ALTERNATIVE STRATEGIES FOR PUBLIC DEFENDERS AND ASSIGNED COUNSEL*

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INTRODUCTION
INSTITUTIONS THAT SECURE THE CONSTITUTIONAL RIGHT TO LEGAL COUNSEL

One of the glories of the American Constitution is its commitment to the protection of individual rights, particularly when those rights are threatened by the state. Among the most powerful embodiments of this commitment is the declaration made in a series of Supreme Court decisions in the nineteen sixties and seventies that United States citizens have a constitutional right to legal representation when the state threatens imprisonment. Further, the Supreme Court concluded that this constitutional right exists independently of a person's ability to pay for it. In the words of the *Miranda*[1] warning, "If you cannot afford a lawyer, one will be provided for you." It is a remarkable commitment of constitutional authority to the protection of individual rights.

Once the Supreme Court established such a right, however, all federal, state, and local governments faced the problem of how, in particular, to secure it. Some local governments, under the authority of state statutes or constitutions, had already established public defender offices. For example, the Los Angeles County Public Defender has existed since 1914.[2] However, states without any statutory or constitutional mandates were now required to comply with the federal constitutional requirements articulated in U.S. Supreme Court rulings that all states must provide counsel regardless of a person's ability to pay. These

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

2. *See* Crim. Just. Stat. Ctr., Cal. Dep't of Justice, *California Criminal Justice Time Line: 1822–2000* 1 (June 2001).

states had to decide who was eligible, how legal representation was to be provided, and who would pay for the representation. In effect, it was necessary to combine public money with the articulated constitutional authority in order to secure the right to counsel.

The states responded to this challenge in a variety of ways. Some states left the issue up to local courts. Typically, the local courts responded by making arrangements with private attorneys who served indigent clients on either a pro bono or paid basis. Appropriated tax dollars provided the money required to support the system. Other states created statewide or local offices of public defenders, also supported by appropriated tax dollars. In these public defender offices, lawyers were employed by the state specifically to represent defendants who were too poor to hire their own lawyers. Still other states opted to contract with individual lawyers, legal partnerships, or nonprofit legal organizations to provide legal representation to indigent defendants on some basis (a fee per case or a commitment to cover all cases referred to them for a given budgetary allotment).

For the purposes of this paper, I refer to the whole set of the state institutional arrangements mentioned above as "indigent defense systems" or "public defense systems." I refer to the subset of state institutional arrangements that involve the creation of publicly financed, publicly staffed agencies or publicly financed, privately staffed, nonprofit organizations as "public defender offices."

I.
LEADERSHIP AND THE CONCEPT OF ORGANIZATIONAL STRATEGY

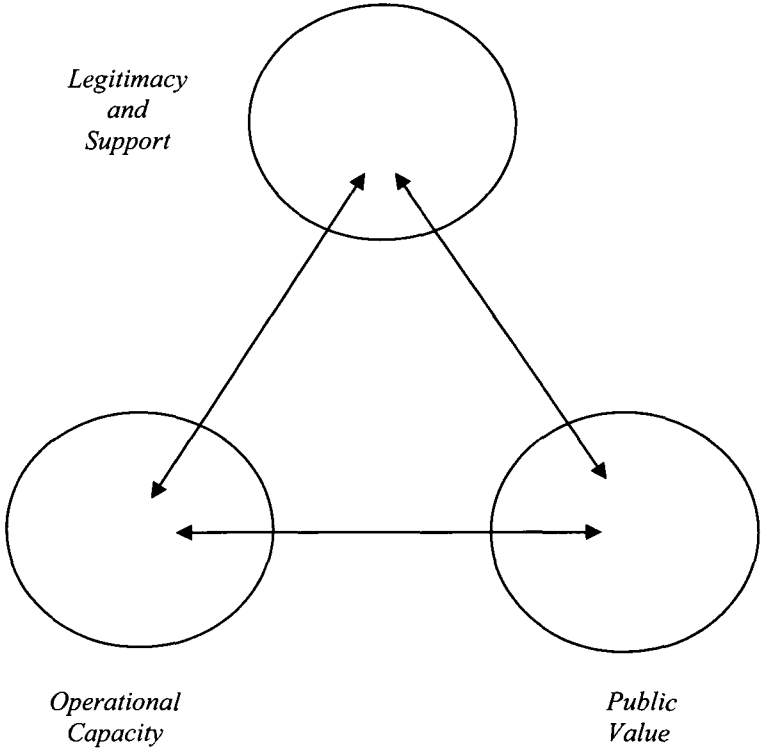
Public defense leaders are important to the development of an effective organizational strategy. Regardless of whether one is considering indigent defense systems or public defender offices, a particular individual, occupying a particular office, is both authorized to manage and held accountable for developing and overseeing public defense. In widely decentralized, court-assigned systems, for instance, state court judges have the power to commit public funds to public defense. In such systems, someone in the court administrative office is usually responsible for allocating cases, overseeing the statewide budget, and reporting to the legislature about the needs and the performance of the particular indigent defense system. In more centralized systems, that responsibility lies with someone who leads a statewide public defender office.

The point is that although the individual is sometimes difficult to find, and may not even be very conscious about her role, an individual in each public defense office is responsible for keeping the enterprise financed, focused on its goals, and operating efficiently and effectively. That individual (or group of individuals) is also responsible for giving an account of the public defender

office's operations, to articulate what purposes the office is trying to achieve, to report its accomplishments to others, to identify new challenges, and so on. We can think of that person or group as the leader of the enterprise of the public defense effort.

Effective leaders of these public defense enterprises need what the private sector refers to as organizational strategies to improve the provision of services. An organizational strategy is a coherent idea that (1) sets out the purposes of an enterprise and the value it is trying to promote; (2) identifies the sources of support (financial and otherwise) that it needs to sustain its operations; and (3) describes how the resources granted to the enterprise can best be deployed to accomplish the desired goals. As Figure 1 illustrates, a coherent organizational strategy can be diagrammed as a triangle with these three elements represented at distinct points on the triangle: legitimacy and support, operational capacity and public value.

FIGURE 1
STRATEGY IN THE PUBLIC SECTOR



In developing a strategy, it is important to consider the ends and means simultaneously. Having valuable goals in mind does little good if the enterprise cannot attract the flow of resources needed to realize them, or if no operational methods or technologies are available to transform fungible resources into desired end results. Similarly, it does little good to sustain the flow of resources to an organization, and keep people employed there, if nothing of value is being produced. In short, part of the basic wisdom of thinking strategically is to make sure that one can reconcile desired results with plausible means. If results and means cannot be reconciled, one must either find new sources of support or new means for achieving the desired results. In the most painful cases—when one can find neither sources of support nor means to achieve the desired results—one must sometimes change the ends to be more consistent with sources of support and operational means.

Changing the end goals of an enterprise due to immovable constraints is described here as painful because that is how most people in the public sector experience such circumstances. After all, people often join public enterprises because they like the particular ends they try to achieve: they like the idea that they can protect the environment, fight to reduce poverty, protect the United States from foreign aggression, or ensure justice for those accused of crimes. They may even have sacrificed some things that matter to them, such as higher pay, good working conditions, or life outside of work to join these enterprises. If they are not supported in those causes they deem important, and if they are not financed adequately and encouraged, they may become discouraged and feel abandoned. Changing the goals in these circumstances seems like a betrayal or a failure, and pain is the only possible reaction.

But changing the end goal does not have to be experienced this way. In the private sector, changing the ends is often seen as an important new opportunity. In one common private sector scenario, an old product line that has long been central to a given company stops being profitable. Consumers stop wanting the product, or competitors emerge with something better. If the firm does not change, it will go bankrupt. Initially, it will seem hard for those in the firm to imagine producing something new, for at least some of the same reasons that change seems hard for those in the public sector. All things being equal, they want to keep producing the same old products and services in the same old way. But with some reflection and strategic analysis, firms can sometimes find within themselves the capability to develop a new product or activity for which there is much public enthusiasm. In this world, a shift to a new goal, necessitated simultaneously by the decline of support for one's old activities and the discovery of a new alternative use of one's organization, is experienced as something positive—as a chance to increase the value of one's efforts rather than reduce it and, incidentally, to preserve the organization for future use. In this sense, developing a strategy often focuses on finding new opportunities in the

future—new sources of support along with new tasks to undertake—as well as finding the means to ensure the continuation of an existing set of purposes.

