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## The Case for Reimbursing Court Costs and a Reasonable Attorney Fee to the Non-Indigent Defendant upon Acquittal

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# THE CASE FOR REIMBURSING COURT COSTS AND A REASONABLE ATTORNEY FEE TO THE NON-INDIGENT DEFENDANT UPON ACQUITTAL

Russell E. Lovell II\*

## I. INTRODUCTION

During the summer of 1963 a massive voter-registration drive was conducted among Negroes in Selma, Alabama. During the course of the drive, law enforcement officials led by Sheriff Jim Clark made several mass arrests of people prominently active in the registration drive for such offenses as vagrancy, concealing identity, inciting to riot, driving automobiles without proper license-plate lights, and truancy. The Attorney General of the United States brought an action under the Civil Rights Act of 1957<sup>1</sup> seeking to enjoin the prosecution of these alleged offenses on the ground that the state laws were being enforced for the purpose of interfering with voter registration by intimidating blacks from registering. The federal district court denied relief because the prosecutions did not violate the defendants' federal constitutional rights.<sup>2</sup> However, in *United States v. McLeod*<sup>3</sup> the Fifth Circuit Court of Appeals found that the arrests and prosecutions by the Selma officials were in violation of 42 U.S.C. section 1971(b) because they were made solely for the purpose of harassment in an attempt to intimidate blacks from registering to vote.

In granting relief under section 1971(c)<sup>4</sup> the *McLeod* court sought to provide a remedy which not only would deter such harassing and coercive prosecutions, but would also put the persons harassed "in the position in which they would have stood had the

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<sup>1</sup> The Civil Rights Act of 1957 makes it unlawful for any person "to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he chooses . . ." 42 U.S.C. § 1971(b) (1964).

<sup>2</sup> *United States v. Dallas County*, 229 F. Supp. 1014 (S.D. Ala. 1964).

<sup>3</sup> 385 F.2d 734 (5th Cir. 1967).

<sup>4</sup> 42 U.S.C. § 1971(c) (1964) provides: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order."

county not acted unlawfully.”<sup>5</sup> For only by making those arrested and prosecuted whole, the court of appeals reasoned, could there be any certainty that the possibility of unlawful arrest and prosecution would not deter blacks from participating in the voting process. Therefore, the case was remanded to the district court with directions to order Selma officials: (1) to return all fines and expunge from the record all baseless arrests and prosecutions; and (2) to reimburse the persons arrested and prosecuted for their costs, including reasonable attorney fees, incurred in defense of the state criminal prosecutions.

*McLeod* is a significant decision not only because it truly effectuates the command of the federal civil rights law by tailoring the remedy to fit the evil presented, but also because its award of costs, including reasonable attorney fees, to those who were illegally prosecuted is most extraordinary in American jurisprudence. Had these defendants been acquitted in the state trial courts or had their convictions been reversed on appeal, they would have had to bear the burden of their defenses on their own. With the exception of indigent defendants in jurisdictions which impose no reimbursement obligations on them for having been represented by assigned counsel, it is the almost universal rule in the United States that the accused bears the costs of his defense regardless of his guilt or innocence. In addition, he may suffer the humiliation of arrest and detention, the cost of making bond, the loss of wages during detention and trial, and frequently the loss of his job, either because of his absence during detention and trial or because of the stigma which accompanies a criminal prosecution irrespective of its verdict.

If we assume, as we must, that judicial decisions are more often right than wrong, it seems logical to also assume that many defendants who are acquitted are in fact innocent. The position has been taken<sup>6</sup> that the reasonable costs of one's criminal defense should be awarded upon acquittal to those lower and middle income defendants who are unable to qualify for state assistance as indigents or under the financial inability standard of the Criminal Justice Act of 1964.<sup>7</sup> The concept is hardly a novel one for both trial and appel-

<sup>5</sup> *United States v. McLeod*, 385 F2d 734, 749 (5th Cir. 1967).

<sup>6</sup> E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 51-52(1961) [hereinafter cited as CAHN]; Stoeckel, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966) [hereinafter cited as Stoeckel]. See also Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967), discussing the application of these concepts to civil suits, to wit, taxing the costs and attorney fees of the victorious party to the losing litigant.

<sup>7</sup> Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Two excellent discussions of the Act are Mattis, *Financial Inability To Obtain An Ade-*

late courts in Great Britain have long had the power to make such awards. The Nebraska Legislature has also taken a short step in this direction in its 1967 session by enacting a statute which provides for the return of all costs, fees, and bonds, when one accused of a "minor offense" is acquitted upon his appeal to the district court.<sup>8</sup>

The policy generally articulated for such reimbursement statutes is that of making innocent men monetarily whole with regard to debts incurred during the defense of their prosecutions. It is contended that to continue to saddle all acquitted defendants with this financial burden due to a latent fear that a few "guilty" persons might likewise be benefited is to contradict the presumption of innocence which is the touchstone of our criminal justice system. Reimbursement would minimize the stigma of the prosecution and would give the innocent defendant a fresh start economically,<sup>9</sup> thus removing two obstacles which not only hinder his return to his former way of life but also could encourage him to take the road to crime. The argument for reimbursing court costs and a reasonable attorney fee to acquitted nonindigent defendants is most persuasive in light of the reality that state standards of indigency are still quite narrowly applied, often precluding state assistance to defendants of very modest means.<sup>10</sup> However, it should be made clear that proponents of this reimbursement proposal do not posit it as an interim step or an alternative to state enactment of legislation embodying the financial inability concept of the Criminal Justice Act; rather, reimbursement in the manner described is envisioned as complementing such statutes—and until such legislation is a reality, the proposed reimbursement would also alleviate the substantial financial hardship presently worked on the lower income acquitted defendant.

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quate Defense, 49 NEB. L. REV. 37 (1969) [hereinafter cited as Mattis], and Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703 (1965).

<sup>8</sup> NEB. REV. STAT. § 29-614 (Supp. 1967). See also L.B. 925, 80th Neb. Leg. Sess. (1969), theoretically reimbursing one for "all loss of time, legal fees, court costs, or other expense involved" in a suit arising from an act of "justifiable self-defense." See Comment, *L.B. 925: Nebraska's New Self-Defense Statute and Its Implications*, 49 NEB. L. REV. 637 (1970).

