KEYNOTE ADDRESS

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I begin my remarks and this Colloquium with the following text:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[1]

These words were written by Justice Sutherland more than 52 years ago in *Powell v. Alabama*.[2] This was the case of the Scottsboro Boys, in which the Supreme Court held that the right to an attorney must be provided in a capital case. Since that decision in 1932, there have been other historic decisions in the development of the right to counsel. In 1963, *Gideon v. Wainwright*[3] extended the right to counsel to all state felony prosecutions and made it clear that counsel must be appointed unless the right to an attorney is competently and intelligently waived. In 1972, *Argersinger v. Hamlin*[4] extended the right to an attorney to misdemeanor cases in which the accused suffers a loss of liberty. In other historic decisions, the Supreme Court has required that counsel be made available in juvenile delinquency proceedings,[5] at lineups,[6] at preliminary hearings,[7] and on a defendant's first appeal.[8]

These decisions, based on the sixth amendment and the due process

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1. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
2. *Id.*
3. 372 U.S. 335 (1963).
4. 407 U.S. 25 (1972).
5. *In re* Gault, 387 U.S. 1 (1967).
6. United States v. Wade, 388 U.S. 218 (1967).
7. Coleman v. Alabama, 399 U.S. 1 (1970).
8. Douglas v. California, 372 U.S. 353 (1963).

clauses, guarantee the right of appointed counsel to persons who previously had no such right. To be meaningful, however, counsel's performance must be effective. It must ensure fair procedures and a fair trial for the defendant. As the Supreme Court has explained in *Strickland v. Washington*,[9] if counsel's performance "undermined the proper functioning of the adversarial process . . . the trial cannot be relied on as producing a just result."[10]

Nevertheless, anyone who surveys the current delivery of criminal defense services for the poor has to be overwhelmed by the impediments that stand in the way of providing effective legal assistance. These problems are so great that, virtually everywhere, the accused is in jeopardy of not receiving the effective representation that the sixth amendment is designed to secure. The chances are thus enhanced that the innocent will be wrongfully convicted.

There are numerous problems that public defenders confront while delivering defense services. Following a nationwide survey, for example, the National Institute of Justice reported in 1984 that the greatest need of public defenders is to improve the quality of representation in felony cases.[11] According to the survey, heavy caseloads are the biggest problem to attaining that quality.[12] Public defenders also complained that they lacked sufficient training and were unable to afford expert witnesses and adequate investigative services.[13] These replies are not surprising. Similar complaints have been repeatedly voiced by public defenders throughout the country for many years.[14] Absent reasonable caseloads and adequate support services, the ability of lawyers to furnish effective representation is impaired. Indeed, no attorney, regardless of talent, can overcome the dual burdens of too many cases and insufficient paralegal and support services.

As another illustration of today's problems in providing defense services, consider the 1984 decision of the Arizona Supreme Court, in which concern for the quality of representation became a constitutional imperative. *State v. Smith*[15] held that a system of defense services that relied on private attorneys who contracted with a county government violated the defendant's right to counsel as guaranteed by the constitutions of the United States and Arizona. A variety of considerations influenced the court, including the practice of the county to accept the lowest bid to provide representation. The county's only

9. 466 U.S. 668 (1984).

10. *Id.* at 686.

11. Gettinger, *Assessing Criminal Justice Needs*, NAT'L INST. OF JUST.: RESEARCH IN BRIEF 4 (June 1984).

12. *Id.*

13. *Id.*

14. *See, e.g.*, National Legal Aid & Defender Assoc., *The Other Face of Justice: A Report of The National Defender Survey*, 1973 NLADA 79 ("Eighty-three percent of the defenders surveyed reported that they are inadequately funded in one or more of the areas in which they are required to provide representation for indigent defendants. Almost three-fourths of the reporting defenders lack adequate funding to provide effective representation in felony cases, while over two-thirds need additional funds to effectively handle their misdemeanor caseload.") [hereinafter cited as Benner].

15. 140 Ariz. 355, 681 P.2d 1374 (1984).

exception to this practice was when the lowest bid was placed by an attorney who previously had been held in contempt for failing to file a brief and was the subject of repeated complaints.

