

Gideon and the Golden Thread

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* President’s Club Professor of Law Emeritus, Moritz College of Law, The Ohio State University. Loving thanks to my wife, Ann Brace, for reading the first and penultimate drafts of this Essay, making many cogent suggestions, and finding more errors than I could have found in ten readings. I am grateful to Daniel Inscore, a 3L student at Moritz, who wants to be a public defender (bless him), for effective research, formatting the text, and putting the footnotes into proper form. I tip my hat to the staff of the *Iowa Law Review* for editorial changes that make this Essay more readable and for the thankless task of checking footnote accuracy. I dedicate this Essay to my parents, Ben and Kate Herman, who taught me by word and deed that due process of law is for everyone, not just for a privileged few.

I. INTRODUCTION

And when London is but a memory and the Old Bailey has sunk back into the primeval mud, my country will be remembered for three things: the British Breakfast, *The Oxford Book of English Verse* and the Presumption of Innocence! That Presumption is the Golden Thread which runs through the whole history of our Criminal Law

Thus spoke Barrister Horace Rumpole, addressing a judge, who was also the trier of fact in a criminal case, in John Mortimer's delightful story *Rumpole and the Golden Thread*.¹

On the other hand:

I have discerned a series of "rules" that seem—in practice—to govern the justice game in America today

Rule I: Almost all criminal defendants are, in fact, guilty.

Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.²

Thus wrote Professor of Law (and highly successful criminal defense lawyer) Alan Dershowitz.

Although Barrister Rumpole was specifically referring to an aspect of the English criminal law process, he was coincidentally referring also to an aspect of the American process, as was Professor Dershowitz. However, Barrister Rumpole and Professor Dershowitz were not referring to the same aspect. One undeniable facet of the American criminal law process is that, like a coin, it has two sides. One side has been described as the "Crime Control Model" and the other side the "Due Process Model."³ The late Professor Herbert Packer articulated the two models to aid in analyzing the criminal process in a much cited and highly regarded law review article.⁴ Later, Professor Packer updated and refined his article as a part of his classic book, *The Limits of the Criminal Sanction*.⁵ Part II of the present Essay is a

1. JOHN MORTIMER, *THE SECOND RUMPOLE OMNIBUS* 274 (1988). Rumpole's characterization of the presumption of innocence as a "golden thread" comes from *Woolmington v. DPP*, [1935] A.C. 462 (H.L.) 481 (appeal taken from Eng.), a very important homicide case. It held that once a defendant introduces enough evidence to raise the defense of "accident[]," the prosecution bears the burden of negating the defense beyond a reasonable doubt. *Id.* at 482.

2. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982). Thanks to Niki Z. Schwartz, my friend, former student, and one of Ohio's top trial lawyers in both civil and criminal cases, for calling my attention to Professor Dershowitz's rules.

3. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964).

4. See generally *id.*

5. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). In footnotes, I will generally refer to Professor Packer's book because it was written five years after *Gideon*, when provision-of-counsel problems had begun to surface. The book is a "must read" for

brief excursion into the most relevant points of Professor Packer's analysis (along with a few footnote comments of my own) that may shed some light on *Gideon*, its problems today, and its prospects. In Part III, I discuss the operation of an Army JAG Office and two cases in which I personally participated when I was an Army JAG officer in the 1950s. These cases show an emulable system working both efficiently and fairly. Substantially the same process exists today and seems to be the only process in the American criminal-justice system that is paying due respect to *Gideon*. In Part IV, I briefly catalogue today's problems, critically analyze some of the solutions that have been proposed in what has become an enormous literature dealing with the provision of counsel, and offer a suggestion based on my own JAG experience.

II. TWO MODELS OF THE CRIMINAL PROCESS

A. CRIME CONTROL MODEL

This model is based on the proposition that the principal function of the criminal process is protection of the public by reducing crime.⁶ To that end, "efficiency" in screening suspects, establishing facts, determining guilt, and sentencing the guilty is of crucial importance.⁷ Also vital is efficiency in dealing with large numbers of people.⁸ Efficiency dictates that the process screen out fairly early those detainees who are probably innocent and pass on to the next stage those who are probably guilty.⁹ "The key to the operation of the model regarding those who are not screened out is . . . a presumption of guilt."¹⁰ "The supposition [of the Crime Control Model] is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt."¹¹ "[S]ubsequent processes, particularly those of

anyone with an interest in criminal law and procedure. I re-read parts of this book every year when I am teaching criminal law, and I highly recommend it to my students.

6. *Id.* at 158.

7. *Id.*

8. *Id.* at 159.

9. *Id.* at 160.

10. *Id.* Professor Packer's reference to "a presumption of guilt" is more than theoretical. See generally Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009).

11. PACKER, *supra* note 5, at 160. The validity of the supposition has been drawn into question by recent research findings that police, having a suspect, too often presume guilt and search only for confirmatory evidence and not for non-confirmatory evidence. Michael J. Saks & D. Michael Risinger, *Baselines, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1055-58.

Anyone who has taught the criminal procedure course that includes confessions has a file of cases and newspaper and magazine articles dealing with false confessions that were obtained through police misconduct. The most recent additions to my fifty-one-year-old file are articles from The New York Times that cast serious doubt on the truth of many murder confessions obtained by two Brooklyn police detectives. Frances Robles, *Louis Scarcella's Ex-Partner is Coming Under Scrutiny in Brooklyn Cases*, N.Y. TIMES (Dec. 27, 2013), <http://www.nytimes.com/2013/12/>

a formal adjudicatory nature, are unlikely to produce as reliable fact-finding. . . .”¹²

B. THE DUE PROCESS MODEL

This model “looks very much like an obstacle course,”¹³ in contrast to the “assembly line”¹⁴ of the Crime Control Model. It denies that police-prosecutor fact-finding is more reliable than the adversary fact-finding of formal adjudication,¹⁵ prefers formal adjudication,¹⁶ is more concerned than the Crime Control Model with the possibility of error,¹⁷ asserts that reliability trumps efficiency,¹⁸ and contends that “[t]he aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.”¹⁹ Crucial parts of the Due Process Model are the presumption of innocence²⁰ and, necessarily, its protector, the right to counsel.²¹

