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marked with significant flaws. Until a more workable answer to the problems of Poor Richard's entrance into the court appears, the legal system is susceptible to one philosopher's comment that

[t]he law, in its magnificent equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.¹⁶¹

H. IRWIN COFFIELD, III

Analysis and Comparison of the Assigned Counsel and Public Defender Systems

In 1969, the North Carolina General Assembly enacted a statute for the avowed purpose of providing legal representation for indigent criminal defendants, strengthening the assigned counsel system and establishing a public defender system in certain judicial districts.¹ This legislation, in a unique experiment in North Carolina, created public defender offices in the Twelfth and Eighteenth Judicial Districts while maintaining the assigned counsel system in all other districts in the state.² The intention of the legislature was to study the function of both systems in order to ascertain how best to meet the problem of providing counsel for indigent criminal defendants.

Although the 1969 General Assembly provided many changes, it failed to rectify "the most widely felt abuse of the assigned counsel system . . . the false claim of indigency to obtain free counsel."³ The new legislation did establish *who* would determine indigency,⁴ but it failed to provide a basis by which to make that determination. Some standards have been

¹⁶¹ J. COURNOS, *A MODERN PLUTARCH* 27 (1928).

¹ N.C. GEN. STAT. § 7A-450 (1969).

² N.C. GEN. STAT. § 7A-465 (1969). The Twelfth Judicial District is made up of Cumberland and Hoke Counties. Its major population center is Fayetteville, North Carolina. The Eighteenth Judicial District is Guilford County, and it includes Greensboro and High Point, North Carolina.

³ Note, *The Representation of Indigent Criminal Defendants in Federal District Court*, 76 HARV. L. REV. 579, 585 (1963).

⁴ N.C. GEN. STAT. § 7A-450(c) (1969): "The question of indigency may be determined or redetermined by the court at any stage in the action or proceeding at which an indigent is entitled to representation." N.C. GEN. STAT. § 7A-453(b) (1969): "The clerk [of court] shall make a preliminary determination as to the person's entitlement to counsel" in the assigned counsel districts. N.C. GEN. STAT. § 7A-453(a) (1969): "The public defender shall make a preliminary determination as to the person's entitlement to his services, and proceed accordingly. The court shall make the final determination."

created by other states in attempts to define indigency. Recently, New Jersey enacted a test in which the disposable assets of the defendant are matched against the anticipated cost of legal representation.⁵ In one judicial district in California, free counsel is *denied* to any defendant who is able to pay his own bail bondsman.⁶ As the number of claims of indigency increases, North Carolina must create a more definite basis for determining indigency.

The sixth amendment to the United States Constitution guarantees the assistance of counsel at a stage in the criminal proceedings which has been characterized as the "critical stage"⁷ and has been described by Justice Douglas as follows: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted."⁸ Arraignment was held to be such a stage in *Hamilton v. Alabama*.⁹ In *United States v. Wade*,¹⁰ the United States Supreme Court held that a post-indictment lineup was a stage at which counsel was required. In *Coleman v. Alabama*,¹¹ the Court held that the preliminary

⁵ Eligibility for the service of the Office of the Public Defender shall be determined on the basis of the need of the defendant. Need shall be measured according to the financial ability of the defendant to engage and compensate competent private counsel and to provide all other necessary expenses of representation. Such ability shall be recognized to be a variable depending on the nature, extent, and liquidity of assets and on the disposable net income of the defendant on the one hand, and on the nature of the charge, the effort and skill required to gather pertinent information, render advice, conduct trial or render other legal service, and probable expenses to be incurred, on the other hand.

N.J. REV. STAT. § 2A:158A-14 (1967).

⁶ Note, 76 HARV. L. REV., *supra* note 3, at 586 & n.25.

⁷ *Hamilton v. Alabama*, 386 U.S. 52, 53 (1961).

⁸ *Id.* at 54. Similarly in *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), Justice Marshall, holding that a hearing on revocation of probation was a critical stage, said: "Appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."