Consider, also, the fees paid to assigned counsel where compensation is provided on a case-by-case basis. The quality of counsel makes a difference to the outcome of a criminal case, and there is a relationship between the conduct of professionals and the compensation available to reward them.[16] In short, money enhances the odds that justice will be done. Yet, according to the most recent national study of the U.S. Department of Justice, fees paid to assigned counsel are normally between $20 and $30 per hour for out-of-court work and $30 to $40 for in-court appearances. Additionally, the maximum amounts payable are often severely limited.[17] The result is that the payments to assigned counsel are often insufficient even to cover the attorney's office overhead.[18]

Sometimes the annual amounts appropriated by the state legislature have been inadequate, and have lead to the cessation of payments and the emergency need for supplemental appropriations.[19] In Washington, D.C., inadequate fees led to a well publicized strike of counsel who accept appointments in the criminal courts.[20] There is also evidence that inadequate fees are sometimes responsible for individual lawyers refusing to take assigned cases.[21]

Moreover, since 1973, studies have consistently shown that courts do not adequately extend the right to counsel in misdemeanor cases.[22] Advisements of the right to counsel are either not given, or are insufficiently supplied.[23] Defendants consequently relinquish their right to counsel in violation of the *Argersinger* decision, and are sometimes incarcerated.[24] A major reason for the failure to fully implement the right to counsel in misdemeanor cases is a shortage due to the fact that lawyers often resist appointment because of inadequate compensation.[25]

The problems in furnishing counsel do not always arise in areas where there is a recognized constitutional right to counsel. For example, there are more than 1400 inmates on death row in the United States. Constitutionally,

16. Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, 1982 A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS REP.

17. *Criminal Defense Systems*, 1984 BUREAU OF JUST. STATISTICS, U.S. DEPT. OF JUST. 5 [hereinafter cited as *Criminal Defense Systems*].

18. Lefstein, *supra* note 16, at 22.

19. Silas, *Lag in Pay for Indigent Defense Riles N.H. Bar*, 10 BAR LEADER 25 (1985).

20. *See* Middleton, *Antitrust Law v. Lawyers*, Nat'l L. J., Feb. 25, 1985, at 13.

21. *See* Lefstein, *supra* note 16, at 28, 39 (studies conducted in Saginaw, Michigan, and San Francisco, California).

22. *See* S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin* 4-5 (1976) [hereinafter cited as S. KRANTZ]; Lefstein, *supra* note 16, at 42 (study conducted in Tuskegee, Alabama).

23. *See, e.g.*, S. KRANTZ, *supra* note 22, at 109-11; Lefstein, *supra* note 16, at 30-31.

24. *See, e.g.*, Lefstein, *supra* note 16, at 42, 55.

25. *Id.* at 41-42.

these persons are not entitled to an appointed lawyer after their first appeal nor in postconviction proceedings.[26] Finding qualified, volunteer counsel for them has become an exceedingly difficult problem.[27] Remarkably, the richest nation on earth, with over 600,000 lawyers—which graduated 36,000 new lawyers in 1983[28]—has a criminal justice system in which it is hard to find attorneys for a couple of hundred unfortunate members of our society who unquestionably have the greatest need for an advocate. In contrast, our new Attorney General did not have difficulty retaining counsel when he was investigated by the government's independent counsel. However, the lawyers for the Attorney General, pursuant to federal law, expect payment from the government, and have submitted their bill for $720,924.[29] Incidentally, the Attorney General's case is one where there has been neither a trial nor an appeal.[30]

Having identified some of the problems confronting the delivery of defense services, it is important to place the subject in the proper context. In assessing the promise of effective assistance of counsel, there are three important perspectives to keep in mind. First, we must not forget that in a very short span of time there has been an exceedingly far-reaching expansion of the right to counsel. When this republic was founded, the right to counsel generally meant the right to retain counsel of one's choice.[31] Normally, attorneys were appointed only in capital cases.[32] It was not until almost 200 years later—following the 1963 *Gideon* decision—that a significant number of attorneys became involved in representing poor defendants in criminal cases nationwide. Although the first public defender programs began in the early part of this century, it was only after *Gideon* that the numbers of such programs grew significantly. In 1961 for example, public defender programs existed in only three percent of the counties in the United States.[33] Today, there are approximately 1200 public defender offices nationwide. They exist in virtually every state.[34] Additionally, there are 18 states in which defense services are organized at the state level and funded solely by state appropriations.[35]

I also suggest a second perspective. We should not assume that the dimensions of the right to counsel are fixed forever. Although it is theoretically possible that the scope of the right will be narrowed, I think it is far more likely that it will continue to expand. Eventually, we may see some of the

26. Ross v. Moffitt, 417 U.S. 600 (1974).

27. *See generally* A. Dershowitz, Gideon's Trumpet is but Faintly Heard on Death Row (Aug. 1, 1983) (unpublished manuscript).

28. *A Review of Legal Education in the United States: Law Schools and Bar Admission Requirements—Fall 1983*, 1984 A.B.A. SEC. LEGAL ED. AND ADMISSIONS TO THE BAR 69.