Of all of the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the

28/nyregion/like-his-old-partner-scarcella-chmil-comes-under-scrutiny.html?r=0; Frances Robles, *As Doubts over Detective Grew Prosecutors Also Made Misteps*, N.Y. TIMES (Sept. 5, 2013), <http://www.nytimes.com/2013/09/06/nyregion/as-doubts-over-detective-grew-prosecutors-also-made-misteps.html>. Then Brooklyn District Attorney Charles J. Hynes initiated a review of a large number of cases in which one of the detectives participated. Robles, *As Doubts over Detective Grew*, *supra*. Hynes was subsequently ousted in an election by Kenneth P. Thompson. Vivian Yee, *Thompson Defeats Hynes, Again, for Brooklyn District Attorney*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/thompson-claims-victory-over-hynes-again-for-brooklyn-district-attorney.html>. The review of doubtful murder convictions has been turned over to Thompson, who has “said he will add more prosecutors and staff members to the conviction integrity unit.” Vivian Yee, *Despite New Evidence, Review of Conviction in 1989 Brooklyn Killing Stalls*, N.Y. TIMES (Dec. 25, 2013), <http://www.nytimes.com/2013/12/26/nyregion/despite-new-evidence-review-of-conviction-in-1989-brooklyn-killing-stalls.html>. As of February, 2014, two men had been set free and numerous other prisoners were challenging their convictions. Vivian Yee, *As 2 Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES (Feb. 6, 2014), <http://www.nytimes.com/2014/02/07/nyregion/at-new-brooklyn-district-attorneys-door-a-tidal-wave-of-wrongful-conviction-cases.html>. In May 2014, a judge exonerated three half-brothers of murder after serious questions were raised about the credibility of a key witness whom the prosecution had repeatedly used in a series of unrelated cases all of which had been investigated by the same Brooklyn detective. Stephanie Clifford, *Judge Voids Murder Convictions for 3 Half Brothers Linked to Brooklyn Detective*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/nyregion/brooklyn-judge-vacates-murder-convictions-of-3-half-brothers.html?emc=eta1&r=1>.

12. PACKER, *supra* note 5, at 162. It seems to me that this position trashes the right to counsel and the presumption of innocence.

13. *Id.* at 163.

14. *Id.*

15. *See id.*

16. *See id.* at 236.

17. *See id.* at 164.

18. *See id.* at 165.

19. *Id.*

20. *Id.* at 166–67.

21. *Id.* at 172, 236–37.

most dependent on what one's model of the process looks like, and the least susceptible of resolution unless one has confronted the antinomies of the two models.²²

C. PROFESSOR PACKER'S POSTSCRIPT

After his analysis of the two models, Professor Packer applies both models to the stages of the criminal process from arrest to collateral attack.²³ Then he adds a postscript entitled "Access to Counsel" in which he observes that in the Crime Control Model, the defense lawyer "is a mere luxury; at no stage is he indispensable,"²⁴ and even at the trial stage he is no more than "merely tolerable."²⁵ In the Due Process Model, however, the defense lawyer is a "crucial figure throughout the process; indeed, the viability of this model's prescriptions depends on his presence."²⁶

Where does *Gideon* fit into Professor Packer's analysis of the two models? "As long as *Gideon* remains in the law, the normative content of state criminal processes will possess a core of meaning in common with the Due Process Model"²⁷ Then Professor Packer sounds a prescient note of caution:

Yet *Gideon* and decisions like it do not alone determine the shape of the criminal process. The response of other institutions of government counts for as much when the question is one of providing the necessary resources to make the norm something more than a ground for reversing a few convictions. The implementation of *Gideon* may provide a paradigm of the tension between forces of change and those of inertia. No one can doubt that the norms of the criminal process have been moved rapidly and spectacularly across the spectrum toward the Due Process Model. But a parallel development in the real-world operation of the process remains for the future. No estimate of the direction and velocity of change in the criminal process can be realistic that fails to appraise not only the normative revolution that has occurred, but the competing forces of change and inertia that will govern the extent to which that revolution becomes a reality.²⁸

This cautionary note about the force of inertia is repeated in the next chapter of Professor Packer's book when he makes a preliminary assessment of the long-term effect of the trend toward the Due Process Model suggested

22. *Id.* at 172.

23. *Id.* at 174–236.

24. *Id.* at 236.

25. *Id.*

26. *Id.*

27. *Id.* at 237.

28. *Id.* at 237–38.

by the decision in *Gideon*.²⁹ What he wrote in 1968 is relevant today. The implementation of *Gideon* requires money, but money must be appropriated by the legislature, and legislatures are prey to grudging inertia.³⁰ As proof, Professor Packer cites the decades-long struggle to implement *Johnson v. Zerbst*.³¹ In 1938, the Supreme Court, ignoring the considerable historical evidence that the Sixth Amendment's right to counsel was a right to *retain* counsel, held that indigent federal defendants were entitled to government-provided counsel.³² Federal courts implemented that decision by appointing lawyers to represent indigents, but there was no provision in federal law authorizing courts to compensate the lawyers for their services and litigation expenses. Although various efforts were made over the years, inertia prevailed and authorizing legislation was not enacted until Congress passed the Criminal Justice Act of 1964.³³ Six years later, the Act was amended and the Federal Public Defender's Office was created.³⁴ In 1968, Professor Packer wondered how long the implementation of *Gideon* would take:

Reform in the criminal process has very little political appeal. There is no constituency of any consequence behind it, aside from a few professional organizations whose concern tends to exist in inverse ratio to their power. If it has taken 25 years to bring *Johnson v. Zerbst* to the brink of puberty, how long will the childhood of *Gideon v. Wainwright* have to last?³⁵

That question, I am sorry to say, might still be asked in 2014.³⁶

III. TWO ILLUSTRATIVE CASES FROM MY ARMY JAG EXPERIENCE³⁷

I entered the Army JAG Corps as a First Lieutenant in 1955³⁸ after eighteen months as a law school teaching fellow and graduate student. I was

29. *Id.* at 239-46.

