DOES *GIDEON* STILL MAKE A DIFFERENCE?

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"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1]

I. INTRODUCTION

March 18, 1998 marked thirty-five years since the United States Supreme Court decided *Gideon v. Wainwright*,[2] the landmark case affirming an indigent defendant's right to appointed counsel. Since *Gideon* was decided, crime has increased and our prisons seem to be growing faster than private enterprise. As a society, we seem to believe that it is far better to be punitive and to imprison offenders than it is to provide meaningful educational and economic opportunity, as well as true rehabilitation programs and alternative sentences. A significant portion of the population feels strongly that we should have a death penalty. A federal death penalty statute exists and recently New York State's governor and legislature have dehumanized our state by enacting one. Life and death hang in the balance. So does our dignity as a civilization.

While these severe penalties have been injected into our criminal justice system, we provide only the most cursory defense services to the poor. Public defender budgets are routinely slashed to the bare bone. Lawyers who serve the poor zealously strive to provide effective legal representation, yet they are overrun by the supe-

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[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[2] 372 U.S. 335 (1963).

rior resources of law enforcement and the Government. The lack of funding for defense services for the poor makes a mockery of justice.

Counsel assigned to federal cases in New York receive $75 per hour for in-court and out-of-court time,[3] less arbitrary reductions made by judges who seem to retaliate against them for being strong advocates.[4] A commission appointed by Chief Justice Rehnquist has recommended that judges be removed from the process of approving these fees.[5] The federal judiciary has chosen to ignore these recommendations.[6]

In New York State courts, assigned lawyers work for the paltry sums of $40 per hour for in-court time and $25 per hour for out-of-court time.[7] Only their dedication to equal justice and their commitment to the spirit of *Gideon* keeps them working. Pay vouchers are routinely delayed, arbitrarily reduced, or lost by mean-spirited judges. Many of these jurists were never defense lawyers or, if they were, it was a long time ago and their memories appear to have dimmed.

We must look beyond the sensational case and remember what is at stake for the indigent defendant. While we routinely under-represent the poor in criminal cases, the government brands them with the scarlet letter of criminal conviction. When a citizen who has no prior convictions pleads guilty to a felony, that person can no longer apply for many jobs or aspire to many careers,[8] or ever vote in a general election.[9] Without a substantial cadre of well trained and uninhibited defense lawyers, our adversarial system of justice simply breaks down. The end result is that society's most powerless citizens are methodically disenfranchised without any certainty that their convictions are just.

In spite of obstinate and uncomprehending opposition by the

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[3] SPANGENBERG GROUP, SURVEY OF INDIGENT DEFENSE PROVISIONS BY STATE (1992).

[4] SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL (October 1997); *see also* Thomas F. Liotti & Harriet B. Rosen, *Review of the Report on the Criminal Justice Act*, N.Y. L.J., Outside Counsel Column, Nov. 17, 1992 at 1, 7; THE MOUTHPIECE (A publication of the New York State Association of Criminal Defense Lawyers), Nov./Dec. 1992 at 19.

[5] JUDICIAL CONFERENCE OF THE UNITED STATES, CRIMINAL JUSTICE ACT REVIEW COMMITTEE: INTERIM REPORT, (1992), *reprinted in* 51 Crim. L. Rep. (BNA) 2335, 2337 (Aug. 19, 1992).

[6] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM, (1993), *reprinted in* 53 Crim. L. Rep. (BNA) 2003, 2010 (Apr. 14, 1993).

[7] N.Y. COUNTY LAW § 722-b (McKinney 1991).

[8] N.Y. CORRECT. LAW §§ 751-55 (McKinney 1981).

[9] N.Y. ELEC. LAW § 5-106 (McKinney 1998).

state legislature, the New York State Defenders Association, Inc. helps criminal defense attorneys by providing research, briefs, transcripts, and strategic and tactical advice. Criminal defense lawyers all too often must wage a lonely fight for justice with nothing more than the fire in their bellies. On the thirty-fifth anniversary of *Gideon*, it's time to give more than just tacit support to that landmark decision. Lawyers must have the tools to fight—without them, all of us are in danger.

Part II of this article inquires into the spirit of *Gideon*. It discusses the history of court-appointed counsel to represent the indigent and the breakdown of that system around the turn of the century. Next, it analyzes federal and state cases that led up to *Gideon*. Finally, it describes New York State's statutory response to *Gideon*.

Parts III and IV address several causes of action that hopefully will spur litigation on behalf of indigent defendants. Part III describes United States Supreme Court treatment of indigent defendants and fundamental rights, with special emphasis on equal protection. Part IV addresses the quality of representation for indigent defendants in New York. Finally, Part V concludes with a general litigation strategy for the fight for equal justice for the poor.

II. THE SPIRIT OF *GIDEON*

A. *The History of Court Appointed Counsel*

Courts have looked to the historical obligations of the bar to justify their own power to appoint and the lawyer's duty to serve.[10] Some commentators claimed to have discovered the roots of appointed counsel in Roman history.[11] However, other commentators question the support for this premise.[12] Historical English and American case law have been used to justify the appointment of attorneys to serve the indigent.[13] The English tradition also supports the attorneys' obligation to accept court appointments.[14]

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[10] *See, e.g.*, Salas v. Cortez, 593 P.2d 226, 229-30 (Cal. 1979), *cert. denied*, 444 U.S. 900 (1979).

[11] *See* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 385 (1923).

[12] *See* David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 739-48 (1980).

[13] *See* Powell v. Alabama, 287 U.S. 45, 72-73 (1932); *see also* White v. Board of Commissioners, 537 So. 2d 1376, 1379 (Fla. 1989); State v. Remeta, 547 So. 2d 181, 182 (Fla. Dist. Ct. App. 1989); United States v. Dillon, 346 F.2d 633, 636-37 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

[14] *See Dillon*, 346 F.2d at 636.

Courts maintain that the history of appointment in England established the bar's duty to serve the indigent without payment.[15] However, the English system does not establish this obligation.[16]

The early reported cases demonstrate a mixed response by the courts when faced with situations requiring appointment. In fact, a number of cases that date back to the sixteenth century show that defendants frequently had to beg the court for the assistance of counsel, and regularly did so to no avail.[17] Yet, this was not always the case. The Ninth Circuit noted in *United States v. Dillon*[18] that some English statutes and case law required certain attorneys to render unpaid services to the indigent as officers of the court.[19] Although mandatory court appointment burdened some privileged members of the legal profession,[20] the claim that these special appointments require an obligation by all attorneys today is unfounded.

American courts have relied on the English tradition of court appointment to justify their own appointment of counsel with little or no compensation. Although authorities disagree about the extent of the right to counsel during the colonial period,[21] the history of that period demonstrates a general departure from the English tradition of not appointing counsel. The colonial legislatures produced a variety of statutes creating a right to counsel.[22]

The idea of appointed counsel was clearly on the minds of the members of the Constitutional Convention.[23] There, three differ-

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15 *Id.*

16 *See* Shapiro, *supra* note 12, at 744-49.

17 *Id.* at 743. *See also* Lord Lovat's Case, 18 How. St. Tr. 529, 578-79 (1746) (blind, deaf invalid denied counsel); Scroop's Case, 5 How. St. Tr. 1034, 1043-46 (1660) (incarcerated defendant required to represent self); Howard's (Duke of Norfolk's) Case, 1 How. St. Tr. 957, 966-67 (1571) (defendant accused of high treason denied counsel).

18 346 F.2d at 636.

19 *But see* Shapiro, *supra* note 12, at 743-49 (criticizing the court's selective use of case law to establish that counsel was always appointed for the indigent in England).

20 *See id.* at 746. Historically, an officer of the court was the holder of public office, usually a sergeant-at-law. A sergeant-at-law was granted unusual privileges not given to other members of the bar and created a special strata within their own exclusive profession. This elite body alone bore the burden of mandatory service to the indigent. *Id.*

21 *See* Shapiro, *supra* note 12, at 750.

22 *See* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030 (1964) (noting that all states except Georgia and Rhode Island had adopted some right to counsel statute by 1789).

