

# ALL DEFENDANTS, RICH AND POOR, SHOULD GET APPOINTED COUNSEL IN CRIMINAL CASES: THE ROUTE TO TRUE EQUAL JUSTICE

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## I. THE CENTRAL PROBLEM

1. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>1</sup>

2. "[I]t shall be a base and vile thing to plead for money and reward"<sup>2</sup>

3. Cartoon: Lawyer says to client sitting in his office: "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"<sup>3</sup>

Q. What is a thousand lawyers at the bottom of the ocean?

A. A good start."

Although they occurred at vastly different time periods and come from radically different sources, all three of the items above are connected. The first statement was made by Justice Black, writing for the majority in *Griffin v. Illinois*<sup>4</sup> which held that the state could not condition access to an appeal of a conviction for a crime on the defendant's ability to pay for a transcript to effect the appeal.

The second statement, which may surprise many readers, is from a statute that existed in the colony of Carolina before America became an independent nation.<sup>5</sup> Similar to the law in the other colonies, this statute prohibited persons from setting themselves up in the business of rendering legal advice for financial compensation.

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1. *Griffin v. Ill.*, 351 U.S. 12, 19 (1956).

2. FRANCIS M. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 19 (Greenwood Press 1969) (1951).

3. ALFRED A. KNOPF, in *THE NEW YORKER BOOK OF LAWYER CARTOONS* 73 (1993).

4. 351 U.S. 12 (1956).

5. See HELLER, *supra* note 2, at 18-19.

The third statement provides two examples of current anti-lawyer "jokes" which either question the relationship that lawyers have to justice or express disdain and hostility toward the legal profession in general.<sup>6</sup>

What is the connection among these three items? The *Griffin* case expresses one of the highest *formal* ideals of the law—all individuals are equal before the law and the rendering of rights should not be arbitrarily compromised by factors extraneous to justice, such as the wealth or indigence of the person before the bar. The early American colonists expressed the same notion in another vein—it was dishonorable and exploitative to make a profit from assisting an individual to pursue his or her rights under the law. It is my speculation that one factor that drives the public antipathy toward the legal profession—as expressed in the "jokes"—is the view that lawyers are indifferent to the real-life consequences of their representation. Lawyers are viewed as ambulance-chasing, wily deceptors, who are solely interested in "selling" legal cover to the highest bidder.<sup>7</sup>

No area of the law illustrates more the actual and perceived failure to ensure equal justice and serve the public interest by providing access to lawyers than the field of criminal representation. The distance between the quality of representation that a wealthy person (or corporation) receives in a criminal case and that received by an indigent person is scandalous. One need only contrast the careful, meticulous, successful representation that any number of high profile, wealthy defendants<sup>8</sup>

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6. See KNOFF, *supra* note 3.

7. William McDonald notes that "anti-lawyer sentiments have been a recurring and virulent theme in the Western experience," dating back to the 13th Century. William R. McDonald, *In Defense of Inequality*, in *THE DEFENSE COUNSEL* 13, 19 (William F. McDonald ed., 1983). He notes that it was not accidental that *Powell v. Alabama*, 287 U.S. 45 (1932), which extended the right to counsel to poor defendants in criminal cases, was decided during an economic depression. McDonald argues that this case served to counter the economically-destabilized public's perception that lawyers operated solely as an "agent of the ruling class." McDonald *supra* at 19.

8. See Tom Kenworthy & John Jetter, *At the Emotional Epicenter, Cheers, Tears and ... Shopping*, WASH. POST, Oct. 4, 1995, at A33. O.J. Simpson was found liable in a subsequent civil trial alleging wrongful death, and evaluations were subsequently made that the outcome of his criminal trial was due to clever, manipulative lawyering by the criminal defense team and an abundance of financial resources. *Id.* See Lorraine Adams & Serge F. Kovaleski, *The Dream Team's Resources*, in *POSTMORTEM* 126 (Jeffrey Abramson ed., 1996) (quoting Alan M. Dershowitz, one of Simpson's defense counsel, who stated that, "Money meant everything in this case"). William Kennedy Smith, the nephew of Senator Ted Kennedy, (D.-Mass.), was acquitted of rape in 1991. After a ten day trial, a jury deliberated less than seventy-seven minutes before returning a verdict of not guilty. Renee Loth, 1991: *Year of the Paper Tiger*, BOSTON GLOBE, Dec. 29, 1991, at 57. Smith spent \$1,000,000 on his defense.

have had with the consistent reports of the overburdened and underfunded public defender and assigned counsel programs for indigents<sup>9</sup> to see that we are failing to provide equal protection of the law to all individuals. The problem is vividly illustrated in the arena of criminal law, where a failure of equal protection has the most dire consequence—the administration of capital punishment. *No wealthy defendant has ever been executed by governmental authorities in American history.*<sup>10</sup> The Mafia is reputed to be a criminal organization that has arranged many assassinations. However, this author could not find an instance in which any member of the Mafia received the death penalty. The members of this organization also qualify as “wealthy” due to the vast resources of their many criminal enterprises. It is not that wealthy people (especially mob figures) have not committed crimes that are indistinguishable from the crimes for which many poor or non-wealthy people have been executed.<sup>11</sup> It is simply that the wealthy defendants had the

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Charles Babington, *The Uncivil Suit*, WASH. POST, Jan. 6, 1992, at C1. For an account of the wealthy defendants who received receiving lesser sentences despite conviction, see *The Money Factor—The Rich and Famous in Court*, S.F. CHRON., Oct. 4, 1995, at A11.

9. For a description of under-funded public defenders programs, see Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364, 390 (1993).

10. Congressman Clay asserts that the answer to the question of whether “At least one rich person convicted of first degree murder in the United States has been executed?” is “no.” WILLIAM S. CLAY SR., TO KILL OR NOT TO KILL; THOUGHTS ON CAPITAL PUNISHMENT 117-18 (Michael & Mary Burgess eds., 1990). Representative Clay, however, provides no citation for the statement. One of his staff members stated that the book had been published 6 years earlier and that the “data collection ... was not now available for review.”

This author queried Criminal Law faculty members and practitioners handling death penalty cases as to whether they had any information that would contradict the statement made above. With one exception, those who responded said that they believed that the statement was accurate. One person suggested reading *Murder in Coweta County*. The book is the account of an individual from a family that reputedly made a fortune in the manufacture of illegal whisky who received the death penalty for murder. At the time of the individual’s trial for the violation of Internal Revenue laws, his lawyers claimed he was without funds and filed “a pauper’s plea.” MURDER IN COWETA COUNTY 261 (1969).

Professor Steve Russell, one of the responding Criminal Law faculty, suggested that “wealthy” in this context should mean having the capacity to put on a defense without regard to cost: a defendant who could afford to hire jury consultants, experts, investigators, experienced criminal lawyers who charge the highest fees, and who could afford collateral costs, like daily transcripts for cross-examination purposes. In short, the kind of defense that was available to O.J. Simpson. See also Charles Judson, et al, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1297 (1969) (finding substantial class bias in death sentencing).

11. “Indistinguishable” or worse: Richard A. Loeb and Nathan F. Leopold, two young men from wealthy Chicago families, kidnapped and murdered a fourteen year old boy solely for the thrill of being able to outwit the authorities: They had killed Robert Franks, because

financial resources to purchase the kind of defense that can blunt a prosecution for a capital crime or dissuade a prosecutor from even pursuing such a penalty.<sup>12</sup> Lawyers versed in the defense of capital cases regularly report that poverty and the failure of adequate defense are the key variables that determine whether the death penalty is imposed or actually carried out.<sup>13</sup>

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they wanted the excitement of committing a perfect, detection-defying crime.

MAUREEN MCKERNAN, *THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB* 22 (Notable Trials Library 1989).

12. It is sometimes speculated that the wealthy defendant escapes even the pursuit of the death penalty by the prosecutor because of a by-product of great wealth—namely, celebrity status or prior public reputation for “respectability” that is easily projected in the media before a jury is chosen. See Shirley E. Perlman, *O.J. Won't Face Death Penalty*, *NEWSDAY*, Sept. 10, 1994, at A6 (reporting that Los Angeles prosecutors decided not to seek the death penalty after a pre-trial run with a mock jury indicated that it would make securing a conviction more difficult). Lawyers active in capital punishment litigation believe that the prosecutor must be able to render a defendant “faceless,” and thus less human, in order to convince a jury to impose the death penalty. A classic example of this speculation is presented by the case of two young persons, described as coming from “affluent” homes, who were charged with first degree murder of their newborn son. The prosecutor, initially announced that he would seek the death penalty. The defense attorney mounted a pre-trial publicity campaign to get the public to protest, and within a week the prosecutor was reported to be “reassessing” the demand for the death penalty. See Karl Vick, “Young Love and a Dead Baby Tear at the Heart of Delaware,” *WASH. POST*, November 22, 1996, at A1, col. 4. Defense counsel is quoted as saying: “What has happened in the last several days is that Brian [one of the two young persons], the individual, the human being, the nice, normal kid, has been displayed.” *Id.* at A22.

One commentator has noted, “because of the greater procedural safeguards in capital cases and the necessity of resolving additional complex issue, death penalty cases take days and sometimes weeks longer than other cases.” Roy B. Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 *TENN. L. REV.* 681, 697 n.104 (1984). High-powered, well-paid counsel are in an even better position to exploit this complexity because they have virtually unlimited resources, and the prosecutor is often aware of this.

