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### Defense Counsel and Public Defence

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# Defense Counsel and Public Defense

*Eve Brensike Primus\**

*Public-defense delivery systems nationwide are grossly inadequate. Public defenders are forced to handle caseloads that no one could effectively manage. They often have no funding for investigation or expert assistance. They aren't adequately trained, and there is little to no oversight of their work. In many jurisdictions, the public-defense function is not sufficiently independent of the judiciary or the elected branches to allow for zealous representation. The result is an assembly line into prison, mostly for poor people of color, with little check on the reliability or fairness of the process. Innocent people are convicted, precious resources are wasted, and the legitimacy of the entire criminal justice system is undermined. This chapter suggests that effective reform is possible if policymakers address how public-defense delivery systems are structured, whether they are independent, the sources and amount of funding allocated to public defense, and the adequacy of training and oversight mechanisms.*

## INTRODUCTION

There is broad agreement that indigent-defense delivery systems in this country are grossly inadequate. More than 80% of American criminal defendants are indigent,<sup>1</sup> so the failure to provide for the public-defense function compromises the legitimacy of the entire criminal justice system. A lack of sufficient funding forces public defenders to handle caseloads that no one could effectively manage. Defenders' abilities to provide quality representation are further compromised by a lack of independence from other branches of government, an absence of attorney training programs, and a failure at all levels to oversee effectively the provision of public-defense services. The result is an assembly line into prison, mostly for poor people of color, with little check on the reliability or fairness of the process.

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\* Professor of Law, University of Michigan Law School. I am grateful to Susan Bandes, Darryl Brown, David Carroll, Beth Colgan, Jennifer Laurin, Richard Leo, Justin Murray, and Jonathan Sacks for helpful comments. In addition, I would like to thank Erik Luna and the staff at Arizona State University College of Law for their Herculean efforts in organizing this project and the Charles Koch Foundation for funding this endeavor.

1. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.

In recent years, many nonprofit organizations have issued reports documenting the public-defense crisis.<sup>2</sup> Recognizing the importance of the problem, two-thirds of the states have created indigent defense commissions to think about and implement reform.<sup>3</sup> President Obama created the Office for Access to Justice<sup>4</sup> to provide federal support to the reform efforts, and legislatures around the country are thinking about suggested improvements.

This chapter explores the contours of the public-defense crisis and explains why it is an essential area for criminal justice reform, canvasses the scholarship on this problem, and identifies possible reforms to fix the system. Ultimately, I recommend that policymakers address how public-defense delivery systems are structured (as public-defender offices, assigned-counsel systems, or contract systems); whether they are independent of the judicial, legislative, and executive branches in their jurisdictions; the sources and amounts of funding allocated to public defense; and what training and oversight mechanisms exist to ensure defense attorneys are effective. Through a combination of reforms in these areas, policymakers can begin to fix broken public-defense delivery systems.

## I. THE PUBLIC-DEFENSE CRISIS AND WHY IT MATTERS

In 1963, the Supreme Court held that criminal defendants facing felony charges have a Sixth Amendment right to trial counsel regardless of their ability to pay for it.<sup>5</sup> The Court later extended this right to alleged misdemeanants facing actual imprisonment upon conviction.<sup>6</sup> It also recognized a constitutional

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2. See, e.g., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), [https://www.opensocietyfoundations.org/sites/default/files/justice\\_20090511.pdf](https://www.opensocietyfoundations.org/sites/default/files/justice_20090511.pdf) [hereinafter JUSTICE DENIED]; NAT'L ASS'N OF CRIMINAL DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), <https://www.nacdl.org/reports/misdemeanor/> [hereinafter MINOR CRIMES]; NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM—SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008), [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) [hereinafter RACE TO THE BOTTOM]; ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [hereinafter BROKEN PROMISE].

3. THE SPANGENBERG PROJECT, STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 5 (2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) [hereinafter EXPENDITURES].

4. See Office for Access to Justice, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atj>.

5. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

right to counsel for criminal defendants on their first appeals<sup>7</sup> and for juveniles facing delinquency proceedings that result in a loss of freedom.<sup>8</sup>

In response to the judicial mandate, Congress passed the Criminal Justice Act of 1964,<sup>9</sup> requiring federal district courts to adopt local plans for furnishing counsel to indigent defendants in federal court. Each plan was to include either a Federal Public Defender Organization (a governmental entity in the judicial branch) or a Community Defender Organization (a private, nonprofit organization) in addition to a court-approved panel of private attorneys available to take indigent criminal defense cases.

Some states and localities have followed suit and created public-defender programs. Others rely on assigned-counsel systems under which private attorneys are appointed on case-by-case bases and are paid per hour, per case, or per event in a case. Still others have contract systems under which private attorneys, law firms, or nonprofit entities contract with the state or local government and are paid flat fees to provide representation in a percentage of indigent-defense cases. Many states use some combination of public-defender offices, assigned-counsel programs, and contract systems to provide for indigent defense.

The right to counsel has always been an unfunded mandate. As criminal codes proliferated in the 1970s and '80s as part of the war on drugs, and legislatures earmarked more funding for law enforcement, criminal court dockets exploded but without corresponding increases in public-defense funding. Numerous investigative reports now document a public-defense crisis characterized by funding problems, a lack of independence, and a failure of training and oversight. These structural problems create a culture of indifference in criminal courts, leading to the wrongful conviction of innocent people<sup>10</sup> and undermining the legitimacy of the criminal justice system.

#### A. FUNDING PROBLEMS

The vast majority of American criminal defendants are indigent, and funding for public defense is grossly insufficient for providing adequate legal representation to such a large client base. A few numbers should make the point. According to the American Bar Association (ABA), no defender should

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

8. See *In re Gault*, 387 U.S. 1 (1967).

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

10. See Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in the present Volume.

handle more than 400 misdemeanor cases in a year.<sup>11</sup> In Chicago and Atlanta, however, public defenders have had to handle more than 2,000 misdemeanor cases annually.<sup>12</sup> In New Orleans, funding shortages have forced public defenders to handle almost 19,000 misdemeanor cases per year.<sup>13</sup> Similarly, the ABA recommends that no defender handle more than 150 felony cases each year,<sup>14</sup> but public defenders in Florida's Miami-Dade County have had to handle more than 700.<sup>15</sup> Countless reports document excessive defender caseloads arising from the lack of funding.<sup>16</sup> The sheer volume of cases means that many defendants sit in jail for months before speaking to their court-appointed lawyers.<sup>17</sup>

In addition to lacking the funds to pay an adequate number of attorneys, public-defender offices lack the funds necessary to provide the attorneys they do have with training, mentorship, or supervision. Lacking training and support, and asked to handle far more cases than is feasible, defenders commonly feel overwhelmed. They often burn out and quit after only a year or two on the job, leaving much indigent-defense representation to a rotating crop of new, inexperienced attorneys.