23 *See* Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 1, 24-25 (1954).

ent versions of the Sixth Amendment were debated.[24] The final version of the Amendment, entitling indigent defendants representation by an attorney, was very similar to the original proposed language.[25] The first Congress passed an Act that required the appointment of counsel in capital cases.[26]

B. State Court Reaction

Three early decisions held on constitutional grounds that an attorney could not be compelled to represent an indigent defendant without compensation. The Supreme Court of Indiana in *Webb v. Baird*,[27] was the first to dismiss the historical justifications for "gratuitous defense of a pauper."[28] The Indiana Court recognized the argument that an attorney has an "honorary" duty to aid the indigent.[29] However, the Court dismissed this claim as having no place under state law or the United States Constitution.[30] The Court considered all professions equal. Therefore, none could be subjected to the unique burden of providing services without compensation.[31]

In *Carpenter v. Dane County*,[32] the Wisconsin Supreme Court repudiated court appointment without compensation on the same grounds as *Webb*.[33] The Iowa Supreme Court in *Hall v. Washington Co.*,[34] relied on the Fifth Amendment's takings clause to hold unconstitutional court appointment without compensation.[35] The Iowa Court ruled that the right to compensation was a fundamental right that would be violated by such an appointment.[36]

By the close of the nineteenth century, the idea of compelled representation without pay was losing acceptance. Generally, states have rarely disciplined lawyers who refused to serve when ap-

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[24] *See* Note, *supra* note 22, at 1031.

[25] *See* Rackow, *supra* note 23, at 24-25.

[26] *See* Rackow, *supra* note 23, at 25-26 n.98.

[27] 6 Ind. 13 (1854).

[28] *Id.* at 16-17.

[29] *Id.* at 16.

[30] *Id.* at 16-17.

[31] *Id.*

[32] 9 Wis. 249 (1859).

[33] *Id.* at 252.

[34] 2 Greene 473 (Iowa 1850).

[35] *Id.* at 478.

[36] *Id. But see* Samuels v. County of Debuque, 13 Iowa 536, 538 (1862) (holding that lawyers must provide representation for a prescribed statutory fee based on the theory that lawyers were officers of the court).

pointed without compensation.[37] Courts have held attorneys in contempt for refusal to proceed as appointed counsel, but they have been reluctant to exercise their judicial power to compel attorneys to serve the indigent.[38] Lawyers began to assert that uncompensated service constituted an excessive burden.

C. *Challenges to Appointment Without Provisions for Compensation*

Many courts accepted the argument that uncompensated service constituted an excessive burden and found challenges to mandatory court appointments both compelling and cognizable. For example, in *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*,[39] the United States District Court for the Northern District of Alabama held the Title VII provision granting courts the discretion to compel representation without provision for payment unconstitutional, as it allowed for the creation of a form of involuntary servitude prohibited by the Thirteenth Amendment.[40] The court distinguished between the fundamental right to defend oneself against criminal charges and the right to initiate a civil lawsuit.[41] The Fifth Circuit Court of Appeals later vacated the decision.[42]

The *Nine Applications* holding was subsequently rejected by most circuit courts addressing the issue. To justify uncompensated service by appointed counsel, courts relied on the public service exception which is grounded in a line of cases permitting the state to call its citizens into temporary service.[43] The Supreme Court's holding in *Hurtado v. United States*,[44] practically assured the application of the public service exception to court appointment challenges by reinforcing the public service exception when applied to criminal justice proceedings.[45] The *Hurtado* Court held that the attorney's duty to represent the indigent was analogous to the pub-

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[37] J.W. Thomey, Annotation, *Attorney's Refusal to Accept Appointment to Defend Indigent, or to Proceed in such Defense, as Contempt*, 86 A.L.R. 3d 1223-24 (1990).

[38] *See id.* at 1224.

[39] 475 F. Supp. 87 (N.D. Ala. 1979).

[40] *Id.* at 88.

[41] *Id.* at 92.

[42] *See* White v. United States Pipe & Foundry Co., 646 F.2d 203 (5th Cir. 1981).

[43] *See* Hurtado v. United States, 410 U.S. 578, 588-89 (1973); Butler v. Perry, 240 U.S. 328, 333 (1916).

[44] 410 U.S. 578 (1973).

[45] *Id.* at 588-89. However, the application of the public service exception has been limited. In *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966), the Second Circuit Court of Appeals held that the government's power to compel public service is restricted by the requirement that the service bear a reasonable relation to the state's needs. *Id.* at 131-32.

lic's duty to provide evidence in criminal cases.[46]

Utilization of the public service exception to court appointment prevents Thirteenth Amendment challenges because the voluntary nature of the service may be imputed from the attorney's oath taken upon entrance to the bar. Other fundamental policies form the foundation of court appointment rather than instances where the state temporarily requires the services of its citizens.[47]

In *United States v. Dillon*,[48] the Ninth Circuit Court of Appeals rejected a deprivation of property challenge to uncompensated court appointment.[49] The *Dillon* court held that lawyers have a professional responsibility to render unpaid services.[50] To find a deprivation, due process analysis requires the court to determine that a taking of property has occurred.[51] The court disposed of this question by holding that no taking of services occurs with court appointments because lawyers by implication consent to service upon entering the profession.[52] The court reasoned that lawyers owed this duty as officers of the court.[53]

The *Dillon* rationale has commanded a wide following in both state and federal courts.[54] However this rationale appears untenable in light of the Supreme Court's current test for examining takings. In *Penn Central Transportation Co. v. New York City*,[55] the Court noted that courts have held a taking exists when the state directs "acquisitions of resources to permit or facilitate uniquely public functions."[56] Court appointments facilitate a public function because appointment allows the state to fulfill the duty imposed upon it by *Gideon* and subsequent cases.

In *Goldblatt v. Town of Hempstead*,[57] the Supreme Court held that no compensation will be awarded unless there is a showing that the means are "unduly oppressive" to the petitioner.[58] Some

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46 410 U.S. at 589.

47 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

48 346 F.2d 633 (9th Cir. 1965).

49 *Id.* at 635-36.

50 *Id.*

51 *Id.* at 635.

52 *Id.* at 635-36.

53 *Id.*

54 *See* White v. United States Pipe & Foundry Co., 646 F.2d 203, 205 (5th Cir. 1981); Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied*, 414 U.S. 864 (1973); Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965); Jackson v. State, 413 P.2d 488, 490 (Alaska 1966).

55 438 U.S. 104 (1978).

56 *Id.* at 128.

57 369 U.S. 590 (1962).

58 *Id.* at 594-95 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

courts have used an analysis similar to the one used in *Goldblatt* to address takings challenges to court appointment.[59] Courts which implicitly follow *Goldblatt* have found that compensation systems violate the Fifth Amendment. Moreover, some decisions declare that uncompensated appointments are *ipso facto* violative of the Fifth Amendment.[60]

D. Dominance of the States

The original Constitution ratified in 1789 contained few references to individual rights.[61] Its major concern was the structure of the new federal government. However, the ratification debates revealed a popular demand for additional constitutional protections of individual and state's rights. The response to these pressures was the introduction and ratification of the first ten amendments, the Bill of Rights, in 1791.[62]

There was little opportunity for the Supreme Court to interpret the Bill of Rights before the Civil War. The first century of constitutional decisions was marked by a concentration on structural issues; the respective roles of the national and federal governments as well as the tripartite separation of powers at the national level.[63] Moreover, Chief Justice Marshall would lay to rest any challenges to state supremacy in the landmark case of *Barron v. Mayor and City Council of Baltimore*.[64] Barron sued the City for ruining the use of his wharf in Baltimore harbor.[65] Justice Marshall, ordinarily not adverse to nationalistic interpretations, held that the Bill of

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59 *See* People *ex rel.* Conn. v. Randolph, 219 N.E.2d 337 (Ill. 1966) (holding trial court may reimburse court-appointed attorney beyond amount authorized by statute where attorney would otherwise "suffer an intolerable sacrifice and burden"). *Id.* at 340; Kansas *ex rel.* Stephan v. Smith, 747 P.2d 816 (Kan. 1987) (holding a violation of the Fifth Amendment has occurred when an attorney is required to advance expense funds without full reimbursement or "is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice"). *Id.* at 842; Daines v. Markoff, 555 P.2d 490 (Nev. 1976).

60 *See* Bedford v. Salt Lake County, 447 P.2d 193, 195 (Utah 1968); Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972); McNabb v. Osmundson, 315 N.W.2d 9, 16 (Iowa 1982).

61 Stewart F. Hancock Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271, 278 (1993); *see generally* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS & INTERPRETATION, SENATE DOCUMENT NO. 103-6 (1996) [hereinafter CONSTITUTION ANNOTATED].

62 U.S. CONST. amend. I-X.

63 *See generally* CONSTITUTION ANNOTATED, *supra* note 61.

64 32 U.S. 243 (1833).

65 *Id.* at 244.