29. Lauter, *U.S. Paid $50 Million to Private Firms*, Nat'l L.J., Feb. 4, 1985, at 52, col. 4.

30. *Id.*

31. W. BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 18-21 (1955).

32. *Id.*

33. Benner, *supra* note 14, at 13.

34. *See generally The 1983 Directory of Legal Aid and Defender Offices in the United States*, 1983 NLADA 73-114.

35. *See Criminal Defense Systems, supra* note 17, at 6.

changes that may be discussed during this conference, such as the removal of eligibility restrictions and the elimination of rules requiring that an accused contribute to his defense. Perhaps we may even someday see the socialization of legal services, so that all persons in need of legal aid—whether in a criminal or civil case—will be entitled to counsel without regard to the ability to pay.[36] We may also see the development of increased alternatives to the adversary model. Thus, some marginal offenses may be decriminalized and diversionary programs expanded. Developments such as these will make it easier to focus attention on the area of greatest need, i.e., the delivery of effective defense services for those charged with serious criminal conduct.

Having gazed into the future, it is good to remember that in today's political and judicial climate, the future that I describe seems distant. During the remainder of this century, expansion of the right to counsel is apt to be modest, and major changes in the structure of the criminal justice system are unlikely. Instead, we will probably see the kind of incremental changes typified by decisions like *Ake v. Oklahoma*,[37] in which the Supreme Court recognized a constitutional right to the appointment of a psychiatric expert in cases where sanity is substantially at issue. For most states, however, the Court's decision did not break new ground because a defendant's right to the appointment of a psychiatric expert was already statutorily or judicially recognized.[38]

The third perspective I offer concerns the present, for it is the situation today—the here and now—with which we must deal. The overwhelming majority of problems confronted today in the delivery of effective defense services stem either directly or indirectly from a lack of adequate financing. Supreme Court decisions that extend the right to counsel are not self-executing. Just because the Court decrees that there is a right to an appointed, effective defense lawyer does not mean that one will be present in the courtroom the next day. The Court's decisions do not reflect extensive concern with how counsel will be provided, nor with how they will be compensated.[39]

Although there surely are some social problems that cannot be solved simply by spending more money, the right to counsel is an area where additional expenditures can make a substantial difference. Recall the problems that I cited earlier to illustrate the difficulties that arise in the delivery of defense services—problems concerning public defender caseloads, adequate compensation for contract attorneys and assigned counsel, and finding counsel to serve in misdemeanor and capital cases. All of these problems stem from a lack of appropriated funds.

As we proceed through this conference today, ask yourself these ques-

36. *See* Frankel, *An Immodest Proposal*, N.Y. Times, Dec. 4, 1977, § 6 (Magazine), at 92.
37. 105 S. Ct. 1087 (1985).
38. *Id.* at 1094 n.4.
39. One of the few times that the Supreme Court has worried about the practical effect of one of its right to counsel decisions was in Argersinger v. Hamlin, 407 U.S. at 37 n.7: "We do not share Mr. Justice Powell's doubt that the Nation's legal resources are insufficient to implement the rule we announce today."

tions. To what extent is the problem being discussed either caused or exacerbated by insufficient financing? Also, to what extent would the problem be eliminated or minimized if additional funds were available? Admittedly, there has been some increase in the amount of money paid for criminal defense services nationwide. In August 1984, the U.S. Department of Justice reported that almost $635,000,000 are spent on defense services in the nation's state and local courts.[40] This represented an increase of approximately $200,000,000 during the past four to five years.[41] In October 1984, for the first time in more than a decade, the federal government increased the compensation paid to private lawyers who take appointments in the federal courts. Now, instead of $20 per hour for out-of-court time, and $30 for in-court time, the rates have been doubled to $40 and $60 per hour respectively.[42] The maximum level of compensation has also increased to $800 for misdemeanors and $2,000 for felonies.[43] Nevertheless, because the financial increases have barely managed to keep pace with the inflation of the last decade, enormous problems with indigent defense services still remain.

Of all the persistent problems, none is perhaps more difficult or important than mobilizing public opinion on behalf of criminal defense services for the poor. Only then will adequate financing be made available. Yet, this is not an attractive cause, despite the fact that a constitutional right is at stake. From the standpoint of legislatures and county governments, criminal defense services are just another social service for the poor and, by and large, much less worthwhile than other poverty programs. Moreover, governments would sooner pay lawyers for their services in other legal services areas. For example, it was recently reported that although the federal government has 17,000 lawyers on its various payrolls, it sometimes goes out into the market place, retains private law firms, and pays rates of up to $285 an hour for representation of the government in specialized matters.[44] The type of work "farmed out" by government agencies to private lawyers, with compensation provided at typical private attorney fee rates, involves a wide variety of legal matters, including patent searches, real estate closings, and collective bargaining.[45]

Similarly, under a variety of statutes, courts can award legal fees to the prevailing party in suits against the federal government.[46] Sometimes the recoveries are enormous when compared to the fee awards made to assigned counsel in criminal cases. For example, in one case in which police officers

40. *See Criminal Defense Systems, supra* note 17, at 2.

