

# NATIONAL CRISIS, NATIONAL NEGLECT: REALIZING JUSTICE THROUGH TRANSFORMATIVE CHANGE

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The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

-- Sir Winston Churchill<sup>1</sup>

## I. Introduction

In May 2005, Marie graduated from Cornell Law School eager to begin a career representing America's most vulnerable citizens: poor people accused of crimes. While many law school graduates have the same desire, Marie was one of a small minority of recent law graduates who wanted to serve as public defenders in a region with the greatest need. Rather than joining a well-resourced office with a national reputation, Marie chose to work in Georgia's new statewide public defender system. She joined a program that promised to train and support her as she worked to provide effective representation for her clients.<sup>2</sup> The program promised Marie a community of peers and seasoned mentors to work with her in getting the nascent reform effort underway. Before Marie could complete the program, however, the state legislature cut funding for indigent defense. The program was scrapped and much of the support Marie enjoyed was gone.

Marie continued her work as a public defender in Georgia, trusting that her commitment would allow her to make a difference for her clients. But without the support she received from the Honors Program she had originally joined, she found it difficult to withstand the onslaught of

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<sup>1</sup> Winston Churchill's words to the UK House of Commons in 1910.

<sup>2</sup> The Georgia Public Defender Honors Program was an initiative to help drive indigent defense reform in Georgia by recruiting dedicated new public defenders to some of the offices throughout the State with the greatest challenges and providing training and mentorship as they became the change agents who would help to introduce a higher standard of practice in their respective systems. The philosophy behind the model was that through recruitment, training, and mentorship, we could shape a new generation of reform-minded public defenders, and that by building a community of these committed lawyers, they could find the support and encouragement needed to sustain their efforts. *See* Georgia Public Defender Standards Council, Training: Public Defenders Honors Program, <http://training.gpdsc.com/honorsprogram/index.php> (last visited July 28, 2010).

injustice to which she was exposed daily. Despite the good work she did for many, she became discouraged over the countless clients who fell through the cracks on her watch. In her final thirteen months as a Georgia public defender, Marie resolved 900 cases, allowing her three hours per year to devote to each client if she worked fifty-hour weeks without taking any vacation time or sick leave.<sup>3</sup> Given that these three hours included court time and client meetings, Marie had no time to be competent. She struggled on as she and her colleagues shared an environment in which lawyers routinely facilitated pleas without looking into the strengths and weaknesses of the case; where investigative and expert resources were the exception, not the rule; and where lawyers were instructed to disregard ethical rules governing conflicts of interest that could prove detrimental to their clients.<sup>4</sup> Marie found herself at a crossroads. Without support, she could not effectively do her job. Remaining a public defender in Georgia, she risked becoming a desensitized lawyer resigned to processing poor people through an inhumane system.<sup>5</sup>

Unwilling to take that risk, Marie left Georgia to join the Public Defender Service for the District of Columbia (PDS), an organization nationally renowned for its quality of representation.<sup>6</sup> Having made this change, Marie no longer feels that she is unable to provide her clients the representation to which they are constitutionally entitled. Unlike her experience in Georgia, her new home is driven by client-centered values. Lawyers are expected to be fiercely zealous advocates, and there is a powerful stigma attached to any behavior that shows a lack of respect or loyalty to each client. She is thrilled to be in a community that honors and expects the values she

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<sup>3</sup> Marie-Pierre Py, *Public Defender System Fails Georgians and Their Lawyers*, ATLANTA J.-CONST., Mar. 30, 2009, § @Issue, at 6A, available at <http://www.ajc.com/printedition/content/printedition/2009/03/30/pyed0330.html>. I knew Marie, and she told her story in the Atlanta Journal-Constitution.

<sup>4</sup> *Id.*

<sup>5</sup> Having worked with public defenders in hopeless systems for more than five years, it is important to emphasize that many of them are talented, committed lawyers who work hard for their clients. That some of them have adapted to a practice that necessitates taking shortcuts and falling short of what the Sixth Amendment requires, is an indictment of the system that shapes this practice, not the lawyers who inevitably learn to work within it. The premise of this article is that even good lawyers are shaped by bad systems, and most will ultimately either leave those systems or adapt to its expectations. For many of those who stay, once their assumptions adjust to the values of the system, their behavior will reinforce those expectations. Nevertheless, those who remain and do the best they can in the face of overwhelming challenges are the heroes of the indigent defense story, even if they cannot live up to our noblest ideals.

<sup>6</sup> See, e.g., Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1273 (2006) (book review) (characterizing PDS as “nationally prominent”); Eugene N. Hamilton, *To Professor Charles Ogletree, Jr.*, 22 HARV. BLACKLETTER L.J. 111, 115 (2006) (describing the mission of PDS as “providing the most competent, professional, learned, and aggressive representation possible to indigent persons charged with the commission of criminal offenses in the District of Columbia”); Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1494 (2005) (labeling PDS “a model agency”); Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon’s Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 218 (2004) (describing PDS as “renowned for its uncommonly skilled attorneys”); Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 453 (2001) (describing PDS as “one of the preeminent criminal defense advocacy offices in the country”); Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 212 (1993) (stating that PDS is “generally recognized as one of the best public defender offices in the United States”).

learned in the Honors Program, but she is saddened that she had to abandon her dream to be part of a movement to reform an indigent defense system in desperate need.

What Marie went through in Georgia is unfortunately more familiar to most public defenders nationally than is her more recent experience at PDS. The crisis she describes is not unique to Georgia, but is national in scope. It stems from a culture that fails to take seriously its commitment to justice for the poorest members of society. This culture is perpetuated by legislators who are unwilling to fund justice,<sup>7</sup> and judges who are more concerned with quickly processing cases than with the lives of the people impacted.<sup>8</sup> This lethal combination creates intense pressure on public defenders to adapt to a culture that requires rapid handling of high volume caseloads and adherence to the desires of judges and prosecutors above clients. If we are to realize meaningful indigent defense reform, we must begin recruiting and building a new generation of public defenders equipped with the tools necessary to resist these pressures so that they may adequately represent their clients in the short run and develop into future leaders prepared to usher in cultural change down the road.

In the second part of this paper, I argue that this crisis of culture is at the core of the indigent defense problem, and I summarize a theoretical model for implementing the cultural change necessary for reform. In the third part, I examine how this “culture of injustice” evolved, exploring forces that pressure state actors to behave so inconsistently with their Sixth Amendment obligations and the role of the courts in sanctioning the status quo. In the fourth part, I introduce the Southern Public Defender Training Center (SPDTC) as a model for driving cultural change, and I discuss a bold new initiative called the Equal Justice Corps (EJC), an effort to build on the work of the SPDTC and affect cultural change in indigent defense nationwide. In the fourth section, I argue that it is imperative that the federal government both view this indigent defense

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<sup>7</sup> Just as Marie was deciding to leave her public defender position in Georgia, State Senator Preston Smith was supporting cuts to the indigent defense budget. Senator Smith—Chairman of both the Senate Judiciary Committee and the Legislative Oversight Committee for the Georgia Public Defender Standards Council, the organization tasked with administering the public defender system—wrote a letter to the Atlanta Journal-Constitution accusing indigent defense advocates who railed against the status quo of demanding “a Lexus-level defense at taxpayer expense.” He also accused indigent defense supporters of being “zealots” and “ideologues,” while implying that poor people in Georgia were receiving “[constitutionally] adequate” representation. He suggested that advocates who demanded a greater commitment to public defense were unreasonable. Preston W. Smith, *Should Indigent Defense Oversight be Changed? PRO: Zealots Want Only More of Your Money*, ATLANTA J.-CONST., Feb. 19, 2009, § @Issue, at 14A.

<sup>8</sup> In a recent letter to a local legal newspaper, a senior judge in Georgia, who is also a former president of the District Attorneys Association of Georgia and the Council of the Superior Court Judges of Georgia, offered his opinion about how the state should address the indigent defense funding crisis. Clearly unconcerned about the quality of representation provided poor Georgians, he suggested that the state require all civil lawyers, regardless of their lack of experience handling criminal cases, to handle a certain number of criminal cases free of charge. Dan Winn, *Sharing the Load*, DAILY REP. (Atlanta, Ga.), Feb. 16, 2010. Another Georgia judge previously offered his opinion about the indigent defense crisis in a letter to the same paper. Judge Andrew Mickle suggested we go back to offering the “many eager and [some starving]” local lawyers \$50 per case, regardless of the time they invest. Mickle never addressed the perverse incentive this creates for lawyers to ignore client interests, but he did tout the value of the good relationships local lawyers have with judges and prosecutors. Andrew A. Mickle, *Is the Process Choking the PD System?*, DAILY REP. (Atlanta, Ga.), Apr. 11, 2008, available at [http://www.law.yale.edu/library/WebFiles/PDFs/Judge\\_Mickle\\_and\\_Bright\\_re\\_Indigent\\_Defense\\_in\\_Georgia.pdf](http://www.law.yale.edu/library/WebFiles/PDFs/Judge_Mickle_and_Bright_re_Indigent_Defense_in_Georgia.pdf).

crisis as a national problem and advance justice for poor people accused of crimes as a national value. I also argue the federal government should invest in solving the problem by infusing resources into failing systems and promoting cultural transformation.

## II. A Culture of Neglect: The Driving Force Behind The Indigent Defense Crisis

“Ordinary injustice results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them.”

-- AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT*<sup>9</sup>

This statement summarizes the thesis of Amy Bach’s powerful examination of our legal system’s failings. One of the characters to which Bach introduces us is Robert Surrency, a lawyer who held the contract to represent indigent defendants in Greene County, Georgia for fourteen years.<sup>10</sup> Although his position was considered part-time, allowing him to maintain a private practice, Surrency’s annual appointed caseload was twice the recommended national standard.<sup>11</sup> He began his public defender career as a young lawyer and quickly adapted to the expected standards of practice. The judges demanded that he process his cases quickly, and he obliged.<sup>12</sup> In one four-year period he handled 1,493 cases, with 1,479 (more than ninety-nine percent) resulting in pleas.<sup>13</sup> Some days he would plead dozens of clients in a single court session, and he had little time to get the details necessary to negotiate on their behalf.<sup>14</sup> He did not request investigative or expert services, claiming “not to need these resources, anyway, because most of his cases were ‘pretty open and shut.’”<sup>15</sup> In addition, “[h]e didn’t want to get people riled up about spending the county’s money.”<sup>16</sup> When clients complained about the insufficient time Surrency spent talking to them, he chalked it up to “their need for attention,” adding, “[y]ou have to draw the line somewhere.”<sup>17</sup> Surrency considered his high-volume, plea-bargain practice “a uniquely productive way to do business” and believed that he “achieved good results” for his clients.<sup>18</sup> Bach concludes that “[u]nder the weight of too many clients to represent, he seemed to have lost the ability both to decide which cases required attention and to care one way or the other.”<sup>19</sup>

At first blush the Surrency saga may appear to be a story solely about crushing caseloads and inadequate resources. The solution to the problem described may seem obvious: invest more money in indigent defense. If Mr. Surrency had fewer cases and more investigative and expert resources, he could do a better job for his clients. Certainly this is true. Unquestionably we must make a greater financial commitment to upholding the Sixth Amendment right to counsel than we

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<sup>9</sup> AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 2 (2009).