30. *See id.* at 241-42.

31. *See Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (holding that the Sixth Amendment provides federal defendants with the right to appointed counsel).

32. *See* LAWRENCE HERMAN, *THE RIGHT TO COUNSEL IN MISDEMEANOR COURT* 41, 94 n.98, 95 n.99 (1973).

33. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2012)).

34. *Criminal Justice Act (CJA) and CJA Processes*, U.S. COURTS, <http://www.uscourts.gov/uscourts/cjaort/processes/003.html> (last visited Apr. 17, 2014).

35. PACKER, *supra* note 5, at 241-42.

36. *See infra* text accompanying notes 68-72.

37. Of the numerous articles and books that I have read in preparation for this Symposium, only one mentions the various JAG Corps, discusses their structure, and recommends that they be viewed as models for civilian practice. *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 299-300 (1997).

38. That means that I am relying to a great extent on my eighty-four-year-old memory. In trying to describe what happened fifty-eight years ago, I have been forced to engage in some

a member of the Ohio Bar, had a strong interest in criminal law, and sought a JAG position that would give me criminal trial experience. Three months of basic training at The Infantry Center, in Fort Benning, Georgia, were followed by another three months of instruction in various aspects of military law, importantly including criminal law, at the JAG's Legal Center and School in Charlottesville, Virginia. Then I was certified as trial counsel and put on a trans-Atlantic plane to my assignment in the Office of the Staff Judge Advocate, Seventh Army Headquarters, in Stuttgart-Vaihingen, West Germany. During the next thirty months, I participated as counsel in approximately seventy General Courts-Martial cases.³⁹

In 1955, as today, the Army JAG Corps, in common with other military JAG Corps, functioned like a huge law firm, rendering diverse legal services to military personnel and their families. In part, a JAG office is a combination of a public defender office (criminal) and legal aid office (civil). Unlike their civilian counterparts, however, JAG services are not limited to indigents. All military family clients are accepted, as they are at military hospitals.

On the criminal side, the 1955 JAG office was not limited to criminal defense. I knew going in that I was expected to do both prosecution and defense work, and I did just that. However, there were no separate cadres of prosecutors and defenders. I might prosecute a case this week and defend one the next.⁴⁰ My training was on-the-job, but gradual. I sat second chair as a prosecutor for a few cases, then second chair as a defender. In the very first cases, I kept my eyes and ears open and my mouth shut, but after each case there was a period of instruction on the ins and outs of litigation. Then I was on my own.

I was apprehensive about being a JAG lawyer. I had fears of drumhead justice and command influence, but my fears were generally groundless. I had only one case in which I was certain that my client had been wrongly convicted, but that conviction was overturned after I filed a memorandum with our in-house civilian reviewer. There was only one incident of

"imaginative reconstruction," particularly with reference to the second case. The first case, which involved the insanity defense, has been a part of my teaching materials for at least five decades.

39. At no point in my tenure did I feel that my caseload was excessive. In that respect, my situation was quite different from today's public defenders. Indeed, while I was handling cases, I also became Chief and sole functionary of the Section that reviewed the records of convictions emanating from Special and Summary Courts-Martial, and I developed and taught a course of instruction that significantly reduced the number of reversible errors committed in those courts.

40. The situation today is slightly different. In 1980, the Trial Defense Service was established as a separate command solely for Army defense counsel. Rookie JAG officers become prosecutors. Once they are skilled trial lawyers, many are transferred to the Trial Defense Service. Telephone Interview with Col. Peter Cullen, Chief of U.S. Army Trial Def. Serv. (June 27, 2013). For a history of the Army Trial Defense Service, see generally John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983).

attempted command influence, but it failed miserably to influence the outcome of any case and was never repeated.

The work ethic of our office was very strong. Although most of our cases were resolved by guilty pleas, all of our cases were investigated by counsel. Advice to plead guilty was given only after an investigation—including a thorough interview of the client and access to the prosecutor's file—convinced defense counsel that his client would be convicted. The great benefit of doing both prosecution and defense work was that we did not develop institutional bad habits. Regardless of which side we represented, we understood the concerns and constraints of the other side.⁴¹ Although zealously representing our client, we were also cooperative. Trial by ambush was not encouraged and did not take place. Generally there was an exchange of information between counsel, and each side interviewed the other side's witnesses (except the defendant) before trial. Prosecutors were generally workmanlike and understated. They did not wave a bloody flag. Defense lawyers were allowed more latitude.

A. CASE ONE: HOMICIDE AT THE GUARD POST

I turn now to two of my cases. I shall label the first, which I defended, "Homicide at the Guard Post." Private Bobby Wilks was charged with murdering Private Wally Jones.⁴² Wilks had been posted on guard duty, given a loaded carbine, and told to guard his post well and to detain anyone attempting to enter or leave without authorization. He was warned that if he did not guard his post well, his unit would lose that post and would have to use another gate some distance away. At no time was Wilks ever given instructions, written or oral, on when to use, or not use, his carbine.

At 1:05 a.m., Jones parked his car near the accused's post and entered the gate. Wilks knew that Jones had been restricted to his barracks, that he had broken restriction, and that he had left the camp without authorization. Jones, who was drunk, asked Wilks to let him return to his barracks. Wilks refused and ordered Jones to remain where he was until Wilks could notify the Sergeant of the Guard. In violation of this order, Jones began running toward his car, swearing at Wilks and yelling that since he was already in trouble, he might as well go back to town for more drinking. Wilks, honestly believing that he was required to stop Jones in any way possible, yelled "halt" three times. When Jones did not stop, Wilks fired. The carbine was on full automatic and fired twelve rounds, seven of which struck Jones. Wilks immediately summoned aid, notified the Sergeant of the Guard, and remained at his post. Jones died en route to the hospital. Wilks was charged

41. On the sense of balance that comes from working on both sides, see Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 278 (2003); Dripps, *supra* note 37, at 301.