41. Based on data drawn from either fiscal years 1980 or 1981, approximately $435 million was spent on criminal defense services nationwide during a one year period. Lefstein, *supra* note 16, at 10.

42. 18 U.S.C. § 3006A(d)(1) (1982 & Supp. II 1984).

43. 18 U.S.C. § 3006A(d)(2) (1982 & Supp. II 1984).

44. See Lauter, *supra* note 29, at 1, col. 2.

45. *Id.* at 51.

46. *See, e.g.*, Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1982); Equal Access to Justice Act, 28 U.S.C.A. § 2412(b) (West Supp. 1985); Tax Reform Act of 1976, 26 U.S.C. § 6110(i)(2) (1982).

were charged with violating the constitutional rights of suspects, the attorneys were paid $243,343. The billing rate was $125 per hour pursuant to the Civil Rights Attorney's Fees Awards Act.[47] Ironically, if the plaintiffs had been charged with crimes and threatened with a loss of liberty, the government would have paid their defense attorneys far less at a much lower hourly rate. The disparity is compounded in some cases where courts make "bonus" awards or apply "multipliers," so that the hourly rates paid to counsel for the prevailing party are significantly increased. For example, in a 1980 employment discrimination case, a court increased the basic fee by fifty percent, thereby converting an $88,450 award into an award of $132,675.[48]

Do not misunderstand me. I do not mean to suggest that the fee awards sometimes made in these federal civil cases reflect unsound policy. I refer to them because they vividly illustrate that our society does not place the same emphasis on protecting the criminally accused and the right to liberty as it does on compensatory redress of civil rights violations. Indeed, the attitude of state courts towards awarding fees for assigned counsel in criminal cases is in stark contrast to the examples I have just cited. The typical attitude is illustrated by the following language from a 1982 Missouri appellate court opinion:

> We hold . . . that when no funds have been appropriated for payment of counsel representing indigent defendants, or when such funds have been expended, attorneys not only have an obligation to accept the representation, but most do so without expecting payment from the state's general revenues.[49]

The legal profession has recognized that lawyers do have a *pro bono* obligation.[50] However, it is folly to think that the rights of the accused can be protected by lawyers serving as *pro bono* counsel. The burdens of defense representation, coupled with nationwide needs, demand adequate compensation. As the American Bar Association's Criminal Justice Standards recognize, "[g]overnment has the responsibility to provide adequate funding for legal representation of all eligible persons . . . ."[51] It is worth remembering that judges,

47. City of Riverside v. Rivera, 679 F.2d 795 (9th Cir. 1982), *vacated and remanded*, 461 U.S. 952 (1983), *prior award reinstituted*, No. CV 76-1803-MRP, slip op. (C.D. Cal. 1984), *aff'd*, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3270 (U.S. Oct. 22, 1985) (No. 85-224). The lower court, after reconsidering its earlier decision in light of Hensley v. Eckerhart, 461 U.S. 424 (1983), concluded that it had correctly decided the amount of attorney's fees it had previously awarded. In *Hensley*, the Supreme Court held that the extent of an attorney's success is a crucial factor that courts should consider in determining fees under the Civil Rights Attorney's Fees Awards Act. The lower court observed that its fee award was justified because of the "substantial success" of the plaintiffs.

48. Bolden v. Pennsylvania State Police, 491 F. Supp. 958, 966 (E.D. Pa. 1980).

49. State v. Cox, 639 S.W.2d 425, 429 (Mo. Ct. App. 1982).

50. *See* MODEL CODE OF PROFESSIONAL RESPONSIBLITY EC 2-25 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

51. STANDARDS FOR CRIMINAL JUSTICE § 5-1.5 (1980).

prosecutors, and other essential participants in the criminal courtroom are not asked to work for nothing or for patently inadequate compensation.

Thomas Jefferson once said that "eternal vigilance is the price of liberty." Our history suggests that no less vigilance is required to assure adequate defense services for the poor. Unless criminal defense lawyers are adequately compensated and are able to function effectively, the capacity of government to overreach will not be challenged, and the great protections of the Bill of Rights will not be realized by all citizens. Unless the adversary system is strong—unless it protects the weakest and least powerful members of society as well as the richest—the promise of the sixth amendment will be unfulfilled.