<sup>10</sup> *Id.* at 12-13.

<sup>11</sup> *Id.* at 12 n.1.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.* at 14.

<sup>14</sup> BACH, *supra* note 9, at 14-15.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> BACH, *supra* note 9, at 15.

have in the past. But there is a subtler, more pernicious, force at play here. Generations of neglect have become institutionalized in the indigent defense environment. This has shaped the attitudes of the professionals who operate within it. Mr. Surrency has become incapable of appreciating the value of investigation and expert analysis. He has learned to discount the needs and concerns of the clients he represents. He has been programmed to see his role as one of helping the judge efficiently process a large volume of cases. In short, he is guided by a set of cultural values inconsistent with the delivery of high quality representation to poor people accused of crimes. These values define the culture of the system in which he works and the assumptions he brings to his vocation. Successful leaders in the business world would understand that Surrency is a product of a dysfunctional cultural system.<sup>20</sup> Leaders in the indigent defense arena are just beginning to recognize the importance of culture in the practice of indigent defense.<sup>21</sup>

Organizational development theorists define culture as “[that] set of basic tacit assumptions about how the world is and ought to be that a group of people share and that determines their perceptions, thoughts, feelings, and to some degree, their overt behavior.”<sup>22</sup> These assumptions, which might also be thought of as attitudes or mind-sets, inform a world-view that is so taken for granted that when asked why one holds it, she might respond, “that’s just how things are done around here.”<sup>23</sup> Such are the internalized assumptions driving much of indigent defense as practiced nationally. But because assumptions drive behavior, they help us understand how the professionals Bach observed contributed to the injustices that defined that system. However, because their conduct reflected their assumptions about how the world should work, they were unable to appreciate that they were doing anything wrong.

Robert Surrency took his cue from the system in which he worked. It functioned according to certain values that everyone in it was expected to embrace. After working in this environment, over time, the system’s values became Surrency’s as well. As he embraced these values, functioned in accordance with them, and ultimately internalized them, they defined his assumptions. At that point he was a product of the existing culture.<sup>24</sup> Therefore, what Bach describes is an example of how cultural forces in the criminal justice arena shape the attitudes of the lawyers operating within it and, ultimately, determine the quality of representation they provide their clients. Robert Surrency did not become a lawyer to process people through a soulless system, but he adapted to a culture that valued the efficient, albeit uncaring, handling of cases over all else. Far from anomalous, the Surrency story is illustrative of the quality of representation visited upon poor people every day.

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<sup>20</sup> See Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008) [hereinafter Rapping, *Directing the Winds of Change*] (providing an in-depth discussion of, and the theory behind, the relationship between organizational culture and the quality of the delivery of indigent defense services).

<sup>21</sup> *Id.*

<sup>22</sup> Edgar H. Schein, *Three Cultures of Management: The Key to Organizational Learning*, 38 MIT SLOAN MGMT. REV., Fall, at 9, 11 (1996).

<sup>23</sup> See, e.g., Rapping, *Directing the Winds of Change*, *supra* note 20, at 202.

<sup>24</sup> Organizational culture theorists help us understand the relationship between values and culture. As an individual is introduced to a new set of values, she begins to operate in accordance with them. If these values help the individual achieve success in the environment within which she operates, she will begin to embrace them. As these values become internalized, they become her assumptions. When a group of people operates under a shared set of assumptions, culture is created. See *id.* at 204-05.

A report by the NAACP pointed to similar cultural problems in Mississippi, exemplified by the cases of Carlos Ivy and Shirley Johnson.<sup>25</sup> Ivy was fourteen years old when he was arrested in Union County, Mississippi and detained in an adult jail, for allegedly taking \$100 from an elderly woman.<sup>26</sup> Despite his protestations of innocence, his lawyer never investigated his claims or consulted with his client. Presumably concluding that Ivy was guilty, and that he would lose at trial, Ivy's court-appointed lawyer advised him to plead guilty and told him that he was "looking at life" if he lost at trial.<sup>27</sup> Feeling he had no other option, Ivy pled guilty.<sup>28</sup>

Ms. Johnson was arrested for attempting to take about \$200 worth of quarters from a slot machine into which she had not put any tokens.<sup>29</sup> Unable to afford her \$100 bond, she sat in jail for eight months without an attorney visit.<sup>30</sup> Without the assistance of counsel to argue for her release on personal recognizance or to investigate her case, Ms. Johnson ultimately pled guilty, receiving a sentence of time served.<sup>31</sup>

The cultural forces that undermine the right to counsel are also apparent through the story of two women in Hearne, Texas.<sup>32</sup> Erma Faye Stewart and Regina Kelly were among twenty-five people arrested in a drug sweep based on the word of an informant who was later proven unreliable.<sup>33</sup> Stewart and Kelly received bonds they could not afford—a particularly trying situation for single mothers with small children.<sup>34</sup> Both women maintained their innocence, but their appointed lawyers failed to investigate their cases or spend sufficient time with them.<sup>35</sup> Instead, the lawyers urged the women to plead guilty and get out of jail.<sup>36</sup> Kelly was able to resist the pressure to plead to something she did not do, in part due to her parents' ability to post her bond.<sup>37</sup> Stewart was not so fortunate.<sup>38</sup> After a month in jail, she gave in to the pressure to accept a guilty plea and gain her freedom.<sup>39</sup> As a result, however, she lost her eligibility for food stamps and federal grant money for education and has since become homeless.<sup>40</sup> When it later became clear that the "informant had lied to the prosecution" and "the evidence was worthless," the cases

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<sup>25</sup> NAACP LEGAL DEF. & EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 9, 13 (2003).

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Ivy's lawyer actually gave him erroneous legal advice. He told Ivy that if he pled guilty he would be eligible for parole in six years. After being sentenced to twenty-five years, Ivy learned he was not eligible for parole for ten years. Ivy never heard from his lawyer again.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 25, at 9.

<sup>31</sup> *Id.*

<sup>32</sup> This story is one of four told in the PBS documentary *The Plea* (PBS television broadcast June 17, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *The Plea*, *supra* note 32.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

of those who did not plead guilty were dismissed.<sup>41</sup> Without a lawyer to fight for a bond reduction, investigate the merits of the case, or advise her of the consequences of her guilty plea, Erma Faye Stewart never had a shot at realizing justice. Stewart's lawyer gave her case so little attention that, during a subsequent interview with PBS, he did not recognize her name.<sup>42</sup>

At the same time Erma Faye Stewart was pleading guilty to a crime she did not commit, about 100 miles away in Corsicana, Texas, Cameron Todd Willingham was awaiting execution for a crime of which he was probably innocent. Willingham was convicted of capital murder for setting fire to his house and killing his three young children.<sup>43</sup> He was convicted, and ultimately executed, based on expert testimony which was later shown to be unreliable.<sup>44</sup> Willingham maintained his innocence up until his final statement before execution.<sup>45</sup> Although multiple experts who subsequently reviewed Willingham's case concluded that the original arson investigation was flawed and the fire was caused by an accident, one voice adamantly supported the jury's verdict: Willingham's court-appointed lawyer, David Martin. When David Grann, an investigative journalist with *The New Yorker*, later asked Martin about the evidence that proved his client's innocence, the lawyer responded that "[t]here were no grounds for reversal, and the verdict was absolutely the right one."<sup>46</sup> He said of the case: "Shit, it's incredible that anyone's even thinking about it."<sup>47</sup> Speaking of people accused of crimes in general, Martin explained to Grann that, "[m]ost of the time they're guilty as sin."<sup>48</sup> During a recent interview on CNN's AC 360, Martin defensively argued Willingham's guilt in the face of mounting evidence of innocence.<sup>49</sup> In an effort to counter every argument supporting his client's innocence, Martin revealed confidential details of his representation,<sup>50</sup> prompting Anderson Cooper to remark, "you sound like [a] sheriff and not the criminal defense attorney."<sup>51</sup>

David Martin is not alone in his contempt for the people he represents. Eddie Joe Lloyd was appointed a lawyer with a similar mindset. Lloyd was convicted of rape and murder when Bob Slameka was appointed to represent him on appeal.<sup>52</sup> During the two years he represented Lloyd, Slameka did not meet with or accept a single phone call from his client. Slameka claimed his inattentiveness was because he was not paid enough. After his appeal failed, Lloyd filed a complaint with the state claiming that Slameka did not devote enough time to his case. Slameka's

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<sup>41</sup> *Id.*

<sup>42</sup> *The Plea*, *supra* note 32.

<sup>43</sup> David Grann, *Trial By Fire: Did Texas Execute An Innocent Man?*, THE NEW YORKER, Sept. 7, 2009, at 5.

<sup>44</sup> *Id.* at 7-8, 12-16.

<sup>45</sup> *Id.* at 8, 10, 16.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.*

<sup>48</sup> Grann, *supra* note 43, at 4.

<sup>49</sup> See Anderson Cooper 360 (CNN television broadcast Oct. 15, 2009) [hereinafter AC 360]. A clip can be viewed on You Tube at <http://www.youtube.com/watch?v=PMSCIGGLj0s>.

<sup>50</sup> TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05 cmt. 2 (1998) (prohibiting the disclosure of confidential information of a client or former client and defining as confidential any "information acquired by the lawyer during the course of or by reason of the representation of the client").

<sup>51</sup> AC 360, *supra* note 49.

<sup>52</sup> See Ailsa Chang, *Not Enough Money or Time to Defend Detroit's Poor* (NPR radio broadcast Aug. 17, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=111811319>.

response revealed what was perhaps the true reason for his lack of attention. Of his former client, Slameka said, “this is a sick individual who raped, kidnapped and strangled a young woman on her way to school. His claim of my wrongdoing is frivolous, just as is his existence. Both should be terminated.”<sup>53</sup> Lloyd was subsequently exonerated by DNA after spending seventeen years in prison.

These cases demonstrate the institutionalized indifference of so many public defenders. But there are so many more. Take the case of Long Beach, California attorney Ron Slick, who had the dubious distinction of having “had more clients sentenced to death than any other lawyer in California.”<sup>54</sup> Slick was loyal to the judges who wanted to move along their dockets, rather than the clients whose lives he held in his hands. He developed a reputation for trying cases quickly, at the expense of adequate preparation. He would spend just a few days trying complex capital cases that should have taken weeks or months.<sup>55</sup> Or consider Houston, Texas defender Joe Frank Cannon, who “[got] appointments because he deliver[ed] on his promises to move the court’s dockets.”<sup>56</sup> Cannon has boasted that he “hurries through criminal trials like ‘greased lightning,’” ten of his clients in Houston, Texas have received the death penalty.<sup>57</sup>

Institutionalized indifference is also evident in the case of Georgia defender Mark Straughan, who claims he “doesn’t investigate [his clients’] versions of events to see if they are telling the truth. . . . [H]e just assumes that they committed the crimes with which they are charged and tells them to plead guilty.”<sup>58</sup> As he testified before the Chief Justice’s Commission on Indigent Defense in 2002, if his clients insist they are innocent, Straughan assumes they are lying.<sup>59</sup>

When poor people are provided lawyers who do not care about them, who are unwilling to advocate for them, or who prioritize the interests of others above their clients’, they cannot receive the “guiding hand of counsel”<sup>60</sup> our Constitution guarantees. In this sense, having the right mindset and embracing fundamental values about the role of the defender and his or her obligation to the client are essential components to providing effective assistance of counsel. In each of the examples above, the lawyers had priorities inconsistent with any notion of what it means to be a zealous advocate.

