KEEPING *GIDEON*'S PROMISE: A COMPARISON OF THE AMERICAN AND ISRAELI PUBLIC DEFENDER EXPERIENCES*

CHARLES J. OGLETREE, JR.†

YOAV SAPIR‡

INTRODUCTION

As we enter the new millennium, indigent defendants throughout the nation and the world are asking an important question: Who will come forward to represent me if I face the risk of losing liberty and life at the hands of the government? If the person is indigent in the United States, the Constitution would seem to answer that question unequivocally. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence."[1] In practice, however, the right is only guaranteed to certain classes of defendants, and the quality of defense is reduced by legal factors such as low standards for representation and by structural factors such as limited funding. In Israel, the right to counsel is yet to be recognized as a fundamental constitutional right, but assistance of counsel is guaranteed to many individuals by statute. The Israeli public defender system faces many of the same challenges as the United States system, but has adopted a different set of strategies to ensure quality representation.

In this article we endeavor to analyze the significance of the right to counsel, particularly as it applies to the creation and expansion of public defender systems in the United States, where public defender systems have been in place for decades, and in Israel, where a public defender system was established just seven years ago. We will examine the history of the public defender systems in both countries. The heart of the analysis will focus on a

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† Jesse Climenko Professor of Law, Harvard Law School; Founder and Director of the Criminal Justice Institute and the Saturday School Program; and Associate Dean of the Harvard Law School Clinical Program. Charles J. Ogletree served as a public defender in the Public Defender's Office for the District of Columbia from 1978–1985.

‡ S.J.D. candidate, 2004, and Teaching Fellow, Harvard University; Clarke Byse Fellow, Harvard University, 2002; LL.M., Harvard University, 2000; Assistant to the District of Tel Aviv Public Defender, 1997–1999; Law Clerk to Justice Mishael Cheshin, Israeli Supreme Court, 1996–1997; LL.B., Tel Aviv University, 1996.

1. U.S. CONST. amend. VI.

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comparison of the perplexing problems that the American and Israeli public defender systems have encountered and the strengths and weaknesses of each system.

Comparison of the American and Israeli public defender systems provides insight into both practical and theoretical issues in public defense. On the practical side, Israel has developed a system of in-process regulation[2] that may serve as a useful model for American public defender offices struggling to provide quality representation as their client base grows and government support dwindles. The United States may need innovations in methods of service provision to compensate for low constitutional standards for representation and the difficulties of enforcing quality requirements through professional regulations, and Israel provides a useful example of potential reforms. Similarly, the difficulties now experienced by public defenders in the United States can provide valuable lessons to Israel. By examining these difficulties and experiences, the public defender system in Israel may be able to avoid some of the predictable pitfalls.

On the theoretical side, different social roles and attorney-client relationships in the two systems bring to light the questions of what role public defender offices should play and whether public defenders should have special rights and responsibilities as compared to private attorneys. The Israeli system may be moving toward treating public defenders as akin to state actors, with obligations toward the justice system as a whole rather than only toward individual clients. Additionally, Israeli public defenders' focus on serving the needs of particular clients is counterbalanced by ethical rules that are geared more toward permitting representation of as many clients as possible than toward protecting individual clients' interests. The American system of public defense, on the other hand, places strong emphasis on the adversarial system. Its ethical regulations correspondingly require attorneys to prioritize individual clients' interests over interests of the judicial system as a whole, as well as over interests of the client base as a whole.[3] While valuable in many respects, focus on individual clients may conflict with the practical need to expand access to quality representation, and may contribute to American public defenders' silence in the public debate shaping laws and policies affecting their work and their client base.

In the United States, although there is a growing body of literature on public defense systems and numerous scholars have addressed the problem of inadequate representation by assigned and contract counsel,[4] little has been

2. By "in-process regulation," we refer to a system in which trained public defenders supervise private attorneys from start to finish as they litigate cases.

3. *See* Kim Taylor-Thompson, *Taking it to the Streets*, 29 REV. L. & SOC. CHANGE 153, 176 (2004).

4. Most scholars address the important problems of fixed low fees that supply incentives for counsel to provide ineffective assistance to their clients. *See, e.g.*, NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL

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written on the assistance, support and supervision that public defender systems can supply to lawyers outside their offices. One explanation for the lack of interest in developing elaborate supervision systems may be that the budget limitations on indigent defense do not allow such innovations. The reluctance to change the basic system of service provision, however, may also stem from American defenders' conceptualization of the role of public defenders and their relation to their clients. Public defender offices in the United States sometimes perceive themselves as ethically and legally barred from performing certain supervisory tasks.[5] We maintain that this perception is wrong and that there is an urgent need to rethink our conceptions of the role of public defender systems and their relations with appointed attorneys.

II.
THE UNITED STATES

A. The History of Public Defender Offices and the Right to Counsel in the United States

Shortly following the ratification of the United States Constitution, a number of important amendments were adopted to protect citizens against the excessive exercise of governmental power. One of the more significant protections afforded citizens was the right to be assisted by a lawyer when subject to criminal prosecution.[6] Despite the apparent simplicity of the right, its meaning and practical implications took many years to unfold. The idea of a public defender service originated in the United States toward the end of the 18th century, but it was not until 1914 that the first public defender office opened, in Los Angeles County.[7] Within four years, New York opened its first public defender office, the Voluntary Defenders Committee.[8]

The first offices were established under an ideology aimed at legitimating the criminal justice system and helping the prosecution in processing cases efficiently. McConville and Mirsky, in their comprehensive research on New York City's indigent defense system, noted:

> Indigent defense providers in the first half of the century adopted a non-adversarial ideology from reformers concerned with crime control and efficiency in government. This ideology became embedded in the practices of defenders toward their clients, the prosecution, and the judicial system. Thus, the mass disposition of poor people's criminal

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REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982).

5. Telephone Interview with Ellen Berz, Director, Assigned Counsels Division for the State Public Defender of Wisconsin (Mar. 27, 2000).

6. U.S. CONST. amend. VI.

7. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2423–24 (1996).

8. *Id.* at 2424.

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> cases by guilty pleas and by other non-trial dispositions can best be understood through the history of indigent criminal defense.[9]

Indeed, the public defender offices would "assist in the system's prosecution of the guilty and would fight for acquittal only for those defendants who were obviously innocent. Adversarial defense was considered an unnecessary strategy because most indigent defendants were thought to be guilty."[10]

While these jurisdictions opted to provide representation, a legal right to counsel had not yet been firmly established. In 1932, the United States Supreme Court decided *Powell v. Alabama*,[11] in which the Court had to determine whether defendants charged with capital offenses were entitled to lawyers to assist in their defense. The Court's response was:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[12]

For the first time, the Court recognized that the indigent accused not only have a right to have counsel present, but also have the right to have an attorney appointed to their case under certain limited circumstances.[13] This important right was extended to non-capital federal felony prosecutions in *Johnson v. Zerbst*.[14]

Despite the early promise expressed in *Powell* and *Johnson*, the Court proved reluctant to expand the right to counsel. One of the more disappointing examples of this reluctance is *Betts v. Brady*. In *Betts* the Court held that the right to assistance of counsel is not a fundamental right and thus not incorporated against the states by the Fourteenth Amendment.[15] Justice Roberts, speaking for a divided Court, observed that:

> [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of

9. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 587–89 (1986–1987).

10. Taylor-Thompson, *supra* note 7, at 2424–25 (citation omitted).

11. 287 U.S. 45 (1932).

12. *Id.* at 68–69.

13. Specifically, the Court required appointment of counsel "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like . . . ." *Id.* at 71.

14. 304 U.S. 458 (1938) (finding that the Sixth Amendment entitles persons charged in federal courts to the assistance of counsel for their defense).

15. 316 U.S. 455 (1942).

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> 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.[16]

Justice Roberts' narrow view of the Sixth Amendment right to counsel was sharply criticized by Justice Black in his dissent. Justice Black observed:

> Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented .... Most of the other states have shown their agreement by constitutional provisions, statutes, or established practice judicially approved which assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.[17]

More than two decades passed before the Supreme Court adopted Justice Black's expansive vision of the right to counsel. In 1963, the Court overruled *Betts* in the seminal case of *Gideon v. Wainwright*.[18]

In 1961, Clarence Earl Gideon was charged with having broken into and entered a poolroom with intent to commit a misdemeanor, an offense that constituted a felony under state law.[19] Gideon requested that he be provided a lawyer because he could not afford to hire one. The trial judge found that although Gideon was poorly educated, the court could not appoint counsel to assist him because he was not charged with a capital offense.[20] Gideon was forced to defend himself at trial, and was sentenced to five years in prison.[21]

The Supreme Court declared that Gideon's inability to conduct his defense with the effectiveness of even a minimally skilled lawyer was not a personal failure, but an institutional one: "in our adversary system of criminal justice," the Court declared, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[22] The *Gideon* Court noted that lawyers are necessities, not luxuries, and held that every

16. *Id.* at 473.

17. *Id.* at 476–77. Justice Black went on to note that in 1942, thirty-five states provided representation to indigent defendants in serious non-capital and capital criminal cases, and that the Supreme Court should have approved such a practice as universally applicable. *Id.* at 477 n.2.

18. 372 U.S. 335 (1963). The principal evidence against Gideon was the testimony of one eyewitness who identified Gideon as the man seen in the Bay Harbour Poolroom near the cigarette machine from which money had been taken. Brief for the Respondent at 19, *Gideon* (No. 155).

19. *Gideon*, 372 U.S. at 336–37.

20. *Id.* at 337.

21. *Id.*

22. *Id.* at 344.

