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Articles

The Right to Counsel in Criminal Cases, A National Crisis

MARY SUE BACKUS* AND PAUL MARCUS**¹

I. HOW CAN THIS BE HAPPENING?

A. THE EXAMPLES ARE EVERYWHERE

In a case of mistaken identity, Henry Earl Clark of Dallas was charged with a drug offense in Tyler, Texas. After his arrest, it took six weeks in jail before he was assigned a lawyer, as he was too poor to afford one on his own. It took seven more weeks after the appointment of the lawyer, until the case was dismissed, for it to become obvious that the police had arrested the wrong man. While in jail, Clark asked for

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1. Much of the material found throughout this Article is based on research conducted for and by the National Committee on the Right to Counsel. The authors serve as Reporters to the Committee. All conclusions are, however, the authors' own. As of the writing of this Article, the work of the Committee has not been completed and its Report not yet finalized. The excellent work of Arnold & Porter LLP and the American University Justice Programs Office in the School of Public Affairs was extremely helpful in several parts of the Article which follow. This Article was greatly improved by the comments on various sections of the underlying report made by Rhoda Billings, David Carroll, Tony Fabelo, Norman Lefstein, Ross Shephard, Virginia Sloan, and Scott Wallace. Many useful comments were received in workshops conducted with law faculty and students at George Washington University, Harvard University, the University of Houston, the University of Oklahoma, Stanford University, Wake Forest University, and the College of William and Mary. The authors wish to express their deep appreciation to the Law Deans at the University of Oklahoma and the College of William and Mary for the strong and continued support given to this lengthy project. The fine research assistance of these William and Mary law students is gratefully acknowledged: Robert Eingurt, Megan Kaufmann, Melissa Mott, Andrea Muse, Fumi Nishiyama, Justin Norwood, Matthew Occhuzzo, and Marilyn Seide.

The information that is the basis for many of the observations herein was current during the writing of this Article in early 2006. With several states stepping forward very recently to provide much needed change, hopefully some of the problems identified here will be eliminated or lessened in states such as Montana, Kentucky, North Dakota, North Carolina, Massachusetts, and Georgia, among others.

quick action writing, "I [need to] get out of this godforsaken jail, get back to my job . . . I am not a drug user or dealer. I am a tax-paying American."² During this time, he lost his job and his car, which was auctioned. After Clark was released, he spent several months in a homeless shelter.³

Two recent Georgia cases can only be seen as shocking, though in very different ways. Sixteen-year-old Denise Lockett was retarded and pregnant. Her baby died when she delivered it in a toilet in her home in a South Georgia housing project. Although an autopsy found no indication that the baby's death had been caused by any intentional act, the prosecutor charged Lockett with first-degree murder. Her appointed lawyer had a contract to handle all the county's criminal cases, about 300 cases in a year, for a flat fee. He performed this work on top of that required by his private practice with paying clients. The lawyer conducted no investigation of the facts, introduced no evidence of his client's mental retardation or of the autopsy findings, and told her to plead guilty to manslaughter. She was sentenced to twenty years in prison.⁴ Tony Humphries was charged with jumping a subway turnstile in Atlanta to evade a \$1.75 fare. He sat in jail for fifty-four days, far longer than the sentence he would have received if convicted, before a lawyer was appointed, at a cost to the taxpayers of \$2330.⁵

A mother in Louisiana recently addressed a state legislative committee:

My son Corey is a defendant in Calcasieu Parish, facing adult charges. He has been incarcerated for three months with no contact from court[-]appointed counsel. Corey and I have tried for three months to get a name and phone number of the appointed attorney. No one in the system can tell us exactly who the court[-]appointed attorney is. The court told us his public defender will be the same one he had for a juvenile adjudication. The court[-]appointed counsel told me he does not represent my son. The court clerk's office cannot help me or my son. We are navigating the system alone.

Eight weeks ago we filed a motion for bond reduction. We have heard nothing—not even a letter of acknowledgement from the court that it received our motion. Without a lawyer to advocate on Corey's behalf, we are defenseless. How many more months will go by without contact

2. Brooks Egerton, *They Had the Wrong Man, But No One Believed Him*, DALLAS MORNING NEWS, July 16, 2000, at 27A.

3. *Id.*

4. *Our Opinion: Poorest Georgians Get Assembly-Line Defense*, THE ATLANTA J.-CONST., July 15, 2001, at D8; see also Nat'l Legal Aid & Defender Ass'n, *Gideon's Heroes: Honoring Those Who Do Justice to Gideon's Promise*, Mar. 2003, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_Heroes_Benham [hereinafter *Gideon's Heroes*].

5. *Gideon's Heroes*, *supra* note 4.

from a lawyer? How many more months will go by without investigation into the case?⁶

Fifty-one criminal defendants in Western Massachusetts were arrested and jailed without any legal representation for many weeks at a time. As one government official stated, "One woman has been sitting in jail [for two months] without counsel and has not even been able to get a bail review. This is an embarrassment. How can we tolerate a system where people don't have lawyers?"⁷

The Chief Public Defender of Fairfax County, Virginia (metropolitan Washington, D.C.) resigned in July 2005, after just ten months in the position. She said that even with legislative reforms in Virginia her office had so many clients and so few lawyers that the attorneys simply could not adequately represent the defendants at trials and on appeal. Last year, the twenty lawyers in the office defended more than 8000 clients.⁸

A defendant in Missoula, Montana, was jailed for nearly six months leading up to his trial. During the months before his trial, the defendant met with his court-appointed attorney just two times. That attorney did nothing to investigate the defendant's allegations that police obtained evidence against him during an illegal search. A second court-appointed lawyer subsequently had the case dismissed.⁹

The first rule of the American Bar Association's Model Rules of Professional Conduct indicates that "competent representation" requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Yet in Broward County, Florida, the elected public defender felt compelled last year to forbid his attorneys from advising indigent criminal defendants to plead guilty unless they have had "meaningful contact" with their clients in advance. The head of the office said that public defenders are often ill-informed about their

6. Testimony of Grace Bauer, Lake Charles, Louisiana, presented to the House Committee on Administration of Criminal Justice, June 7, 2005, in support of SB 323 by Senator Lydia Jackson.

The situation in much of Louisiana is dire. The Calcasieu Parish Public Defenders Office represents nearly 90% of the approximately 3000 persons accused of felony crimes in that Parish. . . . cases often languish three years or more before they are finally resolved, and then it is almost always by plea bargain. Thus, innocent people may sit in jail for months awaiting trial if they are unable to make bond, while those who can make bond are forced to live in a prolonged world of uncertainty.

Sylvia R. Cooks & Karen Karre 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, 208 (2004). The Honorable Sylvia R. Cooks is an Appellate Judge of the Louisiana Court of Appeal for the Third Circuit.

7. David Weber, *Indigent Defendants Languish Without Counsel in W. Mass.*, BOSTON HERALD, July 1, 2004, at 34.

8. Tom Jackman, *Fairfax's Chief Public Defender Quits*, WASH. POST, July 8, 2005, at B8.

9. Matthew Kowalski, *Defensive Holding: ACLU'S Public Defender Lawsuit Deferred to 2005 Legislature*, MISSOULA INDEP., Apr. 13, 2004, available at <http://www.missoulanews.com/Archives/News.asp?no=4044>.

clients' cases and circumstances before advising them to take pleas offered by prosecutors at arraignment. "It's not fair to make life-altering decisions while handcuffed to a chair with fifty people standing around. . . . They meet with an attorney for sixty seconds, then they plead guilty and surrender their rights. . . . That's going to stop," the director stated.¹⁰

Roberto Miranda was charged with first-degree murder with a deadly weapon, robbery with a deadly weapon, and larceny. He was appointed a public defender who was just out of law school and had never defended a murder suspect. Miranda vigorously maintained his innocence throughout the proceedings and supplied his defender with numerous people who would testify on his behalf. Miranda claimed that of the forty people who could have served as witnesses, the lawyer only interviewed three and did not serve a subpoena on a single one. Miranda also asserted that the lawyer's trial performance was equally deficient, resulting in him being found guilty of all charges and sentenced to death. After having spent fourteen years in prison, Miranda was found innocent, his conviction was reversed, and he was released.¹¹

B. MANY OF THE SYSTEMS DO NOT FUNCTION

Poor people account for more than 80% of individuals prosecuted.¹² These criminal defendants plead guilty approximately 90% of the time. In those cases, more than half the lawyers entered pleas for their clients without spending any significant time on the cases, without interviewing witnesses or filing motions. Sometimes they barely spoke with their clients.¹³

10. Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, DAILY BUS. REV., June 6, 2005, available at <http://www.law.com/jsp/article.jsp?id=1117789520360>. While the Florida defender is remarkably candid, he is not the only lawyer taking this approach. In St. Louis the public defender's office recently began to refuse to represent defendants charged with minor offenses because of concerns with rising caseloads. The Missouri State Defender supported the move away from the current system which he described as "meet 'em and greet 'em and plead 'em." Robert Patrick, *Public Defender Rules Are Set to Change: Lawyers Say it's Unethical to Represent Some with so Little Time to Prepare*, ST. LOUIS POST-DISPATCH, July 3, 2005, at E1.

11. *Miranda v. Clark County*, 279 F.3d 1102, 1105 (9th Cir. 2002). Clark County ultimately settled with Robert Miranda for \$5 million after the Ninth Circuit ruled that counties can be sued for failure to provide adequate representation. Carri Geer Thevenot, *Settlement Ends Ex-Inmate's Saga*, LAS VEGAS REV.-J., June 30, 2004, at 1A.

12. See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES I (2000); STEVEN K. SMITH & CAROL J. DEFANCES, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE I (1996). See generally William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J. L. & PUB. POL. 443, 452 (1997). And the actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See Associated Press, *U.S. Poverty Rate Rises to 12.7 Percent*, CBS NEWS, Aug. 30, 2005, <http://www.cbsnews.com/stories/2005/08/30/ap/business/mainD8CABQO81.shtml>.

13. Many sources substantiate these statements. For an excellent overview of the entire area (and a fine discussion of these points), see DEBORAH L. RHODE, ACCESS TO JUSTICE 122-24 (2004).

An attorney was found to have entered pleas of guilty for more than 300 defendants without ever taking a matter to trial.¹⁴ In one case from Mississippi, a woman accused of a minor shoplifting offense spent a year in jail, before any trial, without even speaking to her appointed counsel.¹⁵ In some places, one lawyer may handle more than twenty criminal cases in a single day, with a flat rate of \$50 per case.¹⁶ In others, some defense lawyers providing counsel to indigent defendants under a state contract system can be responsible for more than 1000 cases per year.¹⁷ In one major metropolitan area, San Jose, California, numerous defense attorneys failed to take simple steps to investigate and prepare their cases for trial. Some attorneys went to trial without ever meeting their clients outside the courtroom. Some neglected to interview obvious alibi witnesses. Some accepted without question reports from prosecutors' medical and forensic experts that were ripe for challenge.¹⁸

Entire systems have been viewed as essentially incapable of preserving fundamental constitutional rights. Here are a few examples:

- Georgia: "[T]he right to counsel guaranteed by the state and federal constitutions is not being provided for all of Georgia's citizens."¹⁹
- Virginia: "[The] indigent defense system is deeply flawed and fails to provide indigent defendants the guarantees of effective assistance of counsel required by federal and state law."²⁰ "The deficiencies in Virginia's indigent defense system are notorious and have persisted despite production of numerous reports documenting the problems in the last three decades."²¹
- Louisiana: "[T]he indigent defense system devised by the legislature in Louisiana delivers ineffective, inefficient, poor quality, unethical, conflict-ridden representation to the poor."²²
- Pennsylvania: Pennsylvania does not guarantee indigent criminal defendants adequate, effective representation.²³

14. *Id.* at 126.

15. *Id.*

16. *Id.*

17. *Id.* at 128. As Professor Rhode explains, the resulting situation is dreadful. "Unsurprisingly, these attorneys frequently missed deadlines and court appearances, and many would have been unable to pick their own clients out of a lineup." *Id.*

18. Frederic N. Tulskey, *The High Cost of a Bad Defense*, MERCURY NEWS (San Jose, Cal.), Jan. 24, 2006, at 3A.

19. REPORT OF CHIEF JUSTICE'S [GA.] COMMISSION ON INDIGENT DEFENSE PART 1, at 3 (2002) available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc>.

20. THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 1 (2004) [hereinafter INDIGENT DEFENSE IN VIRGINIA].

21. *Id.* at 7.

22. NAT'L LEGAL AID & DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* 56 (2004), available at <http://www.nlada.org/DMS/Documents/1078863541.49/Avoyelles%20Parsh%20Body%20Text.pdf> [hereinafter TRIAL-LEVEL INDIGENT DEFENSE].

23. Nat'l Legal Aid & Defender Ass'n, *Gideon Reviewed: The State of the Nation 40 Years*

- North Dakota: "The current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel."²⁴

One point must be emphasized here. In reviewing the difficulties found throughout the nation with right to counsel for poor people in criminal cases, many have expressed special concern regarding the relationship between the right to a lawyer and wrongful convictions. Apart from the constitutional right, for many people this concern can be an extremely compelling argument for having a functional strong defense. And, in light of the Supreme Court's right to counsel decisions, one of the most important changes in indigent defense is that we now know with certainty that we sometimes convict innocent people. Until the past decade, an argument about wrongful convictions as a basis for enhanced defense services was unavailable. But it is available now. We now have evidence that overworked and incompetent lawyers contribute to wrongful convictions and that truly well-prepared defense lawyers, with adequate support services, can attack the other causes of wrongful convictions, such as mistakes in eyewitness identifications and insufficient investigations.

Is there a remedy for an outrageous state of affairs that leads to greater risks for the public and the deprivation of constitutional rights? Of course, such a remedy exists, and we have known this for decades. The remedy is the well-recognized approach of decent financial support from the government for indigent defense, and the presence of well-prepared, reasonably paid, resourceful lawyers. Former Attorney General Janet Reno stated the matter forcefully:

A competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor's case, both to test the basis for the prosecution and to challenge the prosecutor's ability to meet the standard of proof beyond a reasonable doubt.

A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence. . . . A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted. . . . In the end, a good lawyer is the best defense against wrongful conviction.²⁵

While tremendous problems exist in providing legal services to poor people in criminal cases, it is important to note that the Committee and its Reporters were greatly impressed with the services offered by many

Later, <http://www.nlada.org/DMS/Documents/1047416381.38/Gideon%20Reviewed%20-%20The%20State%20of%20the%20Nation%2040%20Years%20Later.pdf> (last visited Apr. 14, 2006).

24. ABA, REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA I (2004).

25. Janet Reno, U.S. Att'y Gen., Remarks at the National Symposium on Indigent Defense (June 29, 2000), in OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, REDEFINING LEADERSHIP FOR EQUAL JUSTICE: A CONFERENCE REPORT vi (2000) [hereinafter Reno Remarks].

dedicated defense lawyers across the nation. Moreover, despite the systemic difficulties documented in the pages that follow, one can certainly identify—and we do—some fine defense programs that function effectively.

II. AN OVERVIEW

Many features of the criminal justice system in the United States are often severely criticized, and fairly so. Complaints are common as to problems about sloppy investigative work, rules of evidence in prosecutions, the plea bargaining process, and a shifting focus in sentencing. In one area, however, lawyers and judges most often speak of the tremendous progress and foresight of the United States in promoting equal rights for all in the criminal justice system. This area is, not surprisingly, the right to counsel for indigents in virtually all criminal cases in the United States. The United States Supreme Court has twice spoken with great eloquence of the need for such rights, and has responded accordingly to difficult situations.

In *Powell v. Alabama*, the Court struck down convictions in an egregious case involving indigent defendants:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.²⁶

In the landmark decision *Gideon v. Wainwright*, Justice Black wrote eloquently:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the

26. 287 U.S. 45, 68–69 (1932).

widespread belief that lawyers in criminal cases are necessities, not luxuries.²⁷

The impact of the *Gideon* decision, especially, was amazingly broad. It was held to have full retroactive impact, the violation of the rule can never be deemed harmless error, and the right to counsel was extended well beyond the trial itself soon after the Court's decision.²⁸ The right extends to the vast majority of defendants.²⁹

The Supreme Court did not give as full a right to a lawyer as it could have, leaving to the discretion of trial judges the appointment of lawyers for activities that occur prior to a formal charge,³⁰ non-mandated appeals,³¹ and the minor cases where no imprisonment will be ordered.³² Still, in the main, our Justices deserve a reasonably high mark for taking action in a relatively short period of time to extend the right to a lawyer to most indigents in most important proceedings in most criminal cases.³³ It is, in addition, gratifying to realize that our fellow citizens have reacted positively to the broad Sixth Amendment rulings. The most extensive polling data available indicates that the public is both overwhelmingly satisfied with this direction and supportive of spending government tax dollars to promote this Sixth Amendment right.³⁴

27. 372 U.S. 335, 344 (1963). See generally JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* (2002).

28. The counsel right applies to post-charge interrogations. *Massiah v. United States*, 377 U.S. 201 (1964). It also applies in some identification procedures which occur before trial. *United States v. Wade*, 388 U.S. 218 (1967). The defendant is entitled to a lawyer at various pretrial proceedings such as arraignments and preliminary examinations. *Coleman v. Alabama*, 399 U.S. 1 (1970). The defendant must be represented by counsel at sentencing, *Alabama v. Shelton*, 535 U.S. 654 (2002), and with any automatic appeals, the right to counsel is applied automatically. *Douglas v. California*, 372 U.S. 353 (1963).

29. HARLOW, *supra* note 12, at 1; CAROL J. DEFRAANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, *INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999-1* (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf>; Bill Rankin, *Indigent Defense Rates F*, ATLANTA J.-CONST., Dec. 12, 1990, at 1A (Georgia); NEBRASKA MINORITY & JUSTICE TASK FORCE, *INDIGENT DEFENSE SYSTEM IN NEBRASKA* (2004), available at http://court.nol.org/community/ind_def_study.pdf (Nebraska); PENNSYLVANIA SUPREME COURT COMMITTEE ON GENDER & RACIAL BIAS IN THE JUSTICE SYSTEM, *FINAL REPORT 164-193*, available at www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.ch5.pdf (Pennsylvania); Hon. Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, Address to the Joint Session of the Louisiana Legislature (May 3, 2005) (Louisiana). See generally RHODE, *supra* note 13, at 122.

30. *Kirby v. Illinois*, 406 U.S. 682 (1972).

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

32. *Scott v. Illinois*, 440 U.S. 367 (1979).

33. One notable exception has been the Supreme Court's disturbing and disappointing view of the requirement of effective assistance of counsel for defendants. In a series of cases, the Justices have established a low standard for representation (reasonable competence) and a tough requirement for impact (competent counsel would have affected the outcome of the proceeding) before the Sixth Amendment right will be violated. See *infra*, text accompanying notes 294-310.

34. BELDEN RUSSENELLO & STEWART, *AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION* (2002). A few points are especially worth noting. When presented with the statement "[p]roviding competent legal representation is one of our most fundamental rights

If the public appears supportive, if the judiciary and the organized bar are justly proud of the right to counsel, how can those deeply disturbing and widespread problems discussed at the start of this Article be found so readily? The answer is that the promise of *Gideon*, giving fair and adequate representation to all criminal defendants in almost all prosecutions, simply has not been fulfilled as a matter of practice in many parts of the United States. To be sure, in a host of areas, thoughtful commentators refer to the justice system, at least with respect to the right to counsel, as being in critical disarray.³⁵

The practical problems are widespread in the system, and shared by most states throughout the country. Indeed, details of such problems in any one jurisdiction can fill hundreds of pages, as indicated in the many in depth studies produced over the past two decades.³⁶ Five years ago, a U.S. Department of Justice report indicated that "indigent defense in the United States today is in a chronic state of crisis."³⁷ That state of crisis has certainly not been eliminated in this brief period. As one astute observer has stated:

The goal in providing lawyers, as *Gideon* emphasized, is to assure fairness in our adversary system of justice and prevent the conviction of innocent persons. Yet, forty years after *Gideon*, this nation is still struggling to implement the right to counsel in state criminal and juvenile proceedings. Sadly, there is abundant evidence that systems of indigent defense routinely fail to assure fairness because of underfunding and other problems. It is also more evident now than ever before that innocent persons, sometimes represented by incompetent,

in the U.S.," 88% of those polled found this statement convincing and 65% very convincing. *Id.* at 5. The report found that a majority of Americans believe that low-income people who are charged with a crime should be represented by attorneys with small enough caseloads to provide the necessary time to prepare a defense for each person they represent: 94% think it is important, and 57% say it should be guaranteed. *Id.* at 3. A majority of Americans also believe that low-income persons' attorneys should have the same resources per case that prosecutors have: 88% support the idea and 64% support it strongly. *Id.* at 4. A majority also believes that low-income persons should be provided with the resources to hire investigators to check evidence and find witnesses (91% think it is important and 55% guaranteed), and the resources to obtain DNA and other scientific testing (94% important; 64% guaranteed). *Id.* at 3. More recent polling data from the Commonwealth of Virginia is similar. See VIRGINIA INDEPENDENT DEFENSE COALITION, PUBLIC OPINION IN VIRGINIA ON INDIGENT DEFENSE (2004).

35. See, e.g., Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1515 (2005); Cooks & Fontenot, *supra* note 6 at 197; Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004); Lawrence C. Marshall, *Gideon's Paradox*, 73 FORDHAM L. REV. 955, 956 (2004); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 544 (2004); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001).

36. Almost all of the reports have been compiled by the National Committee and are now readily accessible. See *infra*, text accompanying notes 55-56.

37. OFFICE OF JUSTICE PROGRAMS & BUREAU OF JUSTICE ASSISTANCE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS IX (1999).

unqualified, or overburdened defense lawyers, are convicted and imprisoned.³⁸

A recent ABA Report also highlights this dismal picture:

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.³⁹

Many thoughtful Americans believe that we must take a very close look at the indigent counsel problems that are present throughout our nation.⁴⁰ It is beyond time to have a serious discussion about how such problems can be addressed nationally. To that end, the Constitution Project and the National Association of Legal Aid and Defenders two years ago established the National Committee on the Right to Counsel, bringing together interested citizens from across the country in a bipartisan effort to create consensus recommendations for reforms. The Committee consists of state and federal judges, prosecutors, law enforcement leaders, policy makers, defense lawyers, and academics.⁴¹

38. Lefstein, *supra* note 35, at 838. As an example of this problem, a recent report from Oregon describes a "fiscal and public safety crisis." PUB. DEF. SERVS. COMM'N, EXECUTIVE DIRECTOR'S BIENNIAL REPORT TO THE OREGON LEGISLATIVE ASSEMBLY 7 (2005). By early 2003, Oregon's public defense and public safety systems had suffered unprecedented setbacks: a cut of more than 16% in the 2001-03 budget for public defense services during three of the five Special Sessions of the Legislative Assembly in 2002. *Id.* This resulted in disruptions in public defense services, catastrophic losses to public defense contractors, and threats to the continued operation of the state's public defense system. *Id.* Further, this resulted in the postponement of the appointment of public defense counsel in more than 27,000 cases until the 2003-05 biennium; delays in the prosecution of those 27,000 cases increased threats to the public safety of all Oregonians as a consequence. *Id.*

39. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE IV* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise> [hereinafter *GIDEON'S BROKEN PROMISE*].

40. One well-known lawyer sadly reminds us that "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel." Stephen B. Bright, *Gideon's Reality: After Four Decades Where Are We?*, ABA CRIM. JUSTICE MAG., Summer 2003, at 5.

41. There are two honorary chairs. Former Secretary of the United States Department of Transportation William T. Coleman, Jr. serves on the American Law Institute Council and is a member of O'Melveny & Myers LLP. Former Vice President Walter Mondale, who also served as United States Senator, and—as Minnesota Attorney General—organized the amicus brief of twenty-two states in support of Gideon in *Gideon v. Wainwright*. He is currently a partner at the law firm of Dorsey & Whitney LLP. The three co-chairs are: Honorable Rhoda Bryan Billings, Professor of Law Emeritus, Wake Forest University School of Law [formerly Chief Justice of the North Carolina Supreme Court]; Honorable Robert M.A. Johnson, Anoka County Attorney [Minnesota]; Honorable Timothy K. Lewis, Of Counsel at Schnader Harrison Segal & Lewis [formerly of the United States Court of Appeals for the Third Circuit]. Members of the Committee are: Shawn Marie Armbrust, Esq., Washington, D.C.; Honorable Jay Burnett of Houston; Colonel Dean M. Esserman, Chief of Police of Providence; Dr. Tony Fabelo of Austin; Professor Monroe H. Freedman, Hofstra University Law School; Susan Hermann of New York; Robert E. Hirshon, CEO of the Tonkon Corporation; Professor Bruce R. Jacob of the Stetson University College of Law; Abe Krash of Washington, D.C.; Professor Norman Lefstein of the Indiana University School of Law Indianapolis; Honorable Larry Thompson, Senior Vice President, Government Affairs, General Counsel of Pepsi Co., Inc.; and

The Committee's work was informed by several nationwide research efforts, and also received valuable assistance from organizations such as the ABA, the National Legal Aid & Defender Association (NLADA), the NAACP Legal Defense Fund, and the ACLU.

In this Article we will follow up on the work of the National Committee by looking to the background of the right to counsel in our nation and the problems encountered throughout American jurisdictions. We will also discuss remedies proposed to solve those problems. We start with a brief review of the constitutional right.

III. THE BASIS OF THE RIGHT TO COUNSEL⁴²

In the early part of the 20th Century, little concern was expressed about the right to an attorney in criminal cases. The Supreme Court began a significant expansion of the right starting in the 1930s. In 1932, the Court decided in *Powell v. Alabama* that the Due Process Clause of the Fourteenth Amendment required that an indigent defendant on trial for a capital offense be provided counsel.⁴³ While the facts there were extreme,⁴⁴ the Justices' language, as noted earlier, was very broad. The Court expanded the right to representation when it later held in *Johnson v. Zerbst* that an individual accused of a felony in a federal court has a right to appointed counsel under the Sixth Amendment if he or she is unable to afford an attorney.⁴⁵ In a major retreat, however, the Justices soon decided in the well-known case of *Betts v. Brady*⁴⁶ that the right to counsel in the federal constitution could not be applied routinely to

Hubert Williams, President of the Police Foundation. Mr. Johnson is a past president of the National District Attorneys Association. Dr. Fabelo previously served as Director of the Texas Criminal Justice Policy Council; Ms. Herman was the Executive Director of the National Center for Victims of Crime; Professor Jacob and Mr. Krash both served as counsel in *Gideon v. Wainwright*; Professor Lefstein was the Chairman of the American Bar Association Section of Criminal Justice; Mr. Thompson was the Deputy Attorney General in the United States Department of Justice; and Mr. Williams was the Police Director of New Jersey.

42. These matters are explored in far more detail in several of the articles cited *supra* note 35.

43. 287 U.S. 45, 68-71 (1932).

44. This was the famous "Scottsboro Boys" case in which police officers pulled nine young black men off a train after two white women on the train accused the men of rape. Alabama law required the appointment of counsel in capital cases, but the attorneys did not substantively consult with their clients and had done little more than appear in order to represent them at the trial. In fact, the defendants did not speak with the lawyers until just minutes before their trial. An all-white jury convicted them of murder, and all but the youngest was sentenced to death. The trials were rapidly conducted, taking less than one day. See generally JAMES E. GOODMAN, *STORIES OF SCOTTSBORO* (1995).

45. 304 U.S. 458, 463 (1938).

46. 316 U.S. 455, 473 (1942).

states through the Due Process Clause of the Fourteenth Amendment.⁴⁷ The *Betts* decision lasted for two decades.

Finally, in 1963, the Supreme Court unanimously reversed *Betts* and ruled in *Gideon v. Wainwright*⁴⁸ that the Sixth Amendment right to counsel applied to defendants charged with felonies in state court under the Due Process Clause. In oft-cited language, the Justices concluded that "any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."⁴⁹ Justice Black, writing for the Court, found that average citizens lack the necessary legal skills to be able to mount an effective defense. The result, he stated, is that indigent defendants cannot be ensured a fair trial without the guiding hand of counsel.⁵⁰ The decision in *Gideon* was based on the principle that all individuals in the criminal justice system must be offered a fair opportunity to defend against charges brought against them. The Court reasoned that the lack of counsel for most indigent defendants presented a direct threat to the equality and fairness of the judicial process:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁵¹

A criminal defendant's right to counsel "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."⁵²

47. The case was decided over the vigorous dissent of Justice Black:

A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. . . .

Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. . . .

It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor in such cases is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public. . . . [Most states] assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

Id. at 476-77 (Black, J., dissenting) (internal quotation omitted).

48. 372 U.S. 335 (1963).

49. *Id.* at 344, 343.

50. *Id.* at 345.

51. *Id.* at 344.

52. *Id.* Of course, the right to counsel in criminal cases is not just a federal right. It is also

Gideon certainly did not answer all the key questions involved with the Sixth Amendment right to counsel.⁵³ Still, it set the principal benchmark against which the American criminal justice systems today must be measured.

IV. THE RESEARCH CONDUCTED

A. THE NATIONAL COMMITTEE ON THE RIGHT TO COUNSEL

For the first time in their histories, the Constitution Project and the National Legal Aid and Defender Association (NLADA) joined forces in early 2004, in a partnership to work on this crisis with the right to counsel. Together, they established the National Committee on the Right to Counsel.

The Constitution Project is a bipartisan, nonprofit organization that seeks to educate and promote reform in areas involving controversial legal and constitutional issues. In recent years, the Project has sponsored successful initiatives dealing with sentencing, separation of powers, liberty and security, constitutional amendments, the death penalty, and the courts.

The NLADA is the nation's leading advocate for legal professionals who work with and represent low-income clients, their families, and communities. Speaking on behalf of legal aid and defender programs, as

explicitly guaranteed in most state constitutions. Most specific, perhaps, is the Louisiana state constitutional provision, Article I, Section 13, which directs the legislature to "provide for a uniform system for securing and compensating qualified counsel for indigents" at "each stage" of criminal proceedings. *See also* Ariz. Const. art. II, § 24 ("In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel."); Miss. Const. art. III, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both."); Neb. Const. art. I, § 11 ("In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel."); N.H. Const. art. 15 ("Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown."). It is not only a constitutional right that is at stake in indigent defense. As recently noted in the report on the Oregon defense system, broader issues of safety, economy of resources, and public confidence are also of concern:

The legal services provided . . . represent an essential component of [the] . . . public safety system. Without public defense services, the . . . [state] could not prosecute crime, protect children and families or hold offenders accountable. . . .

[The] public defender attorneys also contribute directly to public safety by advocating for effective criminal sentences, correctional programs, family placements and juvenile dispositions that promote the reduction of crime and delinquency.

PUBLIC DEFENSE SERVICES COMMISSION, THE EXECUTIVE DIRECTOR'S BIENNIAL REPORT TO THE OREGON LEGISLATIVE ASSEMBLY (JULY 1, 2003–JUNE 30, 2005) 1, available at <http://www.ojd.state.or.us/osca/opds/Reports/Executive%20Director's%20Biennial%20Report%202003-05%20with%20appendices.pdf>.