<sup>9</sup> Following his recent acquittal from the charge that he conspired to assassinate President Kennedy, Clay Shaw stated that his arrest and long trial had financially ruined him and would force him to end his retirement and seek some kind of work. *Omaha World-Herald*, March 2, 1969, at 4-A, col. 1.

<sup>10</sup> Mattis, note 7 *supra*, at 45-49. See generally L. SILVERSTEIN, *DEFENSE OF THE POOR* 105-22 (1965).

It should be noted that taxing the costs of criminal trials was unknown at common law. Since courts have no inherent power to award costs on equitable grounds, costs are necessarily creatures of statute.<sup>11</sup> Recognizing the statutory nature of this relief, this article will examine the present costs systems in the United States, with particular emphasis on the Nebraska and federal costs structures. The accused's possible tort remedy of malicious prosecution will be analyzed and its shortcomings pointed out. Attention will then focus on the English costs system and its policy, the feasibility of adapting it to the United States criminal justice system, and the possibility of improving the English system by the adoption of the Scottish form of verdict.

## II. THE ACQUITTED CRIMINAL DEFENDANT— HIS PRESENT FLIGHT

### A. CRIMINAL COSTS IN THE NEBRASKA AND FEDERAL COURTS

Except for section 29-614 of the Nebraska Revised Statutes (Supp. 1967) providing for the return of all costs, fees, and bonds when the accused has been acquitted in a prosecution for a "minor offense," the Nebraska statutory set-up for criminal costs is typical of most American jurisdictions. It is the statutory duty<sup>12</sup> of Nebraska judges to impose the costs of prosecution<sup>13</sup> upon defendants

<sup>11</sup> See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), for an excellent discussion of the general rule that absent contract or statutory authority, attorneys' fees may be allowed as costs only in certain exceptional situations.

<sup>12</sup> NEB. REV. STAT. § 29-2207 (Reissue 1964). There are six states which do not tax the costs of prosecution to the convicted defendant: California, Connecticut, Massachusetts, Michigan, New Hampshire, and New York. Note, *Criminal Law—Taxation of Costs*, 17 VAND. L. REV. 1572, 1572 n.3 (1964).

<sup>13</sup> A survey of the criminal docket of the District Court, Lancaster County, Nebraska, indicates that the costs of prosecution actually taxed are generally nominal. The costs of prosecution in a felony prosecution might be as follows:

Arraignment in County Court		\$ 36.60
Filing and docketing Information		25.00
Judges Retirement Fund Fee		1.00
Sheriff's Fee (for serving Information)		
Service and retirement	\$ 1.00	
Copy	.50	
Mileage	.70	2.20
Witnesses' fees @ \$ 6/day		
4 witnesses, 1 day	\$ 24.00	
1 witness, 2 days	12.00	36.00
	<u>TOTAL</u>	<u>\$100.80</u>

State v. Larry Hubbard, District Court, Lancaster County, Nebraska, Docket 27, at 208, 301.

convicted of a felony or a misdemeanor. If the defendant's conviction is subsequently reversed on appeal to the Supreme Court of Nebraska, the costs of prosecution as to the appeal are waived, but it is discretionary with the trial judge as to whether the defendant will be reimbursed for the costs of prosecution imposed on him by the trial court.<sup>14</sup> If a defendant is acquitted, the costs of prosecution are borne by the state.

In Nebraska, the convicted defendant's failure to pay the costs of prosecution is cause for imprisonment<sup>15</sup> at hard labor on bread and water,<sup>16</sup> with the defendant receiving six dollars credit for each day of his imprisonment.<sup>17</sup> Although there are several old cases holding to the contrary,<sup>18</sup> it seems incontestable that imprisoning one for his inability to pay costs is imprisonment for debt in violation of the thirteenth amendment and the Federal Anti-Peonage Act.<sup>19</sup> It may also be an unconstitutional chilling of one's right to a jury trial, for the insolvent defendant will be discouraged from pleading "not guilty" because such a plea necessitates a trial, which obviously will result in higher costs and their concomitant, a longer prison term, being imposed if he is convicted. Furthermore, the statute can be criticized as poor economics for the defendant's cost of maintenance as a prisoner will normally exceed his worth to the state at hard labor. If the defendant has a family, his imprisonment due to his inability to pay costs will also mean additional welfare expense for the state.<sup>20</sup>

<sup>14</sup> Interview with George H. Turner, Clerk of the Nebraska Supreme Court, in Lincoln, Neb., February 24, 1969.

<sup>15</sup> NEB. REV. STAT. §§ 29-2206, -2404 (Reissue 1964). "At the present time fourteen states unqualifiedly require convicted criminal defendants to completely work out their costs if they are unable to pay them. Several states have recognized the inequity of requiring imprisonment for nonpayment of costs and either have no provision for taxation of costs or by statute exempt all criminal defendants from the payment of such costs . . . In still other states, statutes specifically exempt persons who cannot pay from taxation of costs or from imprisonment for nonpayment. Eleven states have statutes which vest the trial judge with power to release criminal defendants from liability for costs." Note, *Criminal Law—Taxation of Costs*, 17 VAND. L. REV. 1572, 1573-74 (1964) (citations omitted).

<sup>16</sup> NEB. REV. STAT. §§ 29-2208, -2405 (Reissue 1964).

<sup>17</sup> NEB. REV. STAT. § 29-2412 (Reissue 1964).

<sup>18</sup> E.g., *Kennedy v. People*, 122 Ill. 649, 13 N.E. 213 (1887); *State v. Kilmer*, 31 N.D. 442, 153 N.W. 1089 (1915).

<sup>19</sup> 14 Stat. 546, 42 U.S.C. § 1994 (1964). It may also be in violation of the eighth amendment.

<sup>20</sup> Note, *Criminal Law—Taxation of Costs*, 17 VAND. L. REV. 1572, 1573 (1964).