The lawyers involved in the cases described above each practiced under many, if not all, of the following assumptions: their clients are guilty; their clients cannot be trusted; independent investigation and meaningful attorney-client communication are a waste of time; their role is to

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<sup>53</sup> *Id.*

<sup>54</sup> DAVID COLE, *GIDEON V. WAINWRIGHT AND STRICKLAND V. WASHINGTON: BROKEN PROMISES, CRIMINAL PROCEDURE STORIES* 122 (Carol Steiker ed., Found. Press 2006).

<sup>55</sup> *Id.* (citing Ted Rohrlich, *The Case of the Speedy Attorney*, L.A. TIMES, Sept. 26, 1991, at A1).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing Paul M. Barrett, *Lawyer’s Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1).

<sup>58</sup> Editorial, *Presumed Innocent Doesn’t Apply to All: When Justice is a Crime*, ATLANTA J.-CONST., Aug. 5, 2001.

<sup>59</sup> S. CTR. FOR HUM. RTS., “IF YOU CANNOT AFFORD A LAWYER...” A REPORT ON GEORGIA’S FAILED INDIGENT DEFENSE SYSTEM 36 (2003) (citing *Before the Chief Justice’s Commission on Indigent Defense*, Feb. 12, 2002 (testimony of Mark Straughan, Contract Defender, Oconee Judicial Circuit), at 74).

<sup>60</sup> The recognition of this role of counsel is articulated in *Powell v. Alabama*, 287 U.S. 45, 69 (1932) and guaranteed to all persons accused of crimes in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and its progeny.



help judges process cases quickly; this goal is most often served by convincing their clients to accept guilty pleas; and cases, when they must be tried, should be tried quickly. Unfortunately, one or more of these assumptions is too often embraced by lawyers who represent the poor.

As I argue below, these lawyers almost certainly did not become lawyers to process poor people callously through an unjust system. As the story of Robert Surrency suggests, the approach these lawyers took was a product of the system in which they worked. The culture that shaped them existed before they began practicing law. By adapting to this culture, they reinforced it. In order to appreciate how a culture so hostile to our fundamental notions of justice came to thrive in much of America's criminal justice system, and how it takes control of those who practice within that system, we need to understand how it came to exist. This is the focus of section three.

### III. When the Protector Becomes the Abuser: The Role of the Courts In Eviscerating the Right to Counsel

In 1963, advocates for the right to counsel had reason to celebrate. *Gideon v. Wainwright* guaranteed, for the first time in American history, that every citizen, no matter how poor, accused of a crime would have the assistance of counsel.<sup>61</sup> *Gideon* recognized the central role of defense counsel in ensuring that our court system is an instrument of true justice by declaring it fundamental that every American is ensured the right to counsel in criminal proceedings. Yet, nearly fifty years later, as the anecdotes above demonstrate, we have yet to make good on that promise. To any objective observer the nation's indigent defense system is in severe crisis.<sup>62</sup> While *Gideon* made clear that the Sixth Amendment right to counsel applied to the states, it provided no guidance on how the states would fund this mandate. With no meaningful enforcement mechanism, states have almost uniformly fallen short of their obligation to provide competent counsel to the poorest citizens. Indeed, the courts—the institution obligated to enforce *Gideon*—have been complicit in supporting the status quo. And this complicity has played a significant role in ensuring that substandard representation for people without means is now accepted as the norm. As many critics have observed, this predicament is the result of a mandate that has never been sufficiently funded. But years of neglect have created problems that cannot be solved by an infusion of resources alone. Decades of reluctance to uphold the demands of *Gideon* have created an environment in which many indigent defense attorneys have become complicit in maintaining its existence and are oblivious to their own shortcomings. This history has created a culture in which injustice is accepted by lawmakers, judges, prosecutors, and, most tragically, many of the defenders directly tasked with protecting the rights of poor defendants.

The *Gideon* Court recognized that our most fundamental values are placed in jeopardy when poor people accused of crimes are left alone to navigate the morass that our criminal justice system has become. The Court understood that counsel is needed to stand with a citizen against

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<sup>61</sup> In *Gideon*, 372 U.S. at 344-45, which cites *Powell*, 287 U.S. at 69, the Supreme Court reaffirmed that “even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him.” The Court subsequently made clear that the Sixth Amendment right to counsel applies to juveniles charged as delinquents, *In re Gault*, 387 U.S. 1 (1967), and to adults charged as misdemeanants, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>62</sup> Bob Kemper, *Gideon: Right to Counsel?: Landmark Decision Falls Short of Promise*, WASH. LAW., (Sept. 2009), available at [http://www.dcbar.org/for\\_lawyers/resources/publications/Washington\\_lawyer/september\\_2009/gideon.cfm](http://www.dcbar.org/for_lawyers/resources/publications/Washington_lawyer/september_2009/gideon.cfm).

the incredible “machinery” set up by the government “to try defendants accused of crime.”<sup>63</sup> In its decision, the Court stated:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.<sup>64</sup>

Implicit in this pronouncement is the ideal that, before the state can deprive a person of life or liberty, it must provide her a lawyer who possesses the skill, competence, and resources to ensure a fair adversarial contest. But without guidance, states were left to determine how to achieve this. Some jurisdictions turned to public defender offices,<sup>65</sup> others used an assigned counsel system,<sup>66</sup> and yet others chose to use contracts.<sup>67</sup> Likewise, funding schemes varied, with some state governments taking on the bulk of this new financial burden, while others required counties to shoulder a significant portion of the expense. The result was “a patchwork of systems across the country in which the availability and quality of counsel varie[d] significantly from state to state and, in some cases, between counties in a single state.”<sup>68</sup>

Two realities were consistent across jurisdictions: pressure to engage in behavior that undermined the right to counsel, and the courts’ stamp of approval for the resulting low standards of practice in our nation’s criminal justice system. These almost schizophrenic attitudes about the right to counsel existed long before *Gideon*. In an essay discussing *Powell v. Alabama*,<sup>69</sup> the precursor to *Gideon*, Professor Michael Klarman alludes to the competing interests we embrace as a society both to hold out the appearance of fairness in our criminal justice system and to inflict punishment efficiently upon those we brand as “criminals.”<sup>70</sup> As an example of this duality of legal interests, Klarman describes the prevalence of lynching in the South near the conclusion of the Nineteenth Century and its subsequent decline by the time *Powell* was decided. While this decline was to some extent attributable to political forces, it was also partly due to “their

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<sup>63</sup> *Gideon*, 372 U.S. at 344.

<sup>64</sup> *Id.* at 344-45.

<sup>65</sup> “In the public defender model, attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction. Public defenders are full- or part-time salaried employees who frequently work together in an office with a director or administrator and support staff.” NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53 (2009) [hereinafter JUSTICE DENIED], available at <http://tcpjusticedenied.org/>. JUSTICE DENIED provides a comprehensive study of indigent defense delivery systems, a history of their development, an analysis of the problems that exist, and a host of suggested remedies. It is one of the most thorough and thoughtful studies on the subject to date.

<sup>66</sup> “[I]n the assigned counsel model, private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case.” *Id.*

<sup>67</sup> “In the contract model, private attorneys are chosen by a jurisdiction—often after a bidding contest—and provide representation as provided by contractual terms.” *Id.* Contracts often require a lawyer to handle a set number of cases for a flat fee.

<sup>68</sup> Kemper, *supra* note 62.

<sup>69</sup> 287 U.S. at 45. The defendants in this case are infamously known as the Scottsboro Boys.

<sup>70</sup> MICHAEL J. KLARMAN, *POWELL V. ALABAMA: THE SUPREME COURT CONFRONTS “LEGAL LYNCHINGS,”* CRIMINAL PROCEDURE STORIES 1 (Carol S. Steiker ed., Found. Press 2006).

replacement with speedy trials that reliably produced guilty verdicts, death sentences, and rapid executions.”<sup>71</sup> The appearance of process made us feel better about ourselves, while the lack of actual process made us feel safe. Despite *Gideon*, these conflicting attitudes still existed. Even now, many of us believe in the right to counsel in theory, but in practice it is the fear of crime that drives our criminal justice policies.<sup>72</sup>

Politicians win elections by taking “tough on crime” positions,<sup>73</sup> while political attack ads all too often portray adversaries as “soft on crime.”<sup>74</sup> This trend leads to an “escalation in ‘law and order politics’” in which politicians have increasingly supported the criminalization of more and more activities, and have similarly endorsed harsher sentencing schemes.<sup>75</sup> This tendency toward the over-criminalization of American life also offers a boon to law enforcement officials who gain more power and achieve greater career advancement through more aggressive investigation and prosecution.<sup>76</sup> “As a result of the ‘tough on crime’ policy decisions, criminal cases have become more time-consuming and costly to defend.”<sup>77</sup> While this trend has provided greater support for law enforcement entities, it has not provided defense resources necessary to ensure the right to counsel in an environment that creates an ever-expanding number of indigent defendants.<sup>78</sup> “Because the affected class consists [primarily] of poor criminal defendants, overwhelmingly from minority communities, there is little or no political pressure to improve the situation.”<sup>79</sup> As indigent defense advocate Stephen Bright rhetorically questioned at a recent forum discussing these issues: “How much justice is going to be provided by the same government

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<sup>71</sup> *Id.*

<sup>72</sup> See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719-20 (2005); see also *Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 6-8 (2009) (statement of Erik Luna, Professor of Law, Wash. & Lee U. Sch. of Law; Adjunct Scholar, The Cato Institute), available at [http://judiciary.house.gov/hearings/hear\\_090604.html](http://judiciary.house.gov/hearings/hear_090604.html) [hereinafter Luna, *Indigent Representation*].

<sup>73</sup> Luna, *supra* note 72, at 719-20.; see also JUSTICE DENIED, *supra* note 65, at 70-71.

<sup>74</sup> Anyone following the national presidential election in 1988 will recall the political advertisement George H. W. Bush used to criticize Michael Dukakis’ support for a furlough program that allowed convicted felon Willie Horton to gain temporary release. Bush’s political ad can be viewed on Museum of the Moving Image: Presidential Campaign Commercials, at <http://www.livingroomcandidate.org/commercials/1988/furlough-from-the-truth>. Horton went on to commit a rape while on furlough through this program. Similarly, conservative 2008 presidential candidate, Mike Huckabee, was put on the defensive for his decision to commute the sentence of Arkansas felon Maurice Clemmons who, nine years later, allegedly shot and killed four Seattle police officers. See Brian Montopoli, *Mike Huckabee Granted Clemency to Maurice Clemmons*, CBS NEWS POLITICAL HOTSHEET, Nov. 30, 2009, [http://www.cbsnews.com/8301-503544\\_162-5835831-503544.html](http://www.cbsnews.com/8301-503544_162-5835831-503544.html).