53. Later Supreme Court decisions were to determine, for instance, when the Sixth Amendment right to counsel attaches, what level of counsel and counsel-related services is guaranteed, and how to measure the effective assistance of counsel. *See generally* Tomkovicz, *supra*, note 27; Amanda Myra Hornung, Note, *The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495 (2005).

well as individual advocates, it devotes its resources to serving the broad equal justice community. The NLADA provides a national voice in public policy and legislative debates on the many issues affecting the equal justice community.

In their joint endeavor, the two organizations brought together on the Committee an extraordinary group of Americans: those with experience as judges, prosecutors, defenders, academics, victim advocates, law enforcers, and policymakers. Their task was to examine whether indigent criminal defendants across the nation receive competent assistance from attorneys,⁵⁴ and also to create consensus recommendations for any necessary reforms.

B. THE COMMITTEE'S RESEARCH AGENDA

Several research projects were initiated by the Committee in order both to inform the members and to provide a basis for later action. These projects will soon be available in electronic form on the website of the Constitution Project.⁵⁵ The law firm of Arnold & Porter LLP, on a pro bono basis, prepared a substantial report that traced the historical setting for the evolution of the law under the Sixth Amendment to the United States Constitution, reviewed the key United States Supreme Court decisions in the area, explored current litigation regarding the right to counsel, and offered a set of innovative recommendations for change.

The American University School of Public Affairs Justice Programs Office conducted an exhaustive literature review and analysis of every report, judicial, legislative, professional, and academic, written in every jurisdiction in the United States. The results are staggering, with literally hundreds of such reports now available in one place for consideration.⁵⁶

Law students at the College of William and Mary worked to collect, organize, summarize, and analyze a representative sample of media coverage of indigent defense issues nationwide over the past ten years. While not intended to be an empirical study, the goal of the project was to compile a substantial sample, the breadth and depth of which would fairly reflect the salient issues confronted by states in attempting to provide poor criminal defendants adequate legal representation. The resulting database contains more than 900 newspaper articles and

54. At no time during the past thirty years has any other person or organization undertaken a comprehensive analysis of the problems with the right to counsel in criminal cases in every American jurisdiction.

55. See Constitution Project, <http://www.constitutionproject.org/> (last visited Apr. 14, 2006).

56. For the first time, these hundreds of reports are now available electronically in one place for those researching right-to-counsel issues. It should be noted that other older studies do exist and are not part of the final American University product. References to these reports were found in the Committee's research, but the reports themselves could not be located by the Committee, William and Mary law students, or American University.

editorials from state and national newspapers from all fifty states, the District of Columbia, and Puerto Rico from 1994 through 2004.⁵⁷ Newspaper coverage is best viewed as a broad reflection of non-legal views from news reporters and the general public; still, the startling consistency of the media coverage across the nation suggests that there are well known problems with the indigent defense system nationwide.

In addition, members and staff of the Committee visited a number of cities and met with numerous criminal justice professionals during early 2006. The visits helped inform the Committee in a very real way of the problems being encountered across the country. But they also showed that while the public seems strongly supportive of the right to counsel for all Americans,⁵⁸ one task of the Committee will be to educate the nation about the inequities and problems that members found almost everywhere. All too often, the discussion among non-criminal justice professionals begins with the expression of surprise that there are any serious problems with the constitutional guarantee. As one well-known non-law commentator wrote recently, "the right to an attorney . . . [is] taken for granted today."⁵⁹

The research projects taken together reveal that there are overarching, common issues facing state and local governments in meeting the constitutional obligation established by *Gideon* and later federal and state cases. The committee obtained compelling evidence of a true constitutional crisis. The problems documented by the research are all the more startling given their breadth and depth. In the remainder of this Article, we discuss these problems and lay out broad proposals for changes that need to be initiated if our nation is to adhere to the mandate of the Sixth Amendment and the desires of our fellow citizens.

V. THE CRISIS

A. FINANCIAL SUPPORT

By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.⁶⁰ This lack of money is reflected in a wide range of

57. The end product, though huge in scope and reasonably comprehensive, is understandably incomplete due to limitations of time, newspaper postings on web sites, and restrictions of licensing agreements with LexisNexis and Westlaw. Nevertheless, we believe strongly that the result is a good overview of the national picture. It certainly cannot be taken, however, as laying out every article in every newspaper in every state. For instance, in large states such as California, New York, Texas and Florida, the participants were able to look at several of the leading papers in each state, but not at every one of the many papers in each.

58. As reflected in the polling data discussed *supra* note 34.

59. Anna Quindlen, *Keeping the Robes Clean*, NEWSWEEK, July 25, 2005, at 68.

60. The disparity in funding between defense and prosecution is estimated to be enormous. We currently spend about one hundred billion dollars each year on criminal justice, but only about 2-3%

problems, including poor people's limited access to attorneys and the resulting ineffective assistance of counsel, both of which are discussed later in this Article. Here, however, we examine the broader impact of inadequate funding, excessive public defender caseloads and insufficient salaries and compensation for defense lawyers.

I. Funding

Methods of funding indigent defense differ among all fifty states and the District of Columbia. A nationwide study a few years ago revealed that in twenty-three states the state government is responsible for providing 100% of funding for indigent defense.⁶¹ In contrast, two states, Pennsylvania and Utah, provide no funding at the state level and leave the responsibility solely to individual counties. The District of Columbia, of course, receives all of its funding from the federal government.

The remaining states vary greatly in the amount of funds provided by the state and by county governments and the methods through which those funds are derived. In some states, the public defense system is financed mainly by the state with minimum contributions by counties. Other states leave it to the county to establish a system of public defense and then either reimburse a percentage of the costs or provide supplemental funding. A few states, on the other hand, require counties to pay all costs at the trial level; the state then bears the responsibility for any appeals.

While commentators have long been concerned with the funding problems for indigent defense,⁶² most state and local governments have

of that total goes to indigent defense. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 94 (2001). Moreover, poor defendants, in one commentator's words, "receive only an eighth of the resources per case available to prosecutors. The disparity is still greater when adjusted for the amounts available to other law enforcement officials for assistance in investigation and trial preparation." RHODE, *supra* note 13, at 123; accord DAVID COLE, *NO EQUAL JUSTICE* 64, 84 (1999); Douglas McCollam, *The Ghost of Gideon*, AM. LAW., Mar. 2003, at 63, 67; Editorial, *State Should Pay for Indigent Defense*, ATLANTA J.-CONST., Dec. 31, 2001, at A-11 (an eight-to-one disparity). This is not to suggest that prosecutors may not also have serious funding problems, as they well may. See Ronald George, Chief Justice, California Supreme Court, *State of the Judiciary Address by Chief Justice Ronald George to a Joint Session of the California Legislature* (Mar. 23, 2004); Ronald Goldstock et al., *Justice That Makes Sense: Prosecution & Defense Find Common Ground*, THE CHAMPION, 2001, <http://www.criminaljustice.org/public.nsf/ChampionArticles/97deco1?OpenDocument>; Marcia Coyle & Marianne Lavelle, *Legal Safeguards Don't Hamper Crime-Fighting*, NAT'L L.J., Dec. 12, 1988, at 5. Still, the striking numbers reflected above and below must give concern as to the particular needs for indigent defense. See generally Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

61. THE SPANGENBERG GROUP, *STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002-34-35* (2003). The most recent count indicates the number has risen to twenty-six states. See THE SPANGENBERG GROUP, *ASSESSMENT OF THE MISSOURI PUBLIC DEFENDER SYSTEM. ATTACHMENT B 1* (2005) [hereinafter *MISSOURI ASSESSMENT*]. Data on the fifty states was commissioned by the ABA and prepared by The Spangenberg Group. It appears on the ABA website, <http://www.abanet.org/legalservices/sclaid/defender> (last visited Apr. 14, 2006).

62. It is not just the low levels of financial support for the defense programs which are

only come to this realization relatively recently.⁶³ Connecticut is a good example of a state that has taken strong steps to bolster its system. There, public defense is organized by the state and administered through regional offices. These offices handle nearly all indigent defense. In 2003–2004 they took on more than 89,000 cases and had a budget of \$35 million.⁶⁴ For this amount the state was able to provide 188 attorneys and 181 administrative and support staff.⁶⁵ The ACLU sued Connecticut a decade ago because of its inadequate system of public defense. In 1999, Connecticut reached a settlement with the ACLU in which the state agreed to reform the system and provide better funding, lower caseloads, and improved training. Between 1997 and 1999, the state legislature increased public defense funding to a level that allowed for the hiring of approximately eighty additional attorneys.⁶⁶ That is about 44% of the current number of Connecticut public defender attorneys made available in 2003–2004. Today, the state describes its public defender system as cost-effective⁶⁷ and as having adequate funding and resources to keep caseloads within mandated goals.⁶⁸

troublesome. In addition, as one thoughtful commentator noted, there are invisible but great financial advantages given to prosecution offices, but not defense offices.

Finally, prosecutors have greater access to investigators and experts than the typical publicly funded defense attorney. Putting aside the police resources necessary to build a case file to present to the prosecution, the government often spends further resources for a follow-up investigation to strengthen the case in ways identified by the prosecutor's reading of the file. Prosecutors also turn to expert assistance and testimony relating to scientific evidence more often than the defense. All of these components—salary, workload, and support services—combine to produce an overall gap in spending between the prosecution and defense functions.

Wright, *supra* note 60, at 232. The issue is discussed later in this Article.

63. The impetus for change differs greatly throughout the United States. In some states such as Texas and North Carolina, dedicated legislators promoted movement. See *infra* Part VI.A. In others, such as Georgia, Washington, and Virginia, it was the result of a shaming process coming from shocking exposés in news articles or comprehensive studies. The process of change in those states is also explored in Part VI.A. Of course, one should not discount the role of litigation here. As discussed in Part VI.B, actual or threatened litigation led to substantial changes in states as varied as Arizona, Michigan, and New York. See Wright, *supra*, note 60, for a thoughtful analysis of the role of litigation with attorney funding.

64. CONN. DIV. OF PUB. DEFENDER SERVS., ANNUAL REPORT: COST OF PUBLIC DEFENDER SERVICES (2005), available at <http://www.ocpd.state.ct.us/Content/Annual2004/2004Chap4.htm>.

65. *Id.*

66. Press Release, Am. Civil Liberties Union, Settlement Reached in ACLU's Class-Action Lawsuit Alleging Inadequacy of CT Public Defender System (July 7, 1999), available at <http://www.aclu.org/crimjustice/gen/10138prs19990707.html>.

67. CONN. DIV. OF PUB. DEFENDER SERVS., *supra* note 64.

68. *Id.* Another good example is North Dakota. Until last year, per capita spending on indigent defense in North Dakota was among the lowest in the country. In 2005, the state legislature doubled the funding, from approximately \$5 million in the last two-year period to \$10 million for the next two-year period. See N.D. CENT. CODE § 29-07-01.1 (2005). See generally Nat'l Ass'n of Criminal Def. Lawyers, North Dakota's Indigent Defense System, <http://www.nacdl.org/public.nsf/defenseupdates/Northdakota002> (last visited May, 15, 2006). Connecticut and North Dakota are not unique in increasing funding, several other states have also boosted financing here substantially. Still, on a nationwide basis, the funding levels remain terribly low.

However, the budget picture in most other states is not nearly as positive. The Kentucky Department of Public Advocacy (DPA) received increased appropriations in Fiscal Year 2004,⁶⁹ but the amount spent per case still declined by 4.2% from 2003.⁷⁰ This is due to a 12% increase in public defender cases during Fiscal Year 2003 and Fiscal Year 2004.⁷¹ The increase in overall funding in 2004 followed a reduced budget in FY 2002 that was held over in FY 2003.⁷² The current level of funding in Kentucky permits public defenders to spend, on average, a total of 3.8 hours on each case.⁷³ Earlier, DPA adopted performance guidelines for public defenders, under which they were to complete all of the following in the time allotted: review the charges, obtain and review discovery, meet with the client, interview witnesses, appear for arraignment, research and write motions, enter guilty plea or conduct a judge or jury trial, and attend a sentencing hearing.⁷⁴

In Ohio, where counties can seek partial reimbursement from the state, the costs of public defense are climbing. Summit County, which includes Akron, has seen its share of the costs (after state reimbursement) rise from \$1.9 million in 2000 to more than \$3 million in 2004. This is due to increasing caseloads and a decreasing percentage of reimbursement from the state. Criminal cases prosecuted in Summit almost doubled from 2000 to 2004. As these prosecutions increased, Ohio reduced its reimbursements from 45% of the cost to 27%.⁷⁵ The Ohio Public Defender Commission, in its 2004 annual report, listed the total costs reported by the counties to the state and the amount the state reimbursed. For the thirty-five counties that sought reimbursement, Ohio paid approximately 31% of the total cost.⁷⁶ In Fiscal Year 1998, Ohio reimbursed 44% of the costs to counties seeking payment.⁷⁷

69. Ernie Lewis, *Rising Caseloads Continue to Threaten Kentucky Public Defender System*, LEGISLATIVE UPDATE (Department of Public Advocacy), Fall 2004, at 1, available at http://dpa.ky.gov/library/legupd/Fallo4_LegUpdate.pdf.

70. Associated Press, *Public Defenders Say Money Short for Indigent Defendants*, AP ALERT-KY, May 21, 2005. The problems in Kentucky continue. See Press Release, Ky. Dep't of Pub. Advocacy, *Despite Modest Gains, KY Public Defenders Experience Caseload Growth for 5th Consecutive Year: KY Public Advocacy Commission Responds*, <http://dpa.ky.gov/news/pressRelease.php> (last visited Apr. 14, 2006).

71. Ky. Dep't of Pub. Advocacy, *supra* note 70.

72. Lewis, *supra* note 69, at 2.

73. *Id.* at 4; see also Associated Press, *supra* note 70.

74. Lewis, *supra* note 69, at 4.

75. Phil Trexler, *Summit May Alter Its Legal Aid: As Criminal Defense Cost Rises, Non-profit Lawyers Group Has Plan to Take on Some Work*, AKRON BEACON J., May 15, 2005, at B1.

76. OHIO PUB. DEFENDER COMM., 2004 ANNUAL REPORT 20 (2004), available at http://www.opd.ohio.gov/us/us_2004.pdf.

77. OHIO PUB. DEFENDER COMM., 1999 ANNUAL REPORT 36 (1999), available at http://www.opd.ohio.gov/us/us_1999.pdf.

Indigent defense in Minnesota has been funded fully by the state for more than a decade. Public defender budgets there were cut in 2003 and 2004. In 2003, the Minnesota Board of Public Defense asked the legislature to add an additional 102 public defender positions. Instead, twenty attorney and staff positions were cut.⁷⁸ In 2004, Minnesota public defenders operated on a budget of \$53 million, which provided for about 380 full-time staff attorneys. However, a plan to provide more funding by charging co-payments was found by the Minnesota Supreme Court to be unconstitutional, depriving the public defenders of \$7.6 million in expected funds.⁷⁹

A new statewide public defender system in Georgia was implemented in 2004 in response to a 2002 Georgia Supreme Court ruling that the old system was “a hodgepodge of uneven, under-funded and overwhelmed county-run programs” that “heightened the risk of innocent people being wrongly convicted.”⁸⁰ The new system is funded through increased court costs, criminal fines, and bonds. Nevertheless, the director of the Georgia Public Defender Standards Council said, “Our budget is as bare-bones as we can come up with Anything less would put us in a position of not being able to fulfill our mandate.”⁸¹

In Louisiana, the issue of indigent defense funding is at the center of a statewide debate. In a recent editorial, *The Shreveport Times* wrote:

Overhauling Louisiana's woefully under-funded indigent defense system to provide competent legal counsel to crime suspects isn't a social program for the poor. It's about justice for the accused, yes, but also about protecting the interest of crime victims

“We owe it to our citizens,” [Louisiana Supreme Court Chief Justice Pascal] Calogero said, in an account in the *Advocate of Baton Rouge*, “especially to the victims of crime, to do what we can to ensure that convictions are obtained that will survive the appellate process and constitutional challenge . . . so another victim does not have to go through the agony of an overturned conviction.”⁸²

The comments of the Chief Justice and *The Times* follow an April 2005 ruling by the Louisiana Supreme Court that funding for indigent defense is not a local government responsibility.⁸³ In its editorial, *The*

78. Tom Robertson, *Minnesota Lawyers Frustrated Over Shortage of Public Defenders*, MINNESOTA PUBLIC RADIO, Sept. 30, 2003, available at http://news.minnesota.publicradio.org/features/2003/09/30_robertson_pdshortage/.

79. *State v. Tennin*, 674 N.W.2d 403, 410 (Minn. 2004). See Tim W. Budig, *Budget Cuts, Lack of Funding Puts Public Defender Effectiveness in Jeopardy*, ECM CAP. REP., June 22, 2004, available at <http://www.hometownsource.com/capitol/2004/june/22publicdefense.html>.

80. Bill Rankin, *Defender System Gets Early Praise; State Indigent Program Off to Quiet Start*, ATLANTA J.-CONST., Feb. 6, 2005, at 1F. The new system is discussed in Part VI.A.

81. *Id.*

82. Editorial, *Don't Allow Justice to Derail*, SHREVEPORT TIMES, May 8, 2005, at 6I.

83. *State v. Citizen*, 898 So. 2d 325, 335 (La. 2005). In sharp contrast, the Mississippi Supreme Court recently held that the state legislature's failure to fund a statewide public defender program did

Times further points out that a 2003 United States Department of Justice report revealed Louisiana to have the highest adult incarceration rate in the nation. However, the state only spent \$2.10 per capita on indigent defense; neighboring states spent two to four times that amount.⁸⁴ In 2005, the state public defender system received funding of about \$32 million, \$20 million below the level thought to be needed.⁸⁵ Only \$9 million of that \$32 million currently comes from the state, with local parishes responsible for funding the remainder primarily through court fees associated with traffic fines.⁸⁶ However, in some parishes, ticket writing can decrease and the court fees may not be imposed, which leaves certain locales without the necessary revenue stream for adequate indigent defense.⁸⁷ As an example of inadequate funding, the public defender's office in Lake Charles, Louisiana had a negative balance of \$16,000 though it still had six capital murder cases remaining in the year.⁸⁸ The local court was then forced to order the parish council to provide \$275,000 for defense attorneys and other resources.⁸⁹ In 2005, the state legislature began to take action aimed at reforming the system. Among the elements of a bill passed by the state Senate and approved by a House committee was a uniform statewide fee from traffic fines that replaces the varying fees assessed locally throughout the state.⁹⁰ The bill also would provide guidelines for judges to follow before declaring a

not violate the Constitution, as the county could not show that the system resulted in "systemic ineffective assistance of counsel in [the county] and throughout the state." *Quitman County v. State*, 910 So. 2d 1032, 1048 (Miss. 2005). The dissenting justices strongly disagreed:

The trial court ignored the following evidence:

- a. There are a substantial number of instances where neither lawyer nor defendant recognize each other at arraignment, and prisoners remain in jail up to 4 to 5 months without any contact with their attorney.
- b. Client meetings are held in groups in the courtroom within earshot of the prosecutor and the judge.
- c. Public defenders routinely waive preliminary hearings, accept facts in indictments, and do not ask for investigators or experts.
- d. There is no opportunity for the investigation or communication necessary to make an informed decision when pleas are entered on arraignment day.
- e. There is a vast disparity between the resources of the State and public defenders.

Id. at 1050-51 (Graves, J., dissenting).

84. Editorial, *Don't Allow Justice to Derail*, *supra* note 82.

85. Elizabeth Fitch, *Indigent Defenders Overloaded, Underfunded*, NEWS-STAR (Monroe, La.), May 5, 2005, at 1A.

86. *Id.*

87. Editorial, *Don't Allow Justice to Derail*, *supra* note 82.

88. *Talk of the Nation, Radio Interview with Mark Ballard of The Advocate* (Baton Rouge, La.), (Nat'l Pub. Radio broadcast Apr. 13, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4598755>.

89. *Id.*

90. John Hill, *Indigent Defender Reform Heads Into Final Stretch*, THE SHREVEPORT TIMES, June 8, 2005.

defendant to be indigent, as opposed to the current practice of relying solely on the discretion of the judge.

Missouri provides the most stark illustration of the funding problem. The state bears full responsibility for funding the indigent defense system. It provides a statewide public defender program. The state is not generous, however, in its funding, giving the lowest financing, on a cost-per-capita basis, of any state in the nation. Moreover, Missouri has failed to provide any additional funding to the system in the past four years.⁹¹ No other state in the nation has done that, and most states have increased budgets by more than 10% during this time.⁹²

Many states, including California, Mississippi, and Arizona, starkly illustrate the funding problems of indigent defense programs. None, however, is more startling and sobering than the Massachusetts experience, and this in a state which provides excellent oversight and training for its defense counsel. In 2003, court-appointed attorneys representing indigent defendants in Suffolk County, Massachusetts refused to take on new cases.⁹³ Their stand was the result of a dispute over back pay from the previous year. After two days, the Governor signed a spending measure that made up for the amount owed.⁹⁴

The concern of public defenders and appointed counsel in Massachusetts is not simply that they are not getting paid what they are owed, but that the rates at which they are paid are desperately inadequate. In 2003, the state paid its appointed counsel the third-lowest rate in the nation. For district court cases, court-appointed attorneys received \$30 an hour, which was five dollars less than they had been paid seven years earlier. For superior court cases, the rate was \$39, and in murder cases an attorney could earn \$54 an hour.⁹⁵ Believing these rates to be so low as to violate the defendants' right to effective assistance of counsel, attorneys sued the state to force an increase.⁹⁶ The Massachusetts defenders sought raises in hourly rates to \$60 for district court cases, \$90 for superior court cases, and \$120 for murder cases.⁹⁷ Because of the low pay and high caseloads, the number of attorneys willing to act as appointed counsel declined by 9% from the late 1990s through 2003.⁹⁸ In some places the number of available attorneys

91. Joe Lambe, *Public Defense System in Dire State, Report Says*, KAN. CITY STAR, Jan. 8, 2006, at B4 (discussing the 2005 evaluation of the Missouri System).

92. MISSOURI ASSESSMENT, *supra* note 61, at app. B1.

93. Kathleen Burge, *Ending 2-Day Standoff, Lawyers Now Accepting New Cases*, BOSTON GLOBE, Aug. 8, 2003, at B3.

94. *Id.*

95. *Id.*

96. Thanassis Cambanis, *Poor Lack Counsel; Lawyers Cite Low Pay*, BOSTON GLOBE, Nov. 13, 2003, at A1.

97. *Id.*

98. *Id.*

declined by 10%.⁹⁹ The same problem surfaced with state-employed lawyers:

Across the state right now, people are leaving our agency and we can't fill [the jobs] because they've under-funded us again this year. It's a critical situation We have been cut for about three years in a row; it's around another 5% this year, to the point where we have about an \$800,000 shortage in the budget to pay the staff salaries around the state. Right now, there's the possibility that we're going to have voluntary furloughs next spring, the end of the fiscal year.¹⁰⁰

The chief counsel for the governing state agency illustrated the problem with ensuring quality counsel in Massachusetts for indigent clients. His example focused on an attorney who had come to Massachusetts from the University of Michigan. However, after five years of service, the \$39,000 annual salary she made in Massachusetts could not compete with the \$74,000 salary she received when she accepted a position with the Washington, D.C. Public Defender Service.¹⁰¹

Their paltry salaries are a disgrace to the quality of justice in Massachusetts, and the Commonwealth is ill-served by not being able to retain the services of these dedicated public servants. Yet it does not have to be this way. For less than \$1.5 million, all Committee for Public Counsel Services (CPCS) staff attorneys could be raised from their current financial abyss to the salary levels of other state counsel. For another \$7.5 million, all assistant district attorneys and assistant attorneys general could receive identical financial justice.¹⁰²

In 2004, the Massachusetts Supreme Judicial Court found that indigent defendants were in fact not receiving the constitutionally guaranteed right to counsel. The ruling said that, as a consequence, defendants could be jailed only for seven days without a lawyer and that after forty-five days without seeing a lawyer charges would be dropped.¹⁰³ One county judge followed the ruling and, despite objections, released three defendants charged with drug offenses.¹⁰⁴ What the court did not

99. *Id.*

100. Hamilton Kahn, *Court Appointed Attorneys Face Budget Cuts, Heavy Caseloads*, THE PROVINCETOWN BANNER (Mass.), Oct. 9, 2003 (quoting Bill Robinson, attorney-in-charge of the Committee for Public Counsel Services in Massachusetts).

101. William J. Leahy, Editorial, *As You Were Saying: State Pays Third Rate Wages to First-Rate Public Attorneys*, BOSTON HERALD, Apr. 11, 2004, at 26.

102. *Id.*

103. See *Lavallee v. Justices*, 812 N.E.2d 895, 911 (Mass. 2004).

104. See Jonathan Saltzman, *Court Slams Low Pay Rate For Defense Lawyers SJC Says The Poor Are Denied Rights*, THE BOSTON GLOBE, July 3, 2004, at B1. With terrible shortages of defense lawyers in New Orleans—the aftermath of Hurricane Katrina and severe funding problems—“[t]wo of the 12 judges in the Orleans Parish Criminal District Court have raised the prospect of mass releases of defendants by suspending prosecutions in their courts.” Laura Parker, *Lack of Public Defenders May Force New Orleans to Free Accused Felons*, USA TODAY, Feb. 14, 2006, at 1A.

do, however, was order a pay raise for defenders, though the judges' language is strong:

Public safety . . . comes with a cost. One of the components of that cost is the level of compensation at which counsel for indigent defendants will provide the representation required by our Constitution. . . . The inadequacy of compensation for private attorneys who represent indigent criminal defendants has persisted for many years. The continuation of what is now an unconstitutional state of affairs cannot be tolerated.¹⁰⁵

In 2004, the Massachusetts legislature did raise fees for appointed counsel, but not to the levels sought. Instead of hourly increases to \$60, \$90, and \$120, legislators added an additional \$7.50 per hour.¹⁰⁶ A state commission had recommended much greater increases in hourly pay rates.¹⁰⁷ Two years after the Suffolk County defenders refused to take on further cases, threats of a work stoppage arose again.¹⁰⁸

A major, and potentially very positive, legislative development then occurred in July 2005, when the state legislature passed even more significant changes for Massachusetts. This legislation raised compensation levels higher, with counsel in district court receiving \$50 per hour, lawyers in superior court getting \$60 (\$100 per hour for homicide cases), and restrictions being imposed on the number of hours court-appointed attorneys could bill the state annually (1400).¹⁰⁹

2. Caseloads

Firmly enmeshed in the funding dilemma is the problem of overwhelming caseloads carried by public defenders and appointed counsel.¹¹⁰ As a result, defendants can often spend weeks or months

105. *Lavallee*, 812 N.E.2d at 910.

106. See Michael Levenson, *Pay Controversy Leaves Attorney Struggling, Angry Says Family Needs Must Come First*, BOSTON GLOBE, Aug. 18, 2004, at B4.

107. See Editorial, *Fair Pay for Defenders*, BOSTON HERALD, June 20, 2005, at 28.

108. See Maggie Mulvihill, *Public Defenders' Threat Over Pay: 'It Will be Chaos'*, BOSTON HERALD, June 17, 2005, at 7. The problems in Massachusetts have continued, and they are not limited to one county. Just this past year, as explained in one news article:

[J]udges in Middlesex and Suffolk counties sent court officers to scour the hallways of their courthouses to solicit attorneys willing to represent indigent clients . . . there was no lawyer available in Chelsea District Court, where sixteen new defendants were charged. . . . Attorneys were not available for the domestic violence session at Dorchester District Court or Boston Municipal Court, [and in] Roxbury District Court, more than fifty criminal cases were continued . . . so attorneys could be rounded up. . . . In April, a commission appointed by the governor to study the pay-rate issue recommended fee hikes, but the Legislature has failed to fund them.

Maggie Mulvihill, *Kerry Decries States' 'Unconstitutional' Law Crisis*, BOSTON HERALD, July 7, 2005, at 7.

109. See THE SPANGENBERG GROUP, *INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 5* (2005), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/MAindigdefreorm2005.pdf> [hereinafter MASSACHUSETTS REPORT]. It is estimated that Massachusetts now spends \$120 million annually on indigent defense. *Id.* at 6.

110. Part of the difficulty is that no uniform system nationwide defines "caseloads." In some states,

without meeting their attorneys and defense lawyers sometimes have just minutes to prepare for court hearings or even trials. At a 1998 press conference, National Association of Criminal Defense Lawyers president Gerald B. Lefcourt commented:

But no matter how dedicated or idealistic, a public defender carrying a caseload of as many as 700 cases a year, with no investigator, no secretary, no paralegal, no law library, no computer, none of the resources that police and prosecutors take for granted—that lawyer cannot effectively represent his clients.¹¹¹

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals set forth recommendations for limits on public defender caseloads. The NAC stated that a single attorney in a year should not carry more than 150 felonies, or more than 400 misdemeanors, or more than 200 juvenile cases or more than twenty-five appeals.¹¹² If an attorney handles the limit in one category then those are all the cases that person is to handle. Many lawyers throughout the nation do not come close to meeting that standard.¹¹³

the number of cases a public defender carries is the actual number they report. However, other states create formulas through which certain types of cases are given greater weight than others. In Benton County, Washington, objections were voiced in 2001 to a plan by which the county would count "less-serious" cases as one-half of other more serious cases. Janine Jobe, *Defenders Reject Benton's Offer*, TRI-CITY HERALD (Wash.), Nov. 28, 2001, <http://www.tricityherald.com/news/2001/1128/Story3.html>. However, in Connecticut, weighting of cases has become standard. Caseloads in Connecticut are defined as "new cases assigned." DIV. OF PUB. DEFENDER SERV., STATE OF CONN., THE DEMAND FOR PUBLIC DEFENDER SERVICES, available at <http://www.ocpd.state.ct.us/Content/Annual2004/2004Chap2.htm>. Depending on the type of public defender office the case comes to, Connecticut identifies "new cases assigned" differently. In Judicial District offices, caseloads are calculated by noting each murder and non-death penalty capital case as two cases. Each capital felony case in which the death penalty is sought is counted as ten cases. Then, minor felonies, misdemeanors, motor vehicle, cases transferred by the Special Public Defender, and other cases are subtracted. Geographical Area public defender offices determine caseload by subtracting transferred cases from the Special Public Defender and "cases that are nolle or dismissed on the date of appointment and bail only appointments." *Id.* And, finally, Juvenile Matters offices subtract various categories of cases. *Id.* For many years, commentators have argued for a uniform reporting system. See NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING, (2003), available at http://www.ncsonline.org/D_Research/csp/StCtGuide_StatReporting_Complete_color10-26-05.pdf; NAT'L CTR. FOR STATE COURTS, STATE COURT MODEL STATISTICAL DICTIONARY: A JOINT EFFORT OF THE CONFERENCE OF STATE COURT ADMINISTRATORS AND THE NAT'L CTR. FOR STATE COURTS, (1989). NLADA has also prepared materials on case weighting and analysis. See NLADA Defender Legal Services—Standards http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Home (last visited Apr. 14, 2006).

111. News Release, Nat'l Ass'n of Criminal Def. Lawyers, Wenatchee Witch-Hunt Emphasizes Need for Public Defender Funding (June 2, 1998), available at <http://www.nacd1.org/MEDIA/pro000118.htm>.

112. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 B.19 (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> [hereinafter TEN PRINCIPLES OF A PUBLIC DEFENSE].