While there are no statutory provisions in Nebraska authorizing imposition of the costs of prosecution when a defendant has been acquitted, a Pennsylvania statute doing so was recently struck down by the United States Supreme Court as being void for vagueness.<sup>21</sup> While the Court did not make a per se denial of the state's power to assess costs against acquitted defendants,<sup>22</sup> one commentator<sup>23</sup> has concluded that that is the practical effect of the holding since it would be difficult to envision a statute which could be drafted so as to improve upon the trial court's charge, without actually describing the various acts which already give rise to misdemeanor prosecutions.

Acquitted defendants in Nebraska, with the lone exception of section 29-614,<sup>24</sup> are left to bear the burden of the costs of their successful defenses. Section 29-614 has but very limited reach, applying only to offenses in which the punishment cannot exceed three months imprisonment or a fine of one hundred dollars, or both.<sup>25</sup> The policy underlying 29-614, that one who has been prosecuted for an offense he did not commit should not have to pay any costs, bond, or fees,<sup>26</sup> is certainly broad enough to extend the principle to all categories of criminal offenses. Although this piece of legislation met with no resistance either in committee or on the floor of the Unicameral, it is doubtful that a broader statute will be immediately forthcoming. The committee reports indicate that the statute was drafted specifically to cover those instances in which most middle class people have brushes with the criminal law, such as drunk driving. Indeed, the sponsor of the legislation, Senator Proud, flatly stated that he did not want those among the general public who come in contact with the inferior or municipal courts to think the criminal law system unjust because they had to bear these costs despite winning an acquittal.<sup>27</sup>

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<sup>21</sup> *Giacco v. Pennsylvania*, 382 U.S. 399 (1966).

<sup>22</sup> In the concurring opinion, Justices Stewart and Fortas deemed the statute violative of the most fundamental concept of due process in that it permitted the jury to charge the defendant the costs of prosecution after finding him not guilty of any offense charged. *Id.* at 405.

<sup>23</sup> Note, 1966 DUKE L.J. 792, 795 n.16 (1966).

<sup>24</sup> NEB. REV. STAT. § 29-614 (Supp. 1967).

<sup>25</sup> NEB. REV. STAT. § 29-601 (Reissue 1964).

<sup>26</sup> Remarks of Senator Richard F. Proud, sponsor of L.B. 203, Files of Judiciary Committee, 77th Neb. Leg. Sess. (1967).

<sup>27</sup> *Id.*

In the federal system the imposition of the costs of prosecution<sup>28</sup> upon convicted defendants is discretionary with the judge.<sup>29</sup> In practice, costs are only imposed in cases of fraud and tax evasion, and seldom when the defendant is not of substantial means. Although federal statutes make no express provision for imprisoning one for nonpayment of costs, 18 U.S.C. section 3569 sets out a procedure by which an indigent prisoner imprisoned for nonpayment of a fine or of a fine and costs can gain his freedom, after serving thirty days, by taking an oath that he is unable to pay the fine and costs. In light of this statute,<sup>30</sup> any inference that one's liability under federal law for nonpayment of costs is solely civil must rest uneasily. As in the Nebraska system, the costs of prosecution are waived for the acquitted defendant, but there is no provision for reimbursing him for the costs incurred in his defense.

Any presentation of criminal costs statutes among the states would be incomplete without mention that a Kansas statute imposing the defendant's costs on the prosecuting witness, if he initiated the suit without probable cause and with malicious motives,<sup>31</sup> has been upheld by the Supreme Court in *Lowe v. Kansas*<sup>32</sup> over a challenge that taxation of the defendant's costs to the prosecuting witness deprived him of liberty or property without due process of law. While the Kansas statute is really no more than a codification of the tort of malicious prosecution, there is dicta in *Lowe* to the effect that a statute providing "that, upon the failure of the prosecution, the prosecutor should be absolutely liable to pay the costs [of the defense]" would not be constitutionally defective.<sup>33</sup> Notwithstanding the apparent constitutionality of a statutory provision shifting the burden of the acquitted defendant's costs to the state, there is no present legislation effectuating this result in the United States. Therefore, the acquitted defendant has but one hope for recourse—a possible action in tort for malicious prosecution.

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<sup>28</sup> In a criminal case in the federal courts, taxable costs apparently include the following items: (1) fees of the marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees. By the provisions of 28 U.S.C. § 1914 (1964), the clerk's filing fees are limited to civil proceedings. See generally Peck, *Taxation of Costs in United States District Courts*, 42 NEB. L. REV. 788 (1963).

<sup>29</sup> 28 U.S.C. § 1918(b) (1964).

<sup>30</sup> 18 U.S.C. § 3569 (1964).

<sup>31</sup> KAN. STAT. ANN. § 62-1902 (1963).

<sup>32</sup> 163 U.S. 81 (1895).

<sup>33</sup> *Id.* at 86.



## B. MALICIOUS PROSECUTION: A VERY LIMITED REMEDY

The institution of criminal proceedings against a person amounts to a publication of the charge that he is guilty of a crime. Because a criminal prosecution is particularly likely to do serious harm to the reputation of the person so charged, the instigation of an unfounded prosecution would superficially appear to be a form of libel per se.<sup>34</sup> However, case law has developed an exception to the strict liability of the tort of defamation in order that tort law will not hinder the effort to bring criminals to justice. Without such an exception, it was feared that many citizens who in good faith believed that an individual had committed a crime would be discouraged from making formal complaints to law enforcement officials.

Despite this essential but significant concession of individual rights to society's interest in the efficient enforcement of the criminal law, tort law does recognize the individual's interest "in being protected against unjustifiable and oppressive litigation of criminal charges, which not only involve pecuniary loss but also distress and loss of reputation."<sup>35</sup> The remedy, of course, is a cause of action for malicious prosecution.

Before discussing the elements of this tort, it should be noted that public prosecutors are generally afforded an absolute privilege,<sup>36</sup> which obviously will preclude recovery by the acquitted defendant in most instances. If the essential elements of the cause of action can be established against a private person, the acquitted defendant can recover, without further proof, general damages for the harm to his reputation which normally results from such an accusation as that brought against him, and for the emotional distress which normally ensues from the initiation of such proceedings.<sup>37</sup> He also can prove and recover special damages for the harm springing from any arrest or imprisonment suffered by him during the course of the proceedings, the expenses which he has reasonably incurred in defending himself from the accusation, and any specific pecuniary loss which resulted from the institution of the proceedings, such as loss of business or loss of one's employment.<sup>38</sup> These items which are includable in the compensatory damages for this tort have been purposely outlined before the requirements for

<sup>34</sup> W. PROSSER & Y. SMITH, *CASES AND MATERIALS ON TORTS* 1098 (3d ed. 1962).

