

# WHAT POLICY-MAKERS NEED TO KNOW TO IMPROVE INDIGENT DEFENSE SYSTEMS\*

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## I.

### INTRODUCTION

In 1937, U.S. Supreme Court Justice Cardozo stated that certain fundamental constitutional rights are the bases of every other right. These rights are “implicit in the concept of ordered liberty.”<sup>1</sup> In criminal trials, the right to counsel is regarded as one such fundamental right. Since the 1963 U.S. Supreme Court *Gideon v. Wainwright*<sup>2</sup> decision, an indigent defendant who cannot afford counsel is to be provided one by the state. This and other subsequent Court decisions led every state in the nation to adopt indigent defense systems. The Supreme Court left it to the states to decide how public defense would be provided to criminal offenders unable to pay for private counsel. Today, many questions exist as to the effectiveness of some of these state public defense systems.<sup>3</sup>

One serious obstacle to the improvement of indigent defense systems is the lack of data and systemic policy analysis necessary for state policymakers to come to terms with the relevant issues that need to be addressed. One need only examine the limited literature in this area to understand the dearth of empirical research exploring the complex issues relevant to the improvement of indigent defense system operations. This paper makes the case for policymakers and researchers to develop a strategy for formulating relevant inquiries and then gathering current data to assess the effectiveness of a state indigent defense system. A starting point for this undertaking is to identify the major justifications for why a state would want to build a strong indigent defense system and

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1. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

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

3. Throughout this paper, the term “public defender” refers to all indigent defense lawyers, including professional full-time public defenders, assigned counsel, and contract lawyers. A public defender office is a publicly funded agency that hires lawyers and support services to provide indigent defense. An assigned counsel system, on the other hand, relies on the assignment of defense counsel by an appointment authority (usually the judge or a designee). These are attorneys in private practice paid a standard fee for the defense of indigent defendants. Finally, in a contract system the funding agency contracts with private law firms to deliver indigent defense services. Contracted firms in turn provide their services at the rate agreed upon under the terms of the contract.

to formulate the key questions that policymakers need to explore before deciding how best to improve and evaluate a public defense system.<sup>4</sup> Until a comprehensive body of knowledge is established, reforms in this area will continue to be difficult.

## II.

### THE VALUE OF BUILDING A STRONG INDIGENT DEFENSE SYSTEM

Traditional support for a strong indigent defense system typically arises from the notion that a defendant cannot be tried fairly in our system without an adequate defense to challenge the state's accusations. Supreme Court Justice Black stated in the *Gideon* decision that the "right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."<sup>5</sup> An adversarial system structured to search for the truth in a struggle staged between the state and the defendant requires capable fighters on both sides in order to achieve justice. The legal profession and scholars have understood this for a long time. Yet, for the public, an argument can also be made that a strong indigent defense system is a central component of an effective crime fighting policy. How? A strong indigent defense system is essential to shield poor citizens, and indirectly all citizens, against abuses by the state. A strong indigent defense system also can facilitate the smooth operation of the justice system and, in so doing, allow the courts to respond effectively to growing caseloads. A strong indigent defense system promotes the legitimacy of the system—legitimacy necessary to maintain public support for the justice system.

#### *A. Protection Against Crimes Committed by the State*

A strong indigent defense system is the first line of defense against corruption of the justice system. The state can commit crimes against its citizens by abusing its policing and prosecutorial powers. These abuses tend to occur first against poor people alienated from the socioeconomic and political mainstreams. The general public may "look the other way" when these abuses happen to alienated populations, but this apathy may fuel further abuses that may eventually affect a broader segment of the population. Providers of indigent defense services are the first lines of defense in the effort to maintain the system's integrity and prevent the corruption of the justice system typical in many other countries. Widespread corruption eventually can lead to state abuses against law-abiding citizens. Therefore, a strong indigent defense system can help control crime in another area—crimes committed by those who abuse state policing, prosecutorial, and judicial powers.

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4. This paper does not address indigent defense issues in capital cases because, for many reasons, it is a complex area that deserves separate attention.

5. *Gideon*, 372 U.S. at 344.