113. Workload limits have been reinforced by a number of systemic challenges to under-funded indigent defense systems, including judicial determinations that a defender's caseloads may preclude

By 2001 the Clark County (Nevada) Public Defender Office had juvenile caseloads at about seven times the NAC recommended limit. Each of the two attorneys on the juvenile division staff had caseloads approaching 1500.¹¹⁴ A NLADA survey found that as the cases in the division increased from 1993 through 2001, the focus of the attorneys was not so much on representing their clients as it was "about processing cases."¹¹⁵ The evidence they present shows a more than 50% decrease in the amount of time available to the office to dispose of a case. In 1993, an average case took about sixty-three days to complete. By 2001, it was down to approximately twenty-six days.

In Louisiana, a public defender in Rapides Parish told the judge in a recent murder prosecution that she could not adequately defend the accused because she was so overwhelmed with cases that "if you divide the number of hours in a day by the number of cases . . . , I would be allowed . . . to devote eleven minutes . . . to each of the Public Defender files that I have [I]t's just not humanly possible for me to do that."¹¹⁶ Each defender there has a caseload of 472 clients.¹¹⁷ Because of the caseload burden, Rapides Parish public defenders began to refuse new clients, so a judge in Louisiana's Ninth Judicial District used the telephone book to call attorneys and appoint them to represent indigent defendants. Recognizing the situation as dire, the judge said, "We've run into a real crisis that we just can't address on the local level. What we need to do is hire more attorneys and pay them well, at least as much as the prosecutors are making."¹¹⁸

The ninth Judicial District in Minnesota covers seventeen counties and has the highest caseload in the state.¹¹⁹ The chief public defender in the district has had to deal with lawyer resignations—eight within one year—and says that without additional funding the situation could be

the furnishing of adequate defense representation. See, e.g., *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988); *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *State v. Hanger*, 706 P.2d 1240 (Ariz. Ct. App. 1985); *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *Corenevsky v. Superior Court*, 682 P.2d 360 (Cal. 1984); *People v. Knight*, 239 Cal. Rptr. 413 (Ct. App. 1987); *Hatten v. State*, 561 So. 2d 562 (Fla. 1990), cert. denied, 495 U.S. 957 (1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987); *State v. Peart*, 621 So. 2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *State v. Robinson*, 465 A.2d 1214 (N.H. 1983); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. denied, 454 U.S. 1142 (1982); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Mount Vernon v. Weston*, 844 P.2d 438 (Wash. Ct. App. 1992). This matter is discussed further in detail in Part VI.B., *infra*.

114. See NAT'L LEGAL AID & DEFENDER ASS'N, NAT'L COMMITTEE ON THE RIGHT TO COUNSEL, EXCESSIVE CASELOADS, available at http://www.nlada.org/Defender/Defender_Kit/NCRC.

115. See *id.*

116. *State v. Bell*, 896 So. 2d 1236, 1240 (La. Ct. App. 2005).

117. See *id.*

118. Mark Ballard, *Public Defender Changes Sought*, THE SUNDAY ADVOC. (Baton Rouge, La.), May 23, 2004, at 1-A.

119. See Robertson, *supra* note 78.

disastrous. On the whole, public defenders statewide each handle more than 900 cases a year.¹²⁰

The Colorado State Public Defender Office says that the number of cases handled by its attorneys is both growing in number and in complexity.¹²¹ Also, the increase in the number of cases has outpaced population growth in the state—5% versus 1.8%.¹²²

In 2004, the Washington State Bar Association released a paper that revealed that even in places where public defender programs are strong, they are far from perfect:

Despite the existence of strong public-defender programs, and able individual [sic] assigned counsel and contract defenders in Washington, there are many cities and counties where the lawyers are totally overwhelmed by crushing caseloads Often, they are coping with their caseloads, but do not have the resources to send lawyers to arraignment hearings.¹²³

In Seattle, a 2004 plan to revamp public defender services was met with criticism by the King County Bar Association. One of the complaints against the proposed system, designed to eliminate the county's role in public defense and allow the city to contract directly with private attorneys to handle indigent defense, was that it did not impose stricter limits on caseloads.¹²⁴ The fear was that the city's misdemeanor caseloads (about 380 cases per year) were perilously close to the ABA recommended limit of 400 cases. The caseloads of Seattle defenders had already exceeded the state bar's limit of 300.¹²⁵ This followed on the heels of a 2001 situation in Washington State in which Benton County public defenders—all of whom are part-time—rejected a contract offer because of overwhelming caseloads beyond suggested limits.¹²⁶ One mayor, also a public defender, said, "They can't do the numbers they do and expect a first-rate defense."¹²⁷

The need for reduced caseloads is central to improving the defense for indigent clients. In Virginia, Fairfax County public defenders asked that traffic violations be dropped from their assignments in order to

120. *See id.*

121. *See* Office of the State (Colo.) Public Defender, <http://www.state.co.us/defenders/services.html>.

122. *See id.*

123. Robert C. Boruchowitz, *The Right to Counsel: Every Accused Person's Right*, WASH. STATE BAR ASS'N BAR NEWS, Jan. 2004, available at www.wsba.org/media/publications/barnews/2004/jan-04-boruchowitz.htm (last visited Apr. 14, 2006).

124. *See* Ken Armstrong, *Legal-Defense Cost Cutting? Mayor Urged Not to Tinker*, SEATTLE TIMES, May 14, 2004, at B1.

125. *See id.*

126. *See* Jobe, *supra* note 110.

127. *Id.*

lighten caseloads.¹²⁸ That request was granted. What was not granted was a request to hire more attorneys.¹²⁹ In 2004, Fairfax County public defenders represented more than 8000 clients and currently carry a caseload of more than 400 cases each.¹³⁰ James M. McCauley, ethics counsel to the Virginia State Bar, wrote:

Overwhelming caseloads, especially for public defenders, contribute to the perception by many that "assembly-line" justice is all one can expect. Effective assistance of counsel means "that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." Caseloads for Virginia indigent defense counsel render effective assistance impossible in many instances.¹³¹

A plan in Wisconsin would decrease caseloads by decriminalizing driving without a license, an offense that makes up 70% of the cases in at least one Wisconsin county's court.¹³² Though the plan appears to have been pushed principally in order to reduce the workload on prosecutors, the plan would remove state public defenders from those cases entirely.¹³³

In Kentucky, the need to overhaul the indigent defense system led to the creation of the Blue Ribbon Group, which recommended in 1999 that the state provide additional funding to hire thirty-five more attorneys to help alleviate caseloads. In 2000, the state legislature provided funding for adding ten new lawyers.¹³⁴ However, further reductions in the budget decreased that number to five attorneys.¹³⁵ In 2004, caseloads per attorney averaged 489.4¹³⁶ with sixteen offices in Kentucky having caseloads ranging between 500 and 600, and with another office registering an average caseload more than 600. The Department of Public Advocacy has deemed these offices at a "critical" level.¹³⁷ For

128. See Tom Jackman, *With Staff Stretched Thin, Chief Asks Judges to Curtail Caseload*, WASH. POST, Mar. 20, 2005, at C04.

129. See *id.*

130. *Id.* While the Fairfax County case reduction plan may assist the public defenders in providing better service to some clients, courts are then faced with finding counsel willing to handle the traffic and misdemeanor cases at very low compensation rates. See *id.*

131. James McCauley, *Excessive Workloads Create Ethical Issues for Court-Appointed Counsel and Public Defenders*, VA. LAW., Oct. 2004, at 2, available at <http://www.vsb.org/publications/valawyer/oct04/access.pdf>.

132. See Andy Neleson, *Law Change Could Jump-Start Courts*, GREEN BAY PRESS-GAZETTE, June 5, 2005, at 1A.

133. See *id.*

134. ERNIE LEWIS, DEP'T OF PUB. ADVOCACY, LEGISLATIVE UPDATE COVERING CRIM. JUSTICE LEGISLATIVE ISSUES, NO. 14, DEFENDER CASELOADS RISE IN FY01 AND FIRST NINE MONTHS OF FY02 6 (2002), available at http://dpa.ky.gov/library/legupd/June02_LegUpdate.pdf.

135. ERNIE LEWIS, DEP'T OF PUB. ADVOCACY, LEGISLATIVE UPDATE COVERING CRIM. JUSTICE LEGISLATIVE ISSUES, NO. 20, RISING CASELOADS CONTINUE TO THREATEN KENTUCKY PUBLIC DEFENDER SYSTEM 2 (2004), available at http://dpa.ky.gov/library/legupd/Fall04_LegUpdate.pdf.

136. ERWIN W. LEWIS, DEP'T OF PUB. ADVOCACY, DEFENDER CASELOAD REPORT FOR FISCAL YEAR 2003-2004, at 16 (Sept. 2004), available at <http://dpa.ky.gov/library/caseload04.pdf>.

137. Lewis, *supra* note 135, at 2.

Fiscal Year 2005 the DPA anticipated funding for ten caseload relief attorneys, but even with such funding, the caseloads per attorney would only drop to 471, from 489, and that is "only if the recent trend upward in overall caseloads ends."¹³⁸ The Kentucky DPA releases a legislative update twice a year. In fall 2004, the focus was on the caseload dilemma:

When caseloads are as high as they presently are in Kentucky . . . neither the client nor the individual public defender is being treated with fundamental fairness. It is unfair to give an indigent accused a lawyer who does not have time to handle his case Kentucky relies upon its public defenders to ensure that when liberty is taken from a citizen, we can rely upon the judgment that took that liberty. Public defenders truly operate as a check on government, to make sure that the police are arresting properly, that prosecutors are charging properly, and that sentences are fair and just. When caseloads are so high that a public defender can only spend 3.8 hours per case, including serious felony cases, Kentucky's public defenders cannot ensure reliability.¹³⁹

The problem of heavy caseloads caused a stir in New Mexico when, seeking to alleviate the burdens on state public defenders, government officials placed an ad in the New Mexico Bar Bulletin seeking private attorneys willing to work for free for indigent defense at the appellate level.¹⁴⁰

In 2000, the President of the Florida Public Defender Association wrote to the Governor under the specter of statewide budget cuts. The letter spotlighted the fact that the more anti-crime initiatives the state legislature passed, the more work public defenders were responsible for handling. Though remaining sensitive to the priorities of anti-crime legislation, the writer pointed out that chaos would result if budgets were slashed. The resultant backlog of cases would render public defender offices unable to perform their functions.¹⁴¹

In Calcasieu Parish, Louisiana, nine defendants waited two years for their trials to begin. As a result, the state supreme court said that courts could stop capital prosecutions against indigent defendants until more funding became available.¹⁴² Because of lack of funding, public defenders in Calcasieu Parish carry caseloads at nearly four times the ABA recommended levels.¹⁴³ Another account put the number in Calcasieu at

138. *Id.* at 3.

139. *Id.* at 4. The problems in Kentucky remain. *See supra* note 69.

140. *See* Jeremy Pawloski, *State's Ad Has Defense Lawyer Up in Arms*, ALBUQUERQUE J., Apr. 9, 2005, at 1.

141. *See* Letter from Howard H. Babb, Jr., President, Fla. Pub. Defender Ass'n, to Gov. Jeb Bush, Gov. of the State of Fla. (Nov. 1, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/boston/elsewhere/babb.html>.

142. *See* Editorial, *Don't Allow Justice to Derail*, THE SHREVEPORT TIMES, May 8, 2005, at 61.

143. *See id.*

almost six times the ABA limits.¹⁴⁴ In Louisiana's Ninth Judicial District, public defenders have caseloads much closer to the ABA limit than in Calcasieu. But in the Ninth District it is estimated that nine more attorneys are nevertheless needed to meet the caseload burden.¹⁴⁵

3. Compensation

Of course, a great deal of funding for indigent defense goes into paying the attorneys representing the defendants. Depending on the type of indigent defense system used by a state or county, payment may be in the form of set salaries linked to full or part-time employment, or fees based on a contract rate, or on an hourly basis. And, as with the general funding issue, the question is whether the amount available is sufficient. The answer, generally, is no.

a. Fees

For court-appointed counsel, states or counties often set limits on the hourly rates and total compensation for the attorney. The most discussed, and criticized, system is Virginia's. Here there are "hard caps" on the amount a court-appointed attorney is to be paid, regardless of the length of the trial or the total hours she spent working on it. The Washington Post editorialized:

[Virginia] too has abdicated its responsibility to provide reasonable counsel to defendants, a constitutional obligation the U.S. Supreme Court articulated more than four decades ago. The problem in Virginia

144. Fitch, *supra* note 85.

145. *Id.* As statewide remedies are sought, a large part of the problem in Louisiana is inadequate record keeping. Without proper records on the number of cases, those trying to fix the indigent defense system really have no idea about how serious the caseload problem is. The Executive Director of the Louisiana Indigent Defense Assistance Board told *The News Star* (Monroe, LA), "I think we need to have some system of counting cases so we can determine caseload that is uniform throughout the system If they are all counting cases in the same manner we can talk apples and apples." *Id.* Nevertheless, under any set of calculations, it is clear that the State of Louisiana has extremely serious problems in this area. See Cooks & Fontenot, *supra* note 35, at 208-09, stating:

[T]he caseload for the average public defender in Calcasieu Parish is more than three times the caseload recommended by the Louisiana Indigent Defender Assistance Board and more than four times the caseload recommended by the National Advisory Commission on Criminal Justice Standards and Goals. Seven staff attorneys handle an average of 590 felony cases and 150 misdemeanor cases.

While the average time from arrest to disposition for felony cases nationwide is 214 days, in Calcasieu Parish it takes an average of 501 days to dispose of a felony case, with only 20% of all felony cases disposed of within one year of the date of arrest.

The greatest disparity is in time spent with the client. Jail visitation logs "identified a total of 31 trips by public defenders to visit clients, an average of 10 visits per month for the entire office. By comparison, private attorneys made 236 trips to visit incarcerated clients. The difference is pretty dramatic when one considers that the private attorneys handle only 15% of the felony cases in Calcasieu Parish, while public defenders handle the rest.

Id.

The problems throughout the gulf coast states will likely worsen after Hurricane Katrina, as discussed *supra* note 104. See Henry Weinstein, *Evacuated Prisoners are Captive to Legal Limbo*, L.A. TIMES, Oct. 16, 2005, at 26.

is not that funds run out but that payments to court-appointed lawyers are capped at levels so absurdly low as to be inconsistent with a constitutionally adequate defense in any case that is the least bit complicated. A lawyer facing a potentially lengthy trial for a pittance has an overwhelming interest in a quick guilty plea, not an aggressive defense. The Virginia courts cannot order the legislature to lift the fee caps. They could, however, bar prosecutions when the state refuses to pay adequately for an indigent's defense.¹⁴⁶

While court-appointed attorneys in Virginia may claim up to \$90 per hour in fees, they are faced with the lowest payment cap in the nation, \$1235.¹⁴⁷ But, that total is only for attorneys representing defendants who face twenty years to life in prison; if the potential sentence is for fewer than twenty years in prison the cap is \$395.¹⁴⁸ And, for a misdemeanor punishable by jail time the cap is \$112.¹⁴⁹ These caps are not waivable. The Chief Justice of the Supreme Court of Virginia touched on the subject briefly, but accurately:

The issue of funding for court-appointed counsel has been a major concern for many years. When the Supreme Court submitted its budget request for the current biennium, the Court sought funds to increase significantly compensation paid to court-appointed counsel who represent criminal indigent defendants. Court-appointed counsel in Virginia are the poorest paid in the nation, and we must work hard to eradicate this problem. . . . For the first time in many years, the General Assembly allocated additional funding of \$2,000,000 for court-appointed counsel who represent indigent criminal defendants. This increase is a small but important step in the right direction. However, we need more money to improve compensation for these attorney.¹⁵⁰

Caps exist elsewhere in the country, too, though they can be waived. In Ohio, a recent case highlights the inability of court-appointed attorneys to be compensated at levels that make it possible for them to offer an adequate defense. The caps, set by Miami County, limited the compensation for a death penalty case to \$40,000, which was to be split between two attorneys and had to be used by them to pay support staff and take care of other expenses.¹⁵¹ This total compensation may be

146. Editorial, *Louisiana's Wise Word*, WASH. POST, Apr. 12, 2005, at A20.

147. Christina Nuckols, *Legal Reform Lags in Year-Old Effort*, VIRGINIAN-PILOT, Apr. 25, 2005, at B5.

148. See *id.*

149. McCauley, *supra* note 131, at 2.

150. See Hon. Leroy Rountree Hassell, 2005 Virginia State of the Judiciary Address, available at http://www.courts.state.va.us/scv/state_of_the_judiciary_address.html. Additionally, the Virginia Indigent Defense Coalition gave the state a grade of "F" for being unable to reach the goal of placing defense counsel in parity with the prosecution. See VA. INDIGENT DEFENSE COALITION, VIDC REPORT CARD, www.vidcoalition.org/reportcard.html. Proposed legislation has recently been introduced in the Virginia legislature which would eliminate the caps. See Hugh Lessig, *Virginia Warned on Poor's Legal Aid*, DAILY PRESS, Feb. 2, 2006, at A1.

151. Nancy Bowman, *Lawyers Shun Death Cases Because of Low Pay*, DAYTON DAILY NEWS, May 9, 2005, at A1.

compared to the \$40,000 spent by the prosecution in the same case merely to have one witness give expert testimony.¹⁵² However, Miami County is in the middle of the pack in terms of caps set by counties in Ohio. The caps range from \$3000 in one county through a maximum of \$75,000 set by two counties.¹⁵³

In Iowa, the former president of the Iowa State Bar Association decried the use of caps in paying for indigent defense. He asserted that the system actively discouraged competent attorneys from taking appointments. Recent law school graduates can no longer seek viable employment in the area because the debt loads from law school are too much and the compensation for indigent defense appointments is too little. "There is no chance," he wrote, "of servicing a \$75,000 debt, let alone paying for a car, house and family, on the fees from indigent defense."¹⁵⁴ In 2003, Iowa defenders could claim an hourly fee of \$50 an hour for misdemeanor and some felony representation, but were faced with a \$1000 cap for felonies and \$500 for misdemeanors.¹⁵⁵

Assigned counsel rates in New York increased in 2004 for the first time in seventeen years. From the mid-1980s through the turn of the century, lawyers received \$40 per hour for in-court time and \$25 per hour for work outside the courtroom. The new rates were set at \$60 per hour for misdemeanors and \$75 per hour for felonies.¹⁵⁶

In 2001, Bexar County (San Antonio), Texas raised fees for indigent defense for the first time in thirteen years. Prior to the increase an attorney could make a maximum of \$200 per day in court, but could now earn up to \$750 per day on a first-degree felony.¹⁵⁷

In California, where some counties pay private attorneys a flat contract fee to handle indigent defense, the state bar is critical of the results such contracts achieve. A study by the State Bar of California stated, "flat rate compensation . . . encourages attorneys to do what is most profitable for them and what is efficient for the system . . . but not what is in the best interest of clients."¹⁵⁸

152. *See id.*

153. *Id.*

154. Alan Fredregill, *A Changing Oil vs. Changing Venue—A Case Study on Societal Values*, IOWA LAW., Mar. 14, 2003, at 5.

155. *Id.*

156. John Caher, *Statewide Standards Urged for Indigent Defense Counsel*, N.Y.L.J., Apr. 26, 2005, at 1.

157. Lisa Sandberg, *Poor's Counsel to be Quicker, Better Paid*, SAN ANTONIO EXPRESS-NEWS, Dec. 4, 2001, at 1A.

158. John F. Berry, *County's Cost-Saving Practice Draws Criticism from Review*, PRESS-ENTERPRISE, May 28, 2005, at B8.

b. Salaries

In addition to fees and flat contract rate payments, there are thousands of public defenders who receive annual salaries. Salaried public defenders sometimes face paychecks that are less than their counterparts in prosecutor offices, despite an ABA-adopted standard that public defenders and prosecutors be paid at "comparable" rates.¹⁵⁹ In many states the parity does exist.¹⁶⁰ In others, however, the defense lawyers receive lower salaries.

In Baton Rouge, the twenty-seven attorneys earn between \$18,000 and \$35,000 annually, figures that are about 30% less than the salaries in the district attorney's office.¹⁶¹ Public defender salaries in Alameda County, California ranged much higher than in Baton Rouge, anywhere in excess of \$50,000 to greater than \$130,000, but the top prosecutor salaries there far exceeded those of the public defender office.¹⁶² In Georgia, entry-level district attorney and public defender positions both start out at the same annual salary, but the upper limit on the public defender salary scale is lower than that of the district attorney salary.¹⁶³ The average salary for a Portland, Oregon public defender in 2000 was \$45,426 compared to \$61,638 for a prosecutor there.¹⁶⁴

The key problem may not necessarily be a disparity in salaries between prosecutors and defense lawyers, though such a disparity certainly exists in many parts of our country.¹⁶⁵ Rather, the more serious dilemma may be that both sets of lawyers, at the state level, are paid too little.¹⁶⁶ In many states, including Alaska, Maryland, Idaho, Mississippi, Ohio, Illinois, California, Massachusetts, and New Mexico, prosecuting and defending lawyers are paid less than \$40,000 per year.¹⁶⁷

159. See generally Wright, *supra* note 60, at 232.

160. *Id.* at 232-33. A 2004 survey by National Association for Law Placement (NALP) revealed salaries of public defenders and prosecutors to be similar. The median salaries for entry-level public defenders was \$39,000 versus \$40,000 for entry-level local prosecutors and \$40,574 for state prosecutors. At the five-year mark, the median public defender salary was \$50,000 versus \$52,000. At the eleven-to-fifteen-year milestone, public defenders fall slightly behind with a \$65,000 median versus \$69,255 and \$68,139 for local and state prosecutors, respectively. Press Release, Nat'l Ass'n of Law Placement, NALP Publishes New Public Sector and Public Interest Attorney Salary Research (Aug. 31, 2004), available at <http://www.nalp.org/press/details.php?id=6>.

161. Ballard, *supra* note 118, at 1A.

162. PBS, *Presumed Guilty* (2002), <http://www.pbs.org/kqed/presumedguilty/3.2.0.html> (last visited Apr. 14, 2006).

163. Dana Mulhauser, *Pay Dirt: States Are Beginning To Pay Public Defenders As Much As Prosecutors. That's The Wrong Solution To A Big Problem*, LEGAL AFF., Nov. 2004, available at http://www.legalaffairs.org/issues/November-December-2004/argument_mulhauser_novdec04.html.

164. Michelle Roberts, *Public Defenders Go On Strike: Contract Discussions Break Down*, THE OREGONIAN, June 27, 2000, at B1.

165. See Wright, *supra* note 60, at 230.

166. The federal experience is quite different. See *What Lawyers Earn 2000*, http://www.law.com/special/professionals/nlj/earn/earn_4.html (last visited Apr. 14, 2006).

167. For instance, in Fairfax County, Virginia, a very high-cost community in the Washington,

The 2004 annual report by the Missouri Public Defender Commission cites low pay as one reason for the chronic problem of attorney retention.¹⁶⁸ The current annual turnover rate in Missouri is more than 21%. Those leaving the system include entry-level attorneys and other more senior attorneys who depart for careers in the private sector. A targeted pay raise has not occurred there in ten years, and general state employee raises were not sufficient to retain attorneys.¹⁶⁹ The high turnover rate resulted in a backlog of almost 22,000 cases.¹⁷⁰

B. THE SPECIAL AND HIDDEN COSTS: FINDING LAWYERS TO REPRESENT UNPOPULAR CLIENTS

Our country has a proud tradition of providing defense to even the most hated defendants. A defendant's right to a fair trial was not only embodied in the Constitution by our founders, but also exemplified by their actions. In 1770, John Adams showed his belief in this right by defending British soldiers charged with manslaughter for their part in the Boston Massacre. He won an acquittal for the commanding officer and six of the eight accused soldiers. As a patriot, he chose to defend them because of his belief in a principle and not because he had sympathy for their cause. He took the case despite much criticism from his fellow patriots and risk to his business and personal safety.¹⁷¹ It is in this tradition that many modern defense attorneys follow.

The law firm of Arnold & Porter LLP is well known for its public service representation of unpopular clients and causes.¹⁷² In her essay

D.C. area, the starting salary for a public defender is \$41,000 with senior defenders making up to \$55,000. Jackman, *supra* note 8. One promising approach here is the innovative legislation recently offered in the United States House and Senate. The *Prosecutors and Defenders Incentive Act* would authorize funding for student-loan repayment for public attorneys working in the criminal justice system. Its purpose "is to encourage qualified individuals to enter and continue employment as prosecutors and public defenders." H.R. 198, 109th Cong. (2005). See Rhonda McMillion, *A Lighter Load*, 91 A.B.A. J. 64, 64 (2005).

168. J. M. ROBINSON & KATHLEEN L. LEAR, *THE RIGHT TO COUNSEL AND THE STATE PUBLIC DEFENDER SYSTEM IN MISSOURI* 63 (2004), available at <http://www.publicdefender.mo.gov/about/FY2004AnnualReport.pdf>.

169. *Id.* The most recent Missouri findings show that the turnover rate for lawyers over the past five years was almost 100%. See MISSOURI ASSESSMENT, *supra* note 61.

170. ROBINSON & LEAR, *supra* note 168, at 64. A recent article recounted the financial difficulties of two lawyers working in the Nashville criminal justice system, one a prosecutor the other a public defender. Each had multiple jobs in addition to her legal work, because "a lot of young attorneys in our office live from paycheck to paycheck." Each of the lawyers had a law school debt of \$100,000 or more. Each started work for the government at just over \$40,000 per year. Sheila Burke, *Government Lawyers Try to Make Ends Meet*, TENNESSEAN, July 18, 2005, at 1B.

171. See DAVID McCULLOUGH, *JOHN ADAMS* 66 (2001).

172. And, of course, the firm acted as counsel to Clarence Earl Gideon in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

honoring Professor John Ely, Professor Barbara Babcock recounts the way in which the firm responded long ago to concerns over such work.

In the summer of 1962, John Ely and I were law clerks at Arnold, Fortas & Porter. This was a very hot ticket, and we were proud to win it because the firm was the model for doing good while doing well. The principals were major New Dealers, now corporate lawyers and Washington insiders, who also represented poor criminal defendants and the politically oppressed.

Notably, they had taken on the cause of accused communists, clients many lawyers turned away as the Cold War raged on. And Abe Fortas had been the lawyer for Monte Durham, the indigent defendant whose case established the [then] modern insanity defense. Firm members often told about the big business executive (and potential client) who asked Paul Porter whether the firm in fact represented the likes of communists and rapists. "That's right, we do," Porter responded. "What can we do for you?"¹⁷³

According to ABA model rules and guidelines, defense attorneys should not consider the unpopularity of a potential client when deciding whether to accept a case. ABA Defense Function Standard 4-1.6(b), states that "all . . . qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant." ABA Defense Function Standard 4-1.2(a) stresses the importance of defense counsel: "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." The Model Code of Professional Conduct maintains that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."¹⁷⁴ The point is further made in the Ethical Considerations from the ABA Model Code of Professional Responsibility. EC 2-27 notes that, "History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." EC 2-29 is similar: "When a lawyer is appointed to defend an unpopular client by a court, a 'compelling reason' that might justify the lawyer's asking to be excused from the appointment does not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case."

173. Babcock, *supra* note 35, at 1490.

174. ABA MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 (1980).

The Model Rules also discuss a lawyer's duty to defend unpopular clients. While the Ethical Considerations were only recommendations with no consequences for violation, violation of the Rules can result in disciplinary action. Model Rule 6.2 addresses the issue with regard to appointments. "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause." The comment to Rule 6.2 states:

All lawyers have a responsibility in providing pro bono public service An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Unfortunately, not all members of the public understand why an attorney should be willing to represent the accused. They may have little knowledge of a lawyer's professional obligations or the workings of an adversary system of justice. This creates the perception of lawyers as "hired guns," willing to represent anyone who can pay the fee (ironically, these difficult cases are often taken on appointment for little or no pay). This misperception leads to criticism, making it even harder to find attorneys willing to take on difficult cases. Large law firms may want to avoid being associated with unpopular causes because of the way it affects their professional image. Lawyers in smaller communities could risk losing a significant amount of business by defending someone unpopular in their community.

An attorney with political aspirations may have to worry about being labeled soft on crime and criticized for trying to help criminals exploit loopholes in the law. The 2005 Virginia gubernatorial race is a sad example of this. During the campaign, one of the candidates was criticized in print and in television ads for being an "ACLU lawyer" who defends death row inmates.¹⁷⁵ The attorney, then state lieutenant governor, had handled two death-row appeals cases, though not with the ACLU. He was appointed counsel in both cases. The criticism was most unfortunate as it received wide coverage and it was so misguided. Death penalty appeals can be especially time consuming, difficult, and thankless. There is a great deal of pressure because a person's life is on the line. The pay, if any, is almost always well below what a lawyer could make in private practice. Taking on these cases shows the kind of character and professionalism that a lawyer should be able to cite with pride in an election campaign.¹⁷⁶

175. Margaret Edds, *The ACLU, Death Penalty and Gubernatorial Spin*, VIRGINIAN-PILOT, Jan. 2, 2005, at J1; Editorial, *Death Penalty Smear*, WASH. POST, Oct. 12, 2005, at A16.

176. As stated most recently by Justice Stevens at the ABA Annual Meeting in August 2005: "[S]ome of the best lawyers in the country have spent countless uncompensated hours in capital litigation, not only in post-conviction and appellate work, but also at the trial level. The Profession can

To counter the public criticism and misperception of criminal defense attorneys, it is important that members of the bar strongly recognize and praise attorneys who represent unpopular clients. One way to encourage this behavior is for organizations to acknowledge the effort and sacrifice of the lawyers who do such pro bono work. Highlighting the reasons this work is necessary would help counter the criticism those defenders receive. Fortunately, those who see the value of defending unpopular clients have already begun to take such steps. The John Adams Award, given to defenders in the Baltimore area, was created in 1997 for this purpose. "I wanted to send the message that the work that these lawyers do in defending the people who live in the shadows is an act of patriotism," its founder notes. "I believe most of them do it out of a love for their country and a love for this wonderful justice system we have."¹⁷⁷ One recent recipient of the award is Joshua Treem, a successful private defense attorney who regularly accepts appointments to defend indigent defendants. Perhaps his more famous unpopular client was Lee Malvo, one of the I-95 snipers.¹⁷⁸

Another way to keep down the hidden costs of having counsel available to represent the unpopular client is to have prominent members of the bar visibly accept such representation. In his biography, the well-known Washington lawyer, Edward Bennett Williams, wrote of his commitment to such representation.

[I am obliged because of] the right to counsel guaranteed by the Constitution and the role of the advocate in Anglo-Saxon jurisprudence. . . . [F]or the trial lawyer the unpopular cause is often a post of honor. Like other lawyers who try criminal cases, I have taken on many difficult cases for unpopular clients, not because of my own wishes, but because of the unwritten law that I might not refuse.¹⁷⁹

A recent example can be shown with the activities of law dean, and former federal judge and United States Solicitor General, Kenneth Starr, who took on a death row inmate as a client. He and his law firm,

be justly proud of their work." Hon. John P. Stevens, Associate Justice, United States Supreme Court, Address at American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6 2005), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html. The Virginia lawyer who was attacked was elected governor in November 2005.

