



*National Symposium on*

# **INDIGENT DEFENSE**

# **2000**

*Redefining Leadership for Equal Justice*

Washington, D.C. ● June 29-30, 2000

**A Conference Report**



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## *Acknowledgments*

The Office of Justice Programs (OJP) acknowledges with great thanks the members of the Indigent Defense Symposium 2000 planning committee for their contribution in shaping the two day program addressing multi-faceted approaches to "Redefining Leadership for Equal Justice." Committee members included Robert Appel, Office of the Defender General, State of Vermont; Adelle Bernhard, Pace University School of Law; Cait Clarke-Shister, Harvard University; Helen Fremont, Massachusetts Committee for Public Counsel Services; Michael Judge, Chief Public Defender, Los Angeles County; Kristen Levingston, The Vera Institute of Justice; Patricia Puritz, Juvenile Justice Center, American Bar Association, Robert Spangenberg, The Spangenberg Group; Jo Ann Wallace and Scott Wallace, National Legal Aid and Defender Association.

OJP would also like to thank Cait Clarke-Shister and Scott Wallace for their contributions to the tone setting sections of the document summarizing the Symposium proceedings and report out of the state delegations.

Finally, OJP would like to acknowledge Attorney General Janet Reno, whose support and commitment to the improvement of indigent defense services made this project possible.

## *Remarks of Attorney General Janet Reno*

Last year's inaugural National Symposium on Indigent Defense has been characterized as a milestone. The Department of Justice brought together nearly 300 people from all spheres of the criminal justice system and from all levels of Government to focus on making indigent defense services stronger and more effective. We think it was a success. I hope so, but I know from my point of view that it was a great step forward and I want to thank the outstanding efforts of Mary Lou Leary, Nancy Gist, so many other people in the Department of Justice who made this possible.

This year's meeting is taking place at a critical, perfect time for such a meeting to occur. In recent months the American people have begun a national conversation about innocent people who are wrongfully convicted, and about the importance of competent counsel in the criminal justice system. Columbia's Law School's study recently reported that nearly 40 percent of death penalty convictions overturned on appeal during the period of 1973 to 1975 were overturned for reasons attributed to ineffective assistance of counsel.

We must be careful about generalizing from a small subset of the more than 10 million cases processed annually by our criminal justice system, but these cases reinforce a central truth: our system will work only if we provide every defendant with competent counsel. In our system, all defendants are presumed innocent until proven guilty, and all defendants are entitled by our Constitution to a lawyer who will provide effective assistance.

I think this represents the larger problem of how we make the law real to all Americans, how we make it something more than just the paper it's written on, and I think access to justice and access to the law is one of the most critical issues we face in America today.

A competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor's case, both to test the basis for the prosecution and to challenge the prosecutor's ability to meet the standard of proof beyond a reasonable doubt.

A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence. I am fond of saying in the first month that I served as a prosecutor one of Miami's noted defense lawyers came to me with colored charts and other paraphernalia before we had charged and said, now, this is what I think you can prove, but these are the gaps, and it was one of the best examples I have ever seen of representation, because he took me through it step by step, exposed the gaps, cross-examined me, if you will, and his defendant, or his client was not charged.

A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted, and I would add another thought. A competent lawyer, if he or she possibly can, will help their client address the problems that caused the crime in the first place and help them solve the problems so that it does not occur again.

A competent lawyer will help his client explain themselves to him, and he will help explain the client to others. He will build bridges, and fill gaps in the client's life as well, but it is the digging characteristic of a competent lawyer that is so important to me.

One of the things I missed most, and I relish the opportunity when I can get into it either arguing a 10-minute piece of a case in the Supreme Court or digging on an issue, is just the opportunity to dig and dig and dig and get to the truth, and so the competent lawyer needs more than just his or her competence. They need the investigate tools to go with it, because the search for the truth is often illusory if you have neither the time nor the tools to supplement your competence.

Although there has been much discussion of late about the remarkable forensic capability of DNA identification and its capacity to exonerate the wrongfully convicted, there is a relatively narrow universe of cases in which DNA evidence is both available and material.

In the end, a good lawyer is the best defense against wrongful conviction and, I would add, a good prosecutor might equal them by not charging the person in the first place, and the good defense lawyer who fills in the gaps or points out the gaps can aid and abet that effort. In short, we should all have one common goal, that justice be done, justice be done according to the Constitution, and if we have competence and resources and tools and time in balance we ought to do so much more in achieving that goal.

In this room today and around the country, there are many remarkable lawyers who represent indigent defendants. You deserve this Nation's respect and our highest praise, because day-in and day-out you all do your best, with very few pats on the back. The cause you serve, helping poor people charged with crime, has never been popular, yet poor defendants make up about three-quarters of all felony defendants, and many of the lawyers who represent these clients face overwhelming obstacles in their efforts to provide quality representation.

I think to address these issues we must look at several key issues. First, we must recognize the critical role of indigent defense services in the criminal justice system. Too often, there has been a tendency to see defenders as standing separate from the criminal justice system when, in fact, all components of the system are tightly interwoven. Defects in one part of the system have a measurable impact on the rest.

When we create a new drug court in a community, it's not going to work unless there is strong indigent defense representation at the table.

When we set up a re-entry program for offenders coming back from prison, we must include the indigent defense representative at the table, or the program won't work.

When we do State-wide or county-wide planning on criminal justice, we have to ensure that we provide the same level of support and oversight for indigent defense services that we provide for other agencies and functions, or our criminal justice system will not be a system and it won't work.

Secondly, we must strive to implement helpful standards for indigent defense, standards that cover, among other things, skills and experience and appropriate work loads for indigent defense offices. The Department of Justice has compiled a soon-to-be-released five-volume compendium of standards. I hope that these volumes will enable State and local governments to compare standards from other jurisdictions and come up with their own, and we should explore ways to create incentives for counties and agencies to meet standards for competent indigent defense. Indiana, for example, now reimburses counties for a fixed portion of their indigent defense costs when those counties comply with certain minimum standards designed to improve the quality of indigent defense. We should follow that example.

Third, we must devote sufficient resources to indigent defense. I have supported in the past, and will continue to support efforts to have Congress appropriate funds to pay court-appointed public defenders at least \$75 an hour in Federal cases. I hope that State and county governments will look at their compensation levels for indigent defense lawyers and ensure both that they are sufficient to attract counsel with a high level of skills and experience, and sufficient to hire enough lawyers, investigators, and administrative staff to handle the overflowing caseloads.