### B. Increased Effectiveness

A strong indigent defense system can increase the effectiveness of our justice system. Justice works better when all players in the system are capable and have access to adequate resources. When the system includes well-trained public defenders, cases move faster (helping the court manage growing caseloads), and there are increased opportunities for the implementation of innovative programs. With non-traditional populations such as the homeless and the mentally ill flooding the system, public defenders can act as mediators to help facilitate special programs to divert certain categories of offenders from the justice system. Miami's Public Defender Anti-Violence Initiative, for example, reaches out to a variety of public and private service providers to seek the tools from the community that a defendant might need to successfully avoid further legal troubles.<sup>6</sup> Assisting the courts in the smooth management of caseloads and facilitating effective alternative interventions for special needs populations increases the justice system's capacity to respond to growing demands. In this sense, then, public defenders indirectly assist in the fight against crime and can potentially contribute to the effective operation of programs that may help reduce recidivism.

### C. Legitimacy

A strong indigent defense system is essential for maintaining the legitimacy of the judicial process. The sense that the system is governed by fair play, even among those convicted of crimes, is essential for its long-term support. Studies have shown, for example, that the public, particularly citizens living in poor neighborhoods, tends to support the police when they feel that the police are playing by the rules.<sup>7</sup> A strong indigent defense system allows those most alienated from our institutional mainstream to feel that the system is not "stacked" against them, even when they break the law and are punished by the system. Over the long term, this helps maintain the peace by reducing grievances "against the system" among alienated populations. When lawbreakers confront a fairly implemented system of justice, they get the message that the public values the law. When they confront an unfairly implemented system of justice, they get the message that the public values power and privilege instead of the law.

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6. *Community Partnerships*, INDIGENT DEF. (Nat'l Legal Aid & Defender Ass'n, Washington, D.C.), May-June 1999, at 2.

7. See e.g., Blaine Harden, *On Edge but Optimistic, New York Blacks Offer Complex Views in Poll*, N.Y. TIMES, June 28, 2000, at B1. "Black residents of New York City are afraid of being brutalized by the police, but they welcome and appreciate officers who keep criminals out of their neighborhood." *Id.* at B1.

### III. RESEARCH TO GUIDE REFORMS

Indigent defense is delivered and funded in a variety of ways across the nation. According to the Spangenberg Group, research and consulting experts on indigent defense operations, most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states).<sup>8</sup> Only three states rely mainly on an assigned counsel system, with or without contract defenders. The states vary in how they regulate indigent defense systems, with most developing state standards and others providing minimal state oversight and more county-level control.<sup>9</sup>

Funding levels for indigent defense services vary across the nation. A survey conducted by the Spangenberg Group found twenty-one states funding indigent systems, with the rest relying on county funds or a mix of county, state, and court filing fee funding. The fees paid for indigent defense services are difficult to calculate and compare among states. The survey found that assigned counsel hourly compensation rates at felony trials for non-capital cases range from less than \$40 for in-court services, with a maximum benefit of \$1,000, up to \$60 per hour, with a maximum benefit of \$3,000.

In discussing the quality of indigent defense systems, advocates debate issues related to the best way of delivering services, with a strong bias in favor of public defender offices. As can be expected, advocates favor spending more rather than less on these services. Yet, for those making policy, a lack of systematic research to guide policy development in this area is a basic obstacle to promoting reforms. Research literature relevant to the operation of indigent defense systems is limited. Reasons for this lack of research data and analysis include: little federal and state funding; a weak political constituency for indigent defense; no uniformity of state defender services nationwide; and no national infrastructure for indigent defense service providers that would serve as a clearinghouse for research and other information. Also, the lack of parity in federal research funds for the defense as compared to prosecution and law enforcement has not motivated the research community to develop a basic research agenda to serve as a starting point for informing policymakers on indigent defense operations. Moreover, state legislatures have been reluctant to provide resources to research state and local public defense concerns. Because

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8. For a more complete explanation of how defender services are provided, see Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS., 31 (1995). Maine and North Dakota are two states that have no public defender system across the entire state.

