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Article

Culture as a Structural Problem in Indigent Defense

Eve Brensike Primus[†]

INTRODUCTION

There is a serious cultural problem in many indigent defense delivery systems nationwide: too many lawyers appointed to represent poor criminal defendants do not perform their intended role in the system, because they have been conditioned not to fight for their clients. As a result, many indigent defendants who go through the criminal justice system (as well as the friends and families of defendants who suffer through these ordeals with them) feel confused, angry, and ignored.¹ They have no faith in the system or in the legitimacy of their convictions.² Rather, they experience the criminal justice system as an assembly line to prison, mostly for poor people of color.

This cultural problem afflicts most, but not all, indigent defense delivery systems and the problem exists to varying degrees across jurisdictions. Many defenders perform valiantly under trying circumstances and manage to provide zealous, client-centered defense advocacy. Given the obstacles that defense lawyers for the indigent face, the work of these excellent de-

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1. See generally Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005) (discussing the harms of not listening to defendants).

2. See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013) (discussing the perceived lack of legitimacy).

fenders is often nothing short of remarkable. But the difference between valiant defenders and those who are unable to provide zealous representation is not always a matter of the individual characteristics of the particular lawyers in question. It is also often traceable to a difference in the professional cultures in which they work.³ Many defenders sincerely want to be effective advocates for their clients, or at least they had that desire at some point in their careers, but the system and its concomitant pressures beat the fight out of them.

It comes as no surprise to close observers of indigent defense delivery systems that this culture of indifference exists.⁴ Consider the environment in which we ask indigent defense attorneys to work. They are loathed by many in society, because their job is to make arguments on behalf of murderers, rapists, and child molesters.⁵ In the public's view, defenders rely on legal technicalities to get criminals off and send them back to the streets to select their next victims.⁶ A public defender loses track of the number of times she is asked "how do you repre-

3. By "culture," I mean to be describing the shared behaviors, attitudes, and beliefs characteristic of those who provide indigent defense in a given jurisdiction. Of course, every jurisdiction has different people with different personalities and approaches, but the structure of indigent defense delivery in a jurisdiction can cultivate and perpetuate behaviors, attitudes, and beliefs toward the work that the attorneys do. These shared goals and norms define the setting in which indigent defense lawyering happens and shape the ways in which indigent defense services are provided going forward.

4. Indeed, I am not the first person to recognize the cultural problems in the system and the need to redress them. *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81 (1995); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture To Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008).

5. *See, e.g.*, Ogletree, *supra* note 4, at 86 ("Public defenders are often viewed by the public as either incompetent at what they do or immoral for doing it." (footnote omitted)); *Corrupt Public Defender Arrested*, POLITICAL FORUM.COM (Jan. 29, 2015 11:36 AM), <http://www.politicalforum.com/political-opinions-beliefs/393844-corrupt-public-defender-arrested.html> ("Public defenders are THE SCUM OF THE EARTH."); *Why People Think Criminal Defense Lawyers Are Scum*, A PUBLIC DEFENDER (Nov. 25, 2009), <http://apublicdefender.com/2009/11/25/why-people-think-criminal-defense-lawyers-are-scum>.

6. *See* Andrea M. Vargo, Book Note, 59 NOTRE DAME L. REV. 1058, 1058 (1984) (reviewing JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" THE MAKING OF A CRIMINAL LAWYER (1983)) ("[T]he public often perceives the defense attorney, particularly the public defender, as an obstructor [sic] of justice, a master of constitutional technicalities who springs the jailhouse lock and releases the criminal on an unsuspecting public.").

sent *those* people” or “how do you sleep at night?”⁷ And the hostility that defenders feel is not limited to public encounters on the streets; it is a daily part of their lives. Judges, prosecutors, and court personnel associate defenders with criminals. As a result, they often view them as conniving, untrustworthy, and unethical.⁸ Defenders are obstacles to the quick and easy processing of cases, and no one likes obstacles. It is easy for judges, prosecutors, and court personnel to make the life of a defender miserable. Imagine what life is like when no one in your working environment is willing to cut you a break or help you out, when everyone is waiting (and hoping) for you to screw up, and when the environment is, by definition, adversarial.

Now add to that an unreasonable and unmanageable workload. The American Bar Association guidelines recommend that no defender handle more than 150 felonies or 400 misdemeanor cases in a year,⁹ but a 2009 report found that defenders in New Orleans Parish were handling the equivalent of 19,000 misdemeanor cases per attorney annually.¹⁰ That means an average of about seven minutes per case.¹¹ In Florida’s Miami-Dade County, public defenders have been forced to handle more than 700 felony cases per year.¹² In Chicago, Miami, and Atlanta, defenders had more than 2,000 misdemeanor cases a year.¹³ With so many cases, defenders are unable even to meet with each

7. Tina Peng, *I’m a Public Defender. It’s Impossible for Me To Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken-its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html (“I’ve been asked by my family members, my friends and my hairdresser why I represent criminals.”).

8. See, e.g., Timothy Young, *The Dark Side?*, NAT’L ASS’N FOR PUB. DEF. (Sept. 10, 2014), <http://www.publicdefenders.us/?q=node/526> (describing one public defender’s encounter with a judge who described him as being on “the dark side” and explained that money was wasted on public defenders).

9. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter TEN PRINCIPLES].

10. Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. 21 (2009), https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf.

11. *Id.*

12. KAREN HOUPPERT, CHASING *GIDEON*: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 91–94 (2013).

13. Boruchowitz et al., *supra* note 10 (reporting excessive caseloads in Texas, Arizona, Tennessee, Utah, and Kentucky as well).

client before trial. By necessity, defendants are depersonalized and their cases are triaged according to the charges.

A defender's day often consists of running from courtroom to courtroom with a huge stack of files under her arm. Each courtroom is a hostile working environment. The judges, most of whom are former prosecutors, are impatiently waiting for the defender to hurry up and dispose of her cases so they can clear their heavily-congested dockets.¹⁴ As one Ohio judge bluntly stated as he held a public defender in contempt for indicating that he could not represent a man he had only just met, "public defenders often plead their clients guilty only minutes after meeting them. . . . [You] spent 20 minutes with him, which is probably all the time you're going to spend with a client."¹⁵ Given these circumstances, it is remarkable that so many criminal defenders do continue to show high levels of commitment to giving their clients the best possible representation. And it is not at all remarkable that many defenders compromise, or become worn down, and deliver considerably less.

The prosecutors, whose jobs are supposed to involve doing "justice," often have no sympathy for the caseload pressures of a defender and will even use the pressure that a defender is under to take advantage of the situation. Consider, for example, one case in which the trial judge allowed a Miami public defender to withdraw from a complex first-degree felony carrying a potential life sentence because that attorney already had 164 pending felony cases and asserted that he could not effectively take on another serious felony case.¹⁶ The prosecutor in that case appealed the trial court decision.¹⁷ One wonders what could have motivated the prosecutor to appeal this defender's withdrawal other than a desire to take advantage of the defender's inability to provide adequate representation. Or consider a recent Tennessee bill that was requested by the district attorney's office, which would repeal a twenty-three-year-old law that requires counties to give seventy-five cents to public

14. *Id.* at 44.

15. Milan Simonich, *Contempt Upheld for Ohio Public Defender*, PITTSBURGH POST-GAZETTE (Aug. 25, 2007), <http://www.post-gazette.com/frontpage/2007/08/24/Contempt-upheld-for-Ohio-public-defender/stories/200708240267>.

16. Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261 (Fla. 2013).

17. *Id.*

defenders' offices for every dollar it gives to the prosecution.¹⁸ What could motivate the prosecutors' office to push for this legislation other than a desire to get more funding at the expense of defense funding?¹⁹

Often, there is very little support for defenders who face this avalanche of work and hostility. Many American counties still rely on an assigned-counsel system as their primary source of indigent defense representation.²⁰ These assigned lawyers typically don't have the money for adequate support staff or investigators.²¹ Many defenders are solo practitioners who have no support staff whatsoever.²² They don't get any real training aside from their law school experience and maybe an occasional continuing-legal-education seminar here and there. Many attorneys who do this work started doing it as young and inexperienced lawyers straight out of law school.²³ Without any real oversight or feedback, the only cues they have for how to shape their behavior come from more experienced lawyers practicing in that jurisdiction. New defenders quickly learn that the defender who is well-liked in the "courthouse family" is the one who is efficient and doesn't rock the boat or impede the work-

18. S.B. 1324, 109th Gen. Assemb. (Tenn. 2015), <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB1324&GA=109>.

19. See Boruchowitz et al., *supra* note 10, at 14 (concluding based on a national study of misdemeanor courts that prosecutors and judges "push[] defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client").

20. STEPHEN D. OWEN ET AL., U.S. DEP'T OF JUSTICE, NCJ 246683, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012 (2014), <http://www.bjs.gov/content/pub/pdf/idsus0812.pdf> [hereinafter INDIGENT DEFENSE SERVICES]; see also Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 513–17 (2015) (describing assigned-counsel systems).

21. *Pub. Def., Eleventh Judicial Circuit of Fla.*, 115 So. 3d at 278 ("[Defense] attorneys almost never visited the crime scenes, were unable to properly investigate or interview witnesses themselves, often had other attorneys conduct their depositions, and were often unprepared to proceed to trial when the case was called."); Rapping, *supra* note 4, at 185 (describing the lack of funding for experts or investigation in New Orleans pre-Katrina).

22. See, e.g., Testimony of David E. Clark, Trial Attorney, at 42, *State v. Randolph*, No. 13-33003-FC (Mich. Cir. Ct. May 11, 2015) (on file with author) (noting that he does not have any investigators, law clerks, or paralegals and stating "[w]hen you call my office you get me").

23. See Leon Thomas David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753, 757 (1961) (noting that "[b]y tradition . . . appointments fall to the newer members of the bar").

ings of the assembly line machine. The message to a new defender is clear: go along and don't fight too hard.²⁴

And if the messaging isn't clear enough, many defenders have financial incentives to avoid zealously representing their clients. In some jurisdictions, assigned counsel is paid an hourly rate (which is often abysmally low)²⁵ to handle indigent defense cases. One might imagine that an hourly rate creates an incentive for lawyers to spend more time, not less, on each case. But the ability of assigned counsel to make a living depends on their ability to keep getting assigned to cases—indeed, to many cases. Often, the judges before whom these attorneys appear are the ones who assign the cases, and they do so not on the basis of how zealous the defender's representation is but based on how quickly the defender will dispose of his cases and clear the judge's docket.²⁶

Not all assigned defenders are paid per hour; some are paid a flat fee as part of a contract to represent all of the indigent defendants who come through the courthouse.²⁷ Of course, the flat fee is so low²⁸ that these attorneys often have to seek other means of supplementing their incomes, which only detracts from the amount of time that they have to spend on their

24. Boruchowitz et al., *supra* note 10, at 38 (describing a number of jurisdictions in which appointed attorneys *never* requested funds for experts or investigative services).

25. See REBECCA A. DESILETS ET AL., SPANGENBURG 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 (noting that many jurisdictions only pay \$40–\$50 per hour). There are often caps on the total fees that an attorney can be paid and these are also quite low. See *id.* at 9–16 (noting fee caps of \$500 in one Oklahoma county, \$650 in New Mexico, and \$1250 in Illinois).

26. See *infra* Part I.B.

27. Schulhofer, *supra* note 20, at 514 (describing this system).

28. One recent study concluded that, in light of the flat fees paid to Philadelphia appointed counsel, they would effectively be paid \$2 per hour if they put in the number of hours required to provide effective representation. 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, 196 (2012); see also Kim Bellware, *If You're a Poor Defendant in Utah, Good Luck: You'll Need It*, HUFFPOST POL. (Nov. 9, 2015), http://www.huffingtonpost.com/entry/utah-indigent-defense-report_us_563a4849e4b0b24aee486669 (describing one Utah contract defense attorney who was paid a \$600 flat fee to handle 246 cases, which translated to an average of \$30 per case).

cases.²⁹ Moreover, with high caseloads, no real oversight, and no financial incentive to take cases to trial, these defenders have every incentive to plead out their cases as quickly as possible.³⁰ After all, defenders like these also need to stay in the good graces of the officials who hire them, and the interests of those officials again sound largely in clearing the docket.

In much of this Article, I will explain that the sources of the culture of indifference that affects too many criminal defenders has structural causes and that the structure of criminal defense in jurisdictions with public defender offices helps fight against that culture. That is, public defender offices create a different culture from the one that dominates in most assigned-counsel jurisdictions, such that public defenders are better able to provide zealous representation even in the face of the serious headwinds that blow in the faces of all lawyers who represent indigent defendants. That said, public defender offices are not immune from the pressures of the system either. Many public defender agencies face crushing caseloads and do not have sufficient resources to provide adequate support for their line attorneys.³¹ Although some public defender offices provide excellent training, others send their entry-level attorneys into court with no training and no supervision.³² And when administrators in some of these offices have tried to stand up to politically-appointed oversight boards that demand budget cuts and try to lower the quality of defense representation, they have lost their jobs.³³

What is the result of a system that vilifies defenders, gives them an unmanageable workload, underpays them, fails to train them, and doesn't adequately support or supervise them? Many zealous defenders who care about their clients burn out

29. Rapping, *supra* note 4, at 189 (describing the prevalence of this practice in New Orleans where public defenders were only paid \$29,000 a year).

30. Schulhofer, *supra* note 20, at 515 (discussing the perverse incentives in assigned-counsel programs).

31. Peng, *supra* note 7 (describing one public defender office with nine investigators to handle more than 18,000 cases a year).

32. Boruchowitz et al., *supra* note 10, at 39–40 (describing this problem); see also THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 92 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [hereinafter JUSTICE DENIED].