⁹ 386 U.S. at 53.

¹⁰ 388 U.S. 218 (1967). The Supreme Court so found because "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is particularly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.* at 228.

¹¹ 399 U.S. 1 (1970). The Court said:

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or

hearing was a "critical stage" because "potential substantial prejudice" could occur at that stage. The North Carolina statute authorizes appointment of counsel in the following proceedings: in-custody interrogation, pretrial identification at which the presence of the defendant is required, a hearing on reduction of bail, a preliminary hearing, trial and sentencing, and direct review on appeal.¹² The statute further provides for counsel at any additional stage which might later be found to be "critical."¹³

North Carolina's 1969 statute provides an opportunity to compare the assigned counsel and public defender systems in order to resolve the debate between the advocates of the two. Most of the issues in this debate are encompassed by six propositions that are analyzed in this comment. Three of the propositions represent assertions by proponents of the public defender system to support claims of superiority for their plan. They state that the public defender system is less expensive than the assigned counsel system, that its attorneys are more experienced, and that it is more efficient to operate. The other three propositions represent like assertions by advocates of the assigned counsel system. They claim that the assigned counsel system achieves more effective defense of indigents, that it better maintains the essential adversariness of the criminal process, and that it allows beneficial participation by local bar members.

The primary claim made by advocates of the public defender system is that it provides counsel for indigents at a lower cost to the State than does the assigned counsel system. Traditionally, however, assigned counsel has been less expensive because attorneys have been paid only a fraction of the value their services would otherwise bring.¹⁴ Indeed, one view is that assigned attorneys should be paid nothing for representing indigents.¹⁵

preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Id. at 9.

¹² N.C. GEN. STAT. § 7A-451(b) (1969).

¹³ *Id.*

¹⁴ 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN THE AMERICAN COURTS* 32-33 (1965) [hereinafter cited as SILVERSTEIN].

¹⁵ Lawyers should not be paid for their services. They should defend these persons because of community obligation and professional responsibility. Moreover, the courts should use the biggest and the best trial lawyers in the community in this endeavor. This will insure the defendant is being afforded the proper protection of his rights.

Id. at 33. In Kentucky no statutory provision is made for payment to attorneys

Most authorities, however, feel that some compensation should be paid to assigned counsel: "All the taxpayers should contribute to this basic cost of government—law enforcement. There is no sound reason why a small segment of the community, simply because of special training, a sense of pride in their profession, and a feeling of moral obligation, should carry this government function."¹⁶ The New Jersey Supreme Court in *State v. Rush*,¹⁷ relying on policy rather than constitutional grounds, held that the then existing New Jersey system which reimbursed assigned counsel only in murder cases should not continue. The court stated, "We are satisfied the burden is more than the profession alone should shoulder, and hence we are compelled to relieve the profession of it."¹⁸ The court suggested compensation for assigned counsel at a rate equal to sixty percent of the fee a nonindigent would pay an average attorney.¹⁹

Under North Carolina statutes the trial judge sets counsel fees in an amount equal to "a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, the time, effort and responsibility involved, and the fee usually charged in similar cases."²⁰ Under both the indigent and public defender systems, a judgment for counsel fees is rendered against the indigent and in favor of the state. Assigned counsel are immediately paid the adjudged fee by the state while the public defender's office, which operates on a fixed budget, is not reimbursed for individual cases. The state retains those judgments against indigents who were defended under either system and can execute against them at the state's option.²¹

One of the General Assembly's purposes in creating the two public defender districts in 1969 was to permit a cost comparison of the two methods of providing counsel. Such a comparison has been made for the period January 1, 1970, to December 31, 1970.²² Its results are summarized in Table I.

who are designated to defend indigents. In a recent case, the Kentucky Court of Appeals, the highest court of that state, vented its displeasure with such a system and cited authority for judicial provision for such payment even in the absence of statutory authorization. *Jones v. Commonwealth*, 457 S.W.2d 627, 631-32 (Ky. 1970). See also Bird, *The Representation of Indigent Criminal Defendants in Kentucky*, 53 Ky. L.J. 478 (1965).