177. Stephanie Hanes, *Attorney Award Gives Credit Where it is Due*, BALT. SUN, July 19, 2004, at 1B.

178. Brian Witte, *Malvo's Lawyer Has Been Down Similar Path*, BALT. SUN, Oct. 31, 2002, at <http://www.baltimoresun.com/news/bal-sniper-lawyer103103702158.story>. A similar approach is taken in Wyoming with the "Gideon Award" being given to lawyers dedicated to assisting "the poor and downtrodden." See Press Release, University of Wyoming, Public Defenders Office Honors University of Wyoming Professor (Oct. 10, 2005), available at <http://www.uwyo.edu/news/showrelease.asp?id=2821>.

179. EDWARD B. WILLIAMS, *ONE MAN'S FREEDOM* 12-13 (1962). The point is well made in Babcock, *supra* note 35, at 1515-16. For a more detailed look at Williams and his remarkable career, see generally EVAN THOMAS, *THE MAN TO SEE* (1991).

Kirkland & Ellis LLP, accepted the matter pro bono and Starr handled the representation personally.¹⁸⁰ The client always maintained his innocence with regard to the murder. Starr, in the appeal before the United States Court of Appeals for the Fourth Circuit, asserted that the State had acted improperly by destroying the DNA evidence linking the defendant to the murder weapon. The Fourth Circuit affirmed the conviction and sentence,¹⁸¹ and the Supreme Court denied review.¹⁸² Starr then sought clemency for his client. The Virginia Governor granted the request, sentencing the client to life imprisonment without the possibility of parole.¹⁸³ Starr's efforts, as a widely known and well-qualified attorney, set an outstanding example for the rest of the profession, and made a clear statement to the public about the necessity of such work by attorneys.

Other lawyers and law firms, too, have joined to provide competent legal assistance to poor people in the criminal justice system, or to challenge insufficient indigent defense systems. Atlanta-based King & Spalding is now sending attorneys to a Georgia county to represent indigent defendants in a variety of criminal cases. The presiding judge there commented that the addition of these attorneys is "certainly a blessing."¹⁸⁴ The overworked defender office had been handling more than twice the maximum number of cases recommended by the Georgia Supreme Court.¹⁸⁵ The Washington, D.C., office of O'Melveny & Myers LLP operates a similar program, but it works through the Public Defender's Office of Montgomery County, Maryland. The firm receives both felony and misdemeanor files and assigns a junior lawyer to the individual cases. Those young attorneys operate under the direct supervision of a senior partner in the firm, handling all matters and taking the cases to verdict, if necessary.¹⁸⁶ Many firms throughout the nation actively involve their lawyers as counsel for indigent criminal defendants. Jenner & Block LLP of Chicago, and Williams & Connolly of Washington, D.C. are especially well known for their involvement. A striking example of such work involved our newest United States Supreme Court Chief Justice, John Roberts, who participated in a

180. Donna St. George, *Starr, in New Role, Gives Hope to a Needy Death Row Inmate*, WASH. POST, Mar. 14, 2005, at A1.

181. *Lovitt v. True*, 403 F.3d 171, 188 (4th Cir. 2005).

182. *Lovitt v. True*, 403 F.3d 171 (4th Cir. 2005), cert. denied, 126 S. Ct. 400 (2005).

183. Frank Green, *Warner Extends Clemency to Death Row's Lovitt*, RICHMOND TIMES-DISPATCH, Nov. 30, 2005, available at http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD_BasicArticle&c=MGArticle&cid=1128768421539.

184. Bill Rankin, *Premier Law Firm Defends Indigents*, ATLANTA J.-CONST., Aug. 31, 2002, at 1H.

185. *Id.*

186. See Correspondence from K. Lee Blalack, Partner, O'Melveny & Myers LLP, to Paul Marcus (Nov. 7, 2005) (on file with author).

difficult capital case in Florida while he was in private practice at the law firm of Hogan & Hartson LLP.¹⁸⁷

In 2002, Davis Polk & Wardwell represented the New York County Lawyers' Association against New York State and New York City in a suit seeking to raise the rates of compensation paid to assigned counsel who represent children and indigent litigants in family and criminal court proceedings in New York City. The rates were \$25 and \$40 per hour for out-of-court work and in-court work, respectively. The trial judge granted NYCLA's motion for a preliminary injunction and ordered the City and State to raise compensation rates.¹⁸⁸ In response, the legislature lifted rates to \$60 and \$75 per hour.

All of these activities are in the grand tradition of our profession:

The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.¹⁸⁹

187. The case is *Ferguson v. State*, 417 So. 2d 631 (Fla. 1982). See generally Myma Oliver, *Hard Work, Low Pay: Death Row, Few Lawyers for Big Task*, L.A. TIMES, May 21, 1988, at A1. A large number of law professors have also provided representation in many well-known matters. For example, Abner Mikva, University of Chicago (and formerly judge on the U.S. Court of Appeals for the D.C. Circuit) was counsel in *United States v. Ward*, 146 F. App'x 847 (7th Cir. 2005) (appeal of bank robbery conviction); Sheri L. Johnson, Cornell Law School, in *Wilson v. Ozmint*, 352 F.3d 847 (4th Cir. 2003) (habeas corpus appeal in death penalty case); David Siegel, New England Law School, in *Commonwealth v. Laguer*, No. 83103391, 2001 WL 1194619 (Mass. Super. May 2, 2001) (motions for DNA testing for defendant with rape conviction); David D. Cole, Georgetown University, in *Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001) (habeas corpus appeal for relief pending deportation proceeding); Barry Scheck, Cardozo Law School, in *Jones v. Vacco*, 126 F.3d 408 (2d Cir. 1997) (appeal of grant of habeas corpus for denial of right to counsel); and Robert D. Bartels, Arizona State University (formerly at University of Iowa), in *Brewer v. Williams*, 430 U.S. 387 (1977) (confession voided due to famous "Christian Burial Speech" by interrogating police officer).

188. N.Y. County Lawyers Ass'n v. State, 763 N.Y.S.2d 397, 419 (Sup. Ct. 2003). Other major law firms have also worked hard to ensure success in law reform efforts in this area. One prominent effort was with Cravath Swaine & Moore LLP assisting the ACLU in the legal action which ultimately resulted in major changes to the Montana indigent defense system. See Press Release, Am. Civil Liberties Union, ACLU Files Class-Action Lawsuit Against Montana's Indigent Defense Program (Feb. 14, 2002), <http://www.aclu.org/crimjustice/indigent/10127prs20020214.html>.

189. *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). Perhaps the surest way of guaranteeing high quality representation is to have experienced and well regarded private lawyers leave individual practice to work as public defenders. While not a common occurrence, it does happen. A very visible recent illustration took place in Tucson, Arizona when two of the best-known trial lawyers in the community agreed to become, respectively, the Public Defender and the Chief Public Defender of Pima County. See Tom Beal, *Flashy Lawyers Leave Private Practice for Public Defender Jobs*, ARIZ. DAILY STAR, Apr. 24, 2005, at A1.

Many lawyers and law firms throughout our nation tirelessly devote their time to assisting in the quest for competent legal assistance for poor people. These efforts of well-known and highly qualified attorneys set a fine example for the profession and help to educate the public as to the importance of lawyers being willing to represent all defendants, even those charged with or convicted of vile crimes. No responsible observer, however, would suggest that volunteer lawyers can discharge the duty of indigent defense given the massive nature of the undertaking and the constitutional responsibilities of government. Such pro bono work is an important supplement to the public defense work authorized and funded by state and local governments. It is certainly not a substitute.

C. INDEPENDENCE

Virtually everyone working in the criminal justice system appears strongly to agree with the notion that the defense function should be independent. It should not be too closely linked with, or controlled by, the legislature, the executive, the judiciary or the prosecution. As explained in one national report, "[T]he ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."¹⁹⁰ To be sure, the very first of the ABA's Ten Principles of a Public Defense Delivery System makes clear that the "public defense function, including the selection, funding, and payment of defense counsel, is independent."¹⁹¹ No one truly disputes this view in theory. Judges should not be making assignments for personal reasons, and defenders should be held responsible for their actions in a careful professional setting. In practice, however, one finds very troubling situations involving a genuine lack of independence with indigent defense in several key areas.

- Virginia: These comments from experienced lawyers are, sadly, heard throughout the nation and make clear the scope of the problem with appointments: "You have to have a bar card, you have to have a

190. OFFICE OF JUSTICE PROGRAMS REPORT, U.S. DEPT. OF JUSTICE, IMPROVING CRIMINAL JUSTICE THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: A REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE X (2000), available at <http://www.ojp.usdoj.gov/indigentdefense/icjs.pdf>.

191. The comments to the *Principles* explain further:

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 2 (internal citations omitted).

pulse, and you have to know a judge willing to make the appointment."¹⁹²

- Texas: "Judges who are in charge of paying the defense lawyer's bill should not be presiding over the case; there are supposed to be two teams and a referee. The way it actually works is, it's just one big team."¹⁹³ "[S]ome attorneys seeking court appointments believe they must contribute to judges' reelection campaigns if they are to receive appointments";¹⁹⁴ and, [by a state judge] "I don't like making appointments. There's something inherently political about making appointments."¹⁹⁵

- In several states, the public defender is appointed by a government official that "further exacerbates the risk that the state public defender will not pursue necessary resources and technical support when needed."¹⁹⁶ Yet with jurisdictions that have more separated contracting systems for the appointment of defense attorneys, such systems may be "created for the sole purpose of containing costs, [and] they pose significant risks to the quality of representation and the integrity of the criminal justice system."¹⁹⁷

- In Washoe County, Nevada within the past year, a search committee was formed to select a new Chief Public Defender. The entire committee initially consisted of two county commissioners, the prosecuting attorney, and a judge. There were no other lawyers, no members of the government, no one with any connection to criminal defense activity.¹⁹⁸

- The public defender office in St. Louis recently announced that it could no longer represent a class of defendants charged with minor crimes because its lawyers did not have enough time to adequately provide competent assistance. The head of the Missouri system stated that the "meet 'em and greet 'em and plead 'em" system was constitutionally invalid. In response to this action, the local criminal

192. Laurence Hammack, *Virginia May Raise Standards for Court-Appointed Attorneys*, ROANOKE TIMES, Nov. 30, 2003, at B1 (quoting Matthew Geary, head of Virginia Trial Lawyers Association's criminal section).

193. Diane Jennings, *Legislators Make Case for System Reform*, DALLAS MORNING NEWS, Apr. 8, 2001, at 20A (quoting Law Professor David Dow).

194. These remarks are reported in TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT, ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 21-22 (2000), available at <http://www.equaljusticecenter.org/Fair%20Defense%20Reference%20Report.pdf>.

195. *Id.* at 22. In fairness, Texas has made progress here, as noted in Part VI.A. See generally ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT DEFENSE IN TEXAS (2000).

196. THE SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA 75 (2000) [hereinafter NEVADA INDIGENT DEFENSE].

197. U.S. DEPT. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES, INDIGENT DEFENSE SERIES #3, at 1 (2000).

198. Susan Voyles, *Board Under Fire for Putting DA on Selection Panel*, RENO GAZETTE-J., Apr. 20, 2005, at 2A. In response to harsh criticism, the committee was ultimately expanded to sixteen people with community representatives, though the prosecutor remained a member. Dennis Myers, *New Defender*, RENO NEWS & REV., June 23, 2005, available at <http://www.newsreview.com/reno/Content?oid=24938>.

court judge announced that he “would no longer allow public defenders to postpone trials, would go with prosecutors’ recommended sentences over public defenders’ recommendations and would no longer reschedule hearings to avoid conflicts with the public defenders’ schedules.”¹⁹⁹

- With the appointment of counsel, lawyers across the country, as in the state of Washington, voice concern that judges “play favorites” and have wide discretion in determining financial support for investigators and experts.²⁰⁰
- When Avoyelles Parish in Louisiana created a local indigent defense oversight board, its members were appointed directly by the local judges. No member of the board had any prior experience in the criminal justice field.²⁰¹
- Entire statewide systems have been sharply criticized for having a “pervasive absence” of independence for the defense function from the judiciary (North Dakota)²⁰² or giving far too much discretion to judges with the appointment of defense counsel (Texas),²⁰³ or not providing defense counsel who are independent of judges and politicians (Georgia),²⁰⁴ or not having independent oversight commissions (Tennessee),²⁰⁵ or requiring defense services to compete for financial support with other government agencies (Nevada).²⁰⁶

Many steps have been taken throughout the nation to combat these sorts of problems. Independent oversight commissions operate in a number of states.²⁰⁷ Some states very carefully keep the assignment of lawyers apart from the pre-trial process involving criminal defendants.²⁰⁸

199. Robert Patrick, *Public Defender Rules Are Set To Change*, ST. LOUIS POST-DISPATCH, July 3 2005, at E1.

200. THE SPANGENBERG GROUP, OVERVIEW OF THE CLARK COUNTY, WASHINGTON INDIGENT DEFENSE SYSTEM IN 2002 15-16 (2002).

201. TRIAL-LEVEL INDIGENT DEFENSE, *supra* note 22, at 29.

202. THE SPANGENBERG GROUP, REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA (2004). North Dakota recently established a statewide commission on legal counsel for indigents. The commission is to develop and oversee the state-funded defense services program for indigents accused of crimes. It will also establish standards for eligibility for services, qualifications for attorneys, and attorney performance. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, NORTH DAKOTA’S INDIGENT DEFENSE SYSTEM, available at <http://www.nacd.org/public.nsf/defenseupdates/Northdakota002>.

203. TEXAS APPLESEED FAIR DEFENSE PROJECT, *supra* note 194, at 21. For a discussion of the recent efforts to substantially alter the system here, see *infra* Part VI.A.

204. Bill Rankin, *Experts Indict Indigent Defense*, ATLANTA J.-CONST., Dec. 9, 2002, at 1A. For a discussion of the recent efforts to substantially alter the system here, see *infra* Part VI.A.

205. This concern goes back many years, but remains a constant refrain today. One of the earliest complaints can be found in NAT’L LEGAL AID & DEFENDER ASS’N, THE RIGHT TO COUNSEL IN TENNESSEE 83 (1977).

206. NEVADA INDIGENT DEFENSE, *supra* note 196, at 75.

207. The matter is discussed in some detail *infra* Parts VI.A. and VI.B., looking at the reforms that have been taken both legislatively and in response to judicial rulings.

208. The ABA’s guidelines here are quite clear. Standard 5-1.3, *Professional Independence*, provides:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving

Still others lay out in some detail the eligibility requirements for counsel who seek appointments.²⁰⁹ The serious problems remain, however, across the nation in many places.²¹⁰

D. ACCESS TO COUNSEL

Although constitutionally entitled to legal representation, a surprising number of indigent criminal defendants are denied counsel entirely. Referred to as "the dirty little secret of the criminal justice system,"²¹¹ poor defendants are often pressured into pleading guilty, waiving their right to counsel or representing themselves without ever speaking to a lawyer about the merits of their case or the legal consequences of their actions. Stringent eligibility requirements, which can result in coerced self-representation, and the high incidence of defendants ill-advisedly waiving their right to counsel, systematically deprive poor defendants of their legal representation.

These routine practices, in addition to abuses of the plea bargaining process, dispose of cases quickly, but a crowded court docket moves

under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-1.3(a) (1992). See also, the broad structural changes made in New Mexico, as discussed in the ABA Report, *Gideon's Broken Promise*, *supra* note 39, at 36. The state has established a statewide Public Defender Department which maintains trial public defender units across New Mexico. These units have updated technology, are supported by a staff including paralegals, investigators, social workers, alternative sentencing advocates, technology, and administrative staff. The units have specialty sections for appeals, death penalty, post-conviction, and mental health cases; they oversee contracts with private attorneys to provide services in conflict with the defender's office. Contract counsel must also comply with state performance standards.

209. Interesting developments have occurred in North Carolina. There, steps were first systematically taken to go through the court appointment list and take off the names of ineffective attorneys and to organize the remaining lawyers into groups based on the cases to be handled (misdemeanors, low-level felonies, and serious felonies). Each list required a varying number of years of experience. Andrea Weigl, *Wake to Review Defense System*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 28, 2001, at B1. Also, North Carolina's recent legislative reforms include establishing higher qualification standards for attorneys seeking appointment to capital cases and appeals, as well as developing performance guidelines for appointed counsel in non-capital cases. See NORTH CAROLINA INDIGENT DEF. SERVS., IDS'S MAIN ACCOMPLISHMENTS SINCE JULY 2001 (Jan. 2006), available at <http://www.ncids.org/News%20&%20Updates/ids%20accomplishments,%201-06%20update.pdf> [hereinafter IDS'S MAIN ACCOMPLISHMENTS]; NORTH CAROLINA INDIGENT DEF. SERVS., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES (2005), available at <http://www.ncids.org/Reports%20&%20Data/Legislature%20Report%202005.pdf>.

210. For an excellent analysis, see SCOTT WALLACE & DAVID CARROLL, THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf>.

211. Nat'l Comm. on the Right to Counsel, Case Study: No Representation by Counsel, <http://www.thejusticeproject.org/press/national-committee/22405.pdf> (last visited Apr. 14, 2006) [hereinafter No Representation by Counsel].

along without regard for the rights of the accused. Shockingly, there are still areas of the country that simply fail to provide defense attorneys to certain classes of poor criminal defendants at all. Particularly in light of the Court's most recent right to counsel decision in *Alabama v. Shelton*,²¹² there are likely thousands who face criminal charges across the country with no lawyer at all. Two of the main findings of the ABA's recent comprehensive report on the status of the right to counsel are compelling:

Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record. Throughout the country, indigent defendants who have not knowingly, voluntarily, and intelligently waived their right to counsel are denied representation at critical stages of the criminal process, in violation of constitutional requirements. To make matters worse, prosecutors and judges sometimes improperly encourage waivers of the right to counsel and subsequent pleas of guilty from unrepresented indigent defendants, in violation of disciplinary rules and national standards.²¹³

1. *Invalid Waiver as Denial*

Despite the "obvious truth" that "lawyers in criminal courts are necessities, not luxuries,"²¹⁴ a defendant may choose to waive her right to counsel.²¹⁵ To be valid however, a waiver must be voluntary, knowing and intelligent. Given the presumption against the waiver of fundamental constitutional rights, the judge has an obligation to make a thorough inquiry into the particular facts of the case, including the background, experience, and conduct of the accused before finding that a defendant has waived the right to an attorney.²¹⁶ "This duty cannot be discharged as

212. 535 U.S. 654, 662 (2002) (guaranteeing lawyers to misdemeanor defendants facing a suspended sentence). See generally Anne Endress Skove, Nat'l Center for State Courts, *Indigent Defense Trends in 2003: The Wide-Reaching Effects of Alabama v. Shelton*, http://www.Ncsconline.org/WC/Publications/KIS_IndDef_Trendso3.pdf (last visited May, 16, 2006).

213. *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 39. The Committee's own research, found in Appendix B of its Report, confirms this problem.

214. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

215. Of course, a defendant does have an affirmative right to represent himself, but invoking the right to self-representation first requires a valid waiver of the right to counsel. See *Faretta v. California*, 422 U.S. 806, 814 (1975). Where a defendant has chosen to represent herself, the judge has the additional obligation to assure the individual is made aware of the "dangers and disadvantages of self-representation," before permitting her to relinquish counsel. *Id.* at 835. Although not adopted by all states, the Juvenile Justice Standards recognize the critical issue of waiving the right to counsel by recommending that the practice be prohibited entirely in juvenile proceedings. See INST. FOR JUD. ADMIN., ABA, *JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO PRE-TRIAL COURT PROCEEDINGS* 6.1A (1996).

216. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

though it were a mere procedural formality.”²¹⁷ Rather, a judge has a responsibility to ensure that an accused understands the nature of the charges against her, the range of possible punishment, possible defenses to the charges, and any other essential facts to ensure that the defendant truly understands the consequences of the waiver.²¹⁸ Where a judge has not made certain that a defendant has knowingly waived his right to counsel, there is no valid waiver and thus, a denial of counsel must be found.

The trial court’s duty to insure that each defendant is fully advised of her rights and the consequences of waiving counsel is in direct conflict with the demands of crowded dockets and the desire to move cases. As one criminal judge admitted,

In dealing with large calendars and pro se defendants inexperienced with the law and legal process, it’s easy for judges to let their frustration get the best of them and look for ways to move the calendar along. There has been more than one documented case in Washington where judges have not fully advised defendants of their right to counsel and to trial by jury or have explicitly encouraged defendants to waive those rights in the name of efficiency.²¹⁹

A city judge in Troy, New York was removed from the bench by the New York Commission on Judicial Conduct, in part for failing to advise defendants of their right to assigned counsel. He defended the practice of jailing defendants for several days without advising them of their right to counsel and then offering their freedom if they changed their plea to guilty. The judge explained at his disciplinary proceeding that he assumed the repeat offenders who came before him knew their rights, while others were not alert enough to understand what he would have said had he informed them of their rights.²²⁰

In a Snohomish County (Washington) municipal court, one woman stipulated to facts sufficient to convict her, received a suspended jail sentence, a \$500 fine, and a conviction on her record, all without ever speaking to an attorney. In the one minute and forty-seven seconds it took the judge to dispose of her case, the judge never inquired whether she understood her rights.²²¹ After a year of observing Washington courts the observer who documented that case concluded that “[e]very day in Washington courts, hundreds of people face criminal charges without

217. *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948).

218. *Id.* at 723–24.

219. *GIDEON’S BROKEN PROMISE*, *supra* note 39, at 24 (quoting Judge Michael Spearman, Chief Criminal Judge, King County Superior Court (Seattle, Washington)).

220. Gerald Stern, *Violations of Basic Rights May Constitute Judicial Misconduct*, N.Y.L.J., Nov. 15, 2004, at 4.

221. Boruchowitz, *supra* note 123.

lawyers, and many of them plead guilty and go to jail, sometimes unaware that they have a right to a lawyer.²²²

A judge in a large municipal court in Ohio was heard to say, "You have a right to counsel in this case, but if you would like to resolve the matter today you may waive that right and plead guilty."²²³ Explicit threats intended to coerce waiver of counsel are rare, but the requirement that a waiver be voluntary requires more than the mere absence of explicit coercion.²²⁴ The voluntariness of a waiver can also be questioned where the process imposes costs on the defendant for requesting representation, such as where a plea agreement is good only on the day offered or a request for counsel results in the defendant returning to jail until appointment and recalendaring.²²⁵ Comments from the bench can have an inappropriately chilling effect on defendants' exercise of their constitutional right to counsel and fuel the perception that a tacit rule of court is that those who ask for a lawyer are treated more harshly. As one court succinctly put it, "[A] plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary."²²⁶

At times, the lack of a valid waiver goes beyond an individual judge's failure to make the appropriate inquiry and is systemic in nature. In the Rhode Island district courts, the arraignment process is so confusing defendants regularly waive counsel without an appreciation of what they are doing. During arraignment, a video tape explaining legal rights is played for a large group of defendants. The tape informs the defendants that they have a right to counsel and will be referred to the public defender if they cannot afford counsel. However, the video does not explain how or when the defendant can talk to the public defender. Some defendants may not even be aware that a public defender is a lawyer. After viewing the video, defendants are asked to enter a plea. The video does not explain that a not guilty plea must be entered before a defendant can be referred to the public defender. Many are under the impression that they must assert once and for all whether they are guilty or innocent. Most do not realize a not guilty plea can be changed after meeting with a lawyer. Throughout this process the defendants are not asked whether they want to waive their right to counsel. "The judge will generally make no inquiry whatsoever into the defendant's background,

222. *Id.*

223. THE SPANGENBERG GROUP, ASSESSMENT OF INDIGENT DEFENSE SYSTEMS IN OHIO 50 (1991).

224. See SHELDON KRANTZ ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *ARGERSINGER V. HAMLIN* 106-07 (1976).

225. ANN SKOVE, NAT'L CENTER FOR STATE COURTS, *ALABAMA V. SHELTON: THE RIGHT TO COUNSEL IN MISDEMEANOR CASES RESULTING IN SUSPENDED OR PROBATED SENTENCE* (2003), available at http://www.ncsconline.org/WC/Publications/KIS_IndDefSheltonRes.pdf.

226. *Commonwealth v. Evans*, 252 A.2d 689, 690 (Pa. 1969).

the defendant's educational history, the defendant's mental or physical condition, or the defendant's prior dealings with attorneys."²²⁷

Although the United States Supreme Court has declined to prescribe a specific script or formula for determining a valid waiver of counsel, judges still have an obligation to make an appropriate inquiry to determine that a defendant "knows what he is doing and his choice is made with eyes open."²²⁸ Determining that a defendant has enough information to make an intelligent decision depends upon "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."²²⁹ Routine mass explanations through video tapes, forms, or canned presentations by judges or prosecutors are not sufficient to meet this standard.²³⁰

In addition, it is extremely unlikely that these mass information sessions are capable of addressing the individual collateral consequences of a guilty plea, which must be taken into consideration if a waiver is to be voluntary, knowing, and intelligent. The *Argersinger* Court's acknowledgment that even a defendant's brief incarceration for a misdemeanor can result in "quite serious repercussions affecting his career and his reputation"²³¹ is an understatement compared to the complex array of additional punishments a defendant can face today. A minor drug conviction, for instance, can forever preclude welfare benefits, public housing, student-loans, voting, government services, hundreds of different types of jobs requiring licensing, and can mean mandatory deportation for an immigrant.²³² Repeat offenses can result in "career criminal" designation which can trigger harsh recidivist or three-strikes sentences and lead to a felon's extended incarceration. These are precisely the case-specific factors that defendants need to discuss with an attorney before waiving their right to counsel or accepting a plea bargain.

227. Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409, 421-24 (2004).

228. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

229. *Id.*

230. "[A] mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948). For a description of mass arraignments, use of complex forms and the inappropriate involvement of prosecutors in waiver of counsel, see *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 24-25.

231. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

232. See WASH. DEFENDER ASS'N, *BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS* (2005), available at <http://www.defensenet.org/SN/UpdatedBeyondtheConviction.pdf>.

2. Abuse of Plea Bargains

Invalid waivers of counsel are frequently linked to plea bargain abuse.²³³ Few defendants waive counsel with the intention of representing themselves at a trial. Rather, most waive counsel and immediately plead guilty to take advantage of a deal being offered by the prosecutor or judge. Observers of Georgia courts describe a process involving mass arraignments in which groups of defendants are informed of their rights by a judge. The judge then leaves the courtroom and the prosecutors take over. Each defendant lines up to meet privately with the prosecutor. Once each defendant has met with the prosecutor, the judge returns. At this point every defendant informs the judge that he would like to waive counsel and plead guilty.²³⁴

Despite national standards that call for judges to refrain from participating in plea negotiations,²³⁵ judges sometimes play a more active role in the plea bargain process in order to resolve cases efficiently.²³⁶ The Troy, New York judge described above used a combination of exorbitant bail and a taste of jail to coerce defendants into pleading guilty.²³⁷ If a defendant indicated that she wanted to retain counsel or that she was too poor to do so, the judge set excessive bail and adjourned the case for a few days. Upon return to court, the judge asked whether the defendant would like to change the plea to guilty and be released. Most did, of course. This judge handled more than 3000 criminal cases a year, but in a three-year period, presided over only four trials.²³⁸ In upholding the judge's removal from the bench, the majority of a deeply divided New York Court of Appeals found that "coupled with a failure to advise these defendants of their right to assigned counsel, [the judge's] imposition of punitive bail all but guaranteed that defendants would be coerced into pleading guilty: it was the only way to get out of jail."²³⁹

Strikingly similar stories are playing out in courtrooms all across the country. In Rhode Island, a judge offered the defendant a six-month sentence for pleading guilty immediately. He warned the defendant,

233. For a comprehensive look at coercive tactics employed by some judges in plea bargaining, and the negative impact of unprepared lawyers in the process, see generally Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004), and Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

234. GIDEON'S BROKEN PROMISE, *supra* note 39, at 24-25; CHIEF JUSTICE'S COMMISSION ON INDIGENT DEF., THE STATUS OF INDIGENT DEFENSE IN GEORGIA: REPORT OF THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE PART II: IMPACT OF ALABAMA V. SHELTON IN GEORGIA 2 (2004), available at http://www.georgiacourts.org/aoc/press/idx/idx_Report_11090104.pdf.

235. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.3(c), (d) (1999).

236. Federal judges are strictly prohibited from engaging in plea negotiations by the federal rules of criminal procedure. See FED. R. CRIM. P. 11(c)(1) ("The court must not participate in these [plea negotiation] discussions.").

237. Stern, *supra* note 220.

238. *Id.*

239. *In re Bauer*, 818 N.E.2d 1113, 1117 (N.Y. 2004).

however, that if the defendant demanded a lawyer he would probably receive three years of jail time.²⁴⁰ In Riverside, California, a judge told defendants, "[I]f you plead guilty today, you'll go home. If you want an attorney, you'll stay in jail for two more days and then your case will be set for trial and, if you can meet the bail amount, you'll be released."²⁴¹ A juvenile court judge in Georgia candidly admitted that, "I tell the minor, I will up the sentence if you take it to trial, because you could have pleaded and saved us all this trouble."²⁴²

The undeniable message to defendants is that they will be punished for exercising the right guaranteed to them by the Constitution. Without the assistance of counsel and afraid to request an attorney, many defendants plead guilty to avoid the risk of a harsher penalty. Statistics from Riverside, California provide a particularly disturbing example of this systemic failure. According to the NLADA, 40–60% of cases are disposed of at arraignment without counsel in Indio, a branch office of Riverside. In misdemeanor arraignments alone, 14,365 defendants pleaded guilty from October 1, 1998 to September 30, 1999. Of those pleas, 12,350 were made without the assistance of counsel.²⁴³

Even when defendants manage to get court-appointed counsel it does not guarantee they will avoid being pressured into plea bargains. As described in the parts on caseloads and compensation,²⁴⁴ "meet 'em and plead 'em lawyers," in the interest of speed and efficiency, may encourage a plea bargain that is not be the best choice for a defendant. Heavy caseloads, per-case fees, and payment caps create incentives for appointed counsel to dispose of cases as quickly as possible. For example, an attorney in Georgia working on a fixed contract model only went to trial three times in a four-year span. Over this same span, his clients pleaded guilty 313 times. It seems unlikely that all 313 defendants were best served by pleading guilty. This is especially true in light of the fact that many guilty pleas were entered after only a few minutes of discussion between the attorney and client.²⁴⁵

3. Eligibility Standards

Although states have an obligation to provide attorneys for poor criminal defendants, neither *Gideon* nor the right to counsel cases that followed have offered any guidelines for determining who qualifies for

240. *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 25.

241. *Id.*

242. ABA JUVENILE JUSTICE CENTER ET AL., *GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 31 (Patricia Puritz & Tammy Sun eds., 2001) [hereinafter *REPRESENTATION IN DELINQUENCY PROCEEDINGS*].