All organizations have at least an implicit strategy that they are pursuing. Someone examining an organization from the outside can show it what its ends are, the sources of support it relies on, and the primary methods it uses to accomplish its goals. The important leadership questions, however, are (1) whether the organization is both aware of and content with its organizational strategy; (2) whether the current strategy is sustainable; and (3) whether the current strategy represents the best way to use the organization's assets. If the organization is not reflective about its current strategy but nonetheless is passionately committed to it, and if that strategy is unsustainable, or seems to have missed opportunities to increase the overall value of the enterprise, then it becomes important for those in leadership positions to help the organizations both understand and reinvent themselves, to develop new, more sustainable, strategies, or to make better use of the organization's capabilities.

The purpose of this brief document is to help those who lead the nation's indigent defense systems to reflect on and perhaps improve their organizational strategies. To do this, I will first set out my understanding of the current predominant strategy embraced by those who lead public defense systems. I will then consider some alternative directions in which those systems and offices could go in developing new strategies. As I proceed, I will describe moves that seem increasingly difficult to make—moves that require risks in what I will describe as the "capitalization" side or the "operations" side. While these moves might seem risky in the way that all change seems risky, it is important to remember that in some circumstances standing still can be the riskiest strategy of all. In any case, I hope to promote a wider discussion and dialogue about alternative future strategies for those who lead public defense systems.

II.
THE CURRENT STRATEGY OF PUBLIC DEFENDERS

The current strategy of public defenders can be examined using the three elements highlighted in Figure 1: *public value, legitimacy and support*, and *operational capacity.* Public defenders are committed to producing the *public value* of providing professional legal representation to individuals charged with crimes who lack the financial means to hire their own attorneys.

Legitimacy and support for this mission comes in the first instance from the United States Constitution—establishing the fundamental right to counsel—and subsequent Supreme Court rulings that further defined the right, regardless of an individual's ability to pay.[3] This constitutional mandate alone, however, is not

3. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25

sufficient to sustain public defenders, and the Supreme Court is not the only public agency that provides authorization and direction to public defenders. State and local court systems necessarily involve themselves in decisions about the organization and operation of indigent defense systems. Indeed, in many states, the court systems are the principal administrative units charged with overseeing the development and operation of public defense.

In addition to the courts, state and local bar associations have the capacity to be powerful institutional players. This influence results partly from the fact that some bar associations can be influential lobbyists with legislators, but also from the fact that in some states, bar associations provide the operational capacity needed for public defense. In some instances, bar associations organize to produce public defense on a pro bono, voluntary basis. In other places, bar associations provide not only political support but also basic operational capacity for public defenders. Some bar associations, however, strongly resist the notion of members having to provide pro bono public defense. In these cases, bar associations should support funding professional public defender offices. The general attitude of the bar associations about this type of work often determines how public defenders are regarded in the legal community and what professional career opportunities they can anticipate.

Note that the institutions described so far are of a legal nature—the courts and the bar. Because public defenders serve predominantly legal values, interact primarily with legal institutions, and are staffed primarily by lawyers, it is easy to understand why they might think of themselves as inhabiting a predominantly legal world. It is also easy to understand why they might see themselves at least somewhat insulated and divorced from the political world.

The problem, however, is that the Supreme Court's mandate costs money to implement, money raised principally through taxation. Once public money is involved, public agencies must be held accountable for spending it, and oversight must be exercised. The task of raising money, creating agencies, and overseeing operations does not fall strictly on courts and bar associations. State legislatures and governors, county boards and county executives, city councils and mayors choose the institutional form through which the constitutional mandate will be exercised. They also decide how much money will be provided, and on what terms it will become available to indigent defense systems. Because these actors are elected, they are influenced by the political currents of the day as well as by the legal values and imperatives at stake.

As we all know, crime remains a very important political issue. Indeed,

(1972). In the decade following *Gideon*, the Supreme Court expressly extended the right to counsel to specific stages of the criminal justice process. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964) (extending right to counsel in custodial interrogation); United States v. Wade, 388 U.S. 218 (1967) (extending right to counsel in post-indictment line-ups); Coleman v. Alabama, 399 U.S. 1 (1970) (extending right to counsel in preliminary hearings); Douglas v. California, 372 U.S. 353 (1963) (extending right to counsel at the defendant's first appeal of right).

over the last decade or so, what might be called the "law and order" crowd has been gaining influence over what might be called the "due process" crowd. In principle, this imbalance should not be favorable to public defenders, since public defenders' goals are much more aligned with the goals of protecting civil rights than with lowering crime (regardless of cost measured by either money or lost liberty). In practice, indigent defense systems may not have been much affected by this trend. The American public still thinks it is important that public defense systems be supported.[4] As the number of accused persons requiring public defense services has increased in most states, so too have operating budgets tended to increase rather than decrease.[5] Still, in order to think about politics as a market within which the value of public defenders is sold, one must also be concerned with how the crime issue is developing.

To a large extent, the legal community closely controls the provision of public defense services. Public defense is thought to be their business. Legislatures get involved in paying for the services, but even this decision seems not to be discussed much politically. Within budget expenditures, public defense services are a modest appropriation, and decisions about expenditure levels are often contained within larger decisions about financing court operations. One important consequence of this structure is that neither the media nor the public as a whole is much aware of, nor concerned about, public defenders. There is, however, always an opportunity for them to get involved if public defenders do something that concerns the public. Recently, publicity surrounding the various versions of the Innocence Protection Act in Congress[6] has attracted public attention to wrongful convictions, the poor quality of defense, and the inadequate resources provided to public defense practitioners. In general, though, the politics of public defender appropriations is an "inside game," with relatively little external involvement or discussion. This provides some potential safety for

4. In 2000, the Open Society Institute and the National Legal Aid and Defender Association (NLADA) hired a professional public opinion research firm to conduct focus groups nationwide on public views of providing criminal defense to those who cannot afford to hire private lawyers. The researchers concluded in their report that the public overwhelmingly supports state provision of public defense. The study found a wide array of opinions regarding the institutional structure and scope of defense services that the public believes should be provided to those who cannot afford to hire their own counsel. BELDEN, RUSSONELLO & STEWART, THE PRICE OF JUSTICE: MONEY, FAIRNESS AND THE RIGHT TO COUNSEL 5 (2000).

5. For example, of the twenty-one states in which state governments provided more than ninety percent of indigent defense funding in 1999, all twenty-one increased their expenditures for indigent defense between 1982 and 1999, after adjusting for inflation. BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999 3 (2001). Two of these states were spending over four times the amount spent in 1982; five more were spending more than triple the amount spent in 1982; and nine more states were spending more than double the amount spent in 1982. *Id.*

6. S. 486, 107th Cong. (2001); H.R. 912, 107th Cong. (2001). Both the Senate and House bills were introduced to reduce the risk that innocent persons may be executed, among other purposes.

public defender offices, as they do not have to make their case on a daily basis before the court of public opinion. But it also leaves them constrained by whatever it is that inside players think is appropriate for them to do.[7]

The third element of Figure 1, the *operational capacity* of public defenders consists primarily of lawyers. But public defenders, particularly those who staff public defender offices, are not just any kind of lawyers. Because the wages paid to public defenders (either in the form of fees for handling cases or in salaries) are generally relatively low compared with fees paid for other work that lawyers can do, public defenders often have purposes other than earning a salary. Some public defenders are powerfully motivated by the cause of public defense. They care either for an abstract ideal of individual rights against the state, or for the ideal of providing equal opportunity for the poor, or for a combination of the two—that the poor as well as the rich ought to have effective means to protect their rights against state oppression. Others are motivated by a desire to increase their professional skills, by the challenges provided by the job and by the training and experience that the work provides.