Occasionally, such as the murder trial of Erik and Lyle Menendez, a prosecutor will ignore these obstacles and seek the death penalty against a wealthy defendant. The Menendez case is typical of those that produce such a result. The defendants were charged with the first-degree murder of their parents, which was allegedly committed in order to gain access to their parents' wealth. The prosecutor ultimately achieved a conviction, but did not succeed in getting the death penalty. See Anne Burke, *Menendez Riches Took Huge Cut*, *Sources Say*, *SACRAMENTO BEE*, Mar. 27, 1996, at B2 (The first trials of the Menendez brothers cost \$2 million dollars and ended in hung juries). See also *Menendez Brothers Get Life Terms*, *ST. LOUIS POST DISPATCH*, Apr. 18, 1996, at 1A. During the second trials the brothers were convicted of first-degree murder, but the jury refused to impose the death penalty. *Id.*

13. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994). Bright writes:

Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case. It is not the facts of the crime, but the quality of the legal representation that distinguishes this case, where the death penalty was imposed, from many similar cases, where it was not.

The current structure of criminal representation jeopardizes equal protection of the law for indigents. Additionally, and most egregiously, serious questions remain as to whether even *more* injustice is done to lower-middle and middle-class defendants. Under current law, in all felony cases and some misdemeanor cases, a defendant who is clearly "indigent" has an absolute right to counsel at the state's expense.<sup>14</sup> The state may also have to provide such a defendant some expert assistance after that defendant has met certain conditions demonstrating need.<sup>15</sup> Although the classification of "indigent" is clearly a question of federal constitutional import, it has not been fully developed by the United States Supreme Court.<sup>16</sup> Thus, jurisdictions have adopted varying standards with, as Justice Powell has bemoaned, the "inequitable" result that a defendant denied appointment of counsel in one jurisdiction might have qualified in another.<sup>17</sup> There is some evidence that some jurisdictions impose very high barriers to finding a defendant "indigent." This forces those who do not qualify as indigent to proceed without any representation.<sup>18</sup> Moreover, defendants who have some funds, but not

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*Id.*

14. *Id.* at 1836; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

15. Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that upon a preliminary showing of need, the State has an obligation to provide an expert in psychiatry to enable an indigent defendant to assert an insanity defense); Caldwell v. Mississippi, 472 U.S. 320, 323 n. 1 (1985) (noting that the Court expressly reserves question of whether an indigent must be supplied other forms of expert assistance, such as a ballistics or fingerprint expert).

16. Justice Goldberg, in a concurring opinion in *Hardy v. United States*, 375 U.S. 277, 289 (1964) (joined by Justices Warren, Brennan, and Stewart) discussed, in *dicta*, the concept of indigence for purposes of appointment of counsel. Justice Goldberg argued against limiting appointment of counsel only to defendants who presented a picture of total poverty. Justice Goldberg thought that the court should consider the cost of retaining private counsel in the particular case against the totality of the defendant's assets, income, and special obligations. In other words, the issue would not be solely "indigence" *per se*, but whether the defendant would be financially unable to retain counsel. *Id.* (Goldberg, J., concurring).

17. Justice Powell concurring in *Argersinger*: "The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons." 407 U.S. at 50 (Powell, J., concurring).

18. One study has shown that some courts consider a defendant to be eligible for a court-appointed attorney only if he or she has not been able to meet bail or has an income below some arbitrarily chosen level. *See* SHELTON KRANTZ ET. AL., RIGHT TO COUNSEL IN CRIMINAL CASES 309-347 (1976). *See* ABA STANDARDS FOR CRIMINAL JUSTICE—PROVIDING DEFENSE SERVICES 187 (3d. ed. 1992).

Some courts have refused to treat a defendant as eligible for appointed counsel despite the fact that the defendant may be involved in bankruptcy proceedings that block his or her having access to funds for retaining counsel in a criminal case. *See* Craig Peyton Gaumer & Paul R. Griffith, *Presumed Indigent: The Effect of Bankruptcy on a Debtor's Sixth Amend-*

sufficient funds to pay for a full-scale defense, are worse off than indigent persons who get resort to the full attention of a public defender.<sup>19</sup> The Catch-22 which makes the problem even worse is that the issue will likely remain suppressed because most middle-class defendants may not be able to afford extensive appellate activity that may be necessary to raise the question of the proper scope of "indigency."

## II. THE STRAIGHTFORWARD PROPOSED SOLUTION

A just resolution to the problem of unequal access might be advanced by what may at first seem like a radical solution. It is proposed that the state and federal government should adopt legislation that requires that *all* defendants—the wealthy, the middle-class, and the poor—will be represented by counsel that is appointed *and paid for* by the courts.

A host of problems could be solved by such a restructuring of criminal representation. First and foremost, it is the most thorough and complete means of ensuring both the actuality and the appearance of equal justice. Under such an arrangement defendants would no longer be able to avoid conviction or have their penalties softened solely because they "purchased" such an outcome.

The appearance of justice may be almost as important as the substance of justice because the law functions better in an environment of high public confidence. If the general public trusts the criminal justice system, there will be less resort to vigilantism or dangerous forms of "self-help." The public will be more amenable to requests for additional public funding of criminal justice institutions if they believe that those institutions function in a fair manner. There should now be increased concern over the public confidence in the criminal justice sys-

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*ment Right to Criminal Defense Counsel*, 62 UMKC L. REV. 277 (1994).

In 1973, F. William McCalpin, Chairman of the American Bar Association's Special Committee on Prepaid Legal Services, commented that 70% of the population earned between \$5,000 and \$15,000, but "[t]hey do not qualify for free legal services and yet their means frequently do not permit ready access to private lawyers in times of need." KRANTZ, *supra* note 18, at 294 (quotation omitted).

19. Another anomaly results from our current "indigent-only" appointed counsel system. Justice Powell pointed out that working class or middle-class defendants may decide that hiring counsel is an expense their families cannot afford when faced with minor charges that potentially carry a jail sentence, but which they expect will result only in a fine. *Argesinger*, 407 U.S. at 50 (Powell, J., concurring). An indigent would get counsel appointed in such cases. *Id.* If an indigent has no appointed counsel in such a case and the court then decides to impose a jail sentence, the indigent has a right to reversal of the conviction. See *Id.* No reversal is available for the non-indigent defendant who, attempting to protect family resources, underestimates the need for counsel and thus receives a jail sentence.

tem in the wake of the public opinion polls taken after the O.J. Simpson trial. While the outcome in that case was laced with issues of race and gender,<sup>20</sup> it is also clear that the public at large believes that defendants can deeply (and unfairly) influence the outcome in a criminal case if they have virtually unlimited resources to employ many high-powered and specialized lawyer.<sup>21</sup> The growing public awareness of, and suspicion about, the inequities in our criminal justice system can only grow with the increased exposure to the system through televised trials and Court TV. The networks are now aware of the overwhelming public attention to the O.J. Simpson trial and this will ensure that other rich and famous defendants will capture our TV screens in the future. The growing public distrust can only be addressed by dramatic changes.

Middle-class persons would benefit from such changes in a number of ways. As noted above, some defendants who do not meet the stringent standards for "indigency" and do not truly have the full resources for a defense would get such a defense without having to jeopardize essential family resources.<sup>22</sup>

Our society has stigmatized the labeled "poor" to connote not simply a lack of money—but also negative character traits, such as indolence or a lack of self-responsibility. Some middle class persons in the criminal justice system will deplete family resources in order to hire counsel, thus avoiding the ignominy of asking for "welfare." A requirement of appointment of counsel for all persons charged with a crime avoids this expensive face-saving maneuver.

Moreover, the threat to essential family resources of the average middle-class defendant is real. A person facing a serious criminal charge is in an extremely weak bargaining position when confronted with an attorney making fee demands. If the person is caught up in the criminal justice system for the first time he or she has no prior experience to gauge the reasonableness of the fee demanded. Nor is that person or her family likely to be emotionally prepared for bargaining over the matter.

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20. See Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of our Times*, 35 WASHBURN L.J. 225 (1996).

21. *Simpson Case Raises Knowledge, But Increases Skepticism of Criminal Justice System*, W. VA. LAW., Nov. 8 1994, at 17.

22. There may not be much sympathy for the defendant who has, in fact, committed a crime. One may simply see the collateral costs of defense as a by-product that he or she could avoid by abiding by the law. However, it is the resources of family members, who are often wholly innocent of the crime for which the defendant is charged, who bear the cost of counsel.

In many instances middle-class persons will be more likely to suffer the adverse consequences of a criminal conviction than either the poor or the rich. Indigent criminal defendants are more likely to have no steady employment or have access only to low level kinds of employment which a criminal conviction is less of a disqualifier.<sup>23</sup> Moreover, among young males in poor neighborhoods or among those individuals in organized criminal syndicates, a criminal conviction may be a badge of merit, a symbol of "toughness." Note also the anomaly that the truly wealthy may obtain access to the best counsel despite the fact that after a conviction, they frequently have resources for independent living or they may have continuing social contacts who treat the criminal conviction as if it were nothing.<sup>24</sup> These conditions, which neutralize the negativity of a criminal conviction generally do not exist for middle-class persons because their central means of support could be jeopardized by certain kinds of criminal convictions. Furthermore, such persons are much more vulnerable to the stigma and loss of status that can accompany a criminal conviction.

The middle-class defendants, have the greatest incentive to avoid a criminal conviction or to negotiate for the lightest penalty. They may, be compelled to pay extremely costly attorney fees to achieve these goals. Unlike the civil arena, which allows contingent fees, there are no statutory or court controls on the fees that a criminal practitioner may charge.<sup>25</sup> The self-assessment of fees by the attorneys tends to take into account the defendants' assets. For example, Mike Tyson, the former heavyweight champion, was charged \$2 million for defense against a rape charge—a charge of which he was ultimately convicted. A major metropolitan newspaper placed the story of this fee arrangement on its

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23. CRIME AND CAPITALISM 57-75 (David F. Greenberg ed., Temple Univ. Press 1993). "Official Crime statistics demonstrate seemingly clear-cut relations between economic status and crime. A high percentage of those arrested were unemployed at the time of arrest or were employed irregularly at jobs with low pay." *Id.* at 63.