243. No Representation by Counsel, *supra* note 211.

244. See *supra* Part V.A.

245. 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, 825.

court-appointed counsel. National organizations suggest that counsel should be provided to those who are unable to obtain adequate representation without "substantial hardship."²⁴⁶ Even with such a standard, there is wide variation in how jurisdictions determine who qualifies for publicly funded lawyers. Overly restrictive criteria may deny representation to many defendants who are not financially capable of mounting an adequate defense without assistance. The myriad approaches to determining indigency that states have employed, and the wide variations in how these principles are enforced, result in unequal access to counsel across the nation. In short, a poor defendant denied appointed counsel in one state might be entitled to appointed counsel had she been charged in another jurisdiction.²⁴⁷

In Wisconsin, a defendant must make \$3000 or less to be appointed counsel. A person can qualify for food stamps and Medicaid but be ruled wealthy enough to retain his own attorney. It is estimated that each year 11,000 people who would be appointed counsel by standards used in other states are denied counsel by the state of Wisconsin.²⁴⁸ A judge in Kittitas County, Washington routinely denies counsel for college students because in his view an "able-bodied, employable young person with no dependants and virtually no debt [who] chooses to forgo available employment so that he can attain an college degree" is outside the definition of indigent. In one case, an unsuccessful defendant there had an annual income of \$3600.²⁴⁹ In another instance, a judge denied appointed representation to a poor defendant when the contract lawyer questioned the defendant's eligibility because he had failed to list his wedding ring, a necklace and a wristwatch as assets on the application he submitted for representation.²⁵⁰

Limiting eligibility to only the absolute destitute denies representation to a huge stratum of the population that is excluded from public counsel, but unable to afford private attorneys. As a result, these

246. Both the *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services and the ABA defense services standards utilize the substantial hardship approach. The NSC Standard 1.5, *Financial Eligibility Criteria*, states: "Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation." The ABA *Criminal Justice Standards, Providing Defense Services*, Standard 5-7.1, indicates, "Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship."

247. For an excellent discussion of the need for a more consistent standard for the determination of indigency and a thoughtful proposal for establishing a constitutional floor for eligibility, see Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571 (2005).

248. See Laura Parker, *8 Years in a Louisiana Jail, But He Never Went to Trial*, USA TODAY, Aug. 29, 2005, at 1A (quoting the Public Defender of Madison, Wisconsin).

249. Boruchowitz, *supra* note 123.

250. SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES 11 (2000), available at [http://www.nacdl.org/public.nsf/b540e98ee147ea5485256975005cc335/70d377349c1684048525699d005674d1/\\$FILE/IndigentRpt.pdf](http://www.nacdl.org/public.nsf/b540e98ee147ea5485256975005cc335/70d377349c1684048525699d005674d1/$FILE/IndigentRpt.pdf).

defendants have to go to extreme measures to secure counsel. James Daringer, a defendant accused of arson, found himself in this situation. He had a job earning \$21,000 per year, so he did not qualify for court-appointed counsel, but because of debts and other liabilities he did not have enough money to hire a lawyer. He had to choose between representing himself in court and quitting his job so he could qualify for a public defender. Facing up to seven years in prison, Daringer chose to quit his job so he would meet the eligibility standards for the public defenders' office.²⁵¹ There is little sense in forcing defendants to render themselves unemployed, homeless, or without transportation in order to secure counsel, which ultimately could be more costly to the state than appointing counsel. Yet, there are many skeptics like the Kentucky legislator, a trial lawyer opposed to additional funding for state public defender offices, who commented, "I go to court many times and see people that take advantage of the public defender when I know I have similarly situated clients that borrow money or get help from family."²⁵²

E. ETHICS AND PROFESSIONAL RESPONSIBILITY

The challenges facing defenders, including overwhelming caseloads, lack of supervision and training, inadequate compensation and resources, and political pressure, all raise significant ethical issues for defense attorneys, prosecutors, and judges. Although professional standards for defenders are clear, systemic deficiencies push defenders to compromise their efforts on behalf of clients. These questionable compromises undermine ethical standards and, in turn, contribute to the denigration of the legal profession and the criminal justice system. Judges, prosecutors, lawyer disciplinary bodies, and defenders themselves are loath to call attention to these ethical failings. As one notable commentator concluded, "there is a huge chasm between what ethics rules demand and how lawyers actually represent indigent defendants."²⁵³

Virtually every lawyer is governed by some version of the ABA's Model Rules of Professional Conduct.²⁵⁴ Although the rules are not

251. Steve Silverman, *Public Defense Not Always Without Cost*, PANTAGRAPH (Bloomington, Ill.), Mar. 19, 2000, at A3.

252. Deborah Yetter, *Public Defenders Swamped*, COURIER-J. (Louisville, Ky.), Nov. 28, 2004, at 1A.

253. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178 (2003).

254. With the adoption of the original Canons of Professional Ethics in 1908 the ABA began nearly 100 years of leadership in providing model standards on lawyer ethics and professional responsibility. For a historical description of the committee process and the revisions and amendments over the years, see *Preface to MODEL RULES OF PROF'L CONDUCT* (2002). The most recent comprehensive review and revision was undertaken in 1997 by the "Ethics 2000" Commission. Although there are significant differences in individual state codes of ethics, the Model Rules are intended to serve as a national framework for implementation of standards of professional conduct. Thus a large majority of states pattern their standards after the Model Rules.

intended to exhaust all the moral and ethical considerations a lawyer may face, they provide a framework for the ethical practice of law and establish professional norms for legal representation.²⁵⁵ Failure to adhere to a jurisdiction's ethics code may result in disciplinary action against an attorney, up to and including suspension or revocation of an attorney's license to practice law. The substandard legal representation that often results from the systemic problems plaguing public defense systems not only seriously injures poor defendants, but also forces defenders to violate their ethical and professional standards. This erosion of principles undermines the credibility and honor of the legal profession and corrodes the integrity of the criminal justice system.

Ethically a lawyer is required to serve her clients with competence²⁵⁶ and diligence.²⁵⁷ The lawyer must be thorough,²⁵⁸ adequately prepared,²⁵⁹ and a zealous advocate on behalf of the client's interests.²⁶⁰ Regular communication is expected in order to keep the client reasonably informed²⁶¹ and to respond to the client's reasonable requests for information.²⁶² In addition, a lawyer is required to consult with the client regarding how the lawyer will pursue important objectives²⁶³ and to explain matters to clients so that they may make informed decisions.²⁶⁴

In practice, the average lawyer working in an overburdened public defender office, or as an appointed or contract attorney whose compensation is so anemic that the hourly wage barely covers overhead expenses, may do none of these things. The problem arises, for instance, with a lawyer carrying a misdemeanor caseload three times the size of the national recommended standards, who meets a client for the first time just before court is called into session. That attorney simply does not have the time or the resources to investigate, prepare, or communicate adequately with the client so that the client can make an

255. In addition to these general ethical standards which pertain to all attorneys, there are also specific professional standards for defense attorneys which provide a more detailed guide to professional conduct and performance. See NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997); ABA, STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION (1993); ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (1993); ABA, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (1992).

256. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

257. *Id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

258. *Id.* R. 1.1.

259. *Id.*

260. *Id.* R. 1.3 cmt. 1.

261. *Id.* R. 1.4 (a)(3).

262. *Id.* R. 1.4 (a)(4).

263. *Id.* R. 1.4 (a)(2).

264. *Id.* R. 1.4 (b).

informed decision and the attorney can advocate zealously for his client's best interests. Even where the matters are not complex, sheer volume can preclude anything other than an assembly line approach, which falls far short of professional standards. Such is the case for the two contract defenders in Allen County, Indiana, who were assigned 2668 misdemeanor cases last year.²⁶⁵ Each attorney makes less than \$2000 a month and maintains a private practice on the side. Not surprisingly, the overwhelming majority of defendants plead guilty; only twelve went to trial in a year.²⁶⁶

Calling the practice unethical, chief public defenders in two jurisdictions, Broward County, Florida and St. Louis, Missouri, recently refused to continue the "meet 'em and greet 'em and plead 'em" approach.²⁶⁷ In Broward County, public defenders will no longer be allowed to recommend plea agreements to clients at arraignments or first hearings unless the attorney has met with the defendant, established a relationship and has an opportunity to properly assess the case, the client and any plea offer.²⁶⁸ The change was made in acknowledgment that the prior practice of recommending a plea, often portrayed as a one time offer that would worsen over time, at a lawyer's first encounter with a client with almost no information about the case fails to meet ethical standards. Such an approach makes it nearly impossible to determine whether a plea is in a defendant's best interest or to fulfill the duty to explain the matter sufficiently for the client to make an informed decision. For this reason, the ABA *Criminal Justice Standards* require independent investigation: "Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."²⁶⁹

Similarly, in St. Louis the chief defender characterized representation of certain misdemeanor defendants as "unethical, unprofessional and unconstitutional."²⁷⁰ As a result, he instituted a policy of no longer automatically representing defendants the first time they appear in court after having been arrested on misdemeanor charges. The chief defender concluded that it was not possible to "render

265. Fred McKissack, *Maximum Caseload: Misdemeanor Public Defenders Must Scramble*, J. GAZETTE (Fort Wayne, Ind.), Apr. 3, 2005, at 11A.

266. *Id.*

267. Geri L. Dreiling, 'Meet-and-Greet' Pleas Not Good Enough, *Public Defender in Florida Bans Long-Standing Practice*, ABA JOURNAL EREPORT, June 24, 2005; Robert Patrick, *Public Defender Rules Are Set to Change*, ST. LOUIS POST-DISPATCH, July 3, 2005, at E1.

268. Dreiling, *supra* note 267.

269. ABA, CRIMINAL JUSTICE STANDARDS, Standard 4.6 (1993).

270. Patrick, *supra* note 267.

constitutional, ethical and professional assistance of counsel upon walking into court with no discovery, no opportunity for investigation and no opportunity to counsel the accused.²⁷¹ Both of these jurisdictions have simply recognized that, despite caseload pressures, ethics rules require more of defense attorneys than encouraging their clients to accept the prosecution's plea offers.

The ethical dilemmas are not limited to misdemeanor court, however. They may arise wherever caseload pressures make it impossible for defenders to devote sufficient time to each case. Noting the trend of increasing caseloads without corresponding increases in resources, a legislative audit of the public defender agency in Alaska explicitly acknowledged a "heightened concern for professional ethics violations."²⁷² And, although the state expressed a willingness to defend its legal professionals against claims of such violations, the report candidly advised that "each attorney must weigh his/her ever increasing caseload and the demands from the public, against the potential of violating the professional code of ethics, resulting in disciplinary action."²⁷³ That is a rather stark and appalling warning that ethical violations may be inherent in the job of public defender.

Alaska is not alone in raising the alarm. The recent ABA report assessing the status of *Gideon's* mandate across the nation reached a similar conclusion. It found that "defense lawyers throughout the country are violating these ethical rules by failing to provide competent, diligent, continuous, and conflict-free representation."²⁷⁴ As disturbing as it is to suggest that ethical violations are commonplace, it is even more alarming that courts and disciplinary authorities routinely overlook these breaches of professional ethics. The likelihood of any individual defender being subjected to discipline for violation of the minimum levels of competence or zealousness is small.²⁷⁵ Most disciplinary agencies seem reluctant to bring charges against defenders whose conduct breaches ethical rules,²⁷⁶ perhaps because it seems unfair to blame an individual attorney when

271. *Id.*

272. DIV. OF LEGISLATIVE AUDIT, ALASKA DEPARTMENT OF ADMINISTRATION PUBLIC DEFENDER AGENCY CASE MANAGEMENT TIME STUDY AND PERFORMANCE REVIEW 18 (1998), available at <http://www.legaudit.state.ak.us/pages/audits/2000/pdf/453orpt.pdf> [hereinafter ALASKA TIME STUDY].

273. *Id.*

274. *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 20. "Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation." *Id.* at 39.

275. William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 162 (1995) ("While the existence of unreported disciplinary action is certainly a possibility, a computer search indicates no reported case of an attorney being disciplined for failures related to criminal defense."); see also Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 499.

276. Green, *supra* note 253, at 1195.

the failings are more a function of systemic inadequacies.²⁷⁷ The reluctance to sanction defenders of the indigent may also reflect the concern that sanctions could discourage other lawyers from accepting cases of indigent defendants. Such a result would exacerbate the problem of an already short supply of attorneys willing to take on this type of work.²⁷⁸

Another possible ethics enforcement mechanism, malpractice actions by defendants, is likely to be as unavailing as recourse to lawyer disciplinary bodies has been. Many states require that a plaintiff must first succeed in obtaining post-conviction relief for ineffective assistance of counsel before bringing a malpractice claim.²⁷⁹ Moreover, some courts, including some that require post-conviction relief, have held that the plaintiff must effectively demonstrate her actual innocence, not just that she would have been acquitted save for the attorney's negligence.²⁸⁰

Prosecutors and judges must also bear some responsibility in maintaining ethical standards within the criminal justice system, and the roles of both warrant further exploration. The prosecutorial ideal of seeking to "do justice," rather than just pursuing conviction of those who are arrested, has long established roots in our legal tradition. In 1935, the Supreme Court eloquently expressed the contours of this duty in the

277. *Id.* at 1196-97.

278. *Id.*

279. *See, e.g.,* *Levine v. Kling*, 123 F.3d 580, 582-83 (7th Cir. 1997) (applying Illinois law); *Shaw v. State*, 816 P.2d 1358, 1360 (Alaska 1991); *Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999); *Berringer v. Steele*, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000); *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994); *Stevens v. Bispham*, 851 P.2d 556, 565-66 (Or. 1993); *Bailey v. Tucker*, 621 A.2d 108, 115 (Pa. 1993); *Gibson v. Trant*, 58 S.W.3d 103, 117 (Tenn. 2001); *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995); *Adkins v. Dixon*, 482 S.E.2d 797, 801-02 (Va. 1997).

280. *See Levine*, 123 F.3d at 582-83; *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 672-73 (Cal. 2001); *Wiley v. County of San Diego*, 966 P.2d 983, 985-87 (Cal. 1998); *Gomez v. Peters*, 470 S.E.2d 692, 695-96 (Ga. Ct. App. 1996); *Kramer v. Dirksen*, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998); *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997); *Glenn v. Aiken*, 569 N.E.2d 783, 785-86 (Mass. 1991); *Rodriguez v. Nielsen*, 609 N.W.2d 368, 373-74 (Neb. 2000); *Morgano*, 879 P.2d at 738; *Mahoney v. Shaheen*, *Cappiello*, *Stein & Gordon, P.A.*, 727 A.2d 996 (N.H. 1999); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987); *Bailey*, 621 A.2d at 115; *Peeler*, 909 S.W.2d at 497-98; *Falkner v. Foshaug*, 29 P.3d 771, 773 (Wash. Ct. App. 2001). Courts have identified,

[v]arious policies or justifications... for the exoneration rule, including: equitable principles against shifting responsibility for the consequences of the criminal's action; the paradoxical difficulties of awarding damages to a guilty person; theoretical and practical difficulties of proving causation; the potential undermining of the postconviction process if a legal malpractice action overrules the judgments entered in the postconviction proceedings; preserving judicial economy by avoiding relitigation of settled matters; creation of a bright line rule determining when the statute of limitations runs on the malpractice action; availability of alternative postconviction remedies; and the chilling effect on thorough defense lawyering.

Canaan v. Bartec, 72 P.3d 911, 916 (Kan. 2003). Some courts have refused to adopt the "exoneration rule." *See, e.g.,* *Mylar v. Wilkinson*, 435 So. 2d 1237, 1238-39 (Ala. 1983); *Silvers v. Brodeur*, 682 N.E.2d 811, 817-18 (Ind. Ct. App. 1997); *Duncan v. Campbell*, 936 P.2d 863, 868 (N.M. Ct. App. 1997); *Krahn v. Kinney*, 538 N.E.2d 1058, 1060-61 (Ohio 1989).

seminal case of *Berger v. United States*, holding that:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.²⁸¹

Despite their duty to seek justice, there are prosecutors who zealously pursue their role as a representative of the government's interest in conviction, often to the exclusion of other interests. Indeed, some prosecutors are more likely to exploit defense incompetence than to take steps to guard against it.²⁸² For example, there are prosecutors who encourage quick guilty pleas as a way of clearing their dockets and maintaining high conviction rates with low costs.²⁸³

Most authorities hold that prosecutorial intervention in the face of ethical violations by defense counsel is only required if there is a constitutional violation, not if the performance of defense counsel is simply lacking. Indeed, reporting of substandard behavior of defense counsel by the prosecutor must be undertaken with care. There is a substantial concern that if the standards were too lax as to when a prosecutor could report a defense attorney for ethical violations, the procedure would become another litigation tactic. As a result, such action should only be taken if the prosecutor has clear and unmistakable knowledge that an ethical rule has been violated. ABA Standard 3-1.3, the Prosecution Function, provides that prosecutors should always use great restraint when tempted to comment on opposing counsel.²⁸⁴

The role of judges in both monitoring and correcting ethical abuses by defense counsel is also worthy of further attention. Although judges have strong incentives to encourage the quick resolution of cases and to sidestep the issue of the effectiveness of defense counsel in order to move the docket along, judges are uniquely situated to prevent ethical violations.²⁸⁵ The Supreme Court has recognized the role of the trial court as a protector of a defendant's right to counsel.

[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of the incompetent counsel, and . . . judges should strive to maintain proper standards of

281. 295 U.S. 78, 88 (1935).

282. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 637-42 (1999).

283. *Id.*

284. ABA CRIMINAL JUSTICE STANDARDS, Standard 3-1.3 (1993).

285. See generally 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 (1988); William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980).

performance by attorneys who are representing defendants in criminal cases in their courts.²⁸⁶

In appointing counsel, monitoring pretrial activities and evaluating counsel's preparedness, observing courtroom performance and participating in plea bargaining negotiations, the judge must be cognizant that "[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial."²⁸⁷

Regardless of the potential role prosecutors and judges might play in supporting ethical norms in the criminal justice system, defense attorneys themselves have a strict ethical obligation to control their workload in order to ensure that they can deliver competent representation.²⁸⁸ Some courts have recognized the ethical conflict inherent in carrying an excessive caseload and meeting the professional obligations of competence and diligence. They support attorneys' efforts to manage their workload by either declining appointments or withdrawing from representation. The Eastern District of Pennsylvania has suggested that if a public defender is overburdened, he may "at any time decline an appointment, and should decline to accept an appointment if [the defender] is not in a position to properly defend [an] action."²⁸⁹ Similarly, the California Court of Appeal stated, "[w]hen a public defender reels under a staggering workload . . . [he] should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense."²⁹⁰ Courts have occasionally done just that. For example, the Florida District Court of Appeals has upheld a trial court order allowing a public defender to withdraw from representation in six felony cases because of an excessive caseload.²⁹¹

286. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

287. *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978).

288. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2) ("A lawyer's work load must be controlled so that each matter can be handled competently."); ABA CRIMINAL JUSTICE STANDARDS, Standard 5-5.3(a) (1992) ("Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."). The importance of controlling workload is espoused as one of the core principles in TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 1 ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

289. *Iacona v. United States*, 343 F. Supp. 600, 604 (E.D. Pa. 1972).

290. *Ligda v. Superior Court*, 85 Cal. Rptr. 744, 754 (Ct. App. 1970) (internal citation omitted); *see also State ex rel. Escambia County v. Behr*, 354 So. 2d 974, 975-76 (Fla. Dist. Ct. App. 1978).

291. *Behr*, 354 So. 2d at 975-76. The court found that although the statute required that the defender represent all indigent defendants and did not provide any grounds to withdraw because of an excessive caseload, the statute could not be interpreted so mechanically. As a result of the devastation of Hurricane Katrina, along with the insufficient funding situation in Louisiana, prosecutions in New Orleans may need to be halted as there are not enough defense lawyers available to handle the workload. *See Parker*, *supra* note 104.

Not all courts are as enlightened, however. When a highly regarded criminal defense attorney filed a motion seeking a dismissal for his client because Virginia's unwaivable caps on court-appointed fees created a conflict of interest, one judge responded with threats.²⁹² The attorney argued the low compensation paid to court-appointed attorneys created an overwhelming financial disincentive to mount a competent defense for an indigent client and thus generated an impermissible conflict of interest. Another judge, having read about the motion in the newspapers, greeted the lawyers in his courtroom with the announcement that any lawyer who had similar feelings would be removed from the court-appointed list. The threat was clear, "challenge the fee caps at the risk of your livelihood."²⁹³

1. *Strickland and the Undermining of Ethical Standards*

Lawyers may often be stymied in their efforts to resolve the ethical dilemma of how to deliver competent representation in the face of unreasonable caseloads and few resources. Still, their efforts are further undermined by the case law surrounding ineffective assistance of counsel claims. Constitutional decisions interpreting the Sixth Amendment have established a standard for effective assistance of counsel that has been universally criticized as far less demanding than the ethical and professional standards governing defense attorneys.²⁹⁴ The result is that, rather than requiring defenders of the indigent to meet professional standards, the constitutional test for ineffective assistance sets the standard far lower and permits, and some argue encourages, deficient lawyering.²⁹⁵ As Supreme Court Justice Thurgood Marshall observed, "all manner of negligence, ineptitude, and even callous disregard for the client' pass muster under the *Strickland* standard."²⁹⁶

292. Editorial, *Injustice Unchallenged*, WASH. POST, Feb. 22, 2004, at B6.

293. *Id.*

294. Freedman, *supra* note 35, at 915 ("There is, of course, wide scholarly agreement that *Strickland* has neither discouraged incompetent representation nor prevented wrongful convictions."); see also Green, *supra* note 253, at 1186.

295. Green, *supra* note 253, at 1185-90; see also Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) ("[A]ll who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance."); Geimer, *supra* note 275, at 4 ("Strickland has been roundly and properly criticized for fostering tolerance of abysmal lawyering."); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1465 (2003) ("[T]he ruling has proved disabling to the right to effective assistance of counsel in practice."); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441 (2003/2004) ("[T]he test fails to assure even a minimal level of competence or effectiveness. In general, the Court appears to be quite willing to accept a low level of competence by indigent defenders.").

296. Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 860 (1992) (citing Remarks of Justice Thurgood Marshall to the Second Circuit Judicial Conference, Sept. 1988).

The Supreme Court established a two-part test for determining when counsel is constitutionally ineffective in its 1984 decision in *Strickland v. Washington*.²⁹⁷ First, "a convicted defendant [who] complains of the ineffectiveness of counsel's assistance . . . must show that counsel's representation fell below an objective standard of reasonableness."²⁹⁸ There are no specific guidelines for determining whether counsel meets an objective standard of reasonableness.²⁹⁹ Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . considering all the circumstances."³⁰⁰ The second element of an ineffective assistance of counsel claim is that "any deficiencies in counsel's performance must be prejudicial to the defense."³⁰¹ To satisfy the prejudice prong, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of that proceeding would have been different. Reasonable probability is a probability sufficient to undermine confidence in the outcome."³⁰²

Despite some strong rhetoric in support of competent representation,³⁰³ chilling examples abound of abysmal representation that was nevertheless upheld under this constitutional test.³⁰⁴ Unbelievably, courts have relied upon *Strickland* to refuse to find ineffective assistance of counsel even where the defense attorney was silent during the entire trial, shared delusions about his involvement in a murder conspiracy with the jury, or was arrested on the way to the courthouse for driving with a .27 blood-alcohol content.³⁰⁵

Not surprisingly, the two-prong *Strickland* test has been widely criticized as betraying the promise of *Gideon*. In practice the test is

297. 466 U.S. 669 (1984).

298. *Id.* at 687-88.

299. *Id.* at 688.

300. *Id.*

301. *Id.* at 692.

302. *Id.*

303. See, e.g., *id.* at 686 ("[T]he right to counsel is the right to the effective assistance of counsel.") (emphasis added); *id.* at 692 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

304. See, e.g., Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 245-49 (1991) (discussing the deeply distressing stories of Georgia capital defendants Jack House and Billy Mitchell); Bright, *supra* note 296, at 860-61 (describing the case of a since-executed defendant whose conviction was upheld even though defense counsel later apologized to the client for being under significant stress during trial because at the time he was on drugs and breaking up with both his wife and his lover); Roger Parloff, *Legal Aid, Barely*, HARPER'S MAG., Mar. 1993, at 26 (citing examples of denial of ineffective assistance claims where defense attorneys were asleep, using heroin and cocaine throughout the trial, or drunk during the trial).

305. Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 831 (2003).

nearly impossible to meet.³⁰⁶ Thus, as courts continue to apply the demands of the analysis to attorney performance, the definition of acceptable lawyer behavior departs further and further from ethical standards and substandard lawyering is routinely upheld.³⁰⁷

Although it is not particularly difficult to identify errors that an attorney made in the course of representing an indigent defendant, proving the prejudice prong is a hurdle most cannot overcome.³⁰⁸ One central problem is that the trial record, where the prejudice must be found, is itself a product of the defense attorney's deficient performance.³⁰⁹ As Justice Marshall, the single dissenter in *Strickland*, aptly observed, reviewing the record is unlikely to reveal how the defendant may have been prejudiced by an attorney's performance:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.³¹⁰

306. The practical problem was explained in an article laying out the review of recent criminal convictions in the San Jose area:

Attorney errors are not easily corrected. In more than 100 cases, the 6th District Court of Appeal rejected challenges to the attorney's performance by issuing single-sentence orders that lacked explanation. Other cases saw the appellate justices repeatedly rationalize poor conduct. In one instance, they suggested that an alcoholic lawyer's repeated absences and tardiness during trial may have been a knowing tactic to permit him time to sober up before the jury saw him. Twice, justices found no problem with lawyers who could not legally represent their clients because they had been suspended by the State Bar of California.

Tulsky, *supra* note 18, at 3A. See generally Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 284 (1997) ("Under *Strickland*, ineffective assistance is easily alleged but almost impossible to prove."); Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 138 (2005) ("[I]t is almost as difficult to prove ineffectiveness now as it was prior to *Strickland*. Courts have been unwilling to find that an attorney's performance was deficient even in the most egregious cases. . . ."); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2068 (2000) ("It is thus exceedingly difficult to win such a claim under the standard established in *Strickland*."); Kelly Reissmann, Comment, *Our System is Broken: A Study of the Crisis Facing The Death-Eligible Defendant*, 23 N. ILL. U.L. REV. 43, 47 (2002) ("The *Strickland* standard for ineffective counsel is almost impossible to meet.").

307. See Cunningham-Parmeter, *supra* note 305, at 831.

308. This is true despite the highly deferential standard the Court applies to evaluating the strategic choices made by lawyers. *Strickland* establishes a "strong presumption" that a lawyer's performance falls "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

309. Dripps, *supra* note 306, at 278.

310. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (footnote omitted).

If, under the *Strickland* standard, courts can routinely refuse to find ineffective assistance of counsel even where there has been a clear breach of professional norms, then the erosion of those norms is unavoidable. The combination of the low constitutional standard with the reluctance of lawyer disciplinary bodies, prosecutors, judges and defense attorneys themselves to meet their ethical obligations has resulted in the evisceration of the right to counsel for poor criminal defendants.

F. TRAINING, EVALUATION, AND SUPERVISION

A lack of supervision of defenders impairs the quality of representation afforded poor defendants, as does the failure to evaluate counsel to ensure that the lawyer's training, experience, and ability appropriately match the complexity of the cases assigned. The absence of attorney standards can mean defenders of the indigent lack the qualifications to deliver competent criminal defense representation. Ongoing training and supervision are crucial in ensuring that defense lawyers develop and maintain their skills, particularly in specialized areas, and in ensuring that they be held accountable for the level of representation they provide to clients.

1. *Supervision*

Without practice standards, and the supervision and evaluation to enforce those standards, there is no mechanism to ensure the quality or adequacy of indigent defense services. The ABA's Ten Principles recognize this critical feature of an indigent defense system with Principle Ten: "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."³¹¹ As an initial step in assuring competence, however, defense attorneys must not be assigned to cases for which they lack the experience or competence.³¹² As the sixth of the ABA's Ten Principles provides: "Defense counsel's ability, training, and experience [should] match the complexity of the case."³¹³

The importance of matching an attorney's qualifications with the difficulty of the case has long been recognized in death penalty litigation, given the complexity and demands of capital defense. In that context attorney qualifications are a common element of standards established through statute, state supreme court rule, or indigent defense system directive.³¹⁴ Yet, it is also inappropriate in the extreme to assign a rape

311. See TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 1.

312. In fact, this is an ethical obligation as well as a practical consideration. See *supra* Part V.E.

313. See TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 1.

314. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, VOLUME III B1 (2000), available at <http://www.ojp.usdoj.gov/indigentdefense/compendium/pdf/txt/vol3.pdf>.

case where the defendant is facing a life sentence to an attorney who has never handled such a defense before, as has happened to multiple Montana defenders.³¹⁵ In Illinois, one capital defendant was represented by a real estate attorney. When asked if he had ever handled a criminal trial by himself, the lawyer responded, "Well, is paternity criminal?"³¹⁶

Massachusetts, despite its serious problems in compensating and retaining lawyers, has established an excellent system for ensuring that attorneys have the knowledge, skills and experience to handle the cases they are assigned.³¹⁷ The Committee for Public Counsel Services (CPCS) created a tiered certification process. Attorneys seeking appointment must verify their trial experience and CLE compliance. They must also provide recommendations from practicing criminal defense attorneys. In order to be certified as eligible to accept cases in superior court, an attorney must have tried at least six jury or six superior court criminal trials to verdict in the last five years as lead defense counsel. The applicant must fully describe the cases, including names, indictment numbers and charges, names of judges and prosecutors, dates of trials, and the major issues of each case, and offer as reference three criminal defense practitioners familiar with the applicant's work. The chief counsel of CPCS must individually approve each applicant. Attorneys seeking appointment in the district court in misdemeanor and concurrent felony cases must be admitted into a county bar advocate program and complete a five-day training seminar entitled "Zealous Advocacy in District Court." Attorneys must be reevaluated and recertified every four to five years.³¹⁸

Even where an attorney's knowledge and experience are appropriately matched to her case assignments, counsel's performance still must be appropriately monitored and evaluated to ensure quality representation. Ordinarily, a public defender organization has a hierarchy of management in place that can respond and correct inferior performance. But, surprisingly, even public defender management may not deliver much supervision or performance evaluation to ensure competent representation. In Montana, for example, the chief public defender in one county admitted that he does not engage in any meaningful supervision. "I just try to address specific concerns as they

315. NAT'L LEGAL AID & DEFENDER ASS'N, AN ASSESSMENT OF INDIGENT DEFENSE SERVICES IN MONTANA 35-36 (2004) [hereinafter MONTANA REPORT].

316. Marshall, *supra* note 35, at 959.

317. For a complete description of the eligibility and certification requirements in Massachusetts, see Committee for Public Counsel Services, Certification Requirements, <http://www.mass.gov/cpcs/certreqs/> (last visited Apr. 14, 2006).

