the defense lawyer: "We concluded very quickly that that third leg in this context was as essential as the third leg of a stool. We have not quite said it ought to be jurisdictional that you have three parts to this enterprise but we have come very, very close to it."⁴⁵ It is time to admit the overriding *social* need for attorney representation and to abandon the notion that our courts are, or should be, screening the non-indigent before appointment of counsel. On several occasions the leaders of criminal justice thinking in this country have suggested or intimated that we will ultimately come to socialization of the defense function.⁴⁶ Socialization is a pejorative word in this country. Let us simply admit that we need the defense lawyer, are willing to pay the public cost, and, while we will accept a contribution from the defendant, we are not going to worry about whether he might be able to hire his own lawyer, and stop telling defendants that next term of court they will be tried "with or without a lawyer."

45. 31st D.C. Judicial Conference 40.

46. ALLEN REPORT 32; *Legal Manpower Needs* 396; 31st D.C. Judicial Conference 45. All note the Scandinavian system, where generally there is an attempt to force contribution only after trial and conviction. It would be unfair to seek contribution for a state expense from a man judged innocent. See E. CAHN, *THE PREDICAMENT OF MODERN MAN* 51-52 (1964).