Rights restricted only the federal government and did not limit state authority.[66] Marshall pointed to the fears about encroachments of the new national government expressed during the ratifying conventions.[67] Noting that the citizens had adopted not only the Federal Constitution but separate, and sometimes different, constitutions for the states, he saw the Bill of Rights as limiting only the government established by the Federal Constitution.[68]

The result of the *Barron* holding was that neither the Supreme Court nor the lower federal courts were able to exercise meaningful control over the substance or procedures embodied in state law. Therefore, issues surrounding the appointment of counsel without provision for compensation were settled on the state level without consideration of the Sixth Amendment. The Constitution enabled the Supreme Court to provide federal protection of individuals and groups against governmental overreaching. This role would eventually expand with the passage of the Post-Civil War Amendments.

1. Enactment of the Civil War Amendments and Early Interpretations

After *Barron* the Constitution afforded individuals few safeguards against state action. The Civil War itself would radically alter that picture. From an historical perspective, the Civil War was about slavery and emancipation.[69] From a legal standpoint, the focus of the Civil War was federalism - a group of states asserting their prerogative over increasing federal interference into their way of life.[70] The Thirteenth, Fourteenth, and Fifteenth Amendments, passed in the wake of the Civil War, were a reaction to these causes of extreme divisiveness.

The *Slaughter House Cases*,[71] the Supreme Court's first interpretation of the Civil War amendments, stated that the purpose of the amendments was to bar discrimination by the states against blacks,[72] but the court rejected the opportunity to give the amendments reach beyond the issues that spawned them. The Court proved unwilling to conclude that the Fourteenth Amendment lim-

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66 *Id.* at 250-51.
67 *Id.* at 250.
68 *Id.* at 247-48.
69 BRUCE CATTON, THE CIVIL WAR 10 (1960).
70 *Id.* at 8-10.
71 83 U.S. (16 Wall.) 36 (1873).
72 *Id.* at 71-72. *See also* David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 5 DUKE L.J. 800, 805 & n.90 (1987).

ited the states' powers.[73] In its interpretation, the majority relied on the historical background of the amendments and concluded that they were not to be read to "radically change the whole theory of the relations of the State and Federal Government to each other and both of these governments to the people."[74] Additionally, the court reasoned that they would not create a "perpetual censor upon all legislation of the States, on the civil rights of their own citizens."[75]

The growth of industrialization and corporate power in the post-Civil War years led to popular demands and legislative responses. New regulatory laws clashed with the economic *laissez-faire* theories of Adam Smith and the Social Darwinism embraced by writers such as Herbert Spencer.[76] During those clashes, ideas such as survival of the fittest, the defense of economic inequalities, and governmental hands-off policies found their way into legal briefs and found responsive listeners on the bench.[77] Thus, the seeds of substantive due process began to surface in majority opinions.

The Supreme Court increasingly began to question state regulations[78] and eventually began to overturn them based on the Fourteenth Amendment's Due Process Clause.[79] The focus of the Court's scrutiny was economic regulation that conflicted with the Court's *laissez-faire* theory of minimal governmental interference with business. The most infamous of these economic regulation cases was *Lochner v. New York*.[80] At issue was a New York law which limited the hours a bakery employee could work.[81] The Court struck down this law as an abridgment of liberty of contract and a violation of substantive due process.[82] The *Lochner* era had begun.

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73 83 U.S. at 78.

74 *Id.*

75 *Id.*

76 *See* Mark G. Yuduf, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1389 (1990).

77 *Id.* at 1389-90 (describing Justice Holmes chastisement of his fellow justices for reading Herbert Spencer's brand of utilitarian philosophy into the Constitution); *see also* H. SPENCER, SOCIAL STATICS 106 (1865).

78 *See* Munn v. Illinois, 94 U.S. 113, 132-34 (1877) (deferring to the legislature's judgment on the issue but indicating a willingness to determine what regulations were "reasonable").

79 *See* Allgeyer v. Louisiana, 165 U.S. 578, 591-92 (1897) (striking down a Louisiana statute which prohibited anyone from obtaining insurance on Louisiana property from any company not licensed in Louisiana).

80 198 U.S. 45 (1905).

81 *Id.* at 46.

82 *Id.*

Cases of the *Lochner* era had much in common. First, the Court was highly suspicious of legislative motives.[83] The Justices looked only at the legislature's actual motive, not a hypothetical one, and would often go so far as to substitute their own interpretation. For example, in *Lochner*, the Court rejected the proposition that the law at issue was intended to regulate health and safety.[84] Instead, the Court saw the law as a regulation of labor conditions which interfered with liberty of contract.[85] Second, the Court continually refused to defer to legislative findings of fact.[86] The Court concluded, "[i]t is not . . . possible to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman."[87]

Lochner symbolizes the rise of substantive due process as a protection of economic and property rights.[88] For the next three decades the Court intensely scrutinized economic regulations and frequently struck them down. *Lochner* and the judicial philosophy behind it were subjected to intense criticism.

The election of Franklin Roosevelt and the promise of the New Deal programs convinced many of the need for aggressive legislation to ensure the nation's economic survival. Such large scale government intervention in economic affairs was clearly at odds with the *Lochner* freedom of contract philosophy. As a result, in the mid-1930s, judicial intervention in economic legislation began to gradually decline.[89] The use of substantive due process to give special protection to economic and property rights was discredited.[90]

The economic regulation cases are useful to the understanding of *Gideon* because they focused on the judicial power used to protect individual liberties. These cases changed the relationship between federal judges and legislative bodies by changing their powers to determine the scope of "liberty." The new question that arose would be the pace and nature of this change.

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[83] *Id.* at 62-63.
[84] *Id.* at 57.
[85] *Id.* at 61.
[86] *Id.* at 62.
[87] *Id.*
[88] *Id.* at 45.
[89] *See* William Michael Treanor, *Jam For Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 865 (1998).
[90] *Id.*

2. The Rise of Procedural Due Process and the Incorporation Debate

Change in court personnel, together with Roosevelt's court packing plan, contributed to a philosophical shift toward greater deference to legislation in economic affairs.[91] Cases such as *Nebbia v. New York*,[92] explicitly, and *West Coast Hotel Co. v. Parrish*,[93] implicitly, abandoned the *Lochner* philosophy. The battlefield having shifted, the new competing views became selective and total incorporation.

The selective incorporation approach denies that the entire Bill of Rights is made applicable to the states via the Fourteenth Amendment. Instead, only those aspects of liberty that are in some sense "fundamental" are protected by the Fourteenth Amendment against state interference. Justices Cardozo and Frankfurter were the two best-known proponents of the selective incorporation, fundamental rights approach. In *Palko v. Connecticut*,[94] Justice Cardozo articulated the selective incorporation test as being whether the Bill of Rights guarantee is "implicit in the concept of ordered liberty."[95] The proponents of selective incorporation also hold that the Bill of Rights does not set outside limits on the concept of liberty.[96]

The contrary view, total incorporation, asserts that all of the guarantees specified in the Bill of Rights are made applicable to the states by the Fourteenth Amendment's Due Process Clause. The best known proponent of this view was Justice Black, whose position fell one vote short of becoming law in *Adamson v. Califor-*

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91 WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, 231-37 (1963).

92 291 U.S. 502 (1934) (holding that the use of private property and the making of private contracts are free from governmental interference, but neither property rights nor contract rights are absolute: they are subject to public regulation when the public need requires. Regulation of this liberty is constitutional as long as it is not unreasonable, arbitrary and capricious, and the means selected are real and substantially related to the ends).

93 300 U.S. 379 (1937) (holding that property and contract rights are subject to regulation as long as the regulation is reasonable and the means selected are genuine and substantially related to the ends).

94 302 U.S. 319 (1937).

95 *Id.* at 325.

96 *See, e.g., In re* Winship, 397 U.S. 358, 359 (1970) (a selective incorporation decision holding that proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" and therefore binding on state trials even though no specific Bill of Rights provision imposes such a requirement) (citing *In re* Gault, 387 U.S. 1, 13 (1967)).

nia.[97] In his dissent, Justice Black argued that the procedural guarantees applied to the federal government through the Fifth Amendment were automatically rendered applicable to the states via the Fourteenth Amendment.[98] Justice Black argued that this was the intent of the framers of the Fourteenth Amendment.[99] Moreover, in his view, the majority's fundamental rights approach allowed the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[100]

Although the Supreme Court has continued to adhere, in theory at least, to the selective incorporation fundamental rights approach, the Warren Court sped up the process by which individual Bill of Rights guarantees were incorporated into the Fourteenth Amendment.[101] Today, virtually the entire Bill of Rights has been incorporated into the Fourteenth Amendment, one guarantee at a time.[102] In the process, the Bill of Rights in general, and the Due Process Clause in particular, has come to protect the values of a vulnerable citizenry from the overbearing reach of government officials.[103]

3. The Constitutional Right of Indigent Defendants to Appointed Counsel

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense."[104] It was obvious from the outset that this provision guaranteed a right to representation by privately retained counsel. Whether the Sixth Amendment also included an obligation of the state to provide counsel for the indigent defendant was far less certain.[105]

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97 332 U.S. 46 (1947).