It is important to understand these motivations because they tend to shape a culture among public defenders. In states with a hybrid public defender and assigned counsel system, the culture of public defenders is different from that in states with a system of contract lawyers or assigned counsel, who operate independently for the most part. That culture, in turn, is often an enormously important strategic asset. It helps those who work as public defenders tolerate adverse working conditions, extend themselves on behalf of their clients, and endure a certain amount of hostility from the public. On the other hand, from the perspective of those who manage the enterprise, that culture can have some strategic liabilities. Due to the sacrifices that these lawyers make, and because they are hostile to authority in general, public defenders may be particularly resistant to managerial direction from the top. Because they work primarily for a vision of what the enterprise should be (where each defender potentially holds a different vision), some defenders may be particularly resistant if the leadership suggests that its mission or goals should in fact be something different from those they originally signed up to pursue.

An example of this resistance is the reaction of some public defender deputies to the advent of drug treatment courts. The resistors object by claiming: "I did not join this office to be a social worker." Conversely, the strongest advocates for treatment courts are those who have worked in the new problem-solving courts, which include drug courts, community courts, and mental health courts. In short, the passionate commitment that allows public defenders to make huge contributions in difficult circumstances comes with a price: they think of themselves as being part of a movement rather than an organization, and

7. Some public defenders, however, are elected. An unanswered question is whether elected public defenders end up with more or less support and independence than those who are appointed.

therefore entitled to shape as well as respond to the overall strategic direction of the organization.

It is worth noting that this strategy of public defenders—as defined and shaped by the three elements described above—is relatively secure. All that is needed to sustain this strategy is for the Supreme Court mandate to remain solid, for the governments charged with meeting the constitutional requirement to continue to do so, and for the lawyers whose commitment is needed to produce results to continue to be willing to work. Because all these conditions are likely to be met, this basic strategy of public defense is not imminently threatened.

III.
PROBLEMS WITH THE CURRENT STRATEGY

While the current strategy of public defense is relatively simple and secure, it does not necessarily follow that it is coherent or effective. Indeed, some important tensions and difficulties in the current strategy generate a great deal of discomfort and concern—for the public that implicitly authorizes the strategy, for the lawyers who execute it, and for the clients whose interests the strategy represents.

A. The Desired Quality of Public Defense

The first issue is the question of the public value to be produced by public defense. The goal of public defense, generally accepted without controversy, is to provide indigent defendants with legal representation. What this simple phrase leaves out, however, is a clear idea about the quality of the representation to be provided, and who is to be the judge of that quality.

Many professional public defenders and assigned counsel may take issue with the failure to include quality as a standard in this goal statement. What the public regards as important is unclear, although recent focus groups indicate there is some concern about the quality of representation.[8] The public might envision the goal as providing the minimum required defense at the lowest possible cost. This goal is consistent with the view that the public values crime control more than the protection of civil rights, that it views most defendants as guilty and therefore not deserving of high-quality representation, and that it is uninterested in spending tax dollars on something as useless as defending guilty defendants. In this context, the public may believe that the constitutional standard is something to tolerate, rather than an important goal to achieve: we have to provide representation because our Constitution requires it. But we do not have to love the idea or spend a lot of money trying to realize it.

This concept of public demand contrasts rather sharply with what the highly

8. *See* BELDEN, RUSSONELLO & STEWART, *supra* note 4, at 23–24, 27–29.

motivated, idealistic, staff of lawyers wants to supply. Indeed, the professional standards to which public defenders are ethically bound call for the zealous defense of their clients' liberty interests. If lawyers are to retain their self-respect as ethical professionals, they can offer no less than this standard of public defense. And, given their values, public defenders may well want to go beyond this standard.

Obviously, there is a difference between these two standards of service. The consequences of the difference are important: if citizens and their representatives want to meet minimum standards for representation and minimize the cost of doing so, and the attorneys want to give a zealous defense of their clients' interests, then something has to give. The citizens might end up having to pay more for public defense than they want to. Or, in the more likely case, given the relative power of citizens, taxpayers, and their elected representatives to set the standards, public defenders will have to provide higher quality services than they are paid to provide. This situation has two likely consequences. Public defenders will either burn out or will develop triage systems within their offices that allow them to provide bad services in some cases so that they can have enough resources to provide good services in cases where they will make a difference. This situation too will take a toll on dedicated attorneys. It will also cause many of their clients to become disillusioned and dissatisfied with the quality of defense provided, and it will cause the entire system to become a mockery of the constitutional right that was supposed to be protected by the system.

The discussion so far has assumed a coherent, articulated, and professional standard for what constitutes high quality representation. If the standard is focused on how many motions should be filed, how much investigation should be conducted to challenge police reports, how many consultations one should have with the client, and how many rehearsals of trial strategies there should be in order to reach a satisfactory level of representation, the response comes from lawyers looking at each case and its possibilities. This is true regardless of whether one is trying to set a minimum standard, a more ambitious standard that defines routine professional practice, or an even more ambitious standard that approximates the kind of zealous defense one can get from a highly paid private attorney. In each of these scenarios, it is lawyers who set the standards.

The alternative, however, is to judge the quality of representation not by legal standards, but by the satisfaction of the clients whose interests were being represented. Instead of asking lawyers whether other lawyers have done a good job with the legal aspects of the case, one could ask clients whether they were satisfied with the efforts and accomplishments of their attorneys. This approach is the natural way to measure value produced in a private market. It might even be the way to measure quality in a private market for attorneys' services. Clients sense a modicum of control if they retain private criminal defense lawyers. This sense of control adds a positive feature to a relationship that is often lacking

initially with public defender representation, which may affect client satisfaction. Alternatively, an accused person may be reluctant to acknowledge a retained lawyer's bad choice, which would constitute an admission of poor judgment. But it is notable that this approach is not generally considered an important way of measuring the quality of legal representation in public defender circles. Indeed, most indigent defense systems do not routinely survey their clients to gauge their level of satisfaction with the representation they received, although there are exceptions.[9]

There are many ways to explain why clients of public defenders are not surveyed for their opinions. Most focus on the irrationality and unreasonable expectations of the clients. All clients think they are innocent, and they all expect to be acquitted or to have their cases dismissed—regardless of whether the evidence against them is strong and convincing. But this orientation suggests a lack of respect for the clients' judgment. It is the same kind of argument that the police make about the impossibility of taking citizens' complaints about excessive force, brutality, and rudeness seriously in judging how well the police are operating. However, it is instructive that many police departments are overcoming their resistance to asking those whom they police about their experience of being policed, and are increasingly taking those views seriously.

Indeed, for some, the principal reason not to take clients' judgments about the quality of their own representation seriously is that neither the public, nor the public defenders, really think the service is for the clients. They think the services are to protect the abstract idea of providing a fair and adequate defense. I will return to this question of what role clients' desires, as opposed to professional legal standards, might play in determining what constitutes high quality representation. For now, it is enough to keep in mind that the legal, professional standards for quality of representation differ (at least conceptually, and perhaps substantively) from clients' judgments. It is also important to keep in mind that professional standards for quality representation can differ. What is considered good enough for government work may be very different to what one would want and expect if one were wealthy and could hire Johnny Cochran.

An alternative approach to measuring quality with input from the client and an assessment of the service by a knowledgeable and neutral person is to examine what happens when a defendant complains to a judge about the quality of representation. Defender operations could track these formal complaints.[10]

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9. For example, the Bronx Defenders has begun conducting a series of surveys, focusing on different client populations. *See The Bronx Defenders Surveys Clients*, PUB. DEF. BACKUP CENTER REP. (N.Y. State Defenders Ass'n), July, 2000, at 4.

10. In California, such proceedings are called *Marsden* Motions—a name derived from the case *People v. Marsden*, 465 P.2d 44 (Cal. 1970) (establishing a defendant's right to challenge the quality of performance of her appointed criminal defense lawyer). The Los Angeles County Public Defender Office conducted an evaluation to measure quality representation by reviewing the

B. Political Advocacy and Its Limits

The potentially wide gulf between the minimum standards for legal defense that a cost-conscious, frightened, and cynical public may wish to provide on one the hand, and the much higher standards that committed, ethical attorneys who staff public defense systems want to provide (and be paid and honored for) on the other, generates a high degree of tension in the system. Those who lead public defense systems see an obvious and natural way to resolve the tension: persuade the public and its representatives in legislatures and executive offices that they ought to want to pay for the same level of care that the public defenders want to supply. This idea encourages many leaders of public defense systems to become political advocates for the offices they lead and the cause that these offices embody. However, there are problems with this approach.