<sup>75</sup> Luna, *supra* note 72, at 719-20.

<sup>76</sup> *Id.* at 722.

<sup>77</sup> JUSTICE DENIED, *supra* note 65, at 71.

<sup>78</sup> In fact there is often a political benefit to taking positions hostile to the right to counsel. This may help explain how Senator Smith could argue against funding Georgia’s failing indigent defense system while serving as Chairman of both the Senate Judiciary Committee and the Legislative Oversight Committee for the Georgia Public Defender Standards Council. See *supra* note 7.

<sup>79</sup> COLE, *supra* note 54, at 118.

trying to convict these people, and deprive them of their liberty and, in some instances . . . their lives?”<sup>80</sup>

As pressure to expand law enforcement has grown, without a concomitant commitment to fund the legal protection of people targeted by these efforts, indigent defense providers have been stretched beyond their breaking point. Caseloads have increased, critical resources have been rendered unavailable, and the quality of representation has plummeted to unacceptably low levels, as exhibited in the anecdotes above and the countless stories like them.<sup>81</sup>

To reinforce further the reality that *Gideon*'s promise applies in theory but not in practice, courts have sanctioned this approach by making relief for violations virtually impossible to obtain. Twenty years after *Gideon* was decided, the Supreme Court had the opportunity in *Strickland v. Washington* to determine the standard for effective representation to which the government would be held.<sup>82</sup> David Leroy Washington was charged with capital murder. His lawyer did little to prepare and present mitigation evidence that might spare Washington's life. After Washington was sentenced to die, his post-conviction lawyer argued that his trial lawyer had provided ineffective assistance of counsel.<sup>83</sup> Faced with the opportunity to determine the standard for ineffectiveness, the Court fashioned a two pronged test.<sup>84</sup> The first part of this test asks whether counsel's performance fell outside the “wide range of professionally competent assistance,” recognizing “that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”<sup>85</sup> As interpreted, this standard proved to be very forgiving; courts were to presume that even seemingly inexplicable actions were considered sound trial strategy, rather than serious errors.<sup>86</sup> Therefore, the first part of the *Strickland* test set a low bar for what falls outside of the constitutionally acceptable range of behavior. Yet, if this was not enough to keep indigent defendants from getting relief when appointed substandard counsel, the Court included a prejudice component to the *Strickland* standard. Under the second part of this test, if the defendant is able to show that his or her lawyer was constitutionally deficient, she must then take on the burden of proving “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”<sup>87</sup> Not surprisingly, Mr. Washington could not meet this burden. By fashioning a “standard [that] has proved virtually impossible to meet,” the Court reassured the states that “atrocious lawyering would be excused as ‘effective.’”<sup>88</sup>

Through *Strickland* and its progeny, the courts acquiesced as states provided “precisely the sort of ‘justice’ that often prevailed in trials that substituted for lynchings” during the pre-

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<sup>80</sup> Matt Pearce, *Legal Experts Discuss Public Defender Crisis at MU School of Law*, COLUMBIAN, Feb. 28, 2010, available at <http://www.columbiainmissourian.com/stories/2010/02/28/legal-experts-discuss-public-defender-crisis/>.

<sup>81</sup> For an excellent discussion of how growing caseloads and scarce resources have impacted the clients who must rely on the public defender system, see Bennett H. Brummer, *The Banality of Excessive Defense Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009).

<sup>82</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>83</sup> *Id.* at 685-86.

<sup>84</sup> *Id.* at 690.

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* at 689.

<sup>87</sup> *Strickland*, 466 U.S. at 694.

<sup>88</sup> COLE, *supra* note 54, at 113-14.

*Gideon* years.<sup>89</sup> Courts have approved as constitutional states' enforcement of "[l]ow hourly rates and statutory caps [that] induce attorneys who take such cases to accept more cases than they can reasonably handle."<sup>90</sup> They have likewise sanctioned states that "have no experiential qualifications for who may be assigned to represent an indigent defendant."<sup>91</sup> As courts continue to reinforce low expectations when it comes to counsel for the poor, judges are similarly encouraged to value efficiency and convenience over meaningful representation. This explains how Ohio Municipal Court Judge John Plough felt justified in ordering public defender Brian Jones to try a case to which Jones was appointed one day prior.<sup>92</sup> When Judge Plough ordered the trial to proceed, Jones requested more time, explaining that he had had only twenty minutes to meet with the client to date.<sup>93</sup> The judge denied the lawyer's request for a continuance, holding him in contempt of court when he refused to proceed.<sup>94</sup> The Court of Appeals reversed the contempt conviction, noting that the judge "improperly placed an administrative objective of controlling the court's docket above its supervisory imperative of facilitating effective, prepared representation and a fair trial."<sup>95</sup> In defending his position, the trial judge "noted that defenders plead cases and take cases to trial with minimal preparation all the time,"<sup>96</sup> thus documenting the fact that the judge's expectations were consistent with the norm in that courthouse.

The Ohio Court of Appeals' reversal of Jones' contempt conviction sends a message to trial court judges that they must allow a lawyer more than twenty minutes with a client before forcing the client to go to trial *if the lawyer requests a continuance*. However, it does nothing for those convicted defendants whose lawyers either did not have the courage to stand up to a judge who demanded they go to trial unprepared or did not appreciate their lack of preparedness in the first place. Indeed, in light of the rigorous standards laid out in *Strickland*, those clients will likely be left without recourse.

While the *Jones* case is one example of an appellate court doing the right thing, its limited reach is unlikely to broadly impact widespread neglectful practices beyond Judge Plough's courthouse. But by sanctioning sub-standard representation, appellate courts in general can have a devastating impact on the right to counsel. Take, for example, the experience of the public

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<sup>89</sup> KLARMAN, *supra* note 70, at 3.

<sup>90</sup> COLE, *supra* note 54, at 120-21 (citing Paul Calvin Drecksel, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV., 380 (1991)). Cole summarized *Pruett v. State*, 574 So.2d 1342 (Miss. 1990) as "[A] Mississippi death penalty case, [in which] two experienced attorneys spent 449.5 and 482.5 hours, respectively, on preparation and trial. They filed more than 100 motions and took two interlocutory appeals. The prosecution sought to use witnesses who had been hypnotized, requiring the defense to retain expert assistance on the effects of hypnosis. There were nine days of pretrial hearings, and the trial itself lasted four weeks. Each attorney logged nearly 200 hours of in-court time alone. Yet the Mississippi statute limited compensation to \$1000 per case, under which the attorneys would have earned just over two dollars per hour. . . . The Mississippi Supreme Court upheld the cap." *Id.* at 119-20.

<sup>91</sup> *Id.* at 121. Professor Cole points out several examples of lawyers who have been charged with representing indigent defendants with "no relevant experience" (internal citations omitted).

<sup>92</sup> *State v. Jones*, 2008-Ohio-6994 (Ohio Ct. App. Dec. 31, 2008) (The Supreme Court of Ohio & the Ohio Judicial System) *available at* <http://www.sconet.state.oh.us/rod/docs/pdf/11/2008/2008-ohio-6994.pdf>.

<sup>93</sup> *Id.* at ¶ 2.

<sup>94</sup> *Id.* at ¶ 3.

<sup>95</sup> *Id.* at ¶ 10.

<sup>96</sup> Brummer, *supra* note 81, at 148 n.244.

defender office in Miami-Dade County, Florida (“Miami PD”).<sup>97</sup> Due to a funding shortage, public defenders in Miami were handling “about 500 noncapital cases per year, well above the 200-case limit recommended by Florida’s public defender association.”<sup>98</sup> The caseload crisis got so bad that, according to then-Miami-Dade Public Defender Bennett Brummer, “[the office was giving cases] to virtually anybody who [could] walk or breathe.”<sup>99</sup> After all “efforts at improvement had failed, [the Miami PD] filed motions for relief [with the trial court] in June, 2008.”<sup>100</sup> Finding that the “[Miami PD]’s caseloads [were] excessive by any reasonable standard,”<sup>101</sup> and that due to the crushing caseloads, “[the office’s] assistant public defenders [were], at best, providing minimal competent representation to the accused,”<sup>102</sup> Judge Stanford Blake ordered relief by authorizing that office to “decline future, less-serious felony cases, about 60% of [the office’s] felony caseload.”<sup>103</sup> Although Judge Blake’s Order did not give the Miami PD “all the relief [it] believed was necessary,”<sup>104</sup> it represented real progress in the fight to ensure poor people the right to counsel. Unfortunately, that progress was short-lived, as Florida’s Third District Court of Appeals reversed Judge Blake’s Order.<sup>105</sup> The appellate court did not dispute Judge Blake’s factual findings.<sup>106</sup> Rather, it found it impossible to establish a standard to determine when a caseload is excessive, and it faulted Judge Blake for trying to address an office-wide problem.<sup>107</sup> Taking a page from the impossible *Strickland* standard, the court held that relief for an excessive caseload is only available on a case-by-case basis after the assistant public defender proves prejudice.<sup>108</sup> As Brummer notes in response:

Requiring each individual lawyer, especially in an office with about 95 lawyers handling more than 43,000 felony cases per year, to proceed lawyer-by-lawyer or case-by-case is worse than ironic. The underlying problem is that each lawyer lacks sufficient time to assist existing clients. Each would be required to expend precious time and energy to marshal evidence regarding the actual impact of the lack of resources in each case.<sup>109</sup>

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<sup>97</sup> This office is officially the Office of the Public Defender, Eleventh Judicial Circuit of Florida.

<sup>98</sup> David Ovalle, *Miami-Dade Public Defender Caseload Dispute in Court’s Hands*, THE MIAMI HERALD, Mar. 31, 2009, available at <http://www.nlada.org/DMS/Documents/1238503502.39/976128.html>.

<sup>99</sup> Susannah A. Nesmith, *Dade Public Defender: Caseload is Untenable; Miami-Dade’s Public Defender Testifies About How Overworked His Office Is In a Bid to Reduce His Caseload*, THE MIAMI HERALD, July 31, 2008, available at <http://www.nacdl.org/public.nsf/defenseupdates/Florida085>.

<sup>100</sup> Brummer, *supra* note 81, at 151.

<sup>101</sup> Florida v. Loveridge, No. 08-14, at 6 (11th Judicial Cir. Sept. 3, 2008) (order granting in part and denying in part public defender’s motion to appoint other counsel in unappointed noncapital felony cases), available at [http://www.pdmiami.com/Order\\_on\\_motion\\_to\\_appoint\\_other\\_counsel.pdf](http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf) [hereinafter Blake Order].

<sup>102</sup> *Id.* at 4.

<sup>103</sup> Brummer, *supra* note 81, at 151 (citing Blake Order, *supra* note 101, at \*6).

<sup>104</sup> *Id.* at 152.