A lack of funding also means insufficient resources for adequate investigative assistance. In 2013, six states reported that they had fewer than 10 total investigators on staff for all of the state's public-defender offices.<sup>18</sup> Many cases are resolved with no investigation whatsoever.

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11. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002) [hereinafter TEN PRINCIPLES]. The American Bar Association has sent mixed signals about whether it recommends that no attorney handle more than 300 or 400 misdemeanor cases in a year. Compare *id.* (400 cases), with ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 72, 72 n.13 (3d ed. 1992) (300 cases). Under either number, current defender caseloads far exceed the recommendation.

12. See MINOR CRIMES, *supra* note 2, at 21.

13. *Id.*

14. TEN PRINCIPLES, *supra* note 10.

15. See KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 91–94 (2013).

16. See, e.g., MINOR CRIMES, *supra* note 2, at 21 (reporting excessive caseloads in Texas, Arizona, Tennessee, Utah, and Kentucky); JUSTICE DENIED, *supra* note 2, at 65–70; RACE TO THE BOTTOM, *supra* note 2, at 27; BROKEN PROMISE, *supra* note 2, at 16.

17. See Eric Holder, U.S. Att'y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009) (discussing these delays).

18. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 (Nov. 2016), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [hereinafter STATE-ADMINISTERED SYSTEMS].

This lack of funding is striking when compared to the funding for the prosecution and law enforcement. Prosecutors often have higher salaries than defenders,<sup>19</sup> lighter caseloads, and more access to investigative and expert assistance.<sup>20</sup> Prosecutors have the police department and state crime labs to help with their investigations, whereas defense attorneys often have neither investigative nor expert assistance readily available.

The source of public-defense funding is also troubling. A 2010 report found that only 23 states completely fund their indigent-defense systems at the state level.<sup>21</sup> In 19 states, counties shoulder the burden for more than half of the funding. Pennsylvania requires its counties to provide *all* of the funding for indigent defense. A lack of state funding means that financial resources cannot be spread across the state. Urban counties with large indigent populations are overwhelmed and have resorted to conscripting unwilling and inexperienced attorneys who have no criminal-defense background and no financial incentive to be zealous advocates to represent indigent criminal defendants. Other urban counties resort to flat-fee contract systems to save money, resulting in defense lawyers who carry large caseloads for little compensation. These contract lawyers often have to supplement their incomes with other work, resulting in less time for their indigent-defense clients.

Many less-populous rural counties rely on assigned-counsel systems under which attorneys are paid as little as \$40 per hour with hard caps on how much an attorney can earn per case.<sup>22</sup> With caps as low as \$500 per felony case,<sup>23</sup> these attorneys have no financial incentive to go to trial, do legal research, or investigate. They are better off pleading out a case, getting the fee, and getting a new client.

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19. Some jurisdictions with large public defender offices have achieved salary parity through legislation or local practice, but disparities persist in many jurisdictions. *See, e.g.,* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

20. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

21. *See* EXPENDITURES, *supra* note 3, at 5.

22. *See* THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (2007), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_2007felony\\_comp\\_rates\\_update\\_nonfelony.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_2007felony_comp_rates_update_nonfelony.authcheckdam.pdf).

23. *Id.* at 9–16.

Even in counties that can afford public-defender offices, the reliance on county funds often means that the income stream for the office is not stable. In New Orleans, for example, the public-defense budget relies on traffic-ticket revenue.<sup>24</sup> If the police do not issue enough tickets, there is no money for indigent defense.

### B. LACK OF INDEPENDENCE

Many indigent-defense attorneys cannot provide effective representation, because they are not sufficiently independent of the judiciary. A statewide survey of Nebraska judges revealed that some judges punish court-appointed attorneys who take cases to trial rather than pleading them out by not reappointing those attorneys in future cases.<sup>25</sup> In Texas, there are reports of judges appointing those with whom they have personal relationships.<sup>26</sup> And in Detroit, Michigan, some claim that judges give cases to attorneys who make contributions to their re-election campaigns.<sup>27</sup>

Independence problems also exist when elected legislative or executive officials have too much control over public-defender offices. A recent report documented nine states in which the governor had the power to fire the chief public defender,<sup>28</sup> and claims persist that governors have used their removal power to fire especially zealous defenders.<sup>29</sup> In Onondaga County, New York, the Legal Aid Society lost a contract to handle city court cases after the director was questioned by a legislative committee about why she was filing motions and making discovery requests instead of pleading cases.<sup>30</sup> And in some jurisdictions, the public defender is chosen by an advisory board that consists entirely of law enforcement personnel and prosecutors who have a vested interest in ensuring that prosecutions are successful.<sup>31</sup>

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24. See *State v. Peart*, 621 So. 2d 780 (La. 1993); see also David Carroll, *Indigent Defense Progress Stunted by Outdated Funding Mechanism in Louisiana*, SIXTH AMENDMENT CENTER (Sept. 26, 2012), <http://sixthamendment.org/indigent-defense-progress-stunted-by-out-dated-funding-mechanism-in-louisiana/>. For a more general description of the problems associated with using fines and fees to fund the criminal justice system, see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

25. JUSTICE DENIED, *supra* note 2, at 82–83; Holder Remarks, *supra* note 17.

26. JUSTICE DENIED, *supra* note 2, at 82–83.

27. RACE TO THE BOTTOM, *supra* note 2, at 27.

28. STATE-ADMINISTERED SYSTEMS, *supra* note 18.

29. See Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1790 & n.116 (2016) (collecting examples).

30. See JUSTICE DENIED, *supra* note 2, at 81.

31. See, e.g., Manny Araujo, *New Public Defender Set to Start Amid Questions About Hiring Process*, EUREKA TIME-STANDARD (Feb. 18, 2017), <http://www.times-standard.com/article/NJ/20170218/NEWS/170219800>.