¹⁶ Foster, *The Public Defender and Other Suggested Systems for the Defense of Indigents*, 53 JUDICATURE 247 (1969-70) [hereinafter cited as Foster].

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

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ N.C. GEN. STAT. § 7A-458 (1969).

²¹ N.C. GEN. STAT. § 7A-455(b) (1969).

²² This information was taken from quarterly reports which were submitted

TABLE I

	1 <i>Annual Cost</i>	2 <i>Number of Defendants</i>	3 <i>Cost per Defendant</i>	4 <i>Population Mar. 1, 1970²³</i>	5 <i>Cost per Capita</i>
14th Jud. Dist. ²⁴ —					
Assigned Counsel	\$61,616	332	\$185.60	131,362	\$.47
26th Jud. Dist.—					
Assigned Counsel	\$86,000	482	\$176.60	352,006	\$.24
12th Jud. Dist.—					
Public Defender	\$53,018	514	\$103.10	222,692	\$.24
18th Jud. Dist.—					
Public Defender	\$69,944	741	\$ 94.40	283,182	\$.25

In Table I statistics relating to cost per defendant (column three) and cost per capita (column five) are significant. The two public defender districts, the Twelfth and Eighteenth, show substantially less cost per defendant than do the assigned counsel districts tested. Likewise, the public defender offices show lower cost per capita than one of the assigned counsel districts and about the same cost per capita as the other. In Table II, which is a forecast of the cost for the Fourteenth and Twenty-sixth Districts based on cost statistics available for the seven-month period, July 1, 1970, to January 31, 1971, the predicted costs for the Twenty-sixth District approximate the per capita cost of the Fourteenth. This prediction is based upon a dramatic increase in both the number of cases and the total cost of the assigned counsel system in the Twenty-sixth District during the latter half of 1970 and the beginning of 1971. Both the Twenty-sixth and the Fourteenth show, in this forecast, a per capita cost of almost double that of the public defender districts. These statistics indicate that the public defender system is more economical in the four areas tested.

to the Administrative Office of the Courts. During the first year of operation of the public defender offices, an overlap of costs occurred because cases assigned to private counsel prior to January 1, 1970, were completed during the year and payments were made to the attorneys who conducted these cases. Those payments totaled approximately 30,500 dollars in the Twelfth Judicial District and 44,500 dollars in the Eighteenth. In Table I, the costs associated with the public defender office in these two districts do not include those payments. It is assumed that most of that cost was associated with services rendered in 1969, and further, that the cost of the public defender office is a better measure of its economic performance if the cost of the office is compared only to its own output. It should be noted that the services rendered by private attorneys during 1970 represent additional work which ordinarily would have to be performed by the public defender office without additional funding.

²³ Population figures are based on the 1970 census. THE 1971 WORLD ALMANAC AND BOOK OF FACTS 432-33 (L. Long ed. 1971).

²⁴ The Fourteenth Judicial District is Durham County and includes Durham, North Carolina. The Twenty-sixth District is Mecklenburg County which includes the major city of Charlotte, North Carolina.

TABLE II

	<i>26th</i> <i>Judicial District</i>	<i>14th</i> <i>Judicial District</i>
Costs for seven month period—July 1, 1970, to Jan. 31, 1971		
Total cost	\$81,328	\$37,462
Number of defendants	454	246
Cost per defendant	\$179.10	\$152.30
Annualized forecast for year—June 30, 1970, to June 30, 1971		
Total cost	\$139,483	\$64,224
Population	352,006	131,362
Cost per capita	\$.40	\$.49