33. See, e.g., Julie Bykowicz & Tricia Bishop, *Top Md. Public Defender Is Fired*, BALTIMORE SUN (Aug. 22, 2009), http://articles.baltimoresun.com/2009-08-22/news/0908210179_1_forster-public-defender-outsourc.

fast and leave the job.³⁴ Of those who remain, many perform valiantly. But the sheer reality of the difficult task that these lawyers are expected to do is often overwhelming. Especially in contexts where indigent defense lawyers lack institutional support, even lawyers who wish to take their obligations seriously sometimes find themselves overwhelmed and gradually become less sensitive to the routine injustices of the system.³⁵ Others become cynical and depressed, and unhappily continue in the job—aware of the problems, but feeling powerless to effectuate change.³⁶ Either way, they communicate these feelings (or lack thereof) to their clients, sometimes overtly and often more subtly.

Indigent criminal defendants routinely complain that their trial attorneys don't listen to them, don't communicate with them or tell them what is going on, and seem to have already determined that they are guilty.³⁷ These are not just the sour grapes complaints of losing parties. As a trial-level public defender, I have seen this firsthand. I have been in the jail lock up at the courthouse and seen appointed attorneys walk into the cell block on their client's trial date and say, "Hi. I have been appointed to represent you. Here is what is going to happen. The prosecutor has offered you a really good deal, and I think that you should take it." No introductions, no questions, no attempt to hear the client's story, no respect. And as an appellate-level public defender, I have called trial attorneys to get a sense of what happened at trial only to hear them say things like, "the client was obviously lying so I didn't bother to investigate."

My experiences are not unique.³⁸ Many indigent defendants wait weeks and even months in jail before they have initial contact with a lawyer only to have that attorney come and spend less than five minutes speaking to them before disposing of

34. Boruchowitz et al., *supra* note 10, at 43, 46–47 (describing high turnover rates).

35. *Id.* at 31 (quoting one Chicago public defender supervisor as saying that young attorneys coming out of law school want to take cases to trial, but "they tend to get beaten down by the system").

36. *See, e.g.,* Ogletree, *supra* note 4, at 85 (describing the "cynicism and disillusionment" that public defenders develop).

37. Boruchowitz et al., *supra* note 10, at 35 (noting that clients feel like "a cog in a large wheel"); Ogletree, *supra* note 4, at 87 (noting that clients routinely blame their public defenders for the faults of the system).

38. *See* Rapping, *supra* note 4 (describing similar stories from New Orleans).

their case through a plea.³⁹ When these defendants try to explain the ways that they feel the police or others have wronged them, the defender often shakes her head and says, “we can’t talk about that in the courtroom,” “the judge won’t want to hear about that,” or “that is not what this case is about.” Having been shut down by his own attorney, the indigent defendant now understandably feels misunderstood, angry, and embittered. All that the defendant’s family and friends see is another member of their community being processed through the system with little explanation. Sometimes, the defendant is corralled into the courtroom with a bunch of others for a group plea under which the trial judge advises them all together of the rights that they are giving up and then goes down the line to ask them individually if they each know what rights they are foregoing and if they want to plead guilty to their respective offenses.⁴⁰ It is no wonder that so many members of poor communities have so little faith in the system.⁴¹

Any discussion of how to give meaning to the right to counsel has to grapple with this deep-rooted cultural problem.⁴² Our system doesn’t care about or listen to the people it imprisons. That is a serious problem in any system that wants to be viewed as legitimate in the eyes of its people, but it is particularly problematic in an *adversarial* system that relies on defenders being able to do their jobs effectively to justify its re-

39. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Pub. Def., Eleventh Judicial Circuit of Fla. 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.”); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 16 (2004) [hereinafter *GIDEON’S BROKEN PROMISE*] (describing “meet ‘em and plead ‘em” practices); JUSTICE DENIED, *supra* note 32, at 87 (talking about delays); Boruchowitz et al., *supra* note 10, at 31. Attorneys need to meet with indigent clients soon after they enter the system to let them know that someone is going to be an advocate for them. Too many defendants linger in prison for weeks or even months before anyone interviews them. This delay not only undermines their faith in the system; it also makes them feel abandoned and ultimately distrustful when the defense attorney shows up and says that she cares and is there to help.

40. See *United States v. Roblero-Solis*, 588 F.3d 692, 693–94 (9th Cir. 2009) (condemning this practice but describing any error as harmless). Lest readers think that this practice is now obsolete, I had the misfortune of watching pleas being taken en masse in the Genesee County courthouse in Michigan just a few months ago.

41. Schulhofer, *supra* note 20, at 507 (discussing cynicism).

42. See Rapping, *supra* note 4, at 180–81 (making a similar claim).

sults. It is no wonder that more and more wrongful convictions are emerging as scientific advances like DNA testing become more available.⁴³ Of course innocents are convicted when the adversarial system breaks down. But it isn't and shouldn't just be about the innocent. Even the guilty deserve to be treated fairly, to be heard, and to receive just and proportionate sentences.⁴⁴ As *Gideon v. Wainwright*⁴⁵ reached its fiftieth anniversary, scholars, practitioners, and politicians began a call to arms to address the indigent defense crisis.⁴⁶ It is not the first time that experts have come together to talk about what the right to counsel means. Two years before *Gideon v. Wainwright* was decided, Justice William Douglas joined a distinguished group of practitioners and academics to advocate a constitutional right to counsel.⁴⁷ When those judges, scholars, and experts came together, there was a sense that change was coming. Public defender systems existed in some form in thirteen states.⁴⁸ In 1959, a Special Committee of the Association of the Bar of New York City and the National Legal Aid and Defender Association issued a report describing qualitative standards for these emerging public defender organizations.⁴⁹ One year later, Congress passed the District of Columbia Legal Aid Act, which provided for a system of appointed counsel in Washington, D.C.,⁵⁰ and Congress was entertaining legislation designed to

43. See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (describing wrongful convictions).

44. One former defender in Minnesota, Emily Baxter, has launched a project designed to show how everyone in society has violated the law at one time or another but only twenty-five percent of people are caught and prosecuted for their offenses. Her study documents how "We are all Criminals" who deserve fair, individualized treatment in and by the system. See WE ARE ALL CRIMINALS, <http://www.weareallcriminals.org> (last visited Apr. 4, 2016).

45. 372 U.S. 335 (1963).

46. See Symposium, *The Failures of Gideon and New Paths Forward*, 12 OHIO ST. J. CRIM. L. 307 (2015); Symposium, *Gideon at 50: Reassessing the Right to Counsel*, 70 WASH. & LEE L. REV. 835 (2013); Symposium, *The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After Gideon v. Wainwright*, 122 YALE L.J. 2106 (2013); see also *Gideon at 50*, THE CHAMPION, June 2012.

47. See William O. Douglas, *Foreword: The Right to Counsel*, 45 MINN. L. REV. 693 (1961).

48. See Emanuel Celler, *Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 MINN. L. REV. 697, 699 (1961).

49. See Herman I. Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 737 (1961) (discussing this report).

50. District of Columbia Legal Aid Act, Pub. L. No. 86-531, 74 Stat. 229 (1960).

provide indigent federal defendants more broadly with appointed counsel.⁵¹ The Supreme Court's incorporation revolution was beginning⁵² and, one opinion from the High Court had even made the bold pronouncement that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁵³ Justice Douglas and others recognized that change was possible and used the pages of this law review to advocate a broad constitutional right to counsel that encompassed zealous, publicly-funded representation for indigent criminal defendants (both juvenile and adult) at trial and on appeal.

That symposium was filled with hope and ideas and, in the ten years that followed, it seemed that many of those ideas would become realities. The Supreme Court issued its decisions in *Gideon v. Wainwright*,⁵⁴ *Douglas v. California*,⁵⁵ and *Miranda v. Arizona*⁵⁶ suggesting a broad and powerful right to counsel from the time of police interrogation through the appellate review stage. In *In re Gault*,⁵⁷ the Supreme Court demonstrated that it would not limit a broad right to counsel to criminal cases and provided for a right to counsel in juvenile adjudications. Congress enacted the Criminal Justice Act of 1964 requiring federal district courts to adopt a local plan for furnishing counsel to indigent defendants,⁵⁸ and many states that had not already done so followed suit with the creation of indigent defense delivery systems.⁵⁹

But with the war on drugs came the proliferation of criminal offenses and draconian penalties and burgeoning state criminal dockets.⁶⁰ The incorporation of defendants' criminal

51. See Celler, *supra* note 48, 701–11 (discussing these proposals).

52. See *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the right to public trial).

53. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

54. 372 U.S. 335 (1963).

55. 372 U.S. 353 (1963).

56. 384 U.S. 436 (1966).

57. 387 U.S. 1 (1967).

58. Criminal Justice Act of 1964, Pub. L. No. 88-455, 62 Stat. 684 (codified as amended at 18 U.S.C. § 3006A (2006)).

59. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* 67 (14th ed. 2015) (describing the development of state public defender offices).

60. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 (2001) (describing the growth in criminal prosecution rates in the 1970s).

procedure rights within the Fourteenth Amendment threatened to make large numbers of prosecutions on that swelled docket more difficult and time-consuming for courts and prosecutors than they would have been before—especially if the defendants had decent lawyers. And, of course, the economic slowdown that followed the long boom of the 1950s and 60s meant that jurisdictions had fewer resources to expend on these matters. As a result, we have seen a steady and steep retreat from many of the principles and ideals advocated for in that important 1961 symposium. Today's right to counsel is a mere shadow of what the symposium authors envisioned.⁶¹

But hope is not lost. As was true in 1961, there is once again a feeling that change is coming. Countless reports document excessive defender caseloads, a lack of independence, and blatant violations of the constitutional right to counsel across jurisdictions and make recommendations for improvement.⁶² Many states have developed bipartisan Indigent Defense Commissions to investigate best practices and implement more effective and efficient delivery systems.⁶³ Legislators have convened working groups and have proposed legislation to address the crisis.⁶⁴ President Obama created the Office for Access to Justice, an initiative designed to analyze and think about how to improve indigent defense delivery systems.⁶⁵ Symposia, much like the one this Article commemorates, abound detailing the problems with indigent defense delivery systems and recommending potential solutions.⁶⁶

I do not mean to suggest that we are on the verge of the next *Gideon v. Wainwright*. In fact, I highly doubt that any-

61. Countless scholars have lamented these developments. See sources collected *supra* note 46.

62. See, e.g., *GIDEON'S BROKEN PROMISE*, *supra* note 39; *JUSTICE DENIED*, *supra* note 32.

63. See *INDIGENT DEFENSE SERVICES*, *supra* note 20; Terry Brooks & Shubhangi Deoras, *State Commissions Project in Review*, *CRIM. JUST.*, Summer 2001, at 48 (describing commissions in Alabama, Georgia, Illinois, Nevada, North Carolina, Oregon, Texas, and Vermont); Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 *OHIO ST. J. CRIM. L.* 325 (2015) (describing the work of commissions in North Carolina, Texas, and New York).

64. See, e.g., National Center for the Right to Counsel Act, H.R. 2063, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/hr2063>.

65. Ari Shapiro, *Justice Dept. To Launch Indigent Defense Program*, *NAT'L PUB. RADIO* (Feb. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=124094017> (discussing the launch of the office).

66. See sources collected *supra* note 46.

thing quite as revolutionary as *Gideon* is on the horizon. But I do believe that some advances are possible in the current political climate. Rather than attempt to offer a silver bullet that doesn't exist, I want to offer a starting point. That starting point is a focus on culture. Moreover, it is a focus on culture as a structural problem. If we can improve some of the structures, we can improve some of the culture, thus raising the proportion of criminal defenders who defy the difficulty of their role and succeed in delivering zealous, client-centered advocacy. Changing culture sounds like an immensely difficult task, but recognizing the ways that culture flows from structure points the way to practical measures that can have important structural effects. And in suggesting some of these measures, I am drawing on the experience of model defender agencies around the country. There are a number of excellent public defender agencies that have managed to withstand the pressures described above and do provide zealous, client-centered advocacy for indigent defendants, and we can draw lessons from what they have achieved with structural conditions more favorable than those in which too many other defenders operate.⁶⁷

In Part I, I will describe the ways in which today's right-to-counsel challenges are similar to and different from those that faced the writers of the 1961 symposium. I will also explain in more detail why the structural conditions of criminal defense work to create (and, to some extent, always have created) a cultural problem in indigent defense delivery systems across the country. In Part II, I will discuss why I believe that we are, once again, facing a moment for potential reform, albeit reform that is different in scope and kind from that which was possible in the 1960s. Finally, in Part III, I will explore how a focus on improving the culture of indigent defense delivery systems through structural change can and should infuse current reform proposals and inform change going forward.

67. I want to make it clear from the start that I am not here to disparage or indict public defenders. I was a trial and appellate defender before I became a law professor, and I have nothing but respect for defenders and the work that they do. In a number of offices around the country, defenders work in healthy and supportive environments that allow them to do their jobs effectively. However, defenders are not adequately supported in many jurisdictions, because the very structure of indigent defense delivery sets attorneys up for failure and creates a problematic indigent defense culture as a result. See *infra* Part I. My hope is that we can learn from the model defender offices and incorporate structural changes into struggling indigent defense delivery systems that will promote a culture of zealous advocacy and support the work that indigent defense attorneys do.

