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Raise the Proof: A Default Rule for Indigent Defense

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Raise the Proof: A Default Rule for Indigent Defense

ADAM M. GERSHOWITZ

Almost everyone agrees that indigent defense in America is under-funded, but workable solutions have been hard to come by. For the most part, courts have been unwilling to inject themselves into legislative budget decisions. And, when courts have become involved and issued favorable decisions, the benefits have been only temporary because once the pressure of litigation disappears so does a legislature's desire to appropriate more funding. This Article proposes that if an indigent defense system is under-funded, the state supreme court should impose a default rule raising the standard of proof to "beyond all doubt" to convict indigent defendants. The legislature would then have the opportunity to opt out of this higher standard of proof by providing enough funding to bring defense lawyers' caseloads within well-recognized standards or by providing funding parity with prosecutors' offices. Such an approach will create an incentive for legislatures to adequately fund indigent defense without miring courts in detailed supervision of legislative budget decisions. At the same time, because courts can check once per year to determine whether there is funding parity with prosecutors' offices or compliance with caseload guidelines, there will be constant pressure on legislatures to maintain adequate funding in order to avoid the higher standard of proof.

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Raise the Proof: A Default Rule for Indigent Defense

ADAM M. GERSHOWITZ*

I. INTRODUCTION

Indigent defense in America is woefully under-funded.¹ Due to a lack of resources, many public defenders are forced to carry hundreds of cases, far in excess of recommended standards.² Jurisdictions that appoint lawyers on an individual basis often pay them trifles to defend serious felonies.³ And to add insult to injury, defense lawyers in many jurisdictions are paid substantially less than their prosecutor counterparts.⁴ Each year, the states spend more than \$5 billion on prosecuting criminal cases, plus additional billions of dollars on police and crime labs that are used to assist prosecutors, compared with less than \$3 billion for indigent defense.⁵

The results of under-funding indigent defense are not surprising.⁶ Poor

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¹ For the most comprehensive in a long line of articles chronicling the under-funding of indigent defense and its consequences, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

² See, e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (discussing the lack of funding for public defender programs).

³ See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853–55 (1994) (analyzing the law fees paid to lawyers in capital cases); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 847–48 (2004) (discussing divergence in fees paid to private attorneys who represent the government as opposed to indigent defendants).

⁴ See, e.g., Scott Wallace, *Parity: The Fair Safe Standard*, in 1 U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: STANDARDS FOR ADMINISTRATION OF DEFENSE SYSTEMS 13, 16 (2000), available at <http://www.ojp.usdoj.gov/indigentdefense/compendium/pdf/vol1.pdf> ("Salary parity remains the exception rather than the rule, among smaller programs."); THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 34 (2004) available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> [hereinafter VIRGINIA REPORT] ("Average pay in the offices is \$64,000 for [prosecutors] and \$46,000 for assistant public defenders.").

⁵ STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 13–14 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *GIDEON'S BROKEN PROMISE*].

⁶ Scholars have recognized that most problems with indigent defense systems stem from the lack of funding. See Bright, *supra* note 2, at 816 ("The most fundamental reason for the poor quality or

defendants receive inadequate representation, wrongful convictions occur, longer prison terms are meted out to indigent defendants, and confidence in the criminal justice system is decimated.⁷ In short, unlike other areas of law, everyone is in agreement: the under-funding of indigent defense is a serious problem.⁸

There is no shortage of proposals for dealing with the problem. The American Bar Association and legal scholars have advocated requiring funding parity between prosecutors and defense lawyers.⁹ White-shoe law firms have brought litigation that demands increased funding, removal of caps on the fees paid to appointed lawyers, and judicial supervision of the criminal justice system.¹⁰ Still other observers have suggested making it easier to establish ineffective assistance of counsel on post-conviction review.¹¹

Unfortunately, while some of these efforts had initial success, the improvements were short-term and already have dissipated.¹² And the successes have been the exception, not the rule. More often than not,

absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.”); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1620 (2002) (“Poor training, perverse incentives, and massive caseloads [among many other consequences] all stem from the lack of resources devoted to criminal defense.”); Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 373 (2004) (“[F]unding is conceivably related to every other problem in indigent defense.”).

⁷ See Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064 (2000) (describing the “systemic impact of the poor quality of indigent defense counsel”) [hereinafter *Gideon’s Promise Unfulfilled*].

⁸ See Lee, *supra* note 6, at 370 (“A survey of the literature unearths many scholars and practitioners criticizing, and lamenting, the state of indigent defense. Their conclusions are more or less the same: our indigent defense system is in a state of crisis.”); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10 (1997) (“[T]hose familiar with the system agree that the story these numbers tell is generally true: Public defenders are terribly overburdened.”).

⁹ See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM I (2002) available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (“There [should be] parity between defense counsel and the prosecution with respect to resources”); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (arguing for resource parity, but suggesting it may come from legislative action without court intervention); Wallace, *supra* note 4, at 14 (“The U.S. Department of Justice endorsed the concept of parity in the same year that *Gideon v. Wainwright* was handed down.”) (internal emphasis added).

¹⁰ See *infra* Part II (discussing the difference in spending between prosecutors and indigent defense attorneys).

¹¹ See *State v. Peart*, 621 So. 2d 780, 784 (La. 1993) (shifting burden to government to rebut presumption of ineffectiveness); Rebecca Kunkel, Note, *Equalizing the Right to Counsel*, 18 GEO. J. LEGAL ETHICS 843, 858 (2005) (considering whether the government should bear the burden of proving effective assistance of counsel); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 437 (2003–2004) (reviewing the standards of review applied in ineffective assistance cases).

¹² See Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1736 (2005) [hereinafter *Effectively Ineffective*] (“[T]hese decisions have ultimately had less of a practical, sustainable impact than many had hoped.”).

reform efforts have won praise from local newspaper editorials, but failed to convince the judiciary to intervene.¹³ In refusing to get involved, courts have pointed to abstention doctrine, separation of powers concerns, and the general fear that courts should not be in the business of micromanaging legislative budget decisions.¹⁴

The challenge, therefore, is to offer a reform proposal that steers clear of courts' concerns about micro-management and over-reaching. To effect sustainable change, the judiciary should not, by itself, attempt to fix foundering indigent defense systems. Rather, the courts should seek to motivate the legislatures to fix the problem by imposing an unattractive default rule that will operate in the absence of legislative action.¹⁵ The default rule should be simple, bright-line, and unequivocally within the province of the judiciary. Such criteria eliminate the most common proposals for remedying the indigent defense crisis, such as the suggestion that courts undertake the traditionally legislative task of ordering the expenditure of particular sums of money.¹⁶ Similarly, proposals that involve long-term judicial monitoring of indigent defense systems are neither bright-line rules nor, as experience has taught, simple.¹⁷

There is an easier way. A bright-line and classically judicial solution would be for courts facing under-funded indigent defense systems to create a default rule raising the standard of proof in all criminal cases against indigent defendants. Rather than the traditional "beyond a reasonable doubt" standard, the prosecution would shoulder the burden to prove indigent defendants guilty under a higher "beyond all doubt" standard. Because the "beyond all doubt" standard of proof would be a default rule, legislatures would be free to opt out if they adequately fund their indigent defense systems. To keep matters simple, legislatures could demonstrate adequate funding in either of two (and only two) bright-line ways: (1) the caseloads of government-funded defense lawyers do not exceed the recommended guideposts set by the National Advisory Commission on

¹³ Compare Editorial, *Passing the Buck on Defendants' Rights*, COMMERCIAL APPEAL, May 6, 2003, at B4 (criticizing the lack of funding for Mississippi public defenders) with *Quitman County v. Mississippi*, 910 So.2d 1032 (Miss. 2005) (rejecting constitutional challenge to lack of state funding for indigent defense).

¹⁴ See *infra* notes 82-92 and accompanying text.

¹⁵ See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 827 (2006) (discussing the concept of "a default rule that is unattractive by design, so that politicians have an incentive to pick an appropriate conduct rule themselves").

¹⁶ For an early article analyzing such judicial involvement, see Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

¹⁷ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1052 (2004) ("In all of these areas, though varying degrees, there has been a tendency for remedial practice to move away from command-and-control toward experimentalist methods."). Scholars disagree about the extent to which courts are continuing to impose structural injunctions. For a helpful summary of the literature and an argument that such injunctions have not died, but rather become more focused, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).

Criminal Justice Standards and Goals, or (2) the funds appropriated for indigent defense are equal to the funds appropriated for prosecutors' offices.¹⁸

Legislatures would be free to decide how to achieve either (or both) of these scenarios. They could appropriate more money for indigent defense, or they could encourage (or even require) prosecutors to charge fewer defendants, thus reducing the caseloads of government-funded defense lawyers. While the possibilities for implementation are numerous, the outcome should be predictable: prosecutors hostile to a higher standard of proof will lobby the legislature to ensure adequate indigent defense funding, and legislators seeking to be tough on crime will move quickly to ensure that an unnecessarily high standard of proof will not remain intact.¹⁹ Put simply, a default rule imposed by the judiciary will create a strong incentive for the key players in the criminal justice system to provide adequate funding for indigent defense.

This Article begins with a brief overview of the under-funding of indigent defense in the United States and the massive problems it creates. Part III then reviews the litigation efforts that have been made to solve the funding crisis. Part III discusses why most of the proposals have failed outright or resulted only in short-term successes. Part IV then examines the traditional proof beyond a reasonable doubt standard and argues that it would be permissible for the Court to impose a higher standard in cases involving indigent defendants. Part V advocates that the higher standard of proof operate as a default rule. Legislatures could opt out of the higher standard of proof by ensuring that caseloads remain within accepted guidelines or by funding defense resources at the same level as prosecution resources. Part V explains that such a solution has the virtue of maximizing institutional competence. The proposal calls on the judiciary to serve its traditional function of imposing legal standards, while asking the legislature to fulfill its typical job of funding and implementing public policy.

¹⁸ Other scholars have advocated variations of these proposals, though not as a default rule linked to a heightened standard of proof. See Wright, *supra* note 9 (arguing for resource parity but suggesting it may come from legislative action without court intervention); Gideon's *Promise Unfulfilled*, *supra* note 7, at 2073 (noting in passing that imposing the ABA caseload guidelines would require "little judicial inventiveness or lawmaking" and "would require little ongoing judicial management").

¹⁹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001) [hereinafter Stuntz, *Pathological Politics*] (explaining that "at the most basic level, elected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished").

II. THE INDIGENT DEFENSE FUNDING CRISIS

A. *The Under-funding Problem*

There is no serious dispute that indigent defense is under-funded. As one commenter recently explained: “[S]tate and federal governments together allocate over half of their criminal justice spending to the investigation and prosecution of crimes but only about two percent to indigent defense.”²⁰ For instance, in 1998, the federal government spent nearly \$5.5 billion to fund the Federal Bureau of Investigation, the Drug Enforcement Administration, and the U.S. Attorneys’ offices, but less than \$400 million on indigent defense.²¹ Matters at the state level are no better. In a typical year, the states spend more than \$5 billion to prosecute criminal cases compared with less than \$3 billion for indigent defense.²² A 2000 report by the Department of Justice concluded that indigent defense “is in a chronic state of crisis” in large part because “funding has not kept pace with other components of the criminal justice system.”²³

Unfortunately, the under-funding problem is national in scope. A review of Harris County, Texas—which has been the scene of legendary stories about sleeping and drunk lawyers²⁴—revealed that the highly capable District Attorney’s office spent \$26 million in 1999, compared with \$11.6 million for indigent defense.²⁵ In Louisiana, a recent study found that prosecutors outspent government-funded defense lawyers by a three-to-one margin, and those figures did not account for the extra support prosecutors receive from police investigators and state crime labs, which are funded separately.²⁶ In 2000, Mississippi spent more than \$16 million

²⁰ Lee, *supra* note 6, at 373.

²¹ *Id.*

²² GIDEON’S BROKEN PROMISE, *supra* note 5, at 13–14. As one noted observer has explained, “poor defendants receive only an eighth of the resources per case available to prosecutors.” DEBORAH L. RHODE, ACCESS TO JUSTICE 123 (2004).

²³ NAT’L SYMPOSIUM ON INDIGENT DEFENSE, OFFICE OF JUSTICE PROGRAMS, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, at ix (2000), available at www.ojp.usdoj.gov/indigentdefense/icjs.pdf.

²⁴ See, e.g., Paul M. Barrett, *On the Defense: Lawyer’s Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1, available at LEXIS, News Library, WSJNL File (describing the late Joe Frank Cannon, a lawyer in Harris County who repeatedly was appointed to handle capital cases even though he had ten separate clients sentenced to death and reportedly fell asleep during a number of their trials).