42. I have changed both parties' names to protect their privacy.

with unpremeditated murder and was sent to an Army hospital for examination. The examination disclosed that Wilks was mentally retarded.

I was assigned to defend Wilks and immediately read the file. If Wilks was mentally retarded, how did he pass his pre-enlistment intelligence test? The file indicated that Wilks had been recruited at a recruitment office in Georgia, so I contacted the nearest JAG office in Georgia and asked that a lawyer be assigned to investigate for me and make a written report that would contain as much information as possible about Wilks's mental condition, family, and life, as well as detailed information about his recruitment, with particular emphasis on the administration of his pre-enlistment intelligence test. That request was granted immediately.

While waiting for this information, I inquired into the mental examinations of Wilks. The Chief Clinical Psychologist of the United States Army, who had observed Wilks for two weeks after the killing, told me that Wilks was mentally defective, that he could function without great difficulty in uncomplicated situations, but that he lacked judgment and could not function in complicated situations such as his encounter with Jones, and that he honestly believed that it was his military duty to try to stop Jones by firing at him. These opinions were corroborated by an Army psychiatrist who had also examined Wilks.

The opinions of the two doctors meshed nicely with what I learned from the Georgia JAG officer: Wilks's IQ was 63 and he was classified as a middle-grade moron. Both of his parents had IQs of 65. When Wilks was three years old, he fell off a roof and landed on his head. He successfully passed to the second grade and was promoted to the third and fourth grades despite the fact he failed to meet the criteria for promotion. His teachers believed that he was hopeless. He had been unable to hold a job because of his low intelligence. His uncle said that he had been unable to teach Wilks how to sweep a store properly.

How in the world could Wilks have passed his pre-enlistment intelligence test? He didn't. His records were still available and they showed that almost all of Wilks's answers were wrong and that all of the wrong answers had been corrected, undoubtedly by one of the military personnel working at the recruitment office.

Armed with this information, I served notice on the prosecutor that Wilks would raise a defense of insanity.

The details of the trial are fascinating and I would enjoy recounting them, but they are not relevant to the task at hand. What is relevant is that the public defender side of JAG in 1955 had all the right elements for an adequate defense: reasonable caseloads; time to consult with the client; time to investigate; thorough investigation, even at a long distance from the site of the trial; and adequate time to prepare for trial. There was simply no impediment of any sort. As I look back on it now after so many years, it seems to me that the JAG office in which I worked was the embodiment of

the best aspects of the Due Process Model of the criminal process. If only today's public defense processes could be the same.

The result in the Wilks case? Not guilty by reason of insanity.

B. CASE TWO: AGGRAVATED ASSAULT WITH A TWO-BY-FOUR

I shall label the second case, which I prosecuted, "Aggravated Assault with a Two-by-Four." I was assigned to a case in which David Lyle was charged with aggravated assault for striking Matthew Raub in the head with a two-by-four. My investigation took me to a military police ("M.P.") office and Specialist Frank Charles.⁴³ Charles conducted an investigation, seized the two-by-four, arrested Lyle, and interrogated him. Charles produced a typed confession signed by Lyle. Charles told me that he himself had typed the confession. Lyle read it, and was given an opportunity to correct any errors. Then Lyle signed and dated the confession. The confession contained the following statement: "Raub and I had an argument and he pushed me. He kept calling me a sissy and it made me angry. So I hit him in the head with a piece of wood."

When Charles showed me the two-by-four, I silently gasped. It must have been six feet long and it was very heavy. I could not imagine a more unwieldy weapon and wondered how Lyle had been able to use it so accurately.

I questioned Raub at the M.P. office. He admitted that he and Lyle had argued and that he had pushed Lyle and called him a sissy. Then, he said, he had turned to leave, felt a blow to the back of his head, and lost consciousness. When he regained consciousness, someone was helping him. Lyle was gone.

At trial, I called Raub as my first witness. His testimony was the same as his statements to me. My second and last witness was Charles. His testimony duplicated what he had said to me earlier. He authenticated the confession and said that he accurately recorded what Lyle had told him. I regarded his testimony as wooden and rehearsed, but I offered the confession into evidence, it was accepted, there was scant cross-examination, and the prosecution rested.

The defense case began with several witnesses who testified that Lyle had a good reputation for peace and quiet, but that Raub had a reputation as a troublemaker. I waived cross-examination. Then the defense lawyer called his client.

David Lyle was a soft-spoken young man who looked straight at the court (the military jury) as he spoke. He admitted that he and Raub had argued, and said that Raub had pushed him, sworn at him, and called him a sissy. When Raub turned away from him, Lyle picked up the two-by-four, put

43. Again, I have changed all the parties' names to protect their privacy.

it over his shoulder to carry it to a truck, turned around, and accidentally hit Raub in the head with the end of the board.

But the defense lawyer had a confession to contend with. Yes, Lyle said, I was questioned by Charles. Yes, Charles typed a document. Yes, Charles asked me to read it. No, I did not read it carefully. I didn't like Charles and wanted to get out of there quickly. No, I never said that Raub made me angry so I hit him with the two-by-four. I told Charles it was an accident. Charles then said to me that if someone did to him what Raub had done to me, he would have wanted to get back at him. All I said was, "I guess so."

I cross-examined Lyle but I could not budge him from anything he had said on direct examination. I was a pretty good cross-examiner, but I got nowhere with him. Frankly, the more I listened to his answers, the more I believed him.

I vividly remember my final argument because it lasted about one minute. "Under our law the standard you have to follow is that the prosecution has to prove the defendant's guilt beyond a reasonable doubt. You have heard the witnesses and can judge their believability. If you are satisfied beyond a reasonable doubt that the defendant is guilty, find him guilty. If you are not satisfied, you must find him not guilty." After the defense lawyer made his final argument, I was entitled to a rebuttal. I waived it.

The result in the Lyle case? Not guilty.