Now, at the same time that we work to secure these resources, we must make sure that we put in place cost-containment measures to keep defense costs from becoming excessive, otherwise there will be some irate prosecutor like me who said, Bennett, what are you doing this for? Why can't we do it this way better?

Fourth, we must insist that the indigent defense community, in acquiring essential training and technical assistance, be provided with what is necessary to do the job. Every time I turn around, whether it be in policing, in prosecuting, in judging, in providing defense, training can make such a difference, training from people who have been through it, who understand what to look for, how to do it, how to prepare, how to dig and dig some more, and some more.

Understanding the latest technology used in crime analysis no longer is a luxury for an attorney who is defending or prosecuting a criminal case, and public defenders need access to training resources to the same degree that Federal, State, and local prosecutors have the same.

Fifth, we have to gain a better understanding of just how well or how poorly indigent defense systems in this country are faring. The last comprehensive national survey of indigent defense systems was released 20 years ago, although a new survey is now in progress with funding from the Department's Bureau of Justice Assistance. When the new survey is complete, we must study it carefully so that we can focus our attention on those systems with the greatest need.

Finally, although we may be adversaries, the criminal justice system must work in collaboration. I see wonderful evidence in this room of the collaborative spirit that can make the system work. Public defenders have traveled here from their home districts and brought with them judges, prosecutors, police, corrections experts, legislators, county budget officials, bar leaders, and academics. You are all, by the fact that you're here, problem-solvers who have come here to really listen to each other and then return home better able to work together in improving the justice system.

I applaud all those who are not defenders who are here today, who have made themselves available to participate in this symposium. I think your attendance is particularly important, because it is a testament to your commitment to fairness in our justice system.

At the Department of Justice we have tried to make collaboration the foundation for our work in indigent defense. We have used the model of collaboration to pursue exciting projects like our funding of the national defender leadership project run by the Vera Institute, which helps public defenders in management roles build coalitions, marshal resources, and garner support for their organizations.

We have also joined forces with the American Bar Association in funding the Juvenile Defender Training and Technical Assistance Center, which now serves as a long-overdue support system for the juvenile defense bar. This will give the members of that bar a forum for networking, creating partnerships, exchanging information, and participating in the national debate over juvenile crime, and I am looking forward to participating in the first official meeting later this year of the American Council of Chief Defenders, which will be a strong coalition of defenders to address common concerns in the criminal justice area.

When people work together to develop a juvenile diversion program, for example, prosecutors and defenders do not compromise their adversarial roles, but they are able to achieve a result that is good for defendants and good for society if both work together according to their respective roles. The same dynamic operates when law enforcement prevention and treatment specialists put their heads together and come up with a plan to reduce drug abuse in a specific community. The idea is to form a two-way street so that ideas and assistance can flow in both directions in order to further a larger goal, a fair and responsive criminal justice system.

The challenges that we face on indigent defense across the country are great. We cannot expect the defender community to make these improvements on its own. We need the voices of judges, prosecutors, legislators and others. We need to reach out to the business community and let them understand the mathematics of doing it in a way that's spread too thin, or doing it the right way, and letting them know that if they don't appreciate anything else, the return on their dollar is going to be much more effective if it's done the right way.

We must all enhance and publicize the role of an indigent defender as someone who gives practical meaning to that wonderful document, the Constitution, and as someone who is essential in achieving justice. We must explain to lawmakers and the public how the failure to fully fund the indigent defense system in the long run imposes more cost in more ways than one, both on the defendant, but on the community as a whole.

We must all explain that when public defenders are overworked and underpaid, staff turnover will be high, cases will have to be relearned, and more frequent recruitment and training costs will be incurred. There will be more continuances, and more continuances, and we must all explain that if a criminal case goes to trial with a lawyer who lacks competence, and a conviction is subject to reversal by an appellate court, and we have to start the whole cumbersome process all over again, it is going to cost a lot more.

The prosecutor, the judge, the victim, the police officers and other witnesses will have to go through a second trial. The human costs are too great to ignore.

We have all been working on and talking about this issue for a long time, but things are different. People are beginning to listen. Now is our chance, working together, to make real progress. Let's seize the opportunity and press for the improvements that are needed.

The administration of justice is among the most important tasks in any society. In these 7-1/2 years I have had ministers of justice, attorneys general, prosecutors, and even prime ministers come to the conference room of the Attorney General's Office from emerging democracies around the world. At first they come with stars in their eyes, with great hope, and with real spirit, because it is such an exciting challenge. Then they come back, sadder, wiser, more frustrated, and then sometimes they fail, and one of the things that I have been reminded of is how fragile, how frail the institution of democracy is, but I have also been reminded that it comes close to being a miracle, a miracle that people can use that Constitution over 200 years again and again to protect our citizens against tyranny, and to use it as it evolves with technology that our Founding Fathers never dreamed could exist.

But it is some thing that we cannot take for granted, and it is something that requires constant vigilance, and it is something that requires the rule of law to assist it in protecting individual rights.

Your role is so vital in that. We must do it fairly, and I would ask all of you to address in the months ahead what I think is also one of the great problems we face in America. How do we make sure that young people who don't get a good start in life, how can we make sure that at every step along the way the criminal justice system takes steps to correct that problem so that they don't get into trouble, or they don't get into trouble again?

We can stand at the end of the line and watch disparity in filings, disparity in punishment, but where we should also be focusing our efforts is in up-front efforts to keep people out of trouble, to keep people out of detention, to keep people out of secure detention and in home detention, to keep people in the juvenile justice system, to keep people out of long-term minimum mandatory sentences, to keep people away from the death penalty, and that is going to require an effort on the part of us all to achieve if we can.

But I think we can, because we have a sense of collaboration, a spirit that can bring us together to focus on young people who are about to get in trouble, or who have been in trouble, and through project reentries, through work with others, we ought to give to young people a chance, a true chance to get off on the right foot after the system has worked fairly.

There are so many things to do, but I look forward to working with you in every way that I can in the time I have remaining in this job, however long that may be before January. And then after that, after my trip in my red truck, I look forward to working with you all in every way that I can to see that we build in America true access to justice for every single American. Thank you for all you have done to try to achieve that goal.

Janet Reno

June 29, 2000

## *Overview*<sup>1</sup>

The Second National Symposium on Indigent Defense was called to encourage criminal justice professionals and defenders to work together to protect the innocent, promote the integrity of the criminal justice system, and restore public confidence in the criminal justice system. A robust indigent defense system is vital for ensuring justice and helping our communities gain trust in the criminal justice system.