The public defender system has traditionally been used in areas of greater population density because such an office is believed to require a minimum overhead.²⁵ The overhead must include rent and supplies for the public defender office as well as salaries for a public defender, one assistant defender, a secretary and an investigator. The lower limit of operation is approximately the level of the Twelfth Judicial District's public defender office, 53,018 dollars.²⁶ Using fifty thousand dollars as the minimum operational cost and one hundred dollars (the approximate cost per case in the public defender districts in 1970) as the average cost per case, a public defender office could economically handle five hundred indigent cases per year. As the case load decreases below five hundred, the cost per case will rise. At a case load of 250, the cost per case in the public defender district would exceed the cost per case of the assigned counsel system. Therefore, to compare costs for a public defender system in an area less populous than the Twelfth or Eighteenth Judicial Districts, an estimate must be made of the number of indigent cases that will be handled by the intended office and a cost comparison made on that basis.

A second argument advanced for the public defender system is that it provides more experienced attorneys than does the assigned counsel system.²⁷ With seasoned counsel conducting his defense, the defendant is said to be more likely to cooperate and to trust both his attorney and the system. The entire legal process may be expedited since experienced attorneys would be better able to judge a defendant's case and to give the best defense at the earliest possible stage in the proceedings.²⁸ On the

²⁵ 1 SILVERSTEIN 63-69.

²⁶ See p. 709 & note 22 *supra*.

²⁷ 1 SILVERSTEIN 45.

²⁸ MacCarthy, *The Chicago Federal Defender Program*, 8 AM. CRIM. L.Q. 156, 159-60 (1970).

other hand, the enthusiasm of young attorneys and their rapport with youthful indigents could offset the disadvantages of their lack of experience. Even if it be conceded that the advantages of more experienced counsel outweigh its deficiencies, it is not certain that the public defender system *in fact* provides more experienced counsel. A national survey taken in 1963, revealed that nine out of forty-nine (18.4 per cent) of the public defenders interviewed had been admitted to practice within the previous five years; seventeen (34.9 per cent) had been practicing less than ten years.²⁹ In the public defenders' offices in North Carolina, there are seven active attorneys; one has had experience in excess of ten years, two have had experience in excess of five years, and four had no experience before beginning work with the public defender's office.³⁰ By contrast, in one assigned counsel district, the Fourteenth (Durham County), fifty-two out of 191 cases examined (27.3 per cent) were handled by attorneys with less than three years of experience; in that district the median level of prior experience was seven to nine years for the period tested.³¹ Clearly, the experience of attorneys in the assigned counsel system in the Fourteenth District exceeds that of those who now man the two public defender offices in North Carolina.

Supporters of the public defender system assert, lastly, that the public defender's office would make the procedure for defending indigents simpler and more efficient.³² If located close to the court, the public defender's office could be operational day and night in order to have counsel readily available whenever needed. In addition, a public defender working continuously and harmoniously with the local prosecutor could make the criminal process more efficient. The prosecution of cases might be simplified because the district solicitor would deal with the same small group of attorneys on all indigent cases. This kind of efficiency could, however, harm the system of criminal justice. Notwithstanding the de-

²⁹ 1 SILVERSTEIN 45.

³⁰ Interview with Solomon G. Cherry, Public Defender, Twelfth Judicial District, in Fayetteville, North Carolina, Feb. 26, 1971. Interview with Wallace Har-raldson, Public Defender, Eighteenth Judicial District, in Greensboro, North Carolina, Mar. 4, 1971.

³¹ All judgments against indigents and in favor of the state of North Carolina were compiled for the period January 1, 1970, to September 30, 1970, and the trial record of each indigent was examined. A total of 199 defendants was examined, of which eight showed no attorney on the record. For the remaining 191, attorneys were listed and the MARTINDALE-HUBBELL LAW DIRECTORY was used to ascertain their experience.

³² Note, *Implementing the Right to Counsel in New Jersey—A Proposed Defender System*, 20 RUTGERS L. REV. 789, 816 (1966).

mand for efficiency and productivity as noted above, the public defender must maintain his independence in order to properly discharge his duty toward those indigents he defends. Thus, within the public defender system there must be a delicate balance between efficiency and effective due process.