318. See COMMITTEE FOR ASSIGNED COUNSEL SERVICES, ASSIGNED COUNSEL MANUAL: POLICIES AND PROCEDURES, Chap. 3.2 (2004), available at http://www.mass.gov/cpcs/manuals/pmanual/3_2CertificationDistrictCourtCasesChap3Sept2204.pdf (last visited Apr. 14, 2006).

come up I don't follow lawyers around and make sure that they're dotting all their I's and crossing their T's. . . . The individual attorneys monitor their performance."³¹⁹

Another Montana county chief defender carries the largest case load in her office, which precludes her from providing any meaningful supervision to subordinates.³²⁰ Good management here would include conducting in-court observations, reviewing case files, discussing theories of the case, directing training, and monitoring the overall work of the lawyers. All this is impossible to achieve where the supervisor also carries a full caseload. In Alaska, a legislative audit of the public defender agency noted the lack of supervision of attorneys within the agency and quoted one lawyer's assessment: "Everyone is on their own—sink or swim."³²¹

If effectively supervising public defenders within an office is sometimes problematic, holding appointed counsel and contract attorneys accountable for their performance presents an even greater difficulty. Without an independent supervisory check on defense attorneys, incompetent lawyers can be appointed repeatedly, even in the face of multiple bar suspensions or disbarments. In Illinois, attorneys who were previously or subsequently disbarred served as counsel for thirty-three defendants who received death sentences.³²² One of those lawyers had seventy-eight complaints lodged against him. Another attorney, who had been previously disbarred represented four defendants who received death penalties. The attorney was subsequently disbarred a second time.³²³

Oversight is important in maintaining accountability. It is perhaps even more important that the supervision be provided by an independent entity rather than the judiciary or politicians. As discussed in the part on Independence,³²⁴ too often judges, burdened with overwhelming caseloads themselves, are more attuned to clearing the docket than to seriously considering whether an attorney has the requisite skills to mount a competent defense.³²⁵ "[C]ourts may give preference in appointments to attorneys who dispatch cases expeditiously, without a level of motion practice, investigation, or pleas for expert assistance that

319. See MONTANA REPORT, *supra* note 315, at 57.

320. *Id.*

321. ALASKA TIME STUDY, *supra* note 272, at 19.

322. See Marshall, *supra* note 35, at 959.

323. *Id.* For a discussion of these problems, see generally REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT COMMISSION ON CAPITAL PUNISHMENT (April 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/indexhtml. See also Williams, *supra* note 306, at 145.

324. See *supra* Part V.C.

325. See *supra* Part V.A.

would slow dockets and drain limited funds.”³²⁶ In addition, popularly elected state judges are not immune from the pressures of campaigning and may favor those lawyers who contribute to their judicial campaigns.³²⁷

2. Training

If attorneys are to deliver effective assistance of counsel to poor defendants they, like all lawyers, must be competent, zealous advocates.³²⁸ Criminal law is a complex and ever-changing legal area requiring specialized knowledge and skills. As evidenced by the consistent call for regular, organized high-quality training in national criminal defense standards, initial training and ongoing education are crucial to ensuring that lawyers are capable of providing high-quality criminal representation.³²⁹ The ABA’s Ten Principles, which distill the myriad sets of national standards and identify fundamental elements of an effective system, advocate mandatory training.³³⁰ As former Attorney General Janet Reno succinctly put it, “training can make such a difference.”³³¹

Despite the wide recognition of the common sense of providing adequate and ongoing training for defenders, jurisdictions all across the country fail to do so. This lack of training is often manifested by inadequate performance. A well-trained Cincinnati attorney described an inexperienced, court-appointed attorney as “oblivious” about managing the felony case to which he was assigned. “It was startling to me how little he prepared the case. It’s because he’s got no training. He’s got a trial coming up on a serious felony, and he didn’t know the basics of investigation, including that he should interview all potential witnesses

326. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 (2004); see also, Marshall, *supra* note 35, at 958.

In far too many cases, these appointments are a form of patronage, having everything to do with connections, and nothing to do with qualifications. Indeed, there are many instances in which it appears obvious that judges are choosing lawyers whom the judges trust will not put up much of a fight and will keep the assembly line moving.

Id.

327. See Brown, *supra* note 326, at 812 n.46.

328. Competence is also the ethical standard for a lawyer’s work. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

329. See NLADA, *Defender Training and Development Standards* 12 (1997) for a preface listing a wide array of guidelines, standards and reports recognizing the critical importance of training for defenders.

330. TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 1 (“Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.”).

331. Reno Remarks, *supra* note 25, at viii.

before trial.”³³² Similarly, a Pennsylvania county judge admitted that the “younger attorneys are in way over their head[s].”³³³ The expert report prepared for systemic litigation in Montana found that “[t]here is no orientation program for newly hired indigent defense attorneys, no systematic and comprehensive training, and no technical assistance.”³³⁴ A similar situation exists in New York. After monitoring public defense systems in multiple counties for over a year, the New York Civil Liberties Union concluded that the programs were unable to “provide sufficient, or sometimes any, training, supervision, or technical assistance to ensure that attorneys are equipped with the skills and knowledge to adequately represent their clients.”³³⁵ Prior to 2004, in Virginia, there were neither formal training programs for public defenders or court-appointed counsel, nor minimum qualification standards.³³⁶ Not surprisingly, one aspect of the problem is lack of resources to create training programs where public defense dollars are in short supply and needs are great. In southwest Louisiana, for example, the public defender office had no program for professional development and was able to budget only \$4000 per year for travel, very little of which was for professional training. In contrast, the jurisdiction’s prosecutor’s office spends approximately \$100,000 a year for its staff to attend seminars and conferences.³³⁷

Introductory training for the newly hired lawyer, while vital, is not the only need, however. Ongoing specialized advanced training for more experienced lawyers is key to keeping skills current. For instance, as Janet Reno asserted, “understanding the latest technology used in crime analysis no longer is a luxury for an attorney.”³³⁸ In implementing the new training standards required for court-appointed work in his state, Virginia Supreme Court Chief Justice Leroy R. Hassell concentrated his

332. Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 49 (2003).

333. THE SPANGENBERG GROUP, A STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA 72 (2002) [hereinafter PENNSYLVANIA REPORT].

334. See MONTANA REPORT, *supra* note 315, at 37.

335. Testimony of Donna Lieberman, Executive Director of the New York Civil Liberties Union, before The New York State Commission on the Future of Indigent Defense Services (Feb. 11, 2005), available at http://www.nyclu.org/indigent_defense_istmny_021105.html; see also Statement of E. Vincent Warren, Senior Staff Counsel, ACLU Found. Nat’l Legal Dep’t, before the New York State Commission on the Future of Indigent Defense Services 5 (Feb. 11, 2005), available at <http://www.adu.org/FilesPDFs/warren.pdf>.

336. VA. BAR ASS’N, REPORT ON VIRGINIA’S INDIGENT DEFENSE SYSTEM 4 (2005) (discussing specialized training for capital cases mandated by legislation since 1991). A central charge of the newly established Virginia Indigent Defense Commission is to establish and monitor qualifications and training requirements for defenders. See VA. CODE § 19.2-163.01 (2006), discussed *infra* Part VI.A.3.

337. MICHAEL M. KURTH & DARYL V. BURCKEL, DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA 24-25 (2003).

338. Reno Remarks, *supra* note 25, at viii.

energy on providing advanced skills for more experienced lawyers and sponsored a program exclusively for experienced practitioners.³³⁹

The federal defender system, under the Criminal Justice Act,³⁴⁰ provides a model for the delivery of training for defenders in recognition of the critical role training plays in maintaining proficiency in criminal practice.³⁴¹ Federal defenders, regardless of their respective experience levels, have training opportunities. Those opportunities are tailored based on experience. New attorneys take a two-week class instructing them on the key aspects of their new roles as federal defenders. The course includes instruction on litigation and sentencing guidelines. Attorneys subsequently receive training at the National Criminal Defense College, intended as a follow-up to their initial training. At the Defense College, topics covered include trial advocacy, client interaction, investigation, motion practice, and use of experts.³⁴² Similarly, state prosecutors recognize the importance of training and can utilize the resources and expertise of the National College of District Attorneys to provide prosecutors, their investigators and administrative personnel with specialized training.³⁴³ While prosecutors often benefit from the sophisticated training provided by "America's School for Prosecutors," as it is known, state defenders rarely have the funds to take advantage of the defense-oriented training provided by the National Criminal Defense College, where federal defenders receive much of their training.³⁴⁴

339. *Supreme Court Training Session Offered for Skilled Lawyers Who Defend Indigents in Criminal Cases; Basic-Skills Course Set by Indigent Defense Commission*, VA. LAWYER, Feb. 2005, at 16-17, available at <http://www.vsb.org/publications/valawyer/feb05/access.pdf>; see also *Indigent Criminal Defense Training*, VA. LAWYER, June/July 2005, at 25, available at <http://www.vsb.org/publications/valawyer/jul05/access.pdf> (discussing the first seminar sponsored by the Chief Justice of the Supreme Court of Virginia). The training focused on high-tech evidence such as DNA and drew 350 on-site attendees and an additional 100 videoconference participants. *Id.*

340. Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2005)). The Act establishes the statutory framework for the indigent defense systems in each of the ninety-four federal judicial districts. Each district court is responsible for designing a plan to provide legal representation for poor defendants, which may include a federal defender office or the appointment of panel attorneys. Currently eighty-nine federal districts are served by federal public defenders, however, panel attorneys are still utilized to represent defendants who the defender office cannot represent due to workload or conflicts of interest.

341. See *Committee Defends Independence of Representation: An Interview with Judge Patti B. Saris*, in THE THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS, Apr. 2005, available at <http://www.uscourts.gov/ttb/apr05ttb/interview/index.html>.

342. For a general description of training and supervision within federal defender programs, see Inga L. Parsons, "Making a Federal Case": A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 861.

343. For a description of the National College of District Attorneys, which is the training arm of the National District Attorneys Association devoted exclusively to training prosecutors, and its course offerings, see <http://www.law.sc.edu/ncda/> (last visited Apr. 14, 2006).

344. For a description of the National Criminal Defense College and their training programs, see <http://www.ncdc.net/college.html> (last visited Apr. 14, 2006).

Even though the federal and prosecutorial training models remain elusive for many states, some states have been developing adequate training. A recent evaluation of the impact of standards found that 37% of county-funded systems and 50% of state public defense systems with some or all state funding reported use of training standards.³⁴⁵ In addition, virtually every recent state reform effort has included recommendations or provisions for education and training for defenders.³⁴⁶ This reflects a wide recognition of the need for and importance of training.

G. DEFENDER RESOURCES

A lack of ancillary resources, critical to effective representation, plagues defender systems nationwide. The assistance of support staff, investigators, paralegals, social workers and independent experts is rarely available to the degree necessary to provide competent representation. The scarcity of defender resources usually stands in stark contrast to the prosecution's access to the additional resources and services of other governmental agencies, the costs of which are not reflected in their budgets. Although, as the United States Justice Department has suggested, it is difficult to measure accurately this disparity of resources,³⁴⁷ this gap undermines the validity and the effectiveness of the adversary system.

The Supreme Court has recognized that there is more to competent representation than merely having an assigned lawyer. Meaningful access to justice includes the "raw materials integral to the building of an effective defense," and a criminal trial is fundamentally unfair where that access is denied.³⁴⁸ National standards have long recognized the importance of giving lawyers the appropriate tools essential to the defense function, including technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts.³⁴⁹ The role of support staff is critical both to the quality of

345. Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 273 (2004).

346. See, e.g., REPRESENTATION IN DELINQUENCY PROCEEDINGS, *supra* note 242, at 26-27; MONTANA REPORT, *supra* note 315, at 36-39; TRIAL-LEVEL INDIGENT DEFENSE, *supra* note 22, at 46-47. An innovative program for training has been initiated in Virginia. The attorneys who seek to represent indigent defendants are offered the opportunity to work alongside an experienced defense lawyer through a statewide mentorship program. See *Mentorship Program Developed for Indigent Defense Counsel*, VA. LAWYER, Oct. 2005, at 20. And, in North Carolina, the statewide Office of Indigent Defense Services has established "listservs" for defense lawyers to enable the sharing of information and expertise. See N.C. INDIGENT DEF. SERVS., *supra* note 209, at 6.

347. See DeFRANCES & LITRAS, *supra* note 29, at 3.

348. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process.").

349. See ABA, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-1.4 (1992): "The legal representation plan should provide for investigative, expert, and other services

representation a defender can offer and the cost-effectiveness of that representation. As one Alaska judge bluntly told legislative auditors, where there are inadequate support services, "failure is built in."³⁵⁰

1. *Investigators and Support Staff*

Adequate investigation is the most basic of criminal defense requirements,³⁵¹ and often the key to effective representation. An early study of public defender offices in the wake of the expansion of the right to counsel in *Argersinger* found that institutional resources were the most prevalent explanation for the variation in effectiveness scores among defender programs.³⁵² Specifically, an in-depth analysis of nine urban public defender programs found that success in the courtroom was frequently tied to the availability of investigators.³⁵³ Investigators, with their specialized experience and training, are often more skilled than attorneys, and invariably more efficient, at performing critical case-preparation tasks such as gathering and evaluating evidence and interviewing witnesses.³⁵⁴ Without the facts ferreted out by an investigation, a defender has nothing to work with beyond what she might learn from a brief interview with the client. With such limited information regarding the strength and nature of the case, any attorney would be hard pressed to make the sensible strategic decisions necessary to adequately defend an accused or even have any leverage in plea bargaining.

necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process." The ABA's Ten Principles address the importance of adequate resources for public defense; Principle Eight calls for parity between defense counsel and the prosecution in resources such as technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts. TEN PRINCIPLES OF A PUBLIC DEFENSE, *supra* note 112, at 3.

350. ALASKA TIME STUDY, *supra* note 272, at 31.

351. ABA CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION, Standard 4-4.1 (1993) states:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless the accused's admission or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

352. Paul B. Wice & Peter Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 179 (1974).

353. *Id.* at 167-68.

354. In addition, it can be problematic for an attorney to interview witnesses alone. Should the need arise at trial to impeach the witness, the attorney may be put in the difficult situation of having to call herself as a witness as the only person who can testify to the earlier inconsistent statements the witness made during the investigative interview. Commentary to ABA Standard 5-1.4 states: "[W]hen an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously given or withdrawing from the case." ABA, CRIMINAL JUSTICE STANDARDS, PROVIDING DEFENSE SERVICES, Standard 5-1.4 (1992).

Yet, all across the country, public defenders, appointed counsel and contract attorneys do not have access to appropriate investigative resources. A Montana public defender, with no investigative services, commented that he had to be a "private investigator . . . in addition to being the attorney, [making it] difficult to juggle the time necessary to do that."³⁵⁵ In Pennsylvania, most public defenders and contract attorneys cannot recall the last time they used an investigator, and one desperate public defender admits he encourages his clients to conduct their own investigations.³⁵⁶ A part-time New York county assistant public defender's heavy caseload precludes him from spending any time on his assigned cases other than in court, so investigation is well beyond his reach.³⁵⁷ His frustration is shared by the full-time public defender who has neither the time nor the resources to investigate his cases either.³⁵⁸

In many jurisdictions, appointed counsel and contract defenders must secure the approval of the court before incurring any fees for investigators or experts. Judges who have the authority to authorize such expenditures, however, are often reticent to expend taxpayer funds.³⁵⁹ In Virginia, judges so rarely approve funds for investigators or experts that defenders simply have ceased to ask.³⁶⁰ One Virginia attorney admitted that she does not use investigators because the state will not pay for them; shockingly, others confessed that they simply do not conduct investigations because they lack the time and resources.³⁶¹ A similar situation existed in Georgia, where attorneys commented that getting investigators, even in death penalty cases, was like "pulling teeth."³⁶² Hiring an investigator for a non-capital case in Mississippi is possible only if the lawyer pays for it herself.³⁶³ And, in Ohio a judge once refused to award funds for an investigator in a murder trial because one of the defense lawyers had been an investigator thirty years earlier.³⁶⁴

A recent survey of nearly 2000 felony cases in four Alabama circuits vividly illustrates the chilling effect this kind of systemic denial of investigative resources has on future requests. The contract attorneys

355. MONTANA REPORT, *supra* note 315, at 20.

356. THE SPANGENBERG GROUP, A STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA 69 (2002) [hereinafter PENNSYLVANIA REPORT].

357. NAACP LEGAL DEF. AND EDUC. FUND, INC., THE STATUS OF INDIGENT DEFENSE IN SCHUYLER COUNTY 12 (2004).

358. *Id.*

359. RHODE, *supra* note 13, at 129; NAACP LEGAL DEF. AND EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 11 (2003) [hereinafter ASSEMBLY LINE JUSTICE].

360. INDIGENT DEFENSE IN VIRGINIA, *supra* note 20, at 67.

361. *Id.*

362. GA. CHIEF JUSTICE'S COMMISSION ON INDIGENT DEF., REPORT OF CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE PART I 56, n.196 (2002) [hereinafter GEORGIA CHIEF JUSTICE REPORT].

363. ASSEMBLY LINE JUSTICE, *supra* note 359, at 6.

364. De Sario, *supra* note 332, at 56.

there did not request investigators or experts in 99.4% of the cases.³⁶⁵ As a Texas defense attorney explained, "Formal denials of specific requests are rare. But this is because of an unwritten understanding that requests will only be made in cases of extraordinary need. Hence, although virtually every case requires some sort of investigation, the attorney himself must perform these tasks in an uncompensated or under-compensated capacity."³⁶⁶

One Pennsylvania public defender candidly admitted that the lack of investigator services available to defenders influences the outcome of cases.³⁶⁷ This is particularly true when the prosecution benefits from generally higher staffing levels and has the investigative resources of law enforcement available. In Kentucky, for instance, the chief public defender of a four-county area blamed insufficient staff for his office's inability to adequately represent clients. He pointed specifically to the state prosecutor's "huge investigative advantage" as a significant factor in the disparity and concluded that "[r]esources influence results."³⁶⁸ The lack of investigative services was identified as a major problem in Pennsylvania counties, particularly in light of the disparity of investigative resources available to the district attorneys and the public defenders. The 2002 evaluation concluded: "Juxtaposed with the vast resources of local law enforcement at the disposal of the District Attorney, the public defender who does not have investigative capabilities cannot put up a fair defense and begins at a disadvantage."³⁶⁹

2. Experts

Defenders who seek the assistance of experts in defending their clients face many of the same hurdles as they do in securing help with investigation. While the prosecution frequently has at its disposal an assortment of government personnel such as crime investigation and laboratory professionals, psychiatrists, scientists, and doctors, defenders must rely on the state's witnesses or seek funds to compensate an independent expert of their own. Relying on the state's expert witnesses raises questions of independence.³⁷⁰ A Virginia public defender described

365. *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 19.

366. *BUTCHER & MOORE*, *supra* note 195, at 18.

367. *PENNSYLVANIA REPORT*, *supra* note 356, at 69.

368. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 *IND. L.J.* 363, 400-01 (1993).

369. *PENNSYLVANIA REPORT*, *supra* note 356, at 70.

370. In explaining why the public defender needs adequate budget resources to retain outside experts, one report evaluating an Ohio county's public defender office put it this way:

The public defender should never take at face value the State's evidence regarding ballistics tests, drug tests, or psychological evaluations, but should be able to verify those tests by retaining its own experts to conduct testing and testify in court. Their own independent tests may prove that their clients were not the 'shooters,' that the supposed 'cocaine' was really Pillsbury flour, and that the accused has an I.Q. of a four-year old.

MARSHALL J. HARTMAN ET AL., *MANAGEMENT AND OPERATIONAL REVIEW OF THE MONTGOMERY COUNTY*

the state's lab experts as "cops with lab coats. They are openly hostile to us. Many of them think that their function is to support the prosecution."³⁷¹

Unfortunately, courts are often quite reluctant to give funds for experts. An appointed attorney in Georgia, having been denied an expert each of the twenty times he applied for one remarked, "If there was more money for experts, by God, my clients would not be in jail."³⁷² One Virginia public defender described the difficulty in getting funds approved for experts this way: "It's as if judges are taking out their wallets themselves. They just say no."³⁷³ Similarly, Montana defenders are usually forced to rely on the state's experts because, as one defender put it, "Can't use them, can't get them. We just don't have the money in the budget."³⁷⁴

Certainly not every case requires expert testimony, but independent professionals often are essential to challenge the state's evaluation of forensic evidence or competency. Even so, a study in Calcasieu Parish, Louisiana found only two instances in three years where experts were used by the public defender's office in defense of clients.³⁷⁵ Remarkably, one Virginia judge denied a public defender's request for a DNA expert in a seven-year-old murder case where DNA was the only remaining evidence. The judge was apparently swayed by the prosecutor's argument that the cost would have been too much of an expense to the state.³⁷⁶

PUBLIC DEFENDER OFFICE 56-57 (2000). Another argument for the importance of independent experts is the rising tide of errors discovered in state crime laboratories across the country. For instance, in response to an audit of its embattled crime lab, Virginia recently established a scientific review panel and ordered a review of more than 160 past cases. Christina Nuckols, *Governor Appoints Panel to Oversee Virginia's Crime Lab*, VIRGINIAN-PILOT, Aug. 9, 2005, at B3. The Texas state laboratories are undergoing massive reviews because of widespread errors found recently. Editorial, *With Shoddy History, Texas Crime Labs Could Use Oversight*, AUSTIN AM.-STATESMAN, May 16, 2005, available at http://www.statesman.com/opinion/content/editorial/05/16crimelab_edit.html.

371. INDIGENT DEFENSE IN VIRGINIA, *supra* note 20, at 64.

372. GEORGIA CHIEF JUSTICE REPORT, *supra* note 362, at 67.

373. INDIGENT DEFENSE IN VIRGINIA, *supra* note 20, at 64.

374. MONTANA REPORT, *supra* note 315, at 21.

375. KURTH & BURCKEL, *supra* note 337, at 24.

376. INDIGENT DEFENSE IN VIRGINIA, *supra* note 20, at 65. Some states, such as North Carolina, have turned to statewide commissions to appoint and compensate experts. See IDS's MAIN ACCOMPLISHMENTS, *supra* note 209. Oklahoma employs a unique approach to ensuring that both public defenders and contract attorneys have access to the appropriate experts. Each request is reviewed by the chief of psychological services or the chief of forensics to determine whether the evidence in a case warrants the services of an expert. These knowledgeable individuals are able to better target the area of expertise necessary and even negotiate better prices with a host of fee-based expert service providers. This ability to help attorneys focus their use of experts means that resources are used more efficiently and effectively. See Letter from James Drummond, Chief, Non-Capital Trial Div., Okla. Indigent Def. Sys., to Mary Sue Backus & Paul Marcus (Nov. 24, 2005) (on file with authors).

3. *Other Resources: Support Staff and Technology*

In addition to access to experts and investigators, defenders need the full complement of support services and technology that a modern law office would require. Secretaries and paralegals can assist with clerical and administrative tasks, client communication, and case preparation and free up time for legal work only the attorney can handle. In Lake County, Montana, neither of the two public defenders has a secretary or a paralegal, thus they either have to interrupt their work to answer the phone or ignore incoming calls.³⁷⁷ Alaska defenders complain of having their time consumed by filing, mailing, copying and other clerical tasks as a result of inadequate support staff. More than half of the defenders indicated that more than 10% of the tasks they routinely perform could be done by someone with less training, such as a secretary, paralegal, investigator, or other support staff. As one lawyer said, "I shouldn't be doing clerical work."³⁷⁸

When defenders are forced to handle these support tasks themselves it exacerbates the problem of case overloads since a significant amount of the attorney's time is consumed by administrative tasks, which could be performed more cost-effectively by others. For example, the Alaska Judicial Council found that even though public defense attorneys and prosecutors appeared to spend similar amounts of time on their cases, the defense attorneys did so without the benefit of substantial investigative services or administrative support available to prosecutors.³⁷⁹ As a result, the Council recommended increasing these resources as a means of improving defenders' ability to handle increasing case loads.³⁸⁰

Defenders also need the proper tools to adequately represent clients, including the availability of legal research materials or electronic databases, computers and other equipment. However, equipment and resources that most law firms and prosecutor's offices take for granted are often denied to public defender offices. When the public defenders in Lake County, Montana need to do legal research, without the funds to subscribe to online legal research resources, they must drive seventy miles to the University of Montana Law School library.³⁸¹ In Montgomery County, Ohio, the lack of basic equipment was so dire that some defenders resorted to bringing their personal computers to the office to prepare motions and memoranda.³⁸² The lack of equipment also hinders the efforts of the few support staff available to defenders.

377. MONTANA REPORT, *supra* note 315, at 19.

378. ALASKA TIME STUDY, *supra* note 272, at 30-31.

379. LARRY COHN ET AL., ALASKA JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999 285 (2004).

380. *Id.*

381. See MONTANA REPORT, *supra* note 315, at 19.

382. HARTMAN ET AL., *supra* note 370, at 55.

Defenders must share county cars, and cell phones and digital cameras are just a few of the items denied to investigators from the San Bernardino County Public Defender Office, but provided to the investigators in the District Attorney's office.³⁸³ A recent assessment of Virginia's public defender offices found, for example, that the offices "lack the most basic equipment necessary to run a modern law office."³⁸⁴ These lawyers have outdated computers, limited printing capabilities, no capacity to take digital photos or even view those from the medical examiner's office, no ability to retrieve criminal history information on their clients and no access to the technology that would enable them to utilize the multimedia capabilities of the circuit court. The public defender cannot keep up with the prosecutor's office technology and, therefore, is greatly disadvantaged.³⁸⁵

Even public defender offices that have adequate basic technology, such as computers, case tracking software, and online research capability may find it impossible to keep up with the rapidly changing use of technology in the courtroom. In Connecticut, for instance, while the Division of Public Defender Services dedicated its resources to replacing outdated computer equipment and continuing to provide computerized legal research and case tracking information for its attorneys,³⁸⁶ the Chief State's Attorney's Office established a special unit to educate prosecutors on the latest multimedia courtroom presentation techniques.³⁸⁷ Connecticut prosecutors are being trained on sophisticated legal software to present audio and visual evidence to make their arguments more compelling to juries. Each district in the state has acquired laptop computers outfitted with popular courtroom presentation software, theater-sized projection screens, an LCD projector, and document cameras, which can be used to project objects and documents.³⁸⁸ Prosecutors are learning to utilize all this while defenders are not.

Without access to what the Supreme Court has called the "raw materials" of an effective defense,³⁸⁹ defenders cannot provide competent representation to indigent defendants. The result, sadly, is that criminal trials may become fundamentally unfair. Like the prosecution, defenders must have the appropriate tools to do their job, including technology,

383. NAT'L LEGAL AID & DEFENDER ASS'N, EVALUATION REPORT AND RECOMMENDATIONS: SAN BERNARDINO COUNTY PUBLIC DEFENDER OFFICE 53 (2001).

384. INDIGENT DEFENSE IN VIRGINIA, *supra* note 20, at 37.

385. *Id.* at 38.

386. CONN. DIV. OF PUB. DEFENDER SERVS., ANNUAL REPORT (2005), available at <http://www.ocpd.state.ct.us/Content/Annual2005/2005Chap6.htm>.

387. Martin B. Cassidy, *Prosecutors Turning to Multi-Media to Make Case*, GREENWICH TIME (Conn.), Aug. 28, 2005.

388. *See id.*

389. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts. Chief Justice Warren Burger wrote in 1972 that “society’s goal should be that the *system* for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution.”³⁹⁰ In many places we have yet to make much progress in achieving that goal.

VI. REFORMS TAKEN

Many states have taken steps to improve systems that provide attorneys to poor people. Some of these offer real hope, but others seem doomed to failure based on inadequate government commitments. In this Part we consider changes instituted by legislatures and reforms resulting from litigation.

A. LEGISLATIVE CHANGES

Within the past several years Texas,³⁹¹ Georgia,³⁹² Virginia,³⁹³ Washington,³⁹⁴ and Montana,³⁹⁵ among other states such as North Carolina³⁹⁶ and North Dakota,³⁹⁷ have all studied the key indigent defense concerns and have passed legislation modifying their criminal justice systems. Each of these states provides a case study that illuminates the varying means state legislators have used to address problems involving the right to counsel. Since these changes are still in their infancy, their efficacy cannot easily be measured; nevertheless, each state is to be commended for at least establishing some structural changes, including some sort of oversight panel.

1. Texas

We begin with Texas, which may have the most detailed legislative response in the entire nation.

The Texas Fair Defense Act of 2001 established three foundational pieces needed for any criminal justice system: a comprehensive mandate for new local rules and standards to improve indigent defense, a body to administer statewide indigent defense policies, and state funding dedicated to help counties improve indigent defense.³⁹⁸

390. *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

391. Texas Fair Defense Act, 2001 Tex. Sess. Law Serv. ch. 906 (West).

392. GA. CODE ANN. § 17-12-1 (2004).

393. 2004 Va. Legis. Serv. ch. 884 (West).

394. 2005 Wash. Sess. Laws ch. 157.

395. MONT. CODE ANN. § 47-1-101 (2005).

396. N.C. GEN. STAT. §7A-498 (2005).

397. N.D. CENT. CODE § 54-61-01 (2005).

398. The Texas Fair Defense Act is a testament to what the efforts of a few determined individuals can achieve. Texas Senator Rodney Ellis first proposed the Act in 1999, but it was vetoed by then Governor George W. Bush. Reports by the Texas State Bar and the Fair Defense Project helped to identify significant problems with indigent defense in Texas. Senator Ellis and members of the Fair

a. Statewide Comprehensive Mandate for New Local Rules and Standards

Specifically, the Act sets forth five major legal requirements that counties must satisfy in the new system. Counties must create: (1) procedures for providing prompt access to appointed counsel; (2) fair and neutral methods for selecting appointed counsel; (3) qualifications for appointed counsel; (4) financial standards and procedures for determining when a person is indigent; and (5) procedures and fee schedules for appointed counsel, experts, and investigators.³⁹⁹

b. Appointed Counsel, Public Defenders, and Compensation

Section 6 of the Act specifies how lawyers are to be selected from a public appointment list, and that such assignments are to be "allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory."⁴⁰⁰ Though the Act provides that attorneys will rotate through the public appointment list, judges still make the actual selections and this raises a concern about the independence of such appointments if the guidelines are not followed. The judges of a particular county court will keep that county's appointed counsel list,⁴⁰¹ which also raises questions about the independence of such counsel. One mitigating consideration here is that counsel must actually apply to be on the appointed counsel list.⁴⁰² Counsel who are to be appointed to capital cases must meet separate qualifications.⁴⁰³

The Act takes into consideration that public appointment lists may not be the best option for all districts. Alternative selection programs must be approved by two-thirds of the judges within that county.⁴⁰⁴ The Act also creates a mechanism for the appointment of a public defender.⁴⁰⁵ Compensation rates for private attorneys who provide indigent defense

Defense Project, which was organized by Texas Appleseed, a non-profit public interest law organization, worked to reintroduce the bill that became law. Terry Brooks & Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIM. JUST. 56, 56 (Fall 2001).

399. TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 2002) (enacted).

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* art. 26.052.