9. The American Bar Association, along with most states, has established some written guidelines in this area. See e.g., A.B.A. CRIM. JUST. STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992). State standards for indigent defense practices can be accessed on the National Legal Aid and Defender (NLADA) website ([www.nlada.org](http://www.nlada.org)).

of this lack of funding and general interest in defense research, individual policy-makers concerned with these justice issues must start from scratch to identify areas for data collection that will ground future decisions in fact rather than anecdote.

RESPONSE TO TONY FABELO BY MARK MOORE:<sup>10</sup>

Tony is right, I think, to want to get harder information about the costs of providing the quality of publicly supported criminal defense that is consistent with our notions of what all defendants are entitled to have. This standard can get dragged down to a minimum, of course, by an interest in satisfying taxpayers' demands to save money, and by the public's belief that "most defendants are guilty anyway." But we ought to try to fix a standard at a level above the current tawdry one. It is too easy for us to imagine that "we" would never need indigent defender services and that "they" who do are not worth the trouble. This leads to *stinting on the quality of the service*. If, however, we carry in our minds the notion that "we" might actually find ourselves in "their" position, the standard is likely to rise.

He is also right, I think, to want to define the outcomes society seeks through the provision of public defender services, and to get some quantitative indicators of the extent to which the desired outcomes are achieved. He may be right to try to value the outcomes in terms of some kind of "market value" so that the benefits can be directly compared with the costs of providing the services. (See comments below on outcomes.) This is all part of public defenders' being accountable not only to their clients for providing a quality defense, but also to the public and their representatives who are paying the costs of providing the service. It is certainly important in making appropriation decisions that the legislature has some idea of the costs of providing different levels of quality defense.

It is worth noting, however, that in Tony's conception, the value of a public defender office lies only in the services delivered directly to clients and indirectly to the operations of the court system as a whole. Absent from this conception is the value that might be created by expanding the public defender's capacity to understand and speak for the impact that public policy decisions will have on those accused of crimes, their families, and their neighborhoods. In effect, Tony's view ignores the value that could be produced by a public defender office through its contribution to the quality of criminal justice policymaking.

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10. Daniel and Florence V. Guggenheim Professor of Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University.

Building the capacity for participating in policy discussions is rarely a big cost item. In financial terms, it is dwarfed by the costs of providing representation directly. But it is an important factor in determining how the public defense function should be organized. Systems that depend on contract services where the contracts are to individual defense attorneys and are handed out by individual judges will have a much different capacity to understand and represent the interests of defendants as a whole than systems that have a statewide public defender office. Consequently, an important part of the policy question that must be considered in thinking about how to organize and finance public defender services is omitted from this otherwise excellent framework.

#### IV.

#### STRUCTURAL ELEMENTS OF QUALITY INDIGENT DEFENSE

What are the fundamental structural elements for a system, at “face value,” to be seen as providing quality representation to the indigent accused? How are those elements meeting high-quality standards in an indigent defense system? What service delivery systems are the most cost-effective and fair for the timely delivery of such representation? How do service delivery systems vary in terms of their ability to meet established standards? What outcomes are expected from a high-quality indigent defense system?

A common starting point is needed: a research agenda platform from which to launch data collection and study of local indigent defense services. The most basic questions have not been answered in any systematic way in the literature concerning indigent defense and, apparently, cannot be easily answered for particular localities unless a research agenda is designed to do so. This is critical.

Three conceptual challenges must be addressed, with research providing “hard facts” to progress from more general strategies to more specific operational strategies directed at improving indigent defense services. Research needs to provide the knowledge to:

- develop agreements on the structural elements needed for a system to have quality representation at “face value”;
- determine if each service element is delivered with quality; and
- define expected outcomes, how to measure them, and how these outcomes may be impacted by different standards and funding levels.

The policy goals are to:

- develop standards for providing quality indigent defense services;
- determine what funding is needed for an indigent defense system in a locality to meet agreed-upon standards;
- monitor compliance with standards;

- design and measure performance to justify the investments in indigent defense; and
- determine what operational aspects can further be improved to increase performance.

State financial expenditures that are made without understanding each of these areas, and without identifying specific information that needs to be generated, will not serve the criminal justice system well nor the growing number of individuals who cannot afford to hire defense counsel on their own. The minimum expectation for indigent defendants is that they receive a competent defense that meets minimum constitutional standards. However, until we can operationalize that which constitutes an adequate defense—one that extends beyond basic constitutional requirements—and attach standards to it, we will be unable to make significant progress in improving indigent defense services.