²⁵ Bob Sablatura, *Study Confirms Money Counts in County Courts; Those Using Appointed Lawyers Are Twice as Likely to Serve Time*, HOUS. CHRON., Oct. 17, 1999, at A1, available at LEXIS, News Library, HCHRN File. The imbalance is not quite as big as it appears, however. Throughout the United States, approximately 20% of criminal defendants hire private attorneys. See CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES, BUREAU OF JUSTICE STATISTICS 5 (2000), available at www.ojp.usdoj.gov/bjs/abstract/dccc.htm (stating that 80% of felony defendants are indigent). Thus, while the District Attorney’s office needs funding to prosecute 100% of crimes, the indigent defense system only needs funding to defend 80% of the cases. Nevertheless, the funding difference in Harris County is still far out of balance.

²⁶ See NAT’L LEGAL AID & DEFENDER ASS’N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN

to prosecute felony cases while less than \$9 million was spent on indigent defense.²⁷ As one observer recently detailed:

As late as 2000, defenders in one Georgia county were paid an average of \$49.86 per case. Indeed in some states, teenagers selling sodas on the beach can earn more than court-appointed counsel. In Wayne County, Michigan, assigned counsel made, after deducting overhead, \$6 to \$12 per hour . . . Minnesota's 386 full-time public defenders worked 35,000 unpaid overtime hours in 2002, essentially meaning that part-time lawyers worked full time, and full-time lawyers worked nights and weekends to get the job done.²⁸

While there have been improvements in certain localities, for many jurisdictions the situation is becoming worse.²⁹ The City of Pittsburgh cut funding for twelve of the city's fifty-seven public defenders even though the judge heading the criminal division had recommended against such cuts.³⁰ Due to budget shortfalls, Connecticut reduced funding for more than half of fifty-one attorneys and support staff that had recently been hired as part of a settlement to litigation challenging excessive caseloads.³¹ In many jurisdictions, state governments contribute little or no money to indigent defense, requiring county governments to shoulder the entire burden themselves.³² In counties with tight budgets, it is nearly impossible to find the necessary funding.

B. *The Results of Under-funding*

The most obvious problem caused by the under-funding of indigent defense is that jurisdictions cannot hire a sufficient number of lawyers, leaving existing staff with excessive caseloads. The excessive caseloads in

ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* 53 (2004) available at <http://www.nlada.org/DMS/Documents/1078863541.49/Avoyelles%20Parsh%20Body%20Text.pdf> [hereinafter IN DEFENSE OF PUBLIC ACCESS TO JUSTICE]; Catherine Beane, *Gideon Shattered: Justice Stands Still in Avoyelles Parish, Louisiana*, CHAMPION, Mar. 27, 2004, at *6, **8-9, available at LEXIS, News Library, CHAMP File.

²⁷ Erin V. Everett, Comment, *Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis*, 74 MISS. L.J. 213, 219-20 (2004).

²⁸ Lee, *supra* note 6, at 375-76 (internal quotations and citations omitted).

²⁹ See, e.g., Stuntz, *supra* note 8, at 9-10 ("[S]pending on indigent defendants in constant dollars per case appears to have declined significantly between the late 1970s and the early 1990s.").

³⁰ See Bright, *supra* note 2, at 817 (citing Jan Ackerman, *Public Defenders Feel Betrayed by Heavy-Handed County Axing*, PITTSBURGH POST-GAZETTE, Feb. 27, 1996, at B1, available at LEXIS, News Library, PSTGAZ File).

³¹ Kellie A. Wagner, *Advocates: States Not Rising to Call of Gideon*, LEGAL INTELLIGENCER, Mar. 18, 2003, available at WESTLAW, Legal News Library, TLI File.

³² See, e.g., Everett, *supra* note 27, at 224 ("With the exception of death penalty cases, the State of Mississippi does not contribute one dollar towards the representation of poor defendants.").

turn lead to a host of additional problems. Because lawyers are overwhelmed, they lack the time to promptly meet with their clients, leaving indigent defendants to languish in jail for egregiously long periods of time without ever speaking to a lawyer. When lawyers do meet with their clients, they often pressure the defendants to plead guilty irrespective of the merits of the case because of the lack of time to prepare for and conduct a trial. Those defendants who do insist on proceeding to trial are handicapped with inexperienced, overwhelmed, or incompetent lawyers who lack the funds for basic litigation resources such as investigators and expert witnesses. The hurried plea bargains and rushed trials result in convictions of some factually innocent defendants and in harsher sentences than those meted out to comparable non-indigent defendants. As explained in more detail below, the under-funding of indigent defense pervades every step of the criminal justice process.

1. *Excessive Caseloads*

First, the lack of funding for indigent defense means that most public defenders (and many appointed counsel) are handling excessive caseloads.³³ The National Advisory Commission on Criminal Justice Standards and Goals—a national body established by the Department of Justice to implement recommendations from the President's 1968 Crime Commission—has recommended that public defenders handle no more than 150 felonies or 400 misdemeanors in any year.³⁴ The National Legal Aid and Defender Association has endorsed these guideposts,³⁵ and the American Bar Association has cited them approvingly multiple times.³⁶ Commentators have recognized that these caseload standards “have been widely adopted and proven quite durable.”³⁷ Yet, public defenders in Connecticut sometimes each handle more than 1,000 cases per year.³⁸ A recent study of Virginia's indigent defense system found that in most local jurisdictions public defenders were carrying between 100 and 200 open cases at any given time, far in excess of recommended standards.³⁹ One overwhelmed lawyer explained that because the public defenders have so

³³ *Lee*, *supra* note 6, at 377–78.

³⁴ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS, at Standard 13.12 (1973).

³⁵ *See* STANDARDS FOR DEFENSE 13.12, NAT'L LEGAL AID & DEFENDER ASS'N, DEFENDER RESOURCES, http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA (referring to the standards promulgated by the National Commission on Criminal Justice and Goals) (last visited August 26, 2007).

³⁶ *GIDEON'S BROKEN PROMISE*, *supra* note 5, at 17–18; THE SPANGENBERG GROUP, KEEPING DEFENDER WORKLOADS MANAGEABLE 8 (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

³⁷ Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 269 (2004).

³⁸ *Wagner*, *supra* note 31.

³⁹ VIRGINIA REPORT, *supra* note 4, at 27–29.

many open cases, "we let things slide. We cannot help it. We don't have time for investigation or research."⁴⁰

A Minnesota public defender recently quit his job after handling 135 felony cases, nearly 400 misdemeanors, and nearly 200 other matters in a single year.⁴¹ He was doing the job of at least two full-time lawyers. In a seven-month period, a single public defender in Louisiana represented 418 defendants.⁴² A more recent Louisiana study found that a part-time public defender in Avoyelles Parish was paid \$19,200 to handle all of the jurisdiction's 1008 misdemeanor cases and 256 juvenile cases. Without taking into account the felony arraignments he was expected to staff and the additional private cases he also maintained, the "part-time" public defender was handling four-and-a-half times as many cases as national caseload guidelines recommend.⁴³ In another Louisiana parish, public defenders, in addition to defending private clients, carry an average open caseload of 590 felonies and 150 misdemeanors, far in excess of national guidelines.⁴⁴ And so the story goes throughout the United States.

2. Lengthy Delays Before Meeting With Lawyers

Because of their crushing caseloads, many defense lawyers lack the time to meet with their clients, instead spending almost their entire workday in triage, negotiating guilty pleas on the eve of trial and, in worst-case situations, actually trying cases.⁴⁵ Under these circumstances, overburdened public defenders have little time for the "less important" task of visiting their clients in jail and pushing for speedy bail hearings. For instance, a study of Calcasieu Parish in Louisiana found that public defenders who represented 85% of the inmates made 31 jailhouse visits, while private lawyers who represented 15% of the inmates made 236 visits during the same time-period.⁴⁶ The American Bar Association recently reported that defendants in Montana "remain in pretrial detention for up to five to six months without a single contact from an attorney."⁴⁷ In Mississippi, a woman who was arrested for stealing \$200 spent eight

⁴⁰ *Id.* at 28–29 (quotations omitted).

⁴¹ Conrad deFiebre, *Public Defenders Seek Lighter Load; With Its Attorneys Overworked, the Board of Public Defense Has Asked the State's High Court for Help*, STAR TRIBUNE, Aug. 30, 2003, at 1B, available at LEXIS, News Library, STRIB File. The average Minnesota public defender handles more than 900 cases per year. Backus & Marcus, *supra* note 1, at 1055–56.

⁴² See *State v. Peart*, 621 So. 2d 780, 784 (La. 1993).

⁴³ Beane, *supra* note 26, at **12–13.

⁴⁴ *Id.* at *16.

⁴⁵ See Bright, *supra* note 2, at 790 (discussing "triage"); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 809 (2004) (discussing the rationing of scarce resources).

⁴⁶ Sylvia R. Cooks & Karen Karré Fontenot, *The Messiah is Not Coming: It's Time for Louisiana to Change its Method of Funding Indigent Defense*, 31 S.U. L. REV. 197, 209 (2004) (citing MICHAEL M. KURTH & DARYL V. BURCKET, *DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA* 33 (2004)).

⁴⁷ GIDEON'S BROKEN PROMISE, *supra* note 5, at 23.

months in jail without ever seeing a lawyer.⁴⁸ Eventually, she gave up hope of receiving a lawyer and pled guilty to time served just to get out jail.⁴⁹

The problem is just as serious in jurisdictions that utilize appointed counsel systems. Because many jurisdictions cap the total fees that appointed counsel recover, defense lawyers reap diminishing returns for each extra hour they work on a case.⁵⁰ This creates a strong disincentive to make extra trips to the jail to meet with indigent clients prior to their arraignments. The fee caps imposed by the Commonwealth of Virginia are instructive. Virginia pays appointed lawyers at a rate of \$90 per hour, but caps the payment for serious felonies at \$395.⁵¹ Thus, after four-and-a-half hours of work, the appointed lawyer is working for free, hardly an incentive to take time-consuming trips to the local jail to meet promptly with new clients. As a result, many appointed lawyers behave strategically and wait until they have been assigned a substantial number of new clients before going to the local jail to meet with any of them. As one appointed lawyer candidly explained, “[I] will wait three to four weeks after appointment to visit in-custody clients so [I] can visit six or seven in the same trip to the jail.”⁵²

3. *Assembly Line Guilty Pleas*

When indigent defendants do meet with their lawyers, they are often afforded assembly-line justice. Because defense lawyers have more cases than they can handle, they have a strong incentive to plead the cases out, and to do so quickly.⁵³ The problem is particularly vexing in jurisdictions that subject appointed counsel to fee caps because each additional hour worked provides diminishing returns or no payment whatsoever.⁵⁴ As one appointed lawyer explained, “in a court-appointed case [we spend] as little time as possible . . . ‘if we want to make a living we have to get rid of the case as quickly as possible.’”⁵⁵ Not surprisingly, a study of New York City

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Backus & Marcus, *supra* note 1, at 1032–34 (recounting other egregious stories).

⁵⁰ See Stuntz, *supra* note 8, at 10 (“The real key to the statutory fee schedules, however, is not the hourly amounts but the caps on total fees. Most states have such caps.”).

⁵¹ See VA. CODE ANN. § 19.2-163 (2007). The statute actually authorizes \$445 per felony charge, but the legislature has not provided adequate funding. VIRGINIA REPORT, *supra* note 4, at 48.

⁵² VIRGINIA REPORT, *supra* note 4, at 51.

⁵³ See Sablatura, *supra* note 25 (quoting Professor David Dow saying that “[p]art of the problem is that indigent cases pay so little that a court-appointed attorney needs a lot of cases to make a living . . . [a]nd the only way for attorneys to handle a large number of cases is to plead out as many clients as they can as fast as they can”).

⁵⁴ See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 922 (2006) (“[D]efense lawyers who receive flat or capped fees can earn more if they have high turnover. The press of large caseloads and limited funding and support staff also pushes many lawyers and judges to settle quickly, before investing much work.”).

⁵⁵ VIRGINIA REPORT, *supra* note 4, at 50.

found that government-funded lawyers filed substantially fewer motions than retained counsel.⁵⁶

The situation is actually worse in jurisdictions that use low-bid contractors for their indigent defense cases because such lawyers have no incentive to do anything other than plead defendants guilty. For instance, McDuffie County, Georgia, assigned all of its indigent defense cases to a lawyer who offered to handle the cases for about half as much payment as any other bidder.⁵⁷ Over a five-year period, that lawyer encouraged hundreds of defendants to plead guilty while conducting only two jury trials and filing only seven pre-trial motions.⁵⁸ Needless to say, the lawyer conducted no factual or legal investigation of his clients' cases and, in most instances, met with them only moments before they plead guilty.⁵⁹

The American Bar Association has reported that over a five-year period in Quitman County, Mississippi, 42% of indigent defense cases were resolved by guilty pleas when the defense lawyer first met the defendant at his arraignment.⁶⁰ Obviously, the defense lawyer did not conduct a thorough interview with the client, meet the witnesses, or visit the crime scene. In Clark County, Nevada, which employs seventy lawyers, approximately 99.5% of cases are resolved without going to trial.⁶¹ Worse yet, a Montana lawyer, who had a contract to handle all of a county's indigent defense cases, "once bragged to the chief prosecutor in his county that 'he got out of the 1990s without a trial.'"⁶²

4. Incompetent and Under-Resourced Trial Lawyers

Because funding for indigent defense is so low, competent lawyers usually refuse to take appointed cases. As a Virginia prosecutor explained:

Very few experienced attorneys are on those [court-appointed] lists, and the reason is, they can't afford to be on them. So you either have very inexperienced attorneys right out of law school for whom any money is better than no money. Or you have people who are really bad lawyers who

⁵⁶ Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 767-70 (1986-1987); see also Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 212 (2003) ("Attorneys are assigned more cases than they can plausibly handle, so that each client has formal representation but the quantity and quality of representation is constrained. Attorneys forgo motion practice, investigation options, and witness preparation.").