404. S.B. 7, 77th Leg., 2001 Tex. Reg. Sess., sec. 6 (West).

405. The commissioner of courts of two or more counties may enter into a written agreement to jointly appoint and fund a regional public defender. The commissioners' court or courts will also specify the duties, qualifications, appointment procedures and other relevant items should they endeavor to appoint a public defender. The commissioners' courts will select a public defender after having received proposals from government entities and non-profit corporations. Such proposals must include a budget, descriptions of personnel positions, maximum allowable caseloads, training information, anticipated overhead, and policies concerning investigators and experts. The total cost of the proposal may not be the only consideration in awarding the public defender contract, and in order to be eligible, the entity awarded the contract must be headed up by a chief public defender who "(1) is a member of the State Bar of Texas; (2) has practiced law for at least three years; and (3) has substantial experience in the practice of criminal law." TEX. CODE CRIM. PROC. ANN. art. 26.044.

are to be determined by the judges of the courts of a given county or judicial district, but no payment will be awarded until the attorney has submitted an itemized bill for services performed to the judge presiding over the case.⁴⁰⁶ The Act provides for an appeal process for attorneys whose bill is disapproved by the appointing judge.⁴⁰⁷ While the statutory system here makes sense, the presiding judge makes decisions about selection and compensation of attorneys. Thus, the independence of the appointed counsel may be subject to compromise, and the crucial element of independence remains a serious issue.

c. Indigent Defense Task Force

The Indigent Defense Task Force was established as a standing committee of the Texas Judicial Council.⁴⁰⁸ The Task Force is composed of eight ex officio members of the judicial council including the Chief Justice of the Texas Supreme Court along with other members of the judiciary and legislature.⁴⁰⁹ Its mission is to

improve the delivery of indigent defense services through fiscal assistance, accountability and professional support to State, local judicial, county, and municipal officials. The purpose of the Task Force is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas.⁴¹⁰

The Task Force sets the policies and standards for indigent defense in Texas and may receive revenue so as to discharge its duties.⁴¹¹ The remaining sections of the Act provide for counties to report indigent defense information to the Task Force.

The creation of the Task Force is an important reform, but it is by no means the solution to the state's problems. Much of the funding for indigent defense remains with the counties, and Texas only spent \$4.65 per capita on indigent defense in Fiscal Year 1999.⁴¹² Though the Task Force may add to funds provided at the county level from the Fair Defense Account, such additions would have to be substantial to

406. S.B. 7, 77th Leg., 2001 Reg. Sess. sec. 8 (amending TEX. CODE CRIM. PROC. ANN. art. 26.05) (Tex. 2001).

407. *Id.*

408. TEX. GOV'T CODE ANN. § 71.001.

409. *Id.* § 71.051. The Task Force also has five members appointed by the Governor with the advice and consent of the senate; three are members of the judiciary, one is a criminal defense attorney, and the other is a public defender or an employee of a public defender. *Id.*

410. Tex. Task Force on Indigent Def., Who We Are and What We Do, <http://www.courts.state.tx.us/oca/tfid/whoweare.htm> (last visited Apr. 14, 2006).

411. TEX. GOV'T CODE ANN. §§ 71.058, 71.060.

412. Brooks & Deoras, *supra* note 398, at 56. Texas ranked forty-eighth out of fifty states with this figure.

significantly improve this figure.⁴¹³ Moreover, having judges make up a majority of the Task Force raises independence questions.

d. Evaluating the Changes

In November 2003, the Texas House Committee on County Affairs was asked to perform an interim study of the impact of the new Act.⁴¹⁴ A year later, the Task Force funded a study by Texas A&M's Public Policy Research Institute to examine how the Fair Defense Act requirements have affected indigent service delivery and how county implementation strategies may affect counties' effectiveness in meeting these requirements.⁴¹⁵

The key findings in the two studies are startling, leading to both optimism and pessimism:

- "Statewide spending [is] up 50%."⁴¹⁶
- The public has increased access to local practices and expenditures.⁴¹⁷
- So far, there has been 100% compliance with state reporting requirements on expenditures and indigent defense plans.⁴¹⁸

413. See Julie Anderson, *Texas Fair Defense Act: State, Counties, Address Increased Costs of Indigent Defense Services*, COUNTY PROGRESS (Tex.), Apr. 2005, at 12, 13.

Since 2001, the approximate amount of money spent on indigent defense services in Texas, according to (state) reports, is as follows:

- \$91.7 million in FY01 (all county funds, prior to implementation of the Act)
- \$113.9 million in FY02 (\$106.7 million in county funds and \$7.2 million in state funds)
- \$130 million in FY03 (\$118.5 million in county funds and \$11.5 million in state funds)
- \$139.6 million in FY04 (\$128 million in county funds and \$11.6 million in state funds).

Texas counties absorbed the remaining amount of increased costs:

- FY02: \$15 million
- FY03: \$26.8 million
- FY04: \$36.3 million.

Id.

414. See HOUSE COMMITTEE ON COUNTY AFFAIRS, TEXAS HOUSE OF REPRESENTATIVES, INTERIM REPORT 4-5 (2004), available at http://www.house.state.tx.us/committees/reports/78interim/county_affairs.pdf [hereinafter INTERIM REPORT].

415. THE PUB. POLICY RESEARCH INSTITUTE, STUDY TO ASSESS THE IMPACTS OF THE FAIR DEFENSE ACT ON TEXAS COUNTIES (2005), available at <http://www.courts.state.tx.us/oca/tfid/Study%20to%20Assess%20the%20Impacts%20of%20the%20Fair%20Defense%20Act%20on%20Texas%20Counties%20web%20version.pdf> [hereinafter IMPACTS OF FDA]. The Institute was aided by a well-known criminal justice professional, Dr. Tony Fabelo, who is a member of the National Committee on the Right to Counsel.

416. INTERIM REPORT, *supra* note 414, at 11.

417. *Id.*

418. See *id.* at 17.

- Texas is providing more defendants with indigent defense services since the Act was adopted.⁴¹⁹
- State funding is not keeping pace with the increased demands for indigent services on county government.⁴²⁰

2. Georgia

In response to pressure from study groups, media coverage, litigation, and the bar, the state legislature passed the “Georgia Indigent Defense Act” in 2003.⁴²¹ Many provisions of the Act are similar to the Texas Act discussed above, but one important difference is that Georgia requires that each of the state’s forty-nine judicial circuits have a circuit public defender office effective January 1, 2005.⁴²² Furthermore, all circuit defender systems that did not opt out of the structure as described in the Act are funded by the state.⁴²³ This funding includes cases heard in the superior courts and juvenile delinquency cases, but other courts still rely on local government funding. Local governments do have the ability to contract with the circuit public defender to cover their indigent defense needs.⁴²⁴

a. Circuit Public Defenders

The Act describes in some detail how the circuit public defenders are to be compensated, the minimum staff size of assistant public defenders’ offices, which is based on the number of superior court judges in the circuit, and the type of additional personnel that may be hired, including investigators and administrative staff.⁴²⁵ Circuit and assistant

419. In this short period, the number of individuals receiving appointed counsel has increased significantly. In FY 2004, 371,167 adult defendants were served, up from 278,479 during the first year of the Fair Defense Act. Overall costs increased nearly 20% during the same timeframe, rising from \$114 million in 2002 to \$139 million in 2004. Despite these overall increases, however, attorney costs per case have risen a modest 3.3% per year—just enough to keep pace with inflation. See HOUSE COMMITTEE ON COUNTY AFFAIRS, TEXAS H.R., A REPORT TO THE H.R. 79TH TEX. LEG., available at http://www.house.state.tx.us/committees/reports/78interim/county_affairs.pdf.

420. IMPACTS OF FDA, *supra* note 415, at 52 (“Statewide, both the number of indigent defendants requiring representation, and the overall costs associated with attorney fees have increased steadily since the inception of the FDA.”).

421. H.B. 770 (Ga. 2003), available at http://www.legis.state.ga.us/legis/2003_04/versions/hb770_HB_770_APP_12.htm. In 2000, the Supreme Court of Georgia established the Chief Justice’s Commission on Indigent Defense. The Commission has published two reports and has collected data on the state of indigent defense in Georgia. CHIEF JUSTICE’S COMM’N ON INDIGENT DEF., THE STATUS OF INDIGENT DEFENSE IN GEORGIA, REPORT OF THE CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, PART I I (2002), available at <http://www.georgiacourts.org/aoc/press/idx/idxhearings/idxreport.doc>. The reports include findings and recommendations for improving the quality of indigent defense in Georgia, many of which were adopted in the 2003 legislation. The Reporter for the Commission, Professor Paul Kurtz, graciously reviewed an early draft of the materials in this Part.

422. Ga. Pub Defender Standards Council, About Us, <http://www.gpdsc.com/aboutus-main.htm> (last visited Apr. 14, 2006).

423. *Id.* (some Georgia counties that are not part of the system do receive state funding).

424. *Id.*

425. GA. CODE ANN. §§ 17-12-25 to 29 (2005).

circuit defenders are not allowed to "engage in the private practice of law for profit."⁴²⁶ Importantly, this means that those hired by the state as public defenders are full-time employees.

While it is admirable that Georgia has endeavored to fund the personnel costs of the circuit public defender offices, these offices will not necessarily represent all the indigent defendants in Georgia. Moreover, the state will not provide funding for the overhead expenses of the circuit public defenders.⁴²⁷ Though lower court systems are to comply with the same standards as the circuit defenders,⁴²⁸ the financial burden falls to the locality. This does little to help poor counties adequately provide defense for indigents. Because the circuit defenders rely on the counties to fund their overhead costs, questions have been raised as to whether these offices will have adequate space, resources, and even phone service.

The Act also sets out the process for selecting circuit public defenders. Each circuit has its own selection panel consisting of five members who have "significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants."⁴²⁹ The qualifications for a circuit public defender provide that the person must:

- (1) Have attained the age of 25 years; (2) have been duly admitted and licensed to practice law in the superior courts for at least three years; (3) be a member in good standing of the State Bar of Georgia; and (4) if previously disbarred from the practice of law, have been reinstated as provided by law.⁴³⁰

b. Georgia Public Defender Standards Council

The Council was created as an independent agency within the judicial branch. It is "responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled

⁴²⁶ *Id.* § 17-12-33.

⁴²⁷ *Id.* § 17-12-34.

The governing authority of the county shall provide, in conjunction with the other counties in the judicial circuit and in a pro rata share according to the population of each county, appropriate offices, utilities, telephone expenses, materials and supplies as may be necessary to equip, maintain, and furnish the office or offices of the circuit public defender in an orderly and efficient manner. The provisions of an office, utilities, telephone expenses, materials, and supplies shall be subject to the budget procedures required by Article 1 of Chapter 81 of Title 36.

Id.

⁴²⁸ *Id.* § 17-12-23(d).

⁴²⁹ *Id.* § 17-12-20(a). The Governor, the Lieutenant Governor, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court of Georgia, and the Chief Judge the Georgia Court of Appeals each appoint one member of the panel.

⁴³⁰ *Id.* § 17-12-21.

to representation.⁴³¹ The Council is made up of one member from each of Georgia's ten judicial districts,⁴³² and one circuit defender who has been elected by a majority of the circuit public defenders.⁴³³

The director is responsible for the administrative needs of the Council as well as for training attorneys who provide defense to indigents.⁴³⁴ As its name suggests, the Georgia Public Defenders Standards Council is charged with establishing the requirements for indigent defense in the state of Georgia. Examples of such requirements are the caseload limits and staff sizes set by the Council.⁴³⁵ The following average case load limits are not to be exceeded (per attorney per year): 150 felonies (excluding death penalty cases),⁴³⁶ or 300 misdemeanor cases, or 250 juvenile offender cases, or sixty juvenile dependency clients, or 250 civil commitment cases, or twenty-five appeals to the Georgia Supreme Court or the Georgia Court of Appeals.⁴³⁷ As explained above, strict case load limits are essential to ensuring the quality of any indigent defense system.

Georgia, like Texas, has taken an important step toward ensuring the quality of indigent defense by passing its own indigent defense reforms. It is noteworthy that the state itself will fund the circuit public defenders and their personnel. Nonetheless, these offices will require local funding for their overhead costs, and they are not set up to represent all the indigent defendants in the state.

431. *Id.* § 17-12-1.

432. *Id.* § 17-12-3(b)(1). Governor, Lieutenant Governor, the Speaker of the House, the Chief Justice of the Supreme Court of Georgia, and the Chief Judge of the Georgia Court of Appeals each appoint two members of the Council. Which districts an official will appoint from rotates so that they do not keep appointing from the same two districts. *Id.* §§ 17-12-3(b)(2)(A), (B).

433. *Id.* § 17-12-3(b)(3). Those appointing members of the Council should

[s]eek to identify and appoint persons who represent a diversity of backgrounds and experience, and shall solicit suggestions from the State Bar of Georgia, state and local bar associations, the Georgia Associations of Criminal Defense Lawyers, the councils representing the various categories of state court judges in Georgia, and the Prosecuting Attorneys' Council of the State of Georgia as well as from the public and other interested organizations and individuals within the state.

Id. § 17-12-3(c). Once again, as in other states, the judiciary dominates the membership of the Council.

434. *Id.* § 17-12-5. The full responsibilities and qualifications for the council's director are included in this section.

435. *Id.* §§ 17-12-8(b)(1), (3).

436. Death penalty cases are to be handled by the statewide Georgia Capital Defender, Georgia Public Defender Standards Council, About Us, <http://www.gpdsc.com/aboutus-main.htm> (last visited Apr. 14, 2006).

437. Ga. Pub. Defender Standards Council, *Standard for Limiting Case Loads and Determining the Size of Legal Staff in Circuit Public Defender Offices*, available at <http://www.gpdsc.com/cpdsystem-standards-main.htm> (last visited Apr. 14, 2006).

3. Virginia

In 2004, the ABA published a lengthy report on indigent defense in Virginia.⁴³⁸ Among the findings of this report were that there was no “state entity that effectively advocates for indigent defense needs in Virginia” and that “inadequate resources and an absence of an oversight structure form the basis of an indigent defense system that fails to provide lawyers with the tools, time and incentive to provide adequate representation to indigent defendants.”⁴³⁹ These conclusions have not been disputed. The report also noted that Virginia’s unwaivable statutory fee caps were a “disincentive to many assigned counsel” that kept them “from doing the work necessary to provide meaningful and effective representation to their indigent clients.”⁴⁴⁰ The fee caps were, and still are, amazingly low. Maximum fees at the time were \$112 for misdemeanors or juvenile cases eligible for jail or prison sentences; today they are \$158.⁴⁴¹ The state paid \$1096 for felonies punishable by more than twenty years of confinement;⁴⁴² today the state pays \$1235.⁴⁴³ The state offered only \$395 for all other non-capital felony cases; today that figure is \$445.⁴⁴⁴ These findings relate specifically to Virginia’s assigned counsel system. Virginia also has a developing public defender system, but it fared no better under the report than the assigned counsel system did. The reviewers wrote that the Public Defender Commission was “more concerned with assuring the public and elected officials that public defenders can handle cases as cheaply or cheaper than appointed counsel” than advocating for more funding for indigent defense.⁴⁴⁵

Soon after the release of this report, Virginia established the Virginia Indigent Defense Commission. The Commission was charged with setting standards and providing training for court-appointed attorneys, as well as taking over for the existing Public Defender Commission.⁴⁴⁶

a. Appointed Counsel

The Virginia Act specifies fairly detailed qualifications for appointed counsel in both misdemeanor and felony cases.⁴⁴⁷ The Commission also

438. See *INDIGENT DEFENSE IN VIRGINIA*, *supra* note 20.

439. *Id.* at ii.

440. *Id.* at iii.

441. VA. CODE ANN. § 19.2-163 (2005). As the report noted, while other states also cap fees for appointed counsel, the caps in the other states are waivable and range up to \$25,000 in non-capital cases. As of the writing of this Article, legislation is being discussed in Virginia to revamp the fee structure.

442. *INDIGENT DEFENSE IN VIRGINIA*, *supra* note 20, at 2.

443. *Id.*

444. VA. CODE ANN. § 19.2-163.

445. *INDIGENT DEFENSE IN VIRGINIA*, *supra* note 20, at iii.

446. VA. CODE ANN. § 19.2-163.01.

447. In misdemeanor cases, counsel can be individuals who have been members of the Virginia

has the discretion to waive any of the above requirements for "individuals who otherwise demonstrate their level of training and experience."⁴⁴⁸ Once qualified to serve as court-appointed counsel, attorneys must complete six hours of continuing legal education every two years.

The statutory standards for indigent defense are important, but Virginia continues to suffer from its inexcusable and unwaivable fee caps for court-appointed attorneys, still among the lowest in the nation,⁴⁴⁹ though the legislature has approved a modest increase.⁴⁵⁰ Guidelines and standards are certainly necessary for improving the quality of indigent defense, but immense case loads cannot be avoided without dramatically increasing the funding for indigent defense.

b. Virginia Indigent Defense Commission

This new oversight commission was created by the state to set up requirements for court-appointed counsel and public defender offices. Half of the commission is made up of either legislative or judicial personnel, while at least three members are attorneys in private practice with an interest in indigent defense.⁴⁵¹ The inclusion of attorneys in

State Bar for less than a year and "have completed six hours of MCLE-approved continuing legal education developed by the Indigent Defense Commission." *Id.* § 19.2-163.03. For one who has been a member of the bar for more than one year, he or she has to either have completed the six-hour course mentioned above, or "certify to the commission that he has represented, in a district court with the past year, four or more defendants charged with misdemeanors." *Id.*

The requirements for appointed counsel in felony cases are understandably more stringent. Counsel in felony cases must be members in good standing of the Virginia State Bar, have completed the six-hour course mentioned above, and have served as lead or co-counsel in four felony cases from start to finish, including any appeals. For those who have been members of the Virginia Bar for more than a year and have tried four felony cases from start to finish including appeals with the past year, the six-hour course requirement and the co-counsel requirement are waived. Those in good standing for more than one year who can certify that they have been lead counsel in five felony cases from start to finish, including appeals, in the past five years can waive out of the four felony cases within the past year requirement. There are also specific requirements for those who seek appointment to juvenile and domestic relations cases. *Id.*

448. *Id.*

449. VA. INDIGENT DEF. COMM'N, 2005 ANNUAL REPORT EXECUTIVE SUMMARY (2005), available at <http://www.publicdefender.state.va.us/VaIDC%202005%20Annual%20Report%20Executive%20Summary.pdf> (last visited Apr. 14, 2006).

450. Virginia Indigent Defense Commission, About Us, <http://www.publicdefender.state.va.us/aboutus.htm> (last visited Apr. 14, 2006).

451. VA. CODE ANN. § 19.2-163.02. § 19.2-163.02 provides:

The Virginia Indigent Defense Commission shall consist of 12 members, including the chairmen of the House and Senate Committees on Courts of Justice; the chairman of the Virginia State Crime Commission; the executive secretary of the Supreme Court [of Virginia] or his designee; two attorneys officially designated by the Virginia State Bar; two persons appointed by the governor; two persons appointed by the Speaker of the House of Delegates; and two persons appointed by the Senate Committee on Privileges and Elections. At least one of the appointments made by the Governor, one of the appointments made by the Speaker, and one of the appointments made by the Senate Committee on Privileges and Elections, shall be an attorney in the private practice with a demonstrated interest in indigent defense issues. Person who are appointed by virtue of

private practice and designees of the Virginia State Bar ensures that the legislative and judicial members will not be the only audible voices in the Commission.

The Commission is responsible not only for setting the standards and developing training for those providing indigent defense, but also for overseeing the funding of any public defender offices created by the General Assembly.⁴⁵² It is not clear from the Act, however, how much funding will be made available to distribute among the public defender offices. The Act was enacted too recently to gauge the legislative commitment to providing necessary financing to improve indigent legal services.

The significance of the oversight and reporting functions of the Act should not be underestimated, but case load limits and adequate funding are crucial to improving the quality of indigent defense. The state here funds indigent defense without local government assistance.⁴⁵³ Without increased financial support for the public defender system, however, there will be no major improvement in the quality of legal services offered.⁴⁵⁴ Moreover, because mandatory and low fee caps for appointed still counsel remain, private attorneys will still have an incentive to avoid trial and to spend as little time as possible in service to their indigent clients.

4. Washington

In 2004, the *Seattle Times* published a series of articles that brought to light the urgency of the indigent defense crisis in the State of Washington. The series highlighted the severe problems in some counties caused by the prevalence of flat-fee contracting and correspondingly high caseloads and inadequate funding.⁴⁵⁵ Given the series' documentation of

their office shall hold terms coincident with their terms of office. All other appointments shall be for terms of three years.

Id.

452. Va. Indigent Def. Comm'n, Agency Directory, <http://www.publicdefender.state.va.us/agencydirectory.htm> (last visited Apr. 14, 2006) (providing a listing of Virginia's Public Defender, Capital Defender and Appellate Defender offices).

453. Compare with states such as Washington, which only fund at the appellate level. Alabama, Tennessee, Arkansas, Kentucky, West Virginia, and Florida also fund indigent defense at the state level for both appeals and trials.

454. Unfortunately, reforms in Virginia appear to be off to a rocky start, as seen by the resignation of the Chief Public Defender of Fairfax County after less than one year in the position. She said that even after legislative reforms her office had so many clients (more than 8000 last year) and so few lawyers (only twenty) that the attorneys could not adequately represent the defendants at trials and on appeal. She further complained that the Indigent Defense Commission was not treating the office fairly. The Executive Director of the Commission responded by stating that "inadequate funding has been a long-standing, statewide problem, not limited to Fairfax. [We need to have] local and state policy-makers . . . properly fund indigent defense services in Virginia." Jackman, *supra* note 8.

455. Ken Armstrong et al., *Attorney Profited, but his Clients Lost*, SEATTLE TIMES, Apr. 5 2004, at A1 [hereinafter Armstrong, *Attorney Profited*]; Ken Armstrong et al., *Frustrated Attorney, 'You Just*

these serious difficulties, the legislative efforts at reform seem limited and curious. Several years ago, Washington passed legislation that set up the Office of Public Defense ("OPD"). At first glance, this reform appears to be a major step forward. Upon review, however, the legislation is surprisingly narrow in scope.

The OPD was created "[i]n order to implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of the indigent appellate services."⁴⁵⁶ The State of Washington funds the OPD as an "independent agency of the judicial branch."⁴⁵⁷ What is striking here, however, is that Washington established the OPD to oversee indigent defense only at the appellate level and not at the trial level:

The Office of Public Defense administers state funds appropriated for appellate indigent defense, develops administrative procedures, standards, and guidelines for appellate indigent defense services, recommends criteria and standards for determining and verifying indigency, coordinates with the Supreme Court and the three Courts of Appeal to determine how attorney services should be provided, and provides studies and recommendations to the Legislature regarding indigent defense services in Washington State.⁴⁵⁸

This is a serious concern. While the state has the non-profit Washington Defender Association, which was "created in 1983 to promote, assist, and encourage public defense systems which insure that all accused persons in every court receive effective assistance of counsel,"⁴⁵⁹ Washington still lacks a statewide trial court equivalent of the OPD.⁴⁶⁰ Simply, Washington has no single source for disseminating

Can't Help People, SEATTLE TIMES, Apr. 6 2004, at A1; Ken Armstrong et al., *The Empty Promise of an Equal Defense*, SEATTLE TIMES, Apr. 4 2004, at A1 [hereinafter Armstrong, *Empty Promise*]. With costs rising for indigent defense, several counties initiated low-bid, flat fee contract systems in which a lawyer takes all of the indigent defense cases in a jurisdiction for a fixed fee. Armstrong, *Empty Promise*, *supra*, at A1. Although national standards recognize that contracts may be a component of an indigent defense system, these types of low-bid contracts awarded primarily on the basis of cost are prohibited. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-3.1 (1992). They create a financial disincentive for attorneys to provide adequate representation since the attorney must handle all referred cases and also pay for all services such as investigation and expert witnesses. Armstrong, *Empty Promise*, *supra*, at A1.

The situation in the state of Washington is striking, for serious problems certainly exist, as reflected in the Seattle Times series. However, when members of the Committee conducted a site visit to the Defender Association in Seattle, the King County defender program, they found that many aspects of that defense system worked extremely well. Committee Site Visit Report (on file with authors).

456. WASH. REV. CODE ANN. § 2.70.005 (2005).

457. *Id.*

458. See generally WASH. STATE OFFICE OF PUB. DEF., ANNUAL REPORT 10-11 (2003), available at <http://www.opd.wa.gov/Publications/Annual%20Report/2003%20Annual%20Report.pdf> (providing the OPD Client Communications Protocol Guidelines).

459. Wash. Defender Ass'n, Home Page, <http://www.defensenet.org/> (last visited Apr. 14, 2006).

460. Unfortunately, Washington is not alone in taking this limited approach. Michigan, Illinois,

information about indigent defense at the trial level, nor does it have any oversight commission considering the trial process in the state.

The OPD staff and members of its advisory committee are similar in composition to the other state entities discussed above.⁴⁶¹ Once again, the appointment of committee members by the governor and the judiciary raises concerns that the committee will be serving interests other than that of providing constitutionally adequate indigent defense.

5. Montana

Montana took a great leap forward in overhauling its indigent defense system when its legislature enacted extensive reforms in 2005. This groundbreaking legislation created a statewide public defender system, and Montana became the first state in the nation to follow the ABA's *Ten Principles of a Public Defense Delivery System* as a guide to its criminal defense reform.⁴⁶²

Although the deficiencies of Montana's county-based system were documented in a comprehensive report almost thirty years ago,⁴⁶³ a class-action lawsuit filed by the ACLU in 2002 spurred the passage of the Montana Public Defender Act of 2005. The suit, filed against the state and seven counties, alleged that the delivery of the right to counsel in those counties was plagued by constitutional deficiencies. One of the plaintiffs was a young woman who had been detained in jail for seven months, during which her attorney failed to initiate an investigation into the charges against her. Another plaintiff had been detained for more than six weeks without having had a detailed conversation with his attorney about the facts of his case.⁴⁶⁴

Specifically, the action alleged that the state had abdicated its constitutional duty to ensure effective lawyers for the poor by delegating the indigent defense function to its counties without sufficient funding or oversight. As a result of the state's abdication, county programs were plagued by serious deficiencies, including a virtual absence of adversarial

and Idaho all have state funded appellate systems with no financing or serious oversight of trial systems.

461. See generally WASH. REV. CODE ANN. § 2.70.010-.030 (2005). Concerns over independence may arise upon examining the selection process for the OPD director since the position is appointed by the State Supreme Court, from a list submitted by the advisory committee. *Id.* § 2.70.010. The advisory committee is made up of individuals designated by the Chief Justice of the Supreme Court of Washington, the Governor, the Washington State Bar Association, the Court of Appeals Executive Committee, and the President of the Senate. *Id.* § 2.70.030.

462. See Maurice Possley, *Montana Aims to Fix Public Defender System: State's Effort is First to Use Guidelines Suggested by ABA*, CHI. TRIB., June 21, 2005, at 11.

463. See MONTANA REPORT, *supra* note 315, at 22 & n.12 (citing NAT'L CENTER FOR DEF. MGMT., MONTANA STATEWIDE DEFENDER SYSTEMS DEVELOPMENT STUDY (1976)).

464. See Press Release, Am. Civil Liberties Union, ACLU Files Class-Action Lawsuit Against Montana's Indigent Defense Program (Feb. 14, 2002), available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=9695&c=48>.

advocacy, high attorney caseloads, the inability of lawyers to meaningfully confer with their clients or to develop a defense, lack of investigatory and expert services, excessive plea bargaining, and unnecessary pre-trial incarceration. The plaintiffs sought injunctive relief requiring the state to provide adequate representation for poor Montana defendants.⁴⁶⁵

Acting as an expert witness, the NLADA prepared a comprehensive evaluation of Montana defense services and found little had changed in the nearly thirty years since the first national report had documented the shortcomings of the system. The 2004 assessment concluded that the “defense system in Montana delivers ineffective, inefficient, unethical, and conflict-ridden representation to the poor.”⁴⁶⁶ It documented significant problems such as inadequate funding and resources, a lack of independence from political interference, poorly supervised and inexperienced attorneys struggling with excessive caseloads, and inconsistent eligibility standards for representation.⁴⁶⁷

On the eve of trial, the ACLU and the state agreed to postpone the trial to allow the state legislature to act to remedy the situation. As part of the agreement, the state attorney general lobbied lawmakers to create a state commission and a chief state public defender to establish and oversee a system of regional public defense offices.⁴⁶⁸ In the face of mounting pressure to act, including statements encouraging systemic reform by the Chief Justice of the Montana Supreme Court,⁴⁶⁹ the legislature approved a sweeping new law that was heralded as a national model for providing defense lawyers for poor defendants.⁴⁷⁰

The new legislation not only mandates an independent oversight commission, but empowers the commission to set standards for defender education, training and experience, caseloads, access to support services such as paralegals and investigators, and performance criteria and evaluation. Although the new law pumps an additional two million dollars per year into the system to fund these dramatic structural changes, even those celebrating the reform acknowledge that significant

465. See Amended Complaint, *White v. Martz*, No. C DV-2002-133 (Mont. 1st Jud. Dist. Ct. Apr. 14, 2002), available at <http://www.aclu.org/FilesPDFs/white-martz%20amend%20cmplt.pdf>.

466. MONTANA REPORT, *supra* note 315, at 13–14.

467. *Id.* at 4–5.

468. Kowalski, *supra* note 9.

469. *Id.* Chief Justice Gray stated

There's no uniformity, there's no consistency. It isn't efficient and these systems are not necessarily ensuring quality defense for indigent defendants across the state. . . . I'm hopeful that the Legislature in the 2005 session will draw up some kind of systemic approach to a public defense program. It will be a major legislative package and it won't be cheap.

Id.

470. See Possley, *supra* note 462.

fiscal challenges remain.⁴⁷¹ The Act provides a one-year transition period and requires the new system to be operational by July 1, 2006.⁴⁷²

Like reforms in other states, the reforms in Montana are still too new to fully evaluate. Nonetheless, Montana's new standards-based system provides an impressive precedent for other states considering reform. Montana's experience also further highlights the contribution the *ABA Ten Principles* can make in educating policymakers and shaping effective systems. In addition, the role of litigation cannot be overlooked as a key component in capturing the attention of legislators and precipitating change.

B. REFORMS IN DIRECT RESPONSE TO JUDICIAL RULINGS IN LITIGATION

Where a state's political branches have refused to act in response to evidence of an inadequate indigent defense system, reformers have increasingly turned to the courts for relief. As a result, over the last twenty-five years a significant amount of litigation has sought remedies for an assortment of problems plaguing indigent defense systems.⁴⁷³ The cases have targeted the adequacy of attorney compensation, excessive caseloads, the overall system of providing counsel, and which level of government, state or local, must bear the expense of providing lawyers for poor criminal defendants.⁴⁷⁴

The first wave of litigation, initiated primarily by attorneys, focused on the property rights of the appointed lawyer, raising "takings" arguments under the Fifth Amendment and resisting the view that criminal defense lawyers have a professional obligation to represent poor defendants even without compensation.⁴⁷⁵ Over time, the challenges have become broader, with a shift in emphasis from the rights of appointed attorneys to the rights of defendants to receive an effective defense.⁴⁷⁶ In the context of defendant rights, funding remains a central question, but it is linked to the variables that negatively affect a defender's performance, such as unreasonable caseloads and lack of resources.

Commentators have had an ongoing debate about the effectiveness of litigation in achieving enduring, systemic reform of indigent defense systems.⁴⁷⁷ Nevertheless, litigation has produced significant victories in

471. See Jennifer McKee, *ACLU Lauds Montana Plan to Fix Public Defender System*, BILLINGS GAZETTE, June 9, 2005, available at <http://www.billingsgazette.net/articles/2005/06/09/state/export210559.txt>.

472. See Montana Public Defender Act, Mont. Code Ann., § 47-1-101 (2005).

473. See Lefstein, *supra* note 35, at 849-51.

474. *Id.* at 849-50 nn.66-69 (collecting cases).

475. Wright, *supra* note 60, at 244-45; see also *State v. Robinson*, 465 A.2d 1214, 1217 (N.H. 1983) (holding failure to reimburse criminal defense attorneys for their services constitutes a taking in violation of state and federal constitutions).