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defendant charged with a felony, whether tried in state or federal court, is entitled to free legal representation at trial.[23]

Gideon prompted a monumental shift in right to counsel jurisprudence in the United States. The case opened the floodgates for the extension of the right to counsel to cases involving less serious charges, as long as incarceration was a result of conviction,[24] as well as to the early stages of the criminal justice process[25] and to nondiscretionary appeals.[26] *Gideon* and its progeny promised to revolutionize indigent defense in the United States, spurring the growth of public defender systems.

After the *Gideon* decision, public defender offices not only expanded in number but also changed their philosophy toward criminal defendants. Motivated by the Supreme Court's vision that criminal defense lawyers would uncover and raise claims of constitutional violations, public defenders adopted a more adversarial role in the defense of their clients.[27] They began to more closely resemble private attorneys in treatment of clients, viewing them as "individuals with distinct goals,"[28] rather than guilty felons. As a result, public defenders defended their clients by developing legal arguments that would "most advance the case of each client regardless of their compatibility with or impact on the claims to be raised by subsequent clients."[29] In order to improve the quality of representation, public defender offices implemented training programs for new lawyers and allocated resources for investigators and social workers to prepare individualized sentencing proposals for the court.

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23. *Id.*

24. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979) (adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel."); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that without knowing and voluntary waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

25. *See* Escobedo v. Illinois, 378 U.S. 478 (1964). The court held:

> [where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . .

Id. at 490–91.

26. *See* Douglas v. California, 372 U.S. 353, 357 (1963) (extending the indigent criminal defendant's right to counsel to "*the one and only*" state court appeal). For a thorough discussion of the right to counsel in post-appeal habeas corpus proceedings in state and federal courts, see FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 26.3b, at 1208–10, n.36 (4th ed. 1996).

27. Taylor-Thompson, *supra* note 7, at 2427 (citing McMann v. Richardson, 397 U.S. 759, 768, 771 (1970)).

28. *Id.* at 2428.

29. *Id.*

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B. Methods of Provision of Representation to the Poor in Criminal Proceedings

As public defense has grown and evolved over time, four primary models for providing representation for indigent defendants have emerged: assigned counsel, contract counsel, public defender, and mixed systems. In the United States, each jurisdiction has adopted a different variation on or a combination of these methods.[30]

Under the assigned counsel method, lawyers from the private bar are appointed to represent defendants in specific proceedings. The oldest and most common method of assigning counsel is the ad hoc system, in which counsel is assigned, usually by the court, with neither a formal method of assignment nor attention to attorney qualifications. Sometimes the court appoints lawyers on either the basis of their physical presence in the courthouse or familiarity. Some assigned counsel systems are better coordinated. In such systems, the assignment is usually done by way of rotation through lists of lawyers that have expressed willingness to serve as counsel for the poor. Under the assigned counsel system, appointed counsel generally has to apply to the court to get permission to spend money on expert witnesses, investigators, or other defense needs. The attorneys' fees are usually paid by the state or the county, and vary according to criteria such as type of case, number and type of court hearings, and number of hours worked.

Assigned counsel systems may or may not attempt to ensure that quality representation is provided. Some public defender systems demand at least minimal experience in order to be included on attorney lists. Some systems even have an administrative body that provides a certain degree of training, supervision, and support for the attorneys who serve as assigned counsel. Among the impediments to quality representation in the assigned counsel system are the dependency of defense attorneys on the court that appoints them,[31] the very limited regulation of the qualifications and performance of defense attorneys,[32] and the fact that counsel must petition the court for approval of special expenses for experts and investigators,[33] potentially revealing defense strategies.

The contract method similarly relies heavily on private attorneys for the representation of indigent defendants. The state or county enters into retainer contracts with attorneys who agree to handle cases of a certain type for a specific time period. This system, too, incorporates significant barriers to quality representation. Often the contract involves a single flat fee, and does not specify the number of cases to be handled. Since additional time spent working on a

30. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995). The descriptions of each model which follow are drawn from this source. *Id.* at 32–37.

31. *Id.* at 33.

32. *Id.*

33. *Id.*

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case does not result in additional funding, there is an incentive to minimize the amount of time spent on each case. This is exacerbated by the fact that the contracted lawyer is still allowed to maintain paying clients, creating financial pressure to neglect the indigent clients.[34] Moreover, the attorney is also usually responsible for the cost of support services such as investigators and expert witnesses. In other systems, less commonly, the fee is determined according to the number of cases that the lawyer is obliged to handle, and funds for support services are included in the contract.

The public defender method generally entails funding full-time employees at a non-profit organization responsible for handling indigent defense cases in a particular jurisdiction. Public defenders usually receive a monthly salary and operate from central offices. Sometimes, the majority of cases are handled by the public defender service, as in the state of Wisconsin. Sometimes only the minority are handled by the public defenders, as in Washington, D.C. It seems that jurisdictions with public defender offices may provide a higher quality of representation than jurisdictions with other types of systems.[35]

The mixed systems usually combine a public defender element with any of the other methods. The need for a mixed system arises from the conflicts of interest that often occur when public defenders must represent all defendants in a particular jurisdiction, including co-defendants in the same indictment. The degree of coordination between the public defender system and the system of private attorneys varies, and a committee or a board of directors is usually responsible for this coordination. One of the justifications for mixed systems is that the private component of indigent defense is essential for maintaining individuality in zealous representation. Competition between public defenders and assigned private counsel can facilitate innovative quality representation.

In the midst of considerable debate as to what organizational structures and economic expenditures are necessary to implement *Gideon*,[36] public defender systems have emerged as a common method of safeguarding Sixth Amendment rights.[37] Within the hundred most populous counties in 1999, public defender programs were operating in ninety counties, assigned counsel programs in eighty-nine counties, and contract programs in forty-two counties.[38]

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34. SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM (Jan. 2003), *at* http://www.schr.org/reports/docs/jan.%202003.%20report.pdf (last visited Nov. 5, 2000).

35. *See id.* at 16 (noting that "[i]f funded adequately, a public defender is the most efficient and cost-effective system to provide competent counsel to poor defendants.").

36. *E.g.*, Michael B. Mushlin, Gideon v. Wainwright *Revisited: What Does the Right to Counsel Guarantee Today?*, 10 PACE L. REV. 327 (1990).

37. *See* Robert L. Spangenberg & Patricia A. Smith, *An Introduction to Indigent Defense Systems* 11 (1986) (describing the growth of public defender systems in the 1970s).

38. CAROL J. DEFRANCES & MARIKA F. X. LITRAS, BUREAU OF JUST. STATIS., INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf.

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C. *The Broken Promise of* Gideon*: The Problem of Ineffective Assistance of Counsel*

Gideon has become part of American legal mythology. Unlike other constitutional guaranties developed by the Warren Court, the *Gideon* decision is considered uncontroversial. Even before *Gideon* there was increasing agreement on two points: first, that mere lack of financial resources should not influence the rights of the defendant in a criminal trial,[39] and second, that the right to counsel is the most important of defendants' rights, because the exercise of all other rights depends on it.[40]

But despite the initial expansion of and philosophical changes in the public defender system, the promise of *Gideon* was never completely fulfilled. In practice, the legal standard governing the right to counsel has been weakened in two main ways. The first is a series of decisions refusing to extend the right to counsel to criminal proceedings that are not considered "critical stages."[41] Thus, there is no right to an attorney before initiation of formal proceedings. For example, in *Kirby v. Illinois*[42] the Court held that there is no right to have counsel present at a pre-indictment lineup. Even after initiation of formal proceedings, some stages of proceedings are not recognized as critical and are therefore excluded from the proceedings in which a defendant is entitled to appointed counsel.[43] Major limitations on the right to counsel after trial were imposed in *Ross v. Moffitt*[44] when the Court held that the right to counsel does not extend to appeals or review proceedings beyond the first direct appeal, and in *Pennsylvania v. Finely*,[45] when it held that there is no right to counsel in state post-conviction proceedings. At the same time, although the Court held that the consequence of a violation of the right to counsel at the actual trial is reversal,[46]

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39. As far back as 1941 Justice Jackson articulated this idea with regard to any right, in *Edwards v. California*, 314 U.S. 160, 184–85 (1941) ("We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed, or color.").

40. *See, e.g.*, Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

41. "Critical stages" are those in which "counsel's absence might derogate from the accused's right to a fair trial." U.S. v. Wade, 388 U.S. 218, 226 (1967).

42. 406 U.S. 682 (1972).

43. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973) (holding that there is no right to counsel in a post-indictment photograph lineup because it is not a critical stage).

44. 417 U.S. 600 (1974).

45. 481 U.S. 551 (1987).

46. This was the result in *Gideon* itself, but see also *Chapman v. California*, 386 U.S. 18, 23 (1967), holding that some constitutional errors are "so basic to a fair trial that their infraction can never be treated as harmless error." One of these basic errors the Court mentioned is the denial of the right to counsel.