<sup>35</sup> *RESTATEMENT OF TORTS*, Introductory Notes § 653-73, at 380 (1938).

<sup>36</sup> *Id.* § 656, comment b, at 392. This immunity afforded quasi-judicial officers has generally been extended to the police and other law enforcement officers acting within the scope of their duties. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 856 (3d ed. 1964).

<sup>37</sup> *RESTATEMENT OF TORTS* § 670, at 428 and comment a at 429 (1938).

<sup>38</sup> *Id.* § 671 at 430.

establishing a cause of action, not to de-emphasize the difficulties that most acquitted defendants will encounter in trying to make out a case of malicious prosecution, but to stress again the various aspects of the injury inflicted upon innocent defendants by any prosecution, whether wrongful or not.

To sustain an action for malicious prosecution, one must show that the proceedings terminated in favor of the accused and that they were initiated without probable cause and for a purpose other than the enforcement of the criminal law.<sup>39</sup> The acquitted defendant's primary dilemma is proving that the prosecution lacked probable cause, because this showing alone plainly provides some evidence that the prosecution was not brought for a proper purpose.<sup>40</sup> The definition of probable cause set out by the *Restatement of Torts* accurately depicts the state of the law:

One who initiates criminal proceedings against another has probable cause for so doing if he

(a) reasonably believes that the person accused has acted or failed to act in a particular manner, and

(b)

(i) correctly believes that such acts or omission constitute at common law or under an existing statute the offense charged against the accused, or

(ii) mistakenly so believes in reliance on the advice of counsel . . . .<sup>41</sup>

Since vexatious and harassing prosecutions fortunately are not the general rule, and are particularly uncommon when there is no probable cause as defined, it becomes apparent that very few acquitted defendants will be made whole through actions for malicious prosecution.

The acquitted defendant is certain to leave the courtroom in a weakened financial condition. He may have no job to which he can return, and likely will have considerable difficulty securing employment comparable to that he enjoyed prior to his prosecution. He may have been the victim of some less than hospitable treatment by law enforcement personnel and by the press. He probably experienced imprisonment. He certainly experienced the physical

<sup>39</sup> *Shoemaker v. Selnes*, 220 Ore. 573, 349 P.2d 473 (1960). "In other words, it can be said that a citizen has a privilege to start the criminal law into action by complaints to the proper officials so long as he acts either in good faith, i.e., for a legitimate purpose, or with reasonable grounds to believe that the person proceeded against may be guilty of the offense charged." F. HARPER & F. JAMES, JR., *THE LAW OF TORTS* 301 (1956).

<sup>40</sup> *RESTATEMENT OF TORTS* § 669 at 427 (1938). See also Annot., *Malicious Prosecution: Effect of Grand Jury Indictment on Issue of Probable Cause*, 28 A.L.R.3d 748 (1969).

<sup>41</sup> *RESTATEMENT OF TORTS* § 662, at 403-04. (1938).

and emotional strain of his trial. These factors demonstrate that the cost of obtaining "justice" may have been extremely high for the acquitted defendant. The shortcomings of present tort remedies and the American costs system are patent. One need not search his mind's eye for alternatives for the British have provided us with one.

### III. REIMBURSING THE INNOCENT DEFENDANT

#### A. THE ENGLISH CRIMINAL COSTS SYSTEM

Before outlining the British scheme, it is fundamental to note that costs in England are comprised of the actual expenses and disbursements of either side of the prosecution, including reasonable attorney fees and compensation to witnesses on both sides for their trouble and loss of time. The award of costs in criminal cases is dependent on the existence of specific statutory authority and on the exercise of the court's discretion to award or withhold costs.<sup>42</sup>

If no order is made by the court both the prosecution, which on occasion is brought by a private citizen,<sup>43</sup> and the accused will be forced to pay their own costs. However, the award of costs out of public funds to the prosecutor is "virtually automatic, unless the conduct of the prosecution or the propriety of its having been brought is in question."<sup>44</sup> The court can order those convicted to pay all or part of the costs of prosecution, and this is often done when a fine has been imposed for an offense of dishonesty.<sup>45</sup> Should the convicted defendant be refused leave to appeal or have his appeal dismissed by an appellate court, the defendant may also be required to pay all or part of the costs of the appeal.<sup>46</sup> It is important to note that the English defendant's liability for the costs of prosecution is of a civil nature<sup>47</sup> and he is not subject to incarceration for nonpayment.

The English trial courts also have the power in two instances to compensate the accused out of public funds for the costs of his defense. An award can be made when the examining justices refuse to commit the accused for trial, in a proceeding similar to the preliminary hearing in American jurisdictions. An award can also be made upon acquittal when the court "thinks that the prosecution should never have been brought, and not where the acquittal was

<sup>42</sup> G. GRAHAM-GREEN, *CRIMINAL COSTS INCLUDING LEGAL AID* 1 (1965) [hereinafter cited as GRAHAM-GREEN]; R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 258 n.1 (1953).

<sup>43</sup> D. KARLEN, *ANGLO-AMERICAN CRIMINAL JUSTICE* 20-24 (1967).

<sup>44</sup> GRAHAM-GREEN, note 42 *supra*, at 3.

<sup>45</sup> A. KIRALFY, *THE ENGLISH LEGAL SYSTEM* 379 (1954) [hereinafter cited as KIRALFY].

