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## Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems.

Bill Piatt

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# ARTICLE

*Bill Piatt*

## Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems

**Abstract.** Indigent defense remains in a state of crisis. Almost fifty years after the Supreme Court's landmark decision in *Gideon v. Wainwright*, lack of funding, favoritism, inefficiency, and poorly-designed indigent-defense plans plague the system, which can best be characterized as being in a state of disrepair. As a result, accused indigent individuals, a vulnerable population, suffer from a lack of adequate representation. This Article reviews the history and implementation of various indigent-defense systems and examines the ethical issues arising from their operation. It offers a guide to reconstructing a model system, including the suggestion that attorneys first recommit the profession to service. The Article then examines how one of the most successful programs in the country, the San Mateo (California) Private Defender Program, could be implemented by having local governments contract with bar associations to provide indigent defense.

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“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities . . . and . . . the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”<sup>1</sup>

## I. INTRODUCTION

The United States Supreme Court’s 1963 decision in *Gideon v. Wainwright*<sup>2</sup> guarantees individual criminal defendants, under the United States Constitution, the right to counsel at government expense.<sup>3</sup> As a result of the Court’s decision in *Miranda v. Arizona*,<sup>4</sup> defendants are informed of this right at the time of interrogation.<sup>5</sup> The general public is well aware of *Miranda*’s protections due to the frequent reading of these rights in the media<sup>6</sup> and their extensive incorporation in the criminal-justice system.<sup>7</sup> Eighty-eight percent of Americans believe that the government will appoint an attorney to indigent individuals charged with a crime,<sup>8</sup> though they are uncertain who provides the legal representation and who pays the legal expenses.<sup>9</sup> The public may also be unaware of something that has become obvious to the American Bar Association (ABA) and many others within the indigent-defense system: This system doesn’t work very well.<sup>10</sup> Forty years later, *Gideon*’s potential

1. MODEL RULES OF PROF’L CONDUCT pmb. para. 9 (2002).

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

3. *Id.* at 339–40 (“We have construed [the Sixth Amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.”).

4. *Miranda v. Arizona*, 384 U.S. 436 (1966).

5. *Id.* at 473.

6. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”). In *Miranda*, the Court specifically articulated that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Miranda*, 384 U.S. at 444.

7. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (“The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures . . .”).

8. BELDEN RUSSONELLO & STEWART, OPEN SOC’Y INST. & NAT’L LEGAL AID & DEFENDER ASS’N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 1, 4 (2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf> (studying public opinions about “due process and the role of lawyers who represent indigent criminal defendants”). The research included a survey of 1,500 American adults in addition to eight focus groups. *Id.* at 2.

9. *Id.* at 16 (indicating that 28% of survey participants were unsure of whether the state provided the attorney in a public-defender system).

10. See Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735 (2005) (noting an estimated 40% increase in

influence has been characterized as a broken promise.<sup>11</sup> Attorney General Eric Holder recently characterized our indigent-defense system as a “crisis.”<sup>12</sup> The magnitude of the crisis is staggering because an estimated 60%–90% of criminal defendants are indigent.<sup>13</sup> Attorney General Holder indicated that reforming the system is a “top priority for the [Obama] Administration.”<sup>14</sup>

In many instances, state indigent-defense systems’ appointment processes appear rife with favoritism, accompanied by the prevalence of incompetent and corrupt representation of individuals.<sup>15</sup> Furthermore,

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indigent caseloads, thereby indicating that a tremendous number of defendants stand to lose or gain from the effectiveness of appointed counsel).

11. See generally STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 1* (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (recommending indigent-defense reforms to combat the finding that the equal justice implied in *Gideon* remains an unfulfilled promise).

12. Eric H. Holder, Jr., Att’y Gen., Remarks at Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010) (transcript available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>); accord EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS 12 (2010), available at [http://www.acslaw.org/sites/default/files/Primus\\_-\\_Litigation\\_Strategies.pdf](http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf) (affirming that “the indigent[-]defense crisis has reached such epidemic proportions that the federal executive and legislative branches are now willing to intervene”).

13. THE SPANGENBERG GRP., U.S. DEP’T OF JUSTICE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 n.1 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

14. CARA H. DRINAN, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, A LEGISLATIVE APPROACH TO INDIGENT DEFENSE REFORM 1 (2010), available at [http://www.acslaw.org/sites/default/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform\\_0.pdf](http://www.acslaw.org/sites/default/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform_0.pdf).

15. Compare Brian Chasnoff, *Being a Favorite of Judges Pays*, SAN ANTONIO EXPRESS-NEWS, Nov. 6, 2010, [http://www.mysanantonio.com/news/local\\_news/article/being-a-favorite-of-judges-pays-801940.php](http://www.mysanantonio.com/news/local_news/article/being-a-favorite-of-judges-pays-801940.php) (“A state task force pointed out the noncompliance [with the Fair Defense Act of 2001] two months ago in a review requested by a local senator[,] . . . conclud[ing] that too many cases were going to too few attorneys.”), and Brian Chasnoff, *Review Sees Apparent Violations in Bexar Courts*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 2010, <http://www.mysanantonio.com/default/article/Review-sees-apparent-violations-in-Bexar-courts-704717.php> (quoting an anonymous respondent’s 2009 statement to the Texas Task Force on Indigent Defense that “[a] few lawyers are receiving an inordinate number of appointments” (internal quotation marks omitted)), with Laura A. Bischoff, *Some Lawyers Suspect Favoritism in Juvenile Court Appointments*, DAYTON DAILY NEWS, Mar. 6, 2010, <http://www.daytondailynews.com/news/dayton-news/some-lawyers-suspect-favoritism-in-juvenile-court-appointments-584321.html> (“[T]he distribution of the cases show that the [wheel] system is not being strictly followed, and some attorneys wonder whether favoritism plays a role in who gets the work.”), and Brian Collister, *Top Court Appointed Attorneys Rake in Big Bucks*, WOAI, <http://www.woai.com/content/troubleshooters/story/Top-court-appointed-attorneys-rake-in-big-bucks/b8RbHpH5d0OoeonwVsL5rw.csp> (last updated Nov. 8, 2010) (“The data shows that [a judge] hands most of her court appointments . . . to her political supporters and friends.”). *But see*

the rising cost of indigent defense<sup>16</sup> alarms government entities and taxpayers funding these programs.<sup>17</sup> This Article will examine the history, strengths, and weaknesses of the various mechanisms employed by state and local governments to provide indigent representation. It will also explore significant innovations and alternatives. Finally, this Article will demonstrate how individual attorneys, bar associations, and judges should comply with their ethical obligations in order to affirmatively address these concerns.

## II. HISTORY OF THE RIGHT TO COURT-APPOINTED COUNSEL

### A. Constitutional Foundation

The unamended United States Constitution did not contain any provisions guaranteeing the right to counsel, let alone the right to

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Robert I. Kahn, *Free Criminal Attorney in San Antonio*, LAW OFF. OF ROBERT I. KAHN (Dec. 10, 2010), <http://www.kahndefense.com/blog/2010/12/10/> (“Bexar task force to examine indigent defense because a small group of attorneys are receiving [a] large portion of clients. There ha[ve] to be more serious issues facing the Bexar County Courts[;] I personally see the same dedicated attorneys day after day appearing in court waiting for a case to be assigned to them. Should we fault them or should we fault the clerk for assigning cases to the attorneys that show up? No [w]ay! I’ve personally seen Pat, clerk of Bexar County [C]ourt 9 assign the cases in alphabetical order to the attorneys in the same order as they appeared in court. Is this favoritism by the court, or is this attorney[] making our court system move quick and respond to those in need?”).

16. Bill Piatt, *County Needs More Efficient Indigent Defense System*, SAN ANTONIO EXPRESS-NEWS, June 1, 2011, <http://www.mysanantonio.com/opinion/commentary/article/County-needs-more-efficient-indigent-defense-1403588.php>; accord HOLLY R. STEVENS ET AL., STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, STATE, AM. BAR ASS’N, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 6–7 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) (demonstrating that state expenditures on indigent defense rose dramatically over the years: \$991 million in 1986, \$3.3 billion in 2002, \$4.1 billion in 2005, and approximately \$5.3 billion in 2008).

17. Phyllis E. Mann, *Lawmakers Across Country Examine the Costs of Indigent Defense*, NAT’L LEGAL AID & DEFENDER ASS’N JUSTICE STANDARDS, EVALUATION, & RESEARCH INITIATIVE (May 9, 2011, 12:42 PM), <http://www.nlada.net/jscri/blog/lawmakers-across-country-examine-costs-indigent-defense> (“Financial times are bad all over, and policymakers are taking a closer look at what tax dollars are purchasing in the states’ indigent defense systems.”); see, e.g., Jeremy Roebuck & Jared Janes, *Expense of Defense: Costly Indigent Defense Program Burdened by Inefficiencies*, THE MONITOR (Dec. 19, 2009, 9:59 PM), <http://www.themonitor.com/articles/defense-33723-expense-burdened.html> (indicating that Hidalgo County, located in South Texas, spent \$8.6 million on indigent defense in 2009). See generally HOLLY R. STEVENS ET AL., STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 6–7 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) (detailing the increasing expenditures of each state’s indigent-defense programs because the systems are woefully underfunded and in a state of crisis).

government-provided counsel.<sup>18</sup> However, several of the colonies had long recognized these rights.<sup>19</sup> Because the Framers did not provide a right to counsel, states offered constitutional amendments for such as part of their ratifying process.<sup>20</sup> A list of the states and their proposals include:

- ♦ At the Pennsylvania ratifying convention, the anti-federalist minority proposed “[t]hat in all capital and criminal prosecutions, a man has a right to . . . be heard by himself and his counsel.”<sup>21</sup>
- ♦ The Maryland ratifying convention sent “Proposed Amendments” with their ratification, which included the suggestion that “in all criminal prosecutions every man hath a right . . . to be allowed council.”<sup>22</sup>
- ♦ The Virginia ratifying convention offered a proposal “[t]hat in all criminal and capital prosecutions, a man hath a right to . . . be allowed counsel in his favor.”<sup>23</sup>
- ♦ At the New York ratifying convention, where the vote for ratification was one of the hardest fought, the delegates resolved to ratify with the proposal “that in all Criminal Prosecutions, the Accused ought to [have] . . . the

18. *See generally* U.S. CONST. art. I–VII (establishing a framework for the United States’ governing principles).

19. THE MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 15, 17 (Bruce Frohnen ed., 2002) (“Every man that findeth himselfe unfit to plead his owne cause in any Court, shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee, or reward for his paines.”); *see* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 13 (2002) (tracing Pennsylvania’s and Delaware’s 1718–1719 state-appointed counsel provisions for indigents in capital trials; South Carolina’s 1731 statutory provision for up to two court-appointed attorneys upon request; and New Hampshire’s 1791 law providing court-appointed counsel in all capital crimes); HUGH RICHARD WILLIAMS, THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA 7, 9 (rev. ed. 2004), *available at* [http://pol.illinoisstate.edu/downloads/icsps\\_papers/2004/williams123.pdf](http://pol.illinoisstate.edu/downloads/icsps_papers/2004/williams123.pdf) (declaring that Connecticut began offering court-appointed indigent defense in 1750, with South Carolina, Pennsylvania, Rhode Island, and Delaware subsequently following suit).

20. *See, e.g.*, IN CONVENTION OF THE DELEGATES OF THE PEOPLE OF THE STATE OF MARYLAND (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 552, 554 (Bernard Bailyn ed., 6th ed. 1992) (proposing amendments that included a right to counsel).

21. ADDRESS OF THE MINORITY OF THE PENNSYLVANIA CONVENTION (1787), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 268, 271 (Bruce Frohnen ed., 2002).

22. IN CONVENTION OF THE DELEGATES OF THE PEOPLE OF THE STATE OF MARYLAND (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 552, 554 (Bernard Bailyn ed., 6th ed. 1992).

23. VIRGINIA RATIFYING CONVENTION (1788), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 594, 594–95 (Jack N. Rakove ed., 2006).

assistance of Council for his defense.”<sup>24</sup>

♦ On the same day as the New York ratifying convention, the North Carolina ratifying convention offered its declaration that “in all capital and criminal prosecutions, a man hath a right to . . . be allowed counsel in his favor.”<sup>25</sup>

When the First Congress under the Constitution met, it immediately set to work designing what became known as the Bill of Rights.<sup>26</sup> In a speech to Congress, James Madison expressed: “The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are[:] . . . In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defen[s]e.”<sup>27</sup> Ultimately, the House of Representatives proposed “Article the Ninth,” which stated that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defen[s]e.”<sup>28</sup> The language of Article the Ninth was delivered to the states on September 25, 1789, as “Article the Eighth,” for consideration as an amendment to the Constitution.<sup>29</sup> Article the Eighth was ratified and became the Sixth Amendment.<sup>30</sup>

24. NEW YORK RATIFYING CONVENTION (1788), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 600, 602 (Jack N. Rakove ed., 2006); *accord* RATIFICATION OF THE CONSTITUTION BY THE CONVENTION OF THE STATE OF NEW-YORK (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 536, 538 (Bernard Bailyn ed., 6th ed. 1992) (articulating that accused individuals should be granted assistance, in the form of counsel, for their defense).

