

Public Defense

Papers from the Executive Session on Public Defense

What Policymakers Need To Know To Improve Public Defense Systems

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In 1937, U.S. Supreme Court Justice Benjamin Cardozo stated that certain fundamental constitutional rights are the basis for all other rights and that these fundamental rights are “implicit in the concept of ordered liberty.”¹ In criminal trials, the right to counsel is a fundamental right. Since the Court’s 1963 decision in *Gideon v. Wainwright*,² an indigent defendant who cannot afford counsel must be provided an attorney by the state. The Court made the states responsible for how public defense would be provided to criminal offenders who are unable to pay for private counsel. This and subsequent Court decisions led states to adopt public defense systems. Today, many questions exist as to the effectiveness of some of these public defense systems.³

This paper establishes sets of questions to aid policymakers in thinking about the value and effectiveness of their public defense systems and includes several responses to the author’s views by Mark Moore, Daniel and Florence V. Guggenheim Professor of Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, Cambridge, Massachusetts. Because this field is complex and

practices vary throughout the country, knowing where to start can be difficult. Instead of establishing specific outcomes, this paper serves as a guide—a map of questions that policymakers should ask when deciding where to begin investigating public defense services, how to direct field researchers, and how to evaluate the information gathered.

Two serious obstacles to improving public defense systems are the lack of data and lack of systemic policy analysis that state policymakers need to address the relevant issues concerning public defense. Examination of the limited literature in this area reveals the lack of empirical research relevant to improving public defense systems. This paper proposes that policymakers and researchers develop a strategy for formulating relevant inquiries and then gathering current data to assess the effectiveness of a state’s public defense system.

To begin, policymakers must identify why a state would want a strong public defense system and formulate key questions to ask before deciding how best to improve and evaluate their public defense system.⁴ Until a comprehensive

This is one in a series of papers developed with some of the leading figures in public defense during their periodic meetings at Harvard University’s John F. Kennedy School of Government. These 30 members of the Executive Session on Public Defense (ESPD) included state public defender leaders, assigned counsel managers, a prosecutor, a legislator, a social worker, a journalist, and criminal justice experts. In their discussions and resulting papers, they tried to rethink the field of public defense—challenging conventional wisdom and exploring new ways to serve clients and society.

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body of knowledge is established and analyzed, reforms in public defense systems will continue to be difficult.

Value of a Strong Public Defense System

Traditionally, support for a strong public defense system arises from the notion that a defendant cannot be tried fairly in the U.S. court system without an adequate defense. Supreme Court Justice Hugo Black stated in the *Gideon* decision that the “right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”⁵ To achieve justice, an adversarial system structured to search for the truth requires capable counsel for the state and the defendant. In addition, a strong public defense system is a central component of an effective crime-fighting policy to shield poor citizens and, indirectly, all citizens against abuses by the state. It also facilitates a smoother operating justice system and, in so doing, allows the courts to respond effectively to growing caseloads. A strong public defense system promotes the legitimacy of the justice system—legitimacy necessary to maintain public support.

Protection Against Crimes Committed by the State

A strong public defense system is the first line of defense against corruption in the justice system. The state can commit crimes against its citizens by abusing policing, prosecutorial, and judicial

powers. Abuses tend to occur first against poor people who are alienated from the socioeconomic and political mainstreams. The general public may “look the other way” when the justice system abuses members of alienated populations, but this apathy may fuel further corruption in the system.

Widespread corruption can lead to state abuses against law-abiding citizens. Providers of public defense services maintain the system’s integrity and prevent corruption of the justice system. Therefore, a strong public defense system also can help control crime within the justice system—crimes committed by those who abuse state policing, prosecutorial, and judicial powers.

Increasing the Effectiveness of the Justice System

Justice works best when all players within the system are competent and have access to adequate resources. When the system includes well-trained public defenders, cases move faster (helping the court manage growing caseloads), and the system tends to generate and implement innovative programs. With members of such nontraditional populations as homeless and mentally ill people flooding the system, public defenders can act as mediators to facilitate access to special programs that divert these offenders away from crowded jails and prisons. For example, Miami’s Public Defender Anti-Violence Initiative reaches out to a variety of public and private service providers in the community that a defendant might need

Identifying the Value of Public Defense

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

—Mark Moore

to successfully avoid further legal troubles.⁶ By managing caseloads and facilitating effective alternative interventions for special needs populations, public defenders increase the justice system’s capacity to respond to growing demands. In this sense, public defenders assist in the fight against crime and contribute to the effective operation of programs that may help reduce recidivism, thereby increasing the effectiveness of our justice system.