One major problem is the dispiriting fact that many of the substantive arguments that leaders of public defense systems want to make on behalf of their offices seem to lack political resonance in today's political climate. It is not that they have no effect. Significant public support remains for some ideas about procedural justice; even greater public support exists, perhaps, for assuring efficiency in the administration of justice. And this grudging support combined with the constitutional requirements has been enough to create leverage for continued financial support for public defense. Nevertheless, the arguments that are commonly made, and the way they are made, seem to have limited political resonance. Consider the following kinds of appeals:

> *Argument #1: The Supreme Court says that the right to effective assistance of counsel is a constitutional right; thus, the public must support it.*

This argument puts all the burden of justifying public defense on Supreme Court decisions. The strength of that position is that the Supreme Court's views are authoritative. The weakness is that it is not defended substantively—at least not in this formulation. It is a procedural argument rather than a substantive one. Moreover, once someone claims that the Constitution has been consistently misinterpreted by supposedly liberal judges, the moral authority of the Court itself begins to disappear. Precisely because the federal courts have been forced

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results of such motions. Michael Judge, the Los Angeles County Public Defender, reports that "the number of instances in which judges determined clients' *Marsden* Motions complaints were well-founded were infinitesimally small. However, one must be cognizant that contrary decisions by the judges would result in significant delays for new counsel to be appointed and prepare, and might also establish a record undermining any final judgment on appeal. Consequently, the usefulness of such evaluations and the actual validity of such purported independent judicial decisions are suspect." Interview with Michael Judge, Los Angeles County Public Defender (Oct. 28, 2003).

to take leadership positions on some of the most difficult social issues of our time—racial segregation in schools, abortion, the civil rights of women, etc.—and precisely because the work of building political as well as legal support for these positions has not been undertaken, the legitimacy of the Court is more fragile now than it has been in the past. Thus, while the power of this argument resonates strongly with lawyers and with some members of the public, it allows the public to chafe against the requirements imposed by the Court, rather than embrace the cause of public defense as something that the public believes in and is proud of providing. In short, the public does not see the glory of providing public support to indigent defendants.

Argument #2: The court system cannot function without public defenders; thus, the public must pay for public defenders in order to allow the courts to operate.

This argument really depends on the first argument, since it is only the Supreme Court's decision that legal representation is a constitutional right that makes it necessary to provide legal defense. Nonetheless, it adds something to the first argument by invoking a kind of administrative efficiency argument. The implicit idea is that the public has an enormous investment in the police, prosecutors, and courts that will go to waste if not for this final piece of the puzzle. In this view, the public needs public defenders to keep the machinery of justice clanking along efficiently and effectively. Public defenders offer the lubrication that is linked to reassuring generally indifferent citizens that the machine is fair, as well as efficient and effective. The difficulty with this view, however, is that it tends to encourage the idea that the goal is to provide the minimum required level of service in order to keep the overall costs of the system low. Again, the argument is procedural rather than substantive. Thus, while it offers a justification for providing resources to public defense systems, this formulation keeps the aspirations for the quality of that representation low.

Argument #3: The adversarial system is the best and most reliable way to achieve substantive justice, that is, to ensure that the innocent are freed and the guilty convicted. Because public defenders are intrinsic to the effective functioning of the adversarial system, they are necessary to the substantive justice of the system.

This is the substantive argument that gives thrust to the idea that society should support the Supreme Court's decisions. On this view, the public is asked to join lawyers and justices of the Supreme Court in believing that the procedures of an adversarial system are the best way to achieve substantive

justice. The problem is that many citizens do not believe in the equation of a vigorous adversarial process with substantive justice. Many citizens think that procedural justice is just as likely to produce injustice as justice in criminal cases. Citizens are particularly concerned that numerous (substantively) guilty offenders remain free from custody as a result of (procedural) technicalities. The adversarial process not only authorizes but obligates defense attorneys to pursue the zealous defense of their clients, which includes the use of procedural technicalities.

In thinking about this public concern, it is important for public defenders not to interpret the public's suspicion of procedural justice as merely the result of ignorance. It takes a lot of explanation and a lot of experience to understand how frail the judicial institutions are in the determination of guilt and innocence, and to decide that procedural justice is the best that the system can do. It is also worth noting that the public does not have this view only about public defenders and indigent defendants: it is as angry when a white-collar criminal like Michael Miliken gets off as when a poor addict who commits burglaries to support his habit does.

Argument #4: A crucial feature of a system of justice is that it should protect the innocent from unjust punishment. Adequate defense of accused offenders is essential to ensure this aspect of justice.

This argument is a more particular version of the idea that public defenders are necessary to ensure substantive justice. This claim emphasizes the aspect of substantive justice that is most popular with public defenders, and the kind of justice that public defenders are most likely to be responsible for producing. This argument is concerned with vindicating the innocent rather than convicting the guilty. Obviously, this argument has particularly persuasive power when the state threatens capital punishment, and it is an important part of why public defender offices end up spending a great deal of time and attention on capital punishment cases.

The difficulty with this argument, however, is that vindicating the innocent is only occasionally the result of public defense. In the majority of cases, public defenders are defending clients who are guilty of crimes and face powerful evidence against them. Many cases involve complicated questions of mental capacity or intent. While these cases may not be viewed as attractive by the prosecution or the public, it is certainly the duty of public defenders even in such difficult situations to provide a zealous defense for their clients. It may also be true that the only just way of ensuring vindication for the innocent is to provide a zealous defense to all accused offenders. But that argument, again, sounds like the general procedural argument, not a particularly substantive argument. It is difficult for the public to accept the idea that an equally zealous defense for all

accused offenders is the best way to ensure that the innocent will be vindicated or that fairness of the process will be furthered. Indeed, I suspect that few public defenders believe this claim themselves. Public defense lawyers spend a lot of time representing individuals who are overcharged. Public defenders need to assess each case and make substantive judgments about the severity of a crime and the sanction that might be levied against their client, and then adjust their work intensity accordingly. Public defenders must decide which cases require more attention in order to preserve their limited time and then allocate their energy wisely.

> *Argument #5: The state can be a blind bully, running roughshod over the rights of citizens. Even when the state is right, it is important to provide individuals with a friend and protector to counter-balance the enormous power of the state. Such a system is only fair. Public defenders are the living expression of the ideal of fundamental fairness.*

This argument is similar to the arguments for compliance with Supreme Court judgments, for due process, and for the protection of the innocent. But it differs from those above in that it aligns with traditional American fears about the power of the state and a more general sense of fairness in the balance of power. Defense lawyers point to the pervasive practice of overcharging by prosecutors as an example of the powerful discretion that prosecutors wield. This practice can result in grossly disproportionate sentencing unless effectively countered by qualified and properly resourced public defenders. Not only is liberty at stake but also a specter of other things, such as unjust forfeiture of property, loss of vocational and drivers' licenses, and deprivation of employment opportunities are threatened. Prosecutorial overcharging can create room for exercising strong leverage and intense pressure even on innocent people to plead guilty in order to mitigate mandatory sentences that can result from a conviction at trial.

This fifth argument also reaches out to citizens' sense of empathy for other people: it may be hard for citizens to imagine themselves as an arrested defendant appearing in court, but it is not so hard for citizens to imagine what it feels like to be the victim of a powerful bully. Nearly every individual has had that type of experience sometime during their lifetime. The important question remains, however, as to whether Americans think poor criminal defendants are entitled to this protection at the public's expense.

Argument #6: The poor should not be disadvantaged relative to the rich when issues of equal protection against state power are at stake. It is the mark of our commitment to democratic equality that with respect to some fundamental rights, we make individuals equal regardless of their ability to pay. The right to legal representation is one of these areas. Public defenders are essential to ensure that our system of justice does not discriminate against the poor and that their rights are protected as ably as the rights of the rich.

