SYSTEMS FOR PROVIDING INDIGENT DEFENSE: AN INTRODUCTION

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INTRODUCTION

Criminal defense attorneys often project a "lone ranger" image, both to the public and to themselves. This image, fostered by literary and more recently by television models, presents the attorney as the sole defender of, and advocate for, the often lowly and powerless accused facing the governmental machine of prosecution. A natural implication of this image is that the fate of the accused hinges on the skill and commitment of the individual defense attorneys. While such skill and commitment are by no means irrelevant to the quality of representation the accused receives, the *system* which provides defense attorneys to the indigent accused may have as great or greater effect than the attorneys themselves. A few examples will illustrate the point.

In 1981 Robert Corenevsky was arrested in California and charged with the first degree murder, with "special circumstances," of a Manhattan Beach jeweler, an offense which exposed him to the penalty of death. Six feet, six inches tall, 280 pounds, nicknamed "King Kong," and a reputed "hit man," Corenevsky hardly seemed a "victim" in any sense. Yet when he declared indigency and requested that the state provide counsel, he became a victim of the indigent defense system.

Three years later Corenevsky was still in jail in Imperial County, awaiting trial. In the interim he had been represented by at least seven attorneys, including a public defender who had resigned to work in the prosecutor's office, a court-appointed attorney who had quit when his fee was not paid, and an attorney fresh out of law school. His representation by the public defender office eventually required the intervention of the state's supreme court.

The public defender office of Imperial County, located in a converted motel, was seriously overburdened and understaffed. The attorney who headed the office had never tried a capital murder case. He petitioned the court for additional funds to pay for a second attorney, an investigator, law clerks, and various expert witnesses to assist him. The judge granted his request and ordered the county to provide the necessary funds. In defiance of the recommendation of its own county counsel, the county board of supervi-

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sors refused, stating that the $13,314 ordered by the court would "bankrupt" the county. County Auditor-Controller David Titsworth refused to pay the ordered amount without the approval of the board and was held in contempt and went to jail for his refusal.[1]

In 1980, in Clark County, Washington, a Vancouver attorney negotiated a contract with the county to provide representation to indigent defendants in misdemeanor cases. These services had previously been provided by a public defender office, but the contract system was adopted because it was alledgedly more cost efficient. The contracting attorney hired another attorney who was only one year out of law school, and who assumed responsibility for 273 new cases during the first three months of the year-long contract. The defender program, by contrast, had not permitted its attorneys to handle more than forty to fifty cases at any one time. Court records indicate that during the contract period there were fewer jury trials, fewer suppression motions, and fewer appeals taken. During this entire period, there were no requests for the appointment of investigators or expert witnesses. There were more guilty pleas and they were entered earlier in the case. There were also more client complaints about the representation received. The contract included no funds for training and no mechanisms for monitoring the performance of the attorneys.[2]

In Virginia, George Alec Robinson was represented by two appointed lawyers when he was charged with capital murder. Although he was convicted of the murder, the defense was considered a success since he was spared the electric chair. The attorneys were, however, financially devastated. The two lawyers worked a combined total of over 600 hours, enough to entitle them to legal fees of about $55,500 at the prevailing rates for private clients. During this period of intense effort, the attorneys were forced to neglect their law practice and their personal lives and to cope with the emotional pressure of having someone's life in their hands. For their efforts, the State of Virginia paid them each $573.[3] The two lawyers subsequently removed their names from the list of attorneys willing to accept appointments. They joined an increasing number of experienced attorneys nationwide who are no longer willing to provide their services at such great personal and financial sacrifice.[4]

1. See Kirsch, *Rural Justice at the Crossroads*, CAL. LAWYER 23 (Apr. 1984) for a discussion of Corenevsky's case and the problems of the indigent defense systems in California. In Corenevsky v. Superior Court, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984), the California Supreme Court upheld both the trial court's contempt order and its order to pay the funds.

2. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 49-55 (1982) [hereinafter cited as N. LEFSTEIN].

3. *"Crisis" Seen in Va. Court-Appointed Lawyer System*, Washington Post, June 25, 1984 at D1, col.2.