476. Wright, *supra* note 60, at 245.

477. Compare Wright, *supra* note 60, at 251 (reformers should be "wary about the power of

which state courts have acknowledged the constitutional inadequacy of indigent defense systems and ordered reform. These victories, however limited in their long-term impact, suggest that litigation may have a significant role to play in precipitating change. For instance, the state supreme courts of Arizona,⁴⁷⁸ Oklahoma,⁴⁷⁹ and Louisiana⁴⁸⁰ have each provided powerful precedent, if not sustainable practical results, in finding their systems deficient and subsequently sparking legislative action.⁴⁸¹

I. Arizona

In *State v. Smith*, an individual criminal defendant challenged Mohave County's contract defense system.⁴⁸² Smith argued on appeal from his burglary and assault conviction that he was denied effective assistance of counsel due to his attorney's "shocking, staggering, and unworkable" caseload.⁴⁸³ Although the Arizona Supreme Court did not find that Smith's attorney was incompetent, it used the occasion to assess the deficiencies of the Mohave County indigent defense system, which utilized a bid system to award public defense contracts to private attorneys. This system awarded contracts to the lowest bidders, but failed to consider the time required to effectively represent clients; the support costs such as investigators, paralegals, and secretaries; and the experience or skills of the attorney before awarding a contract.

litigation to improve defense funding in the long run."), and Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1751-52 (2005) (litigation has been unsuccessful in generating sustainable structural or fundamental change to indigent systems in the long-run), and Bernhard, *supra* note 295, at 335 (arguing that courts can and will act to improve the quality of criminal defense services), with Gideon's Promise Unfulfilled, *supra* note 306, at 2063 ("[T]he best short-term means for overcoming this political process failure and improving the quality of indigent defense is litigated reform.").

478. See *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984).

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

480. See *State v. Peart*, 621 So. 2d 780, 791 (La. 1993).

481. Of course, these are not the only cases to result in significant reform. See, e.g., *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1271-82 (N.D. Ill. 1996) (finding delays in appellate representation by state defender office are caused by state underfunding of appellate defenders and that lengthy delays are presumptively unconstitutional); *Arnold v. Kemp*, 813 S.W.2d 770, 771 (Ark. 1991) (finding legislatively-imposed fee caps on court-appointed attorneys for indigent clients unconstitutional); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1139 (Fla. 1990) (indicating that although court cannot order the legislature to provide certain funds for criminal defense, if funds are not available within adequate time court will order immediate release pending appeal of certain bondable felons); *In re Pub. Defender's Certification of Conflict*, 709 So. 2d 101, 103-04 (Fla. 1998) (affirming order that bars a Florida public defender's office from accepting new cases because of excessive backlog); *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987) (holding that state has obligation to offer counsel to indigents charged with felonies and to pay such counsel at non-confiscatory rate); *N.Y. County Lawyers Ass'n v. State*, 763 N.Y.S.2d 397, 414 (Sup. Ct. 2003) (granting a permanent injunction and prompting an increase in fees for appointed counsel).

482. 681 P.2d 1374, 1378-79 (Ariz. 1984).

483. *Id.*

As a result of the low-bid contract system, defense counsel routinely accepted caseloads far in excess of the NLADA caseload guidelines. The court relied on NLADA guidelines in concluding that Smith's attorney's caseload was "excessive, if not crushing."⁴⁸⁴ For example, Smith's attorney handled a "part-time" caseload of 149 felonies, 160 misdemeanors, twenty-one juvenile cases, and thirty-three other cases in the year Smith was convicted, in addition to a private civil practice.⁴⁸⁵ The court concluded that "an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective."⁴⁸⁶ Smith also asserted that the attorney spent "only two to three hours interviewing the defendant and 'possibly' six to eight hours studying the case."⁴⁸⁷

The Arizona Supreme Court found that Mohave County's bid system violated defendants' due process rights and right to counsel, and ordered that all subsequent convictions obtained using the same procedure were presumed to be a Sixth Amendment violation. The state would carry the burden of rebutting this presumption until it improved the bid system. The rule applied to any county that utilized a method of appointment that failed to take into consideration the caseload factors identified by the court including the time required to effectively represent clients; support costs such as investigators, paralegals and secretaries; and the experience or competency of the attorney.⁴⁸⁸

Shortly after the decision, Mohave County adopted a new system where court-appointed attorneys were paid by the hour, more than doubling the cost of the previous low-bid system.⁴⁸⁹ However, the long term effect of the court's strong statement about excessive caseloads and implicit endorsement of the NLADA caseload standards is uncertain. A 1993 study found a wide range of noncompliance with *Smith*, with some counties continuing to handle caseloads at twice the level or above than required by the court.⁴⁹⁰ In 1997 the President of the Arizona State Bar, a criminal defense lawyer, lamented the hollow promise of *Gideon* and commented that in Arizona "indigent defendants are often led into court by attorneys who are devastatingly overloaded by cases, who are compensated too poorly to allow anything but a rudimentary review of

484. *Id.* at 1380.

485. *Id.*

486. *Id.* at 1381.

487. *Id.* at 1378.

488. *Id.* at 1381, 1384.

489. Caroline A. Pilch, *State v. Smith: Placing a Limit on Lawyers' Caseloads*, 27 ARIZ. L. REV. 759, 767 (1985).

490. THE SPANGENBERG GROUP, REPORT ON THE STATUS OF INDIGENT DEFENSE IN ARIZONA 7 (1993).

the situation, or are completely inexperienced and untrained in the criminal arena.”⁴⁹¹

2. Oklahoma

Systemic reform of Oklahoma’s indigent defense system was spurred by the state supreme court’s decision in *State v. Lynch*.⁴⁹² In 1989, two attorneys appointed to represent an indigent capital murder defendant requested fees far in excess of the statutory maximum of \$3200.⁴⁹³ The trial court approved the fee request, holding the fee cap unconstitutional. The Oklahoma Supreme Court affirmed, finding the cap unconstitutional as applied to defendants because such a low rate of compensation was a taking of private property.⁴⁹⁴

Although the court “invite[d] legislative attention to this problem,”⁴⁹⁵ it relied on the judiciary’s “direct and inherent constitutional power to regulate the practice of law”⁴⁹⁶ and established an interim set of attorney fee guidelines. Embracing the concept of parity, the court set an hourly rate for appointed defense attorneys that was tied to that of local prosecutors. “In order to place the counsel for the defense on an equal footing with counsel for the prosecution, provision must be made for compensation of defense counsel’s reasonable overhead and out-of-pocket expenses.”⁴⁹⁷

In response to *Lynch*, the Oklahoma legislature undertook sweeping reform of the state’s criminal defense services. Within a year, the legislature enacted the Criminal Defense Act, which established a new state agency, the Oklahoma Indigent Defense System (OIDS) to provide trial, appellate and capital post-conviction criminal defense services to poor defendants.⁴⁹⁸ In addition, the Act instituted major changes in the funding and delivery of defense services at trial and on appeal.⁴⁹⁹ Unfortunately, the promise of this potentially transformational structure has never been wholly fulfilled.

During its relatively brief history, OIDS has continually struggled with a lack of fiscal support, which has interfered with its mission and compromised its effectiveness. According to its 2004 Annual Report, the agency has repeatedly been forced to seek supplemental appropriations from the legislature and struggles with yearly budgetary shortfalls. In

491. Michael L. Piccarreta, *The Promise of Gideon*, ARIZ. ATT’Y, Mar. 1997, at 10.

492. 796 P.2d 1150 (Okla. 1990).

493. *Id.* at 1153–54. Lynch was convicted, but sentenced to life in prison, rather than to death as the prosecution had sought. The lawyers requested fees and expenses of \$17,073.03 and \$10,995.00. *Id.*

494. *Id.* at 1152–54.

495. *Id.* at 1161.

496. *Id.* at 1162.

497. *Id.* at 1161.

498. See OKLA. STAT. ANN. tit. 22 §§ 1355–1369 (West 2000).

499. *Id.*

order to address funding reductions, OIDS has had to eliminate positions, furlough employees, and refuse to enter into contracts with conflict counsel, despite the fact that these drastic measures “hindered the agency’s ability to effectively represent its clients.”⁵⁰⁰ In fact, shortly after its creation, lack of funds nearly resulted in a shutdown of the agency when the original funding mechanism, an additional fee on traffic tickets, failed to generate enough revenue to meet the OIDS payroll.⁵⁰¹

3. Louisiana

In Louisiana, the challenge originated with a single overworked public defender who petitioned the court for help with excessive caseloads and lack of investigative assistance in his office in New Orleans.⁵⁰² At the time he was assigned to represent Leonard Peart on rape, robbery, and murder charges, the defender was also responsible for approximately seventy other felony cases, and had a trial scheduled for a different client on every available court date. Moreover, his clients routinely waited in jail one to two months before he was able to meet with them for the first time.⁵⁰³

Although the Louisiana Supreme Court rejected the trial court’s finding that the New Orleans indigent defense system was unconstitutional, it found that caseloads were so excessive and investigative resources so limited that clients were “not provided with the effective assistance of counsel the Constitution requires.”⁵⁰⁴ Like the Arizona Supreme Court in *State v. Smith*, the Louisiana court created a rebuttable presumption that indigent defendants represented by overworked public defenders are not receiving effective assistance of counsel.⁵⁰⁵ The court required pretrial hearings on whether lawyers could effectively handle the number of cases assigned to them. It also prohibited prosecutions from going forward in cases where effective assistance could not be provided because of a lawyer’s workload and lack of resources.⁵⁰⁶

In the years following *Peart*, the legislature did increase funding to a degree. The state supreme court created the first statewide indigent defense commission, charged with promulgating and enforcing indigent defense qualification and performance guidelines throughout Louisiana.⁵⁰⁷ Despite these positive steps, however, over time the funding

500. OKLA. INDIGENT DEF. SYS., ANNUAL REPORT 1-4 (2004), available at http://www.ok.gov/~oids/reports/ann_rpt_2004.pdf.

501. *Id.* at 3.

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

503. *Id.*

504. *Id.* at 790.

505. *Id.* at 783.

506. *Id.*

507. *See TRIAL-LEVEL INDIGENT DEFENSE*, *supra* note 22, at 58.

has failed to keep up with heavy caseloads,⁵⁰⁸ and a recent assessment of indigent defense in Louisiana found that the “trial-level indigent defense system in Louisiana is rife with systemic deficiencies.”⁵⁰⁹ In addition, “*Peart* motions” have not been a particularly effective tool for criminal defendants.⁵¹⁰

4. *The Promise*

These three celebrated cases provided the impetus for much needed reform and compelled three state legislatures to provide some additional funding in the short term. In the long run, however, even these strong judicial pronouncements were seemingly unable to sustain enduring structural or fundamental change to indigent defense systems.⁵¹¹ It remains to be seen whether legislative action generated by more recent cases will have a more enduring impact. For instance:

- In response to a class action lawsuit filed by the ACLU against the State of Montana, the state legislature enacted groundbreaking public defender legislation in June of 2005. Montana’s Public Defender Act is, as noted above, the first in the nation crafted with the intent to construct a system based on the ABA’s Ten Principles of a Public Defense Delivery System.⁵¹²
- The Massachusetts’ state legislature passed legislation in July 2005 that made significant changes to its system of indigent defense and substantially increased funding, partly in response to *Lavallee v. Justices*.⁵¹³ The changes include increased pay for court-appointed lawyers, restrictions on the number of hours the state will compensate attorneys, additional defender positions, and the creation of a commission to study the idea of decriminalizing certain misdemeanors to reduce caseloads and relieve docket pressure.⁵¹⁴

508. Note, *supra* note 477, at 1738.

509. TRIAL-LEVEL INDIGENT DEFENSE, *supra* note 22, at 58.

510. Note, *supra* note 477, at 1737.

511. For an assessment of the shortcomings of these cases, see *id.*

512. Mike Dennison, *Public Defender System Cited as National Model*, GREAT FALLS TRIB., June 8, 2005, at 17A; see also Press Release, Am. Civil Liberties Union, ACLU Hails Montana’s Public Defense Bill as Leading National Trend (June 8, 2005), available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=18411&c=48>. For a full discussion of the Montana response to the ACLU class action, see *supra*, Part VI.A.

513. 812 N.E. 2d 895 (Mass. 2004). The *Lavallee* suit was filed on behalf of unrepresented indigent criminal defendants in Hampden County. *Id.* at 899. The county was experiencing a critical shortage of lawyers available for appointment due to the low rates of compensation. *Id.* As a result, indigent defendants were being held in custody without counsel. *Id.* at 902 n.10. The court concluded that petitioners were being deprived of their right to counsel and subjected to severe restrictions on their liberty and other constitutional interests. The court held that upon a showing that counsel was not available to represent an indigent defendant despite good faith efforts, the defendant could not be kept more than seven days and the criminal case against such a defendant could not be continued beyond forty-five days.

514. See MASSACHUSETTS REPORT, *supra* note 109, at 5.

• In *State v. Citizen*,⁵¹⁵ the Louisiana State Supreme Court declared that the state legislature, rather than local governments, is responsible for providing adequate resources for public defenders.⁵¹⁶ Where adequate funds are unavailable, defense counsel can request that the prosecution be halted.⁵¹⁷ Several months after the decision, and in the face of mounting national criticism of the state's indigent defense system and the state Chief Justice's calls for reform,⁵¹⁸ the state legislature took some initial steps to address the significant funding and structural issues. The legislature passed a small funding increase and approved legislation that authorized information gathering and standardizing of the definition of a "case" and defining what it is to be indigent.⁵¹⁹

5. *The Risks of Litigation*

Not all litigation has resulted in positive outcomes for reform. The danger in bringing such challenges is that the plaintiffs will fail in their efforts to persuade the courts to intervene, thus inadvertently bolstering a flawed system and making subsequent challenges that much more difficult. Such is perhaps the case in Mississippi, where the state supreme court recently rejected a county's challenge to the state's refusal to provide any funding to pay for lawyers for indigent criminal defendants.⁵²⁰

Quitman County, an impoverished Delta community, sued Mississippi, alleging that the state law requiring local governments to pay for indigent defense was a violation of the United States and Mississippi Constitutions.⁵²¹ The state supreme court rejected the county's contention, however, refusing to find the state's failure to provide any funding for indigent defense unconstitutional.⁵²² In fairly unsympathetic language, the court's majority said if the county was concerned about indigent defense, it could have budgeted more for it.

VII. RECOMMENDATIONS

State and local governments have had more than forty years to respond to *Gideon*'s trumpet call, yet the evidence is overwhelming and undeniable that many states have simply failed to meet their

515. 898 So. 2d 325 (La. 2005).

516. *Id.* at 336.

517. *Id.* at 338-39.

518. In his State of the Judiciary Address delivered before the Joint Session of the Louisiana Legislature on May 3, 2005, the Chief Justice of the Louisiana Supreme Court, Pascal F. Calogero, Jr., called for immediate indigent defense reform. "We have taken steps in the past to make the right to counsel real and meaningful in Louisiana. Unfortunately, these efforts have not proven to be adequate. Much more needs to be done." *Id.*

519. Mark Ballard, *Senate Sends Indigent Defense Bill to Blanco*, THE ADVOC. (Baton Rouge, La.), June 21, 2005, at 8A.

520. *Quitman County v. State*, 910 So. 2d 1032, 1048 (Miss. 2005).

521. *Id.* at 1034.

522. *Id.* at 1041.

constitutional obligation to provide competent legal representation to criminal defendants who are unable to afford an attorney. The comprehensive national research by the National Committee on the Right to Counsel provides compelling support for the conclusion that that we have a true constitutional crisis. Although some parts of the country have started model approaches to providing indigent defense services, the overall picture is bleak. The pervasiveness of this failure is particularly shocking in light of the decades of repeated attempts to call attention to and repair the deep flaws in indigent defense systems across the nation. We can no longer afford to ignore the denial of constitutional rights to the very vulnerable in our society, nor can we tolerate the resulting erosion of the integrity of the criminal justice system and the legitimacy of criminal convictions.

There has been no shortage of recommendations for improving indigent defense systems over the years. In fact, the ABA *Ten Principles of a Public Defense Delivery System* provides an excellent blueprint of the fundamental criteria necessary to construct an effective public defense system. The recommendations that follow, however, go beyond the familiar recitation of the necessary ingredients of an effective system; they also suggest ways in which groups or individuals might go about generating these much needed reforms.

The recommendations begin with the essentials of an effective indigent defense system: an independent structure within which competent attorneys labor for adequate compensation, under reasonable working conditions, and with the proper tools necessary to deliver competent representation. A key component, of course, is that these essentials be funded at adequate levels.

A. INDEPENDENT STRUCTURE

RECOMMENDATION I: *Establishing an independent, statewide nonpartisan authority responsible for the defense function should be the cornerstone of any reform of a state's indigent defense system.*

The imperative of independence is not only reflected in the commitment to this goal in national standards, but is vital to insulate defenders from political and judicial pressures. Defense counsel cannot be vigorous advocates for their clients when their compensation or continued employment depends upon catering to the predilections of judges or legislators, and political pressure can distort the attorney-client relationship. At a minimum, judicial oversight creates serious problems with the perception of and opportunities for abuse. Just as the prosecution represents the government with autonomy and executes its responsibilities with relatively little interference from the judiciary or the legislature, so should the defense.

In addition to insulating the defense function from political and judicial pressures, a statewide oversight entity provides a mechanism for achieving many of the key components of an effective public defense delivery system and should:

- establish attorney qualification standards;
- coordinate eligibility standards to ensure consistency of access to public representation;
- facilitate appropriate appointments, matching attorney experience with the complexity of the cases;
- monitor and evaluate attorney performance and track caseloads;
- develop and provide training, both to entry-level defenders and advanced practitioners;
- provide access to technology and other resources; and
- serve as an advocate in the political process and provide a voice for the support of indigent defense.

With greater capacity for centralized management of defenders' services, an independent oversight body can provide uniformity in the quality of representation by insisting that defendants be represented by capable attorneys, mandating reasonable working conditions, and providing the proper tools for effective representation.

B. COMPETENT ATTORNEYS

RECOMMENDATION 2: States must establish and enforce standards for attorneys who represent poor criminal defendants, including minimum qualifications, training, and performance requirements.

Without competent attorneys, no system of public representation of poor defendants will be successful. Regardless of the type of delivery system a state chooses to provide indigent defense services—contract, court-appointed, public defender or some hybrid—states should ensure that each defense attorney has at least minimum qualifications in criminal defense. A tiered system of qualifications required for appointment for different levels of cases, depending on the experience and training of the attorney, would be ideal. It would ensure that a defender has the requisite knowledge and skills to deliver competent representation to a defendant, whether the case is a simple misdemeanor or a complex felony matter. Monitoring and evaluating defenders based on performance standards would also guarantee that attorneys provide effective representation and meet professional and ethical expectations.

C. CASELOADS

RECOMMENDATION 3: *States must establish and enforce appropriate workload limits to prevent the overburdening of defenders and avoid undermining the quality of representation they are able to deliver.*

Even the most dedicated and able lawyers cannot provide effective representation to their clients when they have simply too many clients. States have a number of options to control workloads, such as caseload standards, decriminalization, and alternative justice programs:

1. *Caseload Standards*

To ensure that defenders have sufficient time to devote to each client, states must control workloads. The most direct route is to establish caseload limits. Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as the availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.

2. *Decriminalization to Reduce Crowded Dockets*

States can take steps to reduce crowded dockets by decriminalizing certain non-serious misdemeanors, e.g., operating a vehicle with a suspended license, or with no license or insurance; shoplifting; disorderly conduct; disturbing the peace; or trespassing. States could reevaluate those misdemeanors that carry possible jail time, but for which incarceration is rarely sought or imposed, and treat them as civil infractions. This would serve several purposes. By reducing crowded court dockets, decriminalization can relieve some of the pressure on courts to move cases through the system quickly at any cost. In turn, this would provide judges with additional time to devote to more serious cases. In addition, removing these cases from the criminal docket would lighten the caseload of defenders and prosecutors, and also reduce the funds needed to provide state-funded defenders. The savings could then be used to fund other needs in a resource-starved defense system.

3. *Alternative Justice Programs*

States could expand the use of alternative justice programs such as diversion into drug courts, mental health courts, or alternative treatment programs. Problem-solving courts, such as community, domestic violence, drug, and mental health courts, may hold promise for reducing caseloads. These alternative courts generally stress a collaborative, multidisciplinary problem-solving approach, rather than an adversarial one. Their goal is to address the defendant's underlying psychosocial

issues by providing appropriate treatment or services as a way of reducing recidivism. Although some observers debate the proper role and ethical obligations of a defense attorney in this novel setting, the potential benefits for poor defendants and defender workloads are worthy of study and consideration.

D. COMPENSATION

RECOMMENDATION 4: *Fair compensation, including adequate overhead and a fair fee, should be paid to all publicly funded defenders.*

It is fundamentally unfair to expect lawyers to perform increasingly demanding work when they are inadequately compensated. The financial burden imposed on publicly funded defenders compromises the quality of representation they provide. Inadequate compensation results in a scarcity of qualified attorneys willing to represent poor defendants and raises significant access to justice questions. In pursuing this goal of fair compensation, states should consider:

1. *Salary Parity with Equivalent Prosecution Attorneys (Where Prosecutors are Fairly Compensated)*

Salary parity is more than just a question of economic fairness. Parity also eliminates the appearance that the government values the defense function is valued less than the prosecution function. Equalizing compensation between defenders and prosecutors acknowledges the equivalent roles the two play in the criminal justice system.

2. *Law Student-Loan Forgiveness Programs for Public Defenders and Prosecutors*

Low pay and significant law school student-loan debt leave many defenders and prosecutors struggling financially and discourage many talented lawyers from careers in public service. Loan forgiveness programs, similar to those offered to doctors, nurses, and teachers, reduce a certain portion of student-loan debt for those who work in underserved areas. This would make it easier to attract and keep good, experienced lawyers as public defenders and prosecutors.

E. PROPER TOOLS

RECOMMENDATION 5: *States must equip their indigent defense systems with the appropriate tools to enable a defender to deliver competent representation. This includes staff support, such as investigators, paralegals, and secretaries; technology and research capabilities; and access to independent experts and other professional services.*

1. *State-Provided Resources*

Without access to the raw materials and support services a lawyer needs to mount an effective defense, defenders cannot provide

competent representation and criminal trials become fundamentally unfair. Frequently, public defenders also face a considerable gap between the ancillary resources provided them and those available to prosecutors. This creates an uneven playing field. Providing these defender resources is often more cost-effective and efficient than saddling an already overburdened defender with clerical or administrative tasks in addition to an overwhelming caseload. The quality of representation improves where resources are available. With appropriate resources, lawyers are able to conduct more thorough investigations, produce and file pretrial motions, challenge the government's evidence with an independent expert, or simply communicate more frequently with clients. Providing the support and resources state defenders desperately need may be an apposite area for federal involvement.

2. *Federal Resources*

The federal government should establish an independent, federally funded defender resource center to assist and strengthen state and local indigent defense systems. Such a center could help states provide competent criminal representation for poor defendants by offering training, support, research assistance, brief and motion banks, advice on identifying and using experts and other services. Twenty-five years ago the ABA recommended the creation of just such a resource center. Establishment of a non-profit Center for Defense Services continues to be ABA policy.⁵²³ The Center's mission would be to strengthen the services of publicly funded defender programs throughout the nation. A federal resource center of this nature could collect and analyze data and conduct research, sponsor pilot programs, award grants, and explore other ways to assist state and local governments in providing indigent defense services.

VIII. GENERATING REFORM

The essential recommendations outlined above, namely an adequately funded, independent structure within which competent attorneys labor under reasonable working conditions with the proper tools necessary to deliver competent representation, are neither new nor particularly visionary. We know how to structure, staff and fund an effective indigent system. Despite four decades of repeated calls for reform, many states have failed to take action. The challenge is not in knowing *what* to do to address the indigent defense crisis, but rather *how*

523. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 121 (Feb. 1979), available at <http://www.abanet.org/legalservices/sclaid/defender/policy.html> (recommending the creation of a federal Center for Defense Services); see also *GIDEON'S BROKEN PROMISE*, *supra* note 39, at 42.

to compel state legislatures and executives to establish, fund, and support a constitutionally adequate indigent defense system. Unfortunately, appealing to constitutional sensitivities has not worked in the face of strained state budgets, political pressures, a lack of a constituency to advocate for poor criminal defendants, and the popularity of “tough on crime” rhetoric.

The Committee was not content to merely join the chorus for reform that has continually gone unheeded. Rather, the recommendations under consideration include a host of potential actions concerned citizens and policymakers might undertake to motivate state legislatures to address the deficiencies in their indigent defense systems. The task of protecting the rights of poor defendants, and thus ensuring the fairness of our courts, the legitimacy of criminal convictions and the integrity of criminal justice, requires the concerted effort of all. Federal, state and local governments, prosecutors, defenders, judges, bar and professional associations, law firms, law schools, and the media all have a role to play in upholding the promise of *Gideon*.

A. SUSTAINED MEDIA ATTENTION FOCUSED ON THE INJUSTICES OF A STATE SYSTEM, PERHAPS HIGHLIGHTING INNOCENT VICTIMS, EXONERATIONS OR THE ROUTINE DENIAL OF JUSTICE

This type of sustained, negative attention serves as both a public education campaign and a shaming process and has been successful in states as diverse as Massachusetts, Georgia, and Washington.⁵²⁴ In addition to calling attention to the problems in a defense system, media exposure can help build a constituency for reform. Compelling stories about how the system failed innocent clients or the unfairness of assembly line justice educate the public and capture its interest. In combination with the broad public support for the Sixth Amendment, the media spotlight may provide state legislators the support they need to take action.

B. INITIATE OR THREATEN SYSTEMIC LITIGATION CHALLENGING THE CONSTITUTIONAL SUFFICIENCY OF THE SYSTEM

A significant amount of litigation throughout the country has targeted the delivery of indigent defense services. Although not all of it has been successful, important settlements in Pennsylvania and Connecticut, significant victories in New York, Massachusetts, and Montana, and favorable rulings in Arizona, Oklahoma, Florida, and

524. Such negative attention may ultimately turn out to be successful in Virginia as well. The legislature there is considering restructuring its program of compensating counsel in light of comments by a “Washington, D.C. law firm [that] says it is poised to file a . . . class-action lawsuit over a compensation system that ranks last in the nation.” Hugh Lessig, *Virginia Warned on Poor’s Legal Aid*, DAILY PRESS (Hampton Roads, Va.), Feb. 2, 2006, at A1.

elsewhere suggest that systemic litigation has the potential to spur legislative action and to educate the public about the failings of a given system. Law firms can make a significant contribution by providing pro bono assistance for these efforts.

C. THOSE WORKING IN THE CRIMINAL JUSTICE SYSTEM SHOULD TAKE INDIVIDUAL AND COLLECTIVE ACTION TO ENSURE THAT THEIR ETHICAL AND PROFESSIONAL OBLIGATIONS ARE NOT COMPROMISED AS A RESULT OF THE PRESSURES FROM THE SYSTEMIC FAILURE OF THE DEFENSE FUNCTION

If all players in the criminal justice system vigilantly guard against violating their own professional codes of ethics, despite the pressures to take shortcuts, we would have strong support for the provision of appropriate indigent defense services.

In keeping with their ethical obligations, for example, attorneys could refuse to take cases where adding to their caseloads threatens their ability to provide competent representation. Judges and prosecutors could be more vigilant in guarding against plea bargaining abuse and invalid waiver of the right to counsel. Furthermore, all participants in the criminal justice system should report observed ethical violations to disciplinary bodies.

D. STATE AND LOCAL BAR ASSOCIATIONS SHOULD TAKE AN ACTIVE ROLE IN ADVOCATING FOR REFORM OF INDIGENT DEFENSE SYSTEMS AND PROVIDE LEADERSHIP IN THOSE REFORM EFFORTS

State and local bar associations are well positioned to provide leadership for necessary reforms of indigent defense systems. As participants in the criminal justice system, bar members can monitor the defense function and call attention to misconduct or ethical violations by prosecutors or judges. As a respected institution within the larger community, a bar association can help educate the public, propose, reform and provide a much-needed voice on behalf of poor criminal defendants.

Bar associations can also establish active and effective disciplinary bodies to create enforceable standards for defense lawyers, judges, and prosecutors so that the ethical violations in indigent defense systems can be remedied.

E. ACADEMICS SHOULD CONTINUE TO MAKE THE CASE AND AGITATE FOR THE RE-EVALUATION OF THE *STRICKLAND* STANDARD TO FACILITATE A MORE EFFECTIVE REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A change in the law defining ineffective assistance of counsel would open an avenue for reform effectively choked off by the stringent

Strickland standard. If the *Strickland* barrier were reduced or removed, criminal defendants could successfully challenge the quality of their government-provided representation in the context of collateral review. Post-conviction relief for ineffective assistance claims would influence the expectations for, and presumably improve, attorney performance at the trial level.

CONCLUSION

The problems explored in this Article, and in the work of the National Committee on the Right to Counsel, demonstrate without question the crisis of the American criminal justice system in terms of providing lawyers for poor people.⁵²⁵ The problems are very real and will only get worse unless action is taken.⁵²⁶ With these proposals, we hope real change can occur. The only way to effect such change is to have a discussion that goes beyond the limited groups that have raised these questions in the forty-year period since *Gideon v. Wainwright*. One commentator has stated the matter well:

How can those in power be persuaded to use that power to confront the continuing crisis in indigent representation? There is no answer to this quandary, but it is clear that the campaign to enhance public support for indigent defense services must be framed in a manner that resonates with groups broader than the traditional progressive communities that have long championed the rights of criminal defendants.⁵²⁷

We believe that recommendations outlined here, and under consideration by the National Committee on the Right to Counsel, are a good first step toward having that serious discussion.

525. Barbara Babcock's comments are fully supported by what we found:

I was giving speeches on *Gideon* as a promise broken—how the Court had guaranteed a body with a law degree next to the defendant but had failed to breathe life into that body. How too many public defender offices start idealistically and then are overwhelmed by rising caseloads and receding funding, until no amount of dedication will suffice to do a good job in the routine cases.

Babcock, *supra* note 35, at 1515; see also Goldstock et al., *supra* note 60, at 18, referring to the "starving of *Gideon*" which "not only threatens wrongful convictions and even executions, it starves America's sense of justice. . . . The law requires that a defendant, even the poorest defendant be represented." As stated by one experienced state judge:

Bench and bar alike are forced to turn a blind eye to the deficiencies in the current system. Many indigent defense attorneys, underpaid and overworked, cut corners and unwittingly or even intentionally violate their personal and professional responsibilities. Gradually they become insensitive to the effects of inadequate representation on a whole class of persons alienated from the basic guarantees of due process and effective access to the courts.

Cooks & Fontenot, *supra* note 35, at 197.

526. Last year the poverty rate in the U.S. went up more than 12%—more than 37 million people now live in poverty. Associated Press, *U.S. Poverty Rate Rises to 12.7 Percent*, CBS NEWS, Aug. 30, 2005, at <http://www.cbsnews.com/stories/2005/08/30/ap/business/mainD8CABQO81.shtml>. And, about 80% of all criminal defendants are poor. See HARLOW, *supra* note 12, at 1.

527. Marshall, *supra* note 35, at 963–64.