Since the public defender's office is ideally both accessible and available to aid indigents, it would seem a better vehicle for providing counsel at the earliest stages in any proceeding.³³ The practical advantages of having counsel involved at an early stage are numerous. If counsel were available at the arrest stage, questioning of the defendant with the required constitutional safeguards could be initiated without delay; counsel would become aware of the facts earlier in each case and would be able either to challenge the process or to dispose of the case at an early stage.³⁴

While in theory counsel might be more readily accessible in public defender systems, in practice, assignment procedures neutralize this apparent advantage. In New Jersey, assignment of a public defender to an indigent's case does not take place, notwithstanding the proximity and

³³ *State v. Rush*, 46 N.J. 399, 415, 217 A.2d 441, 449 (1966).

³⁴ In a Wisconsin survey taken in 1963, judges and district attorneys were asked: 1) Under an ideal system, at what stage of the criminal case do you think the indigent person should first be provided with an attorney if he wants one? 2) Do you think it is unfair if an indigent persons does not have a lawyer at this stage? They replied as follows:

	<i>Question #1</i> <i>Number</i> <i>Saying</i> <i>Ideal</i>	<i>Question #2</i> <i>Number</i> <i>Saying</i> <i>Unfair</i>
<i>Stage in Proceedings:</i>		
<i>Judges answered:</i>		
1. Between arrest and 1st appearance before magistrate	8	4
2. At 1st appearance before magistrate	33	21
3. Between 1st appearance before magistrate and preliminary hearing	19	12
4. At preliminary hearing	1	1
5. After preliminary hearing	8	4
<i>District Attorneys answered:</i>		
1. Between arrest and 1st appearance before magistrate	12	6
2. At 1st appearance before magistrate	14	8
3. Between 1st appearance before magistrate and preliminary hearing	13	9
4. At preliminary hearing	—	—
5. After preliminary hearing	4	2

Winters, *Counsel for the Indigent Accused in Wisconsin*, 49 MARQ. L. REV. 1, 45-46 (1965) [hereinafter cited as Winters].

availability of the public defender's office, until the defendant is formally before the court during the preliminary hearing.³⁵ In North Carolina the sheriff, or other authority having custody over the accused, is required to inform the Clerk of Superior Court or the public defender's office whenever a prisoner is held more than forty-eight hours without counsel.³⁶ The clerk is then authorized to determine whether the prisoner is indigent, and if so, to assign counsel. In the public defender districts the defender's office is authorized to make a preliminary determination of indigency upon the sheriff's notification.³⁷ In the Fourteenth (assigned counsel) and Eighteenth (public defender) districts, prisoners are brought before a magistrate on the day of arrest or on the following day almost without exception, and counsel is assigned at that time.³⁸ The result of such prompt procedure is that counsel is assigned to indigents at the same time in these particular districts. However, in the Twelfth, a public defender district, prisoners are not regularly brought before a magistrate within twenty-four hours.³⁹ The public defender's office in that district interviews all persons claiming indigency after they have been in custody more than forty-eight hours and makes a preliminary determination as to their status.⁴⁰ If, as the statute requires, the authority having custody over prisoners notifies the Clerk of Court of prisoners held more than forty-eight hours, the clerk could make the required determination of indigency and assign counsel at the same time whether the system be public defender or assigned counsel. Therefore, neither system can claim inherent superiority in this respect, and the survey results indicate variation more likely caused by local factors than by type of system.