24. In a 1990 settlement with the SEC, Michael Milken pled guilty to "violations of securities laws, paid more than \$1 billion in fines and settlements and served two years in prison." *While SEC Watches, Milken and Ex-Accountant Settle Suit*, N.Y. TIMES, July 13, 1996, at 34. Although, according to the plea bargain, Milken is banned for life from the securities industry, he is working as a consultant for Bert C. Robert, CEO of MCI Communications, Rupert Murdoch, and, most notably, Ted Turner in a deal with Time-Warner. *Id.*

25. *See United States v. Vague*, 697 F.2d 805 (7th Cir. 1983). The Seventh Circuit held that the trial court had no power to reduce a fee of \$8,000 in a criminal representation even when the attorney disclosed that he spent only 40 hours on the case. *Id.* Therefore the trial court's contempt finding against the lawyer for refusal to return a portion of the fee was reversed. *Cf.* N.Y. COMP. CODES R. & REGS. Tit. 22, § 603.7(e)(2) (1986) (setting maximum fee in tort cases).

front page—clearly confident that it would capture the attention of a public that believes that lawyers financially exploit persons in trouble.<sup>26</sup>

There is no means for avoiding payment of the attorney fees because contingent fee arrangements—in which a defendant may avoid the fee if he or she is convicted—are prohibited in criminal cases in all jurisdictions.<sup>27</sup> Furthermore, many private criminal law practitioners require that the client pay a flat-fee for the entire case before any substantial work is done.<sup>28</sup> One court has speculated that this kind of fee arrangement provides the less than scrupulous attorney an incentive to urge the defendant to plead guilty as a means of maximizing his profit.<sup>29</sup>

Note also that states have structured a one-way street for reimbursement of attorneys' fees. In Maryland, for example, an indigent defendant who is convicted, can be made to pay the costs of his appointed counsel if he should subsequently have the resources to do same.<sup>30</sup> In Maryland, and most jurisdictions, however, a defendant who is acquitted has no claim against the state for reimbursement of counsel fees.<sup>31</sup>

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26. Bill Brubaker, *For Tyson, Money Isn't In the Bank; Aides, Bills, Frills Drained Millions*, WASH. POST, Feb. 12, 1992, at A1. These kind of news stories, indirectly disparaging lawyers for outrageous fees, are common fare. See, e.g., Murray Kempton, *The Wealthy Pay for Acts of Mercy*, NEWSDAY, Jan. 16, 1994, at 43. Attorney Alan Dershowitz had represented the wealthy Leona Helmsley on appeal of her conviction for tax evasion, and had sued her to recover his fee of "\$27,245.67 for each of seven weeks." *Id.* Murray acknowledged that the Dershowitz firm made the "generous concession that a clerical error had misled it into a \$330 overcharge." *Id.*

27. See Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COL. L. REV. 595 (1993).

28. One factor that encourages this practice is the fact that an attorney may be barred from withdrawing from a case solely on the grounds that the client is not able to pay the rest of his fee. See *United States v. Gipson*, 517 F. Supp. 230, 231-32 (W.D. Mich. 1981).

29. See *People v. Winkler*, 523 N.E.2d 485, 487, 528 (N.Y. 1988). Some practitioners allow an arrangement in which a retainer is paid and drawn on as the lawyer expends hours on the case. These arrangements, however, are usually limited to defendants with substantial assets such that the defense counsel is assured that he will be able to collect additional fees if additional time is spent. See Peter Lushing, *Criminal Law: The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, (1991).

30. See MD. ANN. CODE art. 27A, § 7 (1997); see also VA. CODE ANN. § 19.2-163 (Michie 1995).

The American Bar Association (ABA) has opposed these State repayment schemes because they may have a chilling effect on the assertion of the right to counsel. In *Fuller v. Oregon*, 417 U.S. 40 (1974), the Court refused to sustain claims that state repayment schemes are unconstitutional. There is still, however, legitimacy in the ABA's concern that, as a practical matter, some persons may be dissuaded from asserting the right to have appointed counsel for fear of the costs of reimbursement. Such an outcome, even occasionally, is undesirable in policy terms.

31. One federal statute, The Independent Counsel Act, provides that a targeted government official will be reimbursed for attorney fees if an investigation does not result in an

The innocent can never be totally immunized against the anxiety and disruption in liberty that is entailed when one is subjected to criminal charges because prosecutors are human beings who make errors, even when they act in good faith. Supplying counsel to all defendants would prevent the *further* injury of financial drain on an individual who is mistakenly subjected to prosecution.<sup>32</sup>

Two studies have also raised questions about whether middle-class defendants who assume that they will receive superior representation because they have paid an attorney is accurate.<sup>33</sup> A study done in the 1960s demonstrated that retained counsel had a higher ratio of acquittals in more counties than assigned counsel or the public defender who represented indigents. They were, also, more frequently able to negotiate probation or a plea of guilty to lesser offenses.<sup>34</sup> If these results were modulated *solely* by the fact that some defendants had the money to pay for higher quality representation—and thus “better” results (better solely from the defendant’s perspective)—it would be as objectionable in equal justice terms as the better outcomes purchased by wealthy defendants. However, the study speculated that the results may be better explained by conditions of indigent defendants that flow from their poverty, not the quality of representation.<sup>35</sup> Indigent defendants are more likely to be unemployed and unstable. Hence, they have less access to probation or offers of pleas to lesser offenses. They may also be less educated, which may cause them to commit crimes that are more easily detected and proven.<sup>36</sup> A more recent study of retained versus as-

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indictment and the subject of the investigation would not normally have incurred the fees. 28 U.S.C. § 593 (f)(1) (1995). This occurrence is a rarity in the criminal law arena.

32. Naturally, it could be argued that an acquittal means only juridical innocence and the freed party may have still committed the offense. It may simply be that the prosecutor has not been able to meet the very high burden of proof—beyond a reasonable doubt—to support a conviction. However, there are instances in which the proof of the charged (or convicted) person’s innocence is established beyond all reasonable argument to the contrary (*i.e.*, DNA evidence that was not utilized at the time of trial), and even those individuals have no claim from the state for attorney’s fees.

33. One commentator has charged that some lawyers have attempted to covertly pressure persons who are in doubt about paying the high cost of representation into believing that “the practice of law is a confidence game,” and that, unless they purchase some manipulation of the system, they will be treated harshly. *See* KRANTZ ET. AL., *supra* note 18, at 110 (quoting ABRAHAM BLUMBERG, CRIMINAL JUSTICE at 110 (1967)).

34. LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 21-27 (1965).

35. *Id.* at 25.

36. The same study also demonstrated, contrary to the speculation of the New York court, that the defendants represented by retained counsel did not enter into guilty pleas more frequently than assigned counsel or the public defender. *See* SILVERSTEIN, *supra* note

signed counsel demonstrated no overall differences in results.<sup>37</sup> Therefore, under the proposal made in this Article, middle-class defendants would not receive representation of a lesser quality if represented by the public defender.

Another advantage of state-supplied representation for all defendants is that the financial incentive for defense counsel to unethically or illegally assist the client to escape conviction or to be a part of the client's continuing criminal activity would be totally removed. One can agree with Peter Lushing that the popular folklore—particularly within the prosecutor's bar—that views all private criminal practitioners as an ethically suspect group, paints with too broad a brush.<sup>38</sup> It may be a failure to clearly separate the defense counsel from his (often guilty) client. However, lawyers have been charged with engaging in criminal activity to subvert prosecution of clients who have paid and retained them.<sup>39</sup> A Presidential Commission report demonstrates that a long-

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34, at 21. This may, however, be consonant with the study's speculation about a higher percentage of jailed indigent defendants being associated more with their poverty than the quality of their representation. As noted above the crimes committed by indigents may be less sophisticated and more easily proven. Indigents may actually commit more crime because they face greater need. They are less likely to meet bail, and therefore, may as a practical matter plead guilty to minor offenses (even if innocent) if offered "time served" as the punishment. Establishing innocence at a formal trial may be more difficult for indigents. If they cannot make bail, they have to come to trial in prison garb, thus being unable to establish a "clean" citizen's look for the jury. Even if they have an alibi, they are less likely to have access to "respectable" middle class witnesses to prove it.

37. Joyce Sterling, *Retained Counsel Versus The Public Defender*, in *THE DEFENSE COUNSEL* 151 (William F. McDonald ed., 1983).

38. See Lushing, *supra* note 29, at 528. It is common knowledge, however, that prestigious law firms do not generally engage in full scale representation of individuals (as opposed to corporations) charged with crime, despite the fact that very substantial fees may be earned in such representation. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE —LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 26 (noting the disdain of corporate lawyers for criminal practitioners). Auerbach notes that in the early 1900s, some of this was a snobbish reaction to the non-elite, immigrant ethnics who practiced criminal law. However, the practice persists today. Is it possible that such firms do not want to associate with a class of clients who may have the potential of pressuring their attorney into unethical behavior as a concomitant of the high fee?