25. STATE OF NORTH-CAROLINA IN CONVENTION (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 565, 565–65 (Bernard Bailyn ed., 6th ed. 1992).

26. *See* JAMES MADISON, SPEECH INTRODUCING AMENDMENTS IN THE HOUSE OF REPRESENTATIVES (1789), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 613, 616–19 (Jack N. Rakove ed., 2006) (listing the proposed amendments to be made to the Constitution).

27. JAMES MADISON, SPEECH INTRODUCING PROPOSED CONSTITUTIONAL AMENDMENTS (1789), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 332, 338–39 (Bruce Frohnen ed., 2002).

28. AMENDMENTS PROPOSED BY THE HOUSE OF REPRESENTATIVES (1789), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 629, 631 (Jack N. Rakove ed., 2006); *accord* AMENDMENTS PROPOSED BY THE SENATE (1789), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 632, 634 (Jack N. Rakove ed., 2006) (following Article the Ninth as similarly proposed by the House).

29. AMENDMENTS PROPOSED TO THE STATES (1789), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 635, 637 (Jack N. Rakove ed., 2006).

30. *See id.* (portraying the language of Article the Eighth proposed to the states); *see also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been



Only one day prior to proposing Article the Eighth, the First Congress approved the Judiciary Act of 1789.<sup>31</sup> The Judiciary Act provided “[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys[-]at[-]law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.”<sup>32</sup> The following year, Congress passed the first Federal Crimes Act.<sup>33</sup> The Crimes Act provided:

[A]ny person who shall be accused and indicted of treason . . . shall also be allowed and admitted to make his full defen[s]e by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours.<sup>34</sup>

There does not appear to be a contemporary view that the Sixth Amendment, the Judiciary Act of 1789, or the Crimes Act of 1790 intended to provide a cost-free or indigent-defense system.<sup>35</sup> Rather, the Founders apparently intended only to ensure that when a defendant in a federal prosecution wanted to be represented by counsel and could afford counsel, counsel could not be denied.<sup>36</sup> The Founders’ original view remained intact for a century<sup>37</sup> before contemporary Supreme Court

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committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.”).

31. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

32. *Id.* § 35.

33. Federal Crimes Act of 1790, ch. 9, 1 Stat. 112.

34. *Id.* § 29.

35. See HUGH RICHARD WILLIAMS, *THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA* 8 (rev. ed. 2004), available at <http://pol.illinoisstate.edu/downloads/icspapers/2004/williams123.pdf> (“No language in the definition of employ would suggest the[r]e was a guarantee of free counsel for the indigent under the Body of Liberties.”).

36. *E.g., id.* at 8, 20 (stating that “the Framers never intended the Sixth Amendment to do anything else other than allow people the right to use counsel if they could afford it”).

37. See *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (“There is no other statutory provision[] for . . . procuring the assistance of counsel . . .”); *Nabb v. United States*, 1 Ct. Cl. 173, 173 (1864) (articulating that the Act of 1790 “does not authorize the court to contract with such counsel on the credit of the United States”). *Van Duzee* asked the Court to consider whether fees to clerks were recoverable. See *Van Duzee*, 140 U.S. at 173 (“There is, however, no general obligation on the part of the government . . . [to] retain counsel for defendants or prisoners. The object of the [Sixth Amendment] was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government.”). In *Nabb*, defense attorneys, assigned by the Circuit Court of the United States

jurisprudence altered the Founders' vision.<sup>38</sup>

### B. Contemporary Development

In *Powell v. Alabama*,<sup>39</sup> the Supreme Court held that defendants are denied the protection of the Fourteenth Amendment Due Process Clause when a state denies defendants the right to counsel.<sup>40</sup> Powell, an African-American man, and two other men were charged with the rape of two Caucasian women.<sup>41</sup> The defendants were tried separately, each found guilty, and sentenced to death.<sup>42</sup> The defendants "were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed."<sup>43</sup> The Court was not swayed by the trial court generally "appoint[ing] all the members of the bar for the purpose of arraigning the defendants and then . . . continu[ing] to help them if no counsel appears."<sup>44</sup> The Court held that "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel," reasoning that anything less, particularly in a capital case, "would be little short of judicial murder."<sup>45</sup>

Six years later, in *Johnson v. Zerbst*,<sup>46</sup> the Court held that a trial judge

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for Missouri, sued the government for their fees based on an implied contract theory. *Nabb*, 1 Ct. Cl. at 173. The Court held that the government was not liable for the defense's attorneys fees, stating:

The [Sixth] [A]mendment [to] the Constitution provides that the accused shall enjoy the right to have counsel. This is the declaration of a right in the accused, but not of any liability on the part of the United States. In furtherance of the right, the [Federal Crimes] [A]ct of 1790 directs the [C]ourt to assign to the accused such counsel as he shall request. But it does not authorize the court to contract with such counsel on the credit of the United States; and the action, therefore, of the [C]ourt in this case furnishes no inference of any such contract.

*Id.* at 173. The Court reasoned that the attorneys "might have refused the appointment and did not." *Id.*

38. See *infra* Part II.B.

39. *Powell v. Alabama*, 287 U.S. 45 (1932).

40. *Id.* at 59–60, 71; cf. HUGH RICHARD WILLIAMS, THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA 23–28 (rev. ed. 2004), available at <http://pol.illinoisstate.edu/downloads/icspapers/2004/williams123.pdf> (suggesting that *Powell* is an ineffective-assistance-of-counsel case rather than a Sixth Amendment case). Based on this reasoning, *Powell* could not fall under the selective incorporation theory. HUGH RICHARD WILLIAMS, THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA 25–26 (rev. ed. 2004), available at <http://pol.illinoisstate.edu/downloads/icspapers/2004/williams123.pdf>.

41. *Powell*, 287 U.S. at 49.

42. *Id.* at 49–50, 52.

43. *Id.* at 52.

44. *Id.* at 53.

45. *Id.* at 72.

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

has a duty to ensure that the defendant's rights are protected.<sup>47</sup> The Court stated: "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is . . . essential . . . to a federal court's authority."<sup>48</sup>

However, in a 1942 decision, *Betts v. Brady*,<sup>49</sup> the Court backtracked.<sup>50</sup> In *Betts*, the trial judge refused a defendant's request for court-appointed counsel, relying on the fact that it was not the practice in that county to provide indigent defense.<sup>51</sup> The Court held that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts."<sup>52</sup> The Court continued by offering a dizzying interpretation of incorporation:

The [D]ue [P]rocess [C]lause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in *certain circumstances*, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.<sup>53</sup>

By the early 1960s, the ambiguity of the *Betts* decision was laid to rest.<sup>54</sup> In 1961, in the unanimous *Hamilton v. Alabama*<sup>55</sup> decision, the Supreme Court held that:

The guiding hand of counsel is needed at the trial "lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty

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47. *Id.* at 465 ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel."). The *Johnson* Court noted that the trial judge has a "serious and weighty responsibility" to determine whether the defendant waived the right to counsel. *Id.* "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.*

48. *Id.* at 467.

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

50. *See generally id.* at 461–62 (examining an instance where a defendant was unable to call an attorney for assistance because the Supreme Court limited the Sixth Amendment's application to federal cases by stating the right was not incorporated).

51. *Id.* at 457, 473 ("As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.").

52. *Id.* at 461 (citations omitted).

53. *Id.* (emphasis added) (footnotes omitted).

54. *See Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961) (requiring counsel to be present for defendants at arraignment in a state matter).

55. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

which is greater than the law of the [s]tate exacts for the offense which they in fact and in law committed." . . . When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.<sup>56</sup>

Thus, particular circumstances, as previously mandated by *Betts*, were no longer required to receive Sixth Amendment protection.<sup>57</sup>

Two years later, *Gideon v. Wainwright* set the contemporary standard regarding felony prosecutions.<sup>58</sup> *Gideon* was charged with breaking and entering into a pool hall, a felony in Florida.<sup>59</sup> *Gideon* specifically invoked his constitutional right to counsel but was informed by the trial judge that "[u]nder the laws of the State of Florida, the only time the [c]ourt can appoint [c]ounsel to represent a [d]efendant is when that person is charged with a capital offense."<sup>60</sup> However, the Court granted certiorari and appointed counsel to present *Gideon's* argument.<sup>61</sup>

The Court applied its earlier decisions in *Powell* and *Zerbst*, affirming the fundamental nature of the right to counsel as applied to the states.<sup>62</sup> The Court declared that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."<sup>63</sup> The Court reasoned that if prosecutors are deemed essential to protect the rights of the public, it is similarly essential that a defendant's rights be protected by counsel.<sup>64</sup> Recognizing that a defendant's rights "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him,"<sup>65</sup> the unanimous decision firmly established the indigent defendant's right to counsel in felony prosecutions, at government expense, in both federal and state courts.<sup>66</sup>

Many Supreme Court cases followed to refine and expand the guarantees originally granted in *Gideon*. Issues the Court have decided include:

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56. *Id.* at 54–55 (citations omitted).

57. *Betts*, 316 U.S. at 462.

58. *See Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (expanding the right of indigents to defense counsel to include all criminal trials).

59. *Id.* at 336–37.

60. *Id.* at 337.

61. *Id.* at 338.

62. *Id.* at 341–44 (citing *Powell v. Alabama*, 287 U.S. 45, 65 (1932)).

63. *Id.* at 344.

64. *Id.*

65. *Id.*

66. *See id.* at 343–44 (providing the right to counsel in all criminal prosecutions).

- ♦ *Douglas v. California*<sup>67</sup>—Right to counsel on first appeal of right;<sup>68</sup>
- ♦ *White v. Maryland*<sup>69</sup>—Right to counsel at critical stages includes the preliminary hearing and entering a plea;<sup>70</sup>
- ♦ *Massiah v. United States*<sup>71</sup>—Right to counsel during police questioning after formal charges;<sup>72</sup>
- ♦ *Escobedo v. Illinois*<sup>73</sup>—Right to counsel during police questioning before formal charges;<sup>74</sup>
- ♦ *Miranda v. Arizona*<sup>75</sup>—Right to counsel during custodial questioning;<sup>76</sup>
- ♦ *In re Gault*<sup>77</sup>—Right of juveniles to have counsel when confinement is a possibility;<sup>78</sup>
- ♦ *Mempa v. Rhay*<sup>79</sup>—Indigent's right to counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," including the sentencing stage;<sup>80</sup>
- ♦ *Argersinger v. Hamlin*<sup>81</sup>—Right to counsel for misdemeanors when confinement is a possibility;<sup>82</sup>
- ♦ *Ross v. Moffitt*<sup>83</sup>—No right to counsel on discretionary appeals;<sup>84</sup>
- ♦ *Scott v. Illinois*<sup>85</sup>—No right to counsel for misdemeanors when confinement is not a possibility.<sup>86</sup>

As early as 1857, the Texas Code of Criminal Procedure provided for court-appointed counsel for indigents at arraignment.<sup>87</sup> However, not all

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

68. *Id.* at 356–57.

69. *White v. Maryland*, 373 U.S. 59 (1963).

70. *Id.* at 60.

71. *Massiah v. United States*, 377 U.S. 201 (1964).

72. *Id.* at 205.

73. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

74. *Id.* at 487, 492.

75. *Miranda v. Arizona*, 384 U.S. 436 (1966).

76. *Id.* at 498–99 (“In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed.”).

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

78. *Id.* at 36.

79. *Mempa v. Rhay*, 389 U.S. 128 (1967).

80. *Id.* at 134.

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

82. *See id.* at 40 (“[E]very judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.”).

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

84. *Id.* at 610.

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

86. *Id.* at 373–74.

87. *See Marin v. State*, 891 S.W.2d 267, 269 (Tex. Crim. App. 1994) (commenting on the

states were bound to provide defendants, including indigent defendants, the right to counsel.<sup>88</sup>

### III. DEVELOPMENT OF CONTEMPORARY INDIGENT DEFENSE

The individual states, tasked with developing indigent-defense systems, received little guidance after *Gideon* and *Argersinger*.<sup>89</sup> Various methods of implementing the mandate have developed. The most common are: a public-defender system, assigned counsel utilizing a “wheel-like” system, individual contracts, and a private-defender model.<sup>90</sup> Also, there has been a recent suggestion to create a free-market system through the use of vouchers.<sup>91</sup> An analysis of the structure and function of these systems follows.