<sup>105</sup> State v. Public Defender, 12 So.3d 798 (Fla. 3d. Dist. Ct. App. 2009).

<sup>106</sup> *Id.* at 805-06.

<sup>107</sup> *Id.* at 806.

<sup>108</sup> *Id.*

<sup>109</sup> Brummer, *supra* note 81, at 154 (citations omitted).

While anyone can recognize that no lawyer could adequately represent 500 felony clients in a year, the Third District has approved a standard that makes it impossible for any of these clients to insist on constitutionally competent representation.<sup>110</sup>

The Supreme Court of Mississippi made a similar pronouncement in response to Quitman County's allegation that the state abdicated its constitutional obligation to ensure the provision of effective assistance of counsel when it dumped that responsibility on the counties.<sup>111</sup> A poor county in the Mississippi Delta, Quitman recognized that it could not live up to its constitutional obligations to poor defendants. It paid contract counsel a flat-fee of \$1350 per month to "handle[] all the work that came his way, including trials and appeals, along with 'travel, books, supplies, phones, secretarial, everything.'"<sup>112</sup> Quitman acknowledged that this practice "does not provide the essential tools of defense and therefore violates the constitutional guarantee of effective assistance of counsel."<sup>113</sup> For example, its "public defenders are not provided investigators, . . . most often meet defendants [en masse] in the courtroom, . . . [and] are not provided office space."<sup>114</sup> Moreover, "there is little motion practice in Quitman County and [] the part-time flat-fee public defender system is conducive to ineffective assistance."<sup>115</sup> The experience of Diana Brown is an example of the quality of representation defendants receive in Quitman County.

Brown met her court-appointed lawyer for the first time on the day she pleaded guilty to several serious crimes five years ago. They spent five minutes together and have not spoken since. "You are guilty, lady," the lawyer, Thomas Pearson, told Ms. Brown, according to her sworn statement, as he met with her and nine other defendants as a group, rattling off the charges against them. He told her she was facing 60 years in prison for assault, drunken driving and leaving the scene of an accident, and should accept a deal for 10 years, court papers say. He gave her five minutes to decide. Offered no other defense, she took the deal.<sup>116</sup>

The Circuit Court of Quitman County ruled against the county's allegations of "widespread and pervasive ineffectiveness," finding that the county failed to sufficiently support

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<sup>110</sup> Soon after the Third District Court of Appeals reversed Judge Blake's Order, Miami Dade County public Defender Jay Kolsky moved to withdraw from his representation of Antoine Bowen, arguing that his caseload and other responsibilities rendered him unable to provide Mr. Bowen the representation to which he is entitled. After a three-day evidentiary hearing, the trial Court found that Kolsky "had demonstrated adequate, individualized proof of prejudice to Bowens as a direct result of Kolsky's workload," and granted Kolsky's motion to withdraw. *State v. Bowens*, 39 So. 3d 479, 480 (Fl. 2010). The Third Circuit Court of Appeals reversed the trial court finding that the record supported neither "actual or imminent prejudice to Bowens' constitutional rights." *Id.* at 481. For an excellent analysis of this opinion, see Professor Robert C. Boruchowitz's post at CrimProf Blog, [http://lawprofessors.typepad.com/crimprof\\_blog/2010/week27/index.html](http://lawprofessors.typepad.com/crimprof_blog/2010/week27/index.html).

<sup>111</sup> *Quitman County v. State of Mississippi*, 910 So.2d 1032 (Miss. 2005).

<sup>112</sup> Adam Liptak, *County Says It's Too Poor to Defend*, N.Y. TIMES, Apr. 15, 2003, available at <http://truthinjustice.org/too-poor.htm>.

<sup>113</sup> *Quitman*, 910 So.2d at 1039.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Liptak, *supra* note 112.

its claim with specific instances of representation's failure to meet the *Strickland* standard.<sup>117</sup> The Mississippi Supreme Court agreed, essentially refusing to look to systemic deficiencies to gauge whether defendants were receiving constitutionally effective assistance of counsel.<sup>118</sup> Like the appellate court in Florida with respect to Miami-Dade County, the Mississippi Supreme Court held *Quitman* to the impossible standard of showing *Strickland* ineffectiveness in individual cases.

The message to states is that there is no need to make indigent defense a budgetary priority. The message to judges is that they should focus on processing the cases before them rather than correcting greater injustices. The message to lawyers for the poor is that their clients are not entitled to the standard of care that their wealthier counterparts would surely expect. The Court's standard in *Strickland* "uncritically accepts the status quo as 'effective,' [thereby creating] no incentive for the states to improve on existing standards of legal representation for the poor. As the aftermath of *Strickland* demonstrates, that status quo is an embarrassment, and the Court's approach has only entrenched it."<sup>119</sup> At every level—the U.S. Supreme Court as evidenced in *Strickland*, state supreme courts as evidenced in *Quitman*, state appellate courts as evidenced in the Miami PD case, and trial courts as evidenced by Judges Plough, Winn, and Mickle<sup>120</sup>—the judiciary endorses practices fundamentally inconsistent with any rational notion of quality lawyering.

When we view the political pressures to undermine the tenets of *Gideon* and the courts' response, in light of what we know from organizational theorists about how culture is created and the impact it has on those who operate within it, we can begin to understand the attitudes and behavior of lawyers like those described above. First, we know that cultural norms are based on the values embedded in the existing system and so, ipso facto, the reform of that system will require a new set of cultural values.<sup>121</sup> In the case of indigent defense, the politicians responsible for designing and funding the criminal justice delivery system were driven by forces that promoted over-criminalization and a process that quickly and cheaply moved the accused from arrest to sentencing. The resulting criminal justice values were inconsistent with those fundamental to quality criminal defense, such as loyalty and fidelity to the client, zealous advocacy, thorough preparation, and meaningful communication.<sup>122</sup> Second, we understand that as actors within the relevant organization begin to see a benefit to acting in accordance with those values, they begin to embrace them.<sup>123</sup> Here, law enforcement agents more readily achieve success and professional advancement by acting on these values, judicial approval of these values sets expectations for the system, and practicing lawyers are encouraged to meet these expectations by the judges who enforce the rules of the system. Third, as actors internalize these values, the values become the assumptions that drive their behavior and attitudes and, when acting in unison with other professionals in the system, ultimately define the culture.<sup>124</sup> Finally, we know that once

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<sup>117</sup> *Quitman*, 910 So.2d at 1037.

<sup>118</sup> *Id.* at 1039.

<sup>119</sup> COLE, *supra* note 54, at 114.

<sup>120</sup> See *supra* note 6.

<sup>121</sup> See generally Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009) [hereinafter Rapping, *You Can't Build on Shaky Ground*] (arguing that these values are fundamental among those necessary to ensure effective indigent defense delivery).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*



created, culture shapes the assumptions of those who work within it.<sup>125</sup> Therefore, without changing the culture of indigent defense in America, it will be difficult to change the behavior of the public defenders responsible for carrying out *Gideon's* mandate.

#### IV. The Reform Challenge: Transformation of a Culture of Injustice

Various studies have identified obstacles to realizing *Gideon's* mandate.<sup>126</sup> These obstacles generally fall into two categories: financial and structural. Financial challenges require a greater infusion of money to address such issues as excessive caseloads, lack of investigative and expert services, and inadequate equipment like computers and books. Structural challenges are those that require policy or regulative changes, such as: the provision of professional, salaried public defenders; the mandate that public defender offices remain independent from judges, legislators, and county commissioners who may influence their decisions; and the demand for training and practice standards. From studying the work of organizational development theorists, we can understand that our willingness to shortchange indigent defense services, and to tolerate structural deficiencies that so clearly promote injustice, is a cultural concern. If we are serious about indigent defense reform, we must reduce defender caseloads to a manageable level, provide necessary resources, devise and maintain practice standards, and do away with structural features of the system that create a disincentive to provide quality representation. However, if we do not also focus on transforming the current culture of injustice, our efforts will necessarily fall short of their goals.

Some of the requirements mentioned above (reduced caseloads, increased funding, and independence) give defenders who are able and inclined to live up to more rigorous standards of representation, the ability to do so both by giving them the necessary time and resources, and by removing some costs associated with refusal to cater to judges or politicians. For those defenders disinclined to change, setting and enforcing new standards can compel compliance. But where a community of public defenders operates on assumptions shaped by negative cultural forces, these solutions will not change the attitudes of defenders. The lawyer who dislikes his clients and fails to appreciate the importance of client communication will not spend more time with the people she represents simply because she has more time to do so. By requiring a lawyer like this to spend X number of hours per week meeting with clients, we may alter his behavior, but that will not result in the type of meaningful communication required to provide quality representation.

Thus, the only solution is to build a community of defenders who respect their clients and understand why communication is invaluable to the attorney-client relationship. It follows that not only must we provide the reforms just mentioned, but we must also change public defenders' underlying assumptions about their roles and the clients they serve. To be effective, any comprehensive plan to reform indigent defense must include a strategy to change the assumptions and internalized values of public defenders.

I first began to appreciate the role culture plays in shaping the delivery of indigent defense services five years ago. I had recently resigned from my position as Training Director for the Public Defender Services for the District of Columbia (hereinafter "PDS") to join the effort to reform indigent defense in Georgia. I brought with me my own assumptions about what it means

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<sup>125</sup> *Id.*

<sup>126</sup> Indigent defense reformers face many challenges. For a detailed and comprehensive discussion of these challenges, see JUSTICE DENIED, *supra*, note 65.

to be a public defender and how we must relate to the clients we serve. My views had been shaped by my eleven years at PDS.<sup>127</sup> Since its founding in 1970,<sup>128</sup> PDS has earned a national reputation as an organization dedicated to representing its clients—a reputation earned by PDS's adherence to certain fundamental values in its representation of indigent defendants.<sup>129</sup> Fiercely client-centered in its approach, PDS's success is based on a belief that zealous and loyal advocacy to each defendant, regardless of her alleged crime, is paramount. These beliefs are shared and internalized by all staff, and are thus taken for granted. They define the culture of PDS.

After leaving PDS, I went to Georgia in 2004 to serve as the Training Director for its new state-wide public defender system.<sup>130</sup> In January 2005, we held our first training program. Referencing a session on “client-centered representation,” in which we discussed the importance of zealously advocating for one's client, even if doing so might draw the ire of the judge or prosecutor, one attorney explained that he, the judges, and the prosecutors are friends. He “reminded me” that they were all members of the same “legal” community. His clients were not. He went on to make clear that he was unwilling to jeopardize relationships he had developed over time, regardless of his clients' interests. To further justify his position, he assured me that his good relationships with the judges and prosecutors helped his clients.<sup>131</sup>

While I met some excellent public defenders in those early months in Georgia, many others had already internalized the value-laden assumptions of the attorney mentioned above, and they often treated poor people accused of crimes with disrespect and indifference.<sup>132</sup> It was rare to find a community of public defenders that had uniformly embraced zealous, client-centered

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<sup>127</sup> I began working at PDS in 1993 as an intern investigator while still in law school. I joined the office as a staff attorney in 1995, eventually graduating to supervising attorney, and ultimately, Training Director.