#### RESPONSE TO TONY FABELO BY MARK MOORE:

Tony is right to insist from a policy analytic/program evaluation perspective that we make a better effort to conceptualize and measure the valuable outcomes that society expects to achieve by supporting public defender services. The difficulty is that it is not at all clear what those valued outcomes are, or how they ought to best be measured.

In the ordinary case of evaluating publicly supported social services such as education, drug abuse treatment, or job training programs, we have a fairly clear idea of what we would like the outcome of the program to be. We want a student who can read and write; a drug user who has stopped using drugs, stopped committing crimes, secured employment, and met his familial responsibilities; and a formerly unemployed worker who is now gainfully employed. Moreover, we think these things are valuable both to the clients of the program and to society at large. We think a democratic society in particular benefits from having an educated citizenry, reduced crime, and improved social functioning that results from successful treatment programs. Each individual and society benefit from transforming an able-bodied individual from a drain on the economy to an asset.

In the case of evaluating the provision of public defense services, however, we are less likely to define outcomes in terms of particular material results for the individual and the society than in terms of achieving some ideals of justice. In the interests of justice, we would like to ensure that all those individuals charged with crimes be able to defend themselves effectively against the charges; and, that the capacity to defend oneself is not limited only to those who can afford it. This is consistent with a basic notion of individual rights in a democratic

society. The outcome that society intends is that all persons, regardless of wealth, be provided with an attorney who provides some minimum level of quality defense.

If society provides this service, one can imagine a variety of outcomes other than improving the overall quality of justice in society. For example, the overall machinery of justice would move more smoothly, at lower cost, and with greater quality than if we failed to provide these services. Defendants might feel better treated by the society, and with that, somewhat more willing to accept the judgments offered. It is even possible that effective criminal representation focused on finding just and effective dispositions for defendants might reduce crime over the long run. And, as a consequence, effective dispositions might reduce the overall number of people in prison and relative costs imposed. These are potential benefits for both the society and the individual service recipients. In that respect, these beneficial outcomes are like the results that we anticipate for other kinds of social service programs. The difficulty in looking at public defense services in terms of alternate outcomes is that traditionally the most important outcomes have focused on an accused person's liberty interests, or a reduction of state supervision, or a reduction of state supervision to a less intensive form. A defender's traditional role is to defend the liberty interests of a client against the state's desire to bring the defendant under state control. In principle, we could even measure this outcome: by measuring the total number of years in prison saved by the efforts of public defenders.

The difficulty with this view of measuring outcomes of public defenders is that society as a whole may not think this result is particularly valuable. From a social perspective that values crime control over many other competing values, the idea that we use public funds to produce freedom for accused criminals seems perverse. But from a client's perspective, this does not seem perverse at all. If something less than a zealous defense of the client's liberty interests is offered, then the client will justly feel badly treated, and the public defender may feel that she has compromised her professional responsibilities.

So, in providing public defender services, a gap appears between the practical results or outcomes that the society desires and what the individual client desires. Society may want crime control and low cost. The client wants effective defense of her liberty interests and is not concerned with costs. The way to close this gap is to return to the original idea that what everyone should want in providing public defender services is not any particular outcome such as more or less crime. The society should be interested in ensuring that its criminal



justice system operates justly, and should understand that that means providing adequate defense services to those who cannot pay to defend themselves. That is the outcome they seek: justice at low cost, not crime control. The client should understand that she is entitled to a quality defense, but that her idea of a quality defense may not be exactly the same as society's view. She may want (and feel entitled to) a Johnny Cochran level of defense, while society might want to provide less than this standard.

Client satisfaction with the services might be one relevant standard for judging the quality of public defender services, but it is not the only one. Quality in public defender services could also be judged professionally, as doctors are. That is, instead of asking the clients whether they liked the service and got what they thought they deserved, we could look closely at what the lawyers did in representing their clients and compare that with some notion of what constitutes good lawyering in a particular case. Did they investigate the facts of the case and challenge the evidence being offered? Did they file the right number and kind of motions? Did they reach out for a more creative disposition than the one likely to be offered by the prosecution and embraced by the court?