4. This is not an isolated example. Connecticut lawyer Chester Fairlie testified that he ruined his practice and liquidated his personal savings in representing an accused murderer for over 650 hours at the rate of $12.50 per hour. American Bar Association, *Gideon Undone: The Crisis in Indigent Defense Funding* 14-15 (Nov. 1982). Private lawyers in the District of Columbia, organized as the Superior Court Trial Lawyers Association, did not disappear quietly, but rather went on strike in 1983 to protest low fees in appointed criminal cases. Although they

These three examples, taken from the three systems for providing defense services,[5] illustrate a profound reluctance on government's part to provide adequate funds for indigent defense. They show that the government creates and maintains defense systems which place restraints on two crucial ingredients of competent representation: the time to handle each case competently and the extrinsic resources necessary for an adequate defense. As a result of these systemic defects, many indigent defendants are being denied their right to effective assistance of counsel.

The political and social problems which lead to defective defense systems are pervasive and ingrained. Traditionally, efforts to ensure competent representation have focused almost exclusively on the representation provided in individual cases. Because this approach ignores the broader problems of defense systems, it cannot achieve the goal of providing competent representation to all who are charged with a crime. In the articles which follow, the authors explore means of addressing these problems and demonstrate that claims of defects in the defense systems can be raised effectively, both in the defense of a criminal case and also through affirmative litigation.

This introduction considers the history of the development of the right to counsel and the related development of defense systems which help explain the pervasive problems of those systems.

I
THE DEVELOPMENT OF THE RIGHT TO COUNSEL

The notion that the state must provide a free attorney to defendants who cannot afford to hire their own counsel is a fairly recent one. In 1963 *Gideon v. Wainwright*[6] held that the sixth amendment was binding on the states and that an indigent defendant charged with a felony is entitled to free counsel. In 1973 *Argersinger v. Hamlin*[7] extended the right to defendants charged with misdemeanors where conviction could lead to incarceration.[8] Prior to *Gideon* the sixth amendment had no application to the states, and an indigent defend-

were successful in getting increased fees, the Federal Trade Commission subsequently issued a complaint against the lawyers, alleging that their actions constituted a restraint of trade. A detailed description of the day-to-day working conditions of appointed lawyers was developed by the administrative judge who subsequently dismissed the complaint. In the Matter of Superior Court Trial Lawyers Association, No. 9171, slip op. at 24-40 (FTC, Oct. 18, 1984). The matter is now pending appeal by the government to the Federal Trade Commission.

5. The three systems are the public defender system, the contract defense system, and the assigned counsel system. The public defender system is generally characterized by salaried attorneys working full or part-time for a public or private non-profit agency. Under the contract system, individual attorneys, bar associations, or law firms contract to provide defense services for a specified dollar amount. In the assigned counsel system, the court appoints attorneys as needed for specific cases from a list of available attorneys.

6. 372 U.S. 335 (1963).

7. 407 U.S. 25 (1972).

8. In Scott v. Illinois, 440 U.S. 367 (1979), the Court held that where a conviction actually results in a fine, even though the statute authorizes imprisonment, the state need not provide counsel.

ant was provided an attorney only when it was necessary to meet the fundamental fairness requirement of the due process clause.[9] The need for counsel was determined on a case-by-case basis, and generally, failure to provide an attorney violated due process only where the case was unusually complicated or the defendant was particularly unable to present his own defense.[10] Thus, states have been required to provide counsel in a significant number of criminal cases for only slightly more than two decades.

Since *Gideon* there has been an enormous increase in the number of cases in which counsel has to be provided. Although this increase is primarily due to *Gideon* and *Argersinger*, the Supreme Court has also expanded the right to counsel through a number of other cases. The Court extended the right to a number of pretrial stages, including custodial interrogation,[11] line-ups,[12] and preliminary hearings which involve a determination of whether there is probable cause to believe the suspect has committed a crime.[13] The Court also required that counsel be provided for the first level of appeal[14] and for some parole and probation revocation hearings.[15] Finally, the Court extended the right to counsel to juvenile delinquency proceedings.[16] In 1973 it was estimated that there were nearly four million cases annually in which counsel had to be provided.[17] This number is undoubtedly much greater in the 1980s.

The need for defense services has also been affected by the increasing complexity of criminal law practice and the evolution of the standard for judging competence of counsel. In the last few decades the Supreme Court has been extremely active in the criminal procedure area. Many of its decisions have created new responsibilities for defense lawyers. For example, the application of the exclusionary rule for fourth amendment violations requires that counsel must, wherever possible, raise objections based on the legality of any searches or seizures which led to the defendant's prosecution. The development of the law regarding the admissibility of confessions, identification of evidence, and other procedural protections creates similarly greater obligations.

These changes are related to the changes in the standard for competence of counsel. For many years counsel's performance was judged under the due

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

10. *Id.* at 463, 472-73.