#### A. *Public-Defender Model*

In a traditional public-defender system, attorneys are hired as full-time

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instructive use of historical statutes that provided for appointment of indigent defense counsel). The Texas Court of Criminal Appeals stated:

The [appointed-counsel statute] has a legislative history spanning more than 130 years and six amendments.

The 1857 Code of Criminal Procedure provided: “When the defendant is brought into [c]ourt, for the purpose of being arraigned, if it appear[s] that he has no counsel, and is too poor to employ counsel, the [c]ourt shall appoint one or more [practicing] attorneys to defend him.”

*Id.*

88. See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030–31 (1964) (examining pre-1800 right-to-counsel statutes and constitutional provisions in Connecticut, Pennsylvania, Delaware, South Carolina, New York, New Jersey, North Carolina, Rhode Island, and Georgia); see also HUGH RICHARD WILLIAMS, *THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA* 11–19 (rev. ed. 2004), available at [http://pol.illinoisstate.edu/downloads/icsps\\_papers/2004/williams123.pdf](http://pol.illinoisstate.edu/downloads/icsps_papers/2004/williams123.pdf) (discussing the various states’ approaches to the right to counsel).

89. See THE SPANGENBERG GRP., U.S. DEP’T OF JUSTICE, NCI 181160, *CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3* (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (presenting various types of indigent-defense systems used throughout several states and commenting on the positive and negative attributes of each system).

90. See HOLLY R. STEVENS ET AL., *STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 1–2* (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.aut_hcheckdam.pdf) (providing a thorough snapshot of indigent-defense systems used in all states, including expenditures).

91. See Lew Kendall, *The Indigent Accused As a Consumer of Defense Services: Experimentation with Supplementary Voucher Systems*, CAL. ATT’YS FOR CRIM. JUST., Sept.–Oct. 1982, at 24, 28 (announcing the advantages of the voucher system as going “a long way toward mitigating the dissatisfaction of the currently captive consumers of public[-]defender services”).

employees of a government-funded office.<sup>92</sup> Typically, when an indigent is charged with a crime requiring appointment of counsel, a judge appoints the public defender's office and does not select the individual attorney(s) who will handle the case—that decision is left to the chief public defender.<sup>93</sup> Attorneys in this system are typically hired by a chief public defender.<sup>94</sup> The manner of selecting the chief public defender varies by state.<sup>95</sup> In several states, including Florida, Nebraska, Tennessee, and parts of California, the chief public defender is elected.<sup>96</sup> In other states, the county appoints a chief defender.<sup>97</sup> In the remaining states, judges make the appointment.<sup>98</sup>

Public-defender systems provide in-house training and supervision.<sup>99</sup> The government entity funding the public defender office covers office expenses and overhead expenditures, and it provides insurance as well as support staff, investigators, and other professional assistance.<sup>100</sup>

The public-defender system is the primary method of providing

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92. BEXAR CNTY. TASK FORCE ON INDIGENT DEF., MEETING PRESENTATION, THE PUBLIC DEFENDER MODEL 2 (Mar. 9, 2011), available at [http://www.bexar.org/Indigent/public defender model20110309.ppt](http://www.bexar.org/Indigent/public%20defender%20model20110309.ppt).

93. E.g., Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 726 (2010) (describing what the author terms as the assigned-counsel model). There are variations on the assigned-counsel model, including a model where “a single assigned counsel administrator who selects the attorney” or a model where “the chief public defender has responsibility for administering the appointment rotation.” *Id.*

94. See *id.* (explaining that the chief public defender selects the attorneys for individual cases).

95. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf> (reiterating that the selection of a chief public defender should be chosen “on the basis of merit”).

96. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 6 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf>.

97. *Id.*

98. *Id.*

99. E.g., Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision, and Evaluation*, 75 MO. L. REV. 831, 844 (2010) (“Most large public defender offices in major urban areas provide training for new lawyers. . . . Many offices also provide continuing legal education for their staff.”); see Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 161–62 (2009) (discussing a successful Georgia Public Defender training method known as the Georgia Public Defender Standards Council Honors Program).

100. E.g., W. VA. PUBLIC DEFENDER SERVS., ANNUAL REPORT FISCAL YEAR 2009–2010 12–14 (2010), available at <http://www.wvpds.org> (follow “Fiscal Year Reports” hyperlink; then follow “Fiscal Year 2010” hyperlink) (reporting financial data collected about public-defender operations in the state for the purpose of evaluating the efficiency and cost-effectiveness of maintaining the public-defender system).

indigent defense in the nation's largest cities and counties.<sup>101</sup> All states offer some form of public-defender assistance through either a statewide system or by systems organized at the a county level.<sup>102</sup> According to a report by the Bureau of Justice in 2007, 957 public defender offices provided indigent defense in the United States.<sup>103</sup> Moreover, in states where public-defender systems operate at a county level, like Texas, counties within the state may provide indigent defense through other mechanisms.<sup>104</sup> For example, Bexar County, which is mostly comprised of San Antonio, Texas, operates a public-defender's office for appeals but not for trial representation.<sup>105</sup>

Even when a government entity provides a public-defender program, a need remains for a mechanism to appoint additional attorneys because conflicts of interest may develop, such as when multiple defendants are charged with the same crime.<sup>106</sup> Also, defender caseloads may increase

101. LYNN LANGTON & DONALD J. FAROLE, JR., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007- STATISTICAL TABLES 1-2 (rev. ed. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf>; LEAGUE OF WOMEN VOTERS OF THE HOUS. AREA EDUC. FUND, FACTS & ISSUES: PUBLIC DEFENDER OFFICE FOR HARRIS COUNTY 2 (2009), available at <http://www.lwvhouston.org/pdfs/PDOFactsIssuesOct2009.pdf>.

102. LYNN LANGTON & DONALD J. FAROLE, JR., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007- STATISTICAL TABLES 2 (rev. ed. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf>.

103. *Id.* at 1-2.

104. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 6-8 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc>.

105. See TEX. TASK FORCE ON INDIGENT DEF., FAIR DEFENSE LAW: A PRIMER FOR TEXAS OFFICIALS 6-7 (2011), available at <http://www.courts.state.tx.us/tfid/pdf/FairDefenseLawAPrimerforTexasOfficialsJan2011.pdf> (illustrating that the only public defender office in Bexar County, Texas, deals with appellate work rather than trial representation). Pursuant to H.B. 1754, the Task Force on Indigent Defense (TFID) became the Texas Indigent Defense Commission (TIDC). TEXAS INDIGENT DEFENSE COMMISSION, <http://www.txcourts.gov/tidc/tidchome.asp> (follow "Who We Are and What We Do" hyperlink) (last visited Mar. 1, 2012); accord TEX. H.B. 1754, 82d Leg., R.S. (2011) (changing the name of the Texas entity responsible for indigent defense from Task Force on Indigent Defense to the Texas Indigent Defense Commission).

106. *E.g.*, TEX. CODE CRIM. PROC. ANN. § 26.044(j)(1) (West Supp. 2011) (articulating that "[a] public defender's office may not accept an appointment . . . if . . . a conflict of interest exists that has not been waived by the client"); see Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1123-24 (1979) ("An indigent's representation may suffer if, as commonly happens, different public defenders represent the defendant at different stages of the proceedings. These problems are exacerbated if the public defender must represent simultaneously more than one defendant in the case."); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 239 n.142 (1982) (commenting on a District of Columbia policy to appoint "separate counsel for indigent defendants" unless the court gave approval for a joint-counsel request).



beyond what some believe to be an acceptable level.<sup>107</sup>

There are drawbacks to every system.<sup>108</sup> A public-defender system cannot handle the entire indigent caseload,<sup>109</sup> so an additional mechanism must always be in place.<sup>110</sup> There are also some perception problems. It is not uncommon for indigent defendants to view court-appointed attorneys as less competent or zealous than paid, private attorneys.<sup>111</sup> When a defendant is asked if he has an attorney, observers note a common response of “No, I have a public defender.”<sup>112</sup> As in other government-funded systems, defendants cannot select their own public defenders.<sup>113</sup> In addition, the costs associated with operating a public

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107. *But see* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2 (2002) (“A lawyer’s workload must be controlled so that each matter can be handled competently.”). *See generally* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 3 (2009), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_aba\\_sclaid\\_revised\\_rpt\\_119\\_eight\\_guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_sclaid_revised_rpt_119_eight_guidelines.authcheckdam.pdf) (offering a plan to help public-defense providers meet professional obligations when faced with excessive caseloads).

108. *Cf.* Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 725–26 (2010) (describing the various delivery method systems for public-defender services and the conflicts created by the systems).

109. *See* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 3–6 (2009), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_aba\\_sclaid\\_revised\\_rpt\\_119\\_eight\\_guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_sclaid_revised_rpt_119_eight_guidelines.authcheckdam.pdf) (providing guidelines to consider “when excessive workloads are present”).

110. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Systems*, 118 HARV. L. REV. 1731, 1733 (2005) (“To generate more effective reform, courts must adopt a more aggressive role as enforcers of the right to counsel by tackling the problem of indigent defense on a systemic level, ordering the expenditure of funds necessary to protect the right to counsel, and creating oversight mechanisms to ensure the continued implementation of their remedies.”).

111. *Compare* Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409, 421–22 (2004) (criticizing the implication that a public defender was not an attorney), *with* Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 792 (1996) (“In sum, the defender assumes ‘all the obligations and protections attendant upon a private attorney–client relationship except one: the public pays his fee.’” (quoting *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979))).

112. Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409, 421 n.77 (2004) (citation omitted) (internal quotation marks omitted); *accord* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 277 n.354 (1982) (reiterating the confusion experienced by indigent defendants regarding the public defender’s role as an attorney).

113. *See* STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 3 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf> (bemoaning the current public-defender system “in which judges or court administrators assign to the [indigent] defendant an attorney selected from the private bar”).

defender office, particularly start-up costs, are substantial.<sup>114</sup>

A troubling aspect of indigent-defense operations involves public defenders engaging in strikes, slow-downs, and litigation against the government funders over working conditions.<sup>115</sup> Parts IV and V of this Article explore the ethical issues raised by these situations and others.

### B. *Assigned Counsel via the Wheel/Registry*

Another method of obtaining legal representation for indigents is the assigned-counsel mechanism, also known as a wheel.<sup>116</sup> Under this approach, individual attorneys in private practice are appointed by the court.<sup>117</sup> In 2010, approximately 20% of American counties used this model as the sole method for indigent defense.<sup>118</sup> Even in jurisdictions where a public-defender approach is utilized, the rotating system of private appointments supplements indigent representation where overloads or

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114. See LYNN LANGTON & DONALD J. FAROLE, JR., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007- STATISTICAL TABLES 1-2 (rev. ed. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf> (reporting the operating costs of public defender offices in the United States). The Texas Indigent Defense Commission offers three formula grants and four discretionary grants to improve delivery of indigent defense services. *Grant Program*, TEX. INDIGENT DEF. COMMISSION, [http://www.txcourts.gov/tidc/TFID\\_Grant\\_Program.asp](http://www.txcourts.gov/tidc/TFID_Grant_Program.asp) (last visited Feb. 28, 2012).

115. See Robert Patrick, *Public Defender Rules Are Set to Change*, ST. LOUIS POST-DISPATCH, July 2, 2005, [http://www.nlada.org/DMS/Documents/1120663507.69/document\\_info](http://www.nlada.org/DMS/Documents/1120663507.69/document_info) (discussing a strike to oppose the habit of pleading for defendants after a brief attorney-client meeting "because it's unethical and unprofessional to try to represent defendants with only minutes to familiarize themselves with the cases."); see also Kathleen Burge, *Lawyers for Poor Feel Slap from US*, BOSTON.COM NEWS, Oct. 17, 2003, [http://www.boston.com/news/local/articles/2003/10/17/lawyers\\_for\\_poor\\_feel\\_slap\\_from\\_us/](http://www.boston.com/news/local/articles/2003/10/17/lawyers_for_poor_feel_slap_from_us/) (reporting practitioners' refusal to accept new cases and the governor's \$13 million funding reduction to the Committee for Public Council Services, an indigent-defense provider in Massachusetts); Lise Olse, *Lawyers Strike Back in Clark County*, SEATTLE POST-INTELLIGENCER REP., Apr. 28, 2003, <http://www.seattlepi.com/news/article/Lawyers-strike-back-in-Clark-County-1113490.php> (relaying a strike by Seattle indigent defense providers that opposed low pay). See generally Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, 534, 536 (2007) (conveying the economic pressures facing public defender offices participating in strikes and their refusal to accept clients).

116. E.g., Department Trend, *Texas' New Approach to Indigent Defense*, 65 TEX. B.J. 967, 967 (2002) (describing the wheel system as one where "the judge appoints the next attorney on an appointment list rather than choosing an attorney him or herself").