Again, this argument lines up with the stream of arguments that focus on due process, fairness, equal protection, etc. This argument, however, focuses particular attention not on the substantive question of guilt and innocence, nor on the issue of confronting state power, but instead on equity between the rich and the poor. As a political matter, then, this argument depends on either a deep commitment to class fairness, or a strong identification with the plight of the poor.

While the arguments of fairness are strong, they are weakened somewhat by the belief that many of the defendants are guilty and continue to plague the communities in which they reside—deepening the disadvantage of the good people who live there. In short, whether it is pro- or anti-poor, to provide legal defense depends a great deal on one's perceptions of the defendants. If one perceives them as potential assets to the community—as people who can be wage earners, spouses, parents, guardians of the community's youth and peace—then one will think of public defense as consistent not only with the desire to be fair, but also with the goal of advancing the interests of the poor. If, on the other hand, one perceives the defendants as liabilities on the community—individuals who prey upon its slender economic resources and set bad examples for children—then one might think of public defense as hostile to the interests of the poor.

Argument #7: Public defenders ought to be treated in the same way as public prosecutors. They are both equally needed to ensure justice. They are both professionals. Their pay and working conditions ought to be similar.

This argument is most closely related to Argument #2 above, in that it speaks to the administrative arrangements that are necessary to allow the system to work, rather than to the larger values at stake. While it has the advantage of invoking an idea of equity, in my view, this argument appeals more to budgeters and legal professionals than to the broader public.

One can make one's own judgments about the political potency of these different arguments. One can also add other arguments to this list, or make up

combinations and variants. But it seems that when one goes through this list, while it is easy to find arguments that point to important values and that will keep public defenders around, it is hard to find the arguments that will cause much of the American public to get excited about the cause of public defense. My bet is that the most powerful arguments are those that focus on the need to have someone stand with an individual when the state is on her case, and on the idea that the worst thing a state-sponsored justice system can do is to jail the innocent. It will, however be hard to link these values in the minds of the public with the work that public defenders actually do day in and day out.

It is also interesting to note that what is missing from the list is one of the most powerful political currents of our time: namely, the interest in reducing crime and enhancing security, and in ensuring substantive justice. Indeed, what is awkward for public defenders as a political matter is that they often seem to be on the wrong side of this issue: as the so-called criminal's lobby, and are not viewed as people who guarantee that citizens will not be victimized by the state, but as people who do harm to substantive justice by getting people off on technicalities. These claims are the principal political liabilities that public defender offices face.

One member of the Executive Session on Public Defense observed that a common weakness in the management of public defense systems is that their leaders do not reach out to enough constituencies to support them. They tend to be insular, viewing the work that they do in the courtroom as far more important than the work they do in the legislature. Moreover, when they advocate at the political and policy levels (rather than at the individual client level) for support for their office, or more generally for the cause of individual rights, or more generally still for more just and effective criminal justice and social policies, they reach out to familiar allies rather than look for unfamiliar ones. They also tend not to tailor their message or use different advocacy strategies when working in a legislative rather than courtroom setting. In short, they behave as people who believe that their cause is just and who trust that the justice of their cause will ensure the provision of the resources and authority they need to accomplish their mission. They do not think or act politically, because that would be unprincipled and unprofessional. The problem is that the combination of weak arguments and political inattentiveness virtually guarantees fragile support for public defense systems.

IV.
SOME EMERGENT STRATEGIC IDEAS

In the face of these strategic issues, leaders of public defense systems have begun to develop new strategic ideas—new strategic ideas about how the assets

represented by the public defense system can be used to produce both more public value and more public support. Three ideas seem particularly interesting.

A. Public Defenders as Public, Political Advocates

The first idea emerges directly from the discussion above. If public defense systems need additional legitimacy and support in their political environments, and if they cannot necessarily get that support simply by doing their job well, then it is necessary for public defenders to take on the challenge of becoming effective advocates in the political world as well as in the courtroom. This activity should not be an afterthought or something that the leader of the public defense enterprise does during her spare time. It should be the focus of intense attention. Not only must the leader be focused in this way, but the organization and operation of the public defender office must be adjusted to accommodate the importance of this activity. The office may need to develop a specialized capacity to interact with key legislators and to communicate through the press to the wider public. Public defender offices may have to alert their staff attorneys to opportunities for press attention in the cases they handle. Offices may also need to create public education and advertising campaigns to strengthen their message.

The strategic issue for the public defense industry is whether public defender offices are simply to be managed as effectively as possible, or whether they can embrace a significant leadership role that encompasses a public policy advocacy agenda. Articulating a mission that includes such a public policy role will shape the debate and push forward a more balanced platform of sound, progressive measures. Both public defenders and assigned counsel can be more active in the public policy arena to influence and mobilize public attitudes and sentiments, and to insist on a fair process and an equitable system. As Michael Judge, the Los Angeles County Public Defender, states:

> The electorate can provide the impetus for elected and appointed officials to do the right thing without a disabling concern for their own political viability. The electorate will only do this if they are well-informed. Public defenders must engage them, or face the judgment that public defenders must not have cared because they did not try to participate but still congratulated themselves on how much they care.[11]

In short, public defenders and assigned counsel have valuable perspectives on the system and their clients which enable them to clearly see the path of dysfunction that leads many Americans deeper into a criminal justice system.

Note that the advocacy of the office can be directed toward several related but still distinct goals. Given the strategic discussion above, one natural goal of advocacy may be to engender wider support for the enterprise of public defense

11. Interview with Michael Judge, Los Angeles County Public Defender (Oct. 28, 2003).

itself. In effect, the target is to win more public support and more money for the office to ensure its longevity and its ability to create quality representation. This goal simply recognizes the painful fact that the Supreme Court's mandate alone is not sufficient to ensure high quality representation to indigent clients; the legislatures, too, must be persuaded of the importance of the task.

A second, closely related goal may be to advocate for the legal rights of those individuals accused of crimes. This sort of advocacy focuses not on legislative decisions to appropriate money to indigent defense systems, but instead on policy decisions made by both legislatures and courts that affect the legal rights of those accused of crime. For example, the office might want to weigh in heavily on how states plan to use DNA evidence, whether it stays with a grand jury system, or whether it requires sex offenders to register in the towns in which they live and work. A way to think about this kind of advocacy is that it is directed at increasing the power and authority of public defense systems instead of increasing their funding. Note also that part of this work will be the same kind of political work necessary to maintain a flow of appropriations: namely, work with legislators and committees. But another part of the work will be done in courts through various kinds of legal appeals. The reason is that both legislatures and courts can hand out or take away authority from public defender offices. Finally, it is notable that victories won in this arena benefit not only the clients of public defender offices, but all criminal defendants, and thus the private criminal bar as well.

A third goal, also closely related to the others, may be to advocate for criminal justice policies that are more just and effective than those that emphasize longer prison terms for convicted offenders. This sort of political advocacy goes beyond concerns both for the office and general rights of the accused, and seeks to join the debate over what constitutes a just and effective response to crime in the community. The advocacy can focus on the importance of dealing with the root causes of crime through various social policies. Or, the advocacy can focus on preventing crime through more effective efforts to deal with at-risk youth. Or, it can focus on finding and making wider use of sanctions that are less expensive, less intrusive, and more effective than jail and imprisonment for those convicted of offenses. This sort of advocacy, because it is concerned with general crime policy rather than narrow legal issues, will typically require more legislatively-oriented political strategy than legal advocacy in order to be effective.

It is worth distinguishing these different political advocacy goals for at least two reasons. First, as noted above, the various goals must be pursued through different channels of decision-making. There is always a choice to be made about whether to work through political/legislative channels or legal/judicial channels. But the various channels can yield different returns depending on which of the three goals laid out above is being pursued. Additional resources in

the form of money and authority can be sought either through legal/judicial or political/legislative channels, but the greater payoff is likely to come through the latter. In contrast, ensuring the legal rights of the accused is best accomplished through the legal/judicial channel. With respect to advocacy for criminal justice policy, a good deal can be accomplished through courts, but the political channel will generally be more effective. One important conclusion to draw from this quick overview is that politics is important to all three objectives, while the legal channel is a useful element for only one kind of advocacy. This is important because legal/judicial advocacy will come quite naturally to public defense systems. Political advocacy will seem less appropriate, and the skills will be harder to come by and develop. Yet, it is here that the greatest payoff can come.