I. TODAY VERSUS 1961: RIGHT-TO-COUNSEL CHALLENGES AND CULTURAL PROBLEMS

In many respects, we live in a different world from the world that confronted Justice Douglas and the other writers in the 1961 symposium. Back then, an indigent defendant in a state criminal court was only constitutionally entitled to the assistance of counsel if he could show that his case involved special circumstances that required the “guiding hand of counsel.”⁶⁸ Alleged misdemeanants almost never had appointed counsel, and many juveniles were imprisoned without ever consulting an attorney.⁶⁹ Many states viewed the provision of indigent defense representation as a matter of charity and relied wholly on volunteer lawyers to perform this work.⁷⁰ And there were few standards available to describe what effective defense representation would look like.⁷¹

In contrast, now there is a constitutional right to the effective assistance of counsel at trial and on the first appeal as of right for any defendant facing felony charges or misdemeanor charges that result in actual imprisonment.⁷² Juveniles also have a constitutional right to counsel in adjudication proceedings.⁷³ The federal government and the vast majority of states rely primarily on government-funded indigent defense delivery systems rather than simply volunteer lawyers.⁷⁴ And there is a plethora of professional standards now to guide defense lawyers and explain what it means to provide effective representation.⁷⁵

Although there are many important ways in which indigent defense has changed in the last fifty years, many things

68. *Betts v. Brady*, 316 U.S. 455 (1942).

69. See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 22 (2016) (noting that, before *Gideon*, “only a handful of states provided counsel in nonfelony cases”).

70. *Id.* at 38; Pollock, *supra* note 49, at 744 (describing “[t]he traditional philosophy that legal aid is a charity”).

71. See Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1316 (2013) (noting that the first ABA Standards on Criminal Justice were not released until 1968).

72. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony trial right); *Douglas v. California*, 372 U.S. 353 (1963) (first appeal); *Scott v. Illinois*, 440 U.S. 367 (1979) (misdemeanor trial right for offenses that result in imprisonment).

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

74. See INDIGENT DEFENSE SERVICES, *supra* note 20 (describing indigent defense delivery systems).

75. See Drinan, *supra* note 71, at 1316–19 (describing these standards).

remain the same. Indigent defense organizations, to the extent that they exist, are still insufficiently funded.⁷⁶ Defenders still face overwhelming caseloads and are, as a result, unable to give sufficient attention to individual cases.⁷⁷ Defenders continue to be viewed as villains, and many clients continue to be dissatisfied with the quality of representation that they receive.⁷⁸

Indigent defense delivery systems may look somewhat different today than they did in 1961, but the culture-of-indifference problems that have always plagued the system remain. Cultural problems have many sources. Here, I want to point out a few problems in the culture of indigent defense delivery systems whose sources are structural. These structural problems concern the sources of funding, a lack of independence, attorney isolation, inadequate training, and inadequate oversight. To be clear, these are not the only sources of the culture of indifference in criminal defense, much less the only serious problems with the system of representation for the indigent. But in the hopes of pointing out a thematic way in which criminal defense can improve, my present focus is on this set of structural factors that too often shape the professional culture.

These structural problems come from different sources and affect indigent defense culture in different ways. For example, if a public defender office fails to train its line attorneys, that decision has immediate and direct effects on office culture. In contrast, if a state opts to use appointed counsel in lieu of public defenders when structuring its indigent defense delivery system, the downstream effects on culture are more indirect. In both situations, however, the structural decision (whether internal to a defender system or externally imposed on a defender system) helps to shape the culture of the resulting indigent defense delivery system.

A. FUNDING SOURCES

The largest funding problem in indigent defense delivery systems is, quite simply, that not enough money is allocated to indigent defense. This problem is hardly new.⁷⁹ Experts have been calling for increases in indigent defense funding for dec-

76. See sources collected *supra* note 62.

77. See sources collected *supra* note 62.

78. See, e.g., Ogletree, *supra* note 4, at 82 (describing the “special contempt for those who represent indigent clients charged with crimes”).

79. See Pollock, *supra* note 49, at 751 (describing fiscal constraints).

ades.⁸⁰ And severe underfunding certainly contributes to the cultural problems that plague indigent defense delivery systems. Among other things, severe underfunding means too few lawyers for too many cases, and an attorney with a crushing caseload is compromised in his ability to zealously represent his clients in obvious ways. That said, the sheer amount of money earmarked for indigent defense is less a structural consideration about the design of our indigent defense delivery systems than it is a policy choice about what proportion of society's wealth will be devoted to indigent defense. The currently prevailing policy choice to make very little money available has downstream cultural effects on indigent defense delivery systems, and better funding is accordingly imperative, as a great many commentators have noted.⁸¹

My goal in this Article, however, is to describe ways to *structure* indigent defense delivery systems so as to improve the professional culture. So it is worth noticing that the magnitude of the funding for indigent defense is not the only important funding-related issue. It also matters how the funding that is provided is structured. For example, a state must choose whether to force counties to fund their own indigent defense delivery systems or to fund indigent defense at the state level. That structural choice about how to use the limited resources that a state has for indigent defense often has downstream cultural effects. There are reasons for believing that county-funded systems tend to create poorer defender culture than state-wide systems, particularly when resources are constrained—which is always the reality in indigent defense.

Many states continue to make their county governments overwhelmingly responsible for paying the costs of indigent defense representation.⁸² Pennsylvania requires its counties to

80. See Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J.L. & PUB. POL'Y 518, 531 (2015) ("Over thirty-five years ago, the American Bar Association (ABA) advocated for a federally funded program to help state and local governments provide sufficient public defense services. Since then, there is no sign that the federal government will help or that state and local governments are ensuring adequate funding willingly." (footnote omitted)).

81. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."); Joy, *supra* note 80.

82. JUSTICE DENIED, *supra* note 32, at 54–55; Andrew W. Goldsmith, *The Bill for Rights: State and Local Financing of Public Education and Indigent Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 92 (2005).

cover the entire cost.⁸³ In seventeen other states, the state shifts the burden of more than half of the funding to individual counties.⁸⁴ Structurally, this lack of state funding means that financial resources cannot be spread across the state. And as I will explain, this creation of separate county-based silos for indigent defense funding compromises the quality and ultimately the culture of defense representation.

In county-funded systems, urban counties with high crime rates are overwhelmed by the expense of indigent defense. Often, these counties have large indigent populations and, without significant state support, simply cannot raise enough money to support public defender systems. Sometimes, the resource constraints at the county level are so severe that trial courts have to conscript unwilling and inexperienced attorneys to represent indigent criminal defendants.⁸⁵ These lawyers obviously have no financial incentive to provide zealous, client-centered advocacy and no criminal defense experience or training that would enable them to do so.

Some urban counties resort to flat-fee contract systems, under which assigned attorneys are paid flat fees for representing however many indigent cases are on the courts' dockets.⁸⁶ These fees tend to be remarkably low, and they create perverse incentives for attorneys defending the indigent—incentives that discourage effective representation and that corrode the culture of indigent defense.⁸⁷

Consider, for example, the “house counsel” system in Wayne County, Michigan—the county where Detroit is located.⁸⁸ Michigan is one of the states where each individual county

83. See HOLLY R. STEVENS ET AL., SPANGENBURG PROJECT, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008-5 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf [hereinafter STATE, COUNTY AND LOCAL]. A 2009 report suggests that Utah also relies solely on its counties to provide indigent defense. See JUSTICE DENIED, *supra* note 32, at 54. And a reference to a 2012 study suggests that California delegates all funding responsibility to its counties. See Bright & Sanneh, *supra* note 2, at 2165 n.74.

84. JUSTICE DENIED, *supra* note 32, at 54 (listing states); STATE, COUNTY AND LOCAL, *supra* note 83 (listing states).

85. See Schulhofer, *supra* note 20, at 513 n.30 (collecting cases).

86. See *id.* at 514–15 (describing these systems).

87. *Id.*

88. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM, SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 27 (2008), <http://>

is expected to fund the majority of its indigent defense delivery system.⁸⁹ The 36th District Court in Detroit processes 600,000 cases per year, and ninety percent of those cases involve indigent defendants.⁹⁰ Wayne County cannot afford to adequately fund the defense of 540,000 cases. After all, its principal city, Detroit, filed for bankruptcy in 2013.⁹¹ So what does the county do? Defendants accused of low-level misdemeanors are appointed “house counsel” to represent them. Any attorney who is willing to sit through nine hours of training can apply to be “house counsel” in a courtroom for a half-day and receive a \$150 flat fee to handle all of the cases on the docket.⁹² The effects on defender culture are fairly obvious. House counsel do not meet their clients in advance; they rarely file any motions; and they almost never go to trial.⁹³ The sooner they handle their cases, the sooner they get their fee and go home. This, in turn, leads to a culture of devaluing clients and not zealously advocating for their rights.

I went to the 36th District Courthouse with two other public defenders to observe a trial courtroom. Among the three of us, we had more than twenty years of trial-level public defender experience in a half dozen different jurisdictions. We sat in that courtroom and watched as an attorney, who we all thought was the prosecutor, spoke to defendants, offered them deals, and pleaded them out. It took the three of us more than two hours to figure out that the attorney we were watching was not the prosecutor; she was house counsel. There was no client-centered advocacy. As far as we could tell, there was no advocacy at all. It was just “meet-and-plead.”⁹⁴

Many overwhelmed counties have a bidding process under which the flat-fee contract to handle indigent defense cases is given to the lowest bidder.⁹⁵ The predictable result is defense lawyers who carry very large caseloads for very little compen-

www.mynlada.org/michigan/michigan_report.pdf [hereinafter RACE TO THE BOTTOM].

89. JUSTICE DENIED, *supra* note 32, at 54.

90. RACE TO THE BOTTOM, *supra* note 88.

91. Reid Wilson & Michael A. Fletcher, *Detroit Eligible for Bankruptcy Filing*, WASH. POST, Dec. 4, 2013, at A1.

92. RACE TO THE BOTTOM, *supra* note 88.

93. *Id.*

94. *Cf.* Boruchowitz et al., *supra* note 10, at 31 (describing “meet-and-plead” practices in other jurisdictions).

95. *See* Bright & Sanneh, *supra* note 2, at 2165–66 (describing some of these jurisdictions).

sation. Indeed, the compensation is too small for the lawyers to make their living doing indigent defense, so these contract lawyers have to supplement their incomes with other work, which results in even less time for their indigent defense clients.⁹⁶ Given these financial incentives, it is not surprising that plea rates in the criminal justice system are higher than ever⁹⁷ and that zealous, client-centered advocacy is often not possible.

The structural problems associated with county-based funding are not limited to urban counties. Many rural, less populous counties simply cannot fund the overhead costs associated with public defender systems. Instead, they rely on an assigned-counsel system under which assigned attorneys are paid an hourly rate.⁹⁸ And precisely because many of these rural counties don't have significant resources, they cannot compensate attorneys at a fair market rate—at market rates, one complex homicide case could deplete a poor county's entire indigent defense budget.⁹⁹ As a result, compensation for assigned attorneys is often as low as \$40 or \$50 per hour,¹⁰⁰ and there are hard caps on how much an attorney can earn per case. These fee caps are shockingly low. As of 2007, the maximum fee for a non-capital felony was \$1,250 in Illinois, \$650 in New Mexico, and, in one Oklahoma county, just \$500.¹⁰¹ If an attorney is paid \$50 per hour and has a \$500 cap, she has no financial incentive to spend more than ten hours on a felony case. That hardly incentivizes her to go to trial or do significant legal research or investigation. Financially, she is better off pleading out a case, getting her fee, and then getting a new client.

Given the low fees routinely paid to assigned counsel to handle indigent defense cases, many of the lawyers who volun-

96. See Rapping, *supra* note 4, at 189 (explaining how lawyers have needed to supplement).

97. See M. Clara Garcia Hernandez & Carole J. Powell, *Valuing Gideon's Gold: How Much Justice Can We Afford?*, 122 YALE L.J. 2358, 2365 (2013) (“[T]he percentage of felonies that proceed to trial in nine states fell to 2.3% in 2009, from 8% in 1976” (internal citation marks omitted)); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2581 (2013) (“In 1963, nearly 15% of all federal defendants went to trial; in 2010, the figure was 2.7%.”).

98. See Schulhofer, *supra* note 20, at 514–15 (describing these systems).

99. For example, public defenders in Minnehaha County, South Dakota, had one high-profile murder case involving a deaf person eat up more than a third of their annual budget for interpreters. Jill Callison, *Murder Cases Stress Public Defender Staff, Budget*, ARGUSLEADER, Apr. 8, 2007, at 1A.

100. DESILETS ET AL., *supra* note 25.

101. *Id.* at 9, 15–16.

teer are less experienced attorneys who do not otherwise have the ability to attract business.¹⁰² "House counsel" in Detroit, for example, do not have to have any criminal defense experience.¹⁰³ They just have to sit through nine hours of "training" devoted only to "the mechanics of the docket."¹⁰⁴ Given their lack of experience and the absence of any substantive training, it is not surprising that house counsel do not provide zealous advocacy.

Before *Gideon* was decided, scholars and practitioners writing in the pages of this law review understood that experienced, public defenders would be necessary if the right to counsel was to have meaning. As Judge Leon Thomas David wrote:

[T]here is a premium upon detailed knowledge of the statutes and upon adequate experience with criminal procedure This involves far more than the statutes and the case law. It frequently involves knowledge of police operating procedures; knowledge of police record systems; familiarity with the work of the local crime laboratories; and acquaintanceship with the local experts in such things as narcotics, ballistics, arson, forensic chemistry, handwriting, toxicology and criminal identification. This arsenal of information is available through a specialized public or voluntary defender, and a private practitioner entering a criminal case may be unfamiliar with it.¹⁰⁵

Yet, fifty-five years later, states still rely on the services of many inexperienced, non-criminal lawyers to satisfy their obligations to provide indigent defense representation.