Such independence problems are built in to the federal defender system, because the Criminal Justice Act vests control over the structure of appointment and funding for indigent defense in the local courts.<sup>32</sup> This means local judges decide which attorneys can be panel attorneys and whether to approve their payment vouchers or expense requests. Similarly, circuit courts hire the heads of the federal defender organizations and determine how many attorneys can work in the offices. Moreover, the judiciary is charged with asking Congress for funding for both the courts and the defense function at the same time. A 2015 report documented judicial concern that the Executive and Budget Committees sought to reduce the defender budget in order to protect and grow the judiciary's own budget.<sup>33</sup>

### C. FAILURE TO TRAIN AND OVERSEE

Too often, defenders are thrown into the job without training, and their performance is never evaluated. Many offices do not have training directors or funds for training programs. Attorneys learn in court, and defenders often get no constructive feedback from, or substantive review by, supervisors. In assigned-counsel and contract systems, there is often no supervisor at all—just a bureaucrat who coordinates appointments. And the local bar associations do a terrible job of finding and removing ineffective attorneys.<sup>34</sup>

Courts have done little to address these problems. Citing separation-of-powers principles, judges have been loath to inject themselves into state funding issues. Moreover, given the prevailing constitutional standard for judging the adequacy of trial representation, the very fact that defenders are persistently underfunded and overwhelmed *prevents* courts from ruling that any particular failure of representation is a constitutional violation for which a court could order a remedy. Under *Strickland v. Washington*,<sup>35</sup> there is no constitutional violation of the right to effective counsel unless the defendant shows that (a) his attorney performed unreasonably given prevailing norms of practice (with a heavy measure of deference to the trial attorney's strategic decisions and a presumption that decisions were strategic) and (b) the attorney's deficient performance prejudiced the case outcome. When prevailing norms of practice require attorneys to carry excessive caseloads and meet clients for the first time on the trial date, it is hard to show deficient performance. And when there is little to no pretrial investigation, it is hard to demonstrate prejudice.

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32. See 18 U.S.C. § 3006A.

33. See NAT'L ASS'N OF CRIMINAL DEF. LAW., *FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE* 24 (2015).

34. See, e.g., Carol Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 *YALE L.J.* 2694, 2705 (2013) (arguing that bar associations could do more).

35. 466 U.S. 668 (1984).

Given the difficulty of getting courts to rule that the representation in any given trial was inadequate under *Strickland*, some public defenders and advocacy groups have filed pretrial lawsuits arguing that funding and independence problems in particular jurisdictions violate the Sixth Amendment, because they constructively deny indigent defendants counsel altogether.<sup>36</sup> These lawsuits present courts not just with individual cases of abysmal representation, but with data demonstrating the gross inadequacy of public-defense delivery systems as a whole. Nonetheless, many courts have been reticent to get involved. Some courts have dismissed the cases on procedural grounds;<sup>37</sup> other cases have settled.<sup>38</sup> And even in the few places where courts have found systemic constitutional violations,<sup>39</sup> the process has been extremely time- and resource-intensive, and the long-term impact of favorable decisions remains unclear.<sup>40</sup>

#### D. A BROKEN SYSTEM WITH SERIOUS CONSEQUENCES

The lack of funding, excessive caseloads, minimal training, lack of independence, and failure of oversight make it impossible for defense attorneys to do their jobs. The result is a breakdown in the adversarial system that results in wrongful convictions and undermines the legitimacy and fairness of the system. In too many jurisdictions, criminal-defense attorneys show up on the day of court having never met their clients and having conducted no investigation or legal research into their cases. After a hurried five-minute conversation, the client is pushed into a plea and forced down the assembly

36. See *United States v. Cronic*, 466 U.S. 648 (1984) (noting that, if “the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance,” it would be appropriate to presume ineffectiveness); see also Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices are Suing—and Starting to Win*, A.B.A. JOURNAL (Jan. 1, 2017) (describing lawsuits); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) (same); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010) (same).

37. See, e.g., *Luckey v. Miller*, 976 F.2d 673, 676–79 (11th Cir. 1992); *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010); see also Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2687–88 (2013) (collecting cases and discussing procedural barriers).

38. See, e.g., *Hurrell-Harring v. State of New York*, 930 N.E.2d 217 (N.Y. 2010) (settlement order available at [http://www.nyclu.org/files/releases/10.21.14\\_hurrellharring\\_settlement.PDF](http://www.nyclu.org/files/releases/10.21.14_hurrellharring_settlement.PDF)).

39. See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

40. Even after the New York settlement in *Hurrell-Harring*, for example, the state had trouble implementing legislative reforms. See Press Release, ACLU, Governor Rejects Bipartisan Reform of Public Defense System (Jan. 3, 2017), <https://www.aclu.org/news/governor-rejects-bipartisan-reform-public-defense-system>; see also Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1331 (2013) (noting that systemic litigation is time-consuming and expensive). But see Press Release, NYCLU, Lawmakers Pass Major Statewide Reforms of Public Defense System (April 10, 2107), <https://www.nyclu.org/en/news/lawmakers-pass-major-statewide-reforms-public-defense-system>.

line to prison.<sup>41</sup> Many indigent criminal defendants do not even get that five-minute conversation with an attorney; their constitutional rights to counsel are simply ignored, and they are forced to navigate the justice system without any help whatsoever.<sup>42</sup> No one listens to the defendant's side of the story, questions the adequacy of the prosecution's proof, or even explains to the defendant what is happening. All that the defendant's family and friends see is another poor person of color being processed through the system.<sup>43</sup> Sometimes defendants' pleas are taken en masse as group after group of men in orange jumpsuits are corralled into the courtroom and carted off to prison.<sup>44</sup>

This failure to provide defendants with adequate representation contributes to the wrongful imprisonment of innocent people. Scientific advances like DNA testing have made the public more aware that wrongful convictions happen.<sup>45</sup> Defense lawyers are supposed to fight to prevent the conviction of innocent people, but crushing caseloads and a lack of time and funding to investigate cases inhibits their ability to perform that vital role. The chief district defender for Orleans Parish in Louisiana recently acknowledged that his office is not able to guarantee "the timely retrieval of ... important evidence before it [is] routinely erased" and, as a result, innocent people can be imprisoned.<sup>46</sup>

The fact that our system does not care about or listen to the people it imprisons is problematic not just for the innocent. It also undermines the legitimacy of the system in the eyes of the public. As a matter of procedural justice, when people do not feel that they have been treated fairly, it is hard for them to respect the system's results.<sup>47</sup> That lack of respect, in turn, encourages lawlessness and undermines the goals of the criminal justice system. Indigent

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41. See, e.g., *Pub. Defender, Eleventh Judicial Circuit v. State*, 115 So. 3d 261, 278 (Fla. 2013) ("Witnesses from the Public Defender's Office described 'meet and greet pleas' as being routine procedure."); see also *BROKEN PROMISE*, *supra* note 2, at 16 (describing this practice in other jurisdictions). For a more detailed description of the plea bargaining system and its problems, see Jenia I. Turner, "Plea Bargaining," in the present Volume.

42. See *RACE TO THE BOTTOM*, *supra* note 2, at 15–16 (describing denials of counsel and explaining that local practitioners often refers to arraignment days in court as "McJustice Day" for this reason).

43. See Paul Butler, "Race and Adjudication," in the present Volume.

44. See *United States v. Roblero-Solis*, 588 F.3d 692, 693–94 (9th Cir. 2009) (describing this practice). I have personally witnessed this group-plea process in Genesee County, Michigan. See *Primus*, *supra* note 29, at 1777.

45. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); see also Garrett, *supra* note 10.