The first national symposium on indigent defense, in 1999, led to concrete steps toward building coalitions to improve the indigent defense system across the nation. The subtitle for this second symposium, “Redefining Leadership for Equal Justice,” proclaims two important additional messages:

- First, improving indigent defense is not an end in itself, but an indispensable means of advancing the most fundamental purpose of our justice system – the enduring, uniting principle inscribed above the portal of the U.S. Supreme Court: “equal justice under law.” When individuals stand accused by their government of committing criminal offenses, a vigorous and independent indigent defense system, resourced in parity with the prosecution, promotes both fairness and the public’s faith in the justice system.
- Second, our shared quest for equal justice commands joint leadership as well. Police, prosecutors, judges and legislators do not gather around this leadership table out of charitable concern for a disadvantaged separate agency, but because we are all conjoined pieces of a single system, directed toward our shared goals of justice, fairness and balance. Indigent defense is not somebody else’s business; its vitality and quality affirm the legitimacy of our system’s outcomes, and inspire all of us to the highest professionalism. Just as it is the responsibility of any individual judge or prosecutor not to allow a trial to proceed when the defender is asleep or otherwise obviously impaired or incompetent, so too is it the duty and the mission of the leaders of each component to work together to ensure that the indigent defense function across the jurisdiction is not impaired.

Recent major attention to death penalty cases, innocence and DNA testing has focused public and media attention on inadequate defense systems, and provided support for the common perception that only defendants with money can receive effective representation. Awareness is growing that indigent defendants frequently do not receive effective counsel as guaranteed by the U.S. Constitution, and that instead, they are assigned incompetent, overworked, or underfunded defenders, who simply cannot do their jobs. If the criminal justice system is to rebuild national trust and confidence, it must rebuild the indigent defense system.

The majority of public defenders are dedicated to justice and work hard for their clients, despite high caseloads and few resources. However, far too many jurisdictions lack the financial capital or political will to provide adequate funding, staffing, and access to technology like DNA testing. “While our Constitution guarantees the right to effective counsel in criminal cases, that right is very unevenly applied throughout the country,” observed Mary Lou Leary, Acting Assistant Attorney General.

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<sup>1</sup> Opening and Welcome Remarks, Thursday, June 29, 2000. Moderator: Mary Lou Leary, Acting Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Washington, DC; Nancy Gist, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Washington, DC.

Cases are continued because there are not enough defense attorneys; cases are reversed because of ineffective counsel; and innocent people are serving time in jails because they did not have effective representation. “I would so much rather go into court and face a well-trained, well-prepared defense counsel, than win a case and see it reversed on appeal due to inadequate representation,” said Leary.

Public opinion favors a system that is fair and not biased against people without the resources to buy a lawyer’s time, explained Nancy Gist, Director of the Bureau of Justice Assistance. “The public understands that access to justice in this country unfortunately is largely determined by the quality of the representation that you receive, and the quality of representation that you receive is largely determined by the money you have to pay for it.”

The justice system needs to become a partner with the community. Then it can respond to these and other community concerns with deeds, not words, and with the money, technology, partnerships and resources to meet demands for defense. “As justice leaders, we cannot say, on the one hand, that the right to counsel, and fairness and consistency are important, and on the other, continue to provide grossly inadequate funding ... to the leg of the justice system that already has the least support,” said Gist. Indigent defense must become a full partner in the justice system, not just a competing demand.

To bolster indigent defense, the Bureau of Justice Assistance has supported several initiatives, among them: the National Defender Leadership Program (with the Vera Institute of Justice), the American Council of Chief Defenders (with the National Legal Aid and Defender Association), the Executive Session on Indigent Defense Systems at Harvard University’s Kennedy School of Government, and a series of publications on indigent defense topics, such as technology, caseloads, and collaborations, as well as two national symposia on indigent defense.

“How we treat the poor reflects on all of us, especially those of us in the justice business,” said Gist. The combined efforts of the leaders of the various components of the criminal justice system will determine “whether the public’s trust and confidence in the system are bolstered or further diminished, and whether we have been able to satisfy their demand for protection of the innocent, for fairness, and for justice.”

## ***Introduction***

Americans are thinking about justice in new ways. Indigent defense service providers and other criminal justice professionals are working to find new ways to protect the innocent, promote the integrity of the process, and help individuals solve the underlying problems that entangled them in the criminal justice process in the first place.

Public opinion research indicates that Americans generally believe there are serious inequalities in the criminal justice system. The public has become increasingly concerned about competence of counsel and resources allocated to support the defense function. The public feels that accused individuals with money to hire a good lawyer receive more favorable treatment in the justice system than those without resources. State criminal justice systems are seen as slow, overburdened, complicated, and ineffective in addressing the problem of recidivism. The nation is at a “teachable” moment about indigent defense services in particular. Criminal justice practitioners and government leaders recognize the need to act, and have gathered together on several occasions to focus not only these problems but also the array of promising opportunities underway in the American criminal justice system.

## **Historic National Symposia**

This report presents the proceedings of the second of the United States Justice Department’s two historic National Symposia on Indigent Defense. The first symposium was convened in Washington DC in February of 1999 (see *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense*, March 2000, Office of Justice Programs, NCJ181344). The second symposium, subtitled “Redefining Leadership for Equal Justice,” brought together twice as many criminal justice stakeholders to discuss exciting innovations, strategies to fix systemic problems and leadership potential in the criminal justice and indigent defense communities. Over 500 participants from all 50 states, as well as territories, participated in multidisciplinary teams made up of defenders, prosecutors, judges, police, corrections officials, bar leaders, county officials and other criminal justice stakeholders. The teams participated for two days in sixteen workshops, state-delegation collaborative exercises, informal meetings, and plenary sessions. This second national symposium revisited themes from the first and raised new challenges facing indigent defense service providers.

The June 2000 Symposium proceeded from a major challenge and a major opportunity. The challenge is the persistence of serious problems in terms of lack of resources and experts to support the defense function, inadequate training and compensation, the lack of stable defense institutions and state infrastructures, juvenile justice disparities, and deep systemic racial disparities. The opportunity is the significant groundswell of public concern as people learn about the problem of inadequately supported defense counsel, exonerations of the innocent through DNA or sound post-conviction investigation and advocacy, and the inequities and imperfections of the nation’s criminal justice system.

## **Innocence as Catalyst**

National media attention on DNA exonerations has focused attention on failures of the defense function. There are many ways innocent people are pulled into the criminal justice system, such as false confessions, police misconduct or eyewitness misidentification, but there is one principal way that innocent people can be extricated from the system: through the effective assistance of counsel.