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violations of the right to counsel in other proceedings were held subject to the "harmless error" test.[47]

The second and more significant way that *Gideon*'s potential was narrowed was through the low standard for effective assistance of counsel that was set in *Strickland v. Washington*[48] and in *United States v. Cronic*.[49] As the *Strickland* Court noted, the standard is "highly deferential" to the attorney's conduct;[50] the result is that claims of ineffective assistance are extremely difficult to prove. Under the *Strickland* two-prong test, the defendant must prove that the attorney's performance was unreasonable and that it prejudiced the defendant.[51] The Court declined to formulate a specific definition of unreasonable performance, stating:

> [m]ore specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.[52]

Even in the rare cases in which a court is willing to view the attorney's performance as unreasonable, the defendant still has to cope with the almost insurmountable hurdle of proving that she was prejudiced. Prejudice is presumed in certain cases, such as when a defendant is denied counsel or there is state interference with counsel. There is also a limited presumption of prejudice when counsel is burdened by an actual conflict of interest.[53] To claim per se ineffectiveness a defendant must show that the process lost its character as a confrontation between adversaries.[54] This is only possible in cases in which the circumstances surrounding the defense were "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," such as the complete denial of counsel, complete failure by defense counsel "to subject the prosecution's case to meaningful adversarial testing," or the rare cases in which "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective

47. *See, e.g.*, Moore v. Illinois, 434 U.S. 220 (1977) (applying the harmless error analysis to violation of the right to counsel at identification procedures before trial); Coleman v. Alabama, 399 U.S. 1 (1970) (applying the harmless error analysis to violation of the right to counsel at preliminary hearing). *See also* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2527–33 (1996).

48. 466 U.S. 668 (1984).

49. 466 U.S. 648 (1984).

50. *Strickland*, 466 U.S. at 689.

51. *Id.* at 687.

52. *Id.* at 688 (internal citations omitted).

53. *Id.* at 692 (citing *Cronic*, 466 U.S. at 659 & n.25; Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)).

54. *Cronic*, 466 U.S. at 656–57.

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assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[55] If the defendant can show that such circumstances existed, the court need not inquire into the attorney's actual performance at trial.[56] Showing per se ineffectiveness under *Cronic* is possible only on very rare occasions.

In most cases, however, the burden is on the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[57] This is a much higher standard than the "harmless error" standard that the Court has applied to most constitutional rights violations, in which the burden is on the prosecution, not defense, to prove beyond a reasonable doubt that the defendant was not prejudiced by the constitutional violation.

The result of this doctrine is that courts have refused to find ineffective the counsel of lawyers who fell asleep during the trial, were drunk, consumed heroin and cocaine, did not conduct any investigation of the case, did not interview any of the prosecution's witnesses, were not present in court while the prosecution's main witness testified, and so forth.[58] Given such results, it is unsurprising that many critiques have been offered of the standard for ineffective assistance of counsel. It has been compared to an "'eye of a needle' through which few petitioners will be able to pass."[59] Others have cynically described the standard as a "breath test" according to which "[i]f a mirror fogs up when placed beneath the lawyer's nostrils, he or she is not ineffective, as a matter of law."[60] Indeed, it seems that the standard of ineffective assistance of counsel may be a legitimizing tool that justifies the inadequate representation of the poor, rather than a real protection. The very few cases in which courts reverse convictions because of ineffective assistance of counsel serve as a fig leaf for a system in which many defendants are represented inadequately.[61]

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55. *Id.* at 658–60 (citing Powell v. Alabama, 287 U.S. 45 (1932)).

56. *See id.* at 661.

57. *Id.* at 694.

58. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 76–81 (1999).

59. Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard For Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 413–14 (1988) (quoting Sullivan v. Fairman, 819 F.2d 1382, 1391 (7th Cir. 1987)).

60. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE 183 (2000).

61. For a discussion of the "legitimation" effect of law see Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys, ed., 1982); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269–95 (1987); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 236–63 (1977). For a critique of the concept of legitimation see Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983). For application of the concept in the criminal law context see Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L.

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As weak as the legal standards for effective assistance of counsel may be, perhaps the more important determinants of the quality of representation are the structural features of the public defender system that impede the quality representation, particularly the chronic and severe shortage of resources. The growth of the public defense system after the *Gideon* decision was never matched by sufficient increases in funding,[62] and the situation has grown even worse in recent years.

During the 1980s and 1990s, guided in part by the fear fueled by rising levels of crime, legislators imposed stiffer controls in the fight against crime.[63] The War on Drugs waged by the Reagan and Bush administrations resulted in policies that criminal defense lawyers described as "Zero Tolerance" for criminal defendants and their lawyers.[64] Ultimately, public defender offices became targets of fiscal budget cuts. For example, in New York City, Mayor Giuliani cut the budget of the Legal Aid Society by twenty-five percent and arranged for seven new organizations to take limited numbers of cases in late 1994. Legal Aid represented approximately 200,000 defendants in 1995 and 200,000 defendants in 2000, but with twenty million dollars less in funding in 2000.[65] Funding cuts forced layoffs of social workers and investigators, as well as lawyers. Susan L. Henricks, the deputy attorney in charge of Legal Aid's criminal defense division, echoed the frustration and helplessness that many public defender offices feel when she stated, "We're holding things together with bubble gum and string .... We don't have enough lawyers, we don't have enough investigators, we don't have enough social workers. We don't meet the standards for any of this."[66]

Largely due to the lack of financial resources, the public defense system lacks a sufficient number of lawyers.[67] The understaffing and lack of funding result in a situation in which the small number of attorneys who are willing to do

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REV. 355, 429–38 (1995).

62. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 (1982) ("[A]lmost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds.").

63. Taylor-Thompson, *supra* note 7, at 2430.

64. *Id.*

65. *See* Jane Fritisch & David Rohde, *Two-Tier Justice: High Volume Law for New York City's Poor, a Lawyer With 1,600 Clients*, N.Y. TIMES, Apr. 9, 2001, at A1. Other jurisdictions similarly were making cuts in their budgets for public defense. *See, e.g.*, Sonia Y. Lee, *OC's PD's Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1924 (1995–96) (stating that in Cayuga County, New York, the number of cases assigned to public defenders or appointed counsel increased by sixteen percent in 1995, while the costs of assigned counsel programs rose by eighteen percent, but the county decreased funding allocated to indigent defense by six percent).

66. Fritisch & Rohde, *supra* note 65.

67. *See* Richard Klein, *The Eleventh Commandment: Thou Shall Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 365–68 (1993) (noting that the lack of experienced attorneys willing to represent indigent defendants is an increasingly severe problem).

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the work are burdened with high caseloads, tremendous responsibility and pressure, a widely held presumption that public defenders are overworked and unqualified,[68] a sense of isolation,[69] and the frustration of doing work that includes a large bureaucratic, non-legal component. These factors lead many public defenders to burn out,[70] and at the same time make it difficult to recruit new lawyers to the field.

Reliance on constitutional rights might be doomed to failure in this context. Courts are unwilling to uphold a wide substantive right to effective assistance of counsel, largely because of their heavily loaded dockets and their corresponding interest in the finality of proceedings. Furthermore, even absent this interest, an ex post facto revision of an attorney's performance by a court of appeals is limited and inefficient. There is an informational gap between the court, which is supposed to regulate the attorney's conduct, and the attorney herself. The court cannot know about all the actions taken by the attorney in the course of representation and especially about her omissions. Additionally, the harm that can be caused cannot be fully compensated; when it is compensated it is compensated through the inefficient mechanism of retrials.[71] There are also general difficulties with attempting to regulate quality of representation on a case-by-case basis, primarily stemming from the fact that an attorney must make so many discretionary decisions during the course of representation. Finally, no matter what method of oversight is utilized, and no matter what standard is applied, it simply may be nearly impossible for public defenders to improve the quality of representation they offer until the burdens on individual attorneys are lightened. These issues are discussed in further detail below.

D. Alternative Ways to Ensure Quality Representation

Most literature on effective assistance of counsel focuses on the constitutional right, suggesting different interpretations of the concept. Only a few proposals deviate from this mainstream approach. In this part we will examine three main alternatives to reliance on constitutional standards. We claim that none of these proposals are likely to result in a dramatic change. Nevertheless, they are worthy of examination because they provide further insight into the difficulties of effecting change in the quality of representation through oversight of individual cases, rather than through structural change.

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68. Public defenders often experience lack of appreciation of their work. From the very beginning they are distrusted because their clients think that they are not "real lawyers." Mounts, *supra* note 62 at 474.

69. Barbara Babcock mentions three kinds of isolation: isolation from the profession; isolation from the client; and isolation from the general public. Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983–84).

70. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

71. *See* Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193 (1977).

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i. Ex Post Facto Disciplinary Regulation by the Bar

The Model Code of Professional Responsibility requires that lawyers represent their clients "zealously."[72] However, the Code does not define what exactly is required of a zealous advocate. The Model Rules of Professional Conduct attempt to explain what competence means, but in fact they do not provide much more guidance, since they use mostly vague terms such as "legal knowledge," "skill," and "thoroughness," as opposed to providing specific requirements such as number of years of litigation experience, or training in criminal law.[73] Some critics have suggested that the ethical codes and rules do not provide guidance because they are more concerned with protecting the members of the profession than with professionalism.[74]

In any case, there are other reasons to be skeptical about the possibility of efficient enforcement of such rules by the bar. Even if the rules were less vague, they would suffer from the deficiencies of ex post facto rules, much like the ineffective assistance standard of the Sixth Amendment.[75] Furthermore, enforcing quality of representation through ethical rules is complicated by the fact that the attorney must serve the client's best interest by coming as close as possible to the lines drawn by other ethical or legal obligations,[76] without actually crossing these lines. In these circumstances, some reluctance to punish an attorney who did not go so far is understandable.

ii. "Checklist" Method

In his dissenting opinion in *Strickland*, Justice Marshall suggested another alternative. Instead of the two-prong test that the majority adopted, Marshall endorsed "constitutionally prescribed standards."[77] A failure to comply with these standards would be considered ineffective assistance of counsel. Marshall did not promote specific standards in his opinion, but pointed out that "[t]he state and lower federal courts have developed standards for distinguishing effective from inadequate assistance."[78] Scholars have also suggested versions of this checklist method.[79]

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72. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7, EC 7-1 (1981) ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law . . . .").