39. See *Osborn v. United States*, 385 U.S. 323 (1966) (lawyer for the labor racketeer, Jimmy Hoffa, convicted of attempting to bribe a juror on Hoffa's behalf); *In re Doe*, 662 F.2d 1073, 1076 (4th Cir. 1981) (lawyer allegedly advised client to lie during trial and to bribe witnesses and had attempted to procure other false testimony); *People v. Sanders*, 436 N.E.2d 480 (N.Y. 1982) (attorney allegedly influenced the outcome of a case for profit); *People v. Salko*, 391 N.E.2d 976, 980 (N.Y. 1979) (lawyer charged with crimes of bribery and bribing a witness); see Ronald Goldstock & Steven Chananie, *Criminal lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PA. L. REV. 1855, 1858 n.20 (1988) (listing a series of criminal convictions of lawyers and indicating that they are not "isolated" cases).

term fee-based relationship was necessary in order to have regular access to a group of attorneys who abused their office in order to improperly insulate organized crime elements from prosecution.<sup>40</sup> One major form of abuse is that the organized crime figures, who are not on trial, pay the attorney's fee on behalf of an indicted member. Then that attorney conducts the defense so as to protect the absent organized crime figures from any exposure.<sup>41</sup> The historical record also suggests that the prospect of financial profit from the client is a pre-condition for attorneys engaging in illegal conduct to subvert the legal process. I could find no cases in which an attorney was convicted of criminal corruption of the legal process when acting as an assigned counsel or a public defender. The fact that the clients have no financial leverage over assigned counsel or the public defender must play a role in this absence of illegal behavior.<sup>42</sup>

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40. PRESIDENT'S COMM'N ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE IMPACT: ORGANIZED CRIME TODAY 29-31, 221-48 (1986). The report documents five case studies of the long-term employment of lawyers by organized criminal syndicates. Through wiretaps or compelled immunized testimony after an attorney had been convicted, the report shows lawyers who suborned perjury, used their access to grand jury witness lists to identify informers for purposes of assassination, and provided the legal assistance to purchase banks, with undisclosed principals, which were then used to launder the proceeds from crime. *Id.* at 221-48.

41. See *United State v. Allen*, 831 F.2d 1487, 1496-97 (9th Cir. 1987) (finding a conflict of interest when a lawyer was paid by an unindicted crime figure, and the lawyer exaggerated the role of the defendant to protect); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (lawyer advised one party to commit criminal contempt and refuse to give evidence after immunity from the prosecution was granted in order to avoid incrimination of a third party). The problem is also presented when corporations are charged with crimes and they pay the attorneys fee of counsel representing their employees. The fee arrangement can be inquired into by the court, but it is insulated from true scrutiny because the defendant can waive any objection. The defendant, however, may not be fully aware of how the attorney may sacrifice his interests in order to protect the absent third party who pays the fee. See Roman M. Roskewycz, *Third Party payment of Criminal Defense Fees: What Lawyers Should Tell Potential Clients and Their Benefactors Pursuant to (An Amended) Model Rule 1.8*, 7 GEO. J. LEGAL ETHICS 573 (1993).

42. Professor Lushing argues that defense lawyers would not necessarily be driven into unethical behavior to collect a contingent fee if such fees were allowed in criminal representation. Lushing posits that the desire to "win" is more important than money as a motivator. Lushing, *supra*, note 29. It may be the case that personalities that thrive on "winning" may be attracted to the legal profession, but the historical record suggests that when defense attorneys are pushed beyond merely winning to winning by corruption that a substantial financial incentive must be present.

Without a financial incentive, prosecutors apparently sometimes engage in questionable ethical conduct in order to secure a conviction. However, absent irrational, invidious factors, such as racism, modulating such conduct, prosecutors are often motivated by what they believe is a "higher public good"—namely preventing a dangerous person from escaping conviction. Defense attorneys overwhelmingly represent persons who have committed a crime.

A basic tenet of a society maintaining tolerance of and support for lawyers representing persons charged with crime is that we believe in the moral independence of the lawyer from the client. The client is charged with or has committed the crime. The lawyer was not involved in the crime—he or she only supplies representation. That representation should not be taken to signal support for the client's past actions—only support for the due process right to a fair hearing.

This tenet of moral independence is easier to accept and support under two circumstances. The first circumstance requires that there be no incriminating material—physical or documentary “evidence”—of the offense under the control of the defense counsel. Even if it would incriminate their clients, lawyers have an obligation to turn over to the prosecuting authorities the instruments of crimes if they come into possession of such instruments or gain knowledge of their whereabouts.<sup>43</sup> Moreover, lawyers are prohibited from participating in foisting perjured testimony on the courts or foisting deliberately misleading information on regulatory bodies.<sup>44</sup> The second circumstance requires that the offense be clearly an event in the past, and not a continuing offense. In such a circumstance, an attorney enters the scene only at the point where representation on a charge is necessary, because he or she was not available to provide support before or during the commission of the offense.

It is highly unlikely that the above conditions for the claim of “moral independence” exist when one looks carefully at highly paid lawyers representing alleged organized crime figures or corporations that may be actively continuing allegedly criminal conduct. Many lawyers doing criminal defense work actively press their clients to tell them whether they committed the offense, and if they did, the full scope of their activity. This is crucial in assuring that the lawyer is fully prepared for all of the lines of proof that the prosecutor may develop.

In the organized crime context and in most instances in the corpo-

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Therefore, they generally have no concomitant “higher public good” to pursue that may be relied upon to rationalize unethical behavior.

43. See, e.g., *State v. Olwell*, 394 P.2d 681 (Wash. 1964). For a full discussion of the rule, see Kevin R. Reitz, *Clients, Lawyers and the 5th Amendment: The Need for a Projected Privilege*, 1991 DUKE L.J. 572 (1991).

44. The Model Code of Professional Responsibility bars a lawyer from knowingly using perjured testimony or false evidence. MODEL RULES OF PROFESSIONAL RESPONSIBILITY D.R. 7-102 (A)(4) (1980). The Model Rules require the lawyer to disclose any perjury that a client intends to commit or has committed. *Id.* Rule 3.3(a)(4) (1996). See also, Donald Liskov, Note, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution and the Truth*, 28 NEW ENG. L. REV. 881 (1994).

rate context, if the client made full disclosure to the attorney, that attorney must have access to much of the physical or documentary evidence by which the crime was committed. The attorney would also have an ethical and legal obligation to turn such evidence over to the prosecutor. One scholar writing about the defense of white collar corporate crime claims that attorneys do *precisely the opposite*—they work actively to prevent the prosecutor from getting access to incriminating documents.<sup>45</sup> Moreover, major law firms servicing corporate clients have sometimes participated in lodging deliberately misleading information with regulatory bodies.<sup>46</sup> In the rare cases in which an attorney observed his ethical obligation to turn over incriminating evidence, or threatened to report planned perjury by a client, the lawyers were assigned counsel who had no financial ties to the client.<sup>47</sup>

If lawyers retained by members of organized crime groups get full disclosure, they then know of their past criminal activity of drug trafficking, murder, hijacking and extortion. It is fairly difficult to believe that the lawyers—even those who are not manipulated by organized crime—do not know that their clients are continuing their involvement in or supervision of such criminal activity during the defense of the charges. Indeed, mobsters have regularly continued their supervision of organized criminal activity even while they are imprisoned.<sup>48</sup> Is it only privately retained criminal practitioners who are unaware of how organized crime functions? Lawyers have an obligation to represent de-

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45. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* 5 (1985) ("But above all, and this is the central theme of the white-collar crime defense function, defense attorney works to keep potential evidence out of government reach by controlling access to information.").

46. See George N. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 665-77 (1994) (canvassing charges against two nationally-known law firms).

47. See *Nix v. Whiteside*, 475 U.S. 157 (1986); see also *People v. Meredith*, 631 P.2d 46 (Cal. 1981) (involving a lawyer who turned over incriminating evidence). In *Nix*, the lawyer actively warned a defendant in a criminal case that he would not tolerate the defendant putting on perjured testimony and that, if he attempted to do so, the attorney would report it to the court. *Nix*, 475 U.S. at 161. The United States Supreme Court held that the defendant had no right to insist on unethical behavior from his lawyer, and thus had no claim that he had been denied effective assistance of counsel. *Id.* at 171. This was the first time the Court had to decide this issue and the lawyer who acted in such a principled and ethical manner was an appointed counsel with no financial tie to the defendant.

48. See *20 Arrested in Suspected NE Drug Ring*, WASH. POST, Aug. 22, 1996, at B2 (recounting how Rayful Edmond, a convicted drug kingpin, continued to direct the drug ring from federal prison); Arnold H. Lubasch, *U.S. Jury Convicts Eight as Members of Mob Commission*, N.Y. TIMES, Nov. 20, 1986, at A1; Selwyn Raab, *Wanted: A Mob Boss Without the Flash*, N.Y. TIMES, Apr. 4, 1992, at A25.

fendants on past criminal offenses—they cannot support in any way the commission of ongoing or future criminal offenses.<sup>49</sup> Lawyers have, if not a legal obligation, a moral obligation to dissuade a client from committing offenses in the future and a clear ethical obligation to report to the authorities when they learn that their client poses a risk of physical injury to another individual.<sup>50</sup> Even corporate attorneys may be representing clients who are continuing activities that pose a risk of physical injury, such as violations of environmental regulations or work-safety health measures.<sup>51</sup> How many privately retained lawyers who receive high fees to represent organized crime figures or major corporations are fulfilling this moral obligation to dissuade their clients from prospectively engaging in criminal activity?

What would happen if all defendants appointed counsel that was compensated solely by the state? If the person or corporation was innocent—nothing would be different. The innocent defendant would benefit from full disclosure of all of the facts to his appointed counsel. If the defendant had committed the offense, he might elect not to make full disclosure to his or her lawyer. His defense might be hampered, but solely because he elected not to make full disclosure. We could, however, be more certain that defense counsel would fully discharge his ethical obligations to the court, and give the defendant *only* that to which he was entitled—an honest defense.

### III. THE CONSTITUTIONAL QUESTION

Serious questions remain as to whether legislation designed to preclude any defendant from retaining private counsel would be a violation of due process under the Fifth or Fourteenth Amendment, or a violation of the Sixth Amendment which guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance

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49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) cmt. (1996).