In addressing both the shortcomings of the indigent defense function and the many opportunities and collaborative strategies for reform, the second National Symposium examined the following themes and issues:

## **The Importance of Collaboration**

Efforts to collaborate and forge cross-sector alliances among criminal justice stakeholders are on the rise. Defenders, other criminal justice stakeholders, and non-profit organizations such as faith-based institutions, are becoming more creative in their collaborative efforts to improve justice. Indigent defense leaders have aligned with unlikely partners to advance legislative and public understanding of the importance of balance and fairness in justice processes. Although each collaborative effort must be tailored to the needs of each locality, there is shared understanding that collaboration is an essential means of improving indigent defense services and correcting problems in the criminal justice system.

**What is Criminal Justice Collaboration?** Collaboration means building consensus among groups or individuals serving varying roles in the criminal justice system, and then building action upon that consensus. Consensus need not require complete agreement. Rather, it means identifying a common goal or problem, respecting the parties' different roles, then making commitments to pursue a plan of action to achieve a goal or solution. Collaborative efforts align disparate groups to achieve a common end, such as improved case processing, funding, procedural protections, or "problem solving" dispositions.

**Collaboration over the Long Haul:** The desire to collaborate is not enough. Setting goals and strategizing are requisites for successful and lasting collaborative efforts. Success also requires engaging several constituencies and securing commitments from them in furtherance of a specific goal. Successful collaborations, such as Baltimore's Criminal Justice Coordinating Council (featured in this report) invite prosecutors, judges, probation officers, defenders and other stakeholders to sit at the same table in order to analyze justice problems on a regular basis.

**Collaboration to Overcome Turf Resistance and Integrate the System:** A fair and efficient criminal justice system should integrate indigent defense services fully into an interdependent justice structure. But attempts to build consensus on criminal justice issues can trigger turf concerns. For example, in building statewide task forces to enhance indigent defense systems, court officers, especially judges and court clerks, can feel threatened by reforms that might impinge on their decision-making prerogatives. Others are uncomfortable giving up control over justice policies and operations. Integrating defender institutions into the justice system requires

communication, commitment and cooperation from leadership in the legislative and judicial branches. Integration strategies often require enabling legislation, stable funding, and broad-based support from intergovernmental coordination committees.

**Collaborate to Address Systemic Problems:** Collaborations including indigent defense provide effective responses to some of the most complex criminal justice issues, such as racial profiling, sentencing disparities, police brutality, and the disproportionate impact of laws and regulations on low-income minority groups. Indigent defense representatives provide an essential link between the criminal justice system and the buy-in of the client communities affected.

### **Unfairness**

The defense function plays a critical role in improving system fairness. Defenders may be the ones who learn first from clients or communities about the "rotten apple" police units. They may raise awareness about police strategies that impact negatively on a community, such as regular community "sweeps" of young black males in the name of zero tolerance policing. Expanding their view of their role, more defender leaders are taking the initiative to form coalitions with judges, prosecutors, corrections officials, parole and probation agencies, and community groups to resolve such systemic problems. Such coalitions are optimally equipped to resolve such problems before they become public crises, and to build legislative and funding support for solutions.

### **The Criminalization of Poverty**

When people enter the justice system because they are too poor to pay fines, poverty itself becomes a crime. In Seattle, Washington, African Americans lose their licenses and have their cars impounded for the offense of driving with a suspended license much more often than whites. This negatively affects their employment status, their families, and their quality of life. With collaborative efforts organized by a Seattle public defender office and an equitable fine-enforcement program developed by the National Center for State Courts, the city developed viable alternatives for defendants such as diverting cases to community service plans and arranging flexible fine payment schedules.

### **Race and Bias in the Criminal Justice System**

Public trust and confidence in the integrity of the criminal justice system is damaged by disparities between white and minority experiences in the system. Bias may be unintentional and cumulative, e.g., more frisks and searches by police officers in minority communities lead to more encounters with the police, more arrests, and more pretrial detention, more convictions and longer sentences. A judge's decisions in setting bail or denying pretrial release can increase the likelihood of a conviction and a longer sentence.

Disproportionate representation of minorities in the adult and juvenile systems is a major concern to be addressed by all criminal justice stakeholders. Effective responses to address issues related

to racial profiling at the front-end of the system include documenting disparities through collaborative data collection strategies, statistical modeling, discovery of internal police memoranda and policies, cross-agency collaboration to change the culture inside institutions and in daily practices, and as a last resort, litigation.

### **Areas Where Collaboration is Improving the Justice System**

Three areas where collaborative efforts have begun to make a significant difference are in juvenile justice community partnerships, and problem-solving courts.

**Juvenile Justice:** New models for delivery of comprehensive juvenile defender services recognize that children who have problems in school, with learning disabilities, low self-esteem, mental or physical health problems, or who are at risk of abuse at home, too often end up in delinquency court or the criminal justice system. Defenders are redefining the role of the child advocate to include more interdisciplinary outreach, teamwork, and training specifically related understanding adolescent thinking and development.

Lawyers representing juveniles are most effective when they prepare their cases in the traditional mode of zealous advocacy, combined with a multidisciplinary approach to representation. Juvenile advocacy teams include social workers, mental health experts, lawyers, parents, and others concerned about a juvenile's future, and are most effective when they enter a case early and collaborate to intervene in a juvenile's life to avert future criminal justice involvement. Social workers can uncover and relay precise personal information to the defense team and judge. Mental health experts can teach lawyers and judges about the role of trauma in a juvenile's life, cognitive immaturity and brain functioning, how drugs or alcohol severely interfere with moral reasoning, or how juveniles' undeveloped sense of identity can impact their ability to step away from a confrontation or not follow others.

There are two priorities for juvenile correctional options: reducing the need for confinement by improving alternative placements, and improving conditions of confinement. Cross-agency alliances are key: juvenile defenders successfully worked with police officers in Santa Cruz County, California to develop an instrument to evaluate risk categories for children and then to identify those who should receive citations, be detained, or be released into alternative community placements (e.g., parents, grandparents, community organizations, family friends, and responsible third parties). Counsel need special training in juvenile cases to address not only issues of guilt or innocence, but also how to reorient a child back to community life, especially upon release from a correctional setting.