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

on the benefit of the doubt or a technicality."<sup>48</sup> If the accused is not committed for trial by the examining justices (which means a *prima facie* case was not made out), the court may order the prosecutor to pay the costs of the defense, but this power is seldom exercised except in instances of serious misconduct on the part of the prosecutor.<sup>49</sup> Indigent defendants who are assigned counsel through the English Legal Aid System are not eligible to recover costs since they incur no out-of-pocket expenses.<sup>50</sup>

When the defendant wins a reversal on appeal, the appellate court may order as a matter of course that the defendant's costs on appeal be paid out of local funds, and it can also award him the costs he incurred at his trial.<sup>51</sup> Although there are no statutory guidelines as to when costs should be awarded the accused following a reversed conviction, it is submitted that the appellate court examines the ground for reversal to determine whether the objectionable action destroyed the integrity and reliability of the guilt-adjudicating process. If the policy underlying the reversal is primarily deterrence of unlawful action by the police in order to protect the constitutional rights of future accused persons, and the reliability of the determination of guilt is not in substantial doubt, it seems probable that the appellate court will not award the accused his costs.<sup>52</sup> In practice, the considerations may not be as esoteric as suggested. It is not inconceivable that the decisive determination is more simply whether the defendant is a "good" or a "bad" individual as determined by his criminal record or lack thereof—regardless of his probable guilt as to the offense charged.

#### B. POLICY CONSIDERATIONS UNDERLYING THE ENGLISH SYSTEM

The argument for awarding innocent defendants the costs of their defenses is based primarily on two basic concepts: the fundamental premise of our criminal law system that a man is presumed innocent until proven guilty and the compensatory damage policy underlying the law of torts that "the ideal of justice is to make the wronged party whole, at least so far as may be done by money."<sup>53</sup> The conclusion is compelling that an innocent defendant who has suffered through a criminal prosecution and its undesirable incidents at the discretion of the prosecutor should be made whole to

<sup>48</sup> *Id.*

<sup>49</sup> GRAHAM-GREEN, note 42 *supra*, at 3.

<sup>50</sup> KIRALFY, note 45 *supra*, at 379.

<sup>51</sup> *Id.* at 379-80.

<sup>52</sup> The Supreme Court of the United States has laid down basically this same test to determine whether a case which effectuates a new constitutional rule of criminal procedure should be applied retroactively. See *Johnson v. New Jersey*, 384 U.S. 719 (1966).

<sup>53</sup> Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1223 (1967).

the extent of his defense costs, including reasonable attorney fees, by the governmental body which has failed to prove its accusation. Such a reimbursement statute would enable the legal system to restore the innocent defendant to financial solvency and to remove much of the stigma which clings to anyone accused of a crime.

In addition to giving the innocent defendant a badly-needed fresh start, the proposal would have several other desirable con-

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Query, does reciprocity require that *convicted* defendants bear the costs of the prosecution? While the incarceration of convicted defendants for the nonpayment of costs appears clearly unconstitutional, see text accompanying footnotes 18-20, it has been asserted that "the general public should not have to bear the court expense of a person whose own breach of the law necessitates prosecution and its attendant costs." Note, *Criminal Law—Taxation of Court Costs*, 17 VAND. L. REV. 1572, 1573 (1964). The imposition of costs on convicted defendants as a civil liability would not appear objectionable on constitutional grounds. While the costs of prosecution will generally be higher when the accused is convicted after a jury trial, the actual monetary difference would hardly amount to an inducement to plead guilty and forego one's right to a jury trial—except perhaps in those states in which the defendant is subject to imprisonment for nonpayment of costs.

However, since most defendants will not have the funds to pay costs outright, statutes which impose costs on convicted defendants will frequently collide with correctional policies. It is plainly contradictory for us to state that our aim is to integrate the offender into the community by giving him a fresh start and guidance, but at the same time to saddle him with a significant debt. This statement should not be construed as a rejection of the concept that a reasonable restitution requirement can frequently assist the rehabilitation process by instilling respect for the property of others in the offender, but rather a fear that too much of a good thing can backfire.

Silverstein makes the point well: "To the extent that a convicted defendant is able to earn money while on probation, it should be used to support himself and his family and to make restitution if appropriate; otherwise society should bear the cost of his defense, as it bears the cost of operating the court system for civil litigation. Indeed, it can be argued that it is more important for society to defray the cost of providing an adequate defense in criminal cases (a constitutional obligation) than to subsidize the civil court system by charging only nominal fees to litigants." L. SILVERSTEIN, *DEFENSE OF THE POOR* 115 (1965).

While an equitable time payment plan could conceivably overcome these misgivings about requiring convicted defendants to pay the costs of prosecution, it seems most improbable that the state will recover significant sums of money by this requirement. Those that recidivate, and they are a substantial number, will make few repayments and many of those who go straight will not have incomes which permit repayment. Considering the practical realities of repayment and the probable conflict with correctional objectives, this writer submits that convicted defendants should not be burdened with the costs of prosecution.

comitant effects. Although the proposed statute affects only those non-indigent defendants who have not had defense counsel provided at state expense, unfounded harassing prosecutions, as exemplified in *McLeod*, would in all likelihood be discouraged by taxing the costs of the defense to the state whenever an acquittal establishes the innocence of the non-indigent defendant. Despite the fact that the statute's potential application would be limited to a minority of all prosecutions, in these instances at least the statute would prod the prosecutor with a marginal case to better substantiate his charges before he begins a prosecution without deterring the prosecutor with a solid case from bringing charges.

Concern has been expressed that defendants of modest means may not be receiving as high a quality of representation as are indigents counseled by public defender offices,<sup>54</sup> not only because financing a truly adequate defense by private counsel is often an expensive proposition but also because a private attorney who only handles criminal cases on occasion may not be as competent as the public defender who makes his living at criminal law. Reimbursing the innocent non-indigent defendant would help erase this inequality by providing security for the innocent defendant and incentive for his attorney. The defendant would no longer be required to sacrifice his every financial resource to prove his innocence, rather he could look upon his monetary outlays for legal defense services as an investment offering an expectancy of both acquittal and reimbursement of the costs of his defense. It seems clear that the sporting theory of justice inherent in our present system, which forces innocent lower and middle income defendants to choose between risking conviction by paying for mediocre or less than mediocre defense efforts and sacrificing perhaps the entirety of their financial resources to finance competent defense services, has outlived its limited utility.<sup>55</sup>

### C. ADAPTATION OF THE PROPOSAL TO THE UNITED STATES

While the potential expense of the proposal may require the imposition of certain fiscal limitations, the most likely objection legislatively would be that defendants who are not really innocent, but who were not proved guilty beyond a reasonable doubt or whose convictions were reversed on "mere technicalities," would be benefited. However, the English system is cognizant of the reality

<sup>54</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, Explanatory Notes § 6.2, at 56 (Approved Draft 1968); Mattis, note 7 *supra*, at 39-42.