50. See *id.* Rule 1.6 (permitting a breach of the attorney-client privilege to prevent a client from committing a crime that could cause “death or substantial bodily harm”).

The context of corporate activity may present a more complex picture. The illegality of white collar crimes, like anti-trust or environmental violations, may not present as stark and clear a picture of physical danger as the crimes usually engaged in by organized crime groups, such as the Mafia. On the moral issue, however, when the corporate criminal activity is not fraught with any ambiguity and is known to the lawyer, the privately retained lawyer confronts the same ethical problem as those who represent mobsters.

51. See Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 753 (1987); Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

of Counsel for his defence."<sup>52</sup> The questions in constitutional terms could be more concretized. First, is the negotiation of a prevailing market fee arrangement with an lawyer an essential component of the due process right to a hearing, thereby protected by the Fifth and Fourteenth Amendments? Second, does the limitation of all defendants to state appointed counsel deprive those defendants who can afford privately retained counsel of the right to counsel under the Sixth Amendment?

Some light is shed on the due process issue in the case of *Walters v. National Association of Radiation Survivors*.<sup>53</sup> In *Walters*, the Court upheld the constitutional validity of a federal statute that barred any attorney from charging a client more than \$10 to process a claim for death or disability benefits before the Veteran's Administration.<sup>54</sup> The appellees asserted that they had a due process right to retain and pay counsel whatever they choose in order to obtain representation. The majority rejected the lower court's finding that the statute was excessively "paternalistic." On the contrary, the court found one factor supporting the constitutionality of the fee limitation was that it protected the Veteran claimants from excessive attorney fee arrangements which could substantially undermine the goal of preserving an adequate recovery to a Veteran for a proven disability. One goal of the legislation proposed here is to protect middle-class defendants who are generally in a weak bargaining position, in negotiating attorney fees in the private market. Moreover, substantial attorneys' fees disrupt the structured statutory outcome in criminal cases, no matter *what* the result. If a defendant is acquitted and he has paid an attorney's fee, he has had in effect been forced to pay an unrecoverable "fine."<sup>55</sup> If the defendant is convicted and put on probation, or given a jail term, he is also assessed on top of those penalties in effect a "fine," unlike the indigent who has appointed counsel. Moreover, since the State currently maintains no

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52. U.S. CONST. amend. VI.

53. 473 U.S. 305 (1985).

54. 38 U.S.C. § 3404(c) (1988) amended by 38 U.S.C. § 5904 (Supp. 1991). Under Section 5904 attorney fees are allowed in the representation of a direct appeal to the Court of Veterans Appeals ("CVA") with two limitations: (1) the lawyer must disclose the fee arrangement to CVA, and CVA is authorized to reduce a fee deemed to be excessive or unreasonable; and (2) contingency fees which are to be paid by the Veterans Administration are limited to 20% of the award. See 38 U.S.C. § 5904 (1994); see also, Barton F. Stichman, *The Impact of the Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 867-68 (1992).

55. See Lushing, *supra* note 29 (noting that defendants who are acquitted, in most circumstances, have no claim for reimbursement of attorney's fees).

control over this additional penalty, it now varies from defendant to defendant, even for those acquitted or convicted of *identical* crimes. It should not be a violation of due process of law for the State to do away with the unequal imposition of additional penalties, which impairs its control over sentencing of those convicted or which prevents it from neutralizing penalties being imposed on truly innocent persons.

It is to be noted that the proposed legislation is similar to the statute in *Walters*—claimants were not *formally* barred from being represented by counsel or the equivalent of counsel. In fact, the overwhelming majority of Veterans claimants was represented free of charge by service representations supplied by Veterans organizations. Such representations, some of whom were lawyers, were experienced in VA regulations.<sup>56</sup> Moreover, any attorney could represent a claimant, as long as he or she did not charge more than a \$10 fee. Therefore, *Walters* may hold that when individuals have regular access to representation in government controlled proceedings, the government may reinforce such non-profit representation by barring substantial attorney fee arrangements; such a limitation does not deprive individuals of their right to due process of law.<sup>57</sup>

The due process claim and *Walters* (a restriction on counsel in a civil case) are less significant on the issue of the constitutionality of the legislation proposed here than the Sixth Amendment claim which directly implicates the right to counsel in criminal cases. A response to the Sixth Amendment question requires an examination of the precise history that led to its adoption. Prior to the adoption of the Sixth Amendment in the American colonies, the English practice was to formally bar any defendant from access to counsel when that defendant was charged with a felony. At this time, there was some fear that the enemies of the King were too strong, and that it was necessary to

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56. In *Walters*, the court cited a study by the Veterans Administration that found that 86% of claimants were represented by lawyers who were supplied free of charge by veterans organizations. *Walters*, 473 U.S. at 312 n.4.

57. *Walters* does not speak to the proposed legislation here. In fact, the *Walters* court found that the processing of claims was designed to be non-adversarial and supportive of the claimants. The court also found that it generally does not involve complex legal issues. *Id.* at 333. Under these circumstances, there was less of a need for full-fledged representation by a lawyer in processing the average claim. However, the Court acknowledged that a small percentage of cases might entail an appeal that could present more complex legal questions. Nevertheless, the Court did not find that the claimants had to have a substantial fee arrangement to ensure due process because of the steady supply of free representation coming from the veteran's organizations. The Court also rejected First Amendment claims based on the denial of the right to petition government. *See id.*

strengthen the hand of the King's prosecutors. Also, the prosecution of many crimes with the exception of treason, were initiated by one private party against another.<sup>58</sup> The colonists were establishing a new nation in resistance to a strong central authority, like the King. They desired to expand the protections that citizens had against such a central authority, and granting access to counsel in criminal cases was one means of accomplishing that end. Moreover, the colonists had moved more toward the use of a legally trained public prosecutor, and thus saw the need for some counterweight for the defendant. It is also clear, however, that the focus during this period was on removing the absolute English *bar* to the presence of defense counsel. There was no attempt to assure that a defendant would always have a financial relationship with defense counsel. Throughout the Colonies during early English rule, there were some strong constitutional prohibitions on paying for legal counsel.<sup>59</sup> Also, in 1790, Congress passed a statute that imposed a duty on the courts to assign counsel to represent the accused in capital cases.<sup>60</sup> Appointment of counsel was made available to *any* defendant upon request without any inquiry into the defendant's capacity to pay for counsel. The goal was the provision of representation for all (including the rich miser who could refuse to retain counsel) when the defendant faced an extreme penalty, such as death. Thus, the colonists did not see a financial link between the defendant and his counsel (or financial hold of the defendant over his counsel) as constitutionally mandatory.

There are cases that recognize the Sixth Amendment as protecting a defendant's right to hire his or her own counsel.<sup>61</sup> Such statements are only dicta with respect to the constitutionality of the proposed legislation here. They are all made in a context that there were *only* two ways in which one's Sixth Amendment right to counsel would be honored: (1) appointed counsel for indigents, and (2) retained counsel for all others. None of these cases can stand for the proposition that it is unconstitutional for all defendants in criminal cases to be limited to state ap-

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58. Counsel was always permitted for defense of misdemeanors. The King may have had a financial incentive for disabling a felony defense because only in felony convictions could the King share in a fine imposed on the defendant. In 1688, defense counsel was first allowed in cases of treason. It was not until 1836, however, that counsel was permitted for all felonies. See HELLER, *supra* note 2 at 1, 10.

59. See HELLER, *supra* note 2, at 18-19.

60. See HELLER, *supra* note 2, at 110.

61. See, e.g., *Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305, 370 n.19 (1985) ("They [appellees] simply want to exercise their rights to choose, to consult, and to employ the services of legal counsel ... a right that should be unfettered in a free society."). In all criminal proceedings, this right is expressly protected by the Sixth Amendment.

pointed counsel because no jurisdiction has adopted that posture.

In a more refined sense, the Sixth Amendment question may focus on the following: What interests are served by permitting a defendant to hire counsel? Are those interests sufficiently served by the appointment of counsel? Are there countervailing interests of the State and the public at large that should take precedence over the defendants' interests, without compromising his or her fundamental right to a fair trial?

From one perspective, it is difficult for a defendant to claim that he or she is being "deprived" of anything because the proposal here is to provide counsel and to relieve the defendant of financial burden that he or she now bears. However, one interest that may be jeopardized is the liberty to choose a lawyer in whom the defendant will have confidence.

One response to this problem is that the use of one's resources to obtain counsel does not mean that one has an unfettered right to choose counsel.<sup>62</sup> Naturally, a defendant has no right to demand representation by a person who is not formally admitted to the bar. A defendant can be forced to retain other counsel if his preferred attorney is not immediately available due to illness or a conflicting trial schedule (and the trial court finds that waiting would unreasonably delay completing the trial).<sup>63</sup> A trial court may refuse to allow an attorney, retained by the defendant, from serving if the court finds a potential conflict of interest between the defendant and others who are currently represented by that attorney. The court can maintain that stance even if the defendant is so insistent on obtaining a particular attorney that he or she offers to waive the right to make a subsequent objection on conflict of interest grounds.<sup>64</sup>

The United States Supreme Court has ruled on an issue that is tangential to the issue discussed here, namely whether a federal statute that indirectly constricts the defendant's ability to have a personal financial relationship with counsel is constitutional. In *Caplin & Drysdale v. United States*,<sup>65</sup> the defendant asserted that the government vio-

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62. See WAYNE R. LAFAYE, JEROLD H. ISRAEL, CRIMINAL PROCEDURE, 493-94 (student ed., West Publ'g Co. 1985) (citing cases to support the claim that "[a] defendant's right to retained counsel obviously includes the right to select counsel of his choice, but that right is not absolute.").