**Community Partnerships:** Increasingly, all criminal justice institutions are expanding their activities beyond the traditional adversarial or accusatorial processes, as exemplified in preventive, community-oriented approaches to policing, prosecution, courts, and corrections, emphasizing treatment and support rather than simply punishment. Similarly, indigent defense service providers are making efforts to build partnerships within the community. They are forging links to community based treatment providers or other health and support agencies, which can help both in obtaining productive alternative case dispositions and in referrals of clients and their

families for appropriate services, to prevent their problems from worsening. Building links between defenders and communities – e.g., through active outreach, public education, mentoring or other volunteer activities – can also open up lines of communication which allow defenders to intervene early in areas of community concern, such as new policing policies.

**Problem-Solving Courts:** The shift in thinking about criminal justice institutions is reflected in the meteoric rise of problem-solving courts, such as drug courts, mental health courts, community courts, and prisoner re-entry courts. Though these courts bring defenders, prosecutors and judges together to provide constructive and rehabilitative interventions for offenders, certain caveats are important. Problem-solving courts do not reduce the defender’s duties to zealously represent the client’s interests and to hold the government accountable. Additionally, in planning and implementing such courts, all justice stakeholders have an obligation to ensure that the indigent defense community participates as an equal partner.

### **Areas Where More Collaboration is Needed**

There are many areas where improved cross-agency alignments and coalitions can improve criminal justice operations, efficiency and fairness at the state and local levels, including: building statewide structures, drafting and enforcing indigent defense standards, and accessing resources including technology, scientific resources, and data collection experts.

**Statewide Structures:** Structuring and funding indigent defense at the state level improves the equitable allocation of resources and the uniformity of service quality, enhances accountability and training opportunities, provides improved cost efficiencies and reduced administrative redundancies, and leaves counties less vulnerable to budgetary shortfalls resulting from an unexpected caseload surge or a rare capital trial. Statewide defense systems are also consistent with the mandate of *Gideon v. Wainwright* that indigent defense is an obligation of the state.

For those states lacking an institutionalized statewide public defense system (or those with fragmented ones), indigent defense back-up centers can provide valuable support and improve defender professionalism. Washington, Michigan and New York are examples of successful back-up centers that provide technical assistance, information-sharing among defenders, brief banks, legal material updates, and training programs, equitably available to all defender systems and personnel in the state.

**Implementing Indigent Defense Standards:** Standards are the key to uniform quality in all essential governmental functions. Indigent defense standards have been developed by national organizations such as the National Legal Aid and Defender Association and the American Bar Association. They cover areas such as attorney qualifications, including training and experience; performance requirements in individual cases; and essential elements of all types of indigent defense systems, such as requirements for defender independence from the judicial or political branches, vertical representation, prompt and confidential access to clients, adequate training, workload limits, and parity of resources with the prosecution.

Implementation of indigent defense standards takes a variety of forms around the country, including: formal promulgation by state legislature or supreme court, sometimes tied to the availability of state funding; in-house enforcement by state or local public defender programs; adoption by state bar groups or public defender associations; or conducting an audit of an indigent defense program, either self-administered or by an outside team of experts, documenting the extent of compliance or deviation from standards. Consistent implementation involves collaboration and cooperation with entities such as legislatures, funding agencies, courts with rulemaking power, and bar groups.

**Equitable Allocation of Resources:** Parity of resources between prosecution and indigent defense promotes fairness, reduces staff turnover, increases case processing efficiencies, and avoid disruptions in recruitment, training, and retention. Parity extends to salaries, workload, and all resources such as expert services, investigators, staff, legal research, physical plant, student loan forgiveness, and access to Federal grant money. In the area of technology, parity involves not only technology systems, but equal participation in integrated system-wide criminal justice information systems, including national and state criminal history repositories, and training opportunities on evolving forensic technologies such as DNA testing. Achieving parity requires a recognition of all justice agencies' interdependence, and of the necessity of their operating together as a systemic whole, rather than as a series of discrete agencies with separate workloads.

### **Use Technology as a Tool – not a Panacea**

Technology is a tool for improving efficiency, information sharing, and case processing. It is not a replacement for well-trained, fully resourced, dedicated defense lawyers who work to represent individual clients' interests. Examples of innovative technology applications include a computerized e-mail plea offer system in the Ninth Circuit, which saves time by eliminating initial face-to-face plea negotiations and providing a written record for accuracy. In Baltimore, the Criminal Justice Coordinating Council has successfully organized a collaborative effort to create database and e-mail connectivity among various agencies over the existing fiber optic network.

### **Data Collection and Analysis**

Accurate and comprehensive data collection and analysis relating to indigent defense services is an essential means of promoting improvements. It has frequently been used in areas such as jurisdictional comparisons of assigned counsel fees or defender program costs, or in documenting and addressing racial profiling. A collaborative weighted caseload study, such as was implemented in Tennessee, is a means of assessing simultaneously the workload of indigent defense, prosecution and the courts, to present a cohesive picture of case processing resource needs to legislatures and funding agencies.

### **Litigation as a Last Resort**

When other efforts have failed, systemic litigation has spurred improvements in indigent defense systems. Types of actions include:

- class actions for Sixth Amendment violations;
- public defender suits claiming inability to meet constitutional obligations due to inadequate resources;
- post-conviction suits claiming ineffective assistance caused by overburdened public defenders; and
- lawsuits by counties against states, on a theory of unfunded state mandates.

Litigation can result in pretrial settlements, pressure on legislators to increase funding, or simply calling attention to the severity of indigent defense problems, which increases political leverage for reform.

### **Striving Together Toward Shared Goals**

Competent counsel and ample resources help balance the scales of justice and guard against wrongful convictions. Defenders need support from all criminal justice stakeholders to be broad-based advocates to solve problems of clients and communities. Collaborative efforts among stakeholders, increased communication with unlikely partners, public education, and further integration of the criminal justice system will improve accuracy, efficiency, and promote the fairness and integrity of the system.

## ***Redefining the Role of the Defender: The Courtroom and Beyond<sup>2</sup>***

*“We’ve been doing this job as public defenders the same way since Gideon, and the world has changed in 30 years. We need to start thinking about doing this differently. Courts are redefining themselves and reworking what they do, and they’re trying to be problem solving in some way. Prosecutors are thinking about being community workers and getting out there and doing different things. The one actor that’s really not getting out there and trying to do different things is the public defender – and we can.”*

– New York University Law Professor Kim Taylor-Thompson

In many communities around the country, the work of the public defender’s office is unseen, at best, and regarded with suspicion, at worst. Defenders and others are reexamining the role and relationship of the public defender within the communities they serve. Community-based institutions may be powerful forces for the rehabilitation and reintegration of offenders, and defenders themselves may be valuable resources to the communities in turn, e.g., by helping them address issues such as racial profiling and police brutality, which impact strongly on those individuals and communities who are most in need of publicly-supported representation.