Legitimacy of the Judicial Process

A strong public defense system is essential for maintaining the legitimacy of the judicial process. The public’s belief that the system is governed by fair play is essential for long-term support. Studies show that the public supports the police when its members—and particularly, citizens who live in poor neighborhoods—feel police are playing by the rules.⁷ A strong public defense system allows those most alienated from the institutional mainstream to feel that the system is not stacked against them, even when they break the law and are punished. Among alienated populations, this perception of fairness helps maintain the peace by reducing grievances against the system. When lawbreakers confront a



The Executive Session on Public Defense (ESPD) was designed to encourage a new form of dialogue between high-level practitioners and scholars, with a view to redefining and proposing solutions for substantive policy issues. Practitioners rather than academicians were given majority representation in the group. Meetings were conducted as loosely structured seminars or policy debates. Between 1999 and 2001, ESPD met 5 times. During the 3-day meetings, the 30 members discussed the facts and values that have guided, and those that should guide, public defense.

fair justice system, they get the message that the public values the law. When lawbreakers confront an unfair justice system, they get the message that the public values power and privilege, instead of the law.

Research To Guide Policymaking

A significant problem facing policymakers is the lack of comprehensive research to guide public defense policy and reform. Advocates for improving public defense services debate issues regarding the best way to deliver quality public defense services, with a strong bias in favor of enhancing public defender offices. As expected, advocates favor spending more money rather than less on these services. For policymakers, however, a basic obstacle to promoting reform is the lack of systematic research to guide policy development. Consequently, efforts are under way to gather data, set standards, and measure outcomes.

Obstacles to Gathering Data and Setting Standards

A major obstacle to gathering data is the inconsistency in the delivery of public defense services among systems nationwide. This makes it difficult not only to gather data but also to make comparisons between systems. According to The Spangenberg Group (a nationally recognized research and consulting firm that specializes in improving justice programs), most states deliver public defense services using a public defender's office (18 states) or a combination of public defender, assigned counsel, and contract defender (another 29 states).⁸ Only three states rely mainly on an assigned counsel system, with or without contract defenders. States vary also in how they regulate public defense systems. Most develop minimum state standards, whereas others provide minimal state oversight with more local control.⁹

Another obstacle to gathering relevant data and making comparisons is that funding levels for indigent defense services vary among states. A Spangenberg Group survey finds that 21 states fund public systems and the remaining states rely on county funds or a mix of funds derived from county, state, and court filing fees. The survey finds that assigned counsel's hourly compensation at felony trials (noncapital cases) varies significantly among states, with some paying less than \$40 for in-court services, with a maximum benefit of \$1,000, and others paying up to \$60, with a maximum benefit of \$3,000. Because funding for defense services is affected by a wide variety of local circumstances, calculating and comparing funding levels among states is difficult.

Further, federal research funds for the defense lack parity with those for prosecution and law enforcement; this has not motivated the research community to develop a basic research agenda as a starting point for informing policymakers on public defense operations. Moreover, state legislatures have been reluctant to provide resources to research state and local public defense concerns. One reason for this reluctance may be that policymakers have not been clear about why the research is needed or what is required to achieve it. Another reason for this reluctance may be society's—and thus legislators'—ambiguous commitment to funding public defense services. Because of this lack of funding and general interest in defense research, individual policymakers concerned with public defense issues must start from scratch to identify areas for data collection that will ground future decisions in fact rather than anecdote.

In summary, reasons for the lack of research data and analysis in public defense services include little federal and state funding, a weak political constituency for public defense, and no nationwide uniformity of state defender services. What is needed is a national infrastructure for

Costs of Quality

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

—Mark Moore

public defense service providers, which would serve as a clearinghouse for research and other information.

Developing a Research Agenda

Localities need a research agenda to collect accurate and useful data, establish standards, and identify better practices in public defense systems. Each locality should establish agreed-upon standards and provide support to defense lawyers to meet those standards when representing the indigent accused. In 1997, the National Legal Aid and Defenders Association's Blue Ribbon Committee on Indigent Defense stated that indigent defense systems need “well-researched, reliable, nationally accepted standards.”