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

74. *See, e.g.*, JACK SAMMONS, LAWYER PROFESSIONALISM 63 (1988).

75. *See supra* note 71 and accompanying text.

76. *See, e.g.*, Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97, 97 (1995).

77. *Strickland*, 466 U.S. 668, 712 (1984) (Marshall, J., dissenting).

78. *Id.* at 707 (citing Note, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1386–87, 1399–1401, 1408–10 (1983); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After*

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The *Strickland* Court majority rejected this method because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[80] Evaluating representation through a firm categorical set of rules is likely to be misleading in many cases because of the general problem of underinclusiveness and overinclusiveness of rules. A checklist might also encourage attorneys to comply minimally to guard themselves, and might inhibit other methods of zealous and creative representation that are not prescribed by the list.[81]

iii. Ex Ante Qualification Requirements

According to the courts' interpretation of the Sixth Amendment, any licensed lawyer is competent to represent any defendant in any type of case. In fact, courts have approved representation in capital cases by attorneys who had just graduated from law school or had not yet graduated from law school, attorneys who had no elementary knowledge of criminal law, and attorneys who only recently had been suspended or otherwise disciplined.[82] In one case an attorney who was asked to name any criminal law decision by the Supreme Court could only remember "*Miranda* and *Dred Scott*."[83]

In most states there are no qualification requirements at all in non-capital cases. Some states have introduced reforms regarding representation in capital cases and now have minimal prerequisites for competency (though these standards are usually very low).[84] However, setting a higher standard, as some authors have suggested,[85] may also be problematic. Pure *ex ante* regulations may be based on criteria of experience,[86] but experience is not always a good

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United States v. Decoster, 93 HARV. L. REV. 752, 756–58 (1980)).

79. *See, e.g.*, Calhoun, *supra* note 59, at 438–40.

80. *Strickland*, 466 U.S. at 688–89.

81. The *Strickland* Court also hinted at this, saying that "the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689.

82. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2104 n.181 (2000) (citing Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 1, 1, 14–19, 26–27, 31, 58 n.130 (1996)).

83. Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1839 (1994) (citing Transcript of Hearing of April 25–27, 1988, at 231, State v. Birt (Ga. Super. Ct. Jefferson County 1988) (No. 2360)).

84. For an overview of one of the more successful reforms see Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996).

85. *See, e.g.*, Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

86. For example, Donald Dripps proposes an original standard of "parity" with the prosecution that focuses on experience, among other factors. He suggests that courts consider

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proxy for quality. Some of the worst lawyers are experienced, and some of the most talented ones are inexperienced.[87] Moreover, after passing the set threshold, the attorneys will be free of any kind of actual supervision, and it is impossible to foresee their future conduct.[88] One of the most important determinants of an attorney's ability to effectively defend a client is that attorney's preparation for the specific trial at hand—interviewing witnesses and the defendant, visiting the scene of the crime, examining the evidence against the client, seeking expert examinations of mentally ill or mentally retarded clients—and failure to prepare for the trial is perhaps the most common cause of ineffective assistance of counsel.[89] It would simply not be feasible to impose *ex ante* requirements regarding preparedness for each individual trial.

It seems that neither *ex ante* regulation nor *ex post* regulation, whether through enforcement of constitutional standards or professional standards, is very promising. Both approaches fail to capture the uniqueness and difficulties of a defense attorney's role in representing indigent defendants. It seems that the most effective way of improving quality of representation would be through structural changes to lessen the burdens on defense attorneys and equip them with the training and resources they need in order to work effectively. This conclusion is further supported by the fact that the Public Defender Service in Washington, D.C. has achieved excellence primarily by creating a context in which defenders receive sufficient support and training for their work, allowing them to attract and retain highly skilled lawyers.

E. The Washington, D.C. Public Defender Service: One Model of Indigent Representation

The Public Defender Service ("PDS") of Washington, D.C. is renowned for its uncommonly skilled attorneys who are able to devote sufficient time to their cases, including most of their clients' appeals. PDS was the first public defender

"whether defense counsel's credentials and experience would enable defense counsel to compete for a post in the prosecutor's office with responsibilities for prosecuting charges similar in severity and complexity to those against the accused; (b) whether defense counsel is compensated at a level comparable to the compensation paid to a lawyer of comparable seniority in the prosecution's office; and (c) whether defense counsel's current caseload permits defense counsel to defend the case as vigorously as it will be prosecuted, given the investigative resources and support staff available." Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 293–94 (1997).

87. This can be viewed as an "adverse selection" problem. The adverse selection problem arises when members of a large group are treated alike irrespective of some factors that differentiate them. In the law and economics literature this is commonly referred to in the insurance context. *See, e.g.*, ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW 8 (1971).

88. This can be viewed as a "moral hazard" problem. The moral hazard problem arises when people are protected from losses and therefore take less care than they would otherwise. Again, there is substantial discussion of this phenomenon in law and economics literature, in the insurance context. *See, e.g.*, Richard J. Arnott et al., *Implicit Contracts, Labor Mobility, and Unemployment*, 78 AM. ECON. REV. 1046, 1047 (1988).

89. *See* Liebman, *supra* note 82, at 2104 n.181.

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office to receive an "exemplary project" designation from the Law Enforcement Assistance Administration for its efficiency.[90] PDS earned its reputation by following a few firmly established policies.[91] First, the staff is extremely qualified, due to highly selective hiring of staff attorneys as well as requirements that each lawyer participate in an intensive training program.[92] Second, PDS has a full-time staff of professional investigators, and trains hundreds of volunteer college and law students each year to serve as supplemental investigators and law clerks.[93] Third, by statute, it is independent of the judiciary and has an independent board of trustees that sets policy.[94] Fourth, PDS handles a limited number of cases, primarily the most serious offenses in Washington, D.C.[95] Fifth, and perhaps most importantly, PDS has statutorily established caseload limits, considerably smaller than at most other public defender offices, to ensure maximum attention to each client's case.[96]

While many view the PDS as a model public defender office, this point should not be overstated. It is true, in the context of limited case loads, extensive training and supervision, and the availability of a social services and investigative unit, PDS has much to offer other offices, but one must not overlook the problems inherent in any office that tries to promote both broad policies and individualized representation. These problems have been noted at PDS and elsewhere.[97] Thus, it would be wrong to suggest that there is a perfect model. At the same time, we are both encouraged at the independence and client-centered advocacy that is the centerpiece of the new public defender office ("PDO") in Israel, as well as by the fact that the Israeli PDO handles all cases in which defendants are accorded representation rather than only a portion of such cases. While the Israeli system is far from perfect, it does offer, as a new system, an option to reconsider how public defenders do their work and how the state can take responsibility for setting a standard of practice that all public defenders should aspire to meet. A look at the Israeli system of in-process support, supervision, and follow up, as we provide in Section III, may be

90. *See* ROBERT HERMANN, ERIC SINGLE & JOHN BOSTON, COUNSEL FOR THE POOR 124 (1977); Taylor-Thompson, *supra* note 7, at 2427.

91. *See* Ogletree, *supra* note 70, at 1294.

92. *Id.* at 1288; HERMANN, *supra* note 90, at 125.

93. HERMANN, *supra* note 90, at 81.

94. D.C. CODE ANN. §§ 1-2701 to -2708 (1981) (current version at §§ 2-1601 to -1608 (2001)). This independence is important because it prevents judges from interfering with appointment of a qualified attorney to a case in which the judge is biased against the defendant, and prevents the judiciary from pressuring defense attorneys to defend their clients less zealously.

95. *See id.*

96. *Id.* § 1-2702(a)(2) ("Not more than 60 per centum of the persons who are annually determined to be financially unable to obtain adequate representation . . . may be represented by the Service . . . .").

97. *See, e.g.*, Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders*, 14 N.Y.U. REV. L. & SOC. CHANGE 23 (1986) (describing the inherent conflicts within agencies when individual client needs diverge from broader office policies; both authors are former D.C. Public Defender staff attorneys).

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informative in our search for new, more effective methods of providing quality representation to a larger proportion of defendants.

III.
ISRAEL

A. The Right to Counsel in Israel

Unlike the United States, Israel does not have a single written constitution. After Israel became independent from the British Mandate in 1948, its various political parties could not reach agreement on any one version of a constitution.[98] Therefore, in 1950 the Israeli Legislature, the Knesset, issued a decision publicly known as the Harari Resolution,[99] according to which the constitution of Israel would be composed chapter by chapter.[100] The Knesset ordered its Constitutional, Legislative and Judicial Committee to prepare these chapters, called "Basic Laws," which would become the nation's constitution.[101]

For four decades the Knesset passed Basic Laws that dealt mainly with the political and governmental structure of the state of Israel, such as Basic Law: the Government, Basic Law: the Judicature, Basic Law: the Army, and so on. Civil rights were given special status by judge-made law and by regular legislation, but were not included in any of the Basic Laws. In 1992, the Knesset passed two Basic Laws that can be appropriately seen as the beginning of the creation of Israel's Bill of Rights. These two laws were Basic Law: Freedom of Employment, and more important in this context, Basic Law: Human Dignity and Liberty. In 1995, the Supreme Court of Israel decided that these two laws have a constitutional status superior to regular legislation, and granted the courts the authority to engage in judicial review of Knesset legislation.[102] Whether the right to counsel is included in the rights to dignity and liberty is still an open question.[103] Although there has not yet been a decision as to whether there is a constitutional right to counsel in Israel, the right to counsel for indigent defendants is now provided by statute, as discussed below.[104]

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98. Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312 (1995).

