

INTRODUCTION

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Forty years after the Supreme Court's landmark decision in *Gideon v. Wainwright*,¹ the United States faces systemic challenges in criminal justice and legal representation for the poor. Vast difficulties and challenges remain for advocates who intend to fulfill *Gideon's* promise: stark financial constraints on the resources available for defender services;² structural and organizational limitations of traditional public defender offices;³ public and political resistance to representation for the accused;⁴ systemic bias against racial minorities and the poor;⁵ the consequences of rising retributivism and the abandonment of rehabilitative policy in the criminal justice system.⁶ Reformers working to bring about improvements in public defense approach these challenges using different strategies including on-site program evaluations, technical assistance, standards enforcement, leadership and management training, and, of course, systemic litigation where necessary.⁷ Research and critical thinking about indigent defense services, however, is a cornerstone for all these reform strategies.

One public defense research project stands out as unique. In 1998, the Bureau of Justice Assistance (BJA) at the U.S. Department of Justice decided to fund a project that would convene a small group of influential thinkers and practitioners. Over several years, the group members were given the opportunity to step back from their work in the field in order to analyze the broader problems facing public defense service providers. Never before had the federal government initiated a project aimed at rethinking the role of public defense and identifying ways to address the serious problems facing defense providers in states and counties nationwide. The Executive Session on Public Defense

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1. 372 U.S. 335 (1963).

2. Yoav Sapir & Charles Ogletree, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 REV. L. & SOC. CHANGE 203 (2004).

3. Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 REV. L. & SOC. CHANGE 83 (2004); Tony Fabelo, *What Policy-Makers Need to Know to Improve Indigent Defense Systems*, 29 REV. L. & SOC. CHANGE 135 (2004).

4. Mark H. Moore, Michael P. Judge, Carlos J. Martinez & Leonard Noisette, *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 REV. L. & SOC. CHANGE 57 (2004).

5. Kim Taylor-Thompson, *Taking It to the Streets*, 29 REV. L. & SOC. CHANGE 153 (2004).

6. Cait Clarke & Jim Neuhard, *"From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 REV. L. & SOC. CHANGE 11 (2004).

7. Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 REV. L. & SOC. CHANGE 113 (2004); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 REV. L. & SOC. CHANGE 123 (2004).

(ESPD) was an historical moment in the struggle for equal justice.

About the Executive Session on Public Defense

Executive Sessions are an unusual process, developed at Harvard University's Kennedy School of Government, in which practitioners and academics search together for plausibly effective answers to important public problems. Past Executive Sessions have addressed child protective services, drugs and community policing, juvenile justice, medical negligence and patient safety, and state and local prosecution. Because the process typically continues over several years, it provides time for open dialogue, disagreement, reflection, and consensus building around a core set of ideas. The Executive Session on Public Defense was designed to address the persistent indigent defense crisis in states and counties and redefine the role of public defense within a changing criminal justice system. The goal was to encourage a new form of dialogue between high-level practitioners and scholars interested in an array of public defense issues with a view to proposing solutions.

The ESPD process was directed by a unique coalition of leaders from Harvard University's Program in Criminal Justice Policy and Management, the Harvard Law School, NYU's Robert F. Wagner Graduate School of Public Service, the Vera Institute of Justice, the Spangenberg Group, and the Bureau of Justice Assistance. This group was known as the "core committee," which met regularly to plan the content and process for each Executive Session meeting.⁸ It was my pleasure to serve as the project manager for the Executive Session on Public Defense from 1998 to 2001.

Public defense practitioners rather than academicians were given majority representation in the larger group. ESPD had approximately thirty members selected based on their leadership, creative thinking abilities, and experience. The group was diverse in terms of geographic location, race, gender, and representation from different types of public defense systems. In addition to the public defenders there was a small group of participants who were often called "the leavenors." These were participants whose professional life was unrelated to criminal defense, yet their forthright and insightful opinions provided balance to the ongoing conversations. These leavenors included a legislator, a prosecutor, a police commissioner, a journalist and a community organizer.

The ESPD Process

Between 1999 and 2001, ESPD convened five times, and the two-day meetings were conducted as loosely structured policy debates. The ideas discussed were to be tested in the field in between the Kennedy School meetings. Several ESPD members volunteered to commit their ideas to writing throughout the

8. The core committee consisted of Cait Clarke, Frank Hartman, Mark Moore, Charles Ogletree, Ellen Schall, Bob Spangenberg, and Chris Stone.

process. It was hoped that ESPD papers would plant the seeds for positive change within the field by reaching public defense leaders then eventually spread to others like court administrators, county officials, community members, and legislators.