98 *Id.* at 68-92 (Black, J., dissenting).

99 *Id.* at 72, 74-75.

100 *Id.* at 90.

101 *See* Rachel E. Fugate, Comment, *The Florida Constitution: Still Champion of Citizen's Rights?*, 25 FLA. ST. U. L. REV. 87, 91 (1997).

102 *See Adamson*, 332 U.S. at 91 n.32. Bill of Rights guarantees not incorporated into the Fourteenth Amendment are the Fifth Amendment's prohibition of criminal trials without grand jury indictment and the Seventh Amendment's right to a jury in civil cases.

103 *See id.* at 91.

104 U.S. CONST. amend. VI.

105 *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (requiring federal courts to provide indigent defendants with appointed counsel in criminal cases); *But cf.* Betts v. Brady, 316 U.S. 455 (1942) (holding that an indigent defendant in a non-capital case had to show that he had been prejudiced without a lawyer and that special circumstances

1. Right to Appointed Counsel in Felony Cases

Powell v. Alabama[106] was the first United States Supreme Court case to recognize a constitutional right to court appointed counsel.[107] In *Powell*, nine black youths had been charged with the rape of two white girls near Scottsboro, Alabama.[108] Amid a popular frenzy, the defendants who were under the constant guard of the state militia were rushed to trial.[109] Eight of the youths were convicted and the jury imposed the death sentence.[110] The Supreme Court held that the defendants were denied effective appointment of counsel.[111]

Powell was decided under the then prevailing "fundamental fairness" analysis of the Fourteenth Amendment Due Process Clause. According to the Court, the right to appointed counsel derived from the due process right to a fair hearing.[112] The indigent defendant was entitled to a fair hearing,[113] just as the more affluent defendant who could afford to retain a lawyer. The *Powell* opinion stressed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[114] Accordingly, the state had a due process obligation to provide the indigent defendant with a lawyer where the assistance of counsel was essential to achieve a fair hearing.[115] However, the majority limited the holding of *Powell* to the specific facts before the court.[116]

Six years later, in *Johnson v. Zerbst*,[117] the Supreme Court held that the right to appointed counsel was found in the Sixth Amendment.[118] The Court discarded the fundamental fairness interpreta-

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existed, such as defendant's ignorance, illiteracy, etc., to make the proceedings inherently unfair); *But see* Gideon v. Wainwright, 372 U.S. 335 (1963) (overturned *Betts* and held that court appointed counsel is a fundamental right stating, "[w]e think the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights"). *Id.* at 342.

106 287 U.S. 45 (1932).

107 *Id.* at 71.

108 *Id.* at 49.

109 *Id.* at 51.

110 Powell v. State, 141 So. 201, 203 (Ala. 1932).

111 Powell v. Alabama, 287 U.S. 45, 71 (1932).

112 *Id.* at 71.

113 *Id.* at 72-73.

114 *Id.* at 68-69.

115 *Id.* at 71.

116 *Id.*

117 304 U.S. 458 (1938).

118 *Id.* at 462-63.

tion in favor of the selective incorporation analysis[119] that made the Sixth Amendment directly applicable to the states.[120] Its interpretation of the Sixth Amendment rested heavily upon the analysis of the need for counsel first suggested by Justice Sutherland in his opinion for the Court in *Powell*.[121] *Johnson* involved a federal prosecution in which two indigent defendants were charged with counterfeiting. The defendants argued that they had been refused appointed counsel because counterfeiting is not a capital offense.[122]

Justice Black, writing for the majority, held that a trial without counsel violated the Sixth Amendment because the right to counsel applies to "all criminal prosecutions."[123] Relying heavily on the language in *Powell*, that the right to be heard would be of little value without assistance of counsel, Justice Black noted that the average defendant does not have the requisite skill to protect himself in a criminal trial.[124] Therefore, in federal court, a defendant could not be deprived of the right to assistance of counsel unless the defendant waived that right.[125]

This right applied to all criminal defendants, including those who were unable to afford counsel.[126] The Court viewed the right to counsel as a constitutionally defined element of a criminal trial guaranteed by the Sixth Amendment.[127] Therefore, it was the trial court's affirmative obligation to see that the accused was given this right.[128] Furthermore, in the case of an indigent defendant, appointed counsel was required unless he knowingly and intelligently waived this right.[129]

For another twenty-five years the Supreme Court refused to extend the *Johnson* holding to state courts. Even though the Court in *Johnson* held that the Sixth Amendment required appointed counsel in all federal felony cases, state courts were not compelled to employ more than the "fundamental fairness" test of the Fourteenth Amendment.[130] Accordingly, in *Betts v. Brady*,[131] the Court

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119 *Id.* at 467-68.
120 *Id.* at 465-66.
121 *Id.* at 462-63.
122 *Id.* at 460.
123 *Id.* at 463.
124 *Id.*
125 *Id.* at 468-69.
126 *Id.* at 464.
127 *Id.* at 467.
128 *Id.* at 468.
129 Betts v. Brady, 316 U.S. 455, 464-65 (1942).
130 *Id.* at 466.

held that due process required the appointment of counsel only where special circumstances of the particular case demonstrated that the indigent defendant would need a lawyer to obtain a fair trial.[132] Capital cases such as *Powell* presented an example of these special circumstances. However, the need for appointed counsel could also be shown in cases where the nature of the offense or the possible defenses raised complex legal questions[133] or the personal characteristics of the defendant, such as youthfulness or incapacity[134] raised the issue.

The Court in *Gideon v. Wainright*,[135] rejected the special circumstances test of *Betts* and extended the right to appointed counsel in state cases to all indigent felony defendants.[136] The Court held that the Fourteenth Amendment incorporated the Sixth Amendment and made appointment of counsel applicable to the states in all criminal prosecutions.[137] *Gideon* established the requirement that a lawyer's assistance was necessary to guarantee a fair trial.[138] Therefore, if a defendant was unable to afford an attorney, the court had to appoint one for his defense.[139]

In both *Johnson* and *Gideon* the Court viewed the Sixth Amendment as defining the basic elements of a fair trial and included the assistance of counsel among those elements.[140] In *Johnson*, Justice Black viewed the Sixth Amendment as imposing a single counsel requirement, designed to assure a fair trial.[141] Following that premise, no Sixth Amendment distinction should exist between the indigent and affluent criminal defendant as to the basic right of representation by counsel.

2. Right to Appointed Counsel in Misdemeanor Cases

Until 1972 all of the appointed counsel cases decided by the Supreme Court had involved felony prosecutions.[142] In *Argersinger*

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131 316 U.S. 455 (1942).
132 *Id.* at 462, 472-73.
133 *See, e.g.*, Rice v. Olson, 324 U.S. 786, 789 (1945); Powell v. Texas, 392 U.S. 514 (1968).
134 *See, e.g.*, Smith v. O'Grady, 312 U.S. 329 (1941); House v. Mayo, 324 U.S. 42, 45-46 (1945); Canizo v. New York, 327 U.S. 82, 83-84 (1946); Foster v. Illinois, 332 U.S. 134, 137-38 (1947).
135 372 U.S. 335 (1963).
136 *Id.* at 339.
137 *Id.* at 341-42.
138 *Id.* at 344.
139 *Id.*
140 *See Johnson*, 304 U.S. at 468; *Gideon*, 372 U.S. at 344.
141 304 U.S. at 467-68.
142 *See* Argensinger v. Hamlin, 407 U.S. 25 (1972).

v. Hamlin,[143] the Supreme Court held that the right to appointed counsel applied to petty offenses.[144] The Court noted that the problems associated with petty offenses might call for the appearance of counsel to assure a fair trial because the legal issues raised in misdemeanor trials were not less complex just because the jail sentence could not exceed six months.[145] Moreover, misdemeanors created a special need for counsel because the large number of such offenses often caused an "obsession for speedy dispositions, regardless of the fairness of the result."[146]