In sum, the question of what constitutes the valuable outcomes of public defender offices remains a bit uncertain. Are we interested in producing important attributes of justice (regardless of cost or impact on overall levels of crime), or are we interested in achieving more practical, material results such as reductions in crime and costs? Is the value of the service to be judged by society in terms of its particular desires, or is it to be judged by the client or beneficiaries in whose interests, at least in part, the services are provided? Can we see the value produced right at the point of service delivery as the public defender offers a more or less zealous defense of the client's interests, or do we have to wait to see what happens over time to the subsequent criminality of those who are defended? Where, if anywhere, does it become valuable to try to capture the benefits of public defenders in money terms? Should we try to calculate the economic costs of crimes either allowed or avoided, and add them to the costs of imprisonment either imposed or avoided? Or, should we impute a financial value to the services provided by attaching a price that the private market would charge for the services that the public offers to the accused for free through public defender services? Or, should we ask the clients to say how much they would have been willing to pay for the services they received from the public defenders who were assigned to them?

In principle, I am in favor of conceptualizing and measuring the

valuable social outcomes produced by public defenders. I just am not sure we have done the necessary conceptual and political work to produce any kind of agreement about what outcomes we are trying to produce through public defender offices.

A research agenda is necessary to collect accurate and useful data, establish standards, and identify best practices in indigent defense systems. Each locality should establish agreed-upon standards and provide support to defense lawyers to meet those standards when representing the indigent accused. The National Legal Aid and Defenders Association's Blue Ribbon Committee on Indigent Defense stated in 1997 that there is a need for "well researched, reliable, nationally accepted standards for indigent defense systems." The American Bar Association has established some minimum standards, but they need to be revised and updated to meet the modern needs of indigent defense systems. James Neuhard, director of the Michigan Appellate Defender Office, has written, with the advice of other public defense leaders, "The Ten Commandments of Public Defense Delivery Systems."<sup>11</sup> These can provide guidance in elaborating standards that define quality in indigent defense systems.

#### THE TEN COMMANDMENTS OF PUBLIC DEFENSE DELIVERY SYSTEMS

Poverty is not an excuse to provide less than competent representation.

Public defense delivery systems must efficiently and effectively provide high quality, zealous, conflict-free representation to those charged with crimes who cannot afford to hire an attorney. To meet this goal,

*Thou shalt . . .*

1. *Assure that the public defense function, including the selection, funding, and payment of appointed counsel, is independent.* The indigent defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence, and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel or contract systems. Ensuring that the judiciary is independent from undue political pressures is an important means of furthering the independence of indigent defense.

2. *Assure that where the caseload is sufficient, the public defense delivery system consists of both a defender office and the active*

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11. James R. Neuhard, Director of the Michigan Appellate Defender Office, & Scott Wallace, Director of the Defender Legal Services for the National Legal Aid and Defender Association. For complete text, see <http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm>.

*participation of the private bar.* The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is an attorney familiar with the varied requirements of criminal practice in the jurisdiction. Since the responsibility to provide defense services rests with the state to assure uniform quality statewide, systems should be funded and organized at the state level.

3. *Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours.* Counsel should be furnished upon arrest, detention or request, and in no event more than 24 hours thereafter.

4. *Provide counsel sufficient time and a confidential space to meet with the client.* Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

5. *Assure counsel's workload matches counsel's capacity.* Counsel's workload of both appointed and other work should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity and an attorney's nonrepresentational duties) is a more accurate measurement.

6. *Assure counsel's ability, training and experience match the complexity of the case.* Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide zealous, high quality representation.

7. *Assure that the same attorney continuously represents the client until completion of the case.* Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. On appeal, the attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. *Provide counsel with parity of resources with the prosecution and include counsel as an equal partner in the justice system.* There should be parity of workload, salaries and other resources (such as technology,

facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and indigent defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, should provide an overflow or funding mechanism for excess, unusual or complex cases, and should separately fund expert, investigative and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Indigent defense should participate as an equal partner in improving the justice system.