⁵⁷ Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1808-09 (2000).

⁵⁸ *Id.* at 1809.

⁵⁹ *Id.*

⁶⁰ GIDEON'S BROKEN PROMISE, *supra* note 5, at 16.

⁶¹ *Id.* at 19.

⁶² *Id.*

can't make a living except off the court-appointed list.⁶³

Moreover, even though some appointed lawyers and public defenders are competent lawyers, these attorneys often lack the tools to provide a competent defense. While prosecutors have access to police investigators and forensic labs, most defense lawyers lack the funding for similar resources.⁶⁴ At most, the typical public defender office has one or two investigators struggling to work on thousands of cases per year.⁶⁵ Due to a lack of resources, many courts either refuse funding for expert witness or only allot a trivial amount of money.⁶⁶ Additionally, government-funded lawyers often have inadequate access to basic legal tools such as law libraries, internet access, fax machines, and clerical support.⁶⁷ For instance, a recent investigation of Louisiana found that one prosecutor's office had recently undergone an \$850,000 renovation and "exude[d] professionalism," while the indigent defense board was "in disarray," with no receptionist and papers and case files piled in the hallway.⁶⁸

5. *Wrongful Convictions, Unjust Sentences, and Defaulted Appeals*

When indigent defendants proceed to trial they are often represented either by incompetent lawyers, attorneys handling too many cases to perform satisfactorily, or competent lawyers who lack the resources to put forth an adequate defense. Not surprisingly, these indigent defendants are almost always found guilty at trial.⁶⁹ And while most criminal defendants

⁶³ Laura LaFay, *Virginia's Poor Receive Justice on the Cheap: Rock-Bottom Pay for Court-Appointed Lawyers Undermines System, Lawyer Says*, VIRGINIAN-PILOT, Feb. 15, 1998, at A1, available at LEXIS, News library, VAPILT File; see also VIRGINIA REPORT, *supra* note 4, at 52 (quoting an attorney as saying that "[n]o attorney with any self respect will do these [appointed] cases any longer than he has to").

⁶⁴ See, e.g., THE SPANGENBERG GROUP, INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE 67 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idc.html> ("[E]ven attorneys who feel an investigator or expert would help in their cases are reluctant to file motions securing investigative help a) because it will be a waste of time, as such requests are routinely denied and/or b) because it might annoy judges.").

⁶⁵ See, e.g., *State v. Peart*, 621 So.2d 780, 784 (La. 1993) (explaining that three investigators were responsible for handling 7,000 cases per year); Beane, *supra* note 26, at *16 (explaining that in Calcasieu Parish "the District Attorney's Office has 14 staff investigators as well as investigative assistance from local law enforcement, [but] the Public Defender's Office has only two staff investigators"); VIRGINIA REPORT, *supra* note 4, at 38 (reporting that there are a total of twenty-six investigators to handle all of the indigent defense cases in the Commonwealth of Virginia and that "the vast majority of cases receive no investigative work"); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 780-81 (explaining that most indigent defendants "have little or no investigation done on their cases").

⁶⁶ GIDEON'S BROKEN PROMISE, *supra* note 5, at 10-11; Backus & Marcus, *supra* note 1, at 1099-1100.

⁶⁷ GIDEON'S BROKEN PROMISE, *supra* note 5, at 10; VIRGINIA REPORT, *supra* note 4, at 36-38.

⁶⁸ NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 26, at 54.

⁶⁹ See Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 258 (1989) (concluding that defendants represented by public defenders have fewer trials and a greater number of convictions than

are in fact guilty, wrongful convictions occur, and innocent indigent defendants are at greater risk than those with retained counsel. The Innocence Project, which has helped to free scores of innocent felons over the last fifteen years, identifies the lack of funding for indigent defense as one of the prime reasons for wrongful convictions.⁷⁰ In one recent case, DNA technology exonerated a man who had served more than fifteen years for child rape.⁷¹ At trial, his appointed lawyer did not attempt to exclude an equivocal eyewitness identification, filed no pre-trial motions, undertook no investigation, presented no expert testimony, and failed to even file an appeal.⁷² The apparent reason for the appalling representation (and the wrongful conviction) was that the lawyer had a flat-fee contract with the county and received the same minimal compensation, regardless of whether he prepared adequately or not.⁷³ Countless other innocent victims surely languish in prison due to the inadequate representation they received as a result of the under-funding of indigent defense.⁷⁴

Wrongful convictions are not the only problem however. Studies demonstrate that defendants represented by under-funded defense lawyers are sentenced to longer prison terms⁷⁵ than their non-indigent counterparts.⁷⁶ Because most defendants plea bargain, sentencing is often

defendants represented by private counsel).

⁷⁰ See Innocence Project: Bad Lawyering, <http://www.innocenceproject.org/understand/Bad-Lawyering.php>; see also Adele Bernhard, *Trends in Defense Services Standards*, in 1 U.S. DEPT OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: STANDARDS FOR ADMINISTRATION OF DEFENSE SYSTEMS 20 (2000), <http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm> ("In every study of wrongful convictions, investigators inevitably conclude that ineffective assistance of counsel [or] bad lawyering has played a significant role.").

⁷¹ Innocence Project: Jimmy Ray Bromgard, <http://www.innocenceproject.org/Content/61.php> (last visited Sept. 22, 2007).

⁷² Lefstein, *supra* note 3, at 860.

⁷³ *Id.*

⁷⁴ See BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS FROM EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Lefstein, *supra* note 3, at 858–60 (describing the prospect of thousands of wrongful convictions each year and explaining that "[n]either the number of mistakes attributable to defense counsel errors nor the exact number of wrongful convictions can ever be known"). On the problem of innocent defendants pleading guilty to avoid the risks of trial with a poor defense lawyer, see Uphoff, *supra* note 65, at 796–802.

⁷⁵ See generally Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection By the "Marginally Indigent"*, 3 OHIO ST. J. CRIM. L. 223 (2005) (finding that Denver public defenders achieved worse sentencing outcomes for their clients than private defense counsel but cautioning that the results may be due to "marginally-indigent" defendants who know they have worse cases opting for public defenders rather than scraping together the money to pay private counsel in a losing battle); see also Sablatura, *supra* note 25, at A1 ("Criminal defendants in Harris County represented by court-appointed attorneys were twice as likely to be sentenced to jail or prison than defendants with money to hire their own lawyers . . ."); Champion, *supra* note 69, at 261 (studying 1175 cases and finding that for plea agreements secured by public defenders "the incarceration periods were significantly longer compared with lengths of incarceration contained in plea agreements involving private attorneys").

⁷⁶ Moreover, because some of the most appalling representation occurs in capital cases, indigent defendants face greater risks of being sentenced to death. For instance, the infamous Joe Frank Cannon—the late Houston lawyer who repeatedly was appointed to cases even though he had slept

determined by the attorneys' deal-making skills. Given that the extremely complicated federal and state sentencing guidelines (and the cases interpreting them) are thousands of pages long, savvy and hard-working lawyers have considerable room to negotiate during plea bargaining, thus ensuring better sentencing deals than those procured by inexperienced or over-worked lawyers.⁷⁷ In this respect, indigent defendants represented by public defenders (who are repeat players) may be better off than defendants represented by appointed lawyers. Yet, even the hardest working public defenders—many of whom are quite savvy—are handicapped by a lack of time to explore and research potentially helpful sentencing issues.

Additionally, as Professor Stephanos Bibas has pointed out, because mandatory minimum and maximum sentences pervade criminal law, "[k]nowledgeable defense lawyers who act quickly may strike early charge-bargains before a grand jury indicts" thus guaranteeing substantially lower sentences.⁷⁸ By contrast, overwhelmed government-funded lawyers typically do not meet with their clients until well after indictment and therefore have no opportunity to utilize this tactic in the hopes of securing a lower sentence.

Finally, indigent defendants suffer on appeal as well. A recent review of defaulted appeals in Virginia found that public defenders and court-appointed lawyers were responsible for more than 70% of the defaults.⁷⁹ Either because these lawyers were too busy or too incompetent, they failed to file the simple piece of paper necessary to preserve an appeal. More disheartening, judges continued to appoint these lawyers to represent indigent defendants, including one lawyer who defaulted six appeals in a single year.⁸⁰

In sum, because the fees paid to appointed lawyers are so low, quality lawyers refuse to take the cases and judges have no choice but to re-appoint incompetent or overwhelmed lawyers. Indigent defendants suffer during pre-trial discovery, at motion practice, during trial, at sentencing,

through prior trials—saw ten of his clients go to death row. Bright, *Neither Equal Nor Just*, *supra* note 2, at 789; see also Barrett, *supra* note 24 (noting that "Mr. Cannon's collection of 10 death sentences is one of the largest among active lawyers). For an account of "the ineptitude" of a court-appointed lawyer representing a death-row inmate see David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694–95 (1996). Courts continue to appoint inadequate lawyers—even in death-penalty cases—because the funding appropriated for indigent defense is far too low to attract better lawyers.

⁷⁷ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2483–84 (2004) (explaining that "[c]omplexity favors intelligent, savvy repeat players who build up expertise and who pool information" whereas "[g]uidelines neophytes, in contrast, may be ignorant of these opportunities").

⁷⁸ *Id.* at 2484.

⁷⁹ Editorial, *Courts of No Appeal*, WASH. POST, July 4, 2004, at B6, available at LEXIS, News Library, WPOST File.

⁸⁰ Editorial, *Inexcusable Delay*, WASH. POST, July 5, 2004, at A16, available at LEXIS, News library, WPOST File.

and on appeal.

III. THE REFORM ATTEMPTS: FAILURE OR FLEETING SUCCESSES

Frustrated with the lack of indigent defense funding, public defenders, criminal defense associations, and law firms working in pro bono capacities have brought litigation to demand increased funding for indigent defense. The results have been disappointing. As detailed below, many efforts have failed at the outset, with courts dismissing the litigation outright. In other cases, legal victories have been achieved in court, only to see the improvements vanish over time.⁸¹

A. Outright Defeats

For more than a generation, the most obvious avenue for vindication of criminal defendants' rights has been in federal court.⁸² This is not so with indigent defense, however. Federal courts have rejected systemic challenges to state indigent defense systems on abstention grounds.⁸³ Applying *Younger* abstention, courts have held that so long as there is an available remedy in state court, federal courts should not interfere with ongoing state criminal proceedings.

Many state courts also have been unsympathetic to systemic challenges because the plaintiff bringing the case cannot personally point to inadequate representation. For instance, when a Minnesota public defender sought a declaratory judgment that the indigent defense system was unconstitutional because the lack of funding resulted in ineffective assistance of counsel, the state supreme court rejected the challenge because the indigent defendant could not demonstrate that his particular lawyer was sub-standard.⁸⁴ Likewise, the Virginia Court of Appeals rejected a challenge to fee caps that limited attorney recovery to less than \$400 per case because the lawyer bringing the challenge had "zealously" represented his client.⁸⁵ Similar litigation efforts have failed in Alabama,⁸⁶

⁸¹ For the best analysis of the failed litigation efforts, see Wright, *supra* note 9, at 244–48.

⁸² For the classic article praising the ability of federal courts over state courts to protect individual rights, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). While the perception of federal superiority has long existed, scholars have questioned whether it is in fact true. See generally Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005) (discussing the literature).

⁸³ See *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992) ("This Court does not believe that it should exercise its equitable jurisdiction in this case."); *Wallace v. Kern*, 520 F.2d 400, 408 (2d Cir. 1975) (reversing the order below because it "created an intrusion upon existing state criminal process which is fissiparous and gratuitous . . ."). For a criticism of federal courts' reluctance to intervene, see Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L. J. 481 (1991).

⁸⁴ *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996).

⁸⁵ *Webb v. Commonwealth*, 528 S.E.2d 138, 142 (Va. Ct. App. 2000). The focus on "actual injury" is a particularly vexing problem because the lawyers who typically raise challenges to the under-funding of indigent defense are themselves hardworking and effective, even in spite of their

Iowa,⁸⁷ Michigan,⁸⁸ New Jersey,⁸⁹ Utah,⁹⁰ and Vermont.⁹¹

More creative challenges have failed as well. In Mississippi, clever lawyers tried to attack the lack of state indigent defense funding by using a county—rather than a criminal defendant—as the plaintiff and naming the state as a defendant. Although a high-powered legal team represented the county pro bono for more than five years, the Mississippi Supreme Court flatly rejected the claim.⁹²

B. *Settlement Victories . . . Or So They Seemed*

Not all litigation has failed outright however. In a handful of cases, litigation has led to compromise legislation that has been lauded by the media and some reform activists. Ultimately, however, the results of the legislation have been unsatisfactory.