46. Derwyn Bunton, *When the Public Defender Says "I Can't Help,"* N.Y. TIMES (Feb. 19, 2016), [https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?\\_r=0](https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=0).

47. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

criminal defendants routinely complain that their trial attorneys assume that they are guilty, don't listen to them, and don't communicate with them.<sup>48</sup> That is a problem in any system that wants to be perceived as legitimate, but it is particularly problematic in an adversarial system that relies on zealous defenders to justify its results.

The failure to provide defendants with adequate trial representation also creates inefficiencies in the system and generates larger costs later in the process. Society pays to imprison people who would have been released had they had competent counsel to argue for them.<sup>49</sup> And money is wasted at the appellate and post-conviction stages relitigating cases that would not be in the system if they had been properly litigated at trial.<sup>50</sup>

## II. RESEARCH ON THE PUBLIC-DEFENSE CRISIS

Researchers have addressed the funding, independence, training, oversight, and cultural problems discussed above. There is also research that more generally considers how to improve the reliability and quality of defense representation assuming a financially strained environment.

### A. FUNDING

Many have argued for more public-defense funding at the national level as well as at state and local levels.<sup>51</sup> Some suggest that funding should be tied to data-supported workload standards.<sup>52</sup> Others want to compare defense and prosecutorial funding.<sup>53</sup> For example, prosecutors and defenders could create weighted caseload studies about their needs and ask the legislature to commit to funding the same percentage for each side or to develop a formula that would

48. See Primus, *supra* note 29, at 1776.

49. See Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in the present Volume (noting that the lack of counsel at bail review hearings leads to larger rates of pretrial incarceration).

50. See Nancy J. King & Joseph L. Hoffmann, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (arguing that money spent in federal habeas review might be better spent upfront on better trial representation); see also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (noting that money is wasted when appellate counsel are not able to raise ineffective-assistance-of-trial-counsel claims); Nancy J. King, "Criminal Appeals," in the present Volume (describing waste at the appellate level).

51. See, e.g., BROKEN PROMISE, *supra* note 2, at 41; Chemerinsky, *supra* note 37 (discussing the need for funding); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2173–74 (2013)

52. Missouri and Texas have conducted these studies and others are underway in Colorado, Louisiana, Rhode Island, and Tennessee.

53. See Wright, *supra* note 19.

require defender funding to be at least a specified percentage of prosecution and law enforcement funding.<sup>54</sup>

Many have argued that it would be more cost-effective to provide most public-defense services through public-defender offices rather than assigned-counsel or contract systems.<sup>55</sup> It is more efficient to pay for and run one office than to fund many individual practitioners who are working separately but doing the same thing. Defenders working together can pool resources from office space and computer resources to support services and intellectual capital.<sup>56</sup> They can divide their work more efficiently, systematically train and supervise entering attorneys more readily, and share information in ways that promote efficiency and improve the quality of their representation. Studies in Texas document that public-defender offices would cost 23% to 31% less per misdemeanor and 8% to 22% less per felony than assigned-counsel systems, resulting in annual statewide savings of \$13.7 million.<sup>57</sup> Similar studies in New

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54. See *id.* at 238–41 (noting how Tennessee has a ratio that allocates 75 cents to public defense for every dollar given to the prosecution and how Connecticut funding targets for public defense are set at 2/3 the level for the prosecution); David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017) (arguing that public defense funding should be linked to a percentage of law enforcement and prosecutorial funding).

55. See Primus, *supra* note 29, at 1806-07; MICHIGAN INDIGENT DEFENSE COMMISSION, DELIVERY SYSTEM REFORM MODELS: PLANNING IMPROVEMENTS IN PUBLIC DEFENSE (Dec. 2016), <http://michiganidc.gov/wp-content/uploads/2015/04/Delivery-System-Reform-Models-Final-Dec-2016.pdf> (explaining why public defender offices promote higher quality representation, are more cost-effective, and provide institutional resources to the system); TEXAS TASK FORCE ON INDIGENT DEFENSE & THE SPANGENBERG GROUP, BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICES IN TEXAS (June 2008), <http://www.tidc.texas.gov/media/36005/2008blueprintfinal.pdf> [hereinafter BLUEPRINT] (same); see also Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2328 (2013) (“Those who are receptive to the smart-on-crime approach eventually will recognize that the better equipped our indigent defense system is, the less waste and inefficiency our criminal justice system will produce.”).

56. See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 21–22 (2012), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_national\\_indigent\\_defense\\_reform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf) [hereinafter SOLUTION].

57. See TEXAS TASK FORCE ON INDIGENT DEFENSE, EVIDENCE FOR THE FEASIBILITY OF PUBLIC DEFENDER OFFICES IN TEXAS (2011), [http://www.tidc.texas.gov/media/31124/pd-feasibility\\_final.pdf](http://www.tidc.texas.gov/media/31124/pd-feasibility_final.pdf).

York and Iowa project cost savings of between \$125 and \$200 per case.<sup>58</sup> Other studies conclude that public-defender offices often deliver lower conviction rates and shorter sentences than assigned-counsel systems, which would result in reduced probation and prison costs down the line.<sup>59</sup>

Some scholars have suggested that tradeoffs within the criminal justice system can and should be made to make more funding available. For example, Professors Nancy King and Joseph Hoffmann have argued that Congress should drastically cut federal habeas corpus review and divert the money saved to public defense.<sup>60</sup> More recently, some scholars have argued for reducing public-defense costs by permitting non-lawyers to represent criminal defendants in limited circumstances.<sup>61</sup> Professor Stephanos Bibas has gone further, suggesting that we (a) shrink the constitutional right to counsel so it applies only to felonies that result in imprisonment or (b) modify criminal justice procedural rules to

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58. According to a 2014 study in upstate New York, public defenders spent an average of \$255.28 per weighted case whereas assigned counsel spent an average of \$382.59 per weighted case. See NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES, ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK—2014 UPDATE (Nov. 2015), <https://www.ils.ny.gov/files/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202014%20Update%20-%20FINAL.pdf>. Given that assigned counsel handled 239,525 weighted cases in 2014, see *id.*; the state could have saved \$30,493,927.75 had those cases been handled by public defender offices. A 2007 report from Iowa documented a cost per case for public defenders at \$227 as compared to \$427 for court-appointed private attorneys. See OFFICE OF THE IOWA STATE PUBLIC DEFENDER, STATE PUBLIC DEFENDER'S EFFICIENCY REPORT 2 (Dec. 7, 2007), <https://www.legis.iowa.gov/docs/publications/DF/7519.pdf>.

59. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012) (noting that public defenders reduce their clients' murder conviction rate by 19% and lower the probability that their clients will receive a life sentence by 62% and that public defenders reduce overall expected time served in prison by 24% when compared to assigned counsel); RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL (Nat'l Bureau of Econ. Res. Working Paper No. 13187, 2007), <https://www.ils.ny.gov/files/Iyengar%202007.pdf> ("Defendants with CJA panel attorneys are on average more likely to be found guilty and on average receive longer sentences. Overall, the expected sentence for defendants with CJA panel attorneys is nearly 8 months longer.").