From the time I met him, there was something I did not like about Charles. Everything he had said to me seemed rehearsed. When I pressed him at his office on whether he had accurately recorded Lyle's words in the written confession, particularly the words, "it made me angry. So I hit him in the head with a piece of wood," he said with a crooked smile, "Of course. I would never make that up." But I really did not believe him. As I look back on it now, after so many years, it seems to me that Charles was the embodiment of the worst aspects of the Crime Control Model of the criminal process. However, I did not have the authority to dismiss the case and guessed that my superiors would say, "Leave it to the court to sort out who is telling the truth." So even though I was prosecuting, I had tried to counteract Charles by injecting some due process values into the case, thus avoiding the conviction of a person I believed to be innocent.⁴⁴ To this day I wonder whether I would have done the same if I had not had defense experience.⁴⁵

44. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTIONS AND DEFENSE FUNCTION, Standard 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

45. "More generally, experience with representing both sides would improve the criminal justice system. Prosecutors would recognize more often that police investigation sometimes focuses on the innocent and sometimes exceeds the bounds of both decency and the constitution." Dripps, *supra* note 37, at 301.

IV. PROBLEMS AND SOLUTIONS

A. PROBLEMS

I do not intend to write at length about the well-known problems that have piled on public defenders for decades.⁴⁶ Although there are a few noteworthy exceptions, most public defender offices suffer from underfunding.⁴⁷ Underfunding results in inability to hire investigators and expert witnesses.⁴⁸ It also results in low pay and consequent high turnover in personnel.⁴⁹ Excessive caseloads are dealt with by stratagems such as “meet and greet” guilty pleas⁵⁰ and “triage”—working on the most serious felony cases first, thus consigning defendants in less serious felony cases to a “Bermuda Triangle” in which they spend so much time in pre-trial confinement that they are literally begging to plead guilty in exchange for

46. For a vivid depiction of these problems, see generally KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE (2013); NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013); Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2013).

47. Scott J. Bent, *Indigent Defense: Where We Are and Where to Go From Here*, COLUMBUS B. LAWS. Q., Summer 2013, at 7.

48. *Id.* at 8.

49. *Id.* at 7 (obtaining information from Yeura Venters, The Public Defender of Franklin County, Ohio).

50. Pub. Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 278 (Fla. 2013) (internal quotation marks omitted).

The “meet and greet” phenomenon is not limited to guilty pleas. In *State v. Miller*, the New Jersey Supreme Court upheld a conviction that had been obtained under the following circumstances: Defendant retained an attorney on a charge of drug dealing but proceeded *pro se*. *State v. Miller*, 76 A.3d 1250, 1255 (N.J. 2013). A public defender was assigned to the case, but subsequently withdrew. *Id.* A new defender, who had not tried an adult criminal case in seven years, was then pulled from the juvenile unit and assigned to the case on a Thursday. *Id.* A suppression hearing was set for the following Monday. *Id.* The trial court denied the new lawyer’s request for a continuance, and the lawyer then spent the weekend reviewing documents and preparing for the hearing. *Id.* at 1255–56. On Monday, an hour before the suppression hearing, the lawyer met the defendant for the first time. *Id.* at 1256. The meeting took place in an empty stairwell in the courthouse. *Id.* Before the suppression hearing began, the lawyer’s renewed request for adjournment was again denied on the ground that the case had been pending too long. *Id.* After the hearing, lawyer and client conferred in the lawyer’s office. *Id.* at 1257. The trial began the next day, and the defendant was convicted. *Id.* at 1257. The New Jersey Supreme Court upheld the conviction, rejecting the defendant’s argument that lawyer and client had insufficient time to prepare for the suppression hearing and subsequent trial, that the case should be treated as a complete denial of counsel rather than as ineffective assistance, and that the defendant therefore should not have to prove prejudice. *Id.* at 1264–69. A dissenting judge said that the majority had exalted trial scheduling over a just trial. *Id.* at 1275 (Albin, J., dissenting).

time served.”⁵¹ In every important respect there is a lack of parity with prosecutor offices.⁵²

A toxic combination of underfunding, excessive caseloads, and lack of parity systemically jeopardizes effective assistance of counsel.⁵³ Concomitantly, it jeopardizes the presumption of innocence, the protection of actual innocence, and the fairness of all criminal proceedings in which the defendant has a public defender.

Yes, the Crime Control Model of the criminal process, which contains a presumption of guilt, is alive and well. It, as well as government inertia and hostility, have hampered, are hampering, and will continue to hamper the

51. See *Pub. Defender*, 115 So. 3d at 273–74. As the Florida Supreme Court noted, there is a serious problem of conflict of interest when lawyers favor one class of clients over another. *Id.*

As bad as the situation may be in felony courts, it is far worse in misdemeanor courts with their enormous volume of cases. On September 7, 2013, I had a conversation with Judge Mark Serrott, Franklin County (Columbus), Ohio, Court of Common Pleas (felony court). Interview with Judge Mark Serrott, Franklin Cnty., Columbus, Ohio, Ct. Com. Pl., in Columbus, Ohio (Sept. 7, 2013). Judge Serrott, whose prior law practice included criminal defense, said that Franklin County public defenders were performing better in felony court than lawyers retained by middle-class defendants, but they were overwhelmed by the volume of cases in misdemeanor court. *Id.*

52. Dripps, *supra* note 37, at 245, 291–98. One poignant example of lack of parity occurred in Columbus, Ohio, in April 2013. See Debra Cassens Weiss, *PD Explains Why He Fired Himself*, A.B.A. J. (Aug. 12, 2013, 10:37 AM), http://www.abajournal.com/news/article/pd_explains_why_he_fired_himself/?utm_source. Steven Nolder, the Federal Public Defender for the Southern District of Ohio, fired *himself*. *Id.* Forced by the “sequester” to cut his budget, Nolder chose not to fire any of his most recently-hired assistants, all of whom had been recruited from out-of-state. *Id.* The U.S. Attorney’s Office lost no personnel because the Department of Justice was permitted by Congress to move funds around. *Id.*; see also Editorial, *Federal Courts in Crisis*, N.Y. TIMES, Aug. 25, 2013, at A22; Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2013, at A14.