In 2003, the New York County Lawyer's Association (NYCLA) convinced a trial judge that the rates for assigned counsel—\$40 per hour for in-court work and \$25 per hour for out-of-court work—were so low as to deny effective representation.⁹³ Recognizing that “it does not have the capacity or the resources, nor is it in the best position to provide a comprehensive . . . solution,” the court nevertheless ordered that rates be raised to \$90 per hour.⁹⁴ The court encouraged the legislature to get involved, explaining that it is “in a better position to investigate, hold hearings, formulate, debate, [and] identify funding sources . . . to best meet

crushing caseloads. For instance, the lawyer who had the courage to bring the challenge in *Webb*—Steven Benjamin—has served as President of the Virginia Association of Criminal Defense Lawyers and won the prestigious Lewis F. Powell pro bono award. Profile of Steven D. Benjamin, Benjamin & Desportes, P.C., <http://www.lawyers.com/benjamin&desportes/jsp2209433.jsp> (last visited Sept. 22, 2007).

⁸⁶ See *Ex Parte Grayson*, 479 So. 2d 76, 79 (Ala. 1985) (“We do not find that [a \$500 cap on expenses] contravenes the defendant’s Sixth Amendment rights.”).

⁸⁷ See *Lewis v. Iowa Dist. Court*, 555 N.W.2d 216, 220 (Iowa 1996) (“[A]lthough the amount awarded a court-appointed attorney may be less than what an attorney may charge a private client, the guidelines themselves are not per se unreasonable.”).

⁸⁸ See *Wayne County Criminal Def. Bar Ass’n v. Chief Judges of Wayne Cir. Court*, 663 N.W.2d 471, 472 (Mich. 2003) (noting that the fee schedule adopted by the Wayne Circuit Courts does not “fail[] to provide assigned counsel reasonable compensation”). Notably, earlier litigation efforts in Michigan had proved successful, but sufficient benefits did not materialize. See *Recorder’s Bar Ass’n v. Wayne County Court*, 503 N.W.2d 885 (Mich. 1993).

⁸⁹ See *Madden v. Delran*, 601 A.2d 211, 212 (N.J. 1992) (concluding that the government should not be ordered to “pay attorneys who are assigned by the municipal court to represent defendants too poor to pay for counsel”).

⁹⁰ See *State v. Taylor*, 947 P.2d 681, 688 (Utah 1997) (upholding lower courts decision that the minimal compensation provided to the defendant’s attorney did not affect the attorney’s “strategy and efforts”).

⁹¹ See *State v. Bacon*, 658 A.2d 54, 66 (Vt. 1995) (holding that the “States failure to pay defense counsel in a timely manner for expenses and services in connection with this case” does not create a conflict of interest for the defending attorney).

⁹² *Quitman County v. Mississippi*, 910 So. 2d 1032 (Miss. 2005).

⁹³ *New York County Lawyers’ Ass’n v. State*, 763 N.Y.S.2d 397, 400 (N.Y. Sup. Ct. 2003).

⁹⁴ *Id.* at 410.

the needs of the assigned counsel scheme."⁹⁵ Perhaps fearing a reversal,⁹⁶ the County Lawyer's Association accepted a settlement whereby the legislature agreed to new rates of up to \$75 per hour to take effect in 2004.⁹⁷

Most observers counted the *NYCLA* case as a victory for indigent defense,⁹⁸ yet the victory was hollow. As part of the compromise, the legislation provided for a task force to be created to review the sufficiency of assigned counsel rates and issue a report to the Governor and the Legislature by January 15, 2006. Yet, no one was appointed to the task force and no report was ever issued.⁹⁹ Accordingly, as one observer recently remarked, "the rates will not be adjusted or even reviewed" as was intended by the compromise legislation, and "the state seems again on a path where counsel rates remain stagnant for years as the basic . . . living expenses of attorneys increase."¹⁰⁰

Even more problematic, the increased fees for appointed counsel resulting from the *NYCLA* litigation have actually made representation for most indigent defendants worse.¹⁰¹ Many New York jurisdictions rely on both appointed counsel and public defenders, and the *NYCLA* decision only mandated higher compensation for the former. Because the State of New York did not provide sufficient funding to cover the higher fees for appointed counsel, cash-strapped jurisdictions turned to cheaper and already over-burdened public defenders to handle even more cases.¹⁰² The Legal Aid Society, which already provided the bulk of indigent defense representation in New York City, was called upon to handle more cases, yet it did not receive additional funding to deal with those cases. To the contrary, budget shortfalls forced the Legal Aid Society to layoff 25% of

⁹⁵ *Id.*

⁹⁶ Within a few weeks of the favorable court ruling, the City filed a notice of appeal which prevented the judicially ordered rate increases from taking immediate effect. Susan Saulny, *Court Appeal Puts Off Raise for Poor Clients' Lawyers*, N.Y. TIMES, Feb. 27, 2003, at B3, available at LEXIS, News Library, NYT File.

⁹⁷ See N.Y. COUNTY LAW § 722-b (McKinney 2007).

⁹⁸ See Susan Saulny, *Lawyers' Fees to Defend the Poor Will Increase*, N.Y. TIMES, Nov. 13, 2003, at B1, available at LEXIS, News Library, NYT File (quoting NYCLA Vice President's response to the legislative compromise as a "major breakthrough" that is "having a ripple effect on indigent-defense systems across the country"); Susan Saulny, *Judge Orders Rates Doubled for Lawyers for the Poor*, N.Y. TIMES, Feb. 6, 2003, at B3, available at LEXIS, News Library, NYT File (quoting the NYCLA Vice President's response to the court ruling as, "[t]his is great news").

⁹⁹ COMM'N ON THE FUTURE OF INDIGENT DEFENSE, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 12, 13 n.29 (2006).

¹⁰⁰ John Caher, *Report Calls for Replacement of Indigent Defense System: Lack of Standards, Inadequate Funds, Poor Training Cited*, N.Y.L.J., Col. 3, June 29, 2006, at 1, available at Westlaw, Legal News Library, NYLJ File.

¹⁰¹ See *id.* ("[T]he hard fought effort to increase assigned counsel rates . . . actually had a negative impact on indigent defense representation.").

¹⁰² THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 153, 156 (2006).

its support staff in 2004.¹⁰³

Thus, three years after the *NYCLA* decision, a report by a nationally recognized indigent defense expert concluded that “New York’s indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding.”¹⁰⁴

A similar turn of events recently occurred in Massachusetts. In 2004, the Massachusetts Supreme Judicial Court concluded that indigent defendants’ constitutional rights were being violated because the state paid attorneys so poorly—as little as \$30 per hour—that it could not attract enough lawyers, leaving defendants to languish in jail.¹⁰⁵ The court did not raise lawyers’ hourly rates, but instead ordered that if defendants were not provided with counsel within seven days of their arrest they would have to be released.¹⁰⁶ About one year after the court’s decision, the legislature raised rates by \$7.50 per hour,¹⁰⁷ and various groups declared victory.¹⁰⁸ Yet, the victory was short-lived. Within a year, the Massachusetts’ indigent defense commission ran out of money to pay its bills (including its lawyers and investigators), and in the next budget session legislators attempted to cut the funding necessary for the rate increases.¹⁰⁹ In any event, even the nominal rate increases were not enough to satisfy local attorneys and there continues to be a shortage of lawyers to handle appointed cases.¹¹⁰

C. Litigation Victories . . . Or So They Seemed

More celebrated than the compromise legislation adopted in New York and Massachusetts are the handful of decisions in which courts have clearly ruled in favor of indigent defendants. Once again however, these successes are less than meets the eye.

In the most famous decision, *State v. Peart*, the Louisiana Supreme Court considered the plight of a defendant who was represented by a public defender who had represented more than 400 defendants in a seven-month

¹⁰³ *Id.* at 132, 163.

¹⁰⁴ *Id.* at 155.

¹⁰⁵ *Lavallee v. Justices*, 812 N.E.2d 895, 899–901 (Mass. 2004).

¹⁰⁶ *Id.* at 901. A handful of defendants were released because appointed lawyers refused to provide representation. Conor W. Daly, *Avoiding a New Willie Horton Problem: Creating a Better Public Counsel System in Massachusetts*, 18 GEO. J.L. ETHICS 679, 684 (2005).

¹⁰⁷ MASS. GEN. LAWS ANN. ch. 211D, § 11 (West 2007).

¹⁰⁸ See THE SPANGENBERG GROUP, *INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 1* (2005) (“On July 29, 2005, the Massachusetts Legislature made significant changes to the Massachusetts system of indigent defense and substantially increased the appropriation for indigent defense services.”).

¹⁰⁹ See Noah Schaffer, *Bar Advocate Monday is Gone*, MASS. LAW. WKLY., July 17, 2006 (“[T]he increase for private counsel slated to go through this year was stripped from the fiscal 2007 budget that recently came out of a conference committee.”).

¹¹⁰ *Bar Advocates Say Raise Not Enough*, CAPE COD TIMES, July 23, 2005, available at <http://www.bristolcpcs.org/CapeCod20050723.html>.

period and had a felony trial scheduled for every trial date on the docket.¹¹¹ The court labeled the indigent defense system a "crisis" and called on the legislature to act.¹¹² In the interim, the court imposed a presumption that all indigent defendants in an under-funded jurisdiction were receiving ineffective assistance of counsel, and it placed the burden on the government to rebut the ineffectiveness presumption.¹¹³ The Supreme Court further instructed trial judges that if they were not satisfied with the level of representation they "shall not permit the prosecution to go forward until the defendant is provided with reasonably effective assistance of counsel."¹¹⁴ Finally, the court threatened that if "legislative action is not forthcoming and indigent defense reform does not take place" the court "may find it necessary to employ more intrusive and specific measures."¹¹⁵

At least initially, the court's decision in *Peart* had its desired effect. The State of Louisiana increased funding for public defenders by \$5 million and created a task force to study the situation.¹¹⁶ The progress was short-lived however. Judges presented with clearly guilty defendants have been reluctant to enforce the *Peart* rule and possibly set guilty criminals free.¹¹⁷ More importantly, the rebuttable presumption of ineffective assistance of counsel has not encouraged the legislature to enact further funding increases, thereby allowing compensation rates to stagnate.¹¹⁸ As one of the dissenting Justices in *Peart* complained, the court's decision "failed to set forth any standards to give the legislative and executive branches guidance in bringing the system into constitutional compliance."¹¹⁹

Thus, although the legislature provided some additional funding in the wake of the *Peart* decision, in subsequent years the funding did not keep up with inflation or continually increasing caseloads,¹²⁰ and Louisiana's

¹¹¹ *State v. Peart*, 621 So. 2d 780, 784 (La. 1993); see also *GIDEON'S BROKEN PROMISE*, *supra* note 5, at 2073 (discussing rebuttable presumption of ineffective assistance of counsel).

¹¹² *Peart*, 621 So. 2d at 790.

¹¹³ *Id.* at 791.

¹¹⁴ *Id.* at 792.

¹¹⁵ *Id.* at 791.

¹¹⁶ Pascal F. Calogero, Jr., *The State of Indigent Defense in Louisiana*, 42 LA. B.J. 454, 457-58 (1995).

¹¹⁷ As one Louisiana appellate judge has remarked, releasing defendants under ineffective assistance of counsel theories "likely will result in heightening public distrust in the bench and bar. Releasing defendants, who potentially represent a threat to the public, to solve an ill in the system is a remedy far too risky to embrace when alternative solutions are available." Cooks & Fontenot, *supra* note 46, at 213.

¹¹⁸ See *id.* at 209 (describing the local funding of indigent defense more than a decade after *Peart* and explaining that the State of Louisiana contributes less than \$2 per case); Wright, *supra* note 9, at 251 ("The heartening victory in the *Peart* litigation unraveled in less than a decade.").

¹¹⁹ *Peart*, 621 So. 2d at 795 (Dennis, J., dissenting).

¹²⁰ *Effectively Ineffective*, *supra* note 12, at 1738; see also Wright, *supra* note 9, at 249 (describing judicial solutions such as the one in *Peart* as "temporary").

indigent defense system is still in tatters.¹²¹ A trial court recently “expressed its frustration with the continued lack of funding and the fact that it faces some version of the same funding dilemma in virtually every criminal case before it.”¹²² The trial court ordered the parish to set aside hundreds of thousands of dollars for indigent defense, but the Louisiana Supreme Court reversed, holding that the courts lacked authority to issue such an order to the parishes.¹²³ The Supreme Court was left once again to threaten the legislature, this time suggesting that if adequate funding is not appropriated, defendants will be given the option to file motions to halt the prosecution and possibly go free.¹²⁴ Much like the rebuttable presumption of ineffective assistance of counsel, the Court’s new threat to allow trial judges to halt prosecutions is a flawed remedy because it shifts the burden onto trial judges to analyze individual cases, rather than creating a sufficient incentive for the legislature to act.