60. See King & Hoffmann, *supra* note 50. I am not persuaded that streamlining federal habeas corpus review in the ways that Professors King and Hoffmann propose will result in significant cost savings, and, given the injustice that currently plagues public-defense delivery in the states, I am reticent to impose additional limits on access to the federal courts. See Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887 (2012).

61. See Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH. L. REV. 113, 127 (2012); Drinan, *supra* note 40, at 1335–44; Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012). I am skeptical of this proposal for the reasons discussion in Part III, *infra*.

eliminate many rules of evidence and adopt more of an inquisitorial system that would not need lawyers.<sup>62</sup> Finally, a number of experts argue that the costs of public-defense delivery can be reduced by decriminalizing nonviolent offenses, diverting certain offenses to pretrial service programs, or reclassifying offenses as civil infractions.<sup>63</sup>

In my own work, I have argued that policymakers need to improve the sources as well as the amounts of public-defense funding.<sup>64</sup> Placing the fiscal and organizational responsibilities for indigent defense at the county level creates an impoverished, dependent, and unstable defender culture. It is accordingly essential that public defense be funded on a statewide basis.

### B. INDEPENDENCE

Although many experts have argued that a lack of funding contributes to the public-defense crisis, it is not just about money. A number of scholars have also recognized that the public-defense function must be sufficiently independent of the judiciary, chief executive, and legislature so that defenders can provide zealous representation without fear of repercussions.<sup>65</sup> Whether the indigent-defense commission or public-defender office should be run by an independent public-interest board of trustees or housed under the executive or legislative branches remains contested,<sup>66</sup> but scholars agree that judges should not oversee the hiring, payment, and assignment of cases to the attorneys who appear before them. They also agree that public-defense delivery systems must be sufficiently insulated from the legislative and executive branches that they can provide zealous advocacy without fear of losing jobs or funding.

### C. TRAINING AND OVERSIGHT

Scholars urging more training for entry-level defenders have pointed to defender programs like the Public Defender Service in Washington, D.C., as providing a model.<sup>67</sup> These experts contend that initial training should be

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

63. See, e.g., SOLUTION, *supra* note 56, at 9, 14–17; Fairfax, *supra* note 55, at 2329–32; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

64. See Primus, *supra* note 29, at 1783–89.

65. See, e.g., Primus, *supra* note 29, at 1789–91; Patton, *supra* note 54.

66. See Patton, *supra* note 54.

67. See, e.g., Primus, *supra* note 29, at 1813–15; Steiker, *supra* note 34, at 2707; Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90–92 (1995); SOLUTION, *supra* note 56, at 11.

followed by a period of supervision with access to mentors.<sup>68</sup> Indigent-defense administrators should develop metrics designed to measure the performance of their line attorneys and should, at regular intervals, evaluate their progress.<sup>69</sup> Some contend that local bar associations and indigent-defense commissions can play important oversight roles both in preparing and publishing standards that represent best practices and in coordinating and superintending the oversight of appointed counsel and public-defender systems.<sup>70</sup>

The judiciary also has an important oversight role to play, so long as its oversight functions do not compromise defender independence by directly involving judges in the hiring, case assignment, and payment of attorneys. For example, scholars have proposed that courts should review the adequacy of public-defense delivery systems and the defenders' abilities to provide zealous representation. Some scholars want trial judges to be sensitive to caseload pressures and resource constraints and more willing to take creative pretrial steps to address these issues. For example, Professor Donald Dripps has argued that courts, during initial plea colloquies, should inquire in open court and make affirmative findings that defense counsel has provided effective assistance before being willing to enter a guilty plea.<sup>71</sup> He also contends that trial courts should inquire before a trial whether the defense is institutionally equipped to litigate as effectively as the prosecution.<sup>72</sup> Professor Carol Steiker encourages trial judges to refer inadequate attorneys for bar discipline.<sup>73</sup>

Others contend that courts should be more willing to entertain legal challenges to indigent-defense delivery systems and use their supervisory powers to impose caseload limits or catalyze legislative reforms.<sup>74</sup> Courts in Missouri and Florida have taken bold steps forward by empowering public defenders to withdraw from or prevent future appointments in cases once their caseloads reach a certain level.<sup>75</sup> In many states, the mere threat that the

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68. See THE CAPITAL AREA PRIVATE DEFENDER SERVICE, ANNUAL REPORT 2015 (2015), [https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity\\_public&page=1](https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity_public&page=1) [hereinafter CAPITAL AREA REPORT] (describing a mentoring program that exists in Texas).

69. See, e.g., Primus, *supra* note 29, at 1816; SOLUTION, *supra* note 56, at 25–26.

70. See, e.g., Primus, *supra* note 29, at 1818; Drinan, *supra* note 40, at 1315–19 (discussing the importance of creating professional standards); SOLUTION, *supra* note 56, at 18–24.

71. See Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH & LEE L. REV. 883, 918 (2013).

72. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997).

73. See Steiker, *supra* note 34, at 2705.

74. See, e.g., Primus, *supra* note 29, at 1819.

75. See Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 279 (Fla. 2013); State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc).

judiciary is going to get involved has been sufficient to prompt legislative action. In Massachusetts, for example, the Supreme Judicial Court once threatened that it was going to order the release of all defendants detained pretrial unless attorneys were appointed for them within a specific time period. In response, the Massachusetts Legislature increased the defender office's funding.<sup>76</sup> Cases in Georgia, Washington, Pennsylvania, Connecticut, and Louisiana have all catalyzed similar reforms.<sup>77</sup>

Finally, scholars have argued that the federal government could do more to protect the right to counsel. Some have suggested that a greater share of the federal funding currently provided to support state and local criminal justice projects should be earmarked for indigent defense or that such funding should be conditioned on state compliance with minimal standards for the provision of public defense.<sup>78</sup> Others want Congress to pass legislation creating a National Criminal Justice Commission—an oversight body designed to review state and federal criminal justice systems and make recommendations for improvement.<sup>79</sup> Professor Cara Drinan has argued for a National Right to Counsel Act that would create a private right of action for individuals to sue in federal court alleging right-to-counsel violations.<sup>80</sup> I have suggested that Congress enact legislation that would give the Justice Department and other

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76. See Steiker, *supra* note 34, at 2703 (discussing the Massachusetts example).

77. See VIDHYA K. REDDY, INDIGENT DEFENSE REFORM: THE ROLE OF SYSTEMIC LITIGATION IN OPERATIONALIZING THE GIDEON RIGHT TO COUNSEL 17–36 (Wash. U. Sch. of Law Working Paper No. 1279185, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1279185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185) (discussing cases).