Community-oriented policing and problem-solving courts have become commonplace, and public defense offices are beginning to broaden their mission to include not only the processing of the legal cases against their clients, but also the building of relationships with community institutions to advance the broader interests of both the clients and the community. What role should community outreach play in a public defense office? Who should be involved in shaping and defining this outreach? What are the steps necessary to create an effective community-oriented public defender’s office?

In beginning such an effort, defenders must develop a mission statement and implementation plan. Input from community members is essential. Given the ambivalent relationship that such offices have with the community, much groundwork must be laid to at least establish that public defenders are part of the community, that they represent people in the community, and that they try to work with the community in returning people to the community.

Indigent defense officials should attend community meetings and listen to participants’ concerns. The public defender’s office also can play a role as facilitator, and sponsor forums between community members, police and others to discuss contentious issues. By increasing their presence within the community, public defenders can form partnerships with individuals and organizations that will allow them to better serve their clients. Police, prosecution and courts should also be included in such efforts to ensure their support.

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<sup>2</sup> Plenary I: Redefining the Role of the Defender: The Courtroom and Beyond. Moderator: Anthony Thomson, Professor, New York University School of Law, New York, NY; [thompson@junis.law.nyu.edu](mailto:thompson@junis.law.nyu.edu). Robin Steinberg, Executive Director, The Bronx Defenders, Bronx, NY, [robins@bronxdefenders.org](mailto:robins@bronxdefenders.org); E. Michael McCann, District Attorney, Milwaukee County, Milwaukee, WI; Steven Carroll, Public Defender, Department of the Public Defender, San Diego, CA, [ymanga@co.san-diego.ca.us](mailto:ymanga@co.san-diego.ca.us); Kim Taylor Thompson, Professor, New York University School of Law, New York, NY, [thompso@juris.law.nyu.edu](mailto:thompso@juris.law.nyu.edu); Carlos J. Martinez, Director of Program Development, Dade County Public Defender Office, Miami, FL, [cmartinez@pdmiami.com](mailto:cmartinez@pdmiami.com); The Hon. Bonnie Michelle Dumanis, Domestic Violence Court, San Diego, CA, [bdumansp@co.san-diego.ca.us](mailto:bdumansp@co.san-diego.ca.us).

The public defender's staff also must support and carry out these partnerships with the community. "I want to find the people in my office who are already involved, because they're the ones who will bring me up to speed as quickly as possible," said San Diego County Public Defender Steven Carroll.

While most defenders are committed to serving their communities beyond the courtroom, others question how these strategies advance their fundamental mission of providing quality legal representation to their clients. Community-building advocates note that such community work impacts positively on defenders' ability to perform their jobs. Carlos Martinez of the Miami/Dade County Public Defender Office noted, "What we're talking about ... is expanding the role to do what we're supposed to be doing, which is to provide alternatives to our clients at sentencing.... When you're linking up with a community, you have to keep that in mind."

Law schools should teach students not only to be "warriors within the courtroom," but also problem solvers and community workers. Defenders need to be educated about the benefits of a community-oriented approach. With strong community partnerships, defenders can expand the sentencing and treatment options offered to clients. In addition, a more active public defender office can facilitate increased community involvement and action in order to effect change in policing and the criminal justice system, as well as to apply pressure on city officials to support these community-oriented policies within the public defender's office.

In order to maintain the support of its many constituencies, defenders must be clear in their roles – i.e., the primacy of their fundamental mission of zealous advocacy on behalf of the client, in connection with the adoption of broader representational duties to clients and partnerships with the community and community institutions. There are various ways in which a defender office can provide value to a community, including: compiling information on police practices, police officers and expert witnesses; developing relationships with community-based organizations to increase sentencing and treatment options; and supporting dialogue among all community members on issues such as crime prevention and the fairness and effectiveness of the system, particularly with regard to the concerns of low-income communities.

By building strong partnerships and educating all members about their roles, defenders can address and effect change both in the disposition of their individual clients' cases and in the justice system as a whole. This greater understanding among all members of the community helps resolve contentious issues by providing a structure for collaboration where before there was little or none.

## ***Ensuring Quality Representation: Prosecution and Defense Perspectives***<sup>3</sup>

*“We have a fallible system. There are going to be people who are wrongfully charged. It is a huge burden to try a case without competent counsel on the other side, to test a bad case.... The prosecutor’s responsibility is to do justice, and justice is not just convictions.... So we have a common interest.”*

– Anoka County, Minnesota District Attorney Robert Johnson, President-elect, National District Attorneys Association

The quality of indigent defense varies around the country, ranging from well-organized, adequately funded systems providing consistent levels of representation, to areas with disorganized, underfunded and seriously inadequate representation for low-income defendants. Specific problems range from a lack of money and other resources to startling instances of incompetent counsel. To gauge the need for improvement, an examination of the current state of the indigent justice system is necessary.

Defenders and prosecutors generally agree there are significant inequities between the quality of justice available to indigent and nonindigent defendants. Though many prosecutors believe the system works more efficiently for everyone if opposing counsel is competent and knows the law, there are often fundamental disagreements between prosecutors and defenders about the nature and extent of reforms and improvements needed.

Defense lawyers feel undermined by the lack of money available to defend or investigate criminal cases. In an assigned counsel system, the concerns may relate to hourly rates which are inadequate to cover an attorney’s office overhead, and unrealistic per-case caps that do not allow the necessary work to be done. In a public defender system, the concern may be budgets that appear arbitrarily to provide a fraction of the resources provided for the prosecution. In a system where a county opts to contract with private lawyers to defend some or all of its indigent criminal caseload, the issue is commonly that the contract is awarded primarily or solely on the basis of cost rather than quality of services.

### **The Defense Perspective on Achieving Quality Representation**

Common problems cited in indigent defense delivery systems, as described by Stephen Bright, Director of the Southern Center for Human Rights, include:

- Many jurisdictions have no organized indigent defense system of any kind – whether a public defender, a standards-driven contract system, or an assigned-counsel system.
- Even when there is a defender structure, lawyers often have unmanageable caseloads (700 or more in a year), and may not even know the names of all their clients.
- Defenders’ obligations to their clients are in conflict with their loyalty to the judges who appoint them, and who have unilateral power to approve or cut their compensation vouchers.