A similar problem bedeviled an otherwise promising decision by the Oklahoma Supreme Court. In *State v. Lynch*, the court relied on its “inherent power to define and regulate the practice of law” to hold that a cap on fees for appointed counsel violated the Oklahoma Constitution.¹²⁵ The court called on the legislature to address the problem, but in the meantime it increased fees for appointed counsel to be equivalent to the hourly rate for prosecutors.¹²⁶ As in Louisiana, the Supreme Court’s action initially led the legislature to appropriate more funding and to create a supervisory indigent defense board.¹²⁷ Shortly thereafter, however, Oklahoma moved to a low-bid contractor approach to indigent defense, and funding for the indigent defense board began to dry up.¹²⁸ As one observer remarked: “[W]hile the [*Lynch*] decision inspired change, it was unable to sustain it.”¹²⁹

The same problem occurred after a promising decision by the Supreme Court of Arizona. In *State v. Smith*, the defendant contended that his appointed lawyer, a contract attorney who was responsible for all of the

¹²¹ Beane, *supra* note 26, at *6; IN DEFENSE OF PUBLIC ACCESS TO JUSTICE, *supra* note 26, at v. Matters have been made even worse by Hurricane Katrina. See Gwen Filosa, *Judge Blasts Financing for Indigent Defense*, TIMES-PICAYUNE (NEW ORLEANS), June 24, 2006, at 1, available at LEXIS, News Library, NOTPIC File (describing how Hurricane Katrina caused more problems for an already overburdened system); Leslie Eaton, *Judge Steps in for Poor Inmates Without Justice Since Hurricane*, N.Y. TIMES, May 23, 2006, at A1, available at LEXIS, News Library, NYT File (“The criminal justice system in New Orleans was notoriously troubled long before the storms, and if anything, it is now worse.”).

¹²² *State v. Citizen*, 898 So. 2d 325, 329 (La. 2005).

¹²³ *Id.* at 336.

¹²⁴ *Id.* at 338.

¹²⁵ *State v. Lynch*, 796 P.2d 1150, 1163 (Okla. 1990).

¹²⁶ *Id.* at 1161. The Court also required compensation for reasonable overhead expenses. *Id.*

¹²⁷ *Effectively Ineffective*, *supra* note 12, at 1739.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1740.

city's cases, was so overwhelmed that he did not have more than a few hours to devote to a burglary and sexual assault case.¹³⁰ The court looked to the guidelines recommended by the National Legal Aid and Defender Association—no more than 150 felonies or 300 misdemeanors per year—and found Smith's lawyer to be well in excess of those standards.¹³¹ Without finding that Smith in particular had received ineffective assistance of counsel, the court held that the lawyer's caseload was excessive and unconstitutional under the United States and Arizona Constitutions.¹³² The court further stated that for future defendants represented by overburdened, low-bid contract lawyers, there would be a presumption that the defendant received ineffective assistance of counsel, which the government would have the burden of disproving.¹³³

Like *Peart* and *Lynch*, the Arizona Supreme Court's decision in *Smith* was initially successful. The county adopted a new system for hiring counsel and it began to pay them more.¹³⁴ As with the other cases, however, the benefits were ephemeral, with caseloads rising and attorney compensation remaining stagnant in subsequent years.¹³⁵

To be sure, there have been cases in which litigation has succeeded in improving indigent defense. In particular, a handful of courts have held statutory caps on appointed counsel's fee recovery to be unconstitutional.¹³⁶ Yet, the larger story is that many litigation efforts have proven unsuccessful, and that even the cases lauded as "successful" efforts have ultimately proven to be failures.¹³⁷

¹³⁰ *State v. Smith*, 681 P.2d 1374, 1378–79 (Ariz. 1984).

¹³¹ *Id.* at 1380. Of the systemic efforts to improve indigent defense funding, the *Smith* decision is the closest parallel to the proposal I advocate in Parts IV and V because it tied funding to case limits and imposed a default rule in the absence of legislative action. The *Smith* approach suffered from two flaws that should not plague my proposal: (1) it offered no way to measure continued compliance with caseload standards; and (2) it embraced a case-by-case inquiry for ineffective assistance of counsel, rather than a bright-line rule, thus putting the onus on trial judges rather than the legislature. For a discussion of these problems, see *infra* Part V.C.

¹³² *Smith*, 681 P.2d at 1381.

¹³³ *Id.* at 1384.

¹³⁴ *Effectively Ineffective*, *supra* note 12, at 1741.

¹³⁵ *Id.*

¹³⁶ *E.g.*, *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986); *State v. Robinson*, 465 A.2d 1214 (N.H. 1983). These decisions support one of the premises of this article: the best chance for ameliorating indigent defense through the courts is if the judiciary makes bright-line rulings in their traditional areas of competence, such as striking down particular statutory provisions as being unconstitutional. See *infra* Part V.C. For other smaller-scale victories, see *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989) (holding that failure to compensate attorneys for representing indigents amounts to a taking); *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987) (same). Additionally, a handful of other states have adopted legislation in an effort to improve the provision of the right to counsel. As scholars cautiously have observed, however, "[s]ince these changes are still in their infancy, their efficacy cannot easily be measured." Backus & Marcus, *supra* note 1, at 1103.

¹³⁷ There also have been thought-provoking scholarly proposals that have not been adopted by courts. For instance, Professor Richard Klein has suggested that trial judges hold a pre-trial conference to review, *inter alia*, pre-trial discovery, the number of times the lawyer has met with his client, and the

IV. RAISING THE STANDARD OF PROOF

Because prior proposals have failed to motivate legislatures to improve indigent defense funding, I suggest an alternate approach that focuses on a bright-line rule that is particularly within the province of the judiciary: a higher standard of proof. After briefly reviewing the history of the reasonable doubt standard, I argue that state courts should respond to the under-funding of indigent defense by adopting a default rule that raises the standard of proof to “beyond all doubt” for cases involving indigent defendants.

A. *The Long History of the Reasonable Doubt Standard*

Since the earliest days of American history, courts have required proof beyond a reasonable doubt to convict criminal defendants.¹³⁸ And although no specific clause of the U.S. Constitution requires proof beyond a reasonable doubt, the Supreme Court implicitly has accepted the formulation for decades.¹³⁹ Finally, in 1970, after a lower court tried to utilize a lower standard of proof in cases involving juveniles, the Supreme Court specifically held that there is a constitutional guarantee for the “accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹⁴⁰

Despite its long history, the reasonable doubt concept has not remained entirely static. Scholars have demonstrated that the language used to describe “reasonable doubt” has softened, thus arguably lowering the standard of proof.¹⁴¹ In the founding period, reasonable doubt was equated

legal issues that need to be researched. In the alternative, Professor Klein suggested that judges require lawyers to complete a written worksheet indicating what steps they have taken during the representation. Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 580–82 (1988). As Professor Klein recognized, the likely reason this proposal has not been adopted is that holding such conferences or reviewing worksheets would be time-consuming and would “meet resistance in an already over-burdened system.” *Id.* at 581.

¹³⁸ See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1190 (2003) (noting the use of the “beyond a reasonable doubt” standard in the trial of British soldiers involved in the Boston Massacre).

¹³⁹ See *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958) (“Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.”).

¹⁴⁰ *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁴¹ See Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 52 (2005) [hereinafter Lillquist, *Absolute*] (“[B]oth the standard of proof stated by judges and the standard of proof applied by jurors appear to be weaker than what was understood to be required by proof beyond a reasonable doubt at the beginning of the nineteenth century.”) (emphasis omitted); Sheppard, *supra* note 138, at 1239 (“Over time, the loss of our understanding of moral certainty and the increasing

with "moral certainty."¹⁴² Today some courts continue to instruct juries that they must find the defendant guilty to a moral certainty, but the Supreme Court has frowned on such instructions.¹⁴³ In the absence of clear guideposts from the Supreme Court, different jurisdictions have embraced varied terminology to instruct juries on the meaning of reasonable doubt.¹⁴⁴ Yet, while there has been great variation (and difficulty) in defining reasonable doubt, the use of the standard itself is largely uncontroversial.¹⁴⁵

While the reasonable doubt standard remains largely unquestioned, a handful of commentators have suggested imposing a higher "no doubt" standard (or some variation) in capital cases.¹⁴⁶ This "no doubt" standard was recently endorsed by the Massachusetts Governor's Council on Capital Punishment, which had been empanelled to recommend a fair and accurate death-penalty system.¹⁴⁷ A primary justification for the "no doubt" standard in capital cases is that it would serve to minimize the number of wrongful convictions.¹⁴⁸ As explained below, a higher standard

acceptance of articulability as a basis for reasonableness underscored a great shift in thinking about judgment by a juror. The courts have moved the jurors' goal from a vote for the state if the state can convince them of a fact to a vote for the state unless the defense can convince them of a certain type of doubt.").

¹⁴² *Victor v. Nebraska*, 511 U.S. 1, 11 (1994); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 111 (1999).

¹⁴³ *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam); see also *Victor*, 511 U.S. at 37 (Blackmun, J., concurring in part and dissenting in part) (criticizing the "moral certainty" terminology because it could lead jurors "to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards").

¹⁴⁴ See Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 301-17 (2003) (discussing the different definitions courts use and that some courts do not define reasonable doubt at all).

¹⁴⁵ See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 112-17 (2002). "The complete lack of controversy that surrounds the reasonable doubt standard implies that we are pretty happy with the way the standard operates." *Id.* at 190-91.

¹⁴⁶ See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 397-99 (2002), available at <http://www2.law.columbia.edu/brokensystem1/report.pdf>. For various articles noting the imposition of a higher "no doubt" standard see generally Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25 (1996); Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065 (2003); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001); Lillquist, *supra* note 141; Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 CHI. KENT L. REV. 1359 (2003).

¹⁴⁷ See MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT 22 (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04+MassDPRReportFinal.pdf> ("At the sentencing stage of the capital trial, as a prerequisite to the imposition of the death penalty, . . . the jury should be required to find that there is 'no doubt' about the defendant's guilt of capital murder."). For a discussion of the problem associated with raising the standard of proof in capital cases, see the thoughtful commentary by the Council's co-chairman and noted death-penalty scholar. See Joseph L. Hoffmann, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 573 (2005) ("[A]ny further shifting of the balance in favor of the capital defendant inevitably will produce even more 'false negatives' than it will eliminate 'false positives.'").

¹⁴⁸ Other commentators have argued for less drastic revisions of the standard of proof in criminal

of proof to convict indigent defendants could also reduce the risk of wrongful convictions, while at the same time serving to create incentives to increase funding for indigent defense.

B. *The Argument for Raising the Standard of Proof in Indigency Cases*

1. *The Proposal*

The proposal to raise the standard of proof to convict indigent defendants calls for action at the state-court level. When litigators challenge indigent defense systems they often ask courts to make factual findings or legal conclusions that the indigent defense systems are unconstitutionally under-funded.¹⁴⁹ For courts that have made such a finding, the next step is to determine a remedy. Rather than ordering the legislature to provide more funding or subjecting the system to a structural injunction, courts could impose a blanket rule raising the standard of proof to "beyond all doubt" for all indigent defendants prosecuted from that day forward. In recognition of the fact that indigent defendants receive far less funding (and far less attorney competence) to support their defenses, the government would face a tougher standard to convict them. As I lay out below in Part V, the higher standard of proof would be a default rule that the legislature could opt out of by providing adequate funding.¹⁵⁰

2. *Why a Higher Standard of Proof Passes Constitutional Muster*

Critics might complain that a higher standard of proof is unconstitutional because the Supreme Court explicitly recognized in 1970 that the Constitution requires the proof beyond a reasonable doubt standard in criminal cases. This objection is without merit though. In constitutionalizing the reasonable doubt standard, the Court adopted a

cases. Professor Lawrence Solan, while not advocating the abandonment of the reasonable doubt standard, has argued that it does not focus sufficiently on the government's burden of proof, therefore making it easier for jurors to convict defendants in weak cases that should probably result in acquittals. Solan, *supra* note 142, at 132. Accordingly, he suggests that courts should re-direct focus to the government's case by instructing jurors to be "firmly convinced," rather than focusing on doubts that support the defendant. *Id.* at 145-47. Similarly, the Federal Judicial Center has proposed defining proof beyond a reasonable doubt as proof that leaves you "firmly convinced of the defendant's guilt." FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987). This standard has been endorsed by such prominent judges as Justice Ruth Bader Ginsburg and Judge Jon O. Newman. See *Victor v. Nebraska*, 511 U.S. 1, 26-27 (1994) (Ginsburg, J., concurring in part and concurring in the judgment); Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. REV. 979, 991 (1993).

¹⁴⁹ See, e.g., *Quitman County v. State*, 910 So. 2d 1032, 1039, 1047-48 (Miss. 2005) (rejecting plaintiff's claim that indigent defense was under-funded).