A policy research agenda that guides systemic reforms should identify *prima facie* elements that are known components of quality defense. Quality representation of a targeted group requires identifying core elements that make a system efficient, fair, cost-effective, and productive. Support for one aspect of a public defense system will affect other

elements of the system. To make informed decisions, legislators and system designers must consider the interrelationship of all elements within a public defense system.

Before beginning to collect data and study local public defense services, a research agenda must be designed. In previous literature concerning public defense, the most basic questions have not been answered in a systematic way and, apparently, cannot be easily answered for particular localities without a well-established research agenda.

Research must provide hard facts to progress from general to specific operational strategies directed at improving public defense services. The research should provide the knowledge to

- Develop standards for providing quality public defense services.
- Determine funding needed in a locality for a public defense system to meet agreed-upon standards.
- Monitor compliance with standards.
- Design and measure performance to justify investments in public defense.
- Determine operational procedures that can be improved to increase performance.

State financial expenditures made without understanding how best to achieve these policy goals will not serve the criminal justice system well—nor will they serve the growing number of individuals who cannot afford to hire defense counsel. The minimum expectation for indigent defendants is that they receive a competent defense that meets minimum constitutional standards. However, until an adequate defense—one that extends beyond basic constitutional requirements—is defined and made operational with standards, no significant progress will occur in improving defense services.

Standards for Public Defense Systems

Although the American Bar Association has established some minimum standards, they must be revised for modern defense systems. Others have articulated general standards for public defense systems, including James Neuhard, Director of the Michigan Appellate Defender Office, and Scott Wallace, Director of the Defender Legal Services for the National Legal Aid and Defender Association. With the advice of other public defense leaders, they have written “The Ten Commandments of Public Defense Delivery Systems,”¹⁰ which provides guidance for creating standards that define quality in defense systems.

With literature reviews and case studies, these Commandments may be refined to satisfy the needs of a specific locality. If developed with accurate case studies, they could aid policymakers substantially. To build on Neuhard and Wallace’s Commandments, a policy research strategy should examine the many dimensions at work in a public defense system and identify what information needs gathering, what needs reform, what impact those reforms will have on other parts of the system, and how to make the proposed reforms.

Nine Elements of a Research Strategy

The following list highlights nine major elements to include in developing a public defense research agenda. The research agenda needs to examine the structural characteristics (elements one through six) of the public defense system first—those that make it independent, determine workload capacity, and determine how to organize and prepare for its work. Next, it needs to examine the quality of services provided, using the last three elements—notification time, access to counsel, and overall quality of representation.

Independence. How do mechanisms used to appoint and compensate counsel affect the independence of counsel to engage in a vigorous defense? Indicators need to be developed to assess the extent to which appointment and funding are removed from parties that can pressure defense counsel into engaging in less than a vigorous defense to satisfy court processes or funding goals.

Coverage. What is the target population to be served? How are requests for counsel screened for eligibility for the appointment of counsel? The eligibility criteria should allow a range of populations to be served, from a minimal number of defendants who meet only very strict definitions of indigence to a larger number that includes marginally indigent defendants, who can be served using copayments.

What eligibility criteria will be established for appointing publicly supported counsel? The Constitution establishes the basic concept of right to counsel regardless of ability to pay. But it is much less clear on the question of what constitutes indigency for deciding who will be eligible for publicly supported counsel. For example, what will be measured—wealth or income? Will the capacity to pay be calculated for the particular individual or will resources of extended family members be considered as well? What will be the cutoff point for eligibility? Obviously, eligibility is an important design feature because it influences the overall size of the potential client population and workload of the system.

Workload. Are mechanisms in place to monitor properly the workload handled by each defender? Workload is a measure of the capacity to do the job and the demand. It is thought to be related to quality but is not a direct measure of quality representation. Closely tied to the issue of defense counsel qualifications and case complexity, workload measures need to be developed to

The Ten Commandments of Public Defense Delivery Systems

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

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

Thou shalt . . .

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

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

3. Screen clients for eligibility, then assign and notify counsel of their appointment within 24 hours. Counsel

should be furnished upon arrest, detention, or request, and in no event more than 24 hours thereafter.

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

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

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

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

should represent the client throughout the direct appeal.

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

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

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

guarantee the capacity of counsel to properly handle their cases. For example, in some states, such as Tennessee, workload measurements are more accurate because analysts use weighted caseload measures.