<sup>55</sup> CAHN, note 6 *supra*, at 51-52. See also Stoebeuck, note 6 *supra*, at 212 n.75 and Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 86 (1963).

that some defendants who are acquitted and some whose convictions are reversed may very well have committed the alleged crime. It should be recalled that the British procedure does not provide automatic reimbursement upon acquittal or reversal, but makes the award discretionary with the judge, who undoubtedly will make the award only when he is satisfied as to the defendant's innocence.

It can be argued that this discretionary aspect of the English costs structure will prevent some innocent men from recovering and that, in light of our legal system's presumption of innocence, the award should be automatic upon acquittal.<sup>56</sup> An automatic award would simplify administration and ensure uniformity of result. It also would not be prohibitive from the public treasury viewpoint, for acquittals constitute a very low percentage of all criminal dispositions. It is presently estimated that perhaps ninety percent of all convictions are the result of guilty pleas.<sup>57</sup> Of the cases which are actually tried, a recent California study found that California's felony conviction rate<sup>58</sup> exceeded ninety-one percent.<sup>59</sup> If these figures are representative, a simple arithmetical calculation reveals that acquittals may account for as few as one percent of all criminal cases processed to a judicial conclusion. The actual percentage of acquittals in the California study slightly exceeded six percent, undoubtedly because guilty pleas accounted for only seventy percent of all California convictions. Regardless of the figure one chooses, it is evident that the acquitted defendant does not abound in great numbers. However, our calculation is not yet complete as only non-indigents are eligible for reimbursement and Silverstein's study for the President's Commission on Law Enforcement and Administration of Justice indicates that approximately fifty-eight percent of all felony defendants in the United States are

<sup>56</sup> Cf. CAHN, note 6 *supra*, at 51-52; Stoebeck, note 6 *supra*, at 212 n.75.

<sup>57</sup> THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as TASK FORCE REPORT ON THE COURTS].

<sup>58</sup> For the purposes of this article, conviction rate shall mean the percentage of convictions out of the total number of prosecutions which terminate in a conviction or an acquittal.

<sup>59</sup> BUREAU OF CRIMINAL STATISTICS, CRIME & DELINQUENCY IN CALIFORNIA, 1965, at 64 (1966), printed in, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 128 (1967) [hereinafter cited as TASK FORCE REPORT ON CRIME AND ITS IMPACT]. A local study of more limited application suggests that the felony conviction rate in Lancaster County, Nebraska, is comparable to the California figure. In 1967, the conviction rate in Lancaster County was approximately 96% in felony prosecutions. LANCASTER COUNTY ATT'Y ANNUAL REPORT, 1967 at 2 (1968).

indigent.<sup>60</sup> While one would suspect that the conviction rate for indigents is higher than that of non-indigents, which would mean that more than forty-two percent of those acquitted would be automatically reimbursed, it is apparent that the actual number of people eligible for automatic reimbursement would be very small compared to the number of defendants who presently receive state assistance as indigents.

The validity of this position notwithstanding, it seems doubtful that an automatic award would be politically palatable when we consider recent FBI figures indicating high recidivism rates for acquitted defendants.<sup>61</sup> Indeed, if the FBI sample accurately reflects the nation-wide recidivism rate for those acquitted of crimes, it would appear that there are either a lot of defendants "beating the rap" or a lot of innocent defendants going bad following their acquittals. However, it should be pointed out that the FBI's ninety-one percent recidivism figure for those acquitted of crimes is based on the defendant being arrested and charged again, not upon his subsequent conviction. Another qualifying factor is the reality that when the police "lose a conviction," they will often continue to keep a close eye on the defendant despite his acquittal and, in their efforts at trying harder, may find cause to arrest him in marginal situations which otherwise might not call for an arrest. Furthermore, it is not unrealistic to assert that the FBI statistics are really an indictment of the present criminal costs system, which leaves the acquitted defendant destitute and with the stigma of the prosecution around his neck. It is certainly quite conceivable that a man who has been forced into debt to pay the costs of his defense, who has lost his job due to the prosecution and is now finding that no

<sup>60</sup> Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, TASK FORCE REPORT ON THE COURTS, note 57 *supra*, Appendix D at 152.

<sup>61</sup> FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 37 (1968). The FBI recidivism figures are based on a study of 17,876 offenders released from the federal correctional system in 1963 and the number among these who have been re-arrested within the 4-year period prior to December 31, 1967. For the purposes of the FBI study, one need not be convicted to be considered a recidivist, being arrested and charged with a crime was sufficient. Of 1011 defendants who were acquitted or had their cases dismissed in 1963, 915 were re-arrested and charged with another crime prior to December 31, 1967—an FBI recidivism rate of 90.5%. Since recidivism in this study is based on re-arrest rather than conviction or re-conviction, this rate is undoubtedly somewhat high. As of December 31, 1966, 40% of those re-arrested had been convicted. *Id.* at 36-43.

For a discussion of the present data collection techniques of the FBI and suggested improvements see TASK FORCE REPORT ON CRIME AND ITS IMPACT, note 59 *supra*, at 128-30.



comparable jobs are open to him, might be driven to crime either out of desperation or out of animosity toward the system which inflicted the burden upon him.<sup>62</sup>

Nearly half of the persons arrested never go to court, but are dismissed by the police, a prosecutor, or a magistrate at an early stage of the case.<sup>63</sup> It is clear that defendants who are released after a grand jury fails to return an indictment or after a preliminary hearing reveals that the prosecution cannot establish its case would qualify for relief under the English system. Reimbursement should be automatic in these instances because the government was unable to make out even a *prima facie* case.

It would also seem desirable to afford those persons who are arrested, but whose case is subsequently dismissed by the police or the prosecutor prior to trial, the opportunity to recover their costs, which will generally be nominal. However, without such a provision the prosecution could dismiss charges immediately before trial,<sup>64</sup> after the defendant had been put to the expense of preparing his defense, and by this tactic preclude the innocent defendant's recovery. It is submitted that costs incurred by one who is arrested but dismissed informally should be allowed upon application, unless the prosecutor objects on the ground that the case was not dismissed because of the defendant's innocence but solely because the state lacked the evidence to secure a conviction. The award of costs could then be resolved at a hearing with the burden of proving the probability of the defendant's guilt by a preponderance of the evidence resting with the government.