<sup>128</sup> PDS started in 1960 as Legal Aid Agency before being established in 1970 as a model defender organization.

<sup>129</sup> See Rapping, *You Can't Build on Shaky Ground*, *supra* note 121, at 164 (arguing that there are core values that every effective public defender must embrace, including: (1) the duty of zealous and loyal representation; (2) the duty to advocate for the client's cause; (3) the duty to thoroughly study and prepare; and (4) the duty to communicate with the client).

<sup>130</sup> The Georgia Indigent Defense Act of 2003, GA. CODE ANN. § 17-12-1 et. seq. (2003) established a state-wide public defender system to address indigent defense shortcomings in the state. Pursuant to the Act, the Georgia Public Defender Standards Council [hereinafter GPDSC] was created to administer services. The Act took effect on December 31, 2003, creating a state-wide public defender system that began operations on January 1, 2005.

<sup>131</sup> During this same training event, following a session on basic motions practice in which the panelists explained the benefits to developing a robust suppression motions practice, one public defender chief told me that they were unable to routinely file and litigate motions in his circuit because the judges would get angry. Over time, I worked with a number of young public defenders who encountered resistance from judges as they tried to protect their clients' rights through their motions practice.

<sup>132</sup> In a recent exchange between several public defender leaders in the region, one sent an e-mail to his colleagues titled “You won't believe this...” that relayed a story of a client who stole his office mail and forged some of his checks. A second offered his advice about how he structured his office to make sure they could keep an eye on the clients concluding, “this will be an extremely unpopular statement with [the] true believers but our clients are our clients for a reason. Don't trust them. Don't believe them. Don't turn your back on them and you will never have to say ‘you won't believe this . . .’” A third chimed in and described the lengths his office goes through to monitor clients adding, “these folks are who they are . . .”

representation.<sup>133</sup> Although I had not yet studied organizational development, I began to understand the relationship between culture and the quality of indigent defense. To combat these cultural forces and raise the standard of representation across the state, I developed the Georgia Honors Program.<sup>134</sup> I understood from four years on the PDS Recruitment Committee the critical role that recruitment and hiring plays in identifying prospective public defenders that are eager to embrace organizational values. I knew from my years as Training Director how essential a comprehensive training program is to instilling the lessons necessary to carry out an agency's mission. And from my years as a supervising attorney and mentor to newer lawyers, I appreciated the importance of continually reinforcing the office's ideals throughout the new lawyer's early, formative years. These lessons formed the foundation of the Honors Program. For two years, we recruited some of the most promising law graduates to offices throughout the state,<sup>135</sup> put them through an intensive, three-week training program as a class, and brought them together quarterly for follow-up training and community-building sessions. The program was designed to last for three years, with the expectation that our graduates would then serve as faculty members and mentors. However, Georgia stopped funding the program and withdrew its commitment to this group of public defenders.<sup>136</sup>

I left GPDSC in 2006 to become part of a new management team tasked with building a public defender office in New Orleans in the wake of Hurricane Katrina.<sup>137</sup> In October of that year, I walked into a courtroom in Orleans Parish District Court for the first time. The scene was fairly chaotic. People, primarily men, in suits wandered about the well of the court chatting to one another. I assumed they were attorneys, although one could not discern the defenders from the prosecutors. The only players who could be readily identified were the judge, who sat on the bench in a robe, and the prisoners, who were lined up in a row, wearing orange jumpsuits, off to the left side of the courtroom. The suited men had no contact with the defendants. It was not clear that any of the lawyers had ever met any of the defendants before.

When a case was called, one of the suited men would speak for the man whose name was connected to the case. However, none of the men in jumpsuits would be brought to his spokesman's side, and the lawyer often barely acknowledged his client. Then, the judge called a case with no suited spokesman. When it was clear that there was no lawyer claiming this particular client, the judge turned to the row of men in orange and asked the one whose case it was to stand. One of the prisoners rose. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," said the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case.

While it was obviously troubling that a man had spent seventy days in jail without seeing a lawyer, the response in the courtroom was equally dismaying. Not a single person was fazed by this exchange, including the defenders. I would come to learn that this was par for the course for poor defendants in New Orleans, and that public defenders themselves had come to accept it as

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<sup>133</sup> While there were a few very good offices throughout the state, they were the exception to the rule.

<sup>134</sup> See *supra* note 2.

<sup>135</sup> Lawyers joined the program with a commitment to being placed in any office that needed them. In this sense it was akin to a "Peace Corps" for public defenders.

<sup>136</sup> A brief history of the early years of Georgia's state-wide public defender system and the Honors Program can be found in Rapping, *You Can't Build on Shaky Ground*, *supra* note 121, at 161-63.

<sup>137</sup> For an in-depth discussion of this effort, see generally *id.*

part of the system within which they were forced to operate. This experience reinforced what I had come to understand about culture and indigent defense from my time in Georgia.

I then went on to work in, and with, other indigent defense delivery systems across the South. I saw that in most jurisdictions, the fundamental values about indigent defense that I had always taken for granted were absolutely foreign to many of these defenders. I witnessed lawyers who wanted to do good work become jaded as they internalized values that encouraged substandard representation. I worked in systems in which the duty to loyally and zealously advocate for the client gave way to the lawyers' desire to appease the judges. I met lawyers who, rather than appreciating their duty to prepare and to communicate with their client, resigned themselves to their role in a system that processed people quickly. Against this backdrop, it is easy to see how the injustices described in Part II above occur.

It was at this time that I began to study business scholars and organizational development theorists and to recognize that the principles needed to drive indigent defense reform were the same concepts these experts were teaching business leaders.<sup>138</sup> Although corporations are very different in obvious ways from indigent defense programs, these theories are equally applicable to virtually any organization in that their success is determined by the values they instill. I realized that in both Georgia and New Orleans<sup>139</sup> we introduced a new set of values by recruiting lawyers receptive to, training them to practice in accordance with, and mentoring them to internalize, these values. The goal was to have this new generation of lawyers both drive cultural change in the short run and develop into future leaders of the reform effort. This philosophy gave rise to the Southern Public Defender Training Center ("SPDTC").

A. *The Model For Cultural Transformation: The Southern Public Defender Training Center*<sup>140</sup>

In *You Can't Build on Shaky Ground*,<sup>141</sup> I posit that "[l]eaders have two options to [bring about culture change]: changing the way existing lawyers perform"; and "bringing in a new population who practice in accordance with the desired values."<sup>142</sup> However, the more engrained one's assumptions, the harder it is to change them.<sup>143</sup> Because "resistance will likely thwart efforts to alter the practices of seasoned lawyers[,] . . . grooming a new generation [of defenders] is a

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<sup>138</sup> See *id.* at 173-80.

<sup>139</sup> I served for almost a year as the Director of Training and Recruitment in New Orleans. In that capacity, I was involved in hiring the first wave of new attorneys for the office and designing training and supervision programs for the staff.

<sup>140</sup> To learn more about the SPDTC, visit <http://www.thespdtc.org>. To read SPDTC's Executive Summary, visit [http://www.thespdtc.org/uploads/SPDTC\\_Executive\\_Summary.2.pdf](http://www.thespdtc.org/uploads/SPDTC_Executive_Summary.2.pdf).

<sup>141</sup> Rapping, *supra* note 121.

<sup>142</sup> *Id.* at 173.

<sup>143</sup> SPDTC reaches out to public defender chiefs and leaders across the region whom are receptive to the program's ideals, and it builds partnerships with those leaders. However, not all leaders are receptive to change. After the Georgia Honors program was dismantled, several leaders who did not appreciate young lawyers putting their clients' interests over those of powerful judges commented that we were "training young lawyers to get fired." While we need to work with seasoned public defenders in the region who embrace cultural transformation, we also must focus on grooming the next generation of leaders in the region to join this movement.

critical component of any strategy for effective reform.”<sup>144</sup> SPDTC is a model to transform public defender culture through “values-based recruitment, training, and mentoring.”<sup>145</sup>

Each year SPDTC recruits a new class of lawyers eager to be a part of the reform movement in the South. Some of these are inexperienced public defenders who are already working in offices in the region. Others are recent law graduates we were able to recruit and pair with our partner offices. All have less than three years of experience<sup>146</sup> and are screened for their receptiveness to client-centered values.<sup>147</sup> The class participates in SPDTC’s Summer Institute, a fourteen-day public defender “boot camp” designed to teach the requisite knowledge and skills, to instill fundamental values, and to build a supportive community so essential to reinforcing and sustaining these values. Members gather on a semi-annual basis with the other SPDTC classes for additional training and community building during the three-year program. SPDTC uses a national faculty of current and former public defenders who embrace the program’s mission. The participants are linked through an electronic social networking program that allows them and the faculty to communicate with one another and share resources in between sessions. In addition, each participant receives a faculty mentor. Each of these components is designed to help reinforce the value system that will form these lawyers’ assumptions as they mature. Fundamental to the program design is the development of a supportive community of defenders that will ultimately drive the necessary cultural transformation.<sup>148</sup>

In its first four years, SPDTC has trained ninety-five new participants who have worked in public defender offices across seven states.<sup>149</sup> SPDTC has also raised money to include the Georgia Honors Program lawyers who continue to work as public defenders. In January 2010, SPDTC graduated its first class, and it is now in the process of building a second phase for its graduates that will teach them to serve as trainers, mentors, and supervisors to newer members.<sup>150</sup>

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<sup>144</sup> *Id.*; see also RONALD A. HEIFETZ & MARTY LINSKY, *LEADERSHIP ON THE LINE: STAYING ALIVE THROUGH THE DANGERS OF LEADING 30* (Harv. Bus. Sch. Press 2002) (arguing that “[a]daptive change stimulates resistance because it challenges people’s habits, beliefs, and values”).

<sup>145</sup> Rapping, *You Can’t Build on Shaky Ground*, *supra* note 121, at 175. To learn more about SPDTC, visit <http://www.thespdtc.org>.

<sup>146</sup> Under the theory that most lawyers develop habits during their first three years, whether good or bad, that will guide their practice throughout their careers, and because resistance to change among more seasoned lawyers can be so strong, SPDTC seeks out public defenders with less than three years of experience.

<sup>147</sup> Rapping, *You Can’t Build on Shaky Ground*, *supra* note 121.

<sup>148</sup> This is especially critical in smaller, more remote offices where defenders will not otherwise have a community of like-minded colleagues to reinforce the value-system necessary to drive change. Without this supportive, broader network, these lawyers are at risk of either succumbing to the existing culture or leaving out of frustration.

<sup>149</sup> Members practice in Georgia, Louisiana, Mississippi, South Carolina, Tennessee, Texas, and Virginia.

<sup>150</sup> Our vision includes a third phase that will teach leadership and management skills. Assuming each phase is three-years in duration, graduates of Phase III will be ready to serve as public defender leaders in the region after nine years.

The impact on the participants is immeasurable, as exhibited by some of their comments:<sup>151</sup>

“There are no words to explain what SPDTC did for me. I came there on fire and ready to learn, and ended up getting so much more than I bargained for.”