63. See *Ungar v. Sarafite*, 376 U.S. 575 (1964) (refusing to sustain a defendant's claim that his Sixth Amendment right to counsel was violated when the trial court refused to grant a continuance so that the defendant could be represented by the attorney of his choice).

64. *Wheat v. United States*, 486 U.S. 153 (1988).

65. 491 U.S. 617 (1989).

lated the Sixth Amendment when it seized financial assets that he would have used to hire counsel of his choice. The statute allowed the prosecutor to seek forfeiture of the defendant's assets with proof that they were the direct or indirect product of criminal activity.<sup>66</sup> The court held that there was no violation of the Sixth Amendment right to counsel because defendant's assets were properly subject to forfeiture.

Counsel for the defendant made the refined argument that the Sixth Amendment was violated because the *sole* purpose of the statute was to disable the defendant from paying his counsel. He elaborated on this statement by arguing that if the goal was solely to separate the defendant from ill-gotten assets, a forfeiture was not necessary to achieve that. Such a separation was achieved by the defendant's obligation to pay attorney fees.<sup>67</sup> The majority did not dodge the issue in response. It quoted from the lower court and expressly acknowledged that one of the major purposes of the federal legislation was to strip "criminals ... of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent."<sup>68</sup>

The Court was not squarely confronted with the question presented by the proposed legislation here namely blocking a defendant from using any assets, even legitimately held assets, to hire counsel when the State provides counsel. Moreover, the Court acknowledged the possibility that some might find the government's goal of disrupting a substantial financial relationship between the defendant and counsel to be "unsettling."<sup>69</sup> The result, however, is that the Court did not find such a goal antithetical to the Sixth amendment right to counsel, where the ultimate outcome is that the "formerly rich" defendant receives what most defendants receive—representation by appointed counsel.

The theme that runs through these cases is that the right to retain

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66. 18 U.S.C. § 1963 (1995) (racketeering forfeitures); 21 U.S.C. § 853 (1988) (drug ring forfeitures). Funds cannot be seized from a third party who engaged in a *bona fide* transaction with the defendant and who was reasonably unaware that the funds were subject to forfeiture. The prosecutor, however, must allege in the indictment that the defendant's assets are subject to forfeiture. Thus, a lawyer engaged by the defendant is put on notice about the cloud over the property. The trial court has the authority to freeze the assets that are the subject of the indictment prior to trial in order to prevent them from being used to pay legal fees. 21 U.S.C. § 853 (e)(1)(A). Such assets may be recovered from defense counsel after a conviction.

67. See *Caplin & Drysdale*, 491 U.S. at 629.

68. *Id.* (quoting *In re Forfeiture Hearing* as to *Caplin & Drysdale*, Chartered, 837 F.2d 637, 649 (4th Cir. 1988)).

69. See *id.* See also, Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid it*, 43 U. MIAMI L. REV. 765 (1989).

the counsel of one's choice is constrained if other important, overriding values or interests are served, and the defendant is not seriously compromised in his capacity to secure an alternative and adequate form of defense. The Court's view is captured most succinctly in *Wheat v. United States*:

Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer who he prefers.<sup>70</sup>

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[T]he right to counsel "does not override the broader societal interests in the effective administration of justice ... or in the maintenance of 'public confidence in the integrity of our legal system.'"<sup>71</sup>

The public interests served by state appointed counsel for all defendants are implied in the earlier parts of this Article. Such a system would ensure the appearance and the actuality of equal treatment of all defendants, especially those who do not at present qualify for legal aid. We are now in the anomalous position in which the State is constitutionally barred from imposing court costs on a person who is acquitted,<sup>72</sup> but it is not obligated to reimburse such a person for the cost of counsel. The spectacle of the "million-dollar" fees and the wealthy defendants buying their way out of a conviction would come to an end. It would deter the recruitment of attorneys into corrupt activity designed to improperly thwart a conviction. Present law allows the seizure of assets traceable to the defendant's criminal activity to bar their use for defense. However, it may not always be possible for the prosecutor to identify all of the defendant's resources that are the product of criminal activity. Organized crime syndicates, in particular, are active in "laundering" illegal gains and stashing their criminal proceeds in seemingly "legitimate" businesses.<sup>73</sup> An absolute ban on purchasing counsel wholly prevents the injustice of defendants obtaining a better quality defense solely because they have been more manipulative and decep-

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70. 486 U.S. 153, 159 (1988).

71. *Id.* at 158 n.2 (quoting *In re Paradyne Corp.*, 803 F.2d 604, 611 n.16 (11th Cir. 1986).

72. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (holding that a state statute that sought to impose court costs upon an acquitted defendant was vague and arbitrary). Justices Stewart and Fortas, each concurring separately, thought that any imposition of court costs upon an acquitted defendant was a violation of due process. *Id.* at 405.

73. See PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 40, at 11, 28, 35, 37.

tive in hiding the proceeds of their crime. These are substantial protections of the public and improvements in the administration of justice. They should justify remitting all defendants to the same process for receiving counsel. These protections preclude any violation of the Sixth Amendment.

#### IV. IMPEDIMENTS TO ENFORCEMENT

It is possible that even if such statutes were passed, some defendants may illegally attempt to pay appointed counsel in order to effectuate the same allegiance that some retained counsel now have. We know, for example, that some attorneys who represented convicted mobsters, in order to evade payment of income taxes, did not report their full income from fee arrangements to the Internal Revenue Service. One deterrent to this problem would be to make any illegal payments to appointed counsel by the defendant or others on behalf of the defendant.<sup>74</sup> As such an attorney who took such fees would be subject to not only a jail sentence, but disbarment.

However, we must be realistic and ask searching questions before we criminalize what would, in effect, be consensual activity because the criminal law has failed to control other forms of consensual activity such as drug use or the frequenting of prostitutes.<sup>75</sup> We must ask whether the goal to be achieved is worth the additional policing and surveillance that may be entailed. While there are similarities between the consensual activities of selling drugs and sex and the bribery offense proposed here,<sup>76</sup> there are significant differences. There are strong arguments that decriminalizing both drug use and prostitution could be the best way to control the negative and socially destructive side effects of both activities.<sup>77</sup> The current "fee for defense" regime, however, has numerous negative consequences which may only be controlled by prohibiting the financial relationship altogether. Moreover, in the drug and prostitution scenes, the purchaser may be driven by physiologically or sexu-

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74. Note that the federal statute that prohibited payment of more than \$10 to lawyers, criminalized the receipt of more money. 38 U.S.C. § 5905 (1994).

75. See, e.g., STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR* (1993) (detailing the failure of the criminal law to inhibit drug importation and use) [hereinafter DUKE & GROSS].

76. The hallmark of trafficking in drugs and prostitutes is the presence of highly motivated buyers and sellers who have great incentives for secrecy. That would be present in the circumstance of a wealthy defendant who would be highly motivated to "buy" more activity—legal and illegal—from a lawyer who anticipated quickly earning large profits.

77. See Laurie Shrage, *Prostitution and the Case for Decriminalization*, *DISSENT*, Spring 1996, at 41-45; see also, DUKE & GROSS, *supra* note 75, at 231-49.

ally-based needs. Such needs produce a form of irrationality, which resists the deterrent effect of formal penalties.<sup>78</sup> In the case of the "bought-attorney," we are dealing with two "rational actors"—one is trying to buy his way out of jail, the other is willing to selfishly exploit a powerful professional position for material gain and the power therein. This is the kind of motivation that ought to be subject to surveillance and heavy penalties.

In any event, there is always the prospect of desperate, wealthy defendants who will seek to circumvent the restriction on paying counsel. One response is to structure the appointment of counsel in such a manner as to disrupt patterns which enhance the possibility of bribery. In the organized crime context, the organization would often require long-term and regularized access to the attorney appeared necessary so that he or she could be "tested" for "cooperation." In order to preclude such a phenomena, assignment of counsel would be governed by some visible and predictable method, such that it could not be manipulated, even by a judge.<sup>79</sup> The fact that an attorney had represented a defendant on a previous occasion would be a *disqualifier* for representation of that defendant in the future, unless it was a retrial of a reversed conviction. The only permissible bias would be that defendants of substantial resources would more likely be assigned representation by the public defender rather than by counsel who was simultaneously engaged in private practice. It would be easier to monitor the public defender's income for improper payments. Unlike assigned counsel, public defenders are typically prohibited from engaging in outside practice (which could be used as a cover for under cover payments). Their salaries are a matter of public record, and expenditures far beyond that salary may be more visible, and easily traced. Fortunately, inquiries about attorney fee arrangements are generally not shielded by the attorney-client privilege.<sup>80</sup> Not all states or jurisdictions have a public defender system,

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78. The two activities continue despite the fact that the immediate or long-term interests of the purchaser may be in jeopardy. The drug purchaser runs the risk of a painful addiction or death due to overdose. The purchaser of illicit sex must have contact with a class of females who are disproportionately infected with AIDS and who may act as a decoy for a robbery.

79. Reports on organized crime have demonstrated efforts to corrupt judges and other law enforcement officials. See *supra* note 40, at 221-22, 224, 228-29, 242-48.

80. See *Clark v. American Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir. 1992); *In re Grand Jury Matter (Doe)*, 926 F.2d 348 (4th Cir. 1991); *In re Criminal Investigation No. 1/242Q*, 602 A.2d 1220 (Md. 1992). Courts have barred inquiries into fee arrangements only when such inquiries involve disclosure of privileged attorney-client communications. See also *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-*

and such systems may be rare in less populated, rural areas. However, organized crime syndicates, major corporations, and the very wealthy are likely to be located in major metropolitan areas where public defender systems exist.