#### D. A FURTHER MODIFICATION TO PONDER: THE SCOTTISH VERDICT

The English costs structure and the adapted proposal make the decision to award the defendant his costs discretionary with the judge. This is probably the system's weakest procedural link in that there always exists the possibility of uneven treatment from judge to judge, because judge's philosophies vary. Nowhere is this

<sup>62</sup> See Pye, *The Administration of Criminal Justice*, 66 COLUM. L. REV. 286 (1966).

<sup>63</sup> THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 133 (1967) [hereinafter cited as *THE CHALLENGE OF CRIME IN A FREE SOCIETY*].

<sup>64</sup> A recent California study of the judicial processing of felony defendants shows that 7-10% of all prosecutions in California in 1964 and 1965 were dismissed off the calendar in this manner. BUREAU OF CRIMINAL STATISTICS, *CRIME & DELINQUENCY IN CALIFORNIA*, 1965 at 64 (1966); TASK FORCE REPORT ON CRIME AND ITS IMPACT, note 59 *supra*, at 128.

practicality manifested more clearly than in the disparities evident in the sentencing practices of American judges today.<sup>65</sup> Since sentencing is essentially a policy decision, this disparity can be minimized by the collaborative efforts of multi-judge sentencing councils.<sup>66</sup> The decision as to the acquitted defendant's innocence is a factual determination, however, which can best be made by the trial judge, who has had the opportunity to evaluate the credibility of the various witnesses by actual observation of their testimony. No doubt there would be philosophical differences among judges with regard to awarding costs to acquitted defendants, but employment of multi-judge councils would seem to be of limited utility since the decision in each particular case is ultimately a factual one. For the advocate of the proposed legislation who is apprehensive that many judges will not exercise their discretion in favor of those acquitted except in the clearest of cases, this is not a happy situation. For as the old maxim goes, he who finds the facts also controls the legal result.

This problem could be solved, at least in those instances when the accused is tried, by modifying the jury's verdict alternatives. In Scotland, the jury's verdict may take three forms: guilty, not guilty, and not proven.<sup>67</sup> Either of the latter two verdicts will ensure the freedom of the accused. The "not proven" verdict indicates only that the state has not established full legal proof that the accused committed the crime, analogous to the American verdict of "not guilty." The Scottish verdict of "not guilty" represents a finding that the accused is in fact innocent of the alleged crime.

There are two principal objections to adopting the Scottish verdict, aside from the loss of tradition. There is the fear that many innocent defendants who are unable to win a "not guilty" verdict will be severely stigmatized by receiving a verdict of "not proven."<sup>68</sup> While this argument is not without merit,<sup>69</sup> it fails to recognize that the present American verdict structure offers innocent defendants

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<sup>65</sup> CALIFORNIA DEP'T OF THE YOUTH AUTHORITY, ANNUAL STATISTICAL REPORT, 1965 (1966). For a synopsis of the Report and its implications, see THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 18 (1967).

<sup>66</sup> Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966). In addition, judges may also participate in institutes devoted entirely to sentencing. See Youngdahl, *Developments and Accomplishments of Sentencing Institutes in the Federal Judicial System*, 45 NEB. L. REV. 513 (1966).

<sup>67</sup> T. SMITH, SCOTLAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 227-28 (1962) [hereinafter cited as SMITH].

<sup>68</sup> R. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 114 (1968).

<sup>69</sup> *Contra*, SMITH, note 67 *supra*, at 228.

no opportunity to exonerate themselves completely.<sup>70</sup> The innocent defendant with a "not guilty" verdict in America today shares the same stigma as the defendant who was acquitted only because the state could not prove his guilt beyond a reasonable doubt.

The second objection, that expanding the verdict choices to three will make it more difficult to achieve a unanimous verdict and thereby bring about more hung juries,<sup>71</sup> is more cogent. It has been suggested that the Scottish verdict is only workable when, as in Scotland, a majority verdict is acceptable. In the event that a substantial increase in hung juries resulted from implementing the Scottish verdict into the American criminal law system, experimentation with a majority verdict requirement might be constitutionally permissible.<sup>72</sup> The Supreme Court in *Patton v. United States*<sup>73</sup> ruled that a defendant charged in a federal court with any grave offense is entitled to trial by a jury of twelve persons whose verdict must be unanimous. *Duncan v. Louisiana*<sup>74</sup> has now extended the right to a jury trial to defendants in all non-petty state criminal cases, but the Court left open the question of whether the right to a jury trial includes a right not to be convicted except by a unanimous verdict.

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<sup>70</sup> Noted criminal attorney F. Lee Bailey is a proponent of such a provision. He also feels that a tripartite verdict choice would improve the accuracy of the jury's determination. Address by F. Lee Bailey, University of Nebraska, Lincoln, Nebraska, Nov. 14, 1968.

<sup>71</sup> R. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 114 (1968).

<sup>72</sup> At least 4 states permit majority verdicts in criminal cases, but only 2 states permit majority verdicts in felony cases. Louisiana allows a 9:3 verdict in cases where less than the death penalty may be given, LA. CONST. art. 7, § 41, and Oregon verdicts can be rendered by 10 members of the jury except for a verdict of first degree murder, ORE. CONST. art. I, § 11. In misdemeanor cases, Oklahoma allows a 9:3 verdict, OKLA. CONST. art. I, § 19, and Montana allows a 2/3s verdict, MONT. CONST. art. III, § 23, MONT. REV. CODES ANN. § 95-1915 (Pocket Part 1969). The Idaho Constitution permits the legislature to provide for a 5:6 verdict in misdemeanor cases, IDAHO CONST. art. I, § 7, and the legislature initially did so, IDAHO CODE § 19-1902 (Bobbs-Merrill 1948), but a recent amendment to § 19-1902 (Pocket Part 1969) deleted the authorization.