¹⁵⁰ In certain respects, the proposal resembles the inverse of certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996, which encourages states to opt into a more favorable procedural posture by providing funding for counsel during state habeas corpus proceedings. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 2261, 110 Stat. 1221-22 (1996). I am grateful to Toby Heytens for making this point to me.

floor, not a ceiling.¹⁵¹ There is nothing in the United States Constitution to prohibit judges from requiring a higher standard of proof in cases where they believe it is necessary.¹⁵² Indeed, the Constitution does not explicitly provide any particular standard of proof, and the Court imposed the reasonable doubt standard to satisfy due process guarantees. Given that it is now clear that indigent defendants are not receiving adequate protections from their appointed counsel at trial, the Due Process Clause could be construed to require a heightened standard of proof. Moreover, even if state judges did not believe that the United States Constitution served as a basis for imposing a higher standard of proof, they easily could rely instead on their state constitutions because there is no requirement that state constitutions be interpreted co-terminously with the Constitution of the United States.¹⁵³

Furthermore, the proposal does not run afoul of the Equal Protection Clause. While wealthy defendants (who retain their own counsel) will be treated less favorably than poor defendants—by being subjected to a lower standard of proof—the Supreme Court has held that wealth is not a suspect classification.¹⁵⁴ Thus, the rule would be subjected to rational basis scrutiny and would survive review so long as there is a legitimate governmental purpose and the rule is rationally related to that purpose.¹⁵⁵ Ensuring that indigent defendants are adequately represented and receive a fair opportunity to demonstrate their innocence is certainly a legitimate governmental purpose. And increasing the burden of proof to convict those defendants is rationally related to that goal.

Not only would the “beyond all doubt” standard be constitutional, it would also make sense as a matter of remedies jurisprudence. Notably, the proposal does not require courts to impose a higher standard of proof in all cases or in a vacuum. Rather, the “beyond all doubt” formulation would not be imposed until a state court first makes a finding that an indigent defense system has been unconstitutionally under-funded. Courts long have embraced more flexibility when remedying long-term misconduct.

¹⁵¹ See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 585 (2005) (explaining that “the Constitution acts as a floor that limits certain state experimentation”).

¹⁵² See Sand & Rose, *supra* note 146, at 1362–63 (explaining that courts have long recognized, consistent with the Constitution, various standards of proof and that “the more important the interest, the more certainty required in the accuracy of the adjudication”).

¹⁵³ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (noting that state courts often extend, via state constitutions, greater rights than the federal Constitution affords).

¹⁵⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁵⁵ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487–88, 491 (1955) (applying rational basis review). Furthermore, while it is true that the great majority of indigent defendants are African-American, and thus white defendants will be disproportionately saddled with the less rigorous reasonable doubt standard, disparate effects, by themselves, are not enough to nullify a governmental action. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). Rather, there must be a discriminatory purpose, and none is demonstrated here.

For instance, in affirmative action cases, courts are far more likely to permit racial preferences if there has been a history of discrimination than if the preferences were adopted in the abstract.¹⁵⁶ The same approach applies here. The proposal to raise the standard of proof would not be advanced because courts think it is an abstractly useful idea, but rather to remedy the long-standing problem of under-funding indigent defense in particular jurisdictions.

C. *Anticipating Objections to a Higher Standard of Proof*

While a proposal to raise the standard of proof to convict indigent defendants is constitutional, there are serious objections that can be raised. First, as Professor Erik Lillquist recently has argued in the context of death-penalty cases, there is reason to believe that "the existing reasonable doubt jury instructions have almost no impact on juror's [sic] decision-making."¹⁵⁷ Studies demonstrate that a substantial percentage of jurors already wrongly perceive a higher standard of proof than the reasonable doubt standard requires.¹⁵⁸ By contrast, other jurors mistakenly apply a lower standard of proof—even after being read the reasonable doubt instruction.¹⁵⁹ More alarmingly, studies demonstrate that jurors might be less likely to convict under the lower clear and convincing standard of proof than under the reasonable doubt formulation.¹⁶⁰ And still more social science research demonstrates that jurors simply do not understand substantial portions of what they are being told at all.¹⁶¹ Moreover, when

¹⁵⁶ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–09 (1989) (holding that a governmental plan was not narrowly tailored to remedy discrimination because the existence of past discrimination was unclear); *United States v. Paradise*, 480 U.S. 149, 166 (1987) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (authorizing busing to remedy discrimination by explaining that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad").

¹⁵⁷ Lillquist, *Absolute*, *supra* note 141, at 47, 78–84.

¹⁵⁸ See, e.g., Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401, 402, 414 (1990) (studying 600 actual jurors and finding that a majority of "uninstructed jurors revealed a belief that any doubt (or, alternatively, anything less than 100% certainty) is equivalent to reasonable doubt. Reasonable doubt instructions apparently did little to improve jurors' understanding that absolute certainty is not required") (citation omitted).

¹⁵⁹ See Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 98 fig.13 (1998) (finding that nearly 10% of recent criminal jurors believed the burden of proof on prosecutors was "more likely than not" and that another 6% were "not sure" whether that was the correct standard of proof).

¹⁶⁰ See Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 162, 165 (1985) (finding, *inter alia*, that California jury instructions led sample jurors to convict more easily under the reasonable doubt standard than the clear and convincing evidence standard); L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 218–19 (finding the same phenomenon present with a "balance of probabilities" standard vis-à-vis reasonable doubt).

¹⁶¹ See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12

we consider that jurors come to court with preconceived notions based on what they have read in the newspaper or watched on "Law and Order," a "beyond all doubt" instruction would have a lot of baggage to overcome.¹⁶² Accordingly, critics have some basis to contend that imposing a higher standard of proof might have limited effect.¹⁶³

However, while the social science research is startling, it does not demonstrate that a "beyond all doubt" instruction would be ineffective. Indeed, any competent defense lawyer would harp on the instruction during her closing argument and point out that it is higher than the traditional reasonable doubt standard.¹⁶⁴ As even a skeptical observer has conceded, "the very novelty of the no-doubt standard will make it more salient and thus perhaps more likely to be heard and/or understood by the jurors."¹⁶⁵

Assuming that a higher standard of proof would have an effect on jurors' decisions, critics could next complain that the standard will result in setting free more guilty defendants.¹⁶⁶ There is some merit to this objection because freeing the guilty carries a high cost.¹⁶⁷ If the higher standard of proof resulted in droves of guilty defendants going free and only a handful of innocent defendants (who would otherwise have been

(1982) (concluding that jurors in some states understand only about half of the legal instructions presented by a judge); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One*, 52 LAW & CONTEMP. PROBS. 205, 219 (1989) (determining that jurors understood about half of the instructions they received at trial); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992) (same); Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 179-81 (1982) (evaluating jurors' comprehension-levels when given no instructions, general instructions and specific instructions); see also Lillquist, *supra* note 145, at 112-17 (discussing sources demonstrating that jurors do not perceive reasonable doubt to be a "high, fixed standard").

¹⁶² See Lillquist, *supra* note 141, at 82 (noting that jurors "connect to the courtroom with their own preconceptions about what the standard of proof in criminal case should be . . .").

¹⁶³ See *id.* at 47 (contending that a higher burden of proof would have "little or no effect in real world cases"). But see Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 291 (1976) (studying mock jurors and finding that a less rigorous description of reasonable doubt led to higher conviction rates, while a more stringent definition of reasonable doubt led to fewer convictions).

¹⁶⁴ The very premise of this Article casts some doubt on this point, however, because we cannot assume that unimpressive or over-worked appointed attorneys will do an adequate job during closing arguments. See Lillquist, *Absolute*, *supra* note 141, at 80 n.138 (noting that attorneys are motivated to emphasize instructions that favor their clients and that incompetence plays a role in closing arguments). The counter-argument is that even the worst criminal defense attorneys can point out that the standard of proof is the very high "beyond all doubt" standard.

¹⁶⁵ *Id.* at 84 n.153.

¹⁶⁶ Cf. *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) ("If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent.").

¹⁶⁷ See Lillquist, *Absolute*, *supra* note 141, at 66 ("Advocates who wish to justify a higher standard of proof [in capital cases] . . . need to be clearer about why the harms are so much higher in capital cases that they justify a much higher standard of proof.").

convicted) being exonerated, the benefits might not outweigh the costs. Yet, the calculus is difficult to analyze because there is no data on the number of guilty defendants who would go free under a beyond all doubt standard, nor on the number of innocent defendants who would be saved from wrongful convictions.

However, if the social science evidence discussed above is to be believed, the standard of proof, while having some effect on jurors' decision-making, may not have a dramatic effect.¹⁶⁸ Accordingly, the number of wrongful exonerations may well be low. Conversely, in assessing the benefits of the higher standard of proof, we must consider not only exonerations linked to the beyond all doubt standard, but also the systemic benefits that will result from states opting out of the higher burden of proof. As explained below in Part V, the beyond all doubt standard would be a default rule that legislatures could opt out of by ensuring adequate indigent defense funding. Although it is unclear whether the higher standard of proof would make prosecutors' jobs dramatically more difficult, that will certainly be the perception by the public and by most prosecutors. Accordingly, legislatures will be under pressure to opt out of the rule by properly funding their indigent defense systems. And by properly funding indigent defense, legislatures will improve representation for indigent defendants, thus reducing the risk of wrongful convictions, while conferring other benefits on the criminal justice system.¹⁶⁹

Third, critics might ask why indigent defense is special. If a higher standard of proof is to be applied in indigent defense cases, then why not in capital cases, or complicated securities fraud prosecutions, or cases in which there is no eyewitness or no DNA evidence?¹⁷⁰ Put simply, why should indigent defendants be afforded a more beneficial standard than other defendants?¹⁷¹

There are two possible responses. First, indigent defense systems are in such crisis that additional procedural regulation is merited. While securities fraud cases might be more complicated or death-penalty cases might be more important, those defendants are already protected in other

¹⁶⁸ See *supra* notes 157–63 and accompanying text (discussing objections to a higher standard of proof and empirical evidence of jurors' misunderstanding of the current standard of proof).

¹⁶⁹ By "other benefits" I mean to suggest that there is more at stake than simply convicting the guilty and acquitting the innocent. For instance, a properly funded judicial system confers greater legitimacy on the conviction and imprisonment of individuals, demonstrating that the United States is an advanced democracy that takes criminal defendants' rights seriously.

¹⁷⁰ See Newman, *supra* note 148, at 998–1000 (arguing for "heightened scrutiny" in cases involving eyewitness testimony and uncorroborated testimony of accomplices because of the heightened risk of wrongful conviction, not "simply to tilt the balance of criminal justice a shade more favorably toward defendants").

¹⁷¹ See Lillquist, *supra* note 141, at 70 (questioning why a higher burden of proof would be applicable in capital cases, but not other criminal cases).

ways. There are already a myriad of procedures in place in death-penalty cases.¹⁷² Defendants in complex white-collar cases are ahead of the game because such cases are harder to investigate and prove at trial and because such defendants can almost always afford to hire private counsel.¹⁷³ By contrast, without a higher standard of proof, there is little to protect indigent defendants represented by overworked or incompetent government-funded lawyers. No defendant can receive adequate representation when his lawyer has nearly 200 other open cases and no time to devote to preparing a defense. Second, the sheer magnitude of the problem merits special attention. Close to eighty percent of criminal defendants are indigent.¹⁷⁴ In jurisdictions where indigent representation is in crisis, that means that up to four out of five defendants are being denied a fair shake. Such terrible numbers merit additional attention from the judiciary.

Finally, critics might complain that imposing a higher standard of proof would not address the core problem with the under-funding of indigent defense, because the vast majority of criminal cases are plea bargained and never proceed to trial where the standard of proof would matter. This objection is without merit, however, because imposing a "beyond all doubt" standard of proof would change the parameters of the plea bargaining process. Defendants who are alerted to the heightened standard of proof will be more likely to expect exoneration at trial and therefore less likely to plea bargain.¹⁷⁵ A higher standard of proof therefore would force prosecutors to offer more favorable plea bargains or to take more cases to trial. Accordingly, the heightened standard of proof would have a significant systemic impact. As explained below, that impact would spur improvement in indigent defense funding.¹⁷⁶

¹⁷² Of course, scholars have argued convincingly that the extra procedural rules in death-penalty cases offer little actual protection to defendants. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) ("the [Supreme] Court's chosen path of death penalty regulation . . . creates an impression of enormous regulatory effort but achieves negligible regulatory effects.").

¹⁷³ See JEROLD H. ISRAEL ET AL., *WHITE COLLAR CRIME: LAW AND PRACTICE* 9 (2d ed. 2003) ("The white collar crime defense attorney, in contrast, enters the picture substantially before the government has completed its investigation and sometimes before the investigation has even begun . . . Counsel's first line of defense accordingly is 'information control,' which entails keeping documents away from and preventing clients and witnesses from talking to government investigators, prosecutors, and judges." (citing KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1983))).