No private attorney would be permitted to "volunteer" to represent the defendant without charge. This is designed to prevent defendants from covertly attempting to circumvent representation by the public defender. The only exception would be for attorneys who were members of an organization that had regularly and consistently provided non-profit legal aid for a specified period of time prior to the passage of legislation that would limit the choice of counsel.<sup>81</sup> Newly formed organizations would have to establish their right to function as non-profit legal aid organizations and operate at least five years with the public defender as co-counsel before they would be allowed to "volunteer" to handle cases alone. Naturally, the provision of counsel would have to be consistent with the stated law reform goals of the organization. No defendant could be defended by an organization to which he had made a substantial financial contribution.

It is not possible to wholly block wealthy persons or corporations from having access to advice from retained counsel prior to an arrest or an indictment. Therefore, persons with great financial resources, unlike most of the public, would continue even under the proposed plan to retain counsel to advise them as to what is criminal and what is not. Thus, corporations will still have access to retained attorneys to assist them in finding "loopholes" to achieve their goals. Mob bosses will still have retained attorneys who assist them in incorporating banks through which to launder their ill-gotten gains. While this is not desirable, the continued access to private counsel would support the constitutionality of the proposed legislation. A court favoring the legislation could point to the fact that it does not wholly prevent private citizens from access to re-

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Requena (DeGeurin) 913 F.2d 1118 (5th Cir. 1991); *United States v. Anderson*, 906 F.2d 1485 (10th Cir. 1990); *In re Grand Jury Proceeding Cherney*, 898 F.2d 565 (7th Cir. 1990). Whenever a public defender represents a defendant with substantial wealth, he or she may be subjected to scrutiny to ensure that no improper financial relationship develops.

81. This exception is designed to accommodate organizations like the American Civil Liberties Union, or the NAACP Legal Defense & Educational Fund, which may be concerned with appropriate development of the law in particular directions (*i.e.*, protecting civil liberties or opposing the death penalty). Indeed, it is possible that a criminal case could be characterized as a vehicle for advancing the interests of a group and that the right to legal counsel of one's choice may be protected by the First Amendment. See *Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *but cf.* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding a statute barring the client from paying substantial fees to an lawyer against First Amendment challenges).

tained counsel with regard to criminal matters.

### V. POLITICAL FEASIBILITY

I will not attempt to answer fully the question which any reader must have at this point—namely, “Yeah, it’s a great idea, but how in the world could it ever be passed?” I readily admit that the current political environment would be extremely hostile to any proposal to expand governmental responsibility. This is, after all, the era in which major players in both political parties trumpet downsizing “Big Government.”

This Article is written, however, precisely because the current atmosphere is so hostile to the notion that we can *expand* government responsibilities in ways that are creative and more responsive to the public interest. The dream must come before any action may be taken to achieve it. I also believe that the notion that the American public is implacably “Anti-Big-Government” is not an accurate reading of the existing political temperament. Americans do not want to do away with Social Security, although that is one of the largest government programs. They merely want it to be solvent and able to provide the kind of security that most citizens have come to expect. Americans do not want to wholly “privatize” public police forces—they merely want the police to be able to function efficiently so as to enhance safety. Furthermore, Americans are not wholly uncomfortable with the notion that restraints on the private sector may be necessary when the license is abused to produce inequality and unfairness. One needs only look more carefully at the enduring theme which underlies the long-standing public suspicion of the legal profession. At its core, is the notion that justice before the law, particularly criminal law, is a public good and access to it should not depend on financial resources. It should be fairly easy to explain to a disheartened American public that the “purchased” outcome in a criminal trial is not tolerable.

Moreover, while the general public may not get concerned about the potential for private lawyers to exploit persons charged with crimes those in the profession should be concerned. The “jokes” about the legal profession are not “jokes” according to us. We cannot sustain the public’s confidence if they know that we are the only vehicle for criminal justice but see us as fee-hungry predators. Too many members of the “respectable” bar avoid criminal practice, and thus we know that no “free market” operates in this arena. Major bar associations (other than the criminal defense bar) should, therefore, support the proposals made here.

While these proposals may seem radical, they may simply be an-

other logical step in the process of constructing a rational, just way of administering criminal justice. *Throughout American history the direction of the criminal justice system has been toward expanding the financial responsibility of government and reducing the arbitrary role that private money and private initiative can play, in order to enhance public control over public safety and provide equal access to justice.*

The early colonists moved from the English system in which private parties instituted prosecutions against other private parties toward the institution of a public prosecutor.<sup>82</sup> Thus, victims were relieved of the cost of pursuing those who had wronged them. Gradually, we moved from self-help vigilantism to undertaking the cost of a well-equipped and trained police force. Indeed, after all states had undertaken the full cost of prosecution, the Supreme Court progressively required all states to absorb certain costs connected with the defense of criminal charges involving indigents. The state must absorb the cost of the filing fee attached to a *habeas corpus* action;<sup>83</sup> the cost of filing a notice of direct appeal and securing a transcript;<sup>84</sup> the cost of defense counsel when an indigent defendant is charged with a felony or a misdemeanor that can carry a jail sentence;<sup>85</sup> and the cost of expert psychiatric witnesses when necessary.<sup>86</sup>

In summary, the state now bears all the costs of criminal prosecution (district attorneys, police, judges, bailiffs, coroners, etc.) and all of the necessary costs for the defense of criminal charges against indigents. Moreover, approximately 75% of the persons processed through the criminal justice system qualify for public defender representation.<sup>87</sup>

This proposal may not be opposed openly by wealthy defendants because they are not organized and the plea of a right to a special privilege would be shouted down. There are three groups that may op-

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82. HELLER, *supra* note 2, at 21.

83. Smith v. Bennett, 365 U.S. 708, 713-14 (1961).

84. Burns v. Ohio, 360 U.S. 252, 258 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

85. Scott v. Illinois, 440 U.S. 367 (1979) (right to appointed counsel for indigents exists in misdemeanor cases in which the defendant is sentenced to imprisonment); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963) (Fourteenth Amendment incorporates Sixth Amendment, requiring States to appoint counsel for indigents in felony cases); Johnson v. Zerbst, 304 U.S. 458 (1938) (Sixth Amendment requires appointed counsel for indigents in federal felony cases).

86. Ake v. Oklahoma, 470 U.S. 68 (1985). There are other ways in which we have sought to neutralize money as a factor in decision making in the criminal process. A State must have alternatives for pre-trial release other than money bail, or it might be subject to a claim denial of equal protection for indigents. See Schilb v. Kuebel, 404 U.S. 357 (1971).

87. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1733 n.17. (1993).

pose the proposal—organizations of criminal defense attorneys, public officials concerned about the additional cost to the state, and civil liberties organizations.

The private criminal defense bar would have trouble being taken seriously because they have an obvious financial stake in the status quo. They might, however, try to couch their objections in the language of protecting their client's "rights," as plaintiffs' lawyers have done when tort reform suggestions are made. However, plaintiffs' attorneys in the personal injury bar can at least claim that their contingent fee arrangements preserve the capacity for poor and middle-class persons to obtain access to the courts. Since there is no arrangement in the criminal law whereby the lawyer for a defendant collects a fee from "the other side," criminal practitioners can make no claim that they are serving the entire public. The criminal defense bar might not want to be too visible in a debate of the proposal here for it might incite demands for more public disclosure of the level of their fees.<sup>88</sup>

With respect to public officials, the answer is that the cost should not be overwhelming because it would entail providing counsel only for the small minority of defendants who are not now provided counsel as indigents.<sup>89</sup> Indeed for a jurisdiction, like the District of Columbia, it would be an even smaller step because they now underwrite the cost of counsel for defendants who can afford to pay only a part of the counsel's fee.<sup>90</sup> Moreover, legislation has passed the House of Representatives which moves part of the way toward the goal proposed here. The legislation would require the government to pay the legal costs of persons who are acquitted.<sup>91</sup> This legislation was proposed by a Republican, and overwhelmingly supported by a Republican-dominated

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88. Criminal lawyers cannot claim that they are being shut out of the only kind of law they practiced because they can always take cases as assigned counsel or join a public defender office. It would be too embarrassing for these lawyers to claim that they would not be as zealous in defense of their clients unless they were paid high fees because this would contradict their professional obligation.

89. The group that is not absolutely indigent—that should still qualify for representation by a public defender on constitutional grounds—may be even broader than present practices suggest. See *supra* note 87 and accompanying text.

90. See D.C. Indigent Rep. Title III (1996) (providing for partial payment for representation of appointed counsel, and full absorption of the cost of counsel if the defendant who originally retained the attorney becomes financially unable to pay the fee).

91. See "House Backs Measure to Pay Legal Costs," N.Y. TIMES, Sept. 26, 1997, at A24 (the Government would be free of the duty to reimburse the defendant if it could prove that, despite the acquittal the prosecution was "substantially justified or that other special circumstances make an award unjust." Amendment to H.R. 2267, as reported by Mr. Hyde of Illinois.)

House.<sup>92</sup> Republicans strenuously avoid the label of being "soft" on those enmeshed in the criminal justice system, and thus one must conclude that they do not believe that this form of public financing of the criminal defense of non-indigents will not produce a public backlash.

Financing costs should be controllable because federal and state governments have had no trouble securing competent, dedicated lawyers at far less than the \$250 to \$300 per hour that some attorneys charge in the private sector. It is likely that were the proposal here to be entertained in a state legislature or Congress, some legislators would offer an amendment to allow the Government to recover some of the costs of providing counsel from those who were convicted, and who could afford it. It might be argued that the government could impose only reasonable costs on a defendant, without driving innocent members of his family into destitution. This would achieve one of the goals of the proposal because the state would, in effect, have stepped into the process of bargaining for counsel fees, and corrected for the grossly unequal power relationship that now exists between the average middle-class client and private sector criminal defense lawyers. This qualification of the basic proposal treats the Criminal Justice enterprise like a public bus or rail system. Those who "ride" more, would pay more. However, I would oppose such an amendment because there is another value in not imposing a "user" tax in this manner. It would be useful for us to continue in the direction of treating the whole Criminal Justice industry as an enterprise to be wholly financed by the public, so that we can begin to ask hard question about whether we want to use it to respond to every kind of social problem.<sup>93</sup>

Civil liberties groups might make two objections. First, that there is a risk that counsel's legitimate allegiance to his or her client's interests would be diluted by the fact that he or she is paid by the state.<sup>94</sup> That might be a legitimate concern, but it is a risk that indigents now face

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92. The measure was passed by a vote of 340 to 84. See *supra* note 91.