Second, depending on which goals one is advocating, different coalitions become possible. Many people and groups will join coalitions to support some minimal level of funding for public defense systems if they are necessary to support the overall operation of the system. For example, alliances may be built between public defense stakeholders and minority groups who share the values of defenders. Minority groups may be more effective than the private bar in mobilizing communities of color. They may be able to engage minority business leaders who share a common concern for controversial government conduct, such as driving-while-black police stops. Similarly, faith-based communities often share the same concerns as public defenders, such as those over rising incarceration rates and the lasting negative impact of incarceration upon families and communities.

Today, probably fewer people than before will support wider protection of the rights of those accused, but one might find support for this position in unexpected places—including not only the civil libertarians on the left, but also the political libertarians on the right. Many more might support more preventive crime control policies than those now being embraced if they were confident of their effectiveness. Many people agree that the restrictive policies now in place are successful with incapacitation in the short term but are costly and ineffective in the long term; however, they often do not believe that alternatives would be effective. Indeed, it seems that one of the most valuable things that public defenders can offer to the public is the capacity to ensure that those convicted of crimes do not reappear in the criminal justice system. It is not clear that public defenders can actually produce this result. But if they could, they would help to solve a problem that everyone would like to have solved.[12]

One final note about improving the capacity of public defender offices to advocate not only in courts but also in legislatures is worth recording. If one is interested in developing this advocacy capacity, one may have a strong reason

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

for preferring the creation of a statewide public defender office over the development of a contract system for individual lawyers. The reason for this preference is that a centralized office provides a platform for advocacy that may differ from the kind of platform provided by a state contract system. Of course, the differences can be overcome by individual qualities of the people who occupy the offices. A very well connected, savvy, committed leader of a contract system can become an effective advocate for the system, for individual rights, and for rational criminal justice policy; while someone who leads a statewide public defender office may end up squandering the opportunity for leadership it provides. But the point is that, all other things being equal, a statewide public defender office provides a stronger platform for leadership than does a contract system. There is a better chance in a centralized system to create a kind of self-consciousness about the work, and to translate that into an effective political consciousness of the problems the system is facing. There are probably also some important economies of scale in doing the kind of research and creating the staff capacities that translate into effective political advocacy.

The main difficulty with moving public defense systems towards increased advocacy, though, is that legislatures are often hostile to such efforts. They do not like to have their primacy in defining public purposes challenged by those they pay with public dollars; nor do they like to have their options limited. Indeed, if political advocacy becomes an explicit organizational scheme within an office, or a specific appropriation, it could be sliced out. Some public defense organizations are expressly forbidden from engaging in lobbying of any sort, and risk loss of public and private funds if they do so. Several private foundations will not contribute funds to organizations that conduct lobbying efforts.

At the opposite end of the spectrum are public defender offices that hire former state lobbyists to engage full-time in political advocacy on behalf of public defense. These lobbyists deal with budget concerns and substantive criminal justice issues before the legislature. These lobbyists also coordinate the direct involvement of public defenders who take time away from direct case representation to lobby lawmakers when the legislature is in session. For example, the Minnesota Public Defender legislative liaison has been an integral part of the office's budget for many years.

B. Public Defenders as Supporters of the Criminal Defense Bar

A different way of thinking about public defense systems, which may also strengthen their base of political support, is to envision them as enterprises designed to support not only indigent defense but the defense bar more generally. In essence, the enterprise adds to the direct assistance of indigent defendants a set of activities that is valuable to the criminal defense bar generally. This could include (1) information about effective representation provided through libraries,

newsletters, and other publications; (2) training programs and conferences open to all; (3) joint action to protect the interests of criminal defense in the legislature; and (4) a public education and advertising campaign to shape public values and improve the public image of criminal defense.

In principle, the implementation of a set of collaborative strategies with the larger criminal defense bar creates value for public defenders by improving the overall quality of legal defense. A public defender office's contribution will reach beyond those individuals it represents directly and ensure the quality of legal defense on a larger level. Moreover, this strategy may improve public defender resources at a lower cost by taking advantage of economies of scale in monitoring legal developments, communicating about them, and organizing political action to deal with them.

There is enormous potential in a collaborative public advertising campaign, as the private and public defense communities share many of the same professional goals and obstacles. In particular, both communities face a public largely hostile to their work, a view that is often shared by members of the bar at large. Such views undermine appeals for increased funding for public defender offices, but also create unpleasant professional conditions for the private and public defense bar alike. Public disdain for defense work may also erode confidence in our adversary system. This hostility and skepticism can be addressed through an effective advertising campaign that helps the public to understand and appreciate the role of the defense bar. Ultimately, the tenor of such a campaign will depend on the articulation of organizational strategies and goals, a process that I seek to promote in this paper.

This collaboration may also help the overall strategy by reaching out to and securing the political and financial support of a potentially important political ally: namely, the criminal defense bar, and perhaps the bar more generally. Both substantively and politically, then, the idea of adding service to the wider criminal bar can be a strategically important new product line for public defense systems to consider.

C. Representing the "Whole Client"

A third idea, in many ways more radical than those discussed so far, is that public defense systems should embrace the goal of representing the "whole client." Those who advocate for and seek to practice whole-client representation as a way of doing their legal work draw a sharp contrast between this and the traditional kinds of representation.

In the view of those who advocate in favor of whole-client representation, the traditional model of legal representation is limited in various ways. First, it addresses only the legal issues the client faces—not other aspects of the client's circumstance, nor the causes of the client's involvement with the criminal justice system. Second, advocates of whole-client representation view traditional

advocates as focused exclusively on protecting their clients' liberty interests—ensuring that their clients do as little jail time as possible, and minimizing restrictions on their liberty when they are not in jail but still under some kind of state supervision.

It is important to understand that the traditional conception of professional practice enjoys the sanction of professional standards. This traditional strategy is what the code of ethics requires lawyers to do for their clients. Moreover, sometimes lawyers pursue these objectives on behalf of their clients even when their clients want them to consider interests they may have in addition to liberty. There is no small amount of paternalism in these professional judgments about what is really in the best interest of the client. But, as I discuss below, there are real ethical risks in doing anything other than this narrow definition of the lawyer's duty.

The traditional model of legal representation contrasts with the whole-client concept in two important ways. First, in the whole-client concept, the lawyers (and/or the public defense system) are concerned with more than the client's legal problems. Advocates of the whole-client concept see the client as enmeshed in a set of family and community relationships, all of which can be disrupted and are therefore at stake in the legal proceedings against the client. They also see the imminent criminal charge as part of a larger set of problems that underlie and contribute to the client's present circumstance. Where the welfare of the client and the public safety needs of the community converge, some public defenders try to address the client's life outcomes. Michael Judge, the Los Angeles County Public Defender, affirms that public defender goals have evolved beyond the traditional focus on liberty and due process interests. This development toward whole-client representation can be summed up by Judge's statement that "the goal is to ensure people are better off when they leave the justice system than when they entered, for their sake and that of society."[13]

Second, in trying to determine how best to handle the criminal prosecution of a client, it is not always clear that the principal goal should be to protect her liberty interests. For example, in those cases where it is virtually certain that the defendant will go to jail, whole-client representation advocates may feel some responsibility for reconciling their client to that fact, and helping her to make suitable arrangements to meet her obligations to family, friends, and employers while in jail or another form of state supervision. Or, in some cases, they may be interested in developing a disposition that has some chance of preventing a return to the criminal justice system, even if it involves more restrictions on liberty in the short run. Or, it may be that the public defender feels some responsibility to construct a disposition that benefits the client's family and

13. Interview with Michael Judge, Los Angeles County Public Defender (Oct. 28, 2003).

community as well as the client. Michael Judge states:

> The fallacious myth that something that is good for a defendant must be bad for the community must be demolished. A person who temporarily bears the title of defendant is also a neighbor, schoolmate, brother, son, husband, employee, friend, customer, etc. There often is a convergence between society's needs (public safety) and the needs of a defendant and his family, friends, employer, church, and children.[14]

To achieve lasting benefits for the whole community, defenders must convince prosecutors and judges to address the individual needs of clients and the fundamental underlying dysfunction that manifests itself through criminal behavior.