99. The resolution was named after the Knesset member who proposed it.

100. Barak-Erez, *supra* note 98, at 313.

101. *Id.* at 313 n.15.

102. C.A. 6821/93, Bank Hamizrachi v. Migdal, 49(4) P.D. 221.

103. A petition by the Association for Civil Rights in Israel, asking the Supreme Court of Israel to determine that the right to counsel is a constitutional right and to expand the right granted by regular legislation to any criminal defendant, is still pending at the court. *See* H.C. 3823/99, Association for Civil Rights in Israel v. Minister of Justice (petition submitted June 9, 1999).

104. The main sources of the right to counsel are The Criminal Procedure Law [Consolidated Version] § 15 (1982), and the Public Defender Law § 18 (1995).

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B. History of the Public Defender Office in Israel: The American Influence

Before the establishment of the PDO under the Public Defender Law of 1995, the Israeli legal system used assigned counsel to represent indigent defendants.[105] Private attorneys who wished to participate were placed on a list from which the court would select counsel. There was no clear and unified procedure for these appointments, and judicial discretion was not regulated. Sometimes, judges would make appointments themselves, while at other times they would refer cases to the court administration, which would in turn appoint counsel. In some cases, the appointing official, whether a judge or an administrator, would select a lawyer who just happened to be nearby. Payments to appointed counsel had to be approved by the courts, as did expenses for expert witnesses and investigators.

The main categories of people entitled to appointed counsel were: 1) persons accused of crimes that carry a punishment of ten years imprisonment or more; 2) mentally ill, intellectually disabled, mute, deaf, or blind defendants; 3) defendants whom the state wished to hold under preventive detention pending trial, who are provided counsel for the preventive detention hearings; and 4) defendants under the age of sixteen who were tried in a court other than juvenile court.[106] Individuals in all of these groups had a right to appointed counsel regardless of their financial situation. The courts also had discretionary powers to appoint counsel in some other circumstances. However, the courts rarely exercised this power prior to the establishment of the PDO.

The structural flaws of the Israeli assigned counsel system were in many respects similar to the flaws mentioned in American literature regarding this method of providing legal services: dependence of defense attorneys on the court that appointed them, limited regulation of the qualifications and performance of defense attorneys, and requirement that counsel petition the court for approval of special expenses for experts and investigators.[107]

Two intertwined factors are considered to be the *sine qua non* for an assigned counsel system that functions reasonably well. The first is payment of reasonable fees to the participating attorneys, and the second is willingness of enough quality defense attorneys to participate. Neither of these conditions was met in the Israeli system. The fees paid to appointed counsel were lower than the minimal fee for criminal representation issued by the Bar Association. This minimal fee itself was substantially lower than the minimal fee for civil representation and substantially lower than the average market fee for a private

105. THE ESTABLISHMENT OF THE PUBLIC DEFENDER OFFICE—REPORT OF THE CHIEF PUBLIC DEFENDER 6 (1997) [hereinafter ESTABLISHMENT REPORT].

106. Suspects in the rare proceeding of Immediate Testimony also had the same entitlements as defendants. *See infra* note 150 (defining "immediate testimony").

107. *See supra* notes 31–34 and accompanying text. It is important to note that in Israel, in the absence of jury trials, the same judges that presided over these petitions were also the finders of fact.

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attorney. Even though fees were updated four times a year, it was not enough to keep pace with the immense inflation rates in Israel during the 1980s.[108] The fee factor undoubtedly contributed to stigmatization of assigned counsel as unsuccessful lawyers who could not get enough work in the private market. The vicious cycle was that the low fees and stigma discouraged new, talented attorneys from getting involved in indigent defense.

The courts did not even have enough lawyers to fulfill the very limited mission of representing those who fall within the categories of mandatory appointment, let alone making discretionary appointments in other cases.[109] In one case, it was so hard to find defense attorneys willing to represent some of the defendants that the prosecution asked to amend the indictment and charged the defendants with a lesser offense that did not require appointment of counsel. That move solved the problem for the trial, but failed to address the preventive detention request, which still required representation. The prosecution overcame the latter problem by repeatedly using an article in the Criminal Procedure Law that allowed the court to extend the detention of an unrepresented detainee for 30 days, until representation was finally obtained. The detainees were brought to court every 30 days and ultimately spent over a year in preventive detention without being represented.[110]

In 1981, the Minister of Justice created a public committee, chaired by former Supreme Court Justice David Bechor, to examine the flaws of the delivery of legal services to indigent criminal defendants. The members of the committee included officials from the Ministry of Justice, prosecutors, the Courts Administration, judges, representatives of the Bar Association, and academics. Some of the members of the committee had extensive experience working in the American legal system, from which they drew in advising the committee.[111] Other practitioners with experience in the American system

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108. DIN VE-CHESHBON HA-VA'ADAH LE-VEDIKAT NOSE HA-SIYU'A HAMISHPATI BE-INYANIM PELILIYIM [REPORT OF THE COMMITTEE FOR THE EXAMINATION OF THE ISSUE OF LEGAL AID IN CRIMINAL MATTERS], 31-33 (1985) [hereinafter BECHOR REPORT].

109. Cr.A. 134/89, Aberjil v. State of Israel, 44(4) P.D. 203, 210 ("Reality teaches us that even when there is a duty on the court to appoint [counsel], more than once, it faces the difficulty of fulfilling the duty."); *see also* Cr. Motion 353/87, State of Israel v. Ifargan, 41(4) P.D. 147, 150 ("It is a common sight that the courts stand helpless, when they are required to fulfill their duty and appoint counsel who is ready and capable to take upon himself the role of an appointed defense attorney.").

110. Cr. Motion 1257/90, State of Israel v. Alperon, 44(2) P.D. 544.

111. One of the academics was Professor Arnold Enker of Bar-Ilan University. In 1963 Enker started an academic career as a professor at the University of Minnesota, and was intensely involved in the establishment of a public defender office there following the Supreme Court's decision in *Gideon*. Enker practiced law in the United States throughout the heyday of defendants' rights in the 1960s, and brought the new American ideology with him to Israel when he immigrated and was one of the founders of the Bar-Ilan law faculty in 1969. As a member of the Bechor Committee, Enker relied on his experience in the United States and advocated the establishment of a public defender service as part of a mixed system of provision of defense to indigent people. In a recent interview Enker said that he had informed the members of the committee about his experience in Minnesota, and that he managed to convince them, and

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testified to the committee. Kenneth Mann, an American professor at Tel Aviv University, was particularly influential.[112] His testimony included an elaborate exposition of the American criminal justice system's provision of counsel to indigent defendants, as compared to the grave reality of indigent defense in Israel at that time.

The Committee did not issue its final report until 1986. During the intervening years, Mann and others continued to research the state of indigent defense in Israel and advocate for change. Mann's first book in Hebrew was a study of plea-bargaining in Israel based on interviews with judges, prosecutors and defense attorneys. The book was one of the first academic works in Israel addressing the lack of representation for criminal defendants, and the possibility and danger of false convictions.[113] In 1985 Mann published a field study that provided data on the lack of representation of the poor in criminal proceedings in Israel.[114]

The committee's final report identified two major concerns. The first was the very limited right to counsel in Israel, and the second was the poor quality of representation provided to those who were entitled to representation. After examining several possible solutions, the committee recommended the

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particularly the chairman, Justice Bechor, of the superiority of this system. Although he supported this system because he believed it to be the best in terms of quality representation, some members of the committee supported it because they believed that it was economically efficient. Telephone interview with Arnold Enker, Bechor Committee Member, Professor, Bar-Ilan University (Jan. 2, 2003). Enker also remembered that American influence was exerted through visitors. Whenever distinguished (usually Jewish) American judges or lawyers came to Israel for a visit they were amazed by the lack of representation for the poor in criminal proceedings. The amazement and disappointment were expressed by the visitors when they met with representatives of the bar associations, judges and other officials, including the Minister of Justice. According to Enker, this was perhaps part of the reason for the establishment of the Bechor Committee. *Id.*

112. Mann was a college student at Berkeley in the late sixties and took part in the campus struggle for social change. In 1973, after finishing a masters degree on prisoners' rights, Mann immigrated to Israel where he finished his law degree. As a law student he continued to pursue his interest in social change and in helping people who are poor and marginalized, both in his studies and in extracurricular activity. "A Warren Court baby" was his self-description in a recent interview. In 1974 he took part in the establishment of the Association for Civil Rights in Israel, and later became a member of its Board of Directors and the Chairman of the Tel Aviv branch. Between 1977 and 1980 Mann returned to the United States to obtain a Ph.D. in sociology of law. His dissertation was later published as KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985). Mann never lost his interest in civil rights litigation, especially in the rights of indigent criminal defendants. On his return to Israel, Mann began his academic career with a clear emphasis on issues of criminal justice in relation to social justice. He frequently drew upon sociology-of-law methodology, including empirical research designed to stress the difference between "law in the books" and "law in action." Telephone interview with Kenneth Mann, Chief State Public Defender of Isr. (Feb. 9, 2003).

113. ELIAHU HARNON & KENNETH MANN, PLEA BARGAINING IN ISRAEL: THEORY AND PRACTICE IN COMPARATIVE PERSPECTIVE (1981). For a discussion of the book, see Moshe Ben-Zeev, *Book Review: Plea Bargaining in Israel*, 12 MISHPATIM 407, 408 (1982) (stressing the novelty of the questions raised by the authors, and the importance of the question of false convictions).

114. KENNETH MANN, NE'ESHAMIM BE-PLILIM VE-YITSOGAM AL-YEDEY ORCHEY-DIN [CRIMINAL DEFENDANTS AND THEIR REPRESENTATION BY LAWYERS] (1985).