The ESPD process explored the fundamental question of what it means for states and counties to provide quality legal representation to accused persons who cannot afford private counsel. In addition to opportunities for listening, learning and understanding, the Executive Session process also contained moments of frustration. The sources of discontent ranged from the strain of long meetings that revisited some of the same topics to ensure that all participants were comfortable with where the conversation was moving, to the difficulty of committing some of the ideas to paper and sharing this writing responsibility among all participants. Several of the papers produced from ESPD were written by practitioners such as Robin Steinberg, Michael Judge, Leonard Noisette, Mark Stephens, and James Neuhard, and the products demonstrated their insightfulness and authentic voice. Professor Mark Moore authored an important work product of the Executive Session. Moore's paper, entitled *Alternative Strategies for Public Defenders and Assigned Counsel*,⁹ includes a valuable chart that the group referred to often in exploring an expanded defense role. Professor Moore also co-authored another important ESPD paper entitled *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*.¹⁰ Since ESPD ended, several members remain committed to spreading the ESPD ideas and participate as faculty in several of the National Defender Leadership Institute's trainings for public defense leaders and managers of assigned counsel programs. Others continue to develop the core ideas that evolved out of the ESPD discussions through leadership trainings, state and national conferences, local policymaking, and legislative initiatives.

The ESPD Assets

At the final ESPD session in May of 2001, this unique coalition of academics, social justice representatives, leavenors, and defense practitioners ultimately agreed upon a set of ideas with the most potential to reshape the future of indigent defense. Below is the list of what participants called the "ESPD Assets."¹¹ The assets list below is not formally drafted, but instead these reflect the exact notes taken by the large group on the final day around which there was agreement. These consensus points will serve as a framework for the ideas that all ESPD members believe can move us toward positive reform of public defense systems.

9. Moore, *supra* note 3.

10. Moore, *supra* note 4.

11. Cait Clarke, Ideas that Emerged During ESPD with the Most Potential to Reshape the Future: The ESPD Assets, (May 13, 2001) (on file with the Kennedy School of Government, Program in Criminal Justice Policy and Management).

OVERVIEW	<p>1) A shift in openness—support a group of public defenders willing to entertain new ideas. An “intellectual prison break.”</p>
	<p>2) Could see public defenders as an embattled neighborhood.</p> <ul style="list-style-type: none"> • Old position: let others define you. This shift in thinking questions the definitions of who we are. “We are not what they say or think we are.”
	<ul style="list-style-type: none"> • New position: Defender can join others in producing good outcomes and other values (e.g., strong families and neighborhoods, good economy, less crime). • Before common missions become possible, a critical mass of smaller projects accumulate, (sometimes) building into a common community vision.
ROLES	<p>1) Zealous representation to individual clients is an essential base or threshold, <i>but</i> expanding the role is also necessary.</p>
	<p>2) Expanded role includes:</p> <ul style="list-style-type: none"> • public education; • holistic advocacy; and • interdisciplinary outreach.
	<p>3) Important for public defenders to define ourselves (as opposed to others defining us). Need to connect how public defenders create public value.</p> <p>In connecting with the public, public defenders need to:</p> <ul style="list-style-type: none"> • respect the legitimate fears of the public; • identify the client as a member of the community; • agree that resources are being squandered and bring in public defense expertise in knowing what does work; and • recognize and articulate the way interests of the client and community converge.
	<p>4) New willingness to collaborate. Can’t work effectively in isolation, can’t do the work alone. Need to look for unlikely partners and new strategic alliances. Nevertheless, leaders must keep in mind that collaboration still makes public defenders nervous and raises complicated issues.</p>
	<p>5) A lot of the important work is work done outside the courtroom, including policy changes, social work, reintegration of the client into the community, and efforts to shift resources. There’s an interesting role for lawyers as community volunteers.</p>
	<p>6) As the mission expands, methods need to expand.</p> <ul style="list-style-type: none"> • Need for multicultural/multidisciplinary approach. • Need to coordinate cooperative activity.