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

12. United States v. Wade, 388 U.S. 218 (1967).

13. Coleman v. Alabama, 399 U.S. 1 (1970).

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

15. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

16. In re Gault, 387 U.S. 1 (1967). Legislation and the decisions of other courts have extended the right to counsel to other proceedings such as involuntary mental health commitments and deportation proceedings. *See* Applemen, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130 (1976); Catz & Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Toward an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 411 (1984).

17. L. BENNER & B. NEARY, THE OTHER FACE OF JUSTICE 72 (National Legal Aid and Defender Association (NLADA) 1973) [hereafter cited as L. BENNER & B. NEARY].

process clause, and a case was reversed only if counsel's representation reduced the case to a "farce and a mockery" of justice.[18] In 1970 the Supreme Court suggested that a more stringent standard might apply.[19] Many states and nearly all the federal circuit courts of appeals moved away from the "mockery of justice" due process standard toward some version of a "reasonably competent assistance" standard under the sixth amendment.[20] In *Strickland v. Washington*[21] the Supreme Court adopted a sixth amendment competence standard, holding that the proper measure of attorney performance is "reasonableness under prevailing professional norms."[22] There may be reason to question whether this evolution in the competence standard reflects any real difference in the standards by which counsel's performance is judged.[23] However, to the extent that the sixth amendment standard is more demanding than that of the due process clause, it will require more time and effort on the part of defense counsel.

II

THE SYSTEMS USED TO PROVIDE COUNSEL

The historical development of the various systems for providing defense services is closely tied to the expansion of the right to counsel. Under the due

18. This standard was first set out in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

19. McMann v. Richardson, 397 U.S. 759 (1970). *McMann* dealt with the validity of a guilty plea following an allegedly coerced confession. The Court held that such a plea could later be attacked only if the defendant could establish that counsel's advice to plead guilty was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

20. *See* Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 WIS. L. REV. 474, 489-93.

21. 466 U.S. 668 (1984).

22. *Id.* at 688.

23. The opinion in *Strickland* suggests the Court does not intend that the new standard make any dramatic difference. The Court states:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose results are being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696 (emphasis added). The Court's language sounds quite similar to the due process standard.

A review of appellate court action before *Strickland* supports the impression that the shift from the due process standard to the sixth amendment standard may not result in a dramatic change. Courts continue to be reluctant to award new trials because of counsels' errors. A sample of cases raising the issue of ineffectiveness of counsel, taken from the decade after *McMann*, shows that only 3.9% resulted in reversal on that ground. *See* Brief of NLADA, Association of Trial Lawyers of America, and the American Civil Liberties Union as amicus curiae in United States v. Cronic, No. 32-660, at 22; *see also* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 21-27 (1973) (discussing the reluctance of appellate courts to confront this issue).

process approach before *Gideon*, the courts found relatively few cases in which fundamental fairness required the appointment of counsel. When a court did determine that counsel was to be provided, it simply appointed a lawyer from the local community. This attorney generally served without pay.[24] Gradually agreement emerged that the quality of representation was inevitably compromised when attorneys were not paid,[25] and that appointed counsel had to be compensated.[26] Most jurisdictions now provide for some compensation,[27] although the payment received by appointed counsel is often woefully inadequate.[28]

Counties and other administrative units responsible for allocating funds to compensate counsel found that appointed counsel fees were an increasingly significant item in their budgets. They also found that these fees were unpredictable—one or two major cases in a local area could have a dramatic effect on the funds available to compensate defense counsel. Local officials began to search for some way to both decrease and control the amount to be spent. The development of the public defender and contract defense systems have paralleled, and at least in part been motivated by, this search for ways to limit expenditures.

The public defender system developed before the contract system. The primary motivation of those who initially supported the public defender movement was to improve the quality of defense services. They believed that if attorneys specialized in criminal law and were paid an adequate salary, competent representation would be provided.[29] The local politicians and administrators who had to approve the adoption of these programs, however, were generally more concerned with financial considerations than with ensuring that defendants received competent representation.[30] Therefore, public de-

24. *See* Mounts, *supra* note 20, at 478-79. Often attorneys not only received no compensation but also were required to pay expenses out-of-pocket.

25. *Id.* at 479.

26. This consensus developed slowly. As recently as 1951 there were 12 states which made no provision for paying counsel, even in capital cases, and 15 states provided for compensation only in capital cases. E. BROWNELL, LEGAL AID IN THE UNITED STATES 124-25 and app. C (1951) [hereinafter cited as E. BROWNELL]. In 1965 there were still four states that provided compensation only in capital cases, and six states and the District of Columbia did not provide for any compensation in any case. L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES 16 (1965).