78. Steiker, *supra* note 34, at 2709.

79. See, e.g., Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL’Y 597, 612–13 (2011).

80. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010). Although I support such an act in theory, it could face constitutional challenges in federal court. Abstention doctrine requires the federal courts to refrain from interfering with ongoing state court criminal proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971). It remains unclear whether abstention is constitutionally required or merely prudential. Thus, it is unclear whether Congress can legislate around it. As a result, I have counseled against relying solely on a private cause of action to get federal courts to address these problems. See EVE BRENSIKE PRIMUS, AM. CONST. SOC’Y FOR L. & POL’Y, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS (2010).

deputized interest groups the power to file enforcement actions against any state that engages in a pattern or practice of conduct that deprives criminal defendants of the right to effective counsel.<sup>81</sup>

#### D. RELIABILITY AND QUALITY OF PUBLIC DEFENSE

One simple way to improve the reliability and quality of public-defense representation is to allow defense lawyers to give cases the time that they require rather than mass-processing them. For private attorneys, that means banning flat-fee contracts (as Nevada recently has done), that incentivize the speedy disposition of cases over quality representation.<sup>82</sup> It also means paying private attorneys a reasonable hourly wage for taking indigent-defense cases. For public defenders, it means putting caps on caseloads, like those that now exist in Washington and Massachusetts.<sup>83</sup> Not surprisingly, empirical research shows that attorneys can spend more time with their clients, investigate cases more thoroughly, and provide better representation when their caseloads are capped.<sup>84</sup>

One county in Texas is currently experimenting with a client-choice model of defender assignment to improve defender culture. Originally proposed by Professors Stephen Schulhofer and David Friedman,<sup>85</sup> this model permits defendants to select the attorneys who will represent them at state expense. The idea is that attorneys who communicate effectively with their clients and do well for their clients will be sought after, while those who do not will lose business and be driven out of the market.

I have argued that state-funded, statewide public-defender offices improve the quality of indigent-defense representation and are better than assigned-counsel or contract systems.<sup>86</sup> Their group structure tends to promote more training and

81. See PRIMUS, LITIGATION STRATEGIES, *supra* note 80. I also proposed federal legislation that would create a post-trial habeas action that would permit litigants to bring systemic violations of the right to counsel to light and permit federal courts to address them without running into abstention doctrine concerns. See *id.*; see also Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1 (2010).

82. See, e.g., Primus, *supra* note 29, at 1811; SOLUTION, *supra* note 56, at 30.

83. See MINOR CRIMES, *supra* note 2, at 24; Primus, *supra* note 29, at 1809–10.

84. See, e.g., MELISSA LABRIOLA ET AL., INDIGENT DEFENSE REFORMS IN BROOKLYN, NEW YORK: AN ANALYSIS OF MANDATORY CASE CAPS AND ATTORNEY WORKLOAD (2015), [http://www.courtinnovation.org/sites/default/files/documents/Case\\_Caps%20\\_NYC\\_0.pdf](http://www.courtinnovation.org/sites/default/files/documents/Case_Caps%20_NYC_0.pdf).

85. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993); see also Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505 (2015) (describing the Texas experiment).

86. See Primus, *supra* note 29, at 1806–09; see also MICHIGAN INDIGENT DEFENSE COMMISSION, *supra* note 55 (explaining why public defender offices promote higher quality representation, are more cost-effective, and provide institutional resources to the system); BLUEPRINT, *supra* note 55.

oversight, better communication and informal mentoring, and more pooled resources that save attorneys time and allow them to do their jobs better.

### III. IMPLEMENTING REFORM

States interested in reforming their public-defense delivery systems should consider creating a statewide task force charged with collecting data about the scope of the problem and making recommendations about how best to structure public-defense delivery in the state. The task force can be created by the governor (as in Michigan),<sup>87</sup> the legislature (as in Idaho),<sup>88</sup> or the judiciary (as in Utah).<sup>89</sup> A diverse group of criminal justice stakeholders and policymakers (including a number of defense attorneys from different areas of the state) should be members of the task force, and they should engage national technical assistance to help them assess their current delivery systems and learn about best practices nationwide.<sup>90</sup> Ultimately, the task force can recommend judicial, legislative, and executive interventions to improve the system. To be effective, however, these reforms must be multifaceted, addressing the funding, lack of independence, failure of training and oversight, and quality problems discussed above.

#### A. STRUCTURE

Reformers in a given jurisdiction should first examine how public-defense delivery systems are structured. Is there a public-defender office, an assigned-counsel system, a contract system, or some combination? Research shows that statewide public-defender offices are more efficient and cost-effective and also improve the quality and reliability of indigent-defense services.<sup>91</sup> They can more easily provide training, mentorship, and supervision for entry-level attorneys. And their group structure allows them to effectively deploy investigative, expert, and staff support.

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87. See David Carroll, *Michigan Passes Public Defense Reform Legislation*, SIXTH AMENDMENT CENTER (June 19, 2013), <http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/>.

88. See David Carroll, *Idaho Empowers State Commission with New Authority and New Funding*, SIXTH AMENDMENT CENTER (March 23, 2016), <http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/>.

89. See David Carroll, *Utah Reforms Indigent Defense with First-Ever State Dollars for Trial Representation*, SIXTH AMENDMENT CENTER (March 16, 2016), <http://sixthamendment.org/utah-reforms-indigent-defense-with-first-ever-state-dollars-for-trial-representation/>.

90. For example, the National Legal Aid and Defender Association provided technical reports to aid reforms in Michigan and Idaho while the Sixth Amendment Center issued a report on Utah's practices.

91. See *supra* note 55 (collecting sources).

Despite this research, only 22 states have statewide public-defender offices.<sup>92</sup> Some states have not been willing to invest the initial capital that would be required to create a statewide office (even though it would be more cost-effective over time). Others have refused to adopt statewide offices because of political pressure from attorneys who benefit from the quick, easy fees they can obtain in assigned-counsel or contract systems. Still others have legislators who are reticent to reform public-defense delivery systems in ways that appear soft on crime for fear of losing re-election.

Policymakers should think creatively about how to move more states toward statewide public-defender offices or, at the very least, toward public-defense delivery systems that are structured to mimic the benefits of statewide public-defender offices. If there is entrenched political opposition to a statewide public-defender office because attorneys fear a loss of revenue, the state might start with a statewide office that handles only a small percentage of the public-defense caseload<sup>93</sup> and gradually increase the caseload over time. Even a relatively small statewide office can organize training programs for attorneys throughout the state, collect and disseminate defender resources, and improve the quality of representation.<sup>94</sup> Alternatively, the state could create a statewide indigent-defense commission responsible for working with each county to ensure that the counties provide effective defense representation. That commission could, in turn, work with counties or regions to create local public-defender offices, and the commission could function much as the central administration of a statewide agency would by creating standards, implementing training programs, and overseeing the provision of services throughout the state.<sup>95</sup>

Even with public-defender offices, states will need other indigent-defense delivery systems to provide representation in cases where conflicts of interest prevent one office from representing all defendants and to ensure that the

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92. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007 (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf>.