The defendant in *Argersinger* had been sentenced to jail, but the Court declined to delineate the imposition of jail time as the standard for the requirement of appointed counsel.[147] However, the opinion laid the foundation for differentiating between cases involving sentences of imprisonment and those involving an imposition of a fine.[148] It did this by highlighting the special nature of punishment that led to the loss of liberty.[149] Moreover, the opinion cited the practicability of an actual imprisonment standard.[150] Therefore, *Argersinger* only required that counsel be appointed where there was an actual deprivation of personal liberty.[151]

In *Scott v. Illinois*,[152] the Court refused to extend the Sixth Amendment right to counsel beyond the actual imprisonment standard suggested in *Argersinger*. In *Scott*, the petitioner was charged with shoplifting, which carried a penalty of a fine, imprisonment, or both.[153] The defendant was convicted and only a fine was imposed.[154] In a 5-4 decision, the Court concluded that the Federal Constitution did not require state courts to appoint counsel in this case.[155] The majority read *Argersinger* as resting on the conclusion that the loss of liberty due to incarceration was so harsh a penalty that due process required counsel to be appointed to protect the defendant's interests.[156] The mere possibility that im-

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143 407 U.S. 25 (1972).
144 *Id.* at 40.
145 *Id.* at 33.
146 *Id.* at 34.
147 *Id.* at 39.
148 *Id.* at 38-39.
149 *Id.* at 37-40.
150 *Id.* at 39. (quoting A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (Approved Draft 1968)).
151 407 U.S. at 40.
152 440 U.S. 367 (1979).
153 *Id.* at 368.
154 *Id.*
155 *Id.* at 373-74.
156 *Id.* at 372-73.

prisonment could be imposed did not invoke the right to counsel.[157]

Justice Powell's concurring opinion in *Scott* stressed the majority's reliance on the fact that the actual imprisonment standard would provide clear guidance to lower courts.[158] He joined the majority reluctantly, preferring instead a flexible case-by-case adjudication of the need for appointed counsel in petty offense cases.[159] In *Argersinger* Justice Powell urged consideration of a series of factors in petty offense cases, including the complexity of the offense, the probable sentence, the competency of the individual to represent himself, and the "attitude of the community" toward the particular crime.[160] In light of the subsequent cases building upon *Argersinger*, it appears that the Court would not retreat from the requirement of counsel in actual imprisonment cases.[161] The close division among the Court in *Scott* combined with Justice Powell's reluctant concurrence holds open the possibility that the Court might revisit the issue of appointment of counsel in a particularly compelling non-imprisonment misdemeanor case.[162]

3. New York's Statutory Response to *Gideon*

Following the 1963 *Gideon* decision, states that had not previously made provisions to provide counsel for indigent defendants scrambled to enact legislation. New York followed suit in 1965 by amending Article 18 of the County Law, creating Article 18-B.[163]

Article 18-B commands each county in New York State to supply representation to criminal defendants who are financially unable to obtain counsel.[164] This representation must take one of three forms: (1) representation by a public defender as provided for by Article 18-A,[165] (2) representation provided by a private legal aid bureau or society designated by the county,[166] (3) representa-

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157 *Id.* at 373.

158 *Id.* at 374.

159 *Id.* at 374-75; *see also* John E. Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 409 (1979).

160 *See* 407 U.S. at 64 (1972).

161 *See, e.g.*, Baldasar v. Illinois, 446 U.S. 222 (1980) (holding uncounseled conviction which resulted in fine could not be used as prior misdemeanor-theft conviction to support harsher sentence in future sentencing preceding).

162 *See* Nowak, *supra* note 159, at 408-09.

163 N.Y. COUNTY LAW § 722 (McKinney 1965) (current version at N.Y. COUNTY LAW § 722 (McKinney 1991)).

164 *See* N.Y. COUNTY LAW § 722 (McKinney 1991).

165 *See id.* § 722(1).

166 *See id.* § 722(2).

tion by private counsel pursuant to a plan designed by the bar association of each county,[167] or (4) representation according to a plan containing a combination of the foregoing.[168] Article 18-B also provides compensation for investigative, expert, and other services necessary for an adequate defense.[169]

Compensation for private attorneys was provided for under section 722-b.[170] As enacted in 1965, rates were fixed at fifteen dollars per hour for in-court time and ten dollars per hour for out-of-court time.[171] Limits were placed on the total compensation an attorney could receive at five hundred dollars for cases involving felonies and three hundred dollars for cases involving misdemeanors with an option provided for compensation in excess of those limits if provided by the court.[172] In 1966, section 722-b was amended to allow attorneys to receive payment during the course of representation.[173]

Article 18-B was passed with much fanfare. Governor Nelson Rockefeller noted, "New York has always been a leader in the protection of the rights of its citizens and the passage of 18-B mark[ed] another great step in that direction."[174] In addition to the Governor, supporters included the Attorney General, deans of law schools, the State Administrator of the Judicial Conference, the Association of the Bar of the City of New York, the Chairman of the Commission to Revise the Penal Law and the Code of Criminal Procedure, many local bar associations, and the Joint Conference on Legal Education.[175] Opponents were concerned with 18-B's effect on home rule 19[176] and the costs placed on the counties,[177] relative to the differences in the cost of living in more populated

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167 *See id.* § 722(3).

168 *See id.* § 722(4).

169 *See id.* § 722-c.

170 *See id.* § 722-b.

171 N.Y. COUNTY LAW § 722-b (McKinney 1965).

172 *Id.*

173 N.Y. COUNTY LAW § 722-b (McKinney 1966) (current version at N.Y. COUNTY LAW § 722-b (McKinney 1991)).

174 Memorandum filed with: Assembly Bill, Introductory Number 2233, Senate Print Number 5744 and Assembly Bill, Introductory Number 4786, Senate Print Number 7273.

175 *See* Bill Jacket, L. 1965, c. 878.

176 *Id.* Resolution of the Board of Supervisors of Montgomery County (June 8, 1965); Letter from F. Clark Hamlin, Clerk, Jefferson County Board of Supervisors, to Governor Nelson Rockefeller (May 28, 1965).

177 *See id.* Letter from Irving Libenson, County Attorney, Westchester County, to Sol Neil Corbin, Counselor to the Governor (June 30, 1965).

areas as compared to those of rural areas.[178]

Statutory fees for trial counsel have been increased only twice since 1965, to twenty-five dollars per hour for in-court time and fifteen dollars per hour for out-of-court time in 1977, and forty dollars per hour for in-court time and twenty-five dollars per hour for out-of-court time in 1985.[179] The equivalent increases in the caps have brought them to $1,200 for cases involving felonies and $800 for cases involving misdemeanors.[180] As time passed, it became more difficult to attract able attorneys to represent indigent defendants[181] which led to the "abuse and neglect" of indigent cases.[182] Moreover, the consistently higher rates paid in the federal court system acted to dissuade counsel from accepting state cases.[183] Proponents of the increases hoped that they would encourage a greater number of attorneys to participate in the program thereby reducing the individual caseload and providing higher quality legal representation to those clients served by the program.[184] The rates, which went into effect in 1986, have not been increased since.[185]

III. How the Law Treats the Poor

The Supreme Court has recognized that the right to counsel is a fundamental right.[186] Counsel must not only be appointed for an indigent defendant, but must also be paid. If a state establishes a scheme to enact *Gideon* and affects another fundamental right, injustice may result. The injustice may not be just an inequitable distribution of social goods, but the imprisonment of people who do not possess that item by which other social goods are valued. Therefore, the concept of equal protection and the right to counsel for indigent defendants points to inequalities that may impinge directly on access to, or levels of, those rights.

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178 *See id.* Letter from Benjamin I. Taylor, President, Mammamroneck-Harrison Bar Association, to Sol Neil Corbin, Counselor to the Governor (Apr. 6, 1965).

179 N.Y. County Law § 722-b (McKinney 1991).

180 *Id.*

181 *See* Bill Jacket L. 1985, c.315 (Memorandum in Support of Increase in Rates per S.824/A.1216, Prepared by Joseph W. Bellacosa, Chief Administrator to the Courts).

182 *See id.* (Budget Report on Bill, Prepared by State Senators Dunne, Johnson and Goodhue).

183 *See* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice For Criminal Defendants*, 31 Am. Crim. L. Rev. 73, 94-95 (1993).