“Before SPDTC, I often felt alone and isolated in my practice. When I left I knew that I was not alone. I now have a family of lawyers I can call on for advice and strength. We met as strangers and left strongly connected to one another.”

“At the end of the two-week Summer Institute, I was exhausted but also exhilarated. My mind and body were greatly fatigued, but my soul, my essence, my purpose in practice and life has been focused and rejuvenated.”

“This is a great program. Law school provided none of this. The bar provided none of this. Our individual offices would if they could but there is no time, no money, and no one available. I needed this and I didn’t even know it, and it came at a perfect time before a light case of burnout left serious burn scars.”

“There is no other program like this one -- to be effective attorneys, particularly as public defenders, we need to spend REAL TIME on the essentials of trial practice -- a boot camp like this one -- set up where our only responsibility is to learn, is the ONLY WAY to gain these imperative skills in a meaningful way.”

This small army of heroic defenders has made an incredible impact on indigent defense in the South.<sup>152</sup> While there is much more to be done, the SPDTC model provides a critical element to indigent defense reform that has to date been overlooked. The need for such a culture shift is certainly great across the southeastern United States, but the indigent defense crisis is national in

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<sup>151</sup> For more testimonials from some of the SPDTC participants, see The Southern Public Defender Training Center, Participants, <http://www.thespdtc.org/Participants.html> (last visited July 29, 2010).

<sup>152</sup> There are few, if any, success stories in the indigent defense arena as remarkable as the Orleans Public Defenders office in New Orleans [hereinafter OPD]. In 2006, OPD was among the worst public defender offices in the country. See Rapping, *You Can’t Build on Shaky Ground*, *supra* note 121. Over the next three years, the office transformed itself into a potential model office in the region. Leadership in that office resisted, and changed, some of the most intractable problems in the courthouse, such as part-time public defenders and horizontal representation with lawyers tethered to judges. These changes came with incredible struggle. A strategy of values-based recruitment, training, and mentoring was largely responsible for this change. The last three classes of OPD lawyers have participated in SPDTC. However, if these lawyers are to have a meaningful impact and realize their potential in the region, it will take a substantially greater commitment to reform. Some participating offices contribute to the expense of putting their lawyers through the program, while others cannot afford to do so. It costs approximately twenty thousand dollars to put a lawyer through the three-year program, including lodging, meals, materials, and overhead and administrative costs. While this is a relatively modest amount for a comprehensive, three-year program, no office pays more than five thousand dollars per lawyer. The bulk of this expense comes from intensive fundraising efforts targeting private sources.

scope.<sup>153</sup> This model holds out hope, not only to drive regional change but to serve as the foundation for a national movement.

*B. Building a National Reform Movement: The Public Defender Corps*

In collaboration with Equal Justice Works,<sup>154</sup> SPDTC has launched a national initiative called the Public Defender Corps (PDC).<sup>155</sup> Equal Justice Works has developed a robust fellowship program with a proven track record of identifying recent law graduates committed to social justice and placing them in non-profit organizations across the country.<sup>156</sup> By mobilizing private donors to support the work of public interest organizations that would otherwise be unable to afford the salaries of these fellows, Equal Justice Works has been able to drive social change in many fields. Recognizing the moral imperative of providing adequate counsel to the poor, Equal Justice Works, in partnership with SPDTC, has recently turned its attention to the indigent defense arena. Building on the model developed by SPDTC, PDC plans to create fellowship opportunities that will help spark a national movement of public defenders committed to cultural transformation. Just as the value-centered guidelines of organizational development theorists drives the work of the SPDTC, so too is it the basis of PDC. Borrowing from the SPDTC philosophy, the PDC Blueprint recognizes that “[t]o change culture we must introduce the desired client-centered values as new lawyers enter the practice, nurture those lawyers so that they internalize those values and build a large enough community which embraces these values so that each person changes the culture.”<sup>157</sup>

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<sup>153</sup> Lawsuits in Michigan and New York challenging those states’ failures to live up to their Sixth Amendment obligations tell the stories of countless poor people accused of crimes who never receive effective assistance of counsel. See, e.g., *Duncan v. Michigan*, No. 07-000242 (Mich. Apr. 30, 2010) (order affirming the decision of the court of appeals to deny defendants’ motion for summary judgment), available at [http://www.nlada.net/sites/default/files/mi\\_duncanvstate\\_misc04-30-2010\\_order.pdf](http://www.nlada.net/sites/default/files/mi_duncanvstate_misc04-30-2010_order.pdf); *Hurrell-Harring v. New York*, No. 66 (N.Y. May 6, 2010) (order affirming order of appellate division to permit a suit brought by the American Civil Liberties Union on behalf of indigent persons in five counties), available at [http://www.nlada.net/sites/default/files/ny\\_hurrellharingvnewyork\\_ctapp05-06-2010\\_decision.pdf](http://www.nlada.net/sites/default/files/ny_hurrellharingvnewyork_ctapp05-06-2010_decision.pdf).

For information on suits in Michigan, visit [http://www.nlada.net/library/article/mi\\_supremecourt\\_orderinduncan04-30-2010\\_gideonalert](http://www.nlada.net/library/article/mi_supremecourt_orderinduncan04-30-2010_gideonalert). For information on suits in New York, visit [http://www.nlada.net/library/article/ny\\_highestcourtsallowsasetoproceed05-06-2010\\_gideonalert](http://www.nlada.net/library/article/ny_highestcourtsallowsasetoproceed05-06-2010_gideonalert).

<sup>154</sup> Equal Justice Works offers the nation’s largest postgraduate public interest fellowship program for lawyers and has placed thousands of attorneys and students at hundreds of non-profit organizations across the country. To learn more about Equal Justice Works go to <http://www.equaljusticeworks.org>.

<sup>155</sup> Cait Clarke, who is spearheading the PDC initiative, is the Director of Public Law Opportunities at Equal Justice Works. Ms. Clarke also serves on the Board of the SPDTC. To learn more see Equal Justice Works & The Southern Public Defender Training Center, *Equal Justice Corps: Proposed Blueprint*, (Mar. 2010), [http://www.equaljusticeworks.org/files/indigent\\_defense.pdf](http://www.equaljusticeworks.org/files/indigent_defense.pdf) (last visited July 29, 2010) [hereinafter *PDC Blueprint*].

<sup>156</sup> Equal Justice Works also places many undergraduate fellows.

<sup>157</sup> PDC Blueprint, *supra* note 155, at 5. Because the initiative was originally called the Equal Justice Corps (EJC), this name may appear on some of the literature. PDC and EJC are the same program. As the PDC is in its developmental stage, the PDC Blueprint should be viewed as a work in progress.

The PDC vision promises to leverage the Equal Justice Works Fellowship model to spread the work the SPDTC is doing in the South to equally needy jurisdictions nationally. They write:

Imagine if we could recruit, train, and mentor an army of top law graduates to work as public defenders for three years in underserved areas. Imagine if we could build a strong sense of community among these advocates that would extend beyond the three years. Imagine if we could instill such a compelling understanding of the crisis in indigent defense and importance of cultural change that a large majority of these advocates would remain in the field to change the face of indigent defense. Equal Justice Works is proposing to do just that, and in doing so will dramatically improve the quality of representation, seed the field with future indigent defense leaders, and build a national movement for change.<sup>158</sup>

By leveraging public dollars to garner private support, PDC offers a real incentive for state governments to partner in this effort. In doing so, it serves as a counter to the pressures on states to shirk their obligations under *Gideon*, as previously discussed. Because the cost to any public defender system of an PDC Fellow will be significantly less than a full-time public defender salary, participation can come with conditions that further improve the quality of representation. For example, a condition of participation for a partner office<sup>159</sup> might be to limit caseloads, enforce standards, or promote the values of the PDC. The fellowship opportunity also allows the PDC to work closely with public defender leaders who host Fellows to coordinate efforts to improve representation in their jurisdictions.

The PDC represents an opportunity for meaningful indigent defense reform that has not existed to date in America.<sup>160</sup> It is the first national proposal that provides a vehicle for changing the assumptions that drive sub-standard representation in many public defender circles. In recognizing the role that culture change must play in transforming the way counsel to the poor is delivered, PDC promises to enrich the national dialogue. It adds an essential, yet overlooked, component to the debate.

#### V. Making Justice a National Value: The Federal Role in Addressing the Indigent Defense Crisis

America's criminal justice system has deteriorated to the point that it is a national disgrace. Its irregularities and inequities cut against the notion that we are a society founded on fundamental fairness. Our failure to address this problem has caused the nation's prisons to burst their seams with massive

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<sup>158</sup> *Id.* at 8.

<sup>159</sup> A partner office is simply a public defender office that receives a PDC Fellow. In some fellowship arrangements this would be referred to as a "host-site."

<sup>160</sup> As detailed in JUSTICE DENIED there are many thoughtful solutions that address the financial and structural challenges facing indigent defense providers today. At the risk of being redundant, I want to emphasize that these proposals are critical to reform. However, they do not directly address the cultural phenomenon that has so dramatically shaped the indigent defense environment. *Supra* note 65.



overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives.

-- U.S. Senator Jim Webb (Va.)<sup>161</sup>

The federal government invests a significant amount of money annually to support state and local criminal justice initiatives. How that money is allocated says a lot about our national criminal justice values. The Edward Byrne Memorial Justice Assistance Grant Program (JAG) “is the leading source of federal justice funding to state and local jurisdictions.”<sup>162</sup> While it is difficult to get a precise reading on these figures, the National Criminal Justice Association (NCJA) keeps the most comprehensive statistics on federal spending to support state and local criminal justice programs.<sup>163</sup> According to their accounting, approximately \$1.2 billion in JAG funding was provided to state and local jurisdictions.<sup>164</sup> Of that, \$521 million (41%) went to law enforcement;<sup>165</sup> \$216 million (17%) went to corrections and community corrections; \$171 million (13%) went to prosecution and courts; \$135 million (11%) went to planning, evaluation, and technology; \$126 million (10%) went to drug treatment and enforcement; \$75 million (6%) went to prevention and education; and \$31 million (2%) went to crime victims and witnesses.<sup>166</sup> Within this overall spending, only \$3 million went to public defense.<sup>167</sup> This represents an investment of one quarter of one percent of the overall federal commitment to state and local criminal justice initiatives.

America’s commitment to addressing the indigent defense problem is far from commensurate with the magnitude of the crisis as described by Senator Webb and as seen in the many stories of the people who are not given the counsel they were promised. In fact, when the modest federal investment in public defense is compared to the level of national spending used to fuel the over-criminalization agenda, one could easily argue that the federal government now actually contributes to rising levels of injustice. The country simply cannot ask states to live up to ideals that it does not support in its actions. If we are to reform indigent defense in this country, the federal government must make the right to counsel a national value. How the federal government ranks fundamental fairness among other values it embraces should be reflected in the support it gives states for the right to counsel for indigent defendants as compared to its funding commitment in other areas.