93. The Public Defender Service in Washington, D.C., for example, is not permitted to handle more than 60% of the indigent defense caseload. See D.C. CODE § 2-1602.

94. States can also opt to create statewide public defender offices for certain stages of the process. For example, a dozen states have statewide appellate public defender offices even though they do not have statewide services at the trial level. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 45 (Winter 1995); see also King, *supra* note 50.

95. States that are unwilling to create public defender offices should find ways to create similar group structures to take advantage of economies of scale and provide support, training, and oversight to criminal defense attorneys in the state.

private bar remains actively involved in defense representation.<sup>96</sup> Flat-fee contract systems should be banned, because they perversely encourage attorneys to process cases quickly rather than representing their clients well. Instead, states should adopt managed assigned-counsel systems.<sup>97</sup> In a managed assigned-counsel system, experienced administrators hire, train, supervise, and coordinate the assignment of cases to private attorneys. A good managed assigned-counsel system will create a cohesive, experienced, and knowledgeable private criminal-defense bar that ensures quality representation and takes advantage of economies of scale by sharing resources and intellectual capital. It will work closely with any local public-defender office, sharing training information and other resources, to ensure quality representation throughout the system.

Although it is too early to reach definitive conclusions about the client-choice model based on Texas's ongoing experiment, I see considerable reasons for skepticism. The client-choice model assumes that defendants will have the requisite information to make good choices for themselves. Perhaps career criminals who learn the system well will know who the good attorneys are, but it seems unlikely that most arrestees will know whom to choose. Advertising may be more important than skill. Good-looking white men might be chosen over less attractive women or minorities based merely on stereotypes. Moreover, client choice could create an aura of competition among defenders that is destructive to defender culture—for example, if attorneys refuse to share resources or advice with one another for fear of helping the competition. When the Texas experiment is fully evaluated, one important question to ask will be how the client-choice model affected defender culture and the quality of the resulting representation.

All indigent-defense delivery systems—whether public-defender offices, indigent-defense commissions, or managed assigned-counsel systems—need to be structured to be independent of other branches of government. Public-defender offices, indigent-defense commissions, and managed assigned-counsel systems should be run by independent commissions or boards of trustees. No elected official should have the power to hire and fire the head of the agency. And these boards should not be comprised solely of prosecutors

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96. Some states have adopted separate public defender offices specifically to handle conflict cases. This has the advantage of maintaining the benefits of the group structure discussed above, but it does not encourage the private bar to remain engaged in defense representation.

97. For an example of a managed assigned-counsel system, see THE CAPITAL AREA PRIVATE DEFENDER SERVICE, ANNUAL REPORT 2015 (2015), *available at* [https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity\\_public&page=1](https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity_public&page=1) (describing the managed-assigned-counsel system in Travis County, Texas).

and law enforcement officials, but rather should be staffed by a diverse group of individuals, many of whom have criminal defense experience. The public-defense function also needs to be independent of the judiciary. Courts should not make appointments; approve experts, investigators, and payment vouchers; or evaluate the performance of individual attorneys, except in the context of legal challenges to the adequacy of an attorney's representation. Rather, the public defender's office, indigent-defense commission, or administrators in the managed assigned-counsel system should make those judgments. In the federal system, the Criminal Justice Act needs to be amended to create an independent body to oversee the appointment and payment of federal defenders.<sup>98</sup>

### B. FUNDING

More money must be spent on public defense. Funding should be grounded in data-supported workload studies that include consideration of the funding earmarked for the prosecutorial function (including law enforcement). Several firms now perform data-driven workload studies in cooperation with state indigent-defense commissions, public-defender offices, or bar associations.<sup>99</sup> Policymakers should consider commissioning workload analyses to determine how much of a funding problem exists in particular jurisdictions and then use the results to argue for caseload caps and for additional funds as necessary for public defense.

If a legislature cannot fully fund the public-defense function, it should take into account how its proposed budget compares to the prosecution's budget. Prosecutors and defenders should be equally compensated, and the prosecutorial and defender budgets should be proportionate to the caseloads each office handles. When private attorneys are employed through an assigned-counsel system, they should be paid reasonable hourly fees to handle indigent-defense cases.

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98. See Patton, *supra* note 54 (proposing amendments).

99. For example, the American Bar Association, in association with the consulting firm RubinBrown and the Missouri State Public Defender System, recently conducted a study (using survey techniques and empirical analytical methods) to quantify how much time a public defender should reasonably spend on different types of cases to provide effective assistance of counsel. See RUBINBROWN LLP, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS WITH A NATIONAL BLUEPRINT (June 2014), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/lis\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_5c_the_missouri_project_report.authcheckdam.pdf). The Missouri public defender used the study to lobby for more funding and the legislature responded. See Laird, *supra* note 36 (describing how the legislature relied on the data and attempted to allocate more funding).

State legislatures should provide for statewide funding of indigent defense even if the delivery systems are chosen at the county level. That would at least ensure some financial stability and more independence from the influence of local politics. Legislatures should also identify stable and dedicated funding streams for public defense rather than relying on traffic fines, court fees, or other assessments that are highly erratic and often fall heavily on the poorest citizens. This would minimize the need to ask future legislatures to raise public-defense funding, which is important given the political challenges of asking elected officials to do anything that might appear to be soft on crime.

Finally, policymakers should consider ways to reduce criminal justice system costs overall. By fully decriminalizing certain nonviolent offenses or reclassifying them as civil infractions, lawmakers could alleviate caseload burdens for defenders while also achieving larger benefits for society.<sup>100</sup> I am more skeptical of suggestions to reduce costs by shrinking the right to counsel and having laypeople argue in court on behalf of criminal defendants. Laypeople might be productively used as initial intake interviewers, subpoena servers, public-records collectors, or liaisons to a client's family member. In fact, many public-defender offices already use law clerks, interns, and investigators who are not lawyers to perform many of these functions. But an attorney is needed in court to navigate the complexities of the substantive and procedural laws when a person's liberty is at stake.

### C. TRAINING AND OVERSIGHT

Entry-level public defenders need to be adequately trained before they begin representing people in court, and each new defender should have a period of supervision with an experienced mentor once on the job. After that supervision period ends, every defender should be evaluated by supervisors in the defender office according to established and recognized metrics and be given feedback about how to improve. The Atlanta-based organization Gideon's Promise provides a model for rigorous, entry-level defender training combined with supervision and mentoring over a three-year period.<sup>101</sup> Each state should have a state-funded indigent-defense training director (housed in the administration of the public-defender office, indigent-defense commission, or managed assigned-counsel system) whose job is to ensure that entry-level defenders get quality training and mentorship. Quality training should include more than

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100. See Natapoff, *supra* note 63.