A stunning example of both the lack of parity and the vitality of the Crime Control Model occurred in Hamilton County (Cincinnati), Ohio, in 2009. David Carroll, *Gideon Alert: Ohio Public Defender Commission to force change in Hamilton County (Cincinnati)*, NAT’L LEGAL AID & DEF. ASS’N (June 28, 2010, 11:33 AM), <http://www.nlada.net/jseri/blog/gideon-alert-ohio-public-defender-commission-force-change-hamilton-county-cincinnati>. The Ohio Public Defender Commission gave Hamilton County \$1.2 million for the Hamilton County Public Defender Office. *Id.* The County then reduced the Defender Office’s budget by \$700,000 and increased the County Sheriff’s budget by the same amount. *Id.* The result was that the Defender’s Office received a net of \$500,000 instead of \$1.2 million. *Id.* When the Ohio Public Defender Commission threatened to defund the county defender’s office, the county agreed to a reform plan. *Id.* The plan is currently being implemented. *Id.*

53. *Pub. Defender*, 115 So. 3d at 273–74. See generally HOUPPERT, *supra* note 46; Backus & Marcus, *supra* note 46; Bright & Sanneh, *supra* note 46.

The problem has existed for a long time. See Peter Goldman & Don Holt, *How Justice Works: The People v. Donald Payne*, NEWSWEEK, Mar. 8, 1971, at 20; Richard Harris, *Annals of Law in Criminal Court – II*, NEW YORKER, Apr. 21, 1973, at 44. Both articles are excellent pieces of investigative journalism. The *New Yorker* article dealt with indigent defense in Boston. *Id.* The *Newsweek* article concerned indigent defense in Chicago. Goldman & Holt, *supra*. Both articles, written in *Gideon*’s early years, describe overworked and underpaid public defenders. See Goldman & Holt, *supra*; Harris, *supra*. Both articles also describe adjudicative processes that are infected with a presumption of guilt. See Goldman & Holt, *supra*; Harris, *supra*.

effective right to counsel contemplated by *Gideon v. Wainwright*, its predecessors, and its progeny.

For the foreseeable future, it is unlikely that state and county governments will allocate enough money to alleviate significantly the underfunding and excessive caseloads.⁵⁴ Solutions, therefore, must walk a narrow and rocky path that avoids the need for substantial governmental expenditures⁵⁵ on the one hand, and the shrinking of *Gideon* on the other.

B. SOME SOLUTIONS

When I accepted Professor Tomkovicz's invitation to participate in this Symposium, I was vaguely aware that I had not taught the right-to-counsel materials for at least three decades. I was totally unaware, however, of the vast literature that had burgeoned during this period, much of it prompted by *Gideon*'s decennial anniversaries. It is obvious that conditions have not improved over the years. If anything, recent economic miseries have made things worse.

Given current economic circumstances, some have ironically suggested reviving *Gideon* by shrinking it. For example, Professor Stephanos Bibas has written that "courts could shrink *Gideon* to its core of felony cases involving prison sentences to concentrate resources there instead of spreading them too thin."⁵⁶ This suggestion would implicitly convert *Gideon* into *Argersinger v. Hamlin*,⁵⁷ a position that Professor Donald A. Dripps has taken explicitly.⁵⁸ Professor Dripps also suggests that *Douglas v. California*⁵⁹ be modified to provide counsel only for those appellate cases that have survived screening for merit.⁶⁰

The only court that could affect these changes is the Supreme Court, but it is hard to imagine who would initiate the suit and ultimately bring the case to the Supreme Court and even harder to imagine the Court granting review. However, I have a more fundamental objection to these suggested "solutions." It is that they teach the states a lesson that is better left unlearned: if we short-change *Gideon* long enough, we will ultimately get a reward, so let's short-change *Gideon* even more.

54. Steiker, *supra* note 46, at 2700.

55. *Gideon*, of course, was and is an unfunded mandate.

56. Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1296 (2013).

57. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Although recognizing the importance of counsel in misdemeanor cases, the Court did not mandate the provision of counsel for indigents, as it had in *Gideon*. *Id.* at 36–40. Instead, it barred the imposition of a jail sentence. *Id.* at 37. For a detailed discussion, see HERMAN, *supra* note 32, at 73–86.

58. Donald A. Dripps, *Up From Gideon*, 45 TEX. TECH L. REV. 113, 124 (2012).

59. *Douglas v. California*, 372 U.S. 353 (1963).

60. Dripps, *supra* note 58, at 126–27.

At a polar extreme from shrinking *Gideon* is suing to strengthen it. In the wake of suggestions from a number of commentators,⁶¹ some public defender agencies have initiated systemic litigation—suits asserting that underfunding and excessive caseloads have deprived indigent defendants, as a class, of their right to effective assistance of counsel. Noteworthy victories were recently gained in Florida⁶² and Missouri.⁶³ In the Florida case, the Florida Supreme Court allowed the Miami-Dade County Public Defender, which had excessive caseloads, to decline representation in any case of a felony of the lowest degree.⁶⁴ In the Missouri case, the Missouri Public Defender Commission was granted a writ ordering a “trial court to withdraw its appointment of the public defender’s office to represent” a specific person.⁶⁵ The Missouri Supreme Court upheld a Commission rule that permitted a defender office to decline an appointment after exceeding its caseload capacity for three consecutive months.⁶⁶ Both opinions vividly describe the consequences of underfunding and excessive caseloads and both are obviously indirect, but emotionally powerful, pleas to the legislature for more money.⁶⁷ Indeed, the Missouri Supreme Court

61. See, e.g., CARA H. DRINAN, AM. CONSTITUTION SOC’Y, A LEGISLATIVE APPROACH TO INDIGENT DEFENSE REFORM (2010); LEFSTEIN, *supra* note 46, at 161–89.

62. See *Public Defender v. State*, 115 So. 3d 261 (Fla. 2013).

63. See *State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592 (Mo. 2012).

64. The lowest degree is third. FLA. STAT. § 775.081 (2013). The maximum penalty is imprisonment for five years. *Id.* § 775.082. Both the National District Attorneys Association and the Miami-Dade Office of the State Attorney opposed the granting of relief. See L. Jay Jackson, *Miami-Dade’s Overburdened PD’s Office May Decline New Clients, Florida Court Says*, A.B.A. J. (Oct. 1, 2013, 3:50 AM), http://www.abajournal.com/magazine/article/miami-dades_overburdened_pds_office_may_decline_new_clients_florida_court_s. Surely their opposition manifests the darkest side of the Crime Control Model.