¹⁷⁴ See Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 583 (1995-1996) ("Estimates of the percentage of criminal defendants represented by appointed counsel . . . generally hover around seventy-five to eighty percent.").

¹⁷⁵ See Bibas, *supra* note 77, at 2499 ("If one side overestimates the chances of winning at trial, it is likely to make unreasonable settlement offers and to reject reasonable offers.").

¹⁷⁶ See *infra* Part V.C.

V. THE DEFAULT RULE SOLUTION

Having argued in favor of raising the standard of proof to deal with the crisis in indigent defense funding, it is prudent to leave a wide escape hatch that encourages the legislatures to opt out of the judicial remedy. Courts have made clear that they do not want to be in the business of supervising indigent defense systems or ordering particular sums of money to be spent, and legislatures no doubt agree.¹⁷⁷ Whenever possible, it is preferable to encourage legislators to take a policymaking rule, rather than relying on courts. Accordingly, designing a default rule that allows legislatures to control their destiny by opting out of the “beyond all doubt” standard of proof is preferable.

A. Two Options for Opting Out of the Higher Standard of Proof

The default rule would operate as follows. In the first indigent defense case of the calendar year, a state court, upon motion by the defendant, would consider whether the indigent defense system is unconstitutionally under-funded.¹⁷⁸ If the court were to find the system to be under-funded, it then would impose a remedy whereby all indigent defendants could be convicted only upon proof beyond all doubt. Assuming that the trial court’s decision were upheld on appeal, legislatures thereafter would have the option to opt out of the higher standard of proof by demonstrating either that: (1) the caseloads of government-funded defense lawyers do not exceed the recommended guideposts set by the National Advisory Commission on Criminal Justice Standards and Goals, or (2) the funds appropriated for indigent defense are equal to the funds appropriated for prosecutors’ offices.

1. Keeping Caseloads Under Control

The National Advisory Commission on Criminal Justice Standards and Goals has recommended that defense counsel not handle more than 150

¹⁷⁷ See Wright, *supra* note 9, at 252 (“Courts also shy away from remedies that dictate to the legislature a method of addressing a legal violation, particularly when they require the legislature to appropriate public money.”). Professor Stuntz has argued that if the judiciary ordered money to be spent on indigent defense “[n]o judicial micromanagement would be necessary.” Stuntz, *supra* note 8, at 70. Courts and legislatures do not appear to agree, however.

¹⁷⁸ An alternative, though less attractive, approach would be for a criminal defendant to file a civil action seeking a declaration that the indigent defense system is unconstitutionally under-funded and requesting that the standard of proof be raised to remedy the problem. Such an approach would be similar to the continuing structural injunctions issued in cases involving school desegregation and prison conditions. See, e.g., Schlanger, *supra* note 17, at 552–53 (discussing injunctions and desegregation). The declaratory judgment route is less attractive because it is at least one-step removed from the criminal case. First, overworked public defenders and appointed lawyers are less likely to take the added step of filing a separate civil action. Second, civil actions are more likely to become bogged down in time-consuming discovery, thus delaying prompt improvements. Third, a civil action will often be heard by a judge that does not handle many (or even any) criminal cases, thus creating a steep and time-consuming learning curve for the court.

felony cases or 400 misdemeanor cases per year.¹⁷⁹ This guidepost is widely accepted and has been endorsed by the National Legal Aid Defender Association and cited approvingly by the American Bar Association.¹⁸⁰

To bring caseloads within the National Advisory Commission's guideposts, legislatures would have a number of options. They could appropriate more funding, thus making it possible for public defender offices to hire adequate staff as well as enabling courts to pay higher rates that would attract greater numbers of appointed counsel. Another possibility would be for legislatures to keep indigent defense funding static while providing incentives for prosecutors to reduce the number of criminal charges they bring, thus reducing defense caseloads. Alternatively, legislatures could decriminalize high volume offenses (such as drug possession), which would reduce the number of criminal cases and, in turn, the need for defense counsel. In a political world that prizes being tough on crime, these latter solutions seem implausible. In all likelihood, caseload guideposts with some teeth would encourage legislatures to (grudgingly) appropriate more money for indigent defense so that more defense lawyers could be hired.

Once a court has tied the standard of proof to caseload limits, the next problem becomes ensuring that there is compliance with the guideposts. The judiciary has neither the time, the resources, nor the ability to adequately analyze entire indigent defense systems on a regular basis. And courts will not want to be in the business of holding numerous fact-finding hearings to determine whether lawyers are actually following the caseload guideposts. Fortunately, many states already have organizations with the time and expertise to review defense lawyers' caseloads: indigent defense commissions.

More than three-quarters of the states have created commissions or boards to recommend best practices for the defense of the poor.¹⁸¹ The members of the indigent defense commissions are typically appointed by the Governor, the state supreme court, and the legislature, and they come from a wide array of the community, including the judiciary, the executive branch, the criminal defense bar, and sometimes the business world.¹⁸²

¹⁷⁹ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 34, at Standard 13.12.

¹⁸⁰ See *supra* notes 35–36 and accompanying text. While the National Advisory Commission caseload standards are widely cited, they are far from perfect. They do not appear to have been derived from any empirical formula, and instead approximate a "best guess" of what reasonable caseloads should be. Nevertheless, in the absence of more authoritative standards, I rely on them as the best existing source.

¹⁸¹ See generally THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005 (2005) (describing the commissions' makeup and responsibilities). For jurisdictions without indigent defense commissions, the default rule would provide a strong incentive to establish such commissions.

¹⁸² *Id.*

Although many of the commissions lack the budget to effect much change, some of them do succeed in improving funding, reducing caseloads, and creating standards for indigent defense. There is near universal consensus that such indigent defense commissions are a force for good.¹⁸³ Accordingly, they would be well-suited to making an objective determination whether caseloads are in compliance with the National Advisory Commission guidelines, filling a role akin to a special master.¹⁸⁴

Here is how the commission would work. During the year, the commission could study caseload compliance and then—perhaps on the anniversary of the court's decision finding the indigent defense system to be under-funded—the commission could certify in writing whether there has been compliance with the caseload limits. If there has been compliance, the court would then return the standard of proof to the reasonable doubt standard, where it would remain for the next year. The commission would then repeat its inquiry the following year, and report to the court again. Should the commission find that the jurisdiction has fallen out of compliance with the caseload standards, the court would then reinstate the higher standard of proof, which would remain intact until another year had expired.¹⁸⁵

2. Funding Parity

In addition to caseload compliance, courts could establish funding parity as a method to opt out of the higher burden of proof. Put simply, if legislatures provide the same funding for indigent defense counsel that they do for prosecutors, then the higher burden of proof can be eliminated.¹⁸⁶ Yet, for funding parity, the devil is in the details. Legislatures do not simply appropriate \$100 million for prosecutors and \$70 million for indigent defense and call it a day. Rather, the investigation, prosecution, and defense of criminal activity are funded in a host of manners through numerous budget lines. Money is appropriated

¹⁸³ See Malia Brink, *Indigent Defense*, CHAMPION, May 2005, at *30, *31, available at Lexis, News Library, CHAMP File (explaining that indigent defense commissions serve to establish eligibility and qualification requirements, attorney performance standards, while managing the indigent defense system).

¹⁸⁴ See *Effectively Ineffective*, *supra* note 12, at 1750 (suggesting that courts appoint special masters to order funding and review caseloads).

¹⁸⁵ One downside of relying on a numerical measurement such as caseloads is that it can be manipulated through other outlets. For example, judges who want to leave the conventional standard of proof intact might be more aggressive in asking defendants if they want to waive their right to counsel. In the alternative, judges might be more rigorous in ensuring that defendants meet the statutory definition of indigency before appointing free lawyers. See Gershowitz, *supra* note 151, at 583–84 (discussing the extremely low-income levels statutorily required for the appointment of a free lawyer in many states). I am grateful to Ron Wright for raising these points.

¹⁸⁶ See Stuntz, *supra* note 8, at 70–71 (“Unlike prison cases, testing compliance with judicial decrees [to provide funding for defense lawyers] would seem to be easy: Either the required appropriations were made or they weren’t.”).

not only for prosecution and public defender offices, but also for police departments, crime labs, appointed counsel, and sheriff's departments. And to make matters more complicated, many jurisdictions receive supplemental funding from federal, state, and local governments.

Moreover, prosecutors and defense lawyers are not in identical postures. Prosecutors must handle all criminal activity, whereas public defenders or appointed counsel deal only with the roughly eighty percent of criminal defendants who cannot afford private lawyers.¹⁸⁷ In that respect, there is a need for greater funding for prosecutors. At the same time however, it is prosecutors, not government-funded defense lawyers, who are likely to benefit from extra budget lines such as the separate funding of police (who pursue leads for prosecutors)¹⁸⁸ and crime labs, which not only investigate but also provide crucial trial support to prosecutors in the form of testifying witnesses and expert reports.¹⁸⁹ Moreover, it is prosecutors, not defense lawyers, who are likely to receive additional funding from federal, state or local governments.¹⁹⁰

In the end, the best we can hope to achieve is rough parity, whereby the extra cases handled by prosecutors (but not government-funded defense lawyers) are offset by the extra resources that prosecutors receive from separate budget lines. As such, and once again in the interest of simplicity, parity should entail equal funding between prosecutors' offices on the one

¹⁸⁷ HARLOW, *supra* note 25, at 1.

¹⁸⁸ While prosecutors benefit from investigative work conducted by police agencies, it would be a gross overstatement to suggest that prosecutors have control over those agencies. For an analysis of the complexity of these relationships, see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751-53 (2003).

¹⁸⁹ See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 395 (1995) ("Funding for the support services essential to the preparation of the prosecutor's case—police investigation, FBI and local crime labs, and state and local forensic experts—does not come out of the budget for the prosecutor's office, while analogous expenses by the defense must be paid out of the money provided for defense services.").

¹⁹⁰ See *GIDEON'S BROKEN PROMISE*, *supra* note 5, at 42 ("[V]irtually no federal funds are allocated for defense services in the fifty states."); CAROL DEFRAANCES, U.S. DEP'T OF JUSTICE, *PROSECUTORS IN STATE COURTS* 4 (2001) ("Over a third of the [prosecutors] offices indicated that some portion of their budget came from grant funds."); IN DEFENSE OF PUBLIC ACCESS TO JUSTICE, *supra* note 26, at 54 (explaining that a Louisiana prosecutor's office funded an "\$850,000 renovation, including all new computers with high-speed internet access" primarily through federal grants, whereas the indigent defense office received no comparable funding and was in "disarray"); VIRGINIA REPORT, *supra* note 4, at 35 (noting that "[m]any Commonwealth's attorney offices receive supplemental funds from local governments . . ." whereas "just two public defender offices in the state receive local support"); WALLACE, *supra* note 4, at 17 ("Congress appropriated \$100 million for fiscal year 2001 to allow states to hire 'community prosecutors.' Though the amounts of proposed federal support are very substantial, the proposals never include matching funds for the constitutionally mandated provision of legal representation services in the new cases which will be filed by the new prosecutors."). To make up for the lack of funding for indigent defense, many jurisdictions have turned to recoupment and application fees that require indigent defendants to fund their appointed lawyers, at least in part, either before or after their cases are resolved. See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2047 (2006) (explaining that, often against the will of their members, defense organizations, support recoupment and application fees out of budgetary and political necessity).

hand and the amount spent on public defenders' offices and appointed counsel on the other hand.¹⁹¹ At the granular level, this should mean identical salaries for public defenders and district attorneys. At the macro level, it should mean identical appropriations for prosecution funding and defense funding.¹⁹²

B. *Would the Legislature Opt Out of the Default Rule?*

A default rule that raises the standard of proof in the absence of legislative action will create a vastly better incentive structure than prior judicial decisions that have attempted to improve indigent defense on a case-by-case basis. Prosecutors will see the beyond all doubt standard of proof as a threat to their ability to attain convictions, and they will pressure legislators to take whatever steps are necessary to eliminate the higher standard of proof. And even in the absence of such pressure, legislatures acting out of self-interest will want to take credit for removing an undesirable legal rule that will hinder the incarceration of criminals.

1. *Prosecutors' Incentives to Lobby for Opting Out of the Default Rule*

First and quite simply, no litigator wants to lose.¹⁹³ Prosecutors, perhaps even more so than civil litigators, are aggressive lawyers who value their reputations, believe in their cause, and want to win.¹⁹⁴ Prosecutors will likely view a higher standard of proof in eighty percent of their cases as unfairly stacking the deck against them. Thus, in the abstract alone, prosecutors likely will lobby the legislature to remove what they see as an injustice.

More importantly, the incentive for prosecutors to lobby the legislature goes beyond mere philosophical objections. Most district attorneys are elected and must answer to the voters.¹⁹⁵ In their re-election campaigns, prosecutors often stress their conviction rates and highlight their high-

¹⁹¹ Although the goal is bright-line rules, courts will have to dig into at least some of the details to ensure that legislatures are not playing games with the budget to make it falsely appear that defense funding is equal to prosecutorial funding.