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<sup>161</sup> Jim Webb, The National Criminal Justice Commission Act of 2009, [http://webb.senate.gov/issuesandlegislation/Criminal\\_Justice\\_Banner.cfm](http://webb.senate.gov/issuesandlegislation/Criminal_Justice_Banner.cfm) (last visited May 23, 2010).

<sup>162</sup> Department of Justice, Edward Byrne Memorial Justice Assistance Grant Program Fact Sheet, [http://www.ojp.usdoj.gov/BJA/pdf/JAG\\_Fact\\_Sheet.pdf](http://www.ojp.usdoj.gov/BJA/pdf/JAG_Fact_Sheet.pdf) (last visited May 23, 2009).

<sup>163</sup> For more information about NCJA, see National Criminal Justice Association, Homepage, <http://www.ncja.org> (last visited July 29, 2010).

<sup>164</sup> Byrne JAG Funding: A Snapshot from the States, <http://www.iccaweb.org/documents/NCJA-ByrneJAGFunding-AsnapshotfromtheStates-FINAL.pdf> (last visited May 23, 2010). The figures include “grants awarded in 2009, including Recovery Act funds and any other Byrne JAG funds spent in 2009. (This could include funds from FY07, FY08, or FY09).” *Id.*

<sup>165</sup> According to NCJA, “[w]hen combined with direct awards (100% of which go to local law enforcement agencies), the total percentage to law enforcement climbs to 63%.” *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Two common arguments against federal support to states and localities for indigent defense are: 1) it allows states to skimp on their obligation to fund indigent defense, instead passing the cost on to the federal government; and 2) the federal government should not interfere with “core internal affairs of the individual states.”<sup>168</sup> The first argument—that federal support lets states “off the hook” from their obligation to fund the right to counsel—misses the point. States have never been “on the hook.” Their Sixth Amendment obligation has never been enforced. On the contrary, the message sent to the states by the courts is that they need not focus any fiscal energy on counsel for the poor. To make matters worse, although states have a Sixth Amendment obligation to fund effective assistance of counsel, and “no [constitutional] obligation to criminalize and punish any particular behavior, nor . . . to arrest and prosecute any given individual,”<sup>169</sup> there is significantly more pressure to support the latter than the former. Rather than further encourage this unbalanced disparity by widening the already significant funding gap that exists, the federal government should instead seek to correct this disparity and promote fundamental fairness. A compelling argument can be made that the federal government should provide more resources to states for indigent defense than for law enforcement since the former is a constitutional right and therefore of greater importance, and also because the federal government should offset unfairness in state criminal justice systems rather than exacerbate it. At a minimum, federal support for prosecution and defense should be equal.<sup>170</sup>

In response to the concern that funding indigent defense will create a disincentive for state governments to devote resources to the fulfillment of their constitutional obligation, the federal government already frequently uses its purse to encourage states to embrace certain national values. With respect to education, for example, in 2009, President Obama unveiled Race to the Top, a \$4.35 billion initiative designed to award competitive grants to states as an incentive to encourage educational improvement.<sup>171</sup> According to the Department of Education, more than \$10 billion in grant money was available to “states and districts that are driving reform” in education in 2009.<sup>172</sup> With respect to highway safety, federal legislation provides for the Secretary of Transportation to fund state programs that meet certain criteria.<sup>173</sup> These statutes authorize the Secretary to fund grants in order to provide an incentive for states to achieve desired standards.<sup>174</sup> Just as the federal government has used federal funding to encourage improved state performance in the areas of education and highway safety, so too, it could do so for indigent defense.

The second argument against federal funding for state indigent defense—that it interferes with a state function—is equally specious in light of federal involvement in so many other state

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<sup>168</sup> See Luna, *Indigent Representation*, *supra* note 72.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> See JUSTICE DENIED, *supra* note 65, at 201 (Recommendation 13).

<sup>171</sup> See The U.S. Department of Education, President Obama, U.S. Secretary of Education Duncan Announce National Competition to Advance School Reform (July 24, 2009), <http://www2.ed.gov/news/pressreleases/2009/07/07242009.html> (last visited May 23, 2010).

<sup>172</sup> *Id.*

<sup>173</sup> See 23 U.S.C.A § 401 et. seq.

<sup>174</sup> According to the Department of Transportation, approximately \$600 million was provided to states in the form of Highway Traffic Safety Grants in Fiscal Year 2009. See U.S. Department of Transportation, Fiscal Year 2009 Budget in Brief, <http://www.dot.gov/bib2009/htm/NHTSA.html> (last visited July 29, 2010).

functions both within and outside the criminal justice arena.<sup>175</sup> Not only does the federal government provide significantly more funding to the states to support prosecution, law enforcement, and corrections than it does to the right to counsel, it also supports other national values, such as education and highway safety. While some might argue that the federal government should not be involved in any of these state functions, I disagree. There are national values that we uphold as a nation. The protection of our citizenry from crime and violence, the safety of our residents as they travel, and the education of our children, for example, are all values that we, as a nation, embrace and honor. We demonstrate our commitment to these ideals by supporting and encouraging states to live up to national minimum standards. While each of these functions is important, unlike the right to counsel, none is constitutionally mandated. As much, if not more, than these other values, the federal government has a legal, if not moral, obligation to ensure that the states live up to minimum standards of justice and fairness protected through the right to counsel.

States will not reprioritize the right to counsel as a value until there has been a cultural transformation in the criminal justice system. Therefore, the federal government should not only add fundamental fairness in the criminal justice system to the list of values it promotes, but it should invest in models, like that developed by SPDTC, that will drive the cultural transformation necessary to encourage states to rethink their commitments to the right to counsel.

## VI. Conclusion

When I was a young public defender in Washington, D.C., a group of my peers and I would meet regularly to remind ourselves of the reasons we chose this line of work. These gatherings connected us to one another, helping to build a much needed support network, and kept us inspired as we shared and nurtured one another's idealism. It was this community to which we would turn to reassure ourselves of the rightness of our mission when outsiders exhibited so little respect for our work and our clients.

In one such get-together, a close friend, whose parents were very active in the civil rights movement, told us that he chose to be a public defender because he always wanted to be a civil rights lawyer. In his mind, public defense was our generation's civil rights struggle. At the time, I did not appreciate the importance and truth of this sentiment. I associated civil rights with efforts to desegregate the Woolworth's lunch counter in Greensboro, North Carolina in 1960, or to register black people to vote in Mississippi during Freedom Summer in 1964. I knew the work we were doing was important, but I did not see it as civil rights law. Ten years later, the connection would become crystal clear. I moved to Georgia and began working on indigent defense reform across the Southeast. It was my first introduction to the kind of representation that poor people are afforded far too often in much of the country.

In the years since, I have encountered defenders who viewed communication with clients as a waste of time, who did not file basic pre-trial motions to avoid irritating the judge, and who routinely talked about the people they represented with contempt. These lawyers did not begin their public defense work with these negative values; they learned and internalized them from the cultural norms of the systems within which they practiced.

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<sup>175</sup> In fairness to Professor Luna, he suggests the federal government "get out of the business of funding state criminal justice programs altogether." Luna, *Indigent Representation*, *supra* note 72, at 9.

As I began to work with public defenders from across the country and learned more about the environments within which many of them practiced, I saw that these problems were not limited to the South. All across the country politicians are pushed to classify more behavior as criminal and to increase the punishment associated with these crimes. Law enforcement professionals are encouraged to investigate and prosecute crime more aggressively. As we have seen, these forces make it increasingly costly to protect the rights of those suspected of crimes, even as they create a disincentive to invest in the protection of the rights of the accused. Meanwhile, the standard a defendant must meet to prove she was denied her constitutional right to counsel has been set so high that meeting this burden is virtually impossible, and as more and more people are prosecuted, the expectation is that defenders will help process defendants quickly and cheaply. This environment has shaped the assumptions and attitudes of the lawyers responsible for representing indigent defendants. The result has been a culture that makes it difficult to provide meaningful representation to the poor.

While the genesis of this crisis may have been the fiscal and structural barriers to meeting *Gideon*'s mandate, the result has been a powerfully and deeply institutionalized culture that must be transformed. Financial and structural fixes are, of course, necessary. By themselves, however, they cannot provide solutions to the flaws in the existing culture. They are necessary, but not sufficient. If we are to succeed, we must begin to groom the next generation of public defenders to embrace a fundamentally different set of values as they work to fulfill their obligations to uphold the true meaning of the Sixth Amendment. We must identify prospective public defenders that embrace these ideals and place them in jurisdictions in need of change. We must give them the training required to help them learn to practice in ways consistent with these values. And we must provide them intensive mentoring and support as they develop into seasoned lawyers, so that they will internalize these values, making them their own. If we do not do this, the young, idealistic public defenders—our best hope for reform—will be faced with the choice that Marie confronted: to stay and practice in accordance with the existing culture, or to leave.

The SPDTC model of values-based recruitment, training, and mentorship has already proven effective. The partnership between SPDTC and Equal Justice Works is an opportunity to replicate this model nationally. For the reasons described above, however, the states have little incentive to invest in programs that will pressure them to live up to their Sixth Amendment obligations. In fact, the existing system pressures states to continue to move in the opposite direction.

Because fundamental fairness and the right to counsel are important national values that should be prioritized as such, the federal government should take the lead in supporting indigent defense reform. In a speech to the American Bar Association House of Delegates last year, the United States Attorney General recognized the moral imperative we face. As he so eloquently said: "Putting politics aside, we must address the fact that there is a crisis within our nation's system of indigent defense."<sup>176</sup> However, the way the federal government supports state criminal justice initiatives exacerbates the problem, albeit inadvertently, by encouraging existing state priorities without promoting concomitant support for the defense function so essential to ensuring the right to counsel is not swept away in the over-criminalization tide.

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<sup>176</sup> Remarks as Prepared for Delivery by Attorney General Eric Holder at the 2009 ABA Convention, Chicago, IL (Aug. 3, 2009), available at [http://www.abanet.org/legalservices/sclaid/defender/downloads/Attorney\\_General\\_Eric\\_Holder\\_2009\\_ABA\\_HOD.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/Attorney_General_Eric_Holder_2009_ABA_HOD.pdf).

The federal government should instead seek to offset state policies that further marginalize the right to counsel. It should do so not only by providing support that gives states incentives to enact financial and structural reform in the short run, but also by supporting strategies that will change the culture that drives our tolerance for these inequities in the first place. By building a national community of public defenders that embrace a new set of values, we will not only begin to change the course of indigent defense today, but we will also groom the future leaders who will fight to uphold *Gideon*'s mandate.

My former PDS colleague was right: there is no greater civil rights issue in America than what is happening to our most vulnerable citizens in our criminal justice system. Poor people caught in the criminal justice system far too often do not have a chance. They encounter injustices that are driven by political pressure, sanctioned by our courts, and left to fester as the right to counsel remains a hollow promise. As Dante Alighieri said, "the hottest places in hell are reserved for those who in times of great moral crisis maintain their neutrality."<sup>177</sup> There is a moral imperative to correct this injustice.

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<sup>177</sup>See Good Reads, Dante Alighieri Quotes, <http://www.goodreads.com/quotes/show/27510> (last visited July 29, 2010).