Qualifications. Are mechanisms in place to guarantee that the abilities of defense counselors match the complexity of the cases to which they are assigned? Criteria that categorize counselor qualifications in relation to their types of cases establish a baseline for evaluating whether qualified defense lawyers are provided to the accused. Generally, qualification standards are thought to ensure quality representation, but qualifications are not a direct measure of quality.

Support Services. Are mechanisms in place to access current research materials, investigators, expert witnesses, and sentencing specialists? Developing standards for minimum support services needed for specific types of cases is essential in the calculation of adequate support services. Like workload and qualifications, support services are thought to be an attribute of quality but not a direct measure.

Training. Are mechanisms in place to require specific training or continuing legal education for defense counselors? Training is essential for defense lawyers to maintain their skills, particularly in areas that require special expertise (for example, defending convicted sex offenders who are eligible for post-prison sentence civil commitment under the new civil commitment statutes adopted in some states). Training also may help retain a racially and culturally diverse public defense bar.

Notification Time. How long does it take for counsel to be appointed and the defendant to be notified of the appointment? The speed of appointment affects the counsel's ability to influence early stages of the criminal prosecution process and the defendant's ability to be

released on bail and gather witnesses and other resources to prepare the defense. Notification time is a feature of quality representation that may be valued by both society and the client. It is thought by both to be a direct but incomplete measure of the quality of representation in a case. However, the cost associated with providing short notification time is that a number of lawyers must be on duty to respond around the clock. A consequence of this readiness for peak workloads and quick response is that this same capacity is available even when the demand for legal services is low.

Access to Counsel. How are defendants granted access to counsel and how is confidentiality protected? Access to counsel is closely related to notification time and may affect costs significantly. Organizational structures can facilitate or handicap access to counsel and confidentiality, which in turn can impact the effectiveness of attorney-client interactions.

Overall Quality Representation. What is the actual quality of performance in representing individual clients—as judged by clients and as judged against professional standards?

It may appear that the nine elements listed above are arranged in a sequence that moves from “policy” (legislative interest and action) to “operations” (left to the discretion of system managers), but this is not necessarily the case. Legislators may believe some aspects of service quality are fundamental to public defender offices, and consequently, lawmakers may design policies to limit or guide the discretion of system managers. Thus, the kind of justice lawmakers intend to produce will affect the operational features of the system as system managers implement policy.

Courts, too, can mandate performance standards that identify attributes of quality that must be met. As mentioned in the nine elements above, the need for

defendants to see their counsel early is an apparent operational standard that both legislatures and courts may specify. Whether or not standards mandated by legislatures or courts are higher or lower than one another, the challenge for system managers is to calculate the costs to meet the specified standards of quality.

The development of national standards in the areas highlighted above may provide a comparative benchmark. Therefore, reform advocates need to show policymakers how a public defense system can be improved by focusing, at least initially, on the critical issues above. For example, it would be powerful for case studies to reveal that

- A system's target population omits a large group of marginally poor people who cannot afford a quality defense.
- Appointment notification time is longer than in most other systems.
- Discretionary appointments, which are made by judges and follow no established guidelines, have a negative impact on the independence of counsel even if access to counsel is adequate.
- Qualification standards for counsel are not present.
- Workloads are not monitored and may be excessively high.
- Support services are lacking.
- Continued education and/or training are not required.

By defining the elements of the public defense system and implementing standards and practices, the quality of systems may be measured. In similar localities (outside and inside a state under examination), the evaluation of an individual defense system may also allow other systems to revise their policies based on the one evaluation—creating a more efficient and fair public defense system nationally.

Desired Outcomes Judged by Whom?

"In the provision of public defender services, a gap appears between the practical results or outcomes that the society desires and what the individual client desires. Society may want crime control and low cost. The client wants effective defense of his liberty interests and is not concerned with costs. The way to close this gap is to return to the original idea that what everyone should want in providing public defender services is not any particular outcome such as more or less crime. The society should be interested in ensuring that its criminal justice system operates justly, and should understand that that means providing adequate defense services to those who cannot pay to defend themselves. That is the outcome they seek: justice at low cost, not crime control. The client should understand that he is entitled to a quality defense, but that his idea of a quality defense may not be exactly the same as society's view.