Supporters of the assigned counsel system rely on the remaining three propositions to support their position. First, they maintain that the assigned counsel system achieves a more effective defense of indigents. Although gauging effectiveness is hazardous in this area, one authority has suggested the five indices which appear in Table III.⁴¹

³⁵ Note, 20 RUTGERS L. REV., *supra* note 32, at 815. The apparent reason for this delay is that New Jersey law requires counsel for an indigent only if he is charged with an indictable offense. It is not determined whether the offense is indictable until the preliminary hearing, and counsel is assigned at that time. Note, *The New Jersey Public Defender System*, 5 COLUM. J.L. & SOC. PROB. no. 2, at 153, 155 (1969).

³⁶ N.C. GEN. STAT. § 7A-453 (1969).

³⁷ *Id.*

³⁸ Interviews, *supra* note 30.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Benjamin & Pedeliske, *The Minnesota Public Defender System and the*

TABLE III

	North Carolina—1970 Judicial Districts			Minnesota—1968	
	Assigned Counsel	Public Defender		Public Defender	Assigned Counsel
	14th	18th	12th		
Dismissals as a proportion of total dispositions	10.3%	17.4%	23.7%	8.5%	18.1%
Guilty pleas as a proportion of total dispositions (minus dismissals)	85.5%	83.6%	73.3%	85.8%	85.5%
Proportion of total dispositions going to trial	12.9%	13.5%	20.6%	12.8%	14.5%
Proportion of convictions given probation or suspended sentence	38.9%	43.2%	57.6%	49.5%	62.8%
Proportion of criminal trials terminated in acquittal	12.5%	43.0%	51.0%	31.3%	22.5%

The proportionate number of dismissals indicates to what extent counsel is probing the criminal process in its early stages. Dismissals in Table III include both *nolle prosequi* and dismissal either at or before the preliminary hearing. Both of North Carolina's public defender districts show a significantly higher proportion of dismissals than does the North Carolina assigned counsel district.

A high proportion of guilty pleas suggests a failure to provide an adequate defense.⁴² The results in Table III are mixed in this case; one public defender district showed substantially the same proportion as the assigned counsel district while the other public defender district had a significantly lower proportion. The statistics indicate, therefore, that neither system achieved a clear superiority with regard to this index.

Criminal Law Process: A Comparative Study of Behavior at the Judicial District Level, 4 LAW & SOC'Y REV. 279, 291-93 (1969). The statistics for Table III were accumulated as follows:

Fourteenth Judicial District: See note 31 *supra*.

Eighteenth Judicial District: Information was taken from quarterly reports which the defender office prepares for the Office of Administration of the Courts. These statistics were taken from the reports for the four quarters of 1970, the first year of operation.

Twelfth Judicial District: Information was taken from quarterly reports as in the Eighteenth District, except that the report for the first quarter of 1970 was not submitted in the ordinary form. As a result, statistics for the period January 1, 1970, to March 31, 1970, were not comparable to those for the remainder of the year and had to be omitted. Thus the ratios stated are based on information for the last three quarters of 1970 only.

Minnesota statistics used for comparison are taken from Benjamin & Pedeliske at 291-93.

⁴² *Hearings on S. 63 & S. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 9 (1963) [hereinafter cited as 1963 *Hearings*].

The proportion of cases going to trial is a measure of attorneys' decisions to test the state's cases against their clients. Again, only one of the two public defender districts shows a significantly higher proportion, and neither system was shown to have been more aggressive in this regard.

Since probation or suspended sentence is, from the defendant's point of view, a better result than incarceration, the public defender districts surpassed the assigned counsel districts by achieving a higher proportion of suspended sentences. The Eighteenth shows a slightly higher rate of such dispositions than the assigned counsel district tested and the Twelfth shows a significantly higher proportion.

The proportion of criminal trials terminated in acquittals is a measure both of counsel's trial ability and of his judgment of whether his client would fare better by pleading guilty or by going to trial. It is often argued that young attorneys in the assigned counsel system are more likely to advise a client to plead not guilty and to go to trial so that the young attorney can gain trial experience.⁴³ This is probably one factor that accounts for the low acquittal rate (12.5 per cent) in the Fourteenth, the assigned counsel district.