184 *Id.*

185 N. Y. County Law § 722-b (McKinney 1991).

186 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

1. The Meaning of Indigency

Supreme Court opinions generally refer to the rights of an 'indigent defendant' without ever offering a specific definition of indigency. Federal and state appellate courts have established guidelines defining indigency,[187] although studies suggest that trial judges often will create their own standards.[188] Most if not all courts agree that indigency does not mean destitute. Generally, courts consider the full range of defense expenses in light of the defendant's current personal and financial situation.[189] Among the most common considerations are income from employment, real and personal property, number of dependents, outstanding debt, and seriousness of the charge.[190] The court will look to the defendant's current earnings and assets, as well as his potential to generate future income, but will disregard potential assistance from friends and relatives.[191]

2. Equal Protection and Poverty in Constitutional Law

Decisions addressing legislative classifications based on wealth began to attract the attention of the Supreme Court during the Warren Era. The Warren Court expressed the idea that society has a limited duty to lift some of the handicaps of poverty in some circumstances.[192] Equal protection of the law provided the vehicle for the Warren Court to promote a constitutional vision of equal justice for rich and poor alike.[193] On the other hand, the Burger Court halted the expansion of the wealth classification doctrine

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187 *See* Wade R. Habeeb, Annotation, *Determination of Indigency of Accused Entitling Him to Appointment of Counsel*, 51 A.L.R. 3d 1108, 1111-14 (1973).

188 *See* Steven Duke, *The Right to Appointed Counsel:* Argersinger *and Beyond*, 12 AM. CRIM. L. REV. 601, 630 (1975); Ken Anderson, *Indigency: The Need for a Definition*, 5 TEX. S.U.L. REV. 45, 47 (1978).

189 *See, e.g.*, Thiel v. Southern Pac. Co., 159 F.2d 61 (9th Cir. 1946) (estimated costs of appeal); *see also* Morgan v. Rhay, 470 P.2d 180 (Wash. 1970) (attorney fees in light of defendant's financial situation).

190 Williams v. Sup. Ct. of County of Stanislus, 38 Cal. Rptr. 291, 294 (Cal. Ct. App. 1964) (quoting Note, *Representation of Indigents in California*, 13 STAN. L. REV. 522 (1961)); *see* Assad-Faltas v. Univ. South Carolina, 971 F. Supp. 985 (D.S.C. 1997); *see also* Fuller v. Oregon, 417 U.S. 40, 45 (1974); Bramlett v. Peterson, 307 F. Supp. 1311 (D. Fla. 1969).

191 *See* Barry v. Brower, 864 F.2d 294, 299-300 (3rd Cir. 1988); *see also* United States v. Viemont, 91 F.3d 946, 952 (7th Cir. 1996).

192 *See* Edwards v. California, 314 U.S. 160, 174-75 (1941); Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966); McDonald v. Board of Education Commissioners of Chicago, 394 U.S. 802, 807 (1969).

193 *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); McDonald v. Board of Education Commissioners of Chicago, 394 U.S. 802, 807 (1969).

into other areas.[194] Significantly, the Burger Court abandoned the rhetoric of the Warren Court, sacrificing both the spirit and letter of the Warren Court's equal protection decisions.[195]

A. *The Rise of Equal Access*

In *Griffin v. Illinois*,[196] the Supreme Court held that the state must provide the indigent criminal appellant with a free transcript of the trial when the bill of exceptions necessary for appellate review could not be prepared without it.[197] Earlier decisions held that a state was not required to provide appellate review of all criminal convictions.[198] However, the Court in *Griffin* reasoned that once the state establishes an appellate system, that system must treat rich and poor alike.[199] The majority viewed Illinois' justifications as irrational,[200] since there was no relevant relationship between ability to pay and guilt or innocence.[201]

In *Douglas v. California*,[202] the issue was whether a state had to appoint counsel for indigent defendants for their first appeal as of right.[203] In the procedure at issue, the California appellate courts would determine whether the petitioner's claim had merit before appointing counsel.[204] The Supreme Court reaffirmed *Griffin* holding, "[i]n either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[205] The Court in *Douglas* reasoned that California's right of appeal violated due process because indigent defendants were forced to make a preliminary showing of merit.[206]

Similarly, in *Anders v. California*,[207] the Court sought to ensure that court-appointed counsel would passionately represent their

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194 *See generally* Peter Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Courts Competing Idealogies*, 72 GEO. L. J. 185 (1983).

195 *See id.*

196 351 U.S. 12 (1956).

197 *Id.* at 19.

198 *See* McKane v. Durston, 153 U.S. 684, 687-88 (1894).

199 351 U.S. at 19.

200 *Id.* at 17-18.

201 *Id.* at 19.

202 372 U.S. 353 (1963).

203 *Id.* at 355.

204 *Id.*

205 *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

206 372 U.S. at 357.

207 386 U.S. 738 (1967); *see also* Jenkins v. Coombe, 821 F.2d 158 (2d Cir. 1987) (holding that the state appellate court committed a constitutional error by entertaining a defendant's appeal without providing him with effective appellate counsel).

clients regardless of the merits of their claims.[208] The issue in *Anders* was the constitutionality of California's withdrawal system, which permitted court-appointed attorneys to remove themselves from a case if they felt that the appeal was frivolous.[209] The Supreme Court held that the process did not meet the constitutional requirements of due process and equal protection, thus requiring that counsel submit a brief suggesting *any* argument that might support the appeal.[210] The California court could then decide the appeal on the merits by the same standard used for a non-indigent appellee.[211] This "assure[s] penniless defendants the same rights and opportunities on appeal—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."[212]

These cases demonstrated the Court's commitment to equal justice for the poor. The Court's fundamental rationale was to create a protective rule to ensure equal treatment of indigent defendants.[213] The Supreme Court imposed rules in cases like *Anders* so that judges and lawyers may perceive an indigent's claim more critically.[214] These rules provide indigent defendants with the tools to draw attention to their claims. Moreover, they ensure that individuals are treated equally without regard for their ability to pay and are thus given an equal opportunity to preserve their liberty.

Further examples of these rules can be found where the Supreme Court dealt with rights they had already deemed fundamental. In *Gideon v. Wainright*,[215] the Court adopted a rule requiring appointed counsel for every indigent criminal defendant accused of a felony.[216] Subsequently, in *Argersinger v. Hamlin*,[217] the Court extended *Gideon* to all prosecutions which resulted in imprisonment for any term.[218] This extension served as a hedge against the "obsession for speedy dispositions, regardless of the fairness of the result,"[219] caused by the larger number of misdemeanor cases.

Moreover, the Court did not limit this rationale solely to right

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208 *Id.* at 744-45.
209 *Id.* at 739-40 & n.2.
210 *Id.* at 744.
211 *Id.* at 744-45.
212 *Id.* at 745.
213 *Id.*
214 *Id.* at 744-45.
215 372 U.S 335 (1963).
216 *Id.* at 342-45.
217 407 U.S. 25 (1972).
218 *Id.* at 37.
219 *Id.* at 34.

to counsel cases. For example, *Harper v. Virginia Board of Elections*,[220] involved a challenge to Virginia's poll tax.[221] Like the right of appeal from criminal convictions in *Griffin*, the franchise is not independently guaranteed by the Constitution. Nevertheless, the Court held that using wealth as a class to grant the vote to some while denying it to others was a violation of equal protection.[222] As in *Griffin*, the majority refused to legitimatize the purported fiscal purposes served by the poll tax.[223] Moreover, the Court expressed a willingness to mandate the fiscal amounts the state must spend on private services for private citizens.[224] The court also suggested that when there is a fundamental interest at stake, the state has a duty to the indigent because the state bears a special responsibility for the infringement of that right.[225]

B. The Decline of Judicial Intervention on Behalf of the Poor

In the three decades since it was decided, *Griffin* spawned many cases reaffirming the state's duties to the indigent defendant, including *Douglas*. *Douglas* remained essentially untouched until it was overturned by the Supreme Court in *Ross v. Moffit*.[226] *Ross* concerned the state's duty to appoint counsel for indigent state prisoners seeking discretionary review.[227] The Court's holding, that states did not have this duty[228] was no different from the holding in *Douglas*. However, the rationale used in *Ross* was radically different.

The explicit elimination of wealth as a suspect classification was noteworthy. The Court accomplished this by choosing not to impose the cost of counsel for discretionary review on the states.[229] The way the Court defined the issue of wealth within the equal protection paradigm was more subtle, but in the end more devastating to the cause of the poor. In *Ross*, the Court viewed *Griffin* and its progeny as "stand[ing] for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[230] On the other hand, the Court in *Ross* viewed *Douglas* as "an examination of

220 383 U.S. 663 (1966).
221 *Id.* at 664.
222 *Id.* at 670.
223 *Id.* at 668-69.
224 *Id.* at 668.
225 *Id.* at 670.
226 417 U.S. 600 (1974).
227 *Id.* at 602-03.
228 *Id.* at 610, 617-18.
229 *Id.* at 612.
230 *Id.* at 607.

whether an indigent's access to the appellate system was adequate."[231] This subtle shift was a sign that the Court would no longer proactively seek to level the playing field between the rich and the poor.