To a considerable extent, the preceding problems flow from the simple fact that so little money is allocated to indigent defense. But the choice to fund at the county level exacerbates the problem. By requiring each county to handle the overhead costs of any public defender system that it might operate, county-based funding effectively guarantees that a great many counties will use assigned-counsel systems like the ones described above. And even in counties that are able to afford public defender offices, the reliance on county funds often means that the income stream for the office is not as stable as it is in state-funded systems. In New Orleans, for example, the public defender's budget relied on traffic ticket revenue.¹⁰⁶ If the police

102. See Schulhofer, *supra* note 20, at 515 (noting that being paid below market rates is attractive to "attorneys who are inexperienced or not blessed with a flourishing practice").

103. RACE TO THE BOTTOM, *supra* note 88.

104. *Id.*

105. David, *supra* note 23, at 763; see also Pollock, *supra* note 49, at 745 ("[T]he Defender is a specialist in the trial of criminal cases . . .").

106. Rapping, *supra* note 4, at 183-84.

did not issue enough tickets in a given month, there would be no money for indigent defense experts. If experts are not available for months at a time, many lawyers will be conditioned not to ask for them. And if lawyers have to worry constantly that asking for resources in one case will undermine their ability to get them in a later case, they will be forced to think about triaging their requests rather than zealously fighting for all of their clients. In short, a lack of stability undermines a culture of vigorous advocacy. And state-funded systems have the ability to spread resources across the state and strategically plan for and handle shortfalls in ways that counties cannot.

B. LACK OF INDEPENDENCE

Experts in attendance at the 1961 Right to Counsel symposium recognized the importance of having independent defenders who are not beholden to the political will of the electorate or the docket-control needs of the judges before whom they appear. As one trial judge from California wrote, “[n]o adequate organization can be established and function where its support—in money and manpower—fluctuates with the interests and objectives of the changing officers of a national, state, or local bar association.”¹⁰⁷ The then-Chairman of the House Judiciary Committee agreed that independence was essential and noted that “public defenders ought not to be appointed by the district court before which it would be their duty to practice.”¹⁰⁸

Fifty-five years later, independence problems persist. As former Attorney General Eric Holder has explained, “many public defender offices have insufficient independence or oversight to ensure that the lawyers are effectively representing the interests of the accused. In some places judges assign cases to lawyers, which can influence the representation the lawyers provide.”¹⁰⁹ Consider again the house counsel system in Detroit. The 36th District Court’s own plan indicates that “[a]ttorneys seeking assignments are encouraged to meet with the judge or clerk to submit their business card or letter indicating their in-

107. See David, *supra* note 23, at 761.

108. See Celler, *supra* note 48, at 712. A defender in Philadelphia agreed that it is a problem if “the Defender is susceptible to political manipulation and domination by the court.” See Pollock, *supra* note 49, at 748.

109. Eric Holder, U.S. Att’y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009), <http://www.brennancenter.org/analysis/attorney-general-eric-holder-indigent-defense-reform> [hereinafter Holder Remarks].

tent.”¹¹⁰ Judges interview and pick the attorneys they want to be house counsel in their courthouses, and judges have an interest in getting through their dockets. It is perhaps not surprising that house counsel tend not to provide zealous advocacy. Anecdotal evidence suggests that what some house counsel tend to provide are financial contributions to the judges’ campaign funds.¹¹¹

The problem is not limited to Michigan. A 2006 statewide survey of judges in Nebraska revealed that some judges “have ‘paid attorneys back’ for too many trials or other offenses by not appointing them again.”¹¹² And even after Texas adopted a number of reforms to improve its indigent defense delivery system, judges are still tasked with appointing and approving the compensation of defense counsel,¹¹³ and claims that judges routinely appoint those with whom they have personal relationships persist.¹¹⁴

Independence problems also exist when elected legislative or executive officials have too much control over public defender offices. In Onondaga County, New York, for example, 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 at arraignment.¹¹⁵ Similarly, the Chief Public Defender in Maryland was fired in 2009 for being unwilling to scale back statewide operations that encouraged too much zealous representation after the Board of Trustees that governs that indigent defense system—a board that consisted primarily of the Governor’s appointees—pushed for cuts.¹¹⁶

110. RACE TO THE BOTTOM, *supra* note 88.

111. *Id.* Michigan is one of many states with elected judiciaries. See AM. BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, http://www.abanet.org/leadership/fact_sheet.pdf, (last visited Apr. 4, 2016).

112. JUSTICE DENIED, *supra* note 32, at 84 (discussing the study); Holder Remarks, *supra* note 109 (same).

113. Backus & Marcus, *supra* note 81, at 1104–05.

114. JUSTICE DENIED, *supra* note 32, at 82–83; see also Bellware, *supra* note 28 (describing how defense attorneys who file a lot of motions or are “picky during jury selection” will have their indigent defense contracts terminated).

115. JUSTICE DENIED, *supra* note 32, at 81.

116. Bykowicz & Bishop, *supra* note 33; see also Brief for Honorable Norman S. Fletcher et al. as Amicus Curiae Supporting Defendant, Georgia Pub. Def. Standards Council v. Buchanan, 679 S.E.2d 712 (Ga. 2009) (No. S09A0440), 2009 WL 3342659, at *8–14 (describing how Georgia passed legislation in 2007 that transferred control over the Georgia Public Defender

When defenders have to fear losing their jobs or not getting future appointments or contracts as a consequence of zealous advocacy, the implications for defender culture are clear. Defenders either conform to what the judges, legislatures, and executive officials want or they are out. And too often what those officials want is not zealous, client-centered advocacy but efficient processing of cases.

Structural choices at a micro-level can also adversely affect defender independence and, in turn, defender culture. For example, some indigent defense delivery systems are structured such that one defense attorney is assigned to one courtroom for an extended period of time. Studies suggest that defenders who are assigned to one courtroom develop a desire to please that one judge.¹¹⁷ It becomes much harder for the attorney to disagree with the judge or fight against the way things are done in that courtroom, because the attorney does not want to upset the judge just before bringing another client before him. Thus, a courthouse with a one attorney per courtroom system is structurally harmful to creating an independent, zealous, client-centered defense culture.

C. ATTORNEY ISOLATION

One of the most important structural aspects of any workplace is whether its employees work alone or as part of a group. In many fields, there are advantages and disadvantages to both arrangements. In the criminal-defense context, though, the advantages are decidedly on the side of the group structure. Defenders need to work together in communities for the emotional support and motivation that it provides, the expertise and professional assistance that it brings, and the political power that comes from the strength of their combined impact.

Defending the indigent means fighting uphill pretty much all the time, facing scorn and annoyance pretty much all the time, and losing often. It's hard to stay committed under those circumstances, and it's yet harder to do alone. It is incredibly difficult for a human being to face the avalanche of hostility that defenders face day after day and withstand the immense pressure to process cases through the system. Many attorneys in model public defender offices freely admit that one thing

Standards Council to the executive branch and arguing that the system creates a conflict of interest that undermines the Georgia Public Defender Standards Council's independence).

117. See Rapping, *supra* note 4, at 192 n.60 (collecting studies).

that emboldens them and helps them keep fighting for their clients is the knowledge that their offices and their fellow defenders have their backs.¹¹⁸ When they have a success in court, they have teammates who will reinforce their sense of having done a good thing in the face of the annoyed reactions they are likely to get from other players in the system. And when they put in their best efforts and their clients are convicted anyway, their teammates pick them up, dust them off, and send them back into the game fighting.

In addition to the emotional support and motivation that a group structure provides, defenders also benefit from working together in communities because their ability to learn from one another and pool their combined intellectual resources raises the level of representation that each of them is able to provide.¹¹⁹ When a defender office has regular meetings where attorneys can discuss difficult cases and brainstorm legal strategies, public defenders can learn from the experience and expertise of their colleagues. The access to expertise and ability to pool intellectual resources is critical for underfunded defender systems. Defender offices can create databases with sample motions and briefs that allow attorneys to pool resources and save precious time by not having to reinvent the wheel each time a recurring issue arises.¹²⁰ Discussions during strategy sessions and informal conversations by the water fountain provide mentoring and support that can help attorneys spot im-

118. See, e.g., Ogletree, *supra* note 4, at 92–93 (discussing the importance of the culture at the D.C. Public Defender Service).

119. For this reason, some public defender offices have moved toward a team approach to indigent defense representation. They organize their attorneys into teams, which typically consist of a lawyer, an investigator, and a legal assistant. See, e.g., Toby Fey, *Legal Assistants: Humanizing the Criminal Justice Process*, NAT'L LEGAL AID & DEF. ASS'N, http://www.nlada.org/Defender/Defender_NDLI/Defender_NDLI_Success/Portland (last visited Apr. 4, 2016). Offices adopting holistic approaches to indigent defense representation work in teams of attorneys, social workers, mental health experts, immigration experts, and other experts to help clients get out of the system. See, e.g., ROBIN G. STEINBERG, *BEYOND LAWYERING* 5–8, <https://www.nycourts.gov/ip/partnersinjustice/Beyond-Lawyerling.pdf> (last visited Apr. 2, 2016).

120. See JOEL M. SCHUMM, *NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED* 21–22 (2012), http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf [hereinafter *THE SOLUTION IS MULTIFACETED*] (explaining how the Michigan State Appellate Defender Office created a database for attorneys to pool resources).

portant legal issues in their cases and encourage more zealous and effective advocacy.¹²¹

Group structure is also important because there is strength in numbers. When a public defender office has a policy of not taking cases once it reaches a certain caseload, line attorneys can enforce the policy. Even if the trial judge holds one attorney in contempt for refusing to take on yet another case, the next line attorney will do the same thing. Individual attorneys do not have that kind of power, because no individual attorney is a necessary player in ninety percent of a court's docket. And when a public defender office appeals the trial court's refusal to honor its caseload limits, the appellate courts will often listen.

For example, after the Missouri Public Defender Commission developed caseload standards for the state, the state Public Defender tried to enforce a limit on the number of cases it would take in accordance with those standards.¹²² When the trial courts refused to honor the caseload limits and continued to appoint the Public Defender Office to new cases, the Public Defender refused and took its case up to the Missouri Supreme Court. That court upheld both the legitimacy of the caseload standards and the public defender's authority to refuse to take on additional cases.¹²³

Similarly, in Miami, Florida, the public defender filed motions in a number of cases seeking to avoid future appointments, noting that its excessive caseload meant that it could not ethically represent additional defendants and to require it to do so would present a conflict of interest.¹²⁴ The Supreme Court of Florida agreed that the public defender should be permitted to refuse additional cases if it could show that its excessive caseload created a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.¹²⁵

121. See Ogletree, *supra* note 4, at 93 (discussing how attorneys at the Public Defender Service in Washington, D.C. would discuss their cases each day "at lunch meetings, during coffee breaks, and during informal social gatherings at the end of the day," which would lead to the development of "creative arguments that turned out to be persuasive the following day in court").

122. State *ex rel.* Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 597 (Mo. 2012) (en banc).

123. *Id.* at 612.

124. Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 279 (Fla. 2013).

125. *Id.*; see also Gene Johnson, *State High Court Limits Public-Defender Caseloads*, SEATTLE TIMES (June 15, 2012), <http://www.seattletimes.com/seattle-news/state-high-court-limits-public-defender-caseloads> (describing

Public defender offices also have lobbying and negotiating power that assigned counsel do not. It might not be worth it for a prosecutor to sit down and negotiate the contours of a discovery disclosure policy at the demand of one assigned attorney, but the prosecutor might be willing to talk to the head of a public defender office because the public defender office represents the vast majority of clients and has power to interfere more with the prosecutor's operations.

For all of these reasons, the group structure of public defender offices tends to create a culture of more zealous defense advocacy. Lawyers in assigned-counsel systems rarely have a sense of community with their fellow defenders that enables them to stand up to the pressures of the system over time. To be clear, I don't mean to suggest that an assigned attorney cannot zealously fight for her clients. I know some who do. But an indigent defense delivery system structured around sole practitioners or loosely affiliated groups of lawyers is not a system that lends itself to a culture of vigorous defense advocacy.

Empirical studies confirm that public defenders perform better for their clients than court-appointed lawyers. In Philadelphia, for example, one in five homicide defendants is randomly assigned to a public defender, and the other four get court-appointed private attorneys. Researchers at the RAND Corporation used this random assignment to study murder case outcomes and found that, "compared to appointed counsel, public defenders in Philadelphia reduce their clients' murder conviction rate by 19% and lower the probability that their clients receive . . . life sentences by 62%."¹²⁶ Public defenders reduce the overall expected time served in prison by 24%. The researchers interviewed judges, public defenders, and appointed defense attorneys and offered the following explanation for their results: "We find that, in general, appointed counsel have comparatively few resources, face more difficult incentives, and are more isolated than public defenders. The extremely low [pay] reduces the pool of attorneys willing to take the appointments and makes extensive preparation economically undesir-

caseload limits imposed by the Washington Supreme Court); Jim Seckler, *Judge Allows Public Defender To Withdraw from 39 Felony Cases*, MOHAVE DAILY NEWS (Dec. 18, 2007), http://www.mohavedailynews.com/news/local/judge-allows-public-defender-to-withdraw-from-felony-cases/article_d877bab3-2ba7-5901-a459-85a970fb6873.html (describing one superior court judge in Mohave County, Arizona, who permitted the public defender's office to withdraw from thirty-nine felony criminal cases due to its caseload).

126. Anderson & Heaton, *supra* note 28, at 154.

able.”¹²⁷ An analysis of Bureau of Justice Statistics suggests that this effect is not limited to murder cases or to Philadelphia.¹²⁸

This is not to say that the problem of attorney isolation does not exist at all in public defender systems. Many public defender systems do not sufficiently take advantage of their group structure to provide support that encourages zealous advocacy. They don’t have regular brainstorming sessions. They don’t use their collective power to try to raise the level of representation in their jurisdiction. In many such offices, the attorneys may feel that the lack of sufficient time to handle overwhelming caseloads makes office meetings and strategy sessions seem like impossible luxuries. But that view is shortsighted. In the slightly longer run, investing in the benefits of group structure can have important positive effects on defender culture.