In three of the five indices represented in Table III, the two public defender systems show substantially more effective defense of indigents. The public defender districts showed a higher proportion of dismissals, of convictions given probation or suspended sentence, and of trials terminated in acquittal. Neither system showed a significant superiority in the other two indices. Although it is difficult to weigh the importance of one index against another, the public defender system appears in this test to be superior because it surpassed the assigned counsel system in three of the indices here applied and equaled it in the other two.

Those who favor the assigned counsel system assert, secondly, that public defenders lack the "advocacy" which is essential to a proper defense. The public defender system, they claim, makes the lawyer a public official, who, like the prosecutor, is employed by the state and is therefore not primarily concerned with the interests of the accused.⁴⁴ Judge Edward J. Dimock, a United States District Court Judge, has stated:

It seems to me that it becomes obvious that the public defender scheme is bad law as soon as we reflect that a criminal case is nothing but a lawsuit between the two parties, one of whom is the Government and

⁴³ 1 SILVERSTEIN 25.

⁴⁴ Winters 85.

the other is the accused. If a man does not agree with me that a litigant whose lawyer owes his position and his livelihood to his opponent is at a disadvantage, I have not any common ground from which I can argue with him.

There is no axiomatic proposition from which I can prove my thesis because the thesis, itself, seems to be an axiom.⁴⁵

Little evidence for or against this proposition exists; however, in one survey, seventy-one out of seventy-nine judges questioned in California, Illinois, Indiana, Massachusetts, and Florida, said they believed that public defenders maintained their independence.⁴⁶ In the same study thirty-four out of forty prosecutors said that they believed that the public defender maintained his effectiveness as advocate.⁴⁷ Senator Sam J. Ervin of North Carolina, comparing the position of public defenders to that of *judges*, agreed that there was no basis for believing public defenders would surrender their role as advocate.⁴⁸

Notwithstanding the lack of proof, the notion persists that public defenders fail as advocates. Denials by public defenders are self-serving since acknowledgment would be confession of inadequate representation. In the foreseeable deluge of indigent cases, the public defender's office will quite likely be constrained, as is the prosecutor's office now, to dispose of cases as rapidly as possible. The public defender may be tempted to negotiate trade-offs with the prosecutor. One defendant's guilty plea would earn another defendant's *nolle prosequi*. Notwithstanding the adamant denial of public defenders and even if they are loyal, defendants may suspect that trade-offs occur and consequently become dissatisfied with their defense. This dissatisfaction might further destroy confidence in the administration of justice as well as increase indigents' appeals and habeas corpus petitions.

A third advantage asserted for assigned counsel system is the greater opportunity it offers for wide participation in criminal practice by the

⁴⁵ 1963 *Hearings* 34-35.

⁴⁶ 1 SILVERSTEIN 50-51.

⁴⁷ *Id.* at 51.

⁴⁸ There has been sufficient experience with public defenders in State courts to establish that this is a very satisfactory method of providing counsel. . . . I know of no basis for believing that such public defenders would be influenced to disregard the interests of their clients by the fact that they receive compensation from the Government, or were in constant contact with the prosecuting officials. They are no different from judges in that regard, and judges are entirely able to maintain their independence.

1963 *Hearings* 73-74.

local bar.⁴⁰ It is maintained that this plan gives young attorneys the opportunity to gain trial experience⁵⁰ and at the same time keeps all members of the local bar aware of procedural and administrative shortcomings in the criminal processes.⁵¹ In a move to expand attorney participation, one state supreme court has imposed a system of assignment in which all members of the state bar, with a few special exceptions, are required to serve in the assigned counsel system.⁵²

In North Carolina, the statute requires the State Bar Council to promulgate the rules of assigned counsel participation.⁵³ The only limitations imposed by the statute are that the system "provide for the protection of the constitutional rights of all indigent persons," and that there be a "reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this state."⁵⁴ Pursuant to that mandate, the State Bar Council directed that each district bar association formulate a plan and submit it to the local Clerk of the Superior Court for approval.⁵⁵ In a North Carolina survey taken prior to statutory authorization of such plans, fifteen out of the twenty-nine judges who responded stated that they ordinarily used attorneys who had indicated a willingness to represent indigents; seven said they used a roster of all attorneys in their district.⁵⁶ In a different survey, taken in the Fourteenth Judicial District during 1970, forty attorneys handled cases as assigned counsel over a nine month period. The median number of cases handled by a

⁴⁰ 1 SILVERSTEIN 19.