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establishment of a mixed public defender system and a gradual move toward a universal right to counsel.[115]

After publication of the report, several years went by before legislation to implement the committee's recommendations was passed. During this time, Mann continued his academic critique of the status quo of lack of representation, focusing on how unavailability of cross-examination undermines the ideas and ideals of the adversary system. Mann criticized both the legislation governing access to legal counsel, and the attitude of the courts toward the problem of representation.[116]

In 1988 Mann published a law review article comparing the right to counsel in the United States and Israel. Drawing on his American legal influences, Mann claimed that the Supreme Court of Israel should be more active in cases that involve a conflict between individuals' rights and society's interest in law enforcement. Mann argued that if the individual interest reflects a fundamental right, the Court must invalidate the act of the authority unless there is a special and compelling justification for the restriction of that right. Mann argued that representation in the Israeli system was an "unrealized fundamental interest." He labeled the status quo "pathological" because the system had been functioning for years in a way that contradicted one of its fundamental values.[117] The cause of the pathology, according to Mann, was lack of funding, and the solution he proposed was governmental funding and establishment of a public defender system. In particular, Mann criticized the Israeli Supreme Court for relying on American decisions to justify judicial restraint in protecting individual rights. Based on Warren Court opinions, he claimed that the decisions the Israeli Court cited for restraint were outdated and that in any case the restraint doctrine does not apply to fundamental rights.[118]

By the early 1990s Mann shifted his focus from academic writing and research to clinical education, establishing the Center for Legal Aid in Criminal Cases ("CLACC"). CLACC's aim was to offer legal advice and representation in criminal cases while operating clinics to teach trial advocacy at the various law schools in Israel.[119] Soon after, three clinics were established in Jerusalem,

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115. *See* BECHOR REPORT, *supra* note 111. The report heavily relied on a comparative study that was ordered by the Ministry of Justice and conducted by Professor Eliahu Harnon of the Hebrew University. *See* ELIAHU HARNON, LEGAL AID IN CRIMINAL PROCEEDINGS: THEORY AND PRACTICE IN COMPARATIVE PERSPECTIVE 11 (1982).

116. Kenneth Mann, *Inadequate and Discriminatory Defense in Criminal Cases: The Unavailability of Cross Examination*, 38 HA-PRAKLIT 466 (1988–89). [Hebrew].

117. Kenneth Mann, *Judicial Review and Fundamental Values: The Right to Counsel in American Law and its Development in Israeli Law*, 13 TEL AVIV U. L. REV. 557, 609 (1988). [Hebrew].

118. However, by the time Mann published his article, an alternative account of the American attitude toward fundamental rights and the right to counsel was emerging. The Burger Court had begun the process of dismantling the Warren Court's "rights revolution," looking skeptically at the notion of fundamental rights and placing limitations on the right to counsel.

119. Kenneth Mann, *The Center for Legal Aid in Criminal Cases*, 3 PLILIM: ISRAELI J. ON

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Tel Aviv and Haifa. In each of these clinics, attorneys, assisted by students, represented indigent defendants. Nonetheless, the clinics were too small to constitute a solution to the continuing lack of representation for criminal defendants.

Mann encouraged his students to think broadly about the problem of representation for indigent defendants. The first public defender bill was drafted by Mann and his staff and students at the clinic at Tel Aviv University. The bill was the basis for the government bill that, after several modifications, was passed by the Knesset on November 20, 1995, as the Public Defender Law. The Public Defender Law mandated the establishment of the PDO and gave the PDO responsibility for ensuring adequate representation and for the payment of attorneys' fees and expenses.[120]

The PDO was opened on June 16, 1996, in Tel Aviv,[121] and Mann was the natural choice for the role of Chief Public Defender. In a period of less than three years, the PDO opened four more regional offices, and thus completed its national deployment.[122] At the same time, the categories of individuals who are entitled to representation were expanded. The 1995 law accorded appointed representation to persons who are charged with offenses punishable by five years imprisonment or more and qualify as "indigent." Subsequently, largely due to the PDO's lobbying, the right to counsel was extended to two additional categories of defendants: 1) juvenile defendants, regardless of their financial situation, and 2) several categories of detained indigent suspects, before they are officially charged, who are provided counsel for arrest and bail hearings.[123] Finally, the legislation granted courts wide discretion to appoint counsel in other cases.[124]

In order to provide quality representation to such a broad swath of defendants, the PDO developed an elaborate mechanism for supervision and follow up in its first years of operation.[125] The PDO is composed of two groups of attorneys. The first, the "internal defenders," includes lawyers who are full-time employees of the office. The second group, "external defenders," includes part-time private attorneys who work from their private offices under the supervision of internal defenders and are obligated to maintain close and constant contact with the PDO.[126] Though the PDO is responsible for the

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CRIM. JUST. 278 (1992). [Hebrew].

120. The Public Defender Law §§ 1, 7, 11 (1995).

121. ESTABLISHMENT REPORT, *supra* note 105, at 7.

122. ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER 10 (1999).

123. The Public Defender Regulations (Entitlement to Representations for Additional Minors) (1998); The Public Defender Regulations (Representation of Indigent Detainees) (1998).

124. *See* Public Defender Law § 18(b) (1995) (stating representation may be appointed "upon the court's decision that it shall be impossible to conduct the trial if the defendant is not represented").

125. THE PUBLIC DEFENDER OF THE STATE OF ISRAEL, ANNUAL REPORT (1998).

126. ESTABLISHMENT REPORT, *supra* note 105, at 7.

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representation of all indigent defendants and suspects, approximately ninety percent of the cases are actually handled by external defenders, who are assigned to specific cases by the PDO.[127]

For each case that is assigned to an external defender, a specific level of supervision by a member of the internal staff is determined by the District Public Defender, depending on variables such as the complexity of the case, the potential punishment that the defendant is facing, time availability, and the experience and skills of the assigned counsel, including command of foreign languages. Supervision may include demands for reports, advisory telephone conversations and office meetings, critiques of drafts of legal documents, reviews of court transcripts, approvals of attorney's fees applications conditioned upon quality of representation, approvals of filings of appeals, and presence of the supervisor in court hearings.

In its first seven years of operation, the PDO has achieved a great deal. The main two goals of its establishment—broadening the right to counsel and improving the quality of representation—have undoubtedly been achieved.[128] Much like the trainings offered at the Washington, D.C. PDS, the PDO has worked to ensure high quality representation through special training sessions for both the internal and the external public defenders.[129]

However, as a new institution the PDO faces many teething problems, the most important of which are budgetary issues.[130] The 1999 report of the Chief Public Defender specifically mentioned two problems with the in-process supervision system, which are primarily related to insufficient resources. The first is the imbalance between internal and external public defenders. Since internal public defenders have to devote much of their time to supervision, the number of cases in which they can actually represent clients is very limited.[131] This situation might lead to undesirable results, such as a decline in the professional level of the internal staff and the staff's motivation to stay in office. In order to achieve the vision of the founders of the PDO to have the internal staff handle about half the caseload,[132] the treasury will have to approve many more positions for internal public defenders. This is unlikely to happen in the near future. The second problem is that the level of supervision is in decline.[133] The source of this problem is also lack of funding and the existence of an internal staff that is too small. Due to the large number of cases internal defenders must supervise, supervisors cannot give each case as much attention as is needed.

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127. ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER, *supra* note 122, at 30.

128. *Id.* at 10–19.

129. *See, e.g.*, THE PUBLIC DEFENDER OF THE STATE OF ISRAEL, ANNUAL REPORT, *supra* note 125, at 55, 64, 73 (describing Tel Aviv, Jerusalem, and Southern Districts, respectively).

130. *Id.* at 20–41.

131. ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER, *supra* note 122, at 30.

132. *Id.*

133. *Id.* at 31.

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Since 1999 these problems have only increased, as the PDO has experienced major budgetary crises that culminated in 2002 when Mann was nearly obliged to order the cessation of all appointment of counsel except permanent employees of the PDO. Such cessation would have meant that the vast majority of people entitled to representation by law would not be represented.[134] Ultimately a compromise was reached and services were restored, albeit after budget-saving measures were instituted. Attorneys' fees were cut by twenty percent,[135] discretionary powers to appoint counsel were restricted,[136] the PDO started contracting with attorneys who are paid a flat retainer and are committed to handle a certain number of cases per period, and a defendants' co-payment was installed.[137]

These measures are likely to undermine the achievements of the public defender system with regard to both the number of people benefiting from the right to counsel and the quality of representation. Despite expansions in the legal right to counsel, more than half of all defendants are still not represented. Although judges use their discretionary powers to appoint counsel more generously than they did before the establishment of the PDO, about fifty-eight percent of defendants in magistrate courts are not represented, and one in every five defendants who are convicted and sentenced to serve time in prison is unrepresented.[138]

C. The Structure and Role of the Public Defender Office – Noblesse Oblige?

In *District Public Defender of Tel Aviv v. Appellate Committee of the Public Defender*, the Supreme Court of Israel upheld the District Public Defender's decision to exclude a private attorney from the list of attorneys eligible to serve as assigned counsel.[139] The Supreme Court of Israel approved the District

134. Letter from Kenneth Mann, Chief Public Defender of Israel, to Ofir Pinnes, Knesset Member, Chairman; Constitutional, Legislative and Judiciary Committee (Apr. 9, 2002) (on file with authors).

135. Public Defender Regulations (Public Defenders' fees) (Amendment) (2001). As we write these lines there is a struggle over an effort to cut attorneys' fees an additional ten percent. *See* Ben-Zion Tzitrin, *The Bar Association is Struggling Against a Cutback in Public Defenders' Fees*, HA'ARETZ, Apr. 13th, 2003.