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<sup>3</sup> Plenary II: Ensuring Quality Representation. Moderator: Christopher Stone, President and Director, Vera Institute of Justice, Inc. New York, NY, [cstone@vera.org](mailto:cstone@vera.org); Robert M.A. Johnson, President-Elect, National District Attorney's Association, Anoka, MN, [rmjohnso@co.anoka.mn.us](mailto:rmjohnso@co.anoka.mn.us); Stephen Bright, Director, Southern Center for Human Rights, Atlanta, GA, [sbright@schr.org](mailto:sbright@schr.org).

- Resource constraints limit the amount of time defenders can spend preparing a case, or prevent obtaining necessary investigators, expert witnesses or testing.

Resource limitations have fueled a nationwide belief that defendants with money get a better defense – that it is better to be “rich and guilty than poor and innocent.” Mr. Bright noted that “this isn’t cynicism, it’s realism.” While there may be some dedicated public defenders and some with low enough caseloads to do a good job, in general, the problem is widespread.

Examples of inadequate assigned counsel rates cited by Mr. Bright include a death penalty case on appeal in the Fifth Circuit in which a lawyer was effectively paid a rate of \$11.50 an hour, and hourly rates of \$25 in New York, which has a cost-of-living among the highest in the nation.

The competency and monitoring of defenders is often problematic. Research in Kentucky, Illinois, and Texas indicates that one-third of the lawyers representing indigent defendants have been suspended, disbarred, or convicted of criminal offenses.

Occasionally, resistance to change in the system seems bizarre. In Texas, a federal judge granted a habeas corpus petition in a case where the trial lawyer slept through his client’s trial, noting that a sleeping counsel was, in effect, no counsel. The State of Texas, however, fought this ruling and sent its deputy solicitor general to argue that having a sleeping lawyer was no different from having a lawyer under the influence of alcohol or drugs, or suffering from Alzheimer’s Disease or a psychotic episode, all of which he apparently regarded as acceptable. Mr. Bright termed the defense of such incompetence a “disgrace” to the profession and legal system.

An important key to quality indigent defense is sufficient resources. Indigent defendants, however, are generally not a high priority with policymakers and funding agencies. Congress has earmarked billions of dollars for police, prosecutors and corrections, but little for defense. When compensation is between \$20 and \$50 an hour, which is not sufficient to cover ordinary office overhead expenses, and total compensation in a case is capped as low as \$1,000 in a capital case requiring more than 1,000 hours of work, or a flat \$50 for any misdemeanor case, it is virtually impossible to mount an adequate defense.

But resources alone are not enough. There must be independence and structure as well. Establishing an organized structure for delivering indigent defense services, whether an institutional defender agency or an oversight body responsible for coordinating the work of individual attorneys, provides a vehicle for training, supervision, accountability, and the uniform implementation of standards for quality. Structures include specialty units to handle special cases, such as capital cases or clients with mental illness.

Independence is critically important. In many assigned counsel systems, judges have responsibility for selecting and determining the compensation of attorneys; some even prefer to appoint lawyers who politically support or contribute money to their election campaigns. The indigent defense function must be independent from both the political and judicial branches. Defender independence furthers both the goal of judicial impartiality and the client’s right to the effective assistance of conflict-free counsel.

But judges are not always eager for reforms. Judges have appointed clearly incompetent lawyers again and again, and in some venues, have resisted establishing a public defender system or other steps toward defender independence.

Improvements require leadership by bar associations and others in powerful positions in the criminal justice and legal communities. At the federal level, this includes the National Association of Attorneys General and the National District Attorneys Association, to work together in support of legislation to improve the quality of indigent defense representation, such as the Innocence Protection Act currently pending in Congress.

One question posed about any proposal to improve indigent defense is whether it will become more difficult to secure convictions. The answer is yes, if the system is changed to avoid violations of the Sixth Amendment by providing lawyers who investigate and represent their clients effectively. However, the quality of the adversarial system depends on an effective defense as well as an effective prosecution.

Law schools should support efforts for reform. They should provide instruction, including indigent defense clinical programs, to promote quality, especially when there is a lack of structure to provide this support.

### **The Prosecution Perspective on Achieving Quality Defense**

Prosecutors do want indigent defendants to receive a quality defense, in part because cases move along more quickly and efficiently when the defense is competent and therefore unlikely to get sidetracked by irrelevant issues, noted Robert M.A. Johnson, District Attorney of Anoka, Minnesota and president-elect of the National District Attorneys Association.

National standards provide that the highest mission of the prosecutor is not simply to seek convictions, but to see justice done. But Mr. Johnson acknowledged that in a system populated by human beings, errors occur. Any thoughtful prosecutor wants a defendant to have an advocate who can point out where the system has gone wrong.

Unlike many states, Minnesota has had a well-established public defense system for more than 35 years. The system was established through a broad effort not only by criminal justice professionals, but also by professional lobbyists for the insurance industry, big business, and others. Initially, the effort was launched by members of the State Bar and the State Supreme Court. Minnesota offers the lesson that allies outside the criminal justice system can be helpful in reform efforts.

There may be broad agreement among prosecutors on questions of justice and competent counsel, but there are differences on questions of specific reforms. For example, although prosecutors want competent defenders, the National District Attorneys Association has taken a position against national competency standards, preferring to leave it to the states to tailor standards as they see fit. Similarly, although there is a general agreement that DNA testing should be available to prove a defendant's innocence, there is a lack of consensus in support of a national requirement for such tests.

Johnson agreed that the major problem is the lack of effective indigent defense structures. “Prosecutors want quality defenders and will want to help you achieve the structure to provide this.... It is abhorrent to the system if there is no qualified representation on the other side. We need those protections for the system to work,” Johnson said. However, while it might be possible to get broad agreement on these general principles, “the problem is how to accomplish it.”

### **The Problem of Finding Agreement on Specifics**

Bright asked Johnson whether, in light of judicial rulings that problems such as sleeping lawyers do not violate the *Strickland v. Washington* test, the National District Attorneys Association might join in urging the Supreme Court to revisit *Strickland*. He also asked for support in urging the Supreme Court to revisit the procedural default rule, which forecloses future review of an issue which a trial lawyer failed to preserve. Johnson, however, did not embrace these suggestions, expressing concern that “there are other aspects” of changing these rules which might be undesirable.

Bright inquired as to the ethical duty of a prosecutor when confronted with a sleeping or drunk defense lawyer, observing that “everywhere that I practice, they are taking full advantage.” Johnson replied that prosecutors do have some responsibility, although it is not technically an ethical one. He said that he thought he could get consensus on the NDAA board in support of the need for competent counsel, to address such situations. He also said that he would seek to have NDAA take a position in support of the need for indigent defense structures.