101. See Primus, *supra* note 29, at 1814 (describing the program); Steiker, *supra* note 34, at 2710–11. More information about Gideon's Promise training and mentorship programs is available at <http://www.gideonspromise.org/>.

trial advocacy classes or information about the mechanics of the court system. It should also teach entry-level attorneys how to relate to and communicate with clients and how to deal with the challenges of the job.<sup>102</sup> Each state should also create objective metrics for assessing defender performance. Evaluation should include observing the attorney in court, reviewing trial transcripts and pleadings involving that attorney, looking at case outcomes, and speaking to the clients and court personnel who have worked with the attorney.

Here too, judges can play an important role without compromising the independence that defenders need. I agree with those who have argued that trial judges should make *ex ante* inquiries into whether defenders have been able to meet with their clients, investigate their cases, and provide effective representation. Judges should also be more amenable to using their supervisory authority to impose caseload limits, entertain motions to withdraw from overwhelmed public defenders, refer ineffective attorneys to the local bar association for disciplinary action, and encourage legislatures to address funding and independence problems.

At the federal level, Congress should create a federal oversight body designed to review state and federal criminal justice systems and make recommendations for improvement. A federal body could communicate with the many indigent-defense commissions and nonprofit organizations that are currently working on this crisis to collect, analyze, and distribute information and prevent duplication of work. Congress should also give the Department of Justice federal enforcement authority to bring actions against states that systematically violate the right to counsel and permit the Department to extend its own reach in this area by deputizing private individuals or interest groups to file enforcement actions in its name.<sup>103</sup>

## RECOMMENDATIONS

There is no one silver bullet that will solve the public-defense crisis. Rather, policymakers must adopt reforms that address the structure of public-defense delivery, ensure that the defense function is independent of the other branches of government, alleviate the excessive caseloads that defenders currently have, increase and restructure public-defense funding, and ensure that mechanisms are in place to train attorneys and oversee the defense function.

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102 See Primus, *supra* note 29, at 1814 (describing model training programs).

103. Even without new legislation, the federal government can continue to earmark federal grants for states that are collecting data and trying to fix broken public defense delivery systems. Alternatively, the Justice Department could continue its recent practice of filing amicus briefs in support of plaintiffs challenging indigent defense delivery systems in court. Such interventions have been critically important in encouraging states to settle these cases and make improvements in their delivery systems.

1. **Statewide task force.** Policymakers should begin by creating a statewide task force consisting of a diverse group of criminal justice stakeholders and policymakers (including a number of defense attorneys from different parts of the state) to collect data, analyze the current public-defense delivery systems in the state, and make recommendations for improvements. The task force should engage national technical assistance to help it assess the current delivery systems and learn about best practices nationwide.
2. **Structure.** Policymakers should strive to create state-funded, statewide public-defender offices to handle most cases. Those statewide offices should be supplemented by state-funded, managed assigned-counsel systems to handle conflict-of-interest cases and continue the involvement of the private bar in indigent-defense representation. Flat-fee contract programs for attorney assignment should be banned. If in a given state there is not enough political support to create a state-funded, statewide public-defender office, policymakers should strive to create a state-funded, statewide indigent-defense commission that can then work with localities to create county-based or regional public-defender offices and managed assigned-counsel systems. If a state chooses to proceed with an indigent-defense commission, it should ensure that the commission has sufficient power vis-à-vis the counties to ensure that counties do not choose public-defense delivery systems that are inefficient or encourage poor advocacy.
3. **Independence.** Policymakers should ensure that each of a state's chosen public-defense delivery systems—whether public-defender offices, managed assigned-counsel systems, or indigent-defense commissions—are sufficiently independent of the judiciary, legislature, and executive branch that defenders need not fear retaliation for vigorous advocacy. Judges should never be responsible for assigning cases, approving costs, or monitoring individual attorney performance. Instead, administrators in the public-defender office, managed assigned-counsel system, or indigent-defense commission should be responsible for attorney assignment, cost and fee approval, and individual oversight. Those administrators should be appointed by a board that is independent of the political branches of government.
4. **Excessive caseloads.** Policymakers should consider imposing caseload caps based on data-driven case-weighting studies that indicate how many cases attorneys in a given jurisdiction can effectively handle. In jurisdictions where this is not possible, defense attorneys should, consistent with

American Bar Association guidelines,<sup>104</sup> notify the courts of their inability to accept additional cases if doing so will compromise their ability to provide effective representation. If they cannot provide competent representation, they should move to withdraw from appointments, and courts should be receptive to such requests. Bar associations should be more willing to advocate for judicial and legislative enforcement of ethics rules that prohibit excessive caseloads.

5. **Funding.** Policymakers should ensure statewide funding for public defense instead of relying on individual counties to pay the costs. The amount of funding should be tied to data-driven case-weighting studies that indicate how much public-defense funding is necessary to provide effective representation, and it should take into account how much funding is earmarked for the prosecution and law enforcement. Moreover, public-defense funding should have a stable and dedicated source so that defenders—rarely a popular constituency in budgeting processes—do not need to continually renegotiate the source and amount of their funding. Prosecutors and public defenders should have pay parity, and assigned counsel should be paid a reasonable wage. Policymakers should also consider reducing the cost of the public-defense function by fully decriminalizing some nonviolent offenses.
6. **Training and oversight.** Each public-defense delivery system should have a training director responsible for developing and implementing a mandatory training program for entry-level attorneys. Entry-level training should be complemented by a mentorship program that links entry-level defenders to senior defense attorneys. All defense attorneys should be regularly evaluated according to established metrics and should receive feedback on how to improve.

Judges should be willing to (a) make *ex ante* inquiries into the effectiveness of defense counsel; (b) impose caseload caps; (c) grant motions to withdraw when caseloads are excessive; (d) refer ineffective attorneys to the local bar for discipline; and (e) be receptive to systemic challenges to public-defense

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104. See ABA COMM. ON ETHICS & PROF. RESP., FORMAL OPINION 06-441 (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE (2009), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf).

delivery systems. Local bar associations should take a more active role as well, supporting public-defense reform efforts and being more willing to discipline ineffective attorneys.

The federal government should continue to encourage states to adopt best practices for public-defense delivery through its funding choices and by filing amicus briefs in lawsuits challenging broken public-defense delivery systems. It should also pass proposed legislation that would (a) create a federal oversight body to collect, analyze, and distribute information about best practices and (b) give the Department of Justice authority to file federal enforcement actions (or deputize others to do so) when states systematically violate indigent defendants' rights to counsel.