D. INADEQUATE TRAINING

In 1961, there was little training about how to effectively or zealously represent indigent criminal defendants. Courts routinely pressed young, inexperienced lawyers into service representing indigent clients.¹²⁹ Elite law schools did not present indigent defense as a viable career option, so there was no education in law school about how to be a defender.¹³⁰ Because most defender jobs carried either no salary or an incredibly low

127. *Id.* at 188.

128. See THOMAS H. COHEN, WHO’S BETTER AT DEFENDING CRIMINALS? DOES TYPE OF DEFENSE ATTORNEY MATTER IN TERMS OF PRODUCING FAVORABLE CASE OUTCOMES 48 (2011), <http://ssrn.com/abstract=1876474>; see also Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007), <http://www.nber.org/papers/w13187> (analyzing the federal indigent defense system and concluding that, “[i]t appears that public defenders outperform CJA panel attorneys in all outcomes that were considered”).

129. See Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 719, 725 (1961) (describing how judges “would appoint an attorney who happened to be in the courtroom” and the attorney would then “tak[e] the accused to a corner to talk to him for five minutes, return[], and enter[] a plea of guilty”); David, *supra* note 23, at 756–57 (“I have seen the judge scan the courtroom and summon to the indigent’s defense the first young lawyer whom he recognized that morning. I have seen another reach for a list of names he kept under the corner of his blotter; the names were those of young lawyers who had requested that they be assigned for the experience.”).

130. See Mayeux, *supra* note 69, at 35 (“[E]lite law schools neither expected nor encouraged their students to pursue criminal defense as a permanent career.”).

salary, the best-trained lawyers did not enter this line of work.¹³¹

Much is different today, but the failure to train entry-level defenders adequately persists.¹³² Elite law schools now have public service offices that encourage and help students interested in pursuing careers in public interest law,¹³³ and the clinical offerings at most law schools include clinics for law students interested in careers in indigent defense. Many public defender offices offer salaried positions, and more top law students are drawn to public service careers. Despite these advances, most entry-level public defenders still learn how to do their job on the job.¹³⁴ To be sure, something similar could be said about entry-level lawyers in many areas of legal practice, at that broad level of generality. Private-firm lawyers learn how to be private-firm lawyers in substantial part at the firm, rather than arriving fully trained. But it would be a mistake to think that the circumstances are so similar. An entry-level lawyer at a private firm is not, in her first month, thrown unsupervised into a meeting with a client, having been told that she is the sole attorney on the case and that she must, right away, handle the litigation of some matter on which the client's interests vitally depend. In contrast, a new public defender is often put right into the courtroom (sometimes multiple courtrooms at a time) with a docket full of clients. In a good office, new public defenders get a few weeks of training first.¹³⁵ But even that is not as common as it should be.

Anyone who has been in a courtroom knows that it is an environment filled with rules and established procedures—

131. Cuff, *supra* note 129, at 723 (“Reputable and busy lawyers generally find it impractical to volunteer their services for unproductive and unremunerative criminal work.”); see also Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 840 (1961) (“The highest minded and the most competent are not, as a group, the lawyers most attracted to criminal work.”).

132. Boruchowitz et al., *supra* note 10, at 39–40 (describing the lack of training for misdemeanor attorneys).

133. See, e.g., *Public Interest*, UNIV. OF MICH. LAW SCH., <https://www.law.umich.edu/careers/pubintcomm/Pages/default.aspx> (last visited Apr. 4, 2016) (describing the University of Michigan Law School's Public Interest programs).

134. Peng, *supra* note 7 (describing the experience of one public defender who noted that “the week I passed the bar in 2013, I began representing people facing mandatory life sentences on felony charges”).

135. Boruchowitz et al., *supra* note 10, at 40–41 (describing model training programs in Philadelphia, Kentucky, Massachusetts, and Washington, D.C.).

everything from where people sit to when they are permitted to talk is a matter of routine practice. These routines have been established by the local court rules or the trial judges with the goal of efficiently processing cases through the system. When new attorneys are placed in this regimented environment, many of them do the most rational thing: they look around and follow the lead of the more seasoned attorneys in the courtroom. Sit where they sit. Argue when they argue. To figure out what arguments to make during sentencing hearings, watch a few and follow suit. This mimicry replicates the existing quality of indigent defense representation in the jurisdiction.¹³⁶ When that quality is low, as is too often the case (because, of course, the more senior lawyers also did not get adequate training),¹³⁷ the failure to train entry-level attorneys or teach them that something could be done differently often means that entering lawyers become new cogs in the machine that processes people on their way to prison.¹³⁸

When an idealistic, energetic new lawyer comes and tries to elevate the level of practice in a jurisdiction, she is often immediately shut down—not just by the prosecutor but by the judge. “That is not the way we do things here.” “Sit down, counselor.” “Save that argument for your appeal.” Many attorneys are threatened with contempt or actually jailed for trying to zealously represent their clients.¹³⁹ The message to the new attorney is clear: we have a way of doing things here, and you can’t rock the boat.

Without training and support, the line attorney won’t have strategies for figuring out how to navigate this hostile environment. What should she do? Keep fighting for what she thinks is right even when it falls on deaf ears and alienates her from court personnel in ways that might wind up hurting her clients? Or play along, compromise with the culture, and just

136. See Rapping, *supra* note 4, at 190–91.

137. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 (2004) (“[Y]ear after year, in study after study, observers find remarkably poor defense lawyering.”).

138. See Steve Hanlon, *Needed a Cultural Revolution*, 39 HUM. RTS. 2 (2013) (“[T]he principal function of all of the players in the criminal justice system . . . is to serve as a facilitator for the mass overincarceration of a nation that now incarcerates a greater proportion of its population than any other nation in the world.”).

139. See Rapping, *supra* note 4, at 196–97; see also *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009, at *2 (Ohio Ct. App. Dec. 31, 2008).

try to do what she can in small ways? For many young, idealistic lawyers, the latter choice quickly seems like the only realistic option. Their idealism is beaten out of them, and they wind up indifferent or depressed.¹⁴⁰

With a different kind of training, accepting the existing culture might not seem like the only realistic option. There are ways to fight against a bad culture and elevate the level of practice in a jurisdiction. But these courses of action are not easy, and they may not be intuitive, and they are hard to pursue without guidance and support—and a particular kind of training.

Lawyers don't typically get the relevant training in law school, and it is different in kind from the training that entry-level defenders who are lucky enough to get some training often do receive. Some offices train incoming lawyers in standard court practices, client interviews, substantive legal issues, and trial advocacy skills. But too many offices don't teach lawyers about how to stand up against the avalanche when it comes or what strategies to use to fight against the pressure to move things along quickly—when to use smaller and more subtle moves and when to pull in bigger guns, what those moves look like, when to stand your ground and when to change direction and try something else.

Moreover, far too many offices provide little to no training about how to develop good working relationships with indigent clients—how to make your clients feel understood without being patronizing, how to communicate effectively with clients whose backgrounds are different from yours, how to gain their trust when their life experiences have taught them not to trust, and how to make your clients feel like partners who have a voice in what happens in their cases. In some offices, the very structure of the office inhibits the development of a real attorney-client relationship. For example, some public defender offices have adopted horizontal representation systems under which attorneys are assigned to stages of the criminal process rather than clients.¹⁴¹ In a horizontal representation system, a

140. Cf. Ogletree, *supra* note 4, at 88 (explaining how, due to the rigors and challenges of the job, many public defenders “tell of losing their motivation to be a crusader because they have become jaded, disillusioned, or cynical about the work”).

141. See Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1254–55 (2006) (describing horizontal representation models). Horizontal representation permits attorneys to progress slowly through the trial process, becoming expert at each stage in the

client encounters a different lawyer each time he goes into court. That is no way to develop client-centered representation.

Many indigent defendants feel ignored and confused because defense lawyers don't communicate with them effectively. Not surprisingly, defenders who are not taught how to communicate effectively with their clients often fail to develop the important client relationships that are essential to providing client-centered representation. As a result, clients' confusion, mistrust, and frustration color their experience of the system. Defenders themselves also experience high levels of anger and frustration. After all, defenders who never learn how to stand up to the pressure of the justice system often flounder when they try and wind up either giving up or burning out.

E. INADEQUATE OVERSIGHT

Too often, defenders' performance is never evaluated.¹⁴² There is no constructive feedback from, or substantive review by, a supervisor. Promotions are often dependent on length of time in the office rather than the quality of the attorney's performance, so there is no "need" to genuinely assess performance.¹⁴³ There are no bonuses available to reward zealous advocacy: defender offices don't have funds to pay defense attorneys a fair salary, let alone give them extra. A good public defender office has informal ways of recognizing its zealous advocates, but often the attorneys are all so overworked that there is hardly time to notice.¹⁴⁴

For panel attorneys who do not work in public defender offices, there is often no supervisor evaluation because there is no real supervisor at all. The official who coordinates appointments is often nothing more than that; she does not analyze or question the quality of the representation provided. And the local bar associations do a terrible job of finding and removing

process before moving on to the next phase, but they compromise client relationship building in the process. *Id.* at 1255.

142. See Boruchowitz et al., *supra* note 10, at 40 ("[P]erformance reviews are non-existent.").

143. See Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371, 392 (2015) (describing "the common defender-office practice of promoting and remunerating lawyers solely on the basis of length of service").

144. See Boruchowitz et al., *supra* note 10, at 40 (describing one Florida public defender who said that there were two senior attorneys assigned to supervise thirty misdemeanor attorneys in the office, and the two senior attorneys had their own felony caseloads).

ineffective attorneys. The lax judicial standard for judging the effectiveness of a trial attorney's performance¹⁴⁵ means that the judiciary has stood by for decades while sleeping lawyers, drunk lawyers, and lawyers who routinely violate their ethical duties to their clients continue to take on indigent defense cases.¹⁴⁶ This lack of oversight allows poor cultural norms to develop unchecked. It is clearly part of the reason why we have a cultural problem in indigent defense representation.

With county-based funding, a lack of independence, isolated attorneys, inadequate training, and no real oversight of attorney performance, it should come as no surprise that indigent defense delivery systems around the country are in crisis. Although we have come a long way since *Gideon*, the very structure of indigent defense delivery systems in this country continues to create a culture of indifference.

II. A TIME FOR CHANGE

As was true in 1961, there is reason to believe that change is coming to state criminal justice systems in general and indigent defense delivery systems in particular. Legislators, executive officials, judges, and bar associations are expressing concern about the indigent defense crisis, mass incarceration, overcriminalization, and policing, and are looking for ways to work together to reform the criminal justice system.¹⁴⁷ The public also seems more supportive of criminal justice reform than

145. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (requiring the defendant to show that his counsel performed unreasonably given prevailing norms of practice and that counsel's errors were serious enough to undermine confidence in the outcome of the case); *id.* at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

146. See, e.g., Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2679–80 (2013) (“As Senator Patrick Leahy has remarked, ‘Too often individuals facing the ultimate punishment are represented by lawyers who are drunk, sleeping, soon-to-be disbarred or just plain ineffective.’” (quoting 150 CONG. REC. S11,613 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy))); see also DAVID COLE, *NO EQUAL JUSTICE* 78–79 (1999). For a discussion of how poor attorney performance norms can be incorporated into the *Strickland* standard itself, see Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator: Strickland’s Potential for Incorporating Underfunded Norms into Legal Doctrine*, 5 FAULKNER L. REV. 199 (2014).

147. See, e.g., Eric Holder, U.S. Att’y Gen., Address at the American Bar Association National Summit on Indigent Defense (Feb. 4, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent> (discussing collaborative efforts and steps toward reform); see also *infra* notes 152–68.

in the past.¹⁴⁸ No, we are not likely to see big, revolutionary, pro-defendant change. But at least *some* change is possible, and even likely.

In the last fifteen years, governors, state supreme courts, and state legislatures have all played roles in creating more than a dozen new indigent defense oversight bodies in states across the country.¹⁴⁹ Most of these bodies take the form of Indigent Defense Commissions that are charged with overhauling the indigent defense delivery systems in the state. And many of them are currently taking bold and important strides, trying to improve indigent defense delivery systems.

They have gotten some help from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, which, in 2002, promulgated the Ten Principles of a Public Defense Delivery System in order to give policymakers restructuring indigent defense delivery systems "a practical guide" containing "the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation" for the poor.¹⁵⁰ In 2006, the ABA Ethics Committee issued Formal Opinion 06-441 saying that lawyers must move to withdraw and advise the court not to make any new appointments if they are unable to ethically represent more clients because of excessive caseloads.¹⁵¹ In 2009, the ABA built on that opinion by adopting the Eight Guidelines of Indigent Defense Related to Excessive Caseloads.¹⁵² Public defenders in Florida and Missouri who followed the ABA's guidelines and refused to take on additional cases

148. See *infra* notes 169–70.

149. See INDIGENT DEFENSE SERVICES, *supra* note 20 (describing state commissions); Backus & Marcus, *supra* note 81, at 1103–17 (discussing recent state legislative reforms in Texas, Georgia, Virginia, Washington, and Montana); Laurin, *supra* note 63, at 337–38 (“[T]he most recent wave of commission formation, which occurred since 2000, has seen the formation of eleven new oversight bodies, mostly taking the form of independent state commissions . . .”).

150. TEN PRINCIPLES, *supra* note 9.

151. See ABA COMM. ON ETHICS & PROF. RESP., FORMAL OPINION 06-441 5 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf.

152. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf.

recently won important victories in their state supreme courts.¹⁵³

Courts around the country have also helped to catalyze indigent defense reform. In addition to the recent cases in Florida and Missouri, the Washington Supreme Court recently adopted caseload limits for public defenders, modeled on the ABA's standards.¹⁵⁴ In New York, the ACLU filed a class action lawsuit in state court challenging the constitutionality of the state's indigent defense delivery systems.¹⁵⁵ After the New York Court of Appeals agreed to let the class action suit proceed to discovery, the state settled, agreeing to make significant changes to indigent defense delivery systems in five of its counties.¹⁵⁶ And the United States Supreme Court has recently paved the way for more ineffective-assistance-of-trial-counsel claims to be heard in federal habeas courts.¹⁵⁷

Federal executive officials are also taking steps to address the indigent defense crisis. Former Attorney General Eric Holder highlighted the need to address the indigent defense crisis shortly before President Obama announced the creation of an Office for Access to Justice, designed to work with federal, state, and local stakeholders to increase access to effective counsel for the poor.¹⁵⁸ In 2013, that Office announced \$6.7 million in federal grants designed to improve legal defense services

153. *See* Pub. Def., Eleventh Judicial Cir. of Fla. v. State, 115 So. 3d 261, 278 (Fla. 2013); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012) (en banc).

154. *See* Johnson, *supra* note 125.

155. *See* Hurrell-Harring v. State, 930 N.E.2d 217, 219 (N.Y. 2010).

156. *Settlement Begins Historic Reformation of Public Defense in New York State*, N.Y. CIVIL LIBERTIES UNION (Oct. 21, 2014), <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state>. Other ACLU chapters around the country have filed similar lawsuits and garnered other victories. *See, e.g.*, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (holding that two Washington cities' public defense systems deprived indigent defendants of their Sixth Amendment right to counsel); *see also* Complaint at 2–3, *Tucker v. Idaho*, No. CV 0C1510240 (Idaho Dist. Ct. June 17, 2015), <https://www.aclu.org/legal-document/tucker-et-al-v-state-idaho-et-al-complaint>.

157. *See* Trevino v. Thaler, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

158. Eric Holder, U.S. Att'y Gen., Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent> (discussing the fact that public defenders are “under-funded” and “buried under the[ir] caseloads” such that they can’t “interview their clients properly, file appropriate motions, [or] conduct fact investigations”).

for the poor.¹⁵⁹ Although some of that money was for direct services, much of it went to training and leadership development for public defender offices and empirical studies designed to provide metrics for measuring the quality of indigent defense services.¹⁶⁰ Federal legislators are now calling for the development of a National Criminal Justice Commission to review comprehensively state and federal criminal justice systems, including indigent defense delivery systems.¹⁶¹

Researchers have also begun to focus on the indigent defense crisis and are now using empirical tools to assess the efficacy of indigent defense delivery systems.¹⁶² Many state indigent defense commissions have pushed for an incorporation of evidence-based practices into the provision of indigent defense services.¹⁶³

Beyond the indigent defense crisis, other political movements surrounding criminal justice issues present possibilities for more indirect indigent defense reform. The spate of recent DNA exonerations has motivated many in the system to want to address errors.¹⁶⁴ The National Institute of Justice has announced that it is partnering with Milwaukee, Philadelphia, and Baltimore to pilot a sentinel events review process for the criminal justice system.¹⁶⁵ The concept of sentinel events review, which was borrowed from the medical and aviation fields, takes on board the idea that error is endemic to every system and that stakeholders who come together after an error occurs to analyze how various aspects of the system led to that error can learn lessons that are important to preventing future

159. Press Release, Dep't of Justice Office of Pub. Affairs, Attorney General Holder Announces \$6.7 Million To Improve Legal Defense Services for the Poor (Oct. 30, 2013), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-67-million-improve-legal-defense-services-poor>.

160. *Id.*

161. National Criminal Justice Commission Act of 2015, S.1119, 114th Cong. (2015).

162. See Laurin, *supra* note 63, at 340 (describing the push for data).

163. *Id.* at 338–54 (describing the actions of commissions in North Carolina, Texas, and New York).

164. See GARRETT, *supra* note 43, at 5 (describing exonerations).

165. James M. Doyle, *Learning from Error in the Criminal Justice System: Sentinel Event Reviews*, in U.S. NAT'L INST. OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf>; see also KATHARINE BROWNING ET AL., PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS 2 (2015), <https://www.ncjrs.gov/pdffiles1/nij/249097.pdf>.

harms.¹⁶⁶ Police, prosecutors, defenders, judges and other stakeholders in these cities will come together to test the potential of a systematic, nonblaming effort to learn from error in the field. If successful, other cities could think about using sentinel events review to suggest policy reforms that would affect indigent defense delivery systems and the criminal justice system more generally.

The focus on reducing mass incarceration also has prospects for helping with the indigent defense crisis. As President Obama recently emphasized, even though the U.S. is home to only 5% of the world's population, it houses 25% of the world's prisoners, and it costs over \$80 billion a year to maintain this prison system.¹⁶⁷ Conservative and liberal politicians agree that something needs to be done to stem the rising costs of the prison population.¹⁶⁸ Many states have begun to focus on decriminalizing and/or reclassifying low-level offenses as civil infractions. For example, voters in Washington and Colorado recently used ballot measures to legalize marijuana possession¹⁶⁹ and California voters recently rolled back that state's "three strikes" law by requiring that an offender's third strike be violent before it may trigger a twenty-five-years-to-life sentence.¹⁷⁰ On the federal level, the Justice Department's "Smart on Crime" Initiative encourages prosecutors to refocus their efforts on the worst offenders and pursue mandatory minimum sentences less often.¹⁷¹ To the extent that the answer to the mass

166. See BROWNING ET AL., *supra* note 165, at 3.

167. President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [hereinafter Remarks by the President].

168. Edwin Meese III started the "Right on Crime" movement and was joined by several other notable conservatives who agree that we need to reduce incarceration. See *Statement of Principles*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform/statement-of-principles> (last visited Apr. 4, 2016); Peter Baker, '16 Rivals Unite in Push To Alter Justice System, N.Y. TIMES, Apr. 28, 2015, at A1; Charlie Savage, *Trend To Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14.

169. See Sam Becker, *Seven States on the Verge of Marijuana Legalization*, CHEAT SHEET (Oct. 15, 2015), <http://www.cheatsheet.com/business/5-states-and-one-city-ready-to-legalize-marijuana.html>.

170. See Erik Eckholm, *Out of Prison, and Staying Out, After 3rd Strike in California*, N.Y. TIMES, (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/us/california-convicts-are-out-of-prison-after-third-strike-and-staying-out.html>.

171. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), <http://www.justice>

incarceration problem involves decriminalization, reclassification, and/or fewer criminal prosecutions, it could significantly reduce public defender caseloads.¹⁷²

I do not want to overstate the case. Many are pessimistic that real change in indigent defense is likely to come.¹⁷³ And given how long these cultural problems in indigent defense delivery systems have existed and how difficult it is to generate the requisite political will to help indigent criminal defendants,¹⁷⁴ their skepticism is understandable. That said, given the trends described above, it seems that there is at least some room for reform. So it is important to think about what sorts of reforms would be effective. My suggestion, of course, is that we should be thinking in particular about structural reforms that will improve the culture of indigent defense delivery.

[.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf](http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf). President Obama has called on Congress to reduce or eliminate mandatory minimum sentences for non-violent drug offenders and has begun commuting the sentences of dozens of people who were given lengthy prison sentences for non-violent drug convictions. See Remarks by the President, *supra* note 167. Bipartisan legislation is currently making its way through an otherwise-gridlocked Congress to reduce the number of mandatory minimum sentences imposed for non-violent drug offenders. See, e.g., Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2123/text>; see also Press Release, Dep't of Justice, Office of Pub. Affairs, Deputy Attorney General Sally Quillian Yates Written Testimony Before the Senate Judiciary Committee on the Sentencing Reform and Corrections Act of 2015 (Oct. 19, 2015), <http://www.justice.gov/opa/pr/deputy-attorney-general-sally-quillian-yates-written-testimony-senate-judiciary-committee> (expressing support for the bipartisan bill).

172. See, e.g., THE SOLUTION IS MULTIFACETED, *supra* note 120, at 9, 17 (describing one county in Washington that created a diversion program for suspended drivers that reduced defender caseloads by one-third); see also Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701 (2013) (noting that reclassification and diversion can “reduc[e] defender caseloads while also conserving scarce judicial and prosecutorial resources”).

173. See, e.g., John H. Blume & Sheri L. Johnson, *Gideon Exceptionalism?*, 122 YALE L.J. 2126, 2147 (2013) (lamenting that “*Gideon* will remain an unfulfilled dream of what could and should have been”); Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 449 (2015) (explaining how “the formalist *Gideon* framework . . . falls apart as a descriptive mechanism at the bottom”); George C. Thomas, III, *How Gideon v. Wainwright Became Goldilocks*, 12 OHIO ST. J. CRIM. L. 307, 318 (2015) (“[L]egislatures ignore the many pleas for better funding for indigent defense because they have as much defense as they want . . .”).

174. See generally Steiker, *supra* note 172 (describing the failure of *Gideon* to live up to its potential as a failure of political will).

III. FOCUSING REFORM PROPOSALS ON IMPROVING DEFENDER CULTURE

As reformers think about ways to fix this country's broken indigent defense delivery systems, they must address longstanding cultural problems.¹⁷⁵ In this Part, I will discuss proposals for reform. More specifically, I will examine how changes in structure, training, and oversight could improve the culture of indigent defense.

A. STRUCTURE

A focus on ensuring a culture of zealous, client-centered advocacy should push states toward the adoption of statewide public defender systems in lieu of county-based or assigned-counsel systems. It should ensure structural independence and statewide funding for public defender's offices. It should also inform how those offices are internally structured. The interest in fostering a proper culture of client-centered advocacy should also affect the structure of panel systems, which will always be necessary to deal with conflicts cases. I will discuss each of these in turn.

Public Defenders Instead of Appointed-Counsel Systems. Fifty-five years ago, symposium writers recognized that a public defender system would provide more zealous and effective advocacy for indigent defendants than an assigned-counsel system.¹⁷⁶ Empirical research has proven them right.¹⁷⁷ From a cultural perspective, a public defender system has a number of advantages over the assigned-counsel system. Placing defenders together in one geographic location catalyzes collaboration, the sharing of information, and the development of support systems that are otherwise unlikely to develop. A public defender's office with regular brainstorming sessions draws on the collective experience and wisdom of the group. It promotes the development of an expert, professional defense bar. The physical proximity of the attorneys provides opportunities for informal mentoring and emotional support.

For all of these reasons, more and more states have recognized the need for organized and dedicated public defender of-

175. See *supra* Part I.

176. See, e.g., Cuff, *supra* note 129, at 722–23; David, *supra* note 23, at 760–62; Pollock, *supra* note 49, at 744–47.

177. See sources collected *supra* notes 126–28.

fices.¹⁷⁸ That said, there are still a significant number of counties where indigent defense representation is handled by assigned attorneys.¹⁷⁹ As reforms are contemplated, the first step toward changing culture is creating centralized public defender offices where attorneys can lean on one another, develop expertise, get necessary support, and find strength in their numbers.

Statewide Public Defender Office Rather than County-Based System. As discussed above, the structural decision to locate funding and organizational responsibility for the provision of indigent defense at the county level creates a more impoverished and less stable defender culture.¹⁸⁰ The public defender's budget waxes and wanes as a result of the county's relative wealth and crime rate.¹⁸¹ And a county-based system is far more likely to be dependent on local politics.¹⁸² This undermines defenders' abilities to provide zealous, client-centered representation. Reformers should recognize that statewide public defender offices are more able to create a culture of zealous advocacy, because they have more stable institutional resources, collective bargaining power, combined expertise, and independence than county-based public defender systems. The American Bar Association has indicated in the past that statewide systems are preferable to county-based systems.¹⁸³ In its 1992 Standards for Criminal Justice, the ABA explained that "[c]onditions may make it preferable to create a statewide system of defense,"¹⁸⁴ and the commentary to that provision emphasized that state programs "have shown their ability to grow

178. See INDIGENT DEFENSE SERVICES, *supra* note 20 (describing public defender offices in the states).

179. See *id.*

180. See discussion *supra* Part I.A.

181. See, e.g., Rapping, *supra* note 4, at 183–84.

182. See discussion *supra* Part I.B. Local political control might be advantageous for prosecutors who have to make community judgments about whether to pursue charges. When community values are at issue, the more localized the decisionmaker, the more that decisionmaker might be beholden to the community that she represents. However, local control is disadvantageous for defenders whose job is to provide zealous, client-centered advocacy. As discussed *supra* Part I, local political and financial pressures often undermine zealous defense advocacy.

183. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.2(c) (AM. BAR ASS'N 1992), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html.

184. *Id.*

and change with the times while maintaining financial stability.”¹⁸⁵

If a state cannot create a statewide defender office either due to a lack of resources or a failure of political will, it should still attempt to replicate some of the cultural benefits that come from statewide offices. It should try to provide statewide funding of indigent defense even if the delivery systems are chosen at the county level.¹⁸⁶ That would at least ensure more financial stability and more independence from the influence of local politics. The state could also condition receipt of state funding on the development of certain practices that facilitate good professional culture,¹⁸⁷ including regular meetings and brainstorming sessions for defenders, regular meetings of the county public defender chiefs with an eye toward collaboration, and the maintenance of statewide databases and email listservs for communication and distribution of materials so as to capitalize on the expertise of others in different counties.¹⁸⁸

Structural Independence. Public defender agencies need to be sufficiently independent of governmental officials—executive, legislative, or judicial—that they can provide zealous representation to their clients without fear of losing their jobs or their funding. There was some debate in the 1961 right-to-counsel symposium about how best to achieve this independence, with the major question being whether a defender association should be an independent, non-profit corporation governed by a board of directors or a government agency.¹⁸⁹

185. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES § 5-1.2 Commentary 9–10 (3d ed. 1992).