117. See Mark Hansen, Development, *Indigent Defense Fee Abuses Found*, 78 A.B.A. J. 29, 29 (1992) (construing the wheel system as one in which "cases [are] assigned on a rotating basis depending on a lawyer's qualifications and expertise").

118. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 9-10 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf>.

ethical conflicts develop.<sup>119</sup> In Texas, the wheel system is the default mechanism employed when counties cannot otherwise agree on establishing defender offices.<sup>120</sup>

Under this system, a judge or court official appoints an attorney.<sup>121</sup> In Texas and in other jurisdictions, the judge chooses the names of participating attorneys from a rotating wheel.<sup>122</sup> In Texas, a judge that requests attorneys will select from the next five names on the list.<sup>123</sup> In a system without a mandatory wheel, judges are free to select counsel based on the judge's own awareness of the attorney's ability.<sup>124</sup> Theoretically, under a computer-generated wheel, judges are limited in their discretion because they are required to name an attorney from the randomly-generated wheel.<sup>125</sup> In practice, however, judges will often

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119. Cf. Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 LAW & SOC'Y REV. 187, 189 (2009) (explaining that the rotating system is "typically administered by local court staff").

120. Article 26.04(a) of the Texas Code of Criminal Procedure provides:

The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 26.05, and 26.052. A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West Supp. 2011); see TEX. TASK FORCE ON INDIGENT DEF., FAIR DEFENSE LAW: A PRIMER FOR TEXAS OFFICIALS 6–7 (2011), available at <http://www.courts.state.tx.us/tfid/pdf/FairDefenseLawAPrimerforTexasOfficialsJan2011.pdf> (explaining that Texas has two managed assigned-counsel programs and eighteen public defender offices that cover twenty-one counties).

121. Department Trend, *Texas' New Approach to Indigent Defense*, 65 TEX. B.J. 967, 967 (2002).

122. CRIM. PROC. art. 26.04(a).

123. *Id.*

124. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 5, 10–12 n.13 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (reporting the results of a study that surveyed 494 Texas judges, finding that 50.8% of the judges admitted they did "not have formal criteria for selecting attorneys in complex or special cases (e.g., mental illness, DNA, etc.," and that 65% of judges considered an attorney's qualifications when making appointments).

125. Cf. Mark Hansen, Development, *Indigent Defense Fee Abuses Found*, 78 A.B.A. J. 29, 29 (1992) (acknowledging the ABA standards, which announce that "the selection of lawyers for specific cases should not be made by judges or elected officials, but by the administrators of an independent

name attorneys who are not listed next on the wheel.<sup>126</sup> Recently, an evaluation of Bexar County appointments indicated that judges frequently appointed attorneys who were not even listed on the wheel.<sup>127</sup>

Typically, attorneys are required to qualify for participation in appointment programs.<sup>128</sup> In rare instances, they can be removed from the list for legal and ethical violations.<sup>129</sup> However, no formal training or supervision programs are in place under this plan.<sup>130</sup> Attorneys usually provide their own staff, insurance, office space, and overhead, but in some instances, the government entity will furnish some access to investigators.<sup>131</sup>

Drawbacks exist under this system.<sup>132</sup> Attorneys who sign up to participate on the wheel are often inexperienced.<sup>133</sup> Once attorneys acquire experience, many no longer participate.<sup>134</sup>

While some informal mentoring systems exist, wheel attorneys are not

assigned-counsel program”).

126. TEX. TASK FORCE ON INDIGENT DEF., REVIEW OF BEXAR COUNTY'S INDIGENT DEFENSE SYSTEMS 22 (2010), available at <http://www2.mysanantonio.com/PDFs/BexarReviewFinal081610.pdf> (“Bexar County had 355 attorneys on the misdemeanor appointment list for at least part of the year, but 229 additional attorneys received appointments.”).

127. *Id.* at 23, 25 (“Bexar County had 390 attorneys on trial-level felony appointment lists for at least part of the year, but 101 additional attorneys received appointment.” (footnote omitted)).

128. *Id.* at 17; see, e.g., BEXAR CNTY. TASK FORCE ON INDIGENT DEF., BEXAR CNTY. CRIMINAL DIST. COURTS PLAN: STANDARDS & PROCEDURES RELATED TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS 26–27, available at <http://www.bexar.org/Indigent/districtcourtresentation20110510.ppt> (presenting reasons an attorney in Bexar County may be removed from the wheel list);

129. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 7 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc>.

130. *Id.* at 12.

131. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 26.052 (West Supp. 2011) (explaining the procedure for both appointment of counsel in a death penalty case and the reimbursement of investigative expenses).

132. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 5 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (“One of the concerns that some have with the assigned[-]counsel system is that it often results in a revolving door of young or beginning attorneys who accept appointed cases only to gain needed experience and establish themselves in the community.”).

133. *Id.*

134. *Id.* at 4–5. A random survey of 1,376 criminal defense practitioners, 1,113 Texas prosecutors, and 494 Texas judges with criminal jurisdictions revealed that 48.3% of defense attorneys represent fewer indigent defendants as the attorneys' careers progress. *Id.* at 5. Additionally, 59.2% of defense attorneys believe that retained counsel offer more experience than court-appointed counsel. *Id.* This belief is also held by 27.6% of prosecutors and 31.2% of judges. *Id.*

subject to the formal supervision and training that is found in a public-defender system.<sup>135</sup> As a result, individual defendants assigned a wheel attorney do not receive representation on par with those represented by a public defender. Some wheel attorneys openly complain about the small fees.<sup>136</sup> Others undertake private cases in order to make up for what they perceive to be inequitable pay.<sup>137</sup> One wheel attorney admitted at a public hearing that he padded his bills because of the low fee schedule.<sup>138</sup>

A dilemma arises for the judge.<sup>139</sup> What should a judge do when he recognizes the next names on the wheel as attorneys who are incompetent, unethical, or, at a minimum, unequal to their adversary in the courtroom?<sup>140</sup> If the judge appoints the wheel attorney who fails to meet minimum standards of competency, there is a risk to both the client and the system of justice.<sup>141</sup> If the judge selects what he perceives to be a more ethical attorney, the judge is open to an accusation of favoritism.<sup>142</sup>

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135. *Id.* at 7, 12; *see, e.g.*, TEX. TASK FORCE ON INDIGENT DEF., REVIEW OF BEXAR COUNTY'S INDIGENT DEFENSE SYSTEMS 17 (2010), *available at* <http://www2.mysanantonio.com/PDFs/BexarReviewFinal081610.pdf> (explaining the CLE requirements for an attorney to maintain their position on the list).

136. *See* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 9–10 (2004), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (remarking that many practitioners confirmed that the low pay kept many from providing indigent defense services). This view was repeatedly expressed at the public hearing of the Bexar County Task Force on Indigent Defense, chaired by this author, in San Antonio, Texas, from January to May 2011.

137. *See id.*

138. This remark was made by a San Antonio attorney in an open public hearing of the Bexar County Task Force on Indigent Defense, chaired by this author, in San Antonio, Texas, January–May 2011.

139. *Compare* EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS 3 (2010), *available at* [http://www.acslaw.org/sites/default/files/Primus\\_-\\_Litigation\\_Strategies.pdf](http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf) (implying that many judges serve in elected capacities that are subject to political pressures to remain responsive to the public), *with* Laura A. Bischoff, *Some Lawyers Suspect Favoritism in Juvenile Court Appointments*, DAYTON DAILY NEWS, Mar. 6, 2010, <http://www.daytondailynews.com/news/dayton-news/some-lawyers-suspect-favoritism-in-juvenile-court-appointments-584321.html> (reporting an instance where appointed attorneys also contributed to a judge's campaign).

140. EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS 3 (2010), *available at* [http://www.acslaw.org/sites/default/files/Primus\\_-\\_Litigation\\_Strategies.pdf](http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf) (“Nor are the state judiciaries well-equipped to police the quality of indigent[-]defense representation.”).

141. *Cf. id.* (reiterating that the state judicial branch is unable to supervise indigent defense).

142. *See* Brian Chasnoff, *Being a Favorite of Judges Pays*, SAN ANTONIO EXPRESS-NEWS, Nov. 6, 2010, [http://www.mysanantonio.com/news/local\\_news/article/being-a-favorite-of-judges-pays-801940.php](http://www.mysanantonio.com/news/local_news/article/being-a-favorite-of-judges-pays-801940.php) (“Echoing charges of favoritism in the courts, [a task force] concluded that too many [indigent] cases were going to too few attorneys.”).

Judges are human too; there is an obvious temptation to appoint friends, especially when those friends are campaign contributors.<sup>143</sup> At the very least, the appearance of bias leads to accusations of favoritism.<sup>144</sup> This undermines public confidence in the bench, bar, and system of justice.<sup>145</sup>

### C. *Individual Contracting*

Contracting refers to indigent-defense programs which are funded by the public at a state level, county level, or a combination of both.<sup>146</sup> The contractor may be nonprofit or for-profit, full time or part time.<sup>147</sup> This may be a single attorney, law firm or an association of lawyers or law firms.<sup>148</sup> The Bureau of Justice Assistance developed a monograph discussing the many different types of contracting models.<sup>149</sup>

143. See ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 12 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (surveying Texas judges' perceptions and experiences with favoritism). A 1995 survey of 494 Texas judges who had criminal jurisdictions reported that 39.5% of judges believe their peers have made appointments due to personal friendship with the appointed attorney; 35.1% of judges admit to making a consideration of whether the attorney has been a political supporter; and 30.3% admit to considering whether the attorney made campaign contributions. *Id.* A Harris County defense attorney stated "I have been refused appointments because I cannot afford to give money to the judge's reelection campaign[;] . . . those attorneys who contribute the most money receive the most work." *Id.*

144. See Laura A. Bischoff, *Some Lawyers Suspect Favoritism in Juvenile Court Appointments*, DAYTON DAILY NEWS, Mar. 6, 2010, <http://www.daytondailynews.com/news/dayton-news/some-lawyers-suspect-favoritism-in-juvenile-court-appointments-584321.html> ("[T]he distribution of the cases show that the [wheel] system is not being strictly followed, and some attorneys wonder whether favoritism plays a role in who gets the work.").

145. See ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIM. DEFENSE IN TEXAS 7, 12 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> ("Most disturbingly, the current system appears to provide a lower standard of justice for the state's poor.").

146. THE SPANGENBERG GRP., U.S. DEP'T OF JUSTICE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 2 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

147. *Id.*

148. *Id.*

149. *Id.* at 4. The report identifies six distinct variations of contracting and defines them as:

Fixed-Fee, All Cases—specifies the total amount of compensation the lawyer will receive for work on all cases he or she is assigned during a specified contract period. The number of cases assigned to the attorney is not capped; he or she is expected to accept all appointments that arise in the jurisdiction except those in which there is a conflict of interest.

Fixed-Fee, Specific Type of Case—establishes the total amount of compensation the lawyer will receive, but it specifies a particular type of case as well (e.g., all misdemeanors). There is no limit to the number of cases an attorney will be assigned during the contract period.

Counties may have several independent contractors providing indigent defense.<sup>150</sup> Typically in this system, a county government makes the initial determination of awarding the contract.<sup>151</sup> Subsequently, a judge or court administrator assigns each case to the contracting individuals or entities.<sup>152</sup>

Contracting is becoming more prevalent.<sup>153</sup> This is credited to: (1) an increase in the number of indigent defendants; (2) the need for cost-reduction measures; and (3) the decline of workloads in public defender offices.<sup>154</sup> In 2010, approximately 10% of counties utilized contracting as their primary indigent-defense model, while many others employed contracting to handle public-defender conflicts and overloads.<sup>155</sup>

As with the other systems, there are potential problems. Awarding a defense contract to political favorites creates the appearance of favoritism.<sup>156</sup> At least in this circumstance, however, the judiciary would

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Flat Fee, Specific Number of Cases—pays a flat fee for all work completed based on a specific number of cases the attorney agrees to accept during the contract period.

Flat Fee Per Case—establishes a fee by case type (e.g., \$150 per misdemeanor), and the attorney agrees to take all cases of that type that arise in the jurisdiction during the contract period.

Hourly Fee With Caps—pays the attorney an hourly fee established in the contract but includes a cap on the total amount of compensation he or she can receive. Once the ceiling is reached, the attorney may be required to perform additional work without compensation.

Hourly Fee Without Caps—pays the attorney an hourly fee established in the contract, but also covers the actual expenses of each case.

*Id.*

150. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 8–9 (2010), *available at* <http://www.cato.org/pubs/pas/pa666.pdf>.