¹⁹² Identical funding would be easier to accomplish from a logistical standpoint if all jurisdictions used public defenders to provide indigent defense, because legislatures could then simply provide equal funding for both prosecutor and defense offices. However, a substantial number of jurisdictions assign appointed counsel on an individual basis in lieu of public defender offices. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31 (1995) (noting that some states have public defender programs and others rely on the bar for acceptance of court appointments). And given that demographics and traditions vary by jurisdiction, a one-size fits all public defender approach might not be the best option for all jurisdictions.

¹⁹³ Stuntz, *supra* note 19, at 534.

¹⁹⁴ See Bibas, *supra* note 77, at 2472 ("Prosecutors are particularly concerned about their reputations . . . [and] [l]osses at trial hurt prosecutors' public images.").

¹⁹⁵ See CAROL DEFRANCES & GREG W. STEADMAN, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS I (1996) (explaining that more than 95% of chief prosecutors are elected).

profile prosecutions.¹⁹⁶ Voters respond well to such posturing, demonstrating that their prime desire is for convictions and punishment.¹⁹⁷ A higher standard of proof endangers prosecutors' grandstanding because convictions will be harder to come by. Not only will it be harder to prove defendants guilty "beyond all doubt" at trial, but defendants who are alerted to the heightened standard of proof will be more likely to expect exoneration at trial and therefore less likely to plea bargain.¹⁹⁸ Because ninety-five percent of defendants plea bargain under the current system, any significant reduction will have serious repercussions.¹⁹⁹ Fewer guilty pleas will force prosecutors to bring more cases to trial, further diffusing already limited resources and thus making it harder to prevail at trial.²⁰⁰ In the alternative, prosecutors would have to dismiss more charges, or offer defendants better plea deals to entice them to abandon the hopes for success at trial that they developed as a result of the higher standard of proof.²⁰¹

Put simply, the result of a higher standard of proof likely will be more losses at trial, an increased number of voluntary dismissals, and fewer favorable plea bargains. That translates into less grandstanding and more negative publicity about dangerous criminals beating the rap, which in turn endangers prosecutors' re-election prospects. Accordingly, prosecutors will either need to work much harder to overcome the obstacles created by the higher standard of proof or, more likely, they will lobby to have the offending rule removed.²⁰²

And when prosecutors lobby to remove the higher standard of proof, legislatures are likely to listen. First, legislatures are inclined to give

¹⁹⁶ See Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI-TRIBUNE, Jan. 14, 1999 at N1, available at LEXIS, News Library, CHTRIB File ("[P]rosecutors recite conviction rates like boxers touting won-loss records. . .").

¹⁹⁷ See Stuntz, *supra* note 19, at 533-34.

¹⁹⁸ See *supra* note 175 and accompanying text.

¹⁹⁹ Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145 (2005).

²⁰⁰ See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1941 (1992) ("[A]djudication costs are both high and disproportionately allocated to prosecutors. Prosecutors bear the burden of proof and therefore must invest more in digging out and presenting evidence."). Indeed, as Professor Stuntz has observed, docket and funding pressures already result in "prosecutors in most jurisdictions hav[ing] more cases than they have time to handle . . ." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555 (2004).

²⁰¹ See Bibas, *supra* note 77, at 2473-75 (arguing that caseloads and many factors other than the strength of the evidence affect the amount and the generosity of plea bargains); Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 544 (2002) (examining national drug sentencing statistics and concluding, *inter alia*, that "increased [Assistant United States Attorney] caseload correlated with decreased average drug sentence[s]").

²⁰² See Stuntz, *supra* note 19, at 537-38 (explaining that prosecutors lobby for legislation that "makes it cheaper for prosecutors to do their job").

prosecutors what they want because their interests are aligned.²⁰³ Just like prosecutors, legislators want to highlight convictions and punishment that occurred on their watch. Second, legislators will listen to district attorneys' demands because they will fear the consequences. Prosecutors frequently seek higher office, and the failure of legislators to eliminate obstacles to convicting defendants will provide a good campaign issue for the district attorneys.²⁰⁴

2. Legislators' Independent Incentives to Opt Out

Even without lobbying by prosecutors, legislators will independently desire to eliminate the higher standard of proof. Because voters do not have a nuanced view of the intricacies of criminal law and procedure, they look to high-profile cases or prominent and comprehensible criminal procedure rules to assess the state of criminal justice.²⁰⁵ When bad news occurs—usually in the form of high-profile crimes—the voters demand action. In response, politicians signal their bona fides through tough-on-crime rhetoric and symbolic legislation.²⁰⁶ As Professor Bill Stuntz has explained, the legislative response usually takes the form of creating new crimes “to give voters the sense that they are doing something about it.”²⁰⁷

There is every reason to believe this general paradigm will apply to a default rule raising the standard of proof. While voters might not understand the nuances of judicial decisions affecting the federal sentencing guidelines or procedural default rules for habeas corpus proceedings, they will understand headlines trumpeting “Court Raises Standard of Proof in Most Criminal Cases to ‘Beyond All Doubt’ But Invites Legislature To Intervene.” It is not difficult to predict the public's response. Most voters will equate a higher standard of proof with more criminals going free and escaping punishment, the exact opposite of their preference for more convictions.

²⁰³ See *id.* at 534 (“If police and prosecutors want some new criminal prohibition, they likely want it because it would advance their goals. Advancing police and prosecutors' goals usually means advancing legislators' goals as well.”). But see Wright & Logan, *supra* note 190, at 2069 (explaining that there are “more complex settings” in which the interests of prosecutors and legislators are not aligned). With respect to a higher burden of proof, there is little question that prosecutors and legislators would be unified in their opposition.

²⁰⁴ Think of Arlen Specter, John Cornyn, Elliot Spitzer and Rudolph Giuliani, to name just a few prominent examples. See Bibas, *Plea Bargaining*, *supra* note 77, at 2472 (collecting additional examples).

²⁰⁵ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748–49 (2005) (“Cognitive psychology teaches that when voters think of crime and sentencing, they tend to think of examples of crimes that are most salient. Because most voters have no direct experience with crime, their impressions are formed largely from the media.”) (citations omitted). For a detailed analysis of the reasons behind public misperception of crime, see Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

²⁰⁶ See Stuntz, *supra* note 19, at 531 (noting the legislature's goal of taking symbolic stands).

²⁰⁷ *Id.* at 532.

Responding to public opinion, legislatures will move quickly to opt out of the beyond all doubt rule. Legislatures would be more than happy to enact a symbolic statute that returns the standard of proof to the traditional reasonable doubt formulation. They could name it the "Restoring Justice Act" or the "Lower Burden of Proof Act" and reap political dividends.²⁰⁸ Moreover, the political costs²⁰⁹ of enacting the statute—funding parity with prosecutors' offices or caseloads conforming to National Advisory Commission standards—are minimal because the public is unlikely to be outraged by the prospect of equal funding for indigent defense or manageable caseloads.²¹⁰

Additionally, legislatures will be likely to opt out of the higher standard of proof because, practically speaking, it will be easy to do so. The default rule offers only two legislative options for eliminating the higher standard of proof: funding parity or compliance with caseloads guideposts. With only two approaches, legislators should find it easy to draft the legislation.

C. A Solution That Avoids Prior Pitfalls

After so many unsuccessful efforts to improve indigent defense, the final question should be: why is this proposal likely to succeed where others have failed? The reason is that, unlike other efforts, the judiciary's involvement is limited while the incentives for the legislature to act are more direct and more pronounced.

Imposing a higher standard of proof to convict indigent defendants is a bright-line rule that eliminates any need for the judiciary to look case-by-case at each defendant. Every indigent defendant will be subjected to the higher standard of proof in the absence of legislative action—no exceptions. Accordingly, unlike the *Peart* decision in Louisiana—which saddled trial judges with case-by-case responsibility to determine whether the presumption of ineffectiveness had been surmounted²¹¹—trial judges'

²⁰⁸ Consider the "bipartisan acclaim" that legislators enjoyed after enacting the Religious Freedom Restoration Act in response to the Supreme Court's unpopular free-exercise decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438–39 (1994).

²⁰⁹ See, e.g., NAT'L LEGAL AID & DEFENDER ASS'N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 5 (2001) (finding that a majority of the public believes indigent defendants should receive a free "lawyer with a small enough caseload to provide the time necessary to prepare a defense for each person").

²¹⁰ Of course, the public will be outraged if the increased funding for indigent defense results in less funding for education, healthcare, and environmental protections. See Brown, *supra* note 45, at 809 ("Even legislators who concede indigent defense is worthy and important must still rank its priority for marginal budget dollars relative to funds for medical care for the poor, foster care services, improvement of substandard schools, or toxic clean-up of grave environmental health risks.").

²¹¹ The *Peart* rule further taxed busy trial courts by forcing them to have "*Peart* hearings" to assess whether the individual lawyer in the case at bar could provide effective representation. See IN DEFENSE OF PUBLIC ACCESS TO JUSTICE, *supra* note 26, at 3 n.9 (noting that "there is a significant

hands will be tied unless the legislature acts. With all responsibility channeled to the legislature, it will not be able to punt its obligations to trial judges and will instead have no choice but to improve funding or take responsibility for the higher standard of proof associated with its inaction.²¹²

Moreover, while the higher standard of proof imposes direct pressure on the legislature, it does not embroil the judiciary in time-consuming and cumbersome supervision that is so often associated with structural reform litigation. While judicial monitoring of indigent defense will continue each year, the judiciary's responsibilities will be minimal. Once per year, the state court will review the indigent defense commission's analysis of caseload compliance or the legislature's budget to see whether there is funding parity. If everything is in order, the court will impose the reasonable doubt standard until the following year. If caseloads are excessive or the legislature has failed to provide funding parity, then the court will increase the standard of proof to "beyond all doubt" and invite the legislature to do better the following year. Regardless of which standard of proof the court imposes, its work will be complete until the following year. Constant, vigilant oversight will not be necessary. Rather, the vast amount of planning, thinking, and policymaking will remain with the legislature—exactly where it belongs. Such an approach maximizes institutional competence.

Furthermore, at the same time that the judiciary's involvement will be minimal, the framework stands a much better chance of success than prior efforts. In the handful of prior cases where lawyers successfully have challenged the under-funding of indigent defense, the benefits stemming from the litigation have been temporary.²¹³ After successful litigation, legislatures typically respond promptly by appropriating more funding, but in subsequent years the legislatures take no action, allowing salaries to remain stagnant while caseloads climb.²¹⁴ Put simply, the public attention

number of *Peart* motions being litigated across the state"). Yet, because trial judges are under pressure to keep their dockets moving and to see that guilty defendants are convicted, the *Peart* rule has caused more headaches, rather than enabling trial judges to affect systemic change. Accordingly, today Louisiana in general, and New Orleans in particular, are among the nation's most under-funded indigent defense systems. See *supra* notes 120–23 and accompanying text.

²¹² There is a large body of psychological literature demonstrating that when responsibility is diffused individuals are less likely to take socially responsible actions. See, e.g., Bibb Latané & Steve Nida, *Ten Years of Research on Group Size and Helping*, 89 PSYCHOL. BULL. 308 (1981) (noting that presence of other persons inhibits the impulse to help). Accordingly, a rule that channels responsibility to the correct actor—here, the legislature—is preferable.

²¹³ See *supra* Parts III.B and III.C.

²¹⁴ See Wright, *supra* note 9, at 249 (explaining that "[a]fter a judge orders or convinces the state or local government to fund indigent defense at prevailing rates for the time, the world moves on. Inflation immediately starts eroding salaries of the attorneys and greater numbers of arrests and charges erode the gains in caseload. Over time, the old difficulties for defense attorneys return.") (citation omitted).

and pressure wrought by the litigation are temporary, and once they disappear so does the legislatures' incentives to provide adequate funding. By contrast, because the proposal advocated in this article imposes annual monitoring, it is less likely that funding will stagnate while caseloads creep upward. Each year, the legislature must provide funding parity or convince the indigent defense commission that caseloads are within accepted guidelines. Failure to do so will result in a higher standard of proof that will be unpopular not just with prosecutors but the public at large. Put simply, unlike the failed prior decisions, this proposal calls for the legislature to be under pressure, year-after-year, to maintain adequate funding.

VI. CONCLUSION

Indigent defense in America is in crisis. While prior reform efforts have been valiant, they unfortunately have been unsuccessful. For the most part, courts have been unwilling to inject themselves into legislative budget decisions. When courts have become involved and have issued favorable decisions, the benefits have been only temporary because once the pressure of litigation disappeared so did the legislatures' desire to appropriate more funding. A successful approach to improving indigent defense must assuage courts' concerns about micro-managing budget decisions, while simultaneously imposing continuous pressure on legislatures to ensure proper funding. By imposing a higher standard of proof as a default rule, courts can create an incentive for legislatures to opt out by properly funding their indigent defense systems. And by limiting the ability to opt out to bright-line annual benchmarks, courts can ensure that improvements will not dissipate in subsequent years.