186. JUSTICE DENIED, *supra* note 32, at 55–57 (describing trend toward statewide funding); see also SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE, JUSTICE POLICY INST. 4 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf (“[I]n the past decade, more systems have been moving towards full or greater statewide funding, recognizing that statewide funding structures offer a number of advantages.”).

187. *Cf.* Steiker, *supra* note 172, at 2709 (suggesting that the federal government should condition disbursement of federal funds for criminal justice upon state compliance with minimal standards for the provision of indigent defense).

188. In Michigan, for example, the State Appellate Defender Office has created a legal resources website where attorneys throughout the state can access motions, briefs, manuals, and training materials. See THE SOLUTION IS MULTIFACETED, *supra* note 120.

189. Compare Cuff, *supra* note 129, at 720–22 (extolling the virtues of a state-sponsored public defender system), with Pollock, *supra* note 49, at 747–49 (arguing for a voluntary defender).

The major advantage of organizing a public defender office as a non-profit corporation is independence. The Defender Association of Philadelphia, for example, has a Board composed of three groups of directors chosen by three different constituencies—the city government, the organized bar, and the community.¹⁹⁰ Under that structure, the government cannot fire the chief defender if zealous representation is compromising too many prosecutions. At the same time, there is also a risk that the funding for a non-profit organization will not be stable.¹⁹¹ A government-funded public defender has more financial stability but also may not be as independent.¹⁹² The best system would be one that is state funded but has an independent, public interest board of trustees.¹⁹³ Obviously, there will be tradeoffs between how much the state is willing to fund a public defender organization and how much control it has over that agency. Reformers will have to make difficult choices along these lines, but these choices should be made with an understanding that independence is absolutely essential to a culture of zealous advocacy.

Internal Structure. Internally, public defender offices can do more to develop a culture of zealous, client-centered advocacy. They can adopt standards that include caseload limits and lobby the legislature or resort to the courts to try and enforce

190. *History*, DEF. ASS'N OF PHILA., <http://www.philadefender.org/history.php> (last visited Apr. 4, 2016).

191. As one Philadelphia defender writing for the symposium recognized, “the United Fund on which the Defender Association heavily relies for financial support has not been able to provide even the minimum needed by the Association to maintain present services.” Pollock, *supra* note 49, at 751.

192. The Maryland Office of the Public Defender, for example, has a thirteen member Board of Trustees, but eleven members are “appointed by the Governor with the advice and consent of the Senate and one member each appointed by the President of the Senate and the Speaker of the House of Delegates.” The Board, in turn, appoints the Public Defender for a six-year term. See PAUL B. DEWOLFE, STATE OF MD. OFFICE OF THE PUB. DEF., FISCAL YEAR 2014 ANNUAL REPORT WITH STRATEGIC PLAN 10 (2014), http://www.opd.state.md.us/Portals/0/Downloads/OPD_Annual_Report%202014.pdf. More than once, the Board has been accused of removing a public defender for political reasons. See, e.g., Bykowicz & Bishop, *supra* note 33; Ogletree, *supra* note 4, at 90 n.45 (describing the removal of a prior Maryland Public Defender “as a direct result of his criticisms of the criminal justice system in general, and the judiciary in particular”).

193. The Public Defender Service in Washington, D.C., for example, is a federally-funded independent organization. See *Mission & Purpose*, PUB. DEF. SERV. FOR D.C., <http://www.pdsdc.org/about-us/mission-purpose> (last visited Apr. 4, 2016).

them.¹⁹⁴ Empirical research shows that caseload caps work. Attorneys are able to spend more time with their clients, investigate cases more thoroughly, and provide better, more zealous representation when their cases are capped.¹⁹⁵ Indigent defense delivery systems in Washington, Massachusetts, and Wisconsin operate with caseload limits, some imposed by judicial decision and others by statute.¹⁹⁶

Obviously, public defender offices can do more with training, which I will discuss below. But in terms of structure, there are a number of other small ways to encourage zealous, client-centered advocacy. Regular office meetings and brainstorming sessions where attorneys talk about developing client relationships or discuss structural problems in the courtrooms and brainstorm strategies for effectuating change would go a long way, both in communicating the importance of zealous advocacy and in finding ways to support one another to make it happen.¹⁹⁷

Public defender administrators should avoid assigning attorneys to one courtroom for an extended period of time to ensure that they remain independent of the judiciary. At the same time, they should avoid horizontal representation systems, under which attorneys are assigned to stages of the criminal process rather than clients. Vertical representation systems that allow one attorney to form a relationship with and represent the client throughout all the stages of the trial process promote more client-centered advocacy.

Reformers can also be creative in thinking about ways to structure defenders' dockets so as to ensure zealous advocacy. In one Minnesota county, the chief defender worked with the prosecutor's office and the local judges to restructure the criminal docket to reduce the number of days when defenders had to be in court in order to give them some non-courtroom days to do important work on their cases.¹⁹⁸ The chief defender was then able to convey an important cultural message to his line attor-

194. See sources collected *supra* notes 122–25.

195. 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%20NYC_0.pdf.

196. Boruchowitz et al., *supra* note 10, at 24.

197. See Ogletree, *supra* note 4, at 92–93 (describing how the Public Defender Service for Washington, D.C. has such meetings and how effective they are).

198. THE SOLUTION IS MULTIFACETED, *supra* note 120, at 24.

neys: I have created time for you to meet with your clients, develop relationships with them, investigate and research your cases, and formulate trial strategies. That message from an administrator has important effects on the development of the professional culture.

Structuring Panel Attorney Systems. Even when public defenders are the primary indigent defense providers in a jurisdiction, there will be cases that present conflicts of interest.¹⁹⁹ Thus, some alternative method for providing assigned counsel will be necessary. When devising or revising assigned-counsel systems, states should strive to ensure that there is still a culture of vigorous advocacy. There are a number of ways to achieve this.

In some jurisdictions, well-funded law firms have taken it upon themselves to create privately funded pro bono groups that partner with local public defender offices to take on indigent defense cases. Their young associates, many of whom want to do pro bono work, are trained by the public defender office and do work in conjunction with the office to learn the workings of the system.²⁰⁰ These firms are then equipped with trained attorneys who have the financial resources and time to provide zealous advocacy and can take conflict cases. Another possibility is for the firm itself to hire an experienced and zealous former defender who then works in house with the firm's associates to guide them as they take on criminal cases.²⁰¹

If that model is not available and the jurisdiction needs to resort to an assigned-attorney system, there are a number of steps that should be taken to encourage zealous advocacy. First, panel attorneys' compensation should be structured to incentivize zealous advocacy and not encourage mass processing. Flat-fee contract systems should be replaced with systems that pay assigned counsel a reasonable hourly wage.²⁰² And regardless of the wage rate, oversight mechanisms should

199. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (discussing conflicts).

200. Williams & Connolly LLP has, for years, been partnering with the public defender office in Montgomery County, Maryland. See *Pro Bono*, WILLIAMS & CONNOLLY LLP, <https://www.wc.com/probono.html> (last visited Apr. 4, 2016).

201. Arnold and Porter has done this through its creation of a "trial training counsel" position. See Steiker, *supra* note 172, at 2710 (discussing this program).

202. See Boruchowitz et al., *supra* note 10, at 30 (advocating the ban of flat-fee contracts).

reward zealous attorneys with future appointments so as to encourage good representation instead of valuing expediency.

Alternatively, counties that need to rely on assigned-counsel systems could follow the lead of Comal County, Texas, and experiment with a client-choice model of assignment.²⁰³ With the support of the Texas Indigent Defense Commission, indigent defendants in Comal County are permitted to select the attorneys who will represent them at state expense.²⁰⁴ Attorneys who communicate effectively with their clients and partner with them will be sought after, while those who ignore their clients' wishes will not get business. Many believe that the competition this will generate will drive bad attorneys out of the market.²⁰⁵ Whether that will in fact be the predominant result of a client-choice system remains to be seen. It could well have positive cultural effects. It could also create an aura of competition that is destructive to the culture—for example, if attorneys refuse to share resources or advice with one another for fear of helping the competition. When the program's efficacy is assessed, particular attention should be paid to the culture it has created and whether it has promoted or hindered zealous, client-centered advocacy.

States should also be careful to structure any assigned-counsel, panel systems in ways that encourage zealous advocacy and avoid the funding, independence, isolation, and training problems that often infect such systems. Panel systems should be funded at the state level and attorneys should be paid out of a general fund managed by the local bar association or indigent defense commission rather than by the judges before whom the lawyers appear.²⁰⁶ Similarly, panel attorneys should not have to get judicial approval to hire experts.²⁰⁷ That too needs to be controlled by a community or public service board. There should be a supervisor for panel attorneys (a former public defender with experience) who leads regular meetings and instills a culture of vigorous and zealous advocacy in order to combat the problems of attorney isolation. Panel attorneys should attend required training sessions that focus on developing rapport with clients

203. For a full description of the Comal County program, see Schulhofer, *supra* note 20, at 544–56.

204. *Id.* at 509.

205. *See id.* at 523.

206. Many recently created indigent defense commissions are assuming this responsibility. *See* INDIGENT DEFENSE SERVICES, *supra* note 20 (explaining the roles of various indigent defense commissions).

207. *See* Ogletree, *supra* note 4, at 86 (discussing this problem).

and overcoming cultural problems in the system and they should meet regularly with the local public defenders and develop a collaborative relationship with them in order to take advantage of some of the benefits of the group culture.²⁰⁸

B. TRAINING

Many of the current training programs don't equip entering public defenders to be zealous advocates for their clients. Reform proposals should be attentive to and think about ways to use training programs to correct that problem.²⁰⁹ As Jonathan Rapping has argued, this training should begin in law schools.²¹⁰ More law schools should teach students the realities of indigent defense representation and help them think about strategies to challenge and improve deficient indigent defense delivery systems.²¹¹ This can be done in the classroom through a structured criminal justice program,²¹² through criminal defense clinics, or outside the classroom as part of a defender organization.²¹³ Law students who want to be public defenders should learn trial advocacy skills, but they should also learn about the many other skills that effective defenders need to have: how to develop a relationship with a client and learn to tell his story, how to investigate a criminal case and form a

208. The Public Defender Service in Washington, D.C. regularly invites panel attorneys to attend its training sessions. See Ogletree, *supra* note 4, at 90–91 (discussing this training).

209. See *id.* (explaining the training at the D.C. Public Defender Service); Steiker, *supra* note 172, at 2710–11 (discussing the need for training).

210. Jonathan A. Rapping, *Grooming Tomorrow's Change Agents: The Role of Law Schools in Helping To Create a Just Society*, 12 OHIO ST. J. CRIM. L. 465, 487–98 (2015) (discussing how law schools can take steps to educate future lawyers in ways that change culture in the criminal justice system).

211. See *id.* at 504 (“[I]f we are to transform legal systems designed to drive unjust outcomes, we must do more than equip law graduates with the skills and values necessary to be effective practitioners and steer them into careers that serve the public interest. We must ensure that they appreciate the challenges they will face as they strive to provide clients with what they deserve and arm them with strategies to change those systems.”); Steiker, *supra* note 172, at 2711 (“The legal academy has the privilege and responsibility of initiating young lawyers into the norms of the legal profession and educating them about the gaps between the system’s ideals and its realities.”).

212. Jonathan Rapping has created an honors program in criminal justice at Atlanta’s John Marshall Law School. See Rapping, *supra* note 210, at 501–03 (describing the program).

213. At the University of Michigan Law School, the criminal justice faculty has created a group called “MDefenders,” which is designed, in part, to give students an opportunity to talk about the challenges that public defenders face and brainstorm strategies for dealing with those challenges.

case strategy, how to negotiate with prosecutors who hold way too much power, and how to fight against the pressure to process clients through the system.

After law school, entry-level public defenders need to go through comprehensive training programs that teach them not just about trial advocacy or the mechanics of the court system they are entering but also how to relate to clients and deal with the challenges of the job. The non-profit organization Gideon's Promise provides a model for this kind of training.²¹⁴ Working together, Gideon's Promise and a set of public defender agencies select law school graduates who will first be trained by Gideon's Promise and then go to work as public defenders at the partner agencies.²¹⁵ Gideon's Promise fellows go through two weeks of intensive training designed to teach them how to build a supportive defender community, communicate with (and especially listen to) their clients, be excellent advocates, and overcome the challenges of this kind of work.²¹⁶ After going to their respective offices, the fellows come together again for a weekend every six months for three years to talk about the challenges they face and to get necessary support.²¹⁷ Moreover, each fellow is assigned to an experienced mentor for this three-year period.²¹⁸ This type of sustained, long-term investment in young public defenders is vital to cultural change.²¹⁹ Importantly, Gideon's Promise also provides training for public defense *administrators* to give them an opportunity to come together and think about how to shape the culture of indigent defense delivery systems going forward.²²⁰

Reform proposals that seek to ensure more and better training of public defenders should be attentive to whether the *type* of training that is being offered will address these cultural issues. Local bar associations and other organizations that offer

214. For a more detailed description of the training that Gideon's Promise provides, see *Our Mission, Our Movement*, GIDEON'S PROMISE, <http://www.gideonspromise.org/about> (last visited Apr. 4, 2016).

215. *Law School Partnership Program*, GIDEON'S PROMISE, <http://www.gideonspromise.org/programs/lsp> (last visited Apr. 4, 2016).

216. *Core 101*, GIDEON'S PROMISE, <http://www.gideonspromise.org/programs/core-101> (last visited Apr. 4, 2016).

217. *Id.*

218. *Id.*

219. See Ogletree, *supra* note 4, at 92 (discussing the importance of ongoing training that takes place after an attorney has been practicing).