65. *Waters*, 370 S.W.3d at 597, 612.

66. *Id.* at 597.

67. After this Essay was written, The New York Times published an article that updated events in Missouri and Florida. Erick Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 19, 2014, at A10. In Missouri, the American Bar Association sponsored a 2013 study by an accounting firm in which all the lawyers in the Missouri State Public Defender System recorded how they spent their case-work time in five-minute increments. “Independently, a panel of private and public lawyers estimated the average time a defense lawyer in Missouri needed to properly argue cases of varying severity, including . . . consulting with the defendant, investigating evidence, conducting depositions and researching legal options, as well as their time in court.” *Id.* Public defenders averaged only nine hours on serious felonies and spent only two hours on misdemeanors, in stark contrast to the panel recommendations of forty-seven and twelve hours, respectively. *Id.* As a result of the study and panel recommendations, the Missouri State Public Defender Office “requested a funding increase of about \$25 million, phased in over four years, to allow the hiring of 206 more lawyers and, crucially, 412 more clerks and investigators. It has requested an additional \$4 million . . . to cover about 4,000 cases annually in which juvenile offenders receive no representation.” *Id.* The governor “has endorsed only a small fraction of the requested increases.” *Id.* The article also notes that “[i]n recent months, criminal referrals to the public defenders in Missouri have also dipped, apparently because prosecutors are filing fewer cases involving low-level drug offenses and probation violations.” *Id.*

suggested that some long-pending cases might have to be dismissed for want of a speedy trial.⁶⁸

I applaud both courts. They have tried to *do* something about a deplorable situation. At the same time, I have a concern: who will represent the indigent defendants? The answer has to be that since the defendants have a constitutional right to counsel, trial courts will have to appoint lawyers other than public defenders. These lawyers will, of course, have other clients who will pay fees that are considerably more than the compensation the lawyers will get from representing indigents. And so the stage is set for conflicts of interest,⁶⁹ ineffective assistance of counsel, and the continued degradation of *Gideon*.

C. ANOTHER SOLUTION?

I am not optimistic that there is any viable “solution” that can pry enough money from a state’s legislature at the present time to give adequate funding to indigent defense. But I hate to end this Essay on such a pessimistic note, so I am going to make a suggestion. Having participated in the military criminal process and having participated in and closely observed the civilian criminal process for almost five-and-a-half decades, I strongly believe that the civilian process should be reshaped in the JAG mold.

Here is how I imagine the reshaping. The first step is to create a State Department of Justice that will encompass both public defense and prosecution. The mission of the State Department of Justice will include insuring parity between public defenders and prosecutors with reference to pay, staff services, investigative services, expert witness services, and the like. The mission will also include lobbying the legislature for funds to insure

In Miami-Dade County, Florida, the situation was roughly similar to that in Missouri. Although the Florida Supreme Court had permitted the Miami-Dade Public Defender to decline representation in any case of a felony of the lowest degree, see *Public Defender*, *supra* note 62, the Public Defender has yet to do so. The reasons, according to The New York Times, are: (1) that the Defender first wants to complete a study like the one in Missouri; and (2) that there has been a decrease in the number of cases, both juvenile and adult, referred to the Defender. The decline in juvenile cases is attributed to changes in Florida’s juvenile system. *Id.* The decline in adult cases is attributed to a decline in the number of police officers that Miami-Dade County municipalities have been able to afford as a result of the recent economic recession. *Id.*

68. *Waters*, 370 S.W.3d at 612.

69. Backus & Marcus, *supra* note 46, at 1059–62 (discussing compensation limits for indigent defense in Virginia, Ohio, Iowa, Texas, and California). Theresa Haire, Deputy Director of the Ohio Public Defender Office, explains “that some [Ohio] counties operate under a ‘pay-to-play system,’ whereby court-appointed attorneys must help the courts ‘move their dockets’ if they want future appointments.” Bent, *supra* note 47, at 6. “Move their dockets” is obviously a euphemism for “advise the defendant to plead guilty.” This outrageous practice, which is the functional equivalent of buying guilty pleas, exacerbates the conflict of interest. It seems also to be a clear violation of Canons 1–4 of the Ohio Code of Judicial Conduct. OHIO CODE OF JUDICIAL CONDUCT 1–4 (2014).

parity. A crucial function of the Department will be to establish a relationship with all of the state's major newspapers and to keep them informed of any gross disparity between public defenders and prosecutors.⁷⁰

The public defense side of the State Department of Justice will be a unified, state-wide indigent defense system. At the top will be a State Public Defender Commission. Its mission will include hiring, training, and supervising the work of public defenders and setting mandatory, statewide standards for public defenders, including maximum caseloads. All major counties will have a County Public Defender Office. Smaller counties will be formed into regions and will have a Regional Public Defender Office. All offices will have enough personnel and staff to obviate the need for court-appointed counsel other than the public defender. Public defenders and their staffs will be state employees, rather than county employees, and will receive their entire pay from the state.

The prosecution side of the Department of Justice will also be a statewide system. At the top will be a State Prosecution Commission. Its mission will include hiring, training, and supervising the work of prosecutors and setting mandatory statewide standards for prosecutors. All major counties will have a County Prosecutor Office. Smaller counties will be formed into regions and will have a Regional Prosecutor Office. Prosecutors and their staffs will be state employees and will receive their entire pay from the state.

The State Department of Justice, the State Public Defender Commission, and the State Prosecution Commission will be located in the same building in the state capital, preferably on the same floor to encourage interaction. County public defender and county prosecutor offices will be located in the same building in the county seat, preferably on the same floor to encourage interaction. Regional offices will be centrally located. They will be in the same building, preferably on the same floor to encourage interaction.