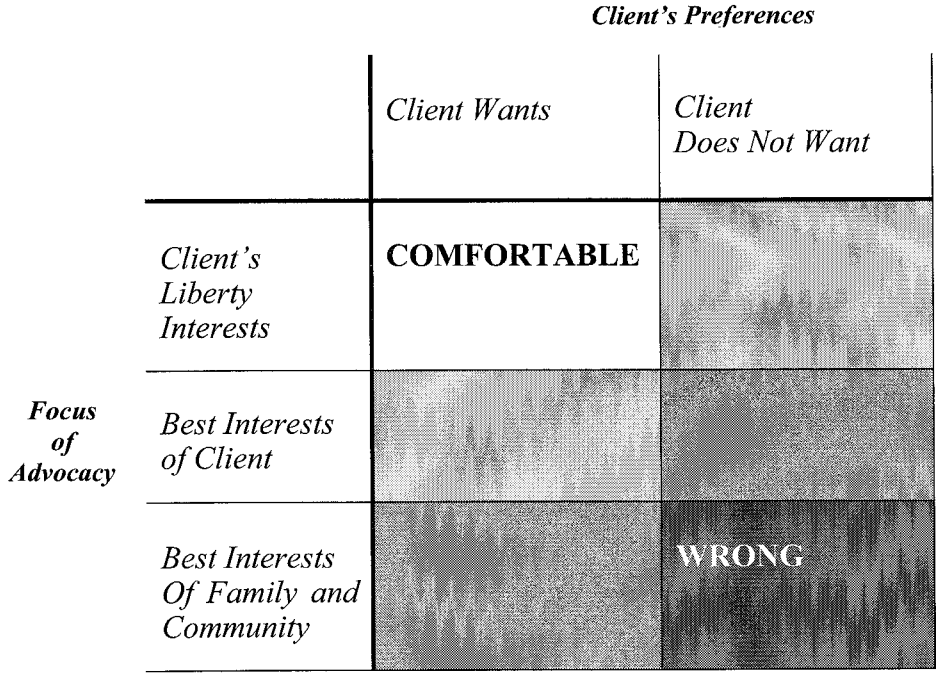
Of course, as we go through this list of examples, it is apparent that we begin to tread on ethically dangerous and operationally difficult territory. It is by no means clear that doing anything other than providing a zealous defense of a client's liberty interests is ethically permissible. Yet, there may be some interesting terrain to explore that lies between the idea that the sole commitment of public defenders is to defend clients' liberty interests on one hand, and that defenders might become part of an oppressive regime on the other.

For example, a client may wish to go into a drug treatment program for, say, eighteen months rather than taking a plea to four to six years. The district attorney, however, may demand that if the client is dismissed from the program her sentence will increase to eight to twelve years. Where the client prefers treatment, and it is clearly in her short-term liberty interests, does the lawyer take on any additional ethical responsibility if she knows there is only a very slim chance that the client will in fact complete the program? As in this example, once an attorney begins to take up more than just the client's immediate interest in liberty, questions arise about whether she is providing effective counsel or setting her client up for failure, resulting in a much harsher sentence in the long run.

Figure 2 sets out an analytical framework in the form of a matrix to consider this dangerous terrain. The rows in Figure 2 describe the aim or objective of advocacy: to protect the client's liberty interests, to promote the best overall interests of the client, or to protect the best interests of a client's family or community. The columns in Figure 2 describe the client's desires: she either does or does not want particular interests defended.

14. *Id.*

FIGURE 2
"DANGEROUS TERRAIN"



We can see that the standard assumption about public defense is captured by the upper left-hand cell of the matrix: the focus of the advocacy is on the liberty interests of the client alone, and that is what the client prefers. In this context, public defenders have a clear duty to protect their clients' liberty. That is what we usually assume is the case.

We can also clearly see some prohibited terrain. The bottom right-hand cell of the matrix describes a place where no ethical public defender can possibly stand: where her advocacy is focused on promoting the best interests of family and community, but the client has no desire to protect these interests. The client's own interests in liberty are more important to her. In this situation—while some social good might come from advocacy focused on family and community interests and one may feel somewhat ambivalent about a client who is uninterested in doing something for her family and community—the ethical public defender still has no choice but to defend the liberty interests of her client.

The interesting parts of the matrix, however, are the remaining four cells. The upper right-hand cell of the matrix captures a situation in which a client is not particularly interested in defending her liberty interests. This creates an ethical dilemma for the public defender: should she advocate for the abstract defense of liberty even if her client does not want it, or should she be responsive

to the client's stated preferences? Of course, stated preferences may not be enough. If the defendant has given up because she is fatigued, mentally distraught, or feels guilty about something other than the offense with which she is charged, the public defender is responsible for trying to figure out what the client's interests would be if she were whole and autonomous. But, as in the case of doctors who often seek to prolong life even when their patients are ambivalent, there is an element of paternalism associated with insisting that defendants accept the burdens of liberty when they would rather not.

More interesting still are the middle and bottom left-hand cells of the matrix. These cells represent situations where the client claims to be interested in advancing something other than her liberty interests. Perhaps she wants access to drug treatment. Or, he wants to find a way to stop hitting his wife and kids. Or, she recognizes that she is going to go to jail and wants to make the best possible arrangements for her family. In light of these goals, she is willing to sacrifice some liberty interests that she might otherwise be entitled to. In these cases, again, the public defender faces the ethical challenge of deciding whether the zealous defense of her client means only defense of her liberty interests, or whether it can include helping the client accomplish what she wants in the disadvantaged circumstances in which she finds herself.

The last remaining cell—the middle cell in the right-hand column—defines a situation where the advocacy focuses on the best interests of the client as the public defender conceives them, but not the way in which the client views them. This cell probably describes inappropriate advocacy behavior by public defenders. While it might be a less egregious offense than the bottom cell in that column (since it involves acting for the interests of the client rather than on behalf of those who would like to make claims on the client), it still has too much unsanctioned paternalism in the judgment about what constitutes the best interests of the client. It has neither the general warrant of liberty protection, nor the special warrant of a client's stated preferences. Still, it might well be that some important advocacy can occur in this cell, and that cases that start out there might gradually be transformed into cases in which the client eventually comes to agree with her advocate's assessment of her best interests.[15]

This dangerous ethical terrain would not be particularly worth exploring if little advocacy value were possible in the three or four ambiguous cells. But some important value may well be created for the individual, her intimates, and the wider society by practices developed within these cells. For example, clients may be more satisfied with their defense if they find a counselor, or someone

15. *See* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C.L. Rev. 841 (1998). Zeidman's article discusses a Second Circuit case where the court found that a defense attorney—in order to meet effective assistance of counsel standards—should have strongly persuaded a client to accept a plea. Nevertheless, a lawyer cannot go too far by usurping the final decision to be made by the client.

who can provide something more than and different from the mere defense of their liberty interests—an effort that is often highly circumscribed in any case. It may also be true that society will be willing to pay a lot if public defenders can fashion practices and dispositions that result in defendants' not coming back for additional offenses.

Finally, learning how to practice in these ambiguous cells may bring public defenders more effectively into those parts of the criminal justice system that are moving away from the discipline of procedural justice and towards the interests of problem solving. In most places, less than ten percent of cases go to trial, although trials receive the most public attention. The quality of the dispositions in the other ninety percent of cases should receive greater emphasis, especially in terms of training to deal with these less adversarial dispositions. Drug courts, juvenile courts, and family violence courts are all emerging as institutions that reject the idea that cases are judged guilty or not guilty, and time under state supervision is meted out according to the seriousness of the offense. These new institutions relate to defendants and their offenses in a social context, and seek dispositions that are satisfactory to those capable of preventing future offenses.