Similarly, in *San Antonio Independent School District v. Rodriguez*,[232] the Supreme Court chose to re-characterize laws that classify people based on wealth. At issue in *Rodriguez* was Texas' system of financing its public schools.[233] The state system guaranteed a minimal level of state financing and permitted the individual districts to raise additional revenues, usually through local property taxes.[234] This led to a gross disparity in educational spending between affluent and poor districts based solely on the underlying property values.[235] The Supreme Court chose to defer to the state's legislative judgments on raising money and how to educate children.[236] More importantly, as further evidence of its retreat, the Court would rely on federalism[237] to uphold a financing system that existed in many states.[238] Ultimately it became apparent that the Court would not guarantee equal access to education but would only mandate that a threshold level be met, assuring at a minimum that each child had a chance to acquire the basic skills.[239]

Following *Ross* and *Rodriguez*, the Court would vacillate on its commitment to equal justice for the poor. In *Lassiter v. Department of Social Services*,[240] a 5-4 majority held that the state is not required to pay for an attorney for an indigent woman whose child is being taken away, but that such determinations should be made at the trial court level on a case by case basis.[241] Justice Stewart's majority opinion concluded that an indigent is preemptively entitled to counsel only when faced with the risk of being deprived of physical liberty.[242] In the same year, the court decided *Little v. Streater*,[243] in which the petitioner gave birth to a child out of wedlock and was

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231 *Id.*
232 411 U.S. 1 (1973).
233 *Id.* at 4-5.
234 *Id.* at 9-10.
235 *Id.* at 15-16.
236 *Id.* at 40-41.
237 *Id.* at 44.
238 *Id.* at 55.
239 *Id.* at 37.
240 452 U.S. 18 (1981).
241 *Id.* at 24-32.
242 *Id.* at 25-26.
243 452 U.S. 1 (1981).

forced by the Connecticut Department of Social Services to bring a paternity suit in order to qualify for welfare.[244] The Supreme Court unanimously held that Connecticut's refusal to pay for the blood tests needed to bring a paternity suit was a violation of due process.[245] The Court reasoned that the state played a "prominent role in the litigation"[246] and was required to pay for the blood tests so that the petitioner would have a "meaningful opportunity to be heard."[247]

In *Plyer v. Doe*,[248] the Court overturned a Texas law that denied public education to the children of illegal aliens.[249] Writing for the majority, Justice Brennan acknowledged that states "have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."[250] He reasoned that the Texas law did not "operate harmoniously" with federal immigration law[251] and that it served no state interest, but to the contrary, only promoted "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[252]

One principle established in *Plyer* is that a state may not pursue policies which invariably create a permanent class of people who are economically depressed and politically disadvantaged, and indeed in some circumstances, the state may have a duty to spend public money to avert creation of a permanent caste of the underclass.[253]

C. *Equal Protection of the Laws and Article 18-B*

As some recent media trials demonstrate, even to those who are not familiar with the details of criminal defense work, the wealthy can buy justice in our country.[254] The Supreme Court has

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244 *Id.* at 15.
245 *Id.* at 16-17.
246 *Id.* at 6.
247 *Id.* at 5-6 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).
248 457 U.S. 202 (1982).
249 *Id.* at 228-30.
250 *Id.* at 225.
251 *Id.* at 226.
252 *Id.* at 230.
253 *Id.*
254 *See generally* Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997) (discussing the notion that justice before the law, particularly criminal law, should not depend on financial resources and that a "purchased" outcome in a criminal trial is not tolerable).

never required that the government neutralize the advantages of wealth. You get what you pay for.

It is indisputable that the abysmally low rate paid to private trial attorneys who represent the indigent in New York under section 722 of Article 18-B of the New York County Law[255] places indigent criminal defendants at a substantial disadvantage. The relative amount of money that New York pays private attorneys has decreased since the passage of Article 18-B. A 1994 report adopted by the House of Delegates of the New York State Bar Association points out that despite the two increases in the rates paid to private attorneys, the consumer price index has increased five times since 1965, amounting to a 44 percent decrease in terms of purchasing power.[256]

The rates paid by New York State for non-capital cases are significantly disproportionate to the federal rates, the rates paid by other states, and the rates paid in New York for other types of legal representation.[257] New York rates are among the lowest in the country despite its higher cost of doing business.[258] Thirty-one states pay more for in-court time and thirty-two states pay more for out-of-court time.[259] Only seven states pay less than New York for in-court time and only six for out-of-court time.[260] It would be foolish to think that an indigent defendant charged with a crime in a New York state court is receiving the same quality of representation as an indigent defendant in a New York federal court.

The rates paid to private attorneys for other types of representation in New York indicate an implicit choice to provide a lower level of representation to poor criminal defendants. Partners assigned under Public Officers Law Section 17 to represent state employees receive $100 per hour for in-court time and $75 per hour for out-of-court work.[261] Associates with three years experience receive $75 and $50 respectively for the same work.[262] In 1992, New York City, which retains attorneys to represent the City and its

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255 N.Y. COUNTY LAW § 722 (McKinney 1991).

256 *See* STATEMENT ON ASSIGNED COUNSEL FEES. Criminal Justice Section of the New York State Bar Association (Adopted at NYSBA Annual Meeting held in New York City on January 28, 1994).

257 *See* Schulhofer & Friedman, *supra* note 183, at 94.

258 *See* Schulhofer & Friedman, *supra* note 183, at 93.

259 *See* SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL (1997).

260 *Id.*

261 *See* "LEGAL FEES" SCHEDULE, NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL, BUREAU OF CONTRACTS AND STATE EXPENDITURES.

262 *Id.*

agencies, established maximum rates for partners of $150 per hour and for associates of $100 per hour.[263] These higher rates suggest a disregard for the indigent criminal defendant's presumption of innocence.

Unfortunately, these incredibly low rates have caused experienced trial attorneys to shun 18-B cases. Veteran attorneys either leave the state 18-B panel or accept more federal cases, thereby depleting the state panel. The current system yields two other interesting results. First, the higher in-court rate causes attorneys to devote more time in court even though out of court preparation and investigation could result in speedier disposition of cases. Second, if caps are exceeded before the case goes to trial, the attorney could be faced with representing the client without a fee, which is impermissible.[264]

IV. Indigency and Effective Assistance of Counsel

The Supreme Court first recognized a constitutional right to effective assistance of counsel in *Powell v. Alabama*.[265] In *Powell* the Court recognized that where due process requires the state to provide counsel for an indigent defendant, "that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[266] Ten years later, in *Glasser v. United States*,[267] the Supreme Court held that there was a Sixth Amendment violation when a judge denied a defendant the "right to have the effective assistance of counsel."[268] Later, in *Evitts v. Lucey*,[269] the Supreme Court found that a defendant was entitled *a fortiori* to effective representation by retained counsel on a first appeal of right.[270] The Court noted that "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."[271]

The right to effective assistance of counsel extends to any proceeding where there is a constitutional right to counsel. In other

263 *See* Edward A. Adams, *Lawyers Cost City $12 Million Last Year*, N.Y. L.J., Apr. 16, 1992, at 1.
264 *See generally* Schulhofer & Friedman, *supra* note 183.
265 287 U.S. 45 (1932).
266 *Id.* at 71.
267 315 U.S. 60 (1942).
268 *Id.* at 76.
269 469 U.S. 387 (1985).
270 *Id.* at 402.
271 *Id.* at 396.

words, the constitutional right to counsel that is grounded in either the Sixth Amendment, the Due Process Clause, or the Equal Protection Clause is the right to effective assistance of counsel. Where there is no such constitutional right, the same constitutional requirement of effective assistance of counsel does not apply.[272] In *Wainwright v. Torna*,[273] the defendant claimed to have been denied effective assistance of counsel when his retained attorney failed to file a timely application for discretionary review.[274] The Court noted that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."[275]

Over the years the courts have allowed appeals based on defense counsel failures in several areas. Some examples include the failure to investigate,[276] to consult sufficiently with the defendant,[277] to adequately represent client interests in plea bargaining,[278] to move to suppress illegally obtained evidence,[279] and to raise or properly present various available defenses.[280]

In *Strickland v. Washington*,[281] and *United States v. Cronic*,[282] which were announced the same day, the Supreme Court sought to provide a general framework for the analysis of ineffective assistance claims. Both opinions noted that the critical element of ineffective assistance claims is to evaluate the performance of counsel in light of the underlying purpose of the constitutional right to counsel.[283] In *Strickland* the Court noted that the objective of the Sixth Amendment right to counsel was to provide the "basic elements of a fair trial."[284] Because the essential character of a fair trial is our adversarial system of litigation, effective assistance claims must be measured by reference to the proper functioning of

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272 *See* Pennsylvania v. Finley, 481 U.S. 551 (1987).