Majority verdicts are quite common in civil cases. *E.g.*, NEB. REV. STAT. § 25-1127 (Reissue 1964) (providing for 5:6 verdict). For a somewhat dated state-by-state chart on the use of majority verdicts in the United States see J. AM. JUD. Soc'y 111 (1949).

One study indicates that the frequency of hung juries in states with a unanimity requirement is 5.6% compared to 3.1% in states utilizing the majority verdict. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 460-61 (1966).

<sup>73</sup> 281 U.S. 276 (1930).

<sup>74</sup> 391 U.S. 145 (1968).

At this point it must be stressed that the Scottish verdict is *not* vital to the general proposition that innocent defendants should be awarded the costs incurred in their defenses. There is no indication from the literature that the English system does not work very efficiently as is. Nonetheless, it is posited that the benefits which the Scottish verdict would bestow on our criminal justice system would easily counterbalance a slight increase in hung juries. But if the actual success of the Scottish verdict depends on implementation of a majority verdict requirement, this writer would be compelled, without a showing of substantial counterbalancing considerations, to side with those who assert that such a dilution of the unanimous verdict requirement would strip the accused of perhaps his most valuable procedural safeguard. Indeed, the Scottish criminal justice system is cognizant of the possible hazards in its majority verdict requisite and attempts to compensate by requiring that evidence in a criminal trial be corroborated.<sup>75</sup> No Scottish jury can convict on the evidence of a single witness.

#### IV. CONCLUSION

Statutes providing compensation to victims of crime, a concept which is not too distant from that of awarding innocent defendants the costs of their defenses, have already been enacted in four states<sup>76</sup> and in Great Britain and New Zealand. The President's Commission on Law Enforcement and the Administration of Justice suggests that there are two philosophies which underlie these movements for victim compensation:

The first argues that the government is responsible for preventing crime and therefore should be made responsible for compensating the victims of the crimes it fails to prevent. The second approach, an extension of welfare doctrines, rests on the belief that people in need, especially those in need because they have been victimized by events they could not avoid, are entitled to public aid.<sup>77</sup>

These arguments for victim compensation statutes even more solidly support a statute awarding innocent defendants costs including attorney fees. The innocent defendant, too, has been victimized by an event he could not avoid. But of even greater import, the government, rather than just failing to prevent the crime which put the victim in his state of distress, has intentionally initiated the prosecution which put the innocent defendant in his disadvanta-

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<sup>75</sup> SMITH, note 67 *supra*, at 228

<sup>76</sup> The four states are: California, Maryland, Massachusetts, and New York. See Geis, *State Compensation to Victims of Violent Crime*, TASK FORCE REPORT ON CRIME AND ITS IMPACT, note 59 *supra*, Appendix B at 157.

<sup>77</sup> THE CHALLENGE OF CRIME IN A FREE SOCIETY, note 63 *supra*, at 41.

geous position. The distinction drawn by this misfeasance-non-feasance argument has merit. Serious thought should be given as to which group of victims has the foremost right to governmental compensation—the innocent defendant who has been victimized by the criminal justice system or the victim of a crime.

Enactment of legislation comparable to the Criminal Justice Act of 1964 would ensure the state court defendant of modest means that he would receive adequate representation, because upon becoming unable to pay at any stage of the proceedings for his counsel or supplementary assistance, he could receive financial assistance from the court.<sup>78</sup> Such a codification, by requiring the state to share the burdens of litigation with the defendant who has some financial resources but not enough to pay for an adequate defense without depriving himself or his family of vital necessities, would truly fulfill the constitutional command of *Gideon v. Wainwright*,<sup>79</sup> but it would not make the innocent non-indigent defendant monetarily whole. The proposed statute would build upon the financial inability concept of the Criminal Justice Act by placing the innocent lower and middle income defendant in the same position economically that he occupied prior to the prosecution,<sup>80</sup> at least to the extent of

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<sup>78</sup> 18 U.S.C. § 3006A (1964). See generally Mattis, note 7 *supra*.

<sup>79</sup> 372 U.S. 335 (1963).

<sup>80</sup> This proposal follows the precedent of the English system which does not award costs to innocent indigent defendants whose defenses have been financed through Legal Aid. However, it is recognized that in many states assigned counsel are grossly underpaid and often must pay for supplemental assistance out of their own pockets, or else forego it. L. SILVERSTEIN, DEFENSE OF THE POOR 16-17, 32-33, 253-67 (1965). Effective counsel for the indigent defendant should be ensured by paying assigned counsel reasonable attorney fees and by adequately funding public defender offices. If these funds are not forthcoming, there would seem to be no reason for not permitting assigned counsel to collect reasonable attorney fees when the indigent he defended is found innocent by the judge.

Clearly, the innocent indigent defendant should recover his costs and reasonable attorney fees in those jurisdictions which impose obligations upon indigents to reimburse the state for the costs of their defenses. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, Explanatory Notes § 6.4 at 58 (Approved Draft 1968). It is submitted that these reimbursement statutes unconstitutionally chill the indigent's decision to request assigned counsel. They are also unwise from a correctional point of view, for imposing such sizable indebtedness will certainly blunt the indigent's incentive to improve his lot and will slow his reintegration into society following his prosecution or, in the event of his conviction, upon his release from prison.

court costs and a reasonable attorney fee.<sup>81</sup> Professor Edmond Cahn has summarized the case for the proposed statute very ably:

A fair-minded society will not only provide and pay independent counsel to defend all indigent persons who are arrested on serious charges; it will also pay the necessary and reasonable defense costs of all accused persons, whatever their economic condition, who are eventually found to be not guilty. As matters now stand in the United States and most other democratic countries, the state, by recognizing no duty of reimbursement after an acquittal, can compel an innocent man to choose between unjust conviction and personal bankruptcy.<sup>82</sup>

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<sup>81</sup> It is recognized that the proposed system does not make the innocent defendant whole as to lost wages, emotional distress and so forth. The relief which is provided would seem to be the minimum that justice requires. Consideration might also be given to a provision which would guarantee an innocent defendant his same job upon his acquittal, analogous to the Universal Military Training and Service Act, 50 U.S.C. App. § 459 (1964), which secures one's return to his former job following his obligation to military service.

<sup>82</sup> CAHN, note 6 *supra*, at 51-52.