The difficulty in looking at public defense services in terms of alternate outcomes is that traditionally the most important outcomes have focused on an accused person's liberty interests, or a reduction of state supervision, or a reduction of state supervision to a less intensive form. A defender's traditional role is to defend the liberty interests of a client against the state's desire to bring the defendant under state control. In principle, we could even measure this outcome: by measuring the total number of years in prison saved by the efforts of public defenders. The difficulty with this view of measuring outcomes of public defenders is that society as a whole may not think this result is particularly valuable. From a social perspective that values crime control over many other competing values, the idea that we use public funds to produce freedom for accused criminals seems perverse. But from a client's perspective, this does not seem perverse at all.

One can imagine a variety of outcomes other than improving the overall quality of justice in society, such as providing services to address the client's underlying problems. Defendants might feel better treated by the society, and with that, somewhat more willing to accept the judgments offered. It is even possible that effective criminal representation focused on finding just and effective dispositions for defendants might reduce crime over the long run. And, as a consequence, effective dispositions might reduce the overall number of people in prison and relative costs imposed. These are potential benefits for both the society and the individual service recipients. In that respect, these beneficial outcomes are like the results that we anticipate for other kinds of social service programs."

—Mark Moore

Defining and Measuring Outcomes

What is the market value of quality representation? This key question must be answered in order to address funding decisions. In the theory of a pure free market system, if the price paid by the state or county for defending an indigent in a criminal case were not competitive, no competent lawyers could be hired. A system that pressures bar members to participate in a public defense market reduces competitive forces. A system that treats all lawyers as if they were of equal competence also reduces the competitive forces by allowing "rookies" to bid for jobs that would be more difficult to get in a free market. Under these circumstances, the state or funding agency has the upper hand and the private sector ends up subsidizing the provision of defense services—just as privately insured individuals subsidize the health care of uninsured indigent patients.

This harsh market reality will be hard to change unless evidence clearly indicates

that a given locality's level of public defense funding adversely affects standards and outcomes for indigent offenders. Without better defined standards and outcomes, it will be difficult to address the issue of what is adequate funding for public defense. Clearly, systems that have been neglected to the extent that they are unable to meet basic standards in the areas delineated earlier can be taken to task for providing too little funding. When the systems seem to meet the basic requirements, however, the question becomes, what would additional funding buy in outcomes for defendants—greater client satisfaction? More litigation? That their voices be heard? If public defense lawyers are paid a lower fee than private lawyers for defending comparable cases, will indigent defendants be more likely to be indicted, incarcerated, denied some other benefit, or to receive longer sentences?

Few studies, according to a review of the literature conducted by Feeney and Jackson in 1991, "have closely examined

the relationship between level of resources and quality representation."¹¹ Opinion surveys of judges, prosecutors, defense lawyers, and defendants show that these players perceive private attorneys to be more effective. However, statistically, defendant cases that are examined reveal no evidence to support this perception.¹²

Sentencing studies that consider type of counsel have produced mixed results. "The more controlled the sentencing study is, the more likely that the type of counsel will have no effect on case outcome."¹³ No empirical evidence links what outcomes are expected at higher levels of funding with those achieved at lower levels of funding. Therefore, policymakers and legislators must ask the following questions of defense systems with fewer financial resources. Will better-funded defense systems

- Help the judicial system process cases faster?

What Are Valued Outcomes?

“Tony is correct to want to define more clearly the outcomes society seeks through the provision of public defender services, and to get some quantitative indicators of the extent to which the desired outcomes are achieved. He may be right to try to value the outcomes in terms of some kind of ‘market value’ so that the benefits can be directly compared with the costs of providing the services. This is all part of public defenders’ being accountable not only to their clients for providing a quality defense, but also to the public and their representatives who are paying the costs of providing the service. It is certainly important in making appropriation decisions that the legislature have some idea of the costs of providing different levels of quality defense.

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

—Mark Moore

- Provide better pretrial and sentencing alternatives?
- Provide better coordination of support services?
- Increase public confidence in the justice system?
- Decrease the errors that deny defendants’ rights, without increasing public safety risks?

Obtaining better research data is a critical first step to answering these questions. Operational research also can be used to improve service delivery. For example, research can be used for “spot” quality control checks—such as uncovering problems with the billing practices of assigned counsel or identifying areas of billing and accountability that can be improved—and for monitoring caseloads and workloads to maintain quality.