For all these reasons, then, whole-client representation may be a new kind of practice that produces a different kind of value, reaches for a different kind of legitimacy and support, and requires new capabilities and cultural commitments from public defender offices. In this respect, whole-client representation may provide a particularly challenging new direction for public defenders to consider.

V.
CONTEMPLATING SHIFTS IN ORGANIZATIONAL STRATEGY

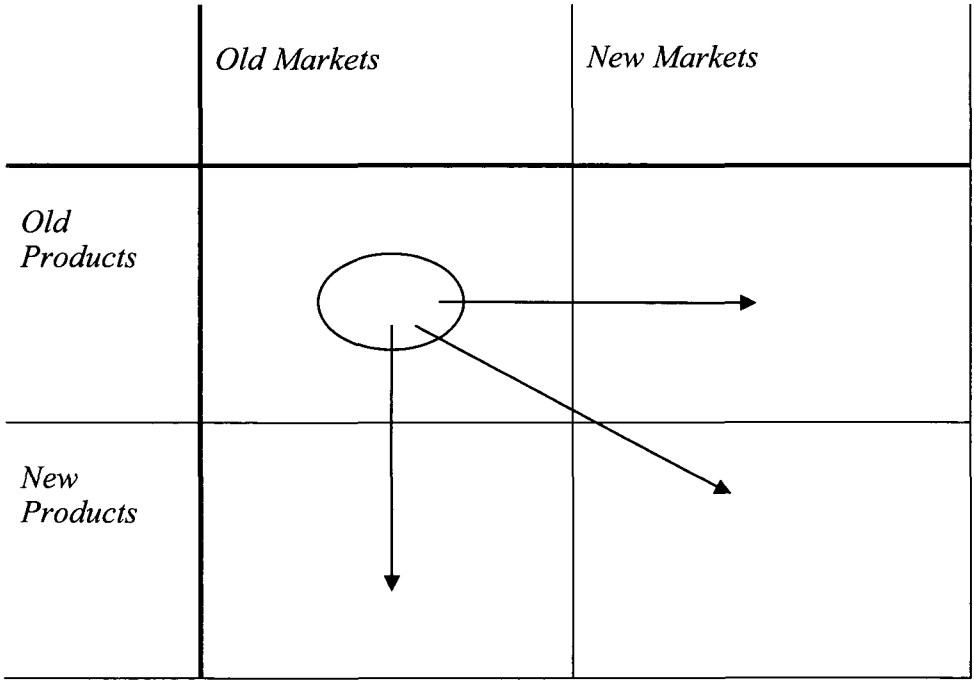
For most organizations, it is scary to contemplate shifts in organizational strategy. This may be particularly true when one occupies a relatively secure niche that has come to have important cultural meaning to those who occupy it. In these cases, ordinary reluctance to contemplate the twin challenges of change and uncertainty will be aligned with a strong emotional commitment to the idea that any change from the past represents an offense against tradition, a reluctance to stay the course and fight the good fight. Still, some organizations are forced to consider a change in strategy because their old strategy is leading them off a cliff. Other organizations choose to consider a change in strategy because they think they see a better use of the assets represented by their organization than they do in the strategy to which they are now entirely committed.

Figure 3 represents a matrix that many private firms have found useful when contemplating the risks and challenges of shifting their strategy.[16] In this matrix,

16. Interview with Richard Cavanagh, former Partner of McKinsey and Company (Oct. 2003).

a change in strategy is essentially identified with a firm's efforts to develop either new markets for old products (cell 2); new products for old markets (cell 3); or new products for new markets (cell 4). Obviously, moving away from the firm's current strategy (cell 1) to any of these new positions entails risks, but the risks for each are different, and are probably of different magnitudes. The move to cell 2 (old products to new markets) involves risks associated with breaking into a new market—not the development of new products or production processes. The move to cell 3 (new products to old markets), in contrast, uses the firm's knowledge of customers and markets, but faces the uncertainty of developing and producing new products. The riskiest, is a move to new products and markets simultaneously (cell 4), for one then absorbs both kinds of risks.

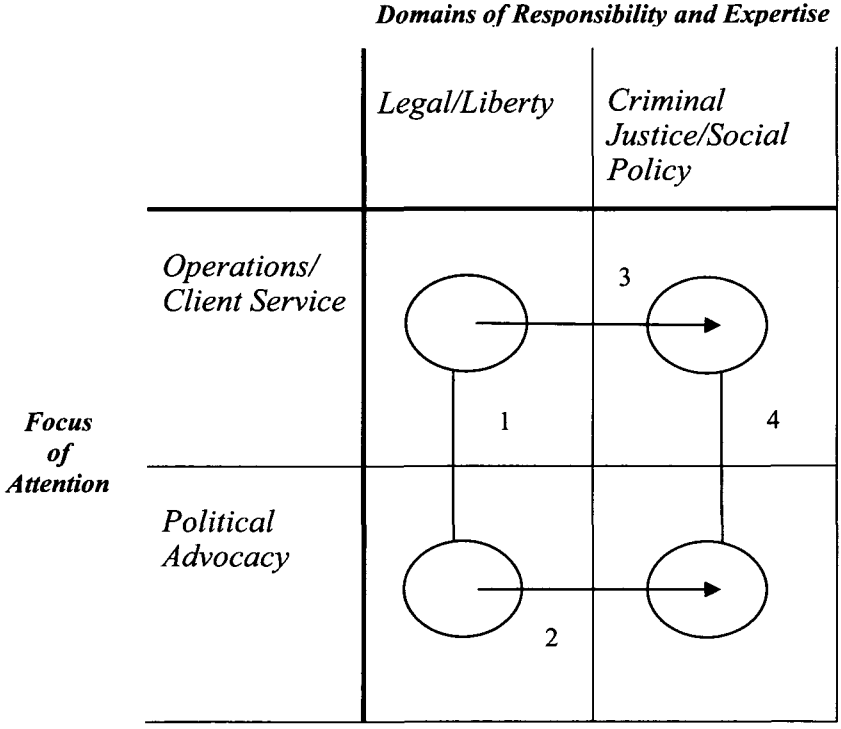
FIGURE 3
DYNAMIC STRATEGY MODEL



One might use this matrix to lay out the risks for changing the current strategy of public defense. Public defenders now occupy a fairly comfortable, well-defined niche. Support may be eroding around the edges, and there may be tension around how to define the mission of the organizations, but it is hard to imagine that the Supreme Court will reverse its holdings and knock the struts out from under these offices. On the other hand, perhaps some new products can be

developed and new markets served by enterprises that have the capabilities of public defense systems. Public defenders can try to serve a new market in the policy-making world by developing their advocacy capabilities. These political advocacy skills, in turn, can be focused on relatively narrow and traditional concerns, such as the protection of the offices and the support of procedural rights for defendants; or they can be focused on broader issues of crime and social policy. On the other hand, at the operational level of the organization, public defenders may be motivated to change from the representation of the liberty interests of their clients to a commitment to whole-client representation. These possibilities are sketched out in Figure 4.

FIGURE 4
DYNAMIC PATHS FOR INDIGENT DEFENSE SYSTEMS



1. The Move to Rights Advocacy
2. The Move to Criminal Justice/Social Policy Advocacy
3. The Move to Whole-Client Representation
4. The Complementary Relationship Between Whole-Client Representation and Social Policy Advocacy

Note that this matrix does not map exactly onto the matrix in Figure 3, since all three cells representing change involve creating both new products and new markets. But in considering these different departures from the current strategy, three issues are worth considering. First, how valuable—to society and the clients whom public defenders seek to represent—would each departure be, and what new sources of legitimacy and support (or their opposites!) would each idea attract? Second, how far is each idea from current practice? How exotic a concept is it in the external and internal understandings of what a public defense system is and does? And how much investment is required to build the new capabilities? Third, to what extent do the different departures complement one another in producing helpful synergies, and to what extent do the different ideas compete with one another? Obviously, in the short run, they will compete with one another in terms of managerial attention and resources. But the question is whether these ideas will compete with one another over the long run. These are the important questions that those who wish to lead public defenders must answer for themselves and for one another.