273 455 U.S. 586 (1982).

274 *Id.* at 586-87.

275 *Id.* at 587-88.

276 *In re* Jones, 917 P.2d 1175, 1179-82 (Cal. 1996).

277 State v. Savage, 577 A.2d 455, 466-69 (N.J. 1990).

278 Mitchell v. State, 762 S.W.2d 916, 922 (Tex. Ct. App. 1989) (citing Diaz v. Martin, 718 F.2d 1372, 1378 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984)).

279 State v. Fisher, 874 P.2d 1381, 1384-85 (Wash. Ct. App. 1994).

280 DeLuca v. Lord, 858 F. Supp. 1330, 1346-52 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *and cert. denied* (1996).

281 466 U.S. 668 (1984).

282 466 U.S. 648 (1984).

283 *Strickland*, 466 U.S. at 685, 692; *Cronic*, 466 U.S. at 655-56.

284 *Strickland*, 466 U.S. at 685.

the adversarial process in a particular case.[285] Therefore, the critical question is whether counsel's performance has been so lacking that the process "los[t] its character as a confrontation between adversaries,"[286] leading to an "actual breakdown of the adversarial process."[287]

The concept of effective assistance of counsel stated in *Strickland* and *Cronic* allows a constitutional challenge only when a defendant can establish that counsel actually failed in some respect to discharge his duties and that the failure affected the adversarial process to an extent that undermines the confidence in the outcome of the proceeding.[288] The Court in *Strickland* emphasized the importance of a fact-sensitive analysis of the nature and impact of the attorney's representation under the circumstances of the particular case.[289] In *Cronic*, Justice Stevens recognized settings in which there could be *per se* violations of the right to effective counsel.[290] First is the situation in which "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."[291] Second, Justice Stevens acknowledged that there were "occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[292]

A. *Conflicts of Interest*

It has long been recognized that the constitutional right to effective assistance of counsel entitles a defendant to the undivided loyalty of his attorney.[293] In *Strickland*, Justice O'Connor stated that capable representation "entails certain basic duties,"[294] and among these duties is an obligation for lawyers to "avoid conflicts of interest."[295] The defendant will not receive a fair trial when his counsel's decisions are affected by obligations to persons other than the defendant. Thus, a conflict of interest is present when defense

285 *Id.* at 690.
286 *Cronic*, 466 U.S. at 656-57.
287 *Id.* at 657.
288 *Id.* at 656; *Strickland*, 466 U.S. at 687.
289 466 U.S. at 690.
290 466 U.S. at 658-59.
291 *Id.* at 659 n.25.
292 *Id.* at 659-60.
293 *Strickland*, 466 U.S. at 688.
294 *Id.*
295 *Id.*

counsel has personal interests that affect their professional judgment in representing the client.[296]

Courts have not found a constitutional bar against representation in potential conflict of interest settings.[297] However, courts have been willing to view representation in those settings as suspect.[298] They have also recognized that it is often impossible to reconstruct the precise impact of an attorney's loyalty because a conflict of interest arises from matters that are not reflected in an appellate record. The reviewing courts have expressed the difficulty in pinpointing acts or omissions at trial that are not readily apparent from the record.[299] Ultimately, the only person who knows the true ramifications of a conflict is the defense attorney.

One response to this issue has been for courts to make a pretrial inquiry into an attorney's possible conflicts. However, if the court itself is the source of the conflict, the inquiry is futile. Therefore, the defendant is forced to utilize post-conviction review. The prevailing standard for post-conviction review was established in *Cuyler v. Sullivan*.[300] In *Cuyler* the Supreme Court stated that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[301] This does not require the defendant to establish that he or she has been prejudiced by the attorney. Once a defendant "shows that a conflict of interest actually affected the adequacy of his representation" he or she is entitled to relief.[302] Thus, there is no need to establish that the Sixth Amendment violation might have adversely affected the outcome of the case. Once the defendant demonstrates both an actual conflict of interest (that the attorney was placed in a situation where conflicting loyalties pointed in opposite directions) and, as a result, the attorney proceeded to act against the defendant's interests, prejudice would be presumed and automatic reversal is required.

New York's scheme for compensating private attorneys creates conflicts of interest that may result in claims of ineffective assistance of counsel. Advocates cannot live in the vacuum of a single

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296 *See* Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980).

297 *See* Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987), *cert. denied*, 488 U.S. 934 (1988).

298 *See* United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975)

299 *Strickland*, 466 U.S. at 689.

300 446 U.S. 335 (1980).

301 *Id.* at 348.

302 *Id.* at 349-50.

case. They must also consider office rent, support staff, and personal expenses as they allocate their time. The low fees paid to those who represent the indigent force them to choose not only how many of these cases they can take, but also the amount of time they devote to each case. The abysmally low rates create inherent conflicts of interest that undermine the quality of representation an attorney is able to provide.

The process of compensation under Article 18-B is equally flawed. Section 722 establishes caps on the total amount per case an attorney may receive.[303] An attorney can exceed those caps only with the permission of the judge handling the case.[304] Thus, the attorney is financially beholden to the judge hearing the case. The attorney's ability to choose how much time to devote to each case and meet expenses as the case progresses depends upon the judge handling the case. Therefore, attorneys may feel that they must tailor their representation strategies to the quirks of the judge in order to survive financially.

Attorneys who want to be appointed to future cases have to keep in mind that judges are charged with appointing counsel.[305] It is my experience that many judges are former prosecutors who believe that defense attorneys who advocate zealously on behalf of their indigent clients are wasting the court's time and the people's money. Again, the inherent problem with a conflict of interest is that it is only the attorney, and perhaps the judge, who know how this affects the quality of legal representation in a particular case.

B. State Interference

Defendants are denied effective assistance of counsel when the state interferes with counsel's ability to make full use of trial procedures.[306] In *Herring v. New York*,[307] the Supreme Court noted that "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradi-

303 N.Y. County Law § 722-b (McKinney 1991).

304 *Id.*; *see also* Schulhofer & Friedman, *supra* note 183, at 94.

305 N.Y. County Law § 722(4) (McKinney 1991).

306 *See* Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (holding that denying counsel's input in deciding if and when a defendant will testify infringes on his or her constitutional rights); *see also* Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (holding that denying defendant's counsel the right to ask defendant questions when he took the stand denied him effective assistance of counsel).

307 422 U.S. 853 (1975).

tions of the adversary fact finding process . . . ."[308] The critical factor leading to the presumption of prejudice in state interference cases flows from the role played by the state in restricting an attorney's representation.[309] The presumption of prejudice acts as a protective measure designed to discourage state action that may preclude effective representation.

New York's scheme for compensating private attorneys amounts to state interference. This scheme thrusts the state into the defense attorney's decision making process. Even if courts do not consider this scheme as establishing a conflict of interest, they cannot deny that these intrusions are the result of state action.

V. CONCLUSION

Article 18-B prohibits counsel from making full use of trial procedures by forcing the attorney to run a financial gauntlet throughout the entire course of a client's representation. This gauntlet consists of the caps on the total amount an attorney may receive and the manner in which it is dispensed.[310] These factors inhibit the attorney in making all of the decisions necessary to prepare and execute a zealous defense. Additionally, when judges make the appointments of 18-B attorneys, it is obvious that the state has injected itself into the indigent's defense. Therefore, the 18-B compensation scheme itself denies indigent defendants their right to effective assistance of counsel.

This article points to what New York attorneys for the indigent have known for some time: indigent criminal defendants are not receiving equal protection of the laws. Similarly situated defendants in New York and other state federal courts are receiving qualitatively better defense services. This unfair treatment of the indigent defendant leads to wrongful convictions that pack our prisons with wrongfully convicted defendants and robs the state of money that could be spent elsewhere to reduce crime.

The Bill of Rights and the Due Process Clause were designed to protect "a vulnerable citizenry from the overbearing concern for efficiency and efficacy" that frequently characterizes government officials.[311] How much longer will we allow the state to perpetuate a society where some are more equal than others?

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[308] *Id.* at 857.

[309] *Id.* at 857-59.

[310] N.Y. COUNTY LAW § 722-b (McKinney 1991).

[311] Stanley v. Illinois, 405 U.S. 645, 656 (1972).