*9. Provide and require counsel to attend continuing legal education.* Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

*10. Supervise and systematically review counsel for quality and efficiency according to nationally and locally adopted standards.* The defender office, its professional and support staff, and assigned counsel or contract defenders should be supervised and periodically evaluated for competence and efficiency.

These "Ten Commandments," along with a literature review and case studies, can be refined to satisfy the needs of each locality. If developed with accurate case studies, the data could aid policymakers substantially. To build on Neuhard's "Commandments," a policy research strategy should examine the many dimensions at work in any indigent defense system. The goal of this strategy is to gain a better understanding of what information needs gathering, what exactly needs reform, what impact those reforms will have on other parts of the system, and how to go about doing so.

## V.

### A POLICY RESEARCH STRATEGY

Any policy research agenda that guides systemic reforms should identify the *prima facie* elements that are generally understood to be components of quality defense representation. It is important to identify those core elements that make a system efficient, fair, not too costly, and able to produce quality representation for a targeted group. Providing support for one element or dimension of an indigent defense system will impact the other dimensions in the system. Consequently, to make informed decisions, legislators and system designers should take into account the interrelationship of these elements. The following

are some of the major elements to be included in a public defense policy research agenda:

- *How Independent Will the System Be?* How do the mechanisms used to appoint and compensate counsel impact the independence of counsel to engage in a vigorous defense? For example, indicators need to be developed to assess to what extent the appointment and funding mechanisms are removed from the hands of parties that can pressure defense counsel into engaging in less than a vigorous defense to satisfy court processes or funding goals.
- *Who Will Be Covered by the System?* What is the target population to be served? How are requests for counsel screened for eligibility for the appointment of counsel? The eligibility criteria can allow a range of populations to be served, from a minimal number of defendants who meet only very strict definitions of indigence to a larger number that includes marginally indigent defendants who can be served with co-payment contributions. What eligibility criteria will be established for appointment of publicly supported counsel? The Constitution establishes the basic concept of right to counsel regardless of ability to pay. But it is much less clear on the question of what constitutes indigency for the purposes of deciding who will be eligible for publicly supported counsel. For example: What will be measured, wealth or income? Will the capacity to pay be calculated for the particular individual or will the resources of an extended family be considered as well? What will be the cut-off point for eligibility? Obviously, eligibility is an important design feature, since it influences the overall size of the potential client population and workload of the system.
- *Workload.* Are mechanisms in place to monitor properly the workload handled by each counsel? Workload is a measure of the relationship between the capacity to do the job on the one hand and demand on the other. It is thought to be related to quality but is not a direct measure of quality representation. Closely tied to the issue of defense counsel qualifications and case complexity is the need to develop workload measures to guarantee the capacity of counsel to properly handle their cases. For example, in some states, such as Tennessee, workload measurements are more accurate because analysts use weighted caseload measures.
- *Qualifications.* Are mechanisms in place to guarantee that the abilities of defense counselors match the complexity of the cases to which they are assigned? Criteria to categorize the qualifications of counselors in relation to categories of cases establish a baseline for evaluating whether qualified defense lawyers are provided to the accused. Qualification standards generally are thought to ensure quality representation, but qualifications are not a direct measure of quality.

- *Support Services.* Are mechanisms in place to access current research materials, investigators, expert witnesses, and sentencing specialists? Developing standards for minimum support services needed for specific types of cases is essential in the calculation of adequate support services. Like workload and qualifications, support services are thought to be an attribute of quality but not a direct measure.
- *Training.* Are mechanisms in place to require specific training or continuing legal education for defense counselors? Training is essential for defense lawyers to maintain their skills, particularly in areas that require special expertise (for example, defending convicted sex offenders who are eligible for post-prison sentence civil commitment under the new civil commitment statutes adopted in some states). Training also may help retain a racially and culturally diverse indigent defense bar.
- *Notification Time.* How long does it take for counsel to be appointed and the defendant to be notified of the appointment? The speed of appointment impacts (a) the ability of counsel to influence early stages of the criminal prosecution process, and (b) the ability of the defendant to be released on bail and gather witnesses and other resources to prepare the defense. Notification time is a feature of quality representation that may be valued by both the society and the client. It is thought by both to be a direct, but incomplete measure of the quality of actual representation in an individual case. However, a cost associated with providing short notification time is that a number of lawyers must be on duty to respond around the clock. A consequence of this readiness for peak loads and quick response is that this same capacity is available even when the demand for legal services is low.
- *Access to Counsel.* How are defendants granted access to counsel and how is confidentiality protected? Access to counsel is closely related to notification time and may affect costs significantly. Organizational structures can facilitate or handicap access to counsel and confidentiality, which in turn can impact the effectiveness of attorney-client interactions.
- *Overall Quality Representation.* What is the actual quality of performance in representing individual clients—as judged by the clients and as judged against professional standards?