93. See *supra* note 75-76 and accompanying text (discussing drug-trafficking and prostitution). An unfortunate by-product of drug trafficking is a concern of this article—it produces such high profits that there is plenty of money to try to corrupt defense counsel.

94. Paul B. Wice, PRIVATE CRIMINAL DEFENSE, in THE DEFENSE COUNSEL 13, 42 (William F. McDonald ed. 1983) Wice notes that "[n]o matter how high the quality of a public defender program, it is still tainted by its relationship to the state. Private criminal lawyers are therefore the sole vestige of an independent adversary to the state's ability to indict and convict." *Id.* Some of the studies that have demonstrated little differential performance between public defenders and private counsel for defendants who are not rich suggest that this estimation of superior independent performance is somewhat inflated. *Id.* at 39-64.

and it is unfair to allow only a handful of defendants to purchase protection against such a risk. Ultimately, we must rely on the integrity of the bar that is recruited to serve as defense counsel and the structure that allows counsel appropriate independence in an adequate defense.

A second claim could be that barring resort to high-priced counsel would further tip the balance of power toward the prosecutor, who already has the enormous advantage of the investigative resources of the police force.<sup>95</sup> The best response to this claim is an even further assumption of public responsibility for criminal defense: Defense counsel should have access to the police force to investigate legitimate leads that could prove a defendant's innocence, defense counsel should have authority to take depositions of prospective witnesses (with proper court supervision), and all criminal laboratory facilities maintained by the state should be open for use by the defense. The state has as much a stake in not convicting an innocent person as it does in convicting a guilty person. The Supreme Court has ruled that a prosecutor has a constitutional obligation to turn over exculpatory evidence to a defendant when a request is made.<sup>96</sup> Why, then, may this obligation not be extended to the police force to respond to reasonable requests for investigation in order to uncover exculpatory evidence? The overwhelming majority of defendants have committed the offense charged or some variant of the offense charged, as attested to by the 90% to 98% of defendants who plead guilty<sup>97</sup> and the less than 3% who are acquitted at trial.<sup>98</sup> Therefore, the additional investigative burden on the police should be justified if it is limited to persons who may be innocent. It is only under a regime of appointed counsel, however, that we could trust that the requests for investigation would be legitimate and not generated by privately retained counsel who are attempting to create a smokescreen.<sup>99</sup>

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95. See Luban *supra* note 87, at 1730. It is to be noted, however, that this imbalance exists only for the indigent defendant, particularly one who may not be able to make bail and is unable to conduct his own investigation. The prosecutor has, a formidable task to achieve a conviction when they are confronted with a wealthy defendant. Such an individual can more readily take the stand in his own defense since he will usually have no prior criminal record. Furthermore, a jury may find him more credible because he is armed with a history of respectability. Prosecutors may have difficulty in prosecuting mob figures because there may be a code of silence that is reinforced by the threat of assassination.

96. *Brady v. Maryland*, 373 U.S. 83 (1963).

97. MILLER, ET. AL., *CRIMINAL JUSTICE ADMINISTRATION*, 923-24 (4th ed., 1991) (guilty pleas are at the 90% level for felonies, and 98% if misdemeanors are included).

98. Luban, *supra* note 87, at 1729. (stating a rate of acquittal for felonies in state courts at 1% and a rate of 2.8% in federal courts).

99. There should obviously be no disclosure at trial of the defense counsel's requests for

A most telling point, is that many prosecutors may be trying to achieve what is proposed here by way of formal legislation. In reliance on the forfeiture statutes, a prosecutor can tap "virtually all" of a given defendant's resources as illegally gained and thus force the defendant into reliance on court-appointed counsel. Such was the case with Panama's ex-dictator, Manuel Noriega.<sup>100</sup> Moreover, private practitioners who regularly represent wealthy persons who are allegedly involved in drug trafficking law report that prosecutors have become especially aggressive in investigating and issuing charges against them for improper involvement with their clients.<sup>101</sup> This obviously can have the impact of driving some of this high-priced talent into other forms of representation.<sup>102</sup>

## VI. HIDDEN AGENDA

Why is such a "high-risk" proposal advanced here? It is because there is an unidentified agenda. That agenda is to call attention to the fact that we have all complacently come to tolerate a two-tier system of justice—one version is overburdened and inadequately financed—and the other is allowed to freely use its excessive resources, legally and illegally, to overwhelm even the best prosecution. Thus, the spirit of *Gideon* regarding the provision of adequate counsel for indigents is regularly undermined in practice.<sup>103</sup>

This kind of two-tier delivery of inadequate versus adequate service characterizes most public institutions when the poor or near poor are

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police investigation. One would not want defense counsel to make such inquiries routinely in order to protect a record should the defendant elect to go to trial. There should be a separate unit of the police department that conducts such investigations because one might need a different temperament and perspective in an investigation to prove innocence.

100. See generally AFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* (1992) (discussing of how the government deprived Noriega of financial resources to pay retained counsel).

101. See Harvey Berkman, *Zealous Civil Lawyers Now Fear Prosecution*, NAT'L L.J., Oct. 30, 1995, at A1. See also William Genego, *The New Adversary*, 54 BROOK. L. REV. 781 (1988) (postulating a recent increase in the number of highly paid defense counsel as the government began to emphasize white collar and drug related offenses and surveying aggressive prosecution tactics to disqualify or conduct intense surveillance of such counsel).

102. One lawyer, who was the subject of the seizure of a \$100,000 fee received from an admitted drug dealer, reported that "more and more good criminal lawyers are leaving this business." See BERKMAN, *supra* note 101, at A4.

103. See McDonald, *supra* note 7, at 8 ("[T]here is a substantial literature suggesting that publicly supported defense services do not provide justice equal to those which rich defendants receive .... The stagnant national and world economy presages further cutbacks in defense services and the exacerbation of the existing differentials between the quality of justice received by rich and poor American defendants.").

separated from the upper middle to upper classes. Public schools and public hospitals are invariably weaker and under-financed in areas where poor persons live.<sup>104</sup> Police are more aggressive in their efforts to investigate and suppress crime in upper class neighborhoods. Some of this occurs because the poor do not have the education, resources, or sophistication to demand and receive adequate public services. Some concerned activists and public officials have intelligently attempted to "integrate" the poor into middle class environments so that they will receive protective coloration. Hence, the demolishing of huge public housing projects and special programs to allow lower class persons to move into middle-class areas have been created.

There are limitations in all of these areas on the extent to which one can "integrate" the poor with classes above them. There are, for instance, important values served in allowing the development of private schools alongside public schools. The practice of one's religion or experimentation with special programs are all positive side effects of allowing persons with superior resources to avoid the public system. Full residential integration of the different classes is likely to take a very long time and a large amount of public resources. Moreover, reasonable arguments can be made that it is not illegitimate for persons to have access to more luxuriant surroundings when they have worked hard and amassed the wealth to do so.

None of those justifications for separation in some areas of our public life exist for the public institution of criminal justice. We do not have to allow the rich to purchase special treatment in the criminal justice system. The blind-folded figure holding the scales of justice is the quintessence of criminal law—class differences should *not* modulate process or outcomes. There are no special, independent values served in allowing a small portion of our citizenry to try to "buy" a better outcome in criminal cases—they have no "right" to such a result. No special resources have to be expended to spatially integrate the criminal justice system. All defendants are tried in the same courts, serviced by

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104. 99 Barbara L. Wolfe, *Reform of Health Care for the Non-elderly Poor*, in CONFRONTING POVERTY 260 (Sheldon H. Danzinger et. al., 1994) (detailing the withdrawal of public support from hospitals utilized by the poor).

Public schools are often financed by property taxes, and therefore schools in poorer districts receive less money. In *San Antonio School Dist. V. Rodriguez*, 411 U.S. 1 (1973), the Court rejected the claim that such a financing scheme denies equal protection of the laws to the poor. The Court reasoned that education is not a fundamental right and that the plaintiffs had not proven that lower levels of financing in some districts had produced poorer quality education. Some state supreme courts have held that their State Constitution requires equal financing. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1979).

the same probation and parole officers, and placed in the same jails. All defendants are investigated by the same police force and prosecuted by the same United States or District Attorney. Now we must take a small step to complete the circle and bar anyone from bringing privately retained defense counsel into the process.

There is no more despised group in this country than indigents charged with crime. They have no political power sufficient to achieve reform of criminal justice.<sup>105</sup> This proposal is a way to recruit the wealthy into becoming advocates for the improvement of our impoverished defense system. Let them explain why they should not be drafted.

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105. This is why the major reforms in criminal procedure have occurred at the level of the United States Supreme Court, an institution designed to protect the politically weak. However, the Court is constrained in the criminal procedure reforms it can work by the resistance of lower level administrators who may be expressing popular dissatisfaction with the Court's decisions. For an exploration of that phenomenon, see GERALD N. ROSENBERG, *THE HOLLOW HOPE* 42-71 (1991) (arguing that the formal racial desegregation ordered by *Brown v. Board of Education*, 347 U.S. 483 (1954), has had little impact on the pattern of racial segregation in schools, because of factors outside the court's control).