151. *See, e.g.*, ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIM. DEFENSE IN TEXAS 4 (2000), *available at* <http://www.uta.edu/pols/moore/indigent/last.doc> (providing an example of a bar association transferring decisions regarding indigent defense and financial burdens to the county).

152. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 9 (2010), *available at* <http://www.cato.org/pubs/pas/pa666.pdf>.

153. THE SPANGENBERG GRP., U.S. DEP'T OF JUSTICE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

154. *Id.*

155. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 9 (2010), *available at* <http://www.cato.org/pubs/pas/pa666.pdf>.

156. THE SPANGENBERG GRP., U.S. DEP'T OF JUSTICE, NCJ 181160, CONTRACTING FOR

not be tainted since the contract is awarded by the government funder and not by a judge.<sup>157</sup> There is also the common perception that contracts may be awarded to the lowest bidder, regardless of the bidder's capabilities.<sup>158</sup> Again, as with the wheel, there is no formal mentoring or training of individual contract attorneys.<sup>159</sup> However, a contracting law firm or association of attorneys might have such mentoring and training mechanisms in place within its firm or associations.<sup>160</sup> Governments are probably better able to control costs under this system by capping a dollar amount for the contracts and by requiring contracted attorneys to represent all indigent defendants who may be charged during a particular year.<sup>161</sup>

#### D. *Private-Defender Model*

A variation on the contracting theme is the private-defender program.<sup>162</sup> The county contracts with one private entity to handle the

INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 19 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

157. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 9 (2010), *available at* <http://www.cato.org/pubs/pas/pa666.pdf>.

158. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 12 n.85 (2004), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (referring to direct testimony received at hearings in Montana, Washington, Michigan, Alabama, Georgia, and South Dakota). *See generally* THE SPANGENBERG GRP., U.S. DEP'T OF JUSTICE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 2 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (explaining the practice of awarding contracts to low-bidders).

159. *See generally* THE SPANGENBERG GRP., U.S. DEP'T OF JUSTICE, NCJ 181160, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 13 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (noting that a deficient contract system includes poor training and supervision).

160. *But cf. id.* at 15 (providing an instance where the firm used "inexperienced lawyers" in a contract for indigent defense).

161. *Cf. id.* at 7 (recognizing that state legislatures require contracting in order to contain government spending).

162. *See* STATE OF TEX. RESOLUTION OF THE TEX. JUDICIAL COUNCIL, SPECIFICALLY AUTHORIZE MANAGED ASSIGNED COUNSEL PROGRAMS, *available at* <http://www.courts.state.tx.us/tjc/82ndLegislature/Resolutions01262011/Specifically%20Authorize%20Managed%20Assigned%20Counsel%20Programs.pdf> ("These types of [private-defender] programs involve outsourcing to a governmental or nonprofit agency, independent of the judiciary, the responsibility for screening attorneys for court-appointment eligibility, assigning lawyers to individual cases, approving attorney fee requests, and approving requests for investigative and expert assistance."). *See generally* PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 8–9 (2010) (explaining the appointment and assignment process



entire indigent-defense program.<sup>163</sup> The Private Defender Program (PDP) of the San Mateo County (California) Bar Association,<sup>164</sup> which began operation in 1969, is the best known program of this kind in the country.<sup>165</sup> The program is operated by the San Mateo County Bar Association under a contract with the county.<sup>166</sup> The bar association selects the chief defender.<sup>167</sup> If a judge determines that a defendant is indigent, the PDP is appointed.<sup>168</sup> The PDP then assigns an individual attorney to the case.<sup>169</sup>

Attorneys who seek to participate must apply and are thoroughly screened before being admitted to the program.<sup>170</sup> They receive constant supervision and training thereafter.<sup>171</sup> Unlike a public-defender system, where an additional mechanism is needed when conflicts develop, no such problem arises within the PDP because the chief defender can simply assign alternate private attorneys where conflicts develop.<sup>172</sup> Attorneys provide their own office space and support staff, while the county provides malpractice insurance and investigative services.<sup>173</sup>

The PDP has operated for over forty years and functions well with the

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in a private-defender program).

163. *E.g.*, PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 10 (2010) (stating that “[a]ll of the lawyers to whom cases are assigned are in private practice San Mateo County”).

164. *Id.*

165. *Id.* at 6.

166. *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/For the Public/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (“While the contract with the County has changed somewhat throughout the years, the basic plan has not. The County pays the Bar Association the contract price in annual installments. The Bar Association provides attorneys to represent those defendants found to be eligible by the Court, and provides investigative, expert, and other ancillary services required to provide proper representation.”).

167. PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 6 (2010).

168. *Id.* at 8.

169. *Id.* at 9.

170. *Id.* at 10.

171. *Id.* at 35–37, 39–40.

172. *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/For the Public/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (“When the Private Defender Program is appointed to represent several co[]defendants, the program is able to avoid the potential conflict issue, because the program’s involvement in the individual case is limited to assigning the several clients to separate attorneys, each of whom is in private practice. This feature alone results in the Private Defender Program being able to deliver lower cost indigent legal services than a Public Defender office, because in co[]defendant cases the Public Defender may represent only one co-defendant, and must refer all other co[]defendants to a costly conflicts panel.”).

173. PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 8, 14, 21, app. B (2010).

active support of the bench, bar, and public.<sup>174</sup> Indeed, the director of the Texas Task Force on Indigent Defense, James Bethke, has identified this program as one of the best, if not the best, indigent-defense programs in the United States.<sup>175</sup> However, one obstacle of this system is that it is expensive, perhaps reflecting the economics of San Mateo County, California itself.<sup>176</sup> Another drawback of this system has been its limited use thus far, although variations of it are now in place in two Texas locations.<sup>177</sup>

#### E. *Free-Market System*

Some have suggested the utilization of a free-market system whereby the state or county would provide indigent defendants with vouchers, which they could then use to choose their own counsel.<sup>178</sup> A variation of this system is in place in Ontario, Canada.<sup>179</sup>

While this system has not taken hold in this country, there are some obvious and foreseeable problems.<sup>180</sup> How would defendants, particularly incarcerated defendants, choose an attorney?<sup>181</sup> One can imagine the

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174. *Id.* at 31–32 (“We value our relationships with the office of the District Attorney, the Sheriff’s Department, the Probation Department, County Counsel, the Department of Health, and the Human Services Agency.”).

175. Sharon Keller, *It’s Official! Sine Die 2011*, TASK FORCE ON INDIGENT DEF. E-NEWSLETTER (Austin, Tex.), June 2010, at 2, available at <http://www.courts.state.tx.us/tfid/pdf/June2011newsletter.pdf>.

176. PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS’N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS app. D (2010) (budgeting approximately \$16 million for the county contract).

177. See LUBBOCK SPECIAL NEEDS DEFENDERS’ OFFICE, <http://www.courts.state.tx.us/tfid/lsndo.html> (last visited Oct. 9, 2011) (“This first-of-its-kind program in Texas provides specially trained private practitioners to represent indigent criminal defendants who are diagnosed with a serious mental illness or condition.”); see also STATE OF TEX. RESOLUTION OF THE TEX. JUDICIAL COUNCIL, SPECIFICALLY AUTHORIZE MANAGED ASSIGNED COUNSEL PROGRAMS, available at [http://www.courts.state.tx.us/tjc/82ndLegislature/Resolutions-01262011/Specifically\\_Authorize\\_Managed\\_Assigned\\_Counsel\\_Programs.pdf](http://www.courts.state.tx.us/tjc/82ndLegislature/Resolutions-01262011/Specifically_Authorize_Managed_Assigned_Counsel_Programs.pdf) (“Lubbock County has recently established and Montgomery County is establishing managed assigned counsel programs. These are modeled on the private[-]defender program in San Mateo, California, where the county contracts with the local bar association to manage the assigned counsel system.”).

178. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 12 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf>.

179. *Id.* at 14.

180. See Lew Kendall, *The Indigent Accused As a Consumer of Defense Services: Experimentation with Supplementary Voucher Systems*, CAL. ATT’YS FOR CRIM. JUST., Sept.–Oct. 1982, at 24 (categorizing the use of the voucher system as experimental in nature).

181. See *id.* (proposing that “consumer choice be incorporated into indigent defense . . . through supplementary voucher systems which would allow consumers to choose their

scenes at the jail or courthouse during arraignment, where attorneys would be on the lookout to announce their availability to potential clients.<sup>182</sup> Also, a delay in selecting an attorney would result in additional incarceration time, which would drive up government costs and add to the backlog in the courts.<sup>183</sup>

#### IV. ETHICAL OBLIGATIONS OF THE BAR AND BENCH

Despite the implementation and proposed implementation of these and other mechanisms, there remains the widespread dissatisfaction with the “broken” system noted above.<sup>184</sup> Why is it that, with the expenditure of so much time, money, and effort thus far, our system remains broken and in need of reform?<sup>185</sup> Perhaps at least part of the difficulty lies in the failure to fully consider and resolve the ethical and practical problems associated with indigent defense.<sup>186</sup>

While it is fairly easy to identify general rules and standards, the failure to produce an adequate indigent-defense system reflects poorly on the legal profession that created it.<sup>187</sup> Critics can point to attorneys engaging in

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counsel”).

182. *See id.* at 28–29 (noting the competition that would arise in the voucher system).

183. *Cf. id.* at 28 (listing an objection to the voucher system as the defendant’s lack of information to choose an attorney).

184. *See generally* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE v* (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (“Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”).

185. *See id.* at 7 (listing the various problems with the indigent defense system). The report found:

Too often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations. To make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment. Further, the structure of indigent[-]defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients. Taken as whole, glaring deficiencies in indigent[-]defense services result in a fundamentally unfair criminal[-]justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them.

*Id.*

186. *Id.* at 21 (proclaiming that ethical violations in indigent defense are prevalent, yet overlooked).

187. *Id.* at 3 (portraying the “importance of providing adequate defense representation”).

strikes, slowdowns, or litigation against their employers.<sup>188</sup> Are these actions primarily motivated by concern for the welfare of the client or that of the attorney? Do these actions create at least the appearance of a conflict of interest for these attorneys? In the wheel arrangement, why do judges appoint attorneys who are not next on the wheel or not even on the wheel? Is it because of favoritism? Or, is it concern over the competence or ethics of the next attorney on the wheel, and the judge knows of someone better able to perform these functions? Even in the latter situation, doesn't the judge's action nonetheless violate the ABA's concern that "the appointment process should never be ad hoc?"<sup>189</sup>

The appropriate approach requires an identification of the ethical standards needed to analyze the interests of all concerned, including the inherent conflicts of those interests.

#### A. *Constitutional Dimensions*

The United States Supreme Court has made quite clear that the right to court-appointed counsel means that the defendant has a right to more than just a warm body sitting at counsel table.<sup>190</sup> Counsel must fulfill the obligation of loyalty to the client.<sup>191</sup> The representation must be

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188. See Lise Olse, *Lawyers Strike Back in Clark County*, SEATTLE POST-INTELLIGENCER REP., Apr. 28, 2003, <http://www.seattlepi.com/news/article/Lawyers-strike-back-in-Clark-County-1113490.php> (recognizing that indigent-defense providers instituted a strike to oppose low pay); Robert Patrick, *Public Defender Rules Are Set to Change*, ST. LOUIS POST-DISPATCH, July 2, 2005, <http://www.nlada.org/DMS/Documents/1120663507.69/74BB796DC78DD5C78625703200329299%3FOpenDocument&highlight%3D%252C%2522Public%2522%2BAND%2B%2522defender%2522%2BAND%2B%2522rules%2522%2BAND%2B%2522are%2522%2BAND%2B%2522set%2522%2BAND%2B%2522to%2522%2BAND%2B%2522change%2522> (chastising and later striking in opposition against an attorney who negotiated a plea for a client minutes after meeting him); see also Kathleen Burge, *Lawyers for Poor Feel Slap from US*, BOSTON.COM NEWS, Oct. 17, 2003, [http://www.boston.com/news/local/articles/2003/10/17/lawyers\\_for\\_poor\\_feel\\_slap\\_from\\_us/](http://www.boston.com/news/local/articles/2003/10/17/lawyers_for_poor_feel_slap_from_us/) (publicizing former Massachusetts Governor Mitt Romney's \$13 million reduction of funding to the provider of indigent defense in the state, resulting in indigent-defense practitioners' refusal to accept new cases). See generally Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533 (2007) (discussing the economic pressures of public defender offices that strike or refuse to accept clients).

189. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf>.

190. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

191. *Id.* at 688 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); accord *Cuyler v. Sullivan*, 446 U.S.