	7) Need mechanisms and measures to ensure client and community voices are heard, both in terms of internal office performance and community change.
	8) Public defense has a role in reducing crime. Public defense has both the power and the responsibility to prevent crime. For individual clients, public defenders can empower clients to choose an alternative to criminal behavior. As co-leaders of the system, defenders can join others in the general goal of crime reduction.
	9) Public defenders have a role in protecting due process rights: <ul style="list-style-type: none"> • discussion about whether the public defender is the linchpin in assuring fairness in system, or • whether public defenders can or should join others who believe they are doing this as well. • Public defender role here is key to public believing in the system!
	10) Need to enlarge ideas about what the critical steps in the process are (e.g., sentencing, first contact with the accused).
IMPLICATIONS FOR TRAINING	1) Start from the premise that we need to rethink the skill set of public defenders and PD managers.
	2) If sentencing matters as a critical stage, lawyers need to be trained differently.
	3) As the role changes, training in negotiation needs to be emphasized.
	4) Lawyers need to be taught the importance of evaluation, outcome measures, logic modules, etc.
	5) Need to consider issues of specialization and teamwork.
CONCERNS & RISKS	1) We do <i>not</i> want to create a more impossible job. We need to set realistic expectations.
	2) We do not want it to be easier for clients to access social services, etc., by entering the criminal justice system than just by being a member of a community.
	3) Lawyers will have to learn how to hold accountable programs to which clients are referred.
LEVERAGING MEDIA	<ul style="list-style-type: none"> • Have a consistent message—clear and simple—that you are ready to use. • Be on the look out for an opening to use it. • Need a professional narrative, which needs to be repeated.

The value of this framework for public defenders who lead programs struggling with huge caseloads, few resources, political isolation, and high staff

turnover rates is that it can serve as a frame of reference for building a reform strategy. Many of the assets listed above have been in practice in some smaller public defense programs. For example, Leonard Noisette, Executive Director of the Neighborhood Defender Service of Harlem, and Robin Steinberg, Executive Director of the Bronx Defenders, with staff dedicated to these concepts of community justice and whole-client advocacy, have built their community-oriented defender programs within this framework over many years. Professor Randy Stone recounts that many of these ideas were the mission of the Community Law Offices operating in Chicago in the 1960s. The ESPD process also had a direct impact on how the Knoxville County Public Defender program was physically constructed and how representation for the indigent accused in Knox County has improved under the creative leadership of its director, and active ESPD participant, Mark Stephens. The new Community Law Office (CLO) in Knoxville is a “bricks and mortar” testament to the successful application of the ESPD assets. The CLO exemplifies how a traditional defender program can be transformed into a community-oriented, problem-solving public defense organization that does not lose track of the core mission of providing zealous trial advocacy.¹² It is possible within traditional defender programs to apply some of these assets so that lawyers, social workers, investigators, and staff are able to wrap a multitude of services around their clients to provide outstanding quality representation and bring dignity to the individual, their families, and their communities. The ESPD papers in this issue explore the different ways this can and should be done to ensure equal justice and fair play in every state and county system.

In the early days of the ESPD under the Clinton administration, some of the work product of this Executive Session was published on the Bureau of Justice Assistance web site and the Kennedy School web site. However, with the change in administration and BJA leadership, there were no further plans to publish the collective work of the Executive Session on Public Defense. Over two years of work was to remain dispersed and largely out of print until the

12. On March 28–29, 2003 many members of the ESPD team gathered to help Mark and his staff commemorate *Gideon*'s Fortieth Anniversary and celebrate the opening of the new Community Law Office. At this reunion, ESPD members entered a sparkling new CLO building with the words “Public Defender—Peace, Liberty and Justice” carved boldly in stone above the entryway. Unlike traditional defender offices, one section of the building houses attorneys' law offices and one entire wing houses social services. The social worker staff supports lawyers on individual cases to resolve CLO clients' problems and to address concerns in the broader community. For example, the CLO offers space for community Alcoholics Anonymous meetings, Narcotics Anonymous meetings, and other services so that clients and families can voluntarily attend counseling sessions with a licensed social worker. To the delight of ESPD participants, the Fortieth Anniversary *Gideon* Celebration and ESPD reunion took place in the gleaming new basketball court and community stage. Many of the ESPD assets were debated; however, the papers gathered in this special edition of *Social Change* are most important because ESPD members hope they will inspire others to do what Mark Stephens and his team has done—to move ideas outside of academic papers and transcribed conversations to help real people and families by providing high quality services to the accused.

N.Y.U. Review of Law & Social Change offered their assistance and these journal pages. Each member of ESPD is most grateful to the editors and staff of the *N.Y.U. Review of Law & Social Change* for their willingness to prepare and publish this collection of ESPD papers and to make widely available the insights that evolved through the Executive Session on Public Defense. We hope that the ideas in these pages will engage current and future defense practitioners to think differently about their work and continue the fight for equal justice so that when *Gideon* marks its Fiftieth Anniversary, we will all have something to celebrate.