These nine elements of the public defender service system are arranged in a sequence that lists first the structural characteristics of the system: those that make it more or less independent, that determine how its workload will be matched to its capacity, and that determine how the enterprise will organize and prepare itself to do its work. These first six elements would be measured by looking at aggregate characteristics of the office as a whole. Measurement would focus on the output of the organization rather than on the governance, or input, of the organization. The last three elements mentioned—notification time, access to counsel, and overall quality of representation—seek to measure the

quality of service being provided. Measurement would focus on the conduct of the office with respect to individual cases.

It might appear that these elements are arranged in a sequence that goes from “policy” (in the sense that they will be the focus of legislative interest and action) to “operations” (in the sense that they might be left to the discretion of those who manage the system). But this is not necessarily the case. The legislature may well step in and say that some aspects of service quality are so fundamental to its idea of the kind of justice it intends to produce through support for public defender offices that it will legislate particular operational features of the system to be met by the managers. Courts, too, can mandate performance standards that identify particular attributes of quality that must be met. The need for defendants to see their counsel early is one of these apparently operational matters that both legislatures and courts might seek to specify. The challenge for those who manage these systems, then, is to figure out how much it would cost to meet higher or lower standards of quality as mandated by legislatures or courts.

Reform advocates, therefore, need to show policymakers how a particular indigent defense system can be improved by focusing, at least initially, on the above critical issues. The development of national standards in the areas highlighted above could provide a comparison benchmark. In a case study, for example, it would be powerful to show that a system’s target population omits a large group of marginally poor people who cannot afford a quality defense; that notification time is longer than in most other systems; that even if access to counsel is adequate, the independence of counsel is negatively impacted by discretionary appointments by judges following no established guidelines; that qualification standards for counsel are not in place; that workloads are not monitored and may be excessively high; that support services are lacking; and that continuing skills training is not required. This can be demonstrated in relation to national standards and practices in other similarly situated localities outside and inside the state under examination.

## VI.

### DEFINING AND MEASURING OUTCOMES

What is the market value of a quality representation? Though not easy to do, this key question must be answered in order to address funding decisions. In a pure free market system, if the price paid by the state or county for defending an indigent criminal case were not competitive, in theory no lawyers could be hired. A system that pressures bar members to participate in the indigent defense market reduces competitive forces. A system that treats all lawyers as if they were of equal competence also reduces the competitive forces by allowing “rookies” to “bid” for jobs that would be more difficult to get in a free market. Under these circumstances then, the state or funding agency has the upper hand and the private sector ends up subsidizing the provision of indigent defense

services (just as privately insured individuals subsidize the health care of uninsured indigent patients).

This harsh market reality will be hard to change unless evidence clearly indicates that the level of funding provided by a particular locality for indigent defense adversely impacts standards and outcomes. Without a better definition of acceptable standards and outcome measures in relation to funding, it will be difficult to address the issue of what is adequate funding for indigent defense. Clearly, systems that have been neglected to the extent that they are unable to meet basic standards in the areas delineated above can be taken to task for providing too little funding. The difficulty arises when the systems seem to meet the basic requirements. Then the question becomes, what would additional funding buy in terms of outcomes for defendants? Greater client satisfaction? Greater protection for being heard and to litigate more often? Are indigent defendants more likely to be indicted, be incarcerated, receive longer sentences, or be denied some other benefit because their lawyers are paid a lower fee than private lawyers receive for defending comparable cases?