220. See *Leadership*, GIDEON'S PROMISE, <http://www.gideonspromise.org/programs/leadership> (last visited Apr. 4, 2016).

continuing legal education should be similarly attentive to the need to offer training that addresses agency culture in addition to training that informs indigent defense lawyers about developments in the law.²²¹

Recently, a number of scholars have argued that non-lawyers should be permitted to represent criminal defendants in limited circumstances so as to ease the caseload burdens on public defenders.²²² Should the profession decide to let paralegals, social workers, or other non-lawyers play a larger role in indigent defense representation, it is crucial that these lay professionals be brought into the system with proper training and with the understanding that their role is to communicate effectively with and zealously advocate for indigent criminal defendants. The entry of a new population into the work force is an opportunity to effectuate a cultural shift.²²³

C. OVERSIGHT

Reforms should ensure that there is some meaningful oversight of defense counsel and that part of that oversight focuses on whether defense attorneys are providing zealous, client-centered representation. Public defender offices, local bar associations and indigent defense commissions, the judiciary, and the federal government all have roles to play in ensuring that defense attorneys provide zealous representation.

221. The Public Defender Service of Washington D.C. has an intensive, client-centered training program for entry-level attorneys as well as year-round continuing training requirements for practicing lawyers. See generally Ogletree, *supra* note 4, at 90–93 (discussing the PDS training model). Much of the material that PDS and other trailblazing public defender agencies who have excellent training programs use is available online or at the request of a public defender agency.

222. See Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH. L. REV. 113, 127 (2012) (advocating for lay advocacy in juvenile and misdemeanor cases); see also Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012) (“Where the law is simple and disputes are factual, paralegals, investigators, and social workers can help to investigate facts, marshal evidence, and prepare clients to tell their own stories.”); Drinan, *supra* note 71, at 1335–44 (arguing that “lay advocates can be an effective alternative to legal counsel” and suggesting possible roles for them in juvenile, misdemeanor, and bail review hearings).

223. I do not mean to take a position on whether or to what extent greater incorporation of lay professionals into the criminal justice system is a good idea. I am merely suggesting that if lay professionals are going to play a larger role in the system, they should be trained in ways that promote a culture of zealous defender advocacy.

Public Defender Offices. Cultural change, to be effective, has to be supported by the leaders of the affected organization.²²⁴ When entry-level public defenders are hired, their initial training should be followed by a period of supervision during which the importance of zealous, client-centered advocacy is stressed.²²⁵ After that period, entry-level defenders should continue to have mentors who regularly check in with them during their first year or two to ensure that they don't become cynical or disillusioned.²²⁶

Administrators in public defender offices should develop metrics designed to measure the performance of their line attorneys and should, at regular intervals, evaluate their progress. These metrics should take into account factors that indicate how zealously the attorney has represented his clients. The public defender office in El Paso, Texas, for example, surveys its clients when they enter the criminal justice system (before they meet their lawyers) to determine what they want and most value from their attorneys and then does an exit survey to gauge how effective its attorneys were at meeting those expectations.²²⁷ Client feedback is important in determining whether the clients feel that they have been listened to and are partners in determining the course of their cases.

Of course, client feedback is not the only relevant factor. Senior attorneys should observe and evaluate junior attorneys—just as would occur in other professional environments. Administrators should review court transcripts involving the attorney at regular intervals. They should speak with attorneys, investigators, and support staff who work with the attorney. They should consider what post-hiring training opportunities the attorney has taken advantage of and how she has performed in those exercises. The evaluation should also consider the candidate's reputation in the legal community. I re-

224. See David H. Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIMINOLOGY & PUB. POL'Y 133, 148 (2002) (arguing that, in order to change the mindset of the rank and file, it is necessary to convince the leadership to set the right tone and citing research showing that organizations are the most powerful determinants of the behavior of the people within them).

225. In Philadelphia, a supervisor shadows each entry-level public defender for a week after they complete training. See *Training and Continuing Legal Education*, DEF. ASS'N OF PHILA., <http://www.philadefender.org/training.php> (last visited Apr. 4, 2016).

226. See sources cited *supra* notes 211–19.

227. Hernandez & Powell, *supra* note 97, at 2370 (describing the survey).

cently read a trial transcript in which the trial judge explained to the jury before the trial started that it was “a real pleasure” for him to have that particular defense attorney in the room, because that appointed attorney didn’t “get into wasted arguments.”²²⁸ An attorney who is well liked by the judiciary or by the prosecution for not objecting or slowing things down is not someone who is being a zealous advocate for his clients. Perhaps it is not surprising that this attorney, who was praised by the judge for moving things along, was also quite willing to call his own client a “jerk,” an “ass,” and an “insufferable” person in his closing arguments to the jury.²²⁹ Indigent defense systems need performance reviews that would force supervisors to notice when an attorney disparages his own client this way, and the supervisor in such an instances should send a clear message that insulting your own client to the jury undermines the attorney-client relationship and will typically violate an attorney’s duty of loyalty to his client.

Attorneys who are not providing zealous representation should be given additional training, re-evaluated, and ultimately let go if they do not improve.²³⁰ Attorneys who are doing an excellent job should be rewarded with praise even if monetary incentives are not available. Something as small as an e-mail from the chief defender commending an attorney on a job well done or a statement at the beginning of the weekly staff meeting about some lawyers who went above and beyond that week can do a lot for office morale and encourage a culture of zealous advocacy.²³¹

228. Transcript of Trial Testimony Vol. 1 at 130, *State v. Andrew Maurice Randolph*, No. 13-33003-FC (Mich. Cir. Ct. Mar. 4, 2014) (on file with author).

229. *Id.* Vol. III at 100, 101, 109 (on file with author).

230. Sixty years ago, it was hard to find good attorneys who wanted to represent indigent criminal defendants, because elite law schools did not present indigent defense as a viable career option, and defender jobs on the East Coast were essentially voluntary in nature with either no salary or such a low salary that it made the job unattractive. See Mayeux, *supra* note 69, at 21–22 (describing this trend in the east). As “public interest law” became a growing phenomenon in the latter part of the twentieth century and as more states developed public defender organizations in the wake of *Gideon*, more lawyers wanted these jobs. Now reputable public defender offices turn away scores of applicants and have much more choice in hiring. There is competition for these jobs, and there is no reason why public defender offices cannot find zealous advocates.

231. Leaders can support office morale and promote zealous advocacy in other ways. See, e.g., Boruchowitz et al., *supra* note 10, at 47 (describing annual public defender conferences in many states, which allow public defenders from across the state come together to learn from one another). Weekly or

Local Bar Associations and Indigent Defense Commissions. Local bar associations and indigent defense commissions can play important oversight roles as well.²³² By collecting and publishing data that reveals how effective local indigent defense delivery systems are at providing zealous, client-centered advocacy, these organizations can shed light on which offices need reform while at the same time describing how model offices have been able to achieve success.

Amy Bach's "Criminal Justice Index" ranks courts on the basis of a number of metrics like cost, crime reduction, fairness, and accurate outcomes.²³³ Local bar associations or indigent defense commissions could develop a similar "Zealous Defender Index" to measure how a defender office is doing in creating a culture that promotes zealous, client-centered advocacy.²³⁴ An office's rankings would take into account many of the factors that I discuss in this Article. Oversight commissions would perform site visits, observe defenders in court, talk to former clients, and read trial transcripts as part of regular performance reviews and then rank the office. Perhaps the development of a "Zealous Defender Index" would catalyze a focus on the importance of promoting a culture of zealous advocacy and lead to improvements in a number of places.

Finally, local bar associations and indigent defense commissions could coordinate and superintend the oversight of appointed panel attorneys and ensure that they are getting the training and support that they needed to be effective, zealous advocates. They could appoint a supervisor for the panel attorneys and ensure that she regularly reviews the performance of panel attorneys through observation, an analysis of any com-

monthly newsletters with inspiring stories about the amazing work that public defenders do and how much it means to their clients can help promote zealous, client-centered advocacy. Media stories about the work that public defenders do are also important, both to promote the development of a culture of zealous advocacy and to educate the public about the valuable role defenders play. See Steiker, *supra* note 172, at 2711 (discussing the important role of the media).

232. See *e.g.*, Steiker, *supra* note 172, at 2705 ("State bar associations can also be important allies for indigent defense reformers not only in setting standards for attorney performance, but also in promoting information gathering and ultimately in producing legislation or facilitating litigation.").

233. See *The Solution*, MEASURES FOR JUSTICE <http://www.measuresforjustice.org/index.html> (last visited Apr. 4, 2016).

234. See Steiker, *supra* note 172, at 2708 (advocating for some ranking system for indigent defense services).

plaints filed, reading transcripts, and looking through case files.²³⁵

Judiciary. Judges shape the structural conditions that either foster or undermine a professional culture in which defenders provide vigorous advocacy. Trial judges should be sensitive to caseload pressures and resource constraints and be more willing to take creative pre-trial steps to address these issues. For example, Donald Dripps has argued that courts, during initial plea colloquies, should inquire in open court and make an affirmative finding that defense counsel has provided effective assistance before being willing to enter a guilty plea.²³⁶ Similarly, he contends that trial courts should inquire before a trial whether the defense is institutionally equipped to litigate as effectively as the prosecution.²³⁷ Judges who took steps to actively encourage a culture of zealous defense advocacy could do a lot to catalyze cultural change.²³⁸

Courts should also 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. As discussed above, 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.²³⁹ The Washington State Supreme Court went even further and actually approved of specific caseload limits.²⁴⁰

In many states, the mere threat that the judiciary is going to get involved has been sufficient to prompt legislative action. In Massachusetts, for example, the Massachusetts Supreme

235. See Boruchowitz et al., *supra* note 10, at 41 (making a similar recommendation).

236. Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 918 (2013) (arguing that courts could rule “that effective assistance of counsel must be established affirmatively at the plea colloquy”).

237. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) (“My thesis holds that the *Strickland* inquiry into counsel’s effectiveness *ex post* should be supplement [sic] by an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution.”).

238. See Steiker, *supra* note 172, at 2705 (imploping trial judges to refer inadequate lawyers to the bar for discipline).

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

240. See Johnson, *supra* note 125.

Judicial Court once threatened that it was going to order the release of all defendants detained pre-trial unless attorneys were appointed for them within a specific time period.²⁴¹ In response, the Massachusetts legislature increased the defender office's funding.²⁴² Cases in Georgia, Washington, Pennsylvania, Connecticut, and Louisiana have all catalyzed similar reforms.²⁴³ Judges can and should use their role in the system to catalyze structural changes and ensure zealous advocacy.²⁴⁴

Federal Government. Finally, the federal government could do more to encourage zealous defense advocacy. Congress should pass proposed legislation creating a National Criminal Justice Commission, which would create an oversight body designed to review state and federal criminal justice systems and make recommendations for improvement.²⁴⁵ As part of its mission, that body should focus on ways to create a more zealous, client-centered advocacy system in indigent defense delivery systems and should develop recommendations for granting or conditioning the grant of federal resources on steps that would improve defender culture. And the federal government should continue to earmark federal grants for states who are creative-

241. Steiker, *supra* note 172, at 2703.

242. *Id.*

243. 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 (discussing cases).

244. Public defender offices should also be willing to encourage civil rights organizations or law firms with significant pro bono practices to file civil class actions on behalf of indigent defendants alleging that systemic deficiencies in the indigent defense delivery system present a substantial risk of irreparable injury and seeking injunctive or declaratory judgments. These suits are time- and resource-intensive and have met with mixed results. See 3 CRIM. PROC. § 11.8(c) n.69 (3d ed. 2007) (describing cases); see also Drinan, *supra* note 71, at 1330–33 (noting that these suits should be used as a “last resort”). If effective, however, they have the potential to catalyze increased resources, caseload caps, or other systemic changes that could positively affect the culture of indigent defense delivery systems.

245. National Criminal Justice Commission Act of 2015, S. 1119, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1119>. As I have argued elsewhere, Congress could also enact legislation that would give the Justice Department and other deputized interest groups the power to file enforcement actions against states that engage in a pattern or practice of conduct that deprives criminal defendants of their right to effective counsel. See EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS (2010), http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf.

ly implementing some of the changes discussed above to ensure a culture of zealous advocacy in their offices.²⁴⁶

As reformers think about how to improve on indigent defense delivery systems in this country, they need to consider how the very structure of an indigent defense delivery system often serves to inhibit zealous, client-centered advocacy. Policymakers should strive to create independent, state-funded, statewide public defender offices that train entry-level defenders to be zealous, client-centered advocates. They also need to ensure that there is sufficient oversight of public defenders' performance to ensure that vigorous advocacy becomes an ingrained part of the culture of indigent defense delivery in this country.

CONCLUSION

Fifty years after *Gideon v. Wainwright* recognized a fundamental, constitutional right to counsel in criminal cases, indigent defense delivery systems in this country remain structured in ways that inhibit zealous, client-centered defense advocacy. With unstable, local funding sources; a lack of independence from the judiciary and the political branches of government; scattered and isolated appointed counsel who have no financial incentives to provide zealous advocacy; inadequate training; and a lack of sufficient oversight, it is unsurprising that there is a serious cultural problem in the delivery of indigent defense services.

But there is some reason for optimism about the future. Legislators, executive branch officials, and judges have focused on the indigent defense crisis, and many states have created indigent defense commissions to consider ways to fix our broken indigent defense delivery systems. As reformers think about how to move forward, they need to address the cultural problems that have long stood at the center of the crisis. Perhaps then we can begin to realize some of the ideals that Justice Douglas and others so wisely advocated for over fifty-five years ago.

246. See Press Release, Dep't of Justice Office of Pub. Affairs, *supra* note 159.