136. *See* Public Defender Law (Amendment No. 5 and Temporary Order), 2002, S.H. 1883. The law restricts discretion to appoint counsel to cases in which the court is convinced that the defendant lacks the means to retain a defense attorney and that there is real fear that without representation the defendant will suffer a miscarriage of justice. In addition, the law gives the President or the Vice President of the court the authority to change the decision of the presiding judge. This temporary order is valid from January 1, 2003 until December 31, 2004.

137. Public Defender Regulations (Payment Obligation of Entitled to Representation) (2000).

138. STUDY REPORT OF THE PUBLIC DEFENDER OFFICE: THE SCOPE OF REPRESENTATION IN CRIMINAL TRIALS 1 (2001) (on file with authors). This report was also submitted to the Supreme Court in H.C. 3823/99, Association for Civil Rights in Israel v. Minister of Justice (petition filed June 9, 1999).

139. H.C. 4495/99, 53(5) P.D. 625. The reason given by the District Public Defender for the rejection of the private attorney's application was his record of convictions for ethical violations in

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Public Defender's policy of carefully choosing lawyers who will be authorized to act on its behalf. In upholding the decision of the District Public Defender, Justice Cheshin wrote for the Supreme Court:

> It is not a coincidence that the Public Defender Law . . . determines that the status of the State Chief Public Defender is the same as the status of the State Attorney and that the status of the employees of the PDO is the same as the status of the employees of the State Attorney office. In its broad meaning—and although the PDO gained independence—this means that the status of the PDO is equal to the status of the State Attorney office. And on such one should say: "*noblesse oblige.*"[140]

In this section we will explore, through examination of some recent developments and Supreme Court decisions regarding the PDO in Israel, various possible meanings of *noblesse oblige* in this context. In other words, we would like to reflect on the special status of the PDO and the special privileges and duties that this status should entail. The three topics that we will focus on are: the duty and privilege of supervision, the expression of views on general issues beyond the representation of a specific defendant, and the duty to act for the public interest when the public interest is in conflict with the interests of a particular client. All of these topics are highly relevant to problems that indigent defense systems in the United States are currently facing.

i. Ensuring Quality Representation—The Public Defender as a Supervisor

The PDO considers the assignment of cases to competent attorneys to be a crucial step in ensuring quality representation, and does not assume that every lawyer can handle every case. Attorneys may not be permitted to take cases if they have not undergone appropriate training. For example, participation in training sessions on the subject of juvenile representation is a prerequisite for inclusion on the list of lawyers eligible to represent clients in juvenile cases, unless a lawyer has proven experience in the field.

In *District Public Defender of Tel Aviv*, the Court emphasized the relationship between the supervision and screening powers of the District Public Defender:

> Not every "qualified" lawyer can provide "adequate representation;" and the authority was given to the District Public Defender to disqualify qualified lawyers . . . because they cannot provide "adequate representation" to a defendant. . . . For the satisfaction of all these duties—and primarily the duty to supervise—the internal defenders accompany the external defenders in their work: the "external" report to the "internal," and the latter guide the former according to the need and the matter. This relationship naturally requires trust, and according to

disciplinary proceedings by the Israeli bar association. *Id.*

140. *Id.* at 628–29.

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> the District Public Defender's claim—which we endorse—an attorney that did not prove himself in the past as one who deserves trust—or who was not cooperative when he should have been—unjustifiably makes the work of the public defender harder, and obviously reduces his own ability to adequately represent his client.[141]

According to this analysis, the PDO is in a position of special privilege, and is asked to exercise that privilege for the good of its clients, and for the good of the profession as a whole. Although the supervision method has undoubtedly improved the quality of indigent defense in Israel, the broad authority given to the PDO to screen private lawyers who express interest in working on the PDO's behalf has provoked negative reactions from some members of the private bar, who claim that mere certification of a lawyer by the bar should be sufficient to qualify someone as an external public defender.

ii. Arguing General Issues – The Public Defender as Amicus Curiae

The authority of the PDO to intervene in cases in which it was not directly representing a defendant was at first unclear. This question involved the broader issue of the status of the PDO and its role as an institutional actor within the criminal justice system. The first case in which this question arose was in a post-conviction petition for retrial[142] by five Israeli Arabs who were convicted of the highly publicized murder of a 15-year old Jewish boy in 1983.[143] The five petitioners were convicted in 1985 on the basis of their written confessions, and were sentenced to life imprisonment. They claimed that they were innocent and that they were coerced to sign false confessions, but their appeals were rejected. Nonetheless, in 1996, with the assistance of an undoubtedly competent criminal attorney, they filed a petition for retrial. The PDO filed a motion to join the case as an amicus curiae and to advance arguments on three issues: (1) the quality of representation that the defendants had received at trial; (2) the interpretation of a new law authorizing the President of the Supreme Court to grant a retrial when there is actual suspicion that a miscarriage of justice has occurred; and (3) the effect that ineffective assistance of counsel should have on a retrial petition under this new law. The State of Israel, as respondent, objected to the admission of the amicus brief, claiming that the public defender lacked standing to participate. Furthermore, the Attorney General argued that it was unnecessarily duplicative to allow the public defender to join the proceeding, since the petitioners were already represented by a competent lawyer, and since the Attorney General is the representative of the public interest.

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141. *Id.* at 630, 632–33.

142. This post-conviction procedure is somewhat similar to habeas corpus proceedings. The President of the Supreme Court of Israel, or another supreme court judge, is authorized to order a retrial after all appeals have been exhausted.

143. Retrial 7929/96, Kuzli v. State of Israel 53(1) P.D. 529.

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The court rejected the State's arguments.[144] After an analysis of the institution of amicus curiae, the court concluded that every petition to join as amicus curiae should be examined within its own circumstances, including elements such as the potential contribution of the party petitioning to join, the expertise and experience of this party, and the nature of the question at stake.

Kuzli set three important precedents of particular importance to the PDO. First, the case was the first one in which a retrial was granted in part based on ineffective assistance of counsel. Second, it was the first time in which the principle of amicus curiae was explicitly recognized under Israeli law. Third, it established the right of the PDO to act as amicus curiae based on its special responsibilities and expertise. Since *Kuzli*, the Public Defender has submitted amicus briefs in a few other important cases.

In a case regarding the criteria for release on bail pending appeal, the majority of the Court broadened the scope of cases in which the Public Defender is allowed to join as amicus curiae.[145] This case had nothing to do with the right to counsel or with the issue of the quality of representation, but the Court permitted the Public Defender to join, emphasizing the general importance of the issue and its potential influence on many defendants.[146]

Some disagreement remained among the members of the Court, however. Justice Kedmi, who filed an opinion concurring in the judgment, argued that the public defender should not be permitted to join the proceeding. As to the criminal law context and the status of the PDO, Justice Kedmi wrote the following:

> In general, it is adequate . . . to limit the summons of a "friend," to circumstances of "procedural necessity," that is: to circumstances in which the involvement of the "friend" is required in order to secure a proper and a fair discussion regarding the defendant's standing trial; as opposed to circumstances in which "friends" request to present their own positions on the litigated question. Although the [PDO] is a friend of the court, in actuality he is a friend of a defendant in trouble . . . . In fact, the public defender requests to join the discussion as "a friend of all the defendants;" and this in order to be given an opportunity to convince the court of the rightness of judicial policy that looks to the public defender as consistent with "the rights of the defendants." This is not the purpose for which the public defender was established.[147]

144. *Id.* ¶ 46.

145. Cr.A. 111/99, Shwartz v. State of Israel, 54(3) P.D. 769, 773.

146. "This question is being raised and litigated routinely in courts, and naturally it has influence on a great number of defendants . . . . Considering its expertise and experience in representing defendants, the joining of the Public Defender to a discussion of this kind may contribute to its deepening and clarification . . . . " Id. ¶ 3.

147. *Id.* ¶ 2 (Kedmi, J., concurring).

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Counter to Justice Kedmi's opinion, there is a growing recognition of the need to broaden the authority of the Israeli PDO, acknowledge its importance to and expertise in the criminal justice system, and entertain the PDO's opinion on important issues before the courts.[148]

iii. Promoting the Public Interest – The Public Defender as an Officer of the Court?

The special status of the PDO was reaffirmed in a recent Supreme Court decision. In *State of Israel v. Public Defender*[149] the PDO took the counter-intuitive position of objecting to the appointment of a public defender to represent a suspect. The facts of the case were unusual. The two suspects, Buskila and Karkokli, were suspected of committing an armed robbery. Although an indictment was filed against Karkokli, the police initially could not find and indict Buskila. Since the victim of the robbery was about to leave the country, the prosecution used a special proceeding called "Immediate Taking of Testimony" to get the victim's testimony against Buskila in absentia.[150] The prosecution requested that a public defender represent Buskila, but the PDO argued that no attorney could be assigned to represent a client whom she had never met and therefore with whom she had never discussed the appropriate defense. The District Court adopted the PDO's position that a "partial defense" is worse than no defense at all. The State appealed.

The Supreme Court reversed the District Court's decision. It agreed that representation of an absent client is flawed, but ruled that it is still better than no representation at all. According to the Court, the law still mandates the appointment of a lawyer even under these circumstances. The Court concluded by stating that "the interpretation that the Public Defender is asking to give to the duty of representation of a defendant or a detained suspect might at the end of

148. There are several other "general," as opposed to specific, representation issues in which the Public Defender of Israel recently was involved. The Public Defender has also worked with various committees of the Ministry of Justice in which it expressed its independent views, and has assisted with the struggle to improve imprisonment conditions. The PDO recently submitted a critical report regarding conditions of detention and imprisonment (on file with authors). For other examples see Yoav Sapir, *The Rise (and Fall?) of Public Defense in Israel: Legitimation, Institutionalization and Deradicalizasion* (Unpublished S.J.D. dissertation, Harvard Law School, on file with authors).