Few studies, according to a review of the literature conducted by Feeny and Jackson in 1999, "have closely examined the relationship between level of resources and quality representation."<sup>12</sup> Some opinion surveys of judges, prosecutors, defense lawyers, and defendants have shown that these players perceive private attorneys to be more effective, but when defendant cases have been examined statistically, no evidence is found to support their subjective opinions.<sup>13</sup> Sentencing studies that considered type of counsel have produced mixed results; "the more controlled the sentencing study is, the more likely that the type of counsel will have no effect on case outcome."<sup>14</sup> There is no empirical evidence, let alone a well-developed theoretical argument, engaging the issue of what outcomes are expected at higher levels of funding that are not achieved at lower levels. The comprehensive question, then, for policymakers and legislators to ask from indigent defense systems with fewer financial resources is: Will better-funded indigent defense systems help the judicial system process cases faster, provide for better utilization of pretrial and sentencing alternatives, provide for better coordination of other services, increase public confidence in the justice system, and decrease the errors that deny liberty rights to defendants without increasing public safety risks?

Obtaining better research data is a critical first step to answering this overarching question. Operational research also can be used to improve service delivery. For example, research can be used for "spot" quality control checks—such as uncovering problems with billing practices of assigned counsel or

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12. Floyd Feeny & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?* 22 RUTGERS L.J. 361, 411 (1991).

13. *Id.* at 376–78.

14. *Id.* at 388.



identifying areas to improve billing processes and accountability—and for monitoring caseloads and workloads to maintain quality.

## VII. CONCLUSION

Defense lawyers are a necessity, not a luxury, in any criminal justice system.<sup>15</sup> It is important to think about the best way to provide indigent defense services before deciding how to fund these lawyers. A national research agenda is needed to generate critical information to guide state or local policy-makers who may be struggling to improve indigent defense systems. Such information will assist policy-makers in: (a) developing standards for indigent defense services; (b) understanding how the achievement of these standards is impacted by funding; and (c) designing performance measures to justify the returns on higher investments in indigent defense systems.<sup>16</sup>

Strong advocacy is endemic within the defense lawyer culture. Advocates are driven by the conviction that they have “their hearts in the right place.” However, in an era when “hard facts” are critical to influence policy-making, emotional zeal is not enough. Today, this vein of zealous trial advocacy is counteracted by a lack of skill in generating relevant policy analysis to guide and influence the enactment of policies that affect the defense function.

When the subject is the controversial issue of public outlays for the legal defense of alleged criminals, the lack of hard facts makes it especially difficult to enact effective policies. Anecdotes about particular abuses of indigent defendants are countered by anecdotes of injustices to victims. Without accurate empirical information on what to reform, how best to reform it, and what outcomes to expect, it will be difficult to achieve the consensus necessary to make progress in improving indigent defense services.

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15. *Gideon*, 372 U.S. at 344. See also *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

16. More information on public defense is available from the following organizations: U.S. Department of Justice, [www.usdoj.gov](http://www.usdoj.gov); Gideon Project, Open Society Institute, [www.soros.org](http://www.soros.org); National Legal Aid Defender Association (NLADA), [www.nlada.org](http://www.nlada.org); Spangenberg Group, [www.spangenberggroup.org](http://www.spangenberggroup.org); Vera Institute of Justice, National Defender Leadership Project, [www.vera.org](http://www.vera.org); American Bar Association, Division for Legal Services, [www.americanbar.org/legalservices](http://www.americanbar.org/legalservices); Brennan Center for Justice at New York University School of Law, [www.brennancenter.org](http://www.brennancenter.org); National Association of Criminal Defense Lawyers, Indigent Defense Council, [www.criminaljustice.org](http://www.criminaljustice.org); National Equal Justice Library, Washington College of Law, American University, <http://nejl.wcl.american.edu>. Several Bureau of Justice Statistics reports also address public defense findings, including: Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT. SELECTED FINDINGS (1996); Carol J. DeFrances & Marika F.X. Litras, *Indigent Defense Services in Large Counties, 1999*, NAT'L SURV. OF INDIGENT DEF. SYSTEMS, 1999 (2000).