“zealous” and “active,” not just “pro forma.”<sup>192</sup> Mere physical presence of an attorney without active assistance in consulting, conferring, and preparing a defense renders the appointment of that attorney nothing more than a sham.<sup>193</sup> The Texas Court of Criminal Appeals concluded that “[c]ompetent counsel’ ought to require more than a human being with a law license and a pulse.”<sup>194</sup> Failure to meet these standards constitutes a breach of the defendant’s constitutional right to counsel.<sup>195</sup> Despite these lofty pronouncements, courts routinely uphold convictions under circumstances most lay persons would recognize as problematic,<sup>196</sup> including a situation where an attorney slept during portions of the trial.<sup>197</sup>

### B. *American Bar Association Model Rules and Standards*

The ABA recognizes the obligations of attorneys and judges in the Model Rules of Professional Conduct.<sup>198</sup> Pursuant to the Model Rules, attorneys owe their clients the obligations of competence,<sup>199</sup> diligence,<sup>200</sup> communication,<sup>201</sup> confidentiality,<sup>202</sup> avoiding conflicts of interest,<sup>203</sup> as

335, 346 (1980) (denoting that defense counsel had an obligation to notify the court when a conflict of interest arose).

192. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). *But see id.* at 75 (Butler, J., dissenting) (pointing to a “very rigorous and rigid cross-examination” as evidence that the defendant’s representation did not qualify as pro forma).

193. *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *accord Moore v. Dempsey*, 261 U.S. 86, 89 (1923) (demonstrating an instance where counsel failed to consult the defendant, call witnesses, and demand a change of venue, which resulted in a reversal of the order and a hearing in federal court).

194. *Ex parte Graves*, 70 S.W.3d 103, 118 (Tex. Crim. App. 2002).

195. *See generally Powell*, 287 U.S. at 58 (emphasizing that a breach of the duty of loyalty on behalf of the attorney resulted in the failure of the defendant to receive due process right of counsel).

196. *See Johnson v. Norris*, 207 F.3d 515, 518 (8th Cir.), *cert. denied*, 531 U.S. 886 (2000) (portraying a situation where a bi-polar defense counsel lied to the client about trial experience and lied on a malpractice insurance application, yet ineffective assistance was not found); *Young v. Zant*, 727 F.2d 1489, 1493 (11th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) (holding that defense counsel’s drug use did not result in ineffective assistance); *McFarland v. State*, 928 S.W.2d 482, 505–06 (Tex. Crim. App. 1996) (concluding that although defense counsel slept through portions of trial, representation was not ineffective and defendant was not prejudiced), *abrogated by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998).

197. Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089, 1093 (2001) (“In *McFarland v. [State]*, when complaints were registered about a capital defendant’s lead counsel sleeping, the trial court reportedly responded, ‘the Constitution guarantees you a right of counsel, but does not say the lawyer has to be awake.’” (quoting *McFarland*, 928 S.W.2d at 505)).

198. MODEL RULES OF PROF’L CONDUCT (1983).

199. *Id.* R. 1.1 (2002).

200. *Id.* R. 1.3.

201. *Id.* R. 1.4.

well as other duties set out in the Model Rules. Judges must comply with the law,<sup>204</sup> avoid impropriety and the appearance thereof,<sup>205</sup> maintain impartiality,<sup>206</sup> act without bias or prejudice,<sup>207</sup> and otherwise comply with the Code of Judicial Conduct.<sup>208</sup> Judges must not use their office to advance personal interests<sup>209</sup> or allow external influences to affect their judicial conduct.<sup>210</sup> The ABA specifically focused on the proper role that attorneys, judges, and government funders should play in the indigent-defense system by promulgating the *ABA Ten Principles of a Public Defense Delivery System*.<sup>211</sup>

### C. Analyzing Attorney-Client-Government Payer Conflict

To some extent, there will always be some level of conflict or potential conflict between every attorney and every client. While the attorney acts as a fiduciary for clients, the attorney also has an interest in making a profit

202. *Id.* R. 1.6 (2003).

203. *Id.* R. 1.7, 1.8 (2002).

204. MODEL CODE OF JUDICIAL CONDUCT R. 1.1 (2007).

205. *Id.* R. 1.2.

206. *Id.* R. 2.2.

207. *Id.* R. 2.3.

208. *See generally* MODEL CODE OF JUDICIAL CONDUCT (2007).

209. *Id.* R. 1.3.

210. *Id.* R. 2.4.

211. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf>. The ten "black letter" principles are:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

*Id.*

from the representation.<sup>212</sup> The preamble to the Model Rules explicitly recognizes the existence of this conflict: “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system[,] and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”<sup>213</sup>

The indigent-defense context exacerbates this conflict because of the third-party interest—namely, the government entity paying for the defense.<sup>214</sup> The attorney wants to make a satisfactory living by representing indigent defendants.<sup>215</sup> The defendant does not desire incarceration, would prefer acquittal, and does not have a particular interest in the amount of money the government pays or the attorney receives. The government wants to process and punish criminals as inexpensively as possible and has no immediate concern for the attorney’s satisfactory living.<sup>216</sup> However, all parties want to avoid conviction of innocent defendants. The state wants to pay as little as possible, while attorneys want to receive as much as possible. The defendant wants, and should expect, zealous representation, regardless of the cost to the government or to the attorney who might receive a reduced fee.

The Model Rules permit a third party—in this case the government—to pay attorney’s fees so long as the attorney does not allow the third party “to direct or regulate the lawyer’s professional judgment in rendering such legal services.”<sup>217</sup> The explicit purpose of this rule is to prevent third-party payers from overriding the client’s interests and “interfering with the lawyer’s professional judgment.”<sup>218</sup> Apart from the system of indigent defense, this rule contemplates the scenario where a client selects an attorney and the attorney sets a fee, then the client’s benefactor pays the fee to the attorney with the knowledge and approval of the informed

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212. *Id.*

213. MODEL RULES OF PROF’L CONDUCT pmb. para. 9 & scope (2002).

214. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 2* (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (citing Robert L. Spangenberg & Marea L. Berman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 41 (1995)).

215. *Id.* at 3.

216. STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 3 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf>.

217. MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (2002).

218. *Id.* R. 5.4(c) cmt. 1.

client.<sup>219</sup> However, in the context of indigent legal defense, the problem proves more complicated than in the traditional third-party payer arrangement. Indigents do not select their attorneys. Appointed attorneys do not set their fees. Clients, and to some extent their attorneys, have little voice in the rate of compensation set by the government. Clients rely on the attorney to provide a zealous defense even if that attorney feels undercompensated.<sup>220</sup> The client–defendant is clearly in the weakest bargaining position of the three parties. After all, governments can negotiate with attorneys over setting fee schedules. Attorneys generally have the freedom not to participate in the indigent-defense system if they feel the compensation is inadequate.<sup>221</sup> Still, the client, including an innocent client, must rely on the ethics and competence of the attorney provided by the state.

In theory, the client should also rely on the judge to assist in this three-way conflict because judges supposedly serve as guarantors of the defendants' interests in the judicial process. However, judges face conflict (particularly in an elected judiciary), experience criticism over clogged dockets,<sup>222</sup> and receive negative attention if perceived as too soft on crime.<sup>223</sup> All the while, judges receive pressure from multiple sources: governmental entities pressure judges to reduce jail populations; attorneys insist on receiving appointments from the judiciary; and judges feel

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219. *Id.* R. 5.4(c) cmt. 2.

220. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf>.

221. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT DEFENSE IN TEXAS 7 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc>.

222. See Kevin Krause, *Judge May Block Court Planned to Clear Dallas County's Crowded Jails, Dockets*, DALL. MORNING-NEWS, May 12, 2010, <http://www.dallasnews.com/news/community-news/dallas/headlines/20100511-Judge-may-block-court-planned-to-9384.ece> (examining a dispute between some judges, the district attorney, and county commissioners); Amy L. Webb, *Clogged Court Dockets Cause Backup in Jail*, INDIANAPOLIS STAR, Apr. 22, 2003, <http://www2.indystar.com/articles/5/037701-2515-P.html> (discussing causes and effects of local clogged court dockets).

223. See Craig Kapitan, *Judge Cuts Offender in DWI Death a Break*, SAN ANTONIO EXPRESS-NEWS, Mar. 17, 2011, [http://www.mysanantonio.com/news/local\\_news/article/Judge-cuts-offender-in-DWI-death-a-break-1160474.php](http://www.mysanantonio.com/news/local_news/article/Judge-cuts-offender-in-DWI-death-a-break-1160474.php) (noticing criticism directed towards a judge who released an inmate "five months into [his] 10-year sentence"); Lori Fullbright, *Plea Bargains For Tulsa Killers: Is The Justice System Soft On Crime?*, NEWS9 (Oct. 16, 2009, 4:27 PM), <http://www.news9.com/story/11324175/plea-bargains-for-tulsa-killers-is-the-justice-system-soft-on-crime?redirected=true> (asking whether the recent imposition of "one year, four year[,] and 30 year[]" sentences in three murder cases forecasts a justice system "too soft on crime").



compelled to approve fee petitions that might overstate the attorney's efforts in a particular case. In some instances, judges experience concerns regarding the competence of some attorneys, yet the wheel system might compel their appointment. In the worst scenario, judges might actively participate in the process of appointing friends, who quickly plead defendants, receive fees for their work, and then contribute to the judge's campaign.<sup>224</sup>

#### D. *Economics Add to the Conflict*

Governments increasingly face budget problems, and the criminal justice system is expensive.<sup>225</sup> The government must provide a police force, afford jails, and fund an effective prosecutor's office.<sup>226</sup> Some individuals balk at the amount of money spent on criminal justice to prosecute and defend those charged with crimes.<sup>227</sup> Adding to the problem is the reality that the government cannot completely predict how much to budget for indigent defense.<sup>228</sup> Crime rates and the prosecutor's

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224. See ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 12 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (reporting the results of a 1995 survey of 494 Texas judges who presided over criminal jurisdictions). The survey reported that 39.5% of judges believed their peers made appointments based on personal friendship with the appointed attorney; 35.1% of judges admitted to considering attorney appointment based on the attorney's political support; and 30.3% admitted taking attorney's campaign contributions into account during the appointment process. *Id.* A Harris County defense attorney stated "I have been refused appointments because I cannot afford to give money to the judge's reelection campaign . . . those attorneys who contribute the most money receive the most work." *Id.*

225. *Employment and Expenditure*, BUREAU OF JUST. STATS., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=5> (last visited Mar. 1, 2012) ("In fiscal year 2007, federal, state, and local governments spent an estimated \$228 billion for police protection, corrections, and judicial and legal services. . . . Federal, state, and local governments spent about \$50 billion for judicial and legal services nationwide.").

226. See ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS 3-5 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (providing a history of the rights of indigent defendants to have an attorney appointed to represent them in light of the Supreme Court's holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

227. See BELDEN RUSSONELLO & STEWART, OPEN SOC'Y INST. & NAT'L LEGAL AID & DEFENDER ASS'N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 37-38 (2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf> (discussing the hesitation to increase government spending for indigent defense).

228. See BEXAR CNTY. TASK FORCE ON INDIGENT DEF., FINAL REPORT 2 (2011), available at <http://www.bexar.org/Indigent/FinalReport2011.pdf> (describing the unexplained, disproportional increase in the cost of indigent defense).

charging discretion rest beyond the control of funders.<sup>229</sup>

Some obvious economic issues present themselves. If appointed attorneys are underpaid to represent indigents, quality attorneys will stay away from the indigent-defense system due to the economic incentives of private representation.<sup>230</sup> Additionally, unethical attorneys who participate face the temptation to inflate bills.<sup>231</sup> On the other hand, if court-appointed attorneys are overpaid, an incentive may exist for attorneys to drag out criminal cases by filing numerous, unnecessary motions and declining legitimate pleas in favor of taking cases to trial.<sup>232</sup>

Some suggest that the solution to these difficulties and conflicts lies in free-market incentives.<sup>233</sup> Others call for legislative<sup>234</sup> and litigation<sup>235</sup> strategies to reform the system. Almost everyone agrees the system is "broken."<sup>236</sup> Many are now struggling in an effort to fix these difficulties.<sup>237</sup> However, no amount of tinkering with the system, mechanism, and structures will succeed unless lawyers and judges recognize

229. *See id.* (displaying the increased levels of criminal prosecution, along with elevated defense expenses, between 2004 and 2010).

230. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7-9 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (describing the difficulty in recruiting and training attorneys for indigent defense without offering comparable compensation).

231. Remark by a San Antonio attorney admitting to bill-padding in response to low pay at an open public hearing of the Bexar County Task Force on Indigent Defense, chaired by this author, in San Antonio, Texas, January-May, 2011.

232. *See* STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, *REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM* 4 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf> (explaining the consequences of paying court-appointed attorneys excessive hourly fees).

233. *See id.* (proposing a free-market alternative to indigent-defense services).