27. *See* N. LEFSTEIN, *supra* note 2, at app. D.

28. *See supra* text accompanying notes 3-4; see also Wallace v. Kern, 392 F. Supp. 834, 841 (E.D.N.Y.), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973), which noted that the legislature had set a maximum rate of payment of $15 per hour for in-court time and $10 for out-of-court time, and that attorneys, in fact, received even less because the judges routinely reduced the actual amount paid to less than the maximum.

29. *See* E. BROWNELL, *supra* note 26, at 119; R. SMITH, JUSTICE AND THE POOR 115, 119 (1919); Freeman, *The Public Defender System*, 32 J. AM. JUD. SOC'Y 76 (1948).

30. New Jersey provides a good example of the persuasiveness of the economic argument. Assigned counsel in New Jersey were not compensated except in capital cases. In 1966 an attorney assigned in a noncapital case challenged the state's failure to pay him for his services. The New Jersey Supreme Court held that the county must compensate him. State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966). The effective date of the decision was delayed to give the legisla-

fender programs were marketed to these local officials as a means of saving money.[31] Public defender supporters promised that the efficiency of the programs would decrease costs and would give the county a means of predicting its expenses.

As public defender programs became well established,[32] they began to request greater appropriations to handle the increased responsibilities created by judicial and legislative extensions of the right to counsel, establish salary parity with prosecuting attorneys, and generally improve the quality of their organizations. Local governments seldom welcomed requests for increased appropriations for any use; however, they seemed particularly resistant to allocating additional funds for the defense of indigents. Therefore, the search for a less expensive means of fulfilling the obligation to provide counsel continued.[33]

The rise of the contract defense system[34] was a response to this continuing effort to save money on indigent defense. Some proponents of the contract system argued that it would be preferable to the public defender system because it would be less bureaucratic and defendants would have more confidence in a "private" attorney. However, the most persuasive sales pitch was

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ture a chance to decide whether to continue with the court appointed system or to create a public defender system. The legislature opted for a statewide public defender system. *See* United States *ex rel.* Wood v. Blacker, 335 F. Supp. 43 (D.N.J. 1971). The budget for this program in 1972-73 was $6,529,049. It was estimated that, if county governments had provided these services through appointed counsel, the cost of the services would have exceeded $12.5 million. L. BENNER & B. NEARY, *supra* note 17, at 32-36.

31. *See, e.g.*, Eisenberg, *Quality Representation v. Cost Effectiveness: Have We Compromised Too Much?*, 36 NLADA BRIEFCASE 348 (1979).

32. The public defender system is now the most common defense system. Public defender programs have been established in 43 of the 50 largest counties and serve 68% of the overall population. U. S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, A NATIONAL SURVEY: CRIMINAL DEFENSE SYSTEMS 3 (1984).

33. Despite the growth of the public defender system, the assigned counsel system has proved very durable. It is still used in about 60% of the counties, most of those counties being rural or in the South. *Id.* at 2. Where this system is used, it is almost always justified as the least expensive means of delivering defense services. Attorney fees average about $20-40 per hour, and resources such as investigators and expert witnesses are either not available at all or very rarely provided. *Id.* at 5.

34. The development of the contract defense systems, in which individual attorneys, bar associations or law firms contract to provide defense services for a specified dollar amount, is a recent phenomenon. In 1982 six percent of all defense services were provided by this system, as compared with 1973 when the percentage was so low that it was not reported. *Id.* at 3. Most contracts are for services in smaller rural counties, or for case overloads or conflict matters which cannot be handled by large urban public defenders. *See also* Spangenberg, *Contract Defense Systems Under Attack: Balancing Cost and Quality*, 39 NLADA BRIEFCASE 5 (1982). Two large cities, San Diego and Seattle, use centrally administered multiple contracts for their defense services. For a discussion of their respective defense systems, see SAN DIEGO COUNTY OFFICE OF DEFENDER SERVICES: EVALUATION AND RECOMMENDATIONS (Abt Associates, Inc. 1981); EVALUATION OF THE LEGAL SERVICES PROVIDED LEGALLY INDIGENT CRIMINAL DEFENDANTS IN THE MUNICIPAL COURT, CITY OF SEATTLE (NLADA 1981). North Dakota now uses contracts virtually throughout the state. NORTH DAKOTA JUDICIAL SYSTEM: INDIGENT DEFENSE PROCEDURES AND GUIDELINES, NORTH DAKOTA COUNSEL FOR INDIGENTS COMMISSION, NORTH DAKOTA SUPREME COURT (May 1983).