Conclusion

Defense lawyers are a necessity, not a luxury, in any criminal justice system,¹⁴ but it is important to identify the best ways to provide public defense services before deciding on funding. This nation’s

defense systems need a national research agenda to generate critical information to guide state or local policymakers who may be struggling to improve their systems. Such information will help policymakers develop standards for public defense services, understand how achieving these standards will affect funding, and design performance measures to demonstrate the returns and generate higher investments in public defense systems.

Strong advocacy is an inherent quality of the public defense lawyer culture, driven by the conviction that these attorneys and other advocates have “their hearts in the right place.” However, emotional zeal is not enough in an era that requires hard facts to influence policymaking. Today, this vein of zealous trial advocacy struggles against a lack of relevant policy analysis to guide and influence the enactment of policies that affect the defense function.

With the controversial issue of public outlays for the legal defense of alleged criminals, the lack of hard facts makes it especially difficult to enact effective policies. Anecdotes about particular abuses

of indigent defendants are countered by anecdotes of injustices to victims. Without accurate empirical information on what to reform, how best to reform it, and what outcomes to expect, it will be difficult to achieve the consensus necessary to improve public defense services.

For More Information

More information on public defense is available from the following organizations:

U.S. Department of Justice:
www.usdoj.gov

The Gideon Project, Open Society Institute: www.soros.org

National Legal Aid Defender Association (NLADA): www.nlada.org

The Spangenberg Group:
www.spangenberggroup.org

Vera Institute of Justice, National Defender Leadership Project:
www.vera.org

American Bar Association, Division for Legal Services: www.americanbar.org/legal-services

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Jo-Ann Wallace, Chief Counsel
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Henry Weinstein, Legal Affairs Writer
Los Angeles Times
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The Brennan Center for Justice at New
York University School of Law:
www.brennancenter.org

National Association of Criminal Defense
Lawyers, Indigent Defense Council:
www.criminaljustice.org

National Equal Justice Library,
Washington College of Law, American
University: <http://nejl.wcl.american.edu>

Several Bureau of Justice Statistics
reports address public defense findings,
including

Steven K. Smith and Carol J. DeFrances,
Indigent Defense, Bureau of Justice
Statistics Selected Findings, February
1996 (NCJ 158909)

Carol J. DeFrances and Marika F.X.
Litras, *Indigent Defense Services in Large
Counties, 1999*, National Survey of
Indigent Defense Systems, 1999,
November 2000 (NCJ 184932)

Notes

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

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

3. Throughout this article, the term “pub-
lic defender” refers to all public defense
lawyers, including professional full-time
public defenders, assigned counsel, and
contract lawyers. A public defender office
is a publicly funded agency that hires

lawyers and various support services to
provide indigent defense. An assigned
counsel system relies on the assignation
of defense counsel by an appointed
authority (usually the judge or a de-
signee), and the defense counsel are pri-
vate practice attorneys paid a standard
fee. In a contract system, the funding
agency contracts with private law firms,
which provide their services at a con-
tractual rate.

4. This bulletin does not address public
defense issues in capital cases.

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

6. National Legal Aid and Defender
Association, “Community Partnerships,”

in *Indigent Defense*, Vol. 3, No. 2 (May/June 1999).

7. See e.g., Blaine Harden, “Poll Shows City’s Blacks Fearing Brutality and Bias but Optimistic on Future,” *New York Times*, June 26, 2000, at A29. “Black residents of New York City are afraid of being brutalized by the police, but they welcome and appreciate officers who keep criminals out of their neighborhood.” *Id.* at A29.

8. For a more complete explanation of how defender services are provided, see Robert L. Spangenberg and Marea L. Beeman, “Indigent Defense Systems in the United States,” *Law and Contemporary Problems*, Vol. 58, No. 31 (1995). Maine and North Dakota are two states

that have no public defender system across the entire state.

9. The American Bar Association, along with most states, has established written guidelines. See e.g., *ABA Standards for Criminal Justice: Providing Defense Services, 3d Edition* (Washington, DC: American Bar Association, 1992), www.abanet.org/crimjust/standards/defsvcs_toc.html. State standards for public defense practices can be accessed on the National Legal Aid and Defender Web site (www.nlada.org).

10. For complete text, see www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm.

11. Floyd Feeney and Patrick G. Jackson, “Public Defenders, Assigned

Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?” *Rutgers Law Journal*, Vol. 22, No. 361, 410 (1991).

12. *Id.* at 408.

13. *Id.* at 338.

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

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