149. Cr.A. 5628/97, State of Israel v. Public Defender (unpublished decision, Sept. 24, 1997) (on file with authors).

150. Criminal Procedure Code [Consolidated Version] § 117 (1982) (providing that the court may take the testimony of a person forthwith "if it considers that his testimony is material to the clarification of the charge and that there is reasonable cause for believing that it will not be possible to take it in the course of the trial . . . ."). Though the law does not list specific circumstances in which immediate testimony should be used, in practice it is used when an important witness becomes unable to testify, such as when the witness has to leave the country, is terminally ill, or when other circumstances prevent the witness from testifying according to ordinary criminal procedure.

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the day hurt the suspect . . . and the social interest of finding the truth in the criminal process . . . ."[151]

The Court's position raises some concerns. Had the position of the PDO been accepted, the testimony of the victim might not have been admissible at trial or at least would have had lesser probative value. It is hard to dismiss the impression that the prosecution insisted on appointment of counsel in order to avoid such a devastating result to its case. It is also unclear how the PDO could ever provide adequate representation to a client it has never met. For example, it may be impossible, reckless, or unethical, to claim self-defense or to present an alibi without ever having spoken to the defendant.

But there is also a broader concern here. It seems that the decision of the Court to have a public defender represent a client she has never met—a decision that is unimaginable in the context of private representation—implies that the Public Defender is different from any other defense attorney, and that it should be concerned with values such as "the social interest in finding the truth in the criminal process." One could read the Court's decision as appealing to the public side of the Public Defender to be in certain cases an officer of the court and to cooperate with the State in achieving such goals as truth seeking. These kinds of demands had been occasionally expressed in Israel by prosecutors, but never before by the Court.[152] If this approach is widely accepted, some fundamental values underlying the establishment of the PDO may be at risk. A distinction between the duties of a public defender and a private attorney in representing their clients creates a distinction between the rights of the indigent and the affluent defendant. If the PDO, unlike the private attorney, has to consider social interests that are in conflict with the zealous representation of its clients, equal protection for the poor is critically compromised.

IV.
CONCLUSION

In both the United States and Israel, public defense systems are necessary in order to protect the right of indigent defendants to counsel. Both countries face similar problems, most notably in the area of inadequate funding. However, significant differences exist between the two systems, which have provided and continue to provide opportunities for learning.

It seems that Israel's PDO has been inspired by the zealous advocacy approach to criminal defense exemplified by American systems such as Washington, D.C.'s PDS. This effect can be seen in the positions adopted by the PDO in the three main Israeli cases discussed *supra*, even if the Supreme Court

151. State of Israel v. Public Defender, at ¶ 6.

152. In a recent speech given for the sixth anniversary of the PDO, the President of the Supreme Court, Aharon Barak, expressed similar views.

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of Israel does not always agree with those views. These cases exemplify the fact that the question whether public defender offices should have special privileges and duties does not have a simple answer. When it comes to the ability of the PDO to play an institutional role within the justice system beyond representation of specific defendants, we think that the answer is yes. An institution that will represent the population of indigent defendants can improve the criminal justice system by balancing the influence and power of the prosecution. Similarly we think that in light of the failure of other methods of regulating quality of representation, special ethical rules should apply to public defender offices, permitting them to engage in the type of information-sharing necessary for in-process supervision. However, our commitment to client-centered advocacy, based on the aspiration to provide indigent defendants with quality of representation that does not fall from that of private attorneys, mandates that neither the special role of the public defender nor its special institutional status should in any way affect its obligation toward individual clients in particular cases.[153]

There are three main limitations, apart from financial ones, that constrain public defenders in the context of supervision of assigned counsel in the United States. The first is the independence and autonomy of the private attorneys. American attorneys feel that principles of professionalism dictate "*that the members of a specialized occupation control their own work.*"[154] This view of professionalism rejects close supervision. The second limitation is the fact that a system of in-process regulation, similar to the Israeli system, could conflict with ethical rules governing conflict of interest cases. In the in-process system, attorneys who are representing co-defendants are supervised by several public defenders working in the same office. The common view in America is that if two attorneys representing two co-defendants are supervised by attorneys from the same office, this may be a prohibited conflict of interest.[155] The third obstacle involves the matter of attorney-client privilege. Some assigned private attorneys and public defenders may think that the attorney-client privilege that they hold with the client precludes them from revealing details of the client's case to anyone except those appointed to represent the client. These concerns may arise if a supervising attorney wishes to review information obtained by the external attorney during her interactions with the client, or to reveal this information to the court.

153. For a different point of view see Taylor-Thompson, *supra* note 7.

154. Eliot Freidson, *Professionalism as Model and Ideology*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 215, 219 (Robert L. Nelson et al. eds., 1992).

155. This problem could be resolved by maintaining a contract system side-by-side with the system of in-process regulation by a public defender office, so that some attorneys with no connection to the public defender office would be available in conflict cases, but such a system would compromise the principle that all defense should be supervised by experienced public defenders, and could perpetuate a system of uneven quality of representation.

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Can these limitations be transcended? The problems that American indigent systems are currently facing, and the apparent failure of other methods of regulating quality of representation, suggest that we should at least think of possible alternatives. To be sure, many public defender offices around the country do have professional relationships with appointed counsel.[156] Some offices provide certain services such as periodical training, library access, and certification of private investigators. However, there is no elaborate system of in-process supervision of particular cases, and the public defender offices do not assume overall responsibility over these cases, as is the case in Israel. There are good policy arguments in favor of focusing the idea of professionalism on the quality of the service provided by the profession rather than on the notion of independence. There are also good reasons why ethical rules governing issues such as attorney-client privilege and conflict of interest should apply differently in the context of the relationship between public defenders and assigned counsel, as compared to the way they apply in the context of private representation,[157] or that some rules should be amended.[158]

The Israeli PDO has chosen to concern itself less with issues of conflict of interest and confidentiality than with ensuring quality of representation. On the other hand, it seems that the Israeli system does not give enough consideration to these problems, and that there is a lack of awareness of the adverse effect that disregard of the ethical concerns might have on clients and lawyers. In Israel, a better system of avoiding conflicts of interest should be developed and employed together with the in-process supervision mechanism.

Another danger against which the Israeli system should guard itself is the potential of incorporation of external defenders into the system and the loss of their identity as a private bar, by virtue of their close supervisory relationship with the PDO. As mentioned above, one of the values of mixed systems is that competition between public defenders and assigned private counsel can facilitate innovative quality representation. These concerns should be taken into account in designing a system in which the public defender office is regularly involved in

156. The system in Minnesota, for example, is largely based on part time employees who also work part time in private practice. Some of the senior officers of the public defender system are part time employees as well. These facts provide for a vital connection to the private bar. *See* OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, THE PUBLIC DEFENDER SYSTEM (Feb. 1992), *available at* http://www.auditor.leg.state.mn.us/ped/1992/pe9203.htm. In Maryland the director of the public defender system is also the administrator of the assigned counsel portion of the mixed system. David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System With a Vision Towards Change*, 52 ALA. L. REV. 975, 991 (2001).

157. *See, e.g.*, People v. Wilkins, 268 N.E.2d 756, 757–58 (N.Y. 1971) (stating that the rationale for the vicarious disqualification rule does not apply to a large-scale legal services program with many offices). Courts are divided on the question of whether a public defender office can represent co-defendants. *See* David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 606 n.145 (1995).

158. It is not a new idea that different ethical rules should apply to different actors, according to their role. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) (conferring special responsibilities on prosecutors).

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the work of assigned counsel, so that assigned counsel will not become institutional players. [159]

Israel's system provides an interesting model for the United States in that the PDO monitors public defense outside of its own staff and caseload. We may be well advised to inquire into the possibility of adopting such an approach. Furthermore, if Israel, with its much younger and more malleable public defense system, is able to develop innovative approaches to the ethical dilemmas that unnecessarily constrain public defenders, this may provide a worthy example for the United States to follow. In all, neither country should miss the opportunity to learn from the other's mistakes, and to adopt those methods that have been found successful.

The Executive Session on Indigent Defense presented a unique forum for many individuals involved in the public defender system to reflect on the current state of the system and what a new system could look like. What we learned was sobering. Forty years after *Gideon*, we are still struggling to meet its important aspiration of providing quality representation to indigent defendants who cannot afford a lawyer. The ideal model is just that: an ideal. Whether it is the Washington, D.C. Public Defender Service, or the Israeli Public Defender Office, we find that there is no easy solution to the thorny ethical dilemmas created in public defender offices. The solutions are as difficult to achieve as they are obvious. Public defenders have the burden of putting their client's interests first, striving to engage in the highest levels of ethical practice, preventing courts and prosecutors from forcing them to compromise their clients' constitutional rights, and seeking permanent solutions to reduce the enormous burdens the criminal justice system imposes on their clients. It is a tall task to achieve, but with *Gideon* as our guidance, we must pursue these goals with dispatch.

159. One commentator claims that "the integrity of the criminal justice system is safeguarded by the involvement of non-institutional players." This, he argues, is one justification for the superiority of mixed systems. Other justifications are: assurance of reasonable caseload limitations for the defender staff, resolution of conflicts of interest, and recognition by the bar of its responsibility to provide competent legal representation to the accused. *See* Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 220–21 (Summer, 1993).

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