the same one that was originally made for public defender programs—that the system is cheaper. This argument is particularly persuasive in the contract bid situation since various groups or individuals bid against each other and the funding agency simply selects the low bid.[35]

The government effort to limit the expense of indigent defense services has been a consistent historical theme in the development of defense systems.[36] Virtually every study of defense services has concluded that the programs are seriously underfunded;[37] defense services receive by far the smallest portion of total expenditures for the criminal justice system.[38]

A number of political factors have contributed to this inadequate level of funding. Providing free attorneys to accused criminals is probably one of the government's least popular functions. In recent years, "victim's rights" movements have become increasingly popular. Many politicians, being sensitive to public opinion, are concerned with appearing to be "tough on crime."[39] Citizens and politicians alike often have little understanding of or sympathy for

35. This "low bid" contract defense system is particularly likely to result in the provision of inadequate representation. *See, e.g.*, R. Wilson, CONTRACT BID PROGRAMS: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES (NLADA Mar. 1982); *Elbowing Out Public Defenders*, Nat'l. L.J., Dec. 14, 1981, at 1, col. 1. This danger led to the development of the GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (NLADA Dec. 1984). The American Bar Association adopted a resolution at the February 1985 Mid-year Meeting opposing "the awarding of governmental contracts for criminal defense services on the basis of cost alone, or through competitive bidding without reference to the quality of representation."

36. Inadequate funding is the most serious cause of defective defense systems. However, it is not the only cause. Judges often contribute to the problem. In appointed counsel systems, the judge generally controls the appointment process and the payment of fees. These powers give the judge a broad range of discretion which can be exercised so as to undermine the ability of the system to provide competent representation. The judge may set fees so low that experienced, competent attorneys withdraw from the appointment list or otherwise try to avoid appointments. Judges may discourage zealous representation by reducing the requested fee on the grounds that certain research was unnecessary, expenses were frivolous or that the case took too long to try.

Judges may also be in a position to affect defender or contract systems. Often, they exercise some control over the selection of the person who heads the defender program or the organization which receives the contract. There are incentives to choose counsel who will be malleable in the political process. Wilson, *Serving Too Many Masters: The Public Defender's Instituitonal Schizophrenia*, 38 NLADA BRIEFCASE 38, 40 (1981).

There may be structural problems within the system which contribute to its weakness. For example, the heads of many defender programs serve at the will of the appointing body and therefore may be reluctant to demand the level of funding which is actually necessary to provide competent representation for all. *See*, Mounts, *supra* note 20.

37. *See, e.g.*, L. BENNER & B. NEARY, *supra* note 17; N. LEFSTEIN, *supra* note 2.

38. The Bureau of Justice Statistics indicates that public defense receives 1.5% of state and local criminal justice funds, prosecution services receive 5.9%; the judiciary, 13.1%; corrections, 24.7%; and police protection, 53.2%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 11 (1981).

39. Witness the willingness of California Auditor Titsworth, *supra* text accompanying note 1, to serve time in jail for contempt of court rather than pay a bill of $13,314 which would allegedly "bankrupt" the county. The issue was not the actual cost to the county, but rather the county's commitment of funds to other services and expenses, and its unwillingness to allocate funds for an unpopular service—the defense of those accused of committing crimes. The audi-

the needs of the adversary system, at least insofar as it requires a strong defense advocate. Defense attorneys are often seen as obstacles to justice, and people who are concerned about the rights of victims may be particularly unsympathetic to the need for adequate funding for defense services. Furthermore, the consumers of defense services, the indigent accused, have absolutely no political power or influence; this heightens the political vulnerability of defense systems.

Recently, many local governments, the primary locus of funding of defense services, have seen their resources dwindle, as tax-cutting measures are passed by the electorate and federal funds for local programs are cut. Local governments have often been forced to cut budgets across the board, and it is not surprising that they expect that the indigent defense system should, at a minimum, take its fair share of cuts. However, when the resources provided are not adequate to allow the system to fulfill its constitutional obligation to provide competent representation, the government's desire to economize, no matter how understandable, must be constrained. The authors' individual articles which follow discuss two approaches to ensuring that government provides defense systems which can deliver competent representation.

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tor may actually be seen by his constituents as an authentic martyr, someone who is willing to go to jail rather than coddle crime.