⁵⁰ Foster 247.

⁵¹ Winters 80.

⁵² The New Jersey Supreme Court, pursuant to its constitutional rule-making power, has provided:

As far as practicable all assignments of counsel . . . shall be made in alphabetical rotation from a master list to be maintained by the assignment judge . . . except in cases of murder and where in the opinion of the court the gravity of the offense warrants the assignment of special counsel. The master list shall include all members of the bar practicing within the county, unless excused by assignment judge or other judge maintaining the list on written application setting forth good cause.

N.J. RULE 1:12-9(e) (1966), *quoted in* Note, 20 RUTGERS L. REV., *supra* note 32, at 809.

⁵³ N.C. GEN. STAT. § 7A-459 (1969).

⁵⁴ *Id.*

⁵⁵ *Rules and Regulations Relating to Appointment of Counsel*, 17 THE NORTH CAROLINA BAR No. 1, at 27 (1970). The established plan in North Carolina's Fourteenth Judicial District provides for two lists which together name all practicing attorneys in the district. A voluntary list is designated for current assignments of indigent cases, and an involuntary list is maintained in the event that no voluntary counsel are available.

⁵⁶ 3 SILVERSTEIN 556.

single attorney during the period was six. The most cases handled by one attorney was fourteen, and eight attorneys took only one case.⁵⁷

Within the limits of this analysis of the six dominant issues here explored, the public defender system proved superior to the assigned counsel system. The public defender system's superiority is primarily demonstrated in the two principal tests, cost to the state and effectiveness of defense. Table I in conjunction with Table II shows that the two defender districts operated at significantly lower cost per defendant and cost per capita. In addition, the two public defender districts demonstrated a superiority in effectiveness of defense in three of the five areas tested in Table III. The fact that the public defender system is superior in both of the dominant tests reinforces its claim to superiority and at the same time minimizes the importance of the results of the four lesser tests. One test disclosed that the assigned counsel district utilized more experienced attorneys than the public defender districts. That conclusion, however, becomes unpersuasive in light of the greater effectiveness of defense that the public defender system has demonstrated. Likewise, the question of adverseness in the public defender system loses its importance if that system continues to outperform the assigned counsel system. The greater efficiency that is asserted by advocates of the public defender system is supported by that system's lower cost to the state. Participation by the local bar remains a separate consideration which must be weighed in conjunction with the other issues. Its importance is minimized by the preponderance of evidence in favor of the public defender system. Weighing all factors, it must be concluded that the public defender system has performed better in the areas tested, and would, therefore, provide the better choice.

The two systems discussed are not the only means for solving the problem of providing counsel for indigents. In addition to the pure assigned counsel and public defender systems many hybrid schemes have been devised. Minnesota utilizes a dual system composed of a full-time State Public Defender who handles all indigent appeals.⁵⁸ The State Public Defender provides help and instruction for the district defenders who represent indigents at the trial level and at the same time engage in private practice.⁵⁹ San Diego County, California, utilizes a mixed public and private system consisting of a staff of full-time attorneys who defend

⁵⁷ See note 31 *supra*.

⁵⁸ MINN. STAT. ANN. § 611.25 (Supp. 1970).

⁵⁹ MINN. STAT. ANN. § 611.26 (Supp. 1970). For a general outline of the operation of the Public Defender System in Minnesota see Benjamin & Pedeliske, *supra* note 41, at 280-82.