After serving a minimum of thirty months, a public defender or a prosecutor may request a transfer to the other side. Transfers will be

70. Effective investigative journalism can move mountains. From January 27 through January 31, 2008, *The Columbus Dispatch* published a five-part investigative journalism series about the preservation and testing of DNA in criminal cases in Ohio and the exoneration through testing of persons convicted of serious felonies in Ohio. Geoff Dutton & Mike Wagner, *Test of Convictions: A Dispatch Investigation*, COLUMBUS DISPATCH, <http://www.dispatch.com/content/topic/special-reports/test-of-convictions-2.html> (last visited Apr. 17, 2014). As a result of the articles, there have been five exonerations and two new trials. Telephone Interview with Mike Wagner, Investigative Reporter, Columbus Dispatch, in Columbus, Ohio (Sept. 20, 2013). In addition, the articles overcame legislative inertia. Ohio statutes now require the preservation of DNA evidence in serious felony cases, OHIO REV. CODE ANN. § 2933.82 (West 2006 & Supp. 2013), and delineate the circumstances under which a convict can request DNA testing. *Id.* §§ 2953.71–2953.84.

encouraged, but it will be recognized that each office has to have a core of senior litigators.

No public defender or prosecutor may be appointed to, or seek election to, a judgeship until out of office for two years.⁷¹

The above reconfiguration of public defense and prosecution is intended to bring defenders and prosecutors closer together so that each understands the concerns of, and constraints on, the other.⁷² In addition, I suggest that the training of prosecutors should stress the presumption of innocence as well as the prosecutor's obligation to "seek justice,"⁷³ and prosecutors should get as much "credit" for dismissing a case as they would get for winning one.

Similarly, I believe that police training should stress that police are not advocates for either side, that people are presumed to be innocent until found guilty in a fair trial, that investigation is a search for the truth, and that it is at least as important for a detective to search for evidence that does not confirm the detective's suspicion as it is to search for evidence that does.

Indeed, there is no reason why police investigative services should be limited to the prosecution. One can easily imagine a "Bureau of Defense Investigative Services" as part of a municipal or state police department.⁷⁴

V. CONCLUSION

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, *presumed to be innocent*. It was the

71. I have no doubt that prosecutors and their professional associations will vigorously oppose this restructuring. Most prosecutors in the United States are elected county officials who choose their assistants. The assistants are usually from the prosecutor's political party. When the governor is from the same political party, a judicial vacancy will ordinarily be filled by the appointment of an assistant prosecutor. It is highly unusual for a public defender to be appointed. Loading the bench with former prosecutors risks giving the Crime Control Model, with its presumption of guilt, undeserved dominance. On the election and other selection of prosecutors, see PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 147-49 (1967), available at <http://www.ncjrs.gov/pdf/files1/nij/42.pdf>.

72. To deal with the problem of "burnout" in both prosecutor and public defender offices, I tentatively suggest the following: Law schools should offer a "Certificate in Criminal Law" to students who successfully complete Criminal Law, Criminal Procedure (Investigation), Criminal Procedure (Process of Adjudication), Evidence, and Clinical Work that includes trial experience in misdemeanor cases either as prosecutor or defense counsel. One might also include an internship with either a prosecutor's or public defender's office. Upon graduating with a J.D. degree and passing the bar examination, certificated students would be assigned to a paid position in a prosecutor's office for thirty months, then move to a paid position in a public defender's office for thirty months. At the end of the sixty-month period, the student's law-school debt would be reduced by, for example, \$2000 for each of the sixty months.

73. See AM. BAR ASS'N, *supra* note 44.

74. It should not be necessary for me to say this, but I am going to say it anyhow in order to guard against the accusation that I am unconcerned with public safety: the system I have recommended does convict the guilty.

duty of the court having their cases in charge to see that they were denied no necessary incident of a *fair trial*.

....

...[D]uring perhaps the most critical period of the proceedings against these defendants... from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense....

....

...[T]he intelligent and educated layman... lacks both the skill and knowledge adequately to prepare his defense, *even though he have a perfect one*. . . . Without [the guiding hand of counsel], *though he be not guilty*, he faces the danger of conviction⁷⁵

So wrote Justice Sutherland eighty-one years ago in *Powell v. Alabama*.⁷⁶ We would do well to remember today that Justice Sutherland linked the right to counsel to fair trial, to the presumption of innocence, and to the defendant's ability to offer evidence of actual innocence. Yet today, sad to relate, "*Gideon's* simple holding, the promise of a 'guiding hand,' has not been fulfilled for an equally simple reason. No one wants to pay for it."⁷⁷

Also sad to relate is the fact that if you put the right to counsel into a broken system, there is precious little that the right to counsel can do to fix it. Indeed, the greater likelihood is that the right to counsel will become broken too.

In this Essay, I have tried to sketch a new system. Well, it can hardly be new when I practiced in a similar system in the mid-1950s. But it is also a system that isn't broken. It honors the right to counsel. It honors the right to the effective assistance of counsel. It honors Barrister Horace Rumpole's "Golden Thread," the presumption of innocence. And it thereby tries to protect actual innocence. Let's give it a try.

75. *Powell v. Alabama*, 287 U.S. 45, 52, 57, 69 (1932) (emphasis added).

76. *See generally id.*

77. Barry C. Scheck & Sarah L. Tofte, *Gideon's Promise and the Innocent Defendant*, *The Champion*, Jan./Feb. 2003, at 38, available at Westlaw, 27-FEB *Champion* 38. Nor does anyone know how much it would cost. The absence of information has allowed doomsayers to frighten courts into excessively narrow interpretations of *Gideon*. That is what happened in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), when the Solicitor General's amicus brief induced the Court to convert the right to counsel into a restriction on sentencing the unrepresented defendant to jail. *See* HERMAN, *supra* note 32, at 84–86. It happened again in *Scott v. Illinois*, 440 U.S. 367 (1979), when the Court applied *Argersinger* to a case in which the unrepresented defendant faced confinement for a year, but was actually sentenced to pay a fine of \$50. This time the doomsayer was Justice Rehnquist. Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 82–85 (1979).