234. *See* CARA H. DRINAN, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, *A LEGISLATIVE APPROACH TO INDIGENT DEFENSE REFORM* 5-7 (2010), available at [http://www.acslaw.org/sites/default/files/ACS\\_Issue\\_Brief\\_Drinan\\_Indigent\\_Def\\_Reform\\_0.pdf](http://www.acslaw.org/sites/default/files/ACS_Issue_Brief_Drinan_Indigent_Def_Reform_0.pdf) (proposing federal legislation to clarify the state burden of providing indigent defense along with remedies available for violations of a defendant's right to counsel).

235. *See* EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, *LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS* 5 (2010), available at [http://www.acslaw.org/sites/default/files/Primus\\_-\\_Litigation\\_Strategies.pdf](http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf) (suggesting court review of inadequate counsel to indigent defendants).

236. *See, e.g., id.* at 1 (characterizing the current indigent-defense structure as being in "a state of crisis").

237. *See generally* BEXAR CNTY. TASK FORCE ON INDIGENT DEF., *FINAL REPORT* (2011), available at <http://www.bexar.org/Indigent/FinalReport2011.pdf> (proposing several improvements to Bexar County's method of indigent defense, none of which have been implemented although support for improvement exists).

that the problem is not just one of economics, but also one of ethics.

## V. RECONSTRUCTING A MODEL SYSTEM

Forty years after *Gideon*, how would one best reconstruct an indigent-defense system that will function ethically, effectively, and efficiently? Before attempting to move attorneys, clients, and resources into new configurations, one should stop for a moment to consider the purpose of reconstructing a broken system. The inevitable conflicts, previously identified in this Article, must be confronted in order to determine how to balance the competing and conflicting concerns. A suggested approach is provided below.

### A. *Recommit Our Profession to the Goal of Service*

The legal profession enjoys a monopoly on the practice of law. Indeed, it is a crime for a nonlawyer to engage in law practice.<sup>238</sup> Lawyers carry substantial public responsibility, given that the legal profession intends to remain a self-regulating profession. Since the profession shuns nonlawyers from the practice and its regulation, attorneys must recommit themselves to the notion that the practice of law is a service profession. The service component of the profession does not negate the fact that attorneys may still receive a “satisfactory living”<sup>239</sup> from their employment, but the focus must consist of more than simply the attorney’s well-being.<sup>240</sup> It is easy to recall noble examples of attorneys who, at great personal sacrifice, vigorously represented the interests of unpopular clients. John Adams defended the British soldiers charged with murdering American patriots at

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238. TEX. PENAL CODE ANN. § 38.123 (West 2011) (articulating the components of unauthorized practice of law); accord MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2002) (“A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”). Rule 5.4(d) further states:

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROF’L CONDUCT R. 5.4(d) (2002).

239. See MODEL RULES OF PROF’L CONDUCT pmb. para. 9 & scope (2002) (suggesting that lawyers are entitled to a reasonable wage while remaining ethical).

240. See *id.* (suggesting that lawyers are entitled to a reasonable wage while remaining ethical).

the outbreak of the Revolutionary War.<sup>241</sup> Even in fictional accounts, such as *To Kill a Mockingbird*,<sup>242</sup> the nobility of the lawyer's sacrifice in the name of service to the client and the public serves as an inspiration.

The recommitment to the notion of service emphasizes a need to refocus on the client and societal interests, which will ultimately benefit the profession.<sup>243</sup> Attorneys should be held in higher esteem than is reflected by society's current view, and this can be done by serving the community. Attorneys are committed, in theory, to the concept of pro bono assistance.<sup>244</sup> This theory can and should be better implemented in the indigent-defense system.

Specifically, attorneys in private practice must be willing to represent indigent clients competently and zealously, even if they are not paid the same rate that private clients would pay.<sup>245</sup> This is nothing new; in some instances attorneys have been willing to work in this capacity for free.<sup>246</sup> The San Antonio plan, for example, required all local attorneys to sign up for appointments at no charge or pay an annual fee if they chose to opt out.<sup>247</sup>

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241. L. Kinvin Wroth & Hiller B. Zobel, *The Boston Massacre Trials*, 55 A.B.A. J. 329, 329-33 (1969) (quoting John Adam's letter to his father, which stated that the soldiers "charged with murder, are not yet legally proved guilty, and therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid").

242. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (advancing Atticus Finch as a court-appointed attorney representing a black man falsely accused of rape in the fictional novel set in the 1950s).

243. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 1* (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (declaring that the indigent-defense system is inadequately funded and sourced, resulting in the denial of proper legal representation for the indigent population).

244. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002) (encouraging attorneys to devote a minimum of fifty hours per year to pro bono service).

245. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 9* (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (acknowledging the low wages paid toward indigent representation).

246. See generally ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., *MUTING GIDEON'S TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS* (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (noting the practice of counties that appointed attorneys but did not compensate for their legal services).

247. ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., *MUTING GIDEON'S TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS* 6 n.8 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.doc> (observing that attorneys in Bexar and El Paso Counties could pay a fee to "buy

Attorneys seeking positions as public defenders should do so with the understanding that they may not be paid as well as the private attorneys or prosecutors whom they face in court.<sup>248</sup> Instead, time spent in the public defender office should be viewed as an opportunity to serve and to gain experience that will ultimately open new doors.<sup>249</sup> Those who then leave the public defender office will be better able to train and mentor new public defenders or private counsel.<sup>250</sup> Experienced attorneys in private practice must be willing to participate, as both client advocates and as trainers and mentors for less experienced counsel.<sup>251</sup>

Judges must be willing to appoint counsel when necessary, rather than attempting to save government expense by avoiding appointment of indigent-defense counsel.<sup>252</sup> Judges have to scrupulously avoid even the appearance of favoritism or kickbacks in operating an indigent-defense system of private appointments.<sup>253</sup> Indeed, as a group, judges should join with attorneys to advocate for “[r]emoving oversight from the judiciary” and placing that oversight in the hands of a nonpartisan board, as

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out” and keep their names off the indigent-defense wheel list). Oral history was provided to this Article’s author in January 2011 by Tom Stolhandske, member of the Bexar County Task Force on Indigent Defense; Hon. Larry Noll, Judge, Bexar County 408th District Court; Jimmy Allison, Executive Director, San Antonio Bar Association; and others.

248. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf> (recommending parity in “workloads, salaries, and other resources” between the indigent’s counsel and the prosecutor).

249. See *id.* at 17 (describing the voluminous case load in indigent representation).

250. See AM. COUNCIL OF CHIEF DEFENDERS BEST PRACTICES COMM., NAT’L LEGAL AID & DEFENDERS ASS’N, IMPLEMENTATION OF THE ABA’S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS 10–12 (2010), available at <http://www.nlada.org/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf> (articulating several mentorship and training programs adopted across the nation).

251. See AM. COUNCIL OF CHIEF DEFENDERS BEST PRACTICES COMM., NAT’L LEGAL AID & DEFENDERS ASS’N, IMPLEMENTATION OF THE ABA’S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS 12 (2010), available at <http://www.nlada.org/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf> (discussing the mentoring programs in place in various counties across the country whereby experienced attorneys mentor new attorneys).

252. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 25 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (noting instances when judges permitted indigent and illiterate defendants to sign complex forms that waive the defendant’s constitutional right to counsel and serve as a plea of guilty).

253. See BEXAR CNTY. TASK FORCE ON INDIGENT DEF., FINAL REPORT 10–11 (2011), available at <http://www.bexar.org/Indigent/FinalReport2011.pdf> (requiring judges to justify appointing an attorney “off the wheel” given the implication of impropriety).

recommended by the ABA.<sup>254</sup> Judges should join with attorneys in a public education function.<sup>255</sup> They should inform the governing bodies and the public at large of the importance of maintaining an ethical, effective, and efficient system by helping everyone understand the ongoing conflicts and dilemmas associated with the system.<sup>256</sup>

### B. *Think Locally*

Some very strong arguments have been made for national standards in indigent defense, either through legislation<sup>257</sup> or judicial determination.<sup>258</sup> However, a “one-size-fits-all” approach is not practical since states vary in demographics, population density, and other relevant factors.<sup>259</sup> A public-defender system might work well in a highly populated metropolitan area but experience difficulties in a less populated district in the United States. Moreover, a national system would undermine the local bar participation, which is critical to the ultimate success of indigent-defense systems as argued under this subsection and the next.<sup>260</sup>

254. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf> (suggesting that an independent board should replace the judiciary in overseeing the indigent-defense programs).

255. *See* AM. COUNCIL OF CHIEF DEFENDERS BEST PRACTICES COMM., NAT'L LEGAL AID & DEFENDERS ASS'N, IMPLEMENTATION OF THE ABA'S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS 12 (2010), *available at* <http://www.nlada.org/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mr%20final.pdf> (noting that judges may provide informal feedback for indigent representatives).

256. *See generally* ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEX., MUTING *GIDEON'S* TRUMPET: THE CRISIS OF INDIGENT CRIMINAL DEFENSE IN TEXAS (2000), *available at* <http://www.uta.edu/pols/moore/indigent/last.doc> (calling for a movement to reform the existing dysfunctional policies in Texas).

257. *See* CARA H. DRINAN, AM. CONSTITUTION. SOC'Y FOR LAW & POLICY, A LEGISLATIVE APPROACH TO INDIGENT DEFENSE REFORM 5–7 (2010), *available at* [http://www.acslaw.org/sites/default/files/ACS\\_Issue\\_Brief\\_Drinan\\_Indigent\\_Def\\_Reform\\_0.pdf](http://www.acslaw.org/sites/default/files/ACS_Issue_Brief_Drinan_Indigent_Def_Reform_0.pdf) (proposing specific text and criteria necessary for a legislative solution).

258. *See* EVE BRENSIKE PRIMUS, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS 5 (2010), *available at* [http://www.acslaw.org/sites/default/files/Primus\\_-\\_Litigation\\_Strategies.pdf](http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf) (advocating federal judicial review of a state's alleged denial of counsel to indigent defendants).

259. *See* TEX. TASK FORCE ON INDIGENT DEF. & THE SPANGENBERG GRP., BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS 25–43 (2d ed. 2008), *available at* <http://www.courts.state.tx.us/tidc/pdf/2008revisedblueprintfinal.pdf> (detailing examples of differing populations and caseloads within Texas and in other jurisdictions).

260. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National*

The control and structure of indigent defense should be at the local level, operating under a constitutionally mandated framework, which would work similar to the educational approach in this country.<sup>261</sup> For example, the Constitution guarantees that schools will not operate in a segregated fashion, yet local boards are left with the discretion to create and operate their own public education systems.<sup>262</sup> Local control means local responsibility, which means greater public participation.<sup>263</sup>

### C. *Roll the Wheel to the Bar Associations*

Bar associations are currently responsible for disciplinary oversight.<sup>264</sup> Local bar association members know each other, work together on a multitude of projects, and thus should be intimately involved with the indigent-defense system.<sup>265</sup> The “active participation of the private bar” is recognized by the ABA as one of the principles of an effective defense system.<sup>266</sup>

How could this participation be guaranteed? Every system, including public-defender systems, requires some involvement of private attorneys<sup>267</sup> and increased participation should be sought.<sup>268</sup>

*Crisis*, 57 HASTINGS L.J. 1031, 1129 (2006) (suggesting local and state bars effectively monitor the defense system and establish workable standards tailored to the community).

261. See TEX. TASK FORCE ON INDIGENT DEF. & THE SPANGENBERG GRP., BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS 41–43 (2d ed. 2008), available at <http://www.courts.state.tx.us/tidc/pdf/2008revisedblueprintfinal.pdf> (indicating the historical responsibility of local counties for supporting indigent representation).

262. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregated schools are unconstitutional and remanding for argument regarding implementation).

263. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1129 (2006) (advocating for local bar participation and monitoring of the indigent system).

264. See, e.g., TEX. GOV'T CODE ANN. § 81.071 (West 2005) (establishing the State Bar of Texas and a “chief disciplinary counsel” responsible for disciplining violations under the rules of conduct).

265. See, e.g., Victor H. Negron, Jr., *SABA: YOUR Bar Association*, SAN ANTONIO B. ASS'N (Oct. 5, 2011, 12:14 PM), <http://www.sanantoniobar.org/displaycommon.cfm?an=1&subarticlenbr=71> (providing an example of a local bar association's goal for furthering its community's objectives).

266. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf>.

267. See, e.g., *Jewell v. Maynard*, 383 S.E.2d 536, 539 (W. Va. 1989) (relaying that “most judicial circuits still rely on the appointment of private practitioners for indigent defense work”).

268. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinci>

Transferring supervision of indigent-defense systems from the judiciary to the local bar association “ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”<sup>269</sup> Oversight by the bar association would force attorneys not typically associated with indigent criminal defense to become involved.<sup>270</sup> Attorneys would buy into the system and could no longer ignore issues by assuming that these matters are being handled by others.<sup>271</sup>

#### D. *Look West . . . to San Mateo*

No one program will work in every jurisdiction. Areas with well-established, well-functioning public defender offices need not make sudden changes but should consider the need for private attorney participation due to conflicts, overloads, and other similar issues.<sup>272</sup> In areas without a well-functioning public-defender system, where the county must either supplement its public-defender system or utilize a wheel or private attorney contracts, the San Mateo County PDP provides clear benefits of guaranteed bar oversight.<sup>273</sup> The San Mateo County PDP establishes collaboration between the independent oversight of the local bar association and the needs of San Mateo County.<sup>274</sup> The San Mateo County Bar Association’s website describes the history and an overview of the system, stating:

Frustration with the problems of the direct appointment system led the Board of Supervisors of San Mateo County to seriously consider the establishment of a Public Defender Office in the course of preparing its 1967–[19]68 budget. The initial proposal for such an office by the [c]ounty administrative staff was highly unrealistic in terms of staffing, and the San Mateo County Bar Association strongly voiced its criticism. The Bar Association felt that there were many good aspects to the direct appointment system, but recognized the validity of certain complaints, such as the cost

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plesbooklet.authcheckdam.pdf (advancing participation of attorneys and the local bar association).

269. *See id.* (advocating for an independent board to oversee the structure and implementation of indigent defense).

270. *See id.* (encouraging active participation by bar members).

271. *See id.* (recommending participation across public and private efforts).

272. *See id.* (suggesting the active participation of private bar associations and establishing independent oversight).

273. *See Private Defender Program*, SAN MATEO CNTY. B. ASS’N, <https://www.smcba.org/ForthePublic/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (demonstrating the cooperation between the county and the bar association).

274. *See id.* (discussing the indigent-defense contract between the bar association and the county).



control problem, and the absence of a system for matching the attorney's skill and experience to the seriousness of a given case. The Bar Association appointed a select committee to examine the alternatives. The committee developed the idea of the Bar Association assuming the responsibility of providing attorneys for indigent defendants, and administering the entire program. The plan called for a contract with the [c]ounty, incorporating cost and quality controls, with the courts determining the eligibility of defendants for appointed counsel. In December 1968, the County of San Mateo, and the San Mateo County Bar Association entered into such contract, and the Private Defender Program ("PDP") was born.<sup>275</sup>

The San Mateo plan has worked well for over forty years.<sup>276</sup> The bench, the bar, the prosecutor's office, and the county government all support the program.<sup>277</sup> There is a noticeable feeling of professionalism associated with the program, and it operates without the friction that characterizes other systems.<sup>278</sup> The program's training manuals, fee schedules, and other materials are readily available and could be easily tailored to the circumstances of other jurisdictions.<sup>279</sup> A board of directors names the chief defender, who implements a weighted method for determining caseload distribution, as well as other administrative tasks.<sup>280</sup> The board is elected by the members of the bar, thereby eliminating the likelihood of dissatisfaction, strikes, or lawsuits by participating attorneys.<sup>281</sup>

Unlike other systems, the San Mateo Private Defender Program is not broken. It is the model for an effective, ethical, and efficient indigent-defense system and should be duplicated wherever possible.<sup>282</sup> Rather than offering full-time employment to some but denying court

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275. *Id.*

276. PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 6 (2010).

277. See *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/ForthePublic/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (discussing the cooperation amongst the parties).

278. PRIVATE DEFENDER PROGRAM, SAN MATEO CNTY. BAR ASS'N, ANNUAL REPORT: FISCAL YEAR 2009–2010 TO THE BOARD OF SUPERVISORS 42 (2010).

279. See *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/ForthePublic/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (explaining the basic agreement between the bar association and the county).

280. See *id.* (describing the responsibilities of the chief defender).

281. See *id.* (discussing the relationship between the Bar Association Board of Directors and the chief defender's position).

282. See *Description of Service Programs*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/ForthePublic/CommunityServicePrograms.aspx> (last visited Mar. 1, 2012) (referencing national acclaim for the system due to the high quality representation of indigent clients).

appointments to many more, the PDP allows more attorneys to be involved in indigent defense than under a traditional public-defender system.<sup>283</sup> The involvement of the local bar deflects any potential opposition by the bar when a county considers establishing its own public-defender system.<sup>284</sup>

#### E. *Create Incentives for Attorney Participation*

One of the most important components in encouraging participation and support for indigent-defense programs is to provide attorneys with sufficient compensation.<sup>285</sup> However, attorneys should not expect those in the public service role of defending indigents to be compensated at the same rate as those in private practice.<sup>286</sup> They should understand that other attorney participants in the criminal-justice system, namely judges and prosecutors, are also not commanding the salaries that private practitioners with comparable experience receive in the practice of law.<sup>287</sup> They should be sensitive to the budgetary realities with which governments are struggling.<sup>288</sup> Unrealistic compensation demands could create a backlash, adding to the public perception of attorneys as greedy individuals only concerned with their own well-being.<sup>289</sup> So how can those interested in creating effective indigent-defense systems help create incentives that

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283. See *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, <https://www.smcba.org/ForthePublic/PrivateDefenderProgram.aspx> (last visited Mar. 1, 2012) (commenting on the program's growth in both case load and budget since the time of its inception).

284. See *id.* (referring to the original opposition to the county's efforts in starting its own public defender's office).

285. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 9 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (noting the need to adequately compensate attorneys for indigent representation).

286. See *id.* (recognizing the disparity between adequate compensation and current compensation for indigent defense).

287. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) (reiterating that the lower wage paid to court-appointed attorneys "falls within the realm of humanities rather than commerce").

288. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 8 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (explaining the funding disparities between regions).

289. See STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, *REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM* 11 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf> (indicating the wealth amassed by some appointed attorneys who had minimal contact with their indigent client).

will make attorney participation more attractive?

A first step would be to examine the fee schedules in the San Mateo plan, then to make adjustments based on the economic situation of the particular state or county. The bar should be involved in the process, so that attorneys would enter the program with a feeling that the compensation, although not enriching, was nonetheless satisfactory.<sup>290</sup> Another step would be to seek development of loan forgiveness programs for attorneys in public service, which are available through many law schools.<sup>291</sup> Furthermore, private donors might be willing to contribute to such a program. The creation of individual development accounts, which would pay for additional travel, continuing education, and maybe even the equivalent of sabbaticals for practitioners with a specified amount of time in the program, should be explored. Local governments could consider allowing attorneys to participate in health care and other benefits already offered to prosecutors.<sup>292</sup>

Noneconomic incentives could also be created.<sup>293</sup> Bar associations could recognize and publicize the efforts and sacrifices of the participating attorneys.<sup>294</sup> Law firms might recruit attorneys from those who have served in the indigent-defense program.<sup>295</sup> After all, these attorneys would have obtained intense client contact, negotiation, and trial experience skills useful in civil law practices.

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290. See *Private Defender Program*, SAN MATEO CNTY. B. ASS'N, [https://www.smcba.org/For the Public/PrivateDefenderProgram.aspx](https://www.smcba.org/For%20the%20Public/PrivateDefenderProgram.aspx) (last visited Mar. 1, 2012) (outlining the flexible attorney fee structure in San Mateo County).

291. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 14 n.114 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (discussing the fact that public defenders do not receive loan forgiveness while their counterparts in prosecution do).

292. See *id.* at 13–14 (pointing out the disparities between resources available to prosecutors versus public defenders).

293. See STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 11 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf> (focusing on non-economic incentives such as “personal pride, professional ethics, and idealistic commitment to helping the accused”).

294. Cf. LEGAL SERVS. OF N. FLA., PRIVATE ATTORNEY INVOLVEMENT PLAN 2011 5–6 (2011), available at <http://lsnf.org/plan2011.pdf> (recognizing pro bono service in indigent representation through the Private Attorney Involvement Program).

295. See STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INST. POLICY ANALYSIS, NO. 666, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 11 (2010), available at <http://www.cato.org/pubs/pas/pa666.pdf> (advancing the need for more than mere idealism to incentivize attorneys in representing an indigent client).

Incentives must be created for government improvements to the system.<sup>296</sup> Bar associations should seek to determine whether grants, such as those available in Texas,<sup>297</sup> could be used to improve the local system.<sup>298</sup> Bar leaders and local law schools should explore whether partnerships with the clinical programs of those schools could bring resources, including the participation of law students and faculty members into the system.<sup>299</sup> Criminal defense firms must be willing to mentor and supervise new attorneys.<sup>300</sup> Finally, bar associations can utilize the resources and suggestions available in developing improved programs and urge their adoption.<sup>301</sup>

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296. See generally TEX. INDIGENT DEFENSE COMM'N, FY 2012 FORMULA GRANT PROGRAM (2011), available at <http://www.txcourts.gov/tidc/pdf/FY2012FormulaGrantRFA.pdf> (allowing eligible counties to receive grants in order to promote compliance with indigent-defense standards promulgated by the commission).

297. See generally *Grant Program*, TEX. INDIGENT DEF. COMMISSION, [http://www.txcourts.gov/tfid/TFID\\_Grant\\_Program.asp](http://www.txcourts.gov/tfid/TFID_Grant_Program.asp) (last visited Feb. 28, 2012) (offering three formula grants and four discretionary grants).

298. See *id.* (explaining the programs and grants, as well as providing descriptions of each funding stream).

299. LEGAL SERVS. OF N. FLA., PRIVATE ATTORNEY INVOLVEMENT PLAN 2011 5 (2011), available at <http://lsnf.org/plan2011.pdf> (proposing an outreach program involving law students in indigent defense). This Article's author, as vice president of the Mexican American Law Student Association at the University of New Mexico School of Law, assisted in the creation of a partnership between the New Mexico Public Defender's Office and the University of New Mexico School of Law in the 1970s. "Centrolegal" provided indigent defense to those charged with misdemeanors in Albuquerque. This Article's author served as a supervising attorney in the program after graduation in 1975.

300. See AM. COUNCIL OF CHIEF DEFENDERS BEST PRACTICES COMM., NAT'L LEGAL AID & DEFENDERS ASS'N, IMPLEMENTATION OF THE ABA'S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS 12 (2010), available at <http://www.nlada.org/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf> (describing the various mentoring programs that supply formal and informal performance reviews of attorneys representing indigent clients).

301. See RICHARD J. WILSON, INDIGENT DEFENSE RESOURCES: AN ANNOTATED BIBLIOGRAPHY OF MATERIALS ON INDIGENT DEFENSE SYSTEMS, INCLUDING A STATE-BY-STATE LISTING OF REPORTS AND STUDIES, available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325\\_aba\\_indigentdefensesresourcesbibliog.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_indigentdefensesresourcesbibliog.authcheckdam.pdf) (examining the various public-defender assistance programs, organized by state, conducted through the Bar Information Program); *Indigent Defense/Public Defender Systems: ABA Policies & Guidelines on Indigent Defense*, A.B.A., [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/indigent\\_defense\\_systems\\_improvement/policies\\_guidelines.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/policies_guidelines.html) (last visited Mar. 1, 2012) (providing a complete list of adopted indigent-defense policies from 1973 to the present); see also AM. COUNCIL OF CHIEF DEFENDERS BEST PRACTICES COMM., NAT'L LEGAL AID & DEFENDERS ASS'N, IMPLEMENTATION OF THE ABA'S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS 12 (2010), available at <http://www.nlada.org/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf> (analyzing existing indigent-defense systems under the ABA's Ten Principles for best practices). The Texas Task Force on Indigent Defense, along with the Spangenberg Group, recommend that the following steps be taken when creating a public-defender program:

## VI. CONCLUSION

We cannot allow an important part of our legal system to remain broken any longer. Constructing new, ethical, efficient, and effective indigent-defense systems will benefit individual defendants, our system of justice, the attorneys who participate, and our profession as a whole.

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(1) convening stakeholders to discuss options, methods and impact; (2) decide what categories of cases the public defender will be assigned; (3) write a Request for Proposals (examples abound); (4) evaluate RFP responses and select a governmental or non-profit organization to operate the public defender; (5) negotiate a contract or establish a budget; (6) hire or approve the chief public defender; and (7) modify procedures to transition from the existing system to the public defender.

TEX. TASK FORCE ON INDIGENT DEF. & THE SPANGENBERG GRP., *BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS* 41–43 (2d ed. 2008), available at <http://www.courts.state.tx.us/tidc/pdf/2008revisedblueprintfinal.pdf>; see *Policies and Standards*, TEX. INDIGENT DEF. COMMISSION, [http://www.txcourts.gov/tidc/TFID\\_policies\\_and\\_standards.htm](http://www.txcourts.gov/tidc/TFID_policies_and_standards.htm) (last visited Mar. 1, 2012) (listing sample indigent-defense plans and templates).