Agreement was also elusive regarding the appropriateness of national requirements for competence of counsel and defense access to DNA testing, such as in the proposed Innocence Protection Act in Congress. Jeffrey E. Thoma, the public defender in Mendocino County, noted that after a similar bill was introduced in California, both the Attorney General’s Office and the District Attorneys Association testified against it. Johnson responded that these organizations are probably not opposed generally to the principle of DNA testing, but concerned instead with specifying the standards appropriately and assuring that the system has the capacity to respond effectively once testing is implemented.

On the issue of resources, Bright noted the disparity of federal grant funding awarded to police and prosecutors, and urged federal support for creating defense structures which are independent from the courts. Johnson preferred to see resources come from the states, rather than being dispersed in the form of federal grants.

These disagreements over strategies and procedures relate to the fundamental reason for the Symposium: the search for a new and greater consensus on the need for quality indigent defense as an integral component of a balanced, effective and fair criminal justice system. The focus of the Symposium was on realizing the need for a “renewed commitment” from all members of the criminal justice system, including the prosecutors, police, judges, public defenders, and others, to achieve this goal.

## ***Improving Systems through Litigation***<sup>4</sup>

If all other efforts, such as through the legislature, the public, or the media, have failed, systemic litigation to seek improved quality of representation and funding can be successful as a last resort.

Systemic litigation comes in many forms, but has several common attributes. It is a resort to the courts. It usually entails an assertion of ineffective assistance of counsel under the Sixth Amendment, although other claims may be asserted based on who the plaintiffs are, such as attorneys objecting to an uncompensated taking of their services. And the assertion of counsel's ineffectiveness comes before counsel has actually been ineffective in an individual case – unlike post-conviction reversals for incompetence under *Strickland v. Washington* – based on the inevitability that high caseloads and inadequate funding will produce ineffective representation across the board in the future.

Specific forms of systemic litigation have included:

- Post-conviction actions by individual defendants claiming ineffective assistance of counsel due to a defender's excessive caseload;
- Class actions by clients arguing that a system-wide lack of funding violates their Sixth Amendment rights;
- Suits by public defenders claiming an inability to provide constitutionally required representation due to inadequate resources and excessive caseloads;
- Actions by counties against states, challenging the state's failure to pay for indigent defense as an unfunded mandate, which *Gideon v. Wainwright* held to be a responsibility of the state.

Even where not litigated to completion, these cases have been effective in achieving settlements, in motivating the legislators to increase funding, or in gaining additional compensation for counsel in particular cases. At the very least, they have been helpful in calling attention to indigent defense problems, and in generating momentum to address the problem both locally and nationwide. Current examples of different approaches are found in New York, Florida, and Mississippi.

### The Major Types of Litigation to Improve the Indigent Defense System

The unifying theme of the different litigative approaches is a systemic challenge to the inadequacy of defense representation. Suits have been based on the Sixth Amendment, state constitutional provisions, and statutes or rules dealing with provision of legal counsel.

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<sup>4</sup> Workshop A: Improving Systems through Litigation. Moderator: Scott Wallace, Director, Defender Legal Services, National Legal Aid & Defender Association, Washington, D.C., [s.wallace@nlada.org](mailto:s.wallace@nlada.org). Robin Dahlberg, Senior Staff Attorney, American Civil Liberties Union, New York, NY, [rdahlberg@aclu.org](mailto:rdahlberg@aclu.org); Stephen F. Hanlon, Partner, Holland & Knight, Tallahassee, FL, [shanlon@hklaw.com](mailto:shanlon@hklaw.com); Robert B. McDuff, Criminal Rights & Civil Defense Attorney, Jacksonville, MS, [rjm767@aol.com](mailto:rjm767@aol.com); Norman L. Reimer, New York County Lawyers' Association, New York, NY, [nreim24@aol.com](mailto:nreim24@aol.com).

The American Civil Liberties Union has recently established a clearinghouse for information and training regarding systemic litigation over inadequate defense services or funding. The director of this project, Robin Dahlberg, described the four major approaches:

1. Suits by Individuals Post-Conviction: In landmark cases such as in Louisiana and Arizona, state supreme courts have found that an indigent defendant's lawyer had caseloads which were so high that none of their clients could possibly be adequately defended. The courts' response was to establish a rebuttable presumption of ineffective assistance of counsel in such cases. While the individual defendants did not get relief, these cases did get the court to address the systemic issues in an individual proceeding.
2. Class Actions on Behalf of Public Defender Clients: These actions, which may be brought by county administrators of public defender programs, assert that the funding provided by the state or county is inadequate to administer the public defender program and has deprived the program's clients of their Sixth Amendment right to adequate representation. Many of these suits have not survived motions to dismiss on the issue of whether public defender clients who have not yet been convicted can complain of a Sixth Amendment violation, i.e., on the theory that a Sixth Amendment claim arises only after defendants have been denied a fair trial. However, when cases have survived pretrial motions, they generally have resulted in a favorable settlement and no trial, since states and counties, and the prosecutors and judges in them, may wish to avoid a public spotlight on problems in their criminal justice systems.
3. Suits by Public Defenders Claiming an Inability to Provide an Adequate Defense: In these actions, public defenders claim that they are unable to offer constitutionally required representation due to inadequate resources or excessive caseloads. The plaintiffs argue that low payment constitutes a taking of property because the attorneys are being required by the courts to represent public clients, and not being paid a living wage for doing so. Generally, these cases have succeeded, as in Oklahoma, West Virginia, Alaska, and New Hampshire. In other cases, the public defenders have sued on behalf of their clients, alleging that the clients have not been provided with an adequate defense because the defenders have not been provided with the necessary compensation. Success has depended on whether the courts have found that the public defenders have standing to assert the Sixth Amendment on behalf of their clients. There have been mixed results.
4. Suits by Counties against States. In these cases, counties have claimed they have been made fiscally responsible for indigent defense by higher-level government mandates, and that the burden is too overwhelming for them. Essentially, these have been taxpayer suits asking the state to take a more active role in funding indigent defense programs.

#### Assigned counsel fees in New York

The problem of defending indigent defendants in New York has been especially dire, according to Norman L. Reimer of the New York County Lawyers' Association. New York has the second lowest rate of payment to lawyers in the country – only \$40 an hour for in-court work and \$25 an hour for out-of-court work. At the same time, reliance on assigned counsel is very high – 30 to 40 percent of the cases, or about 75,000-100,000 cases a year. These rates have not changed in 15 years, and the result has been a decline in the number and quality of lawyers included on panels

from which assigned counsel are chosen. With so few qualified defenders to take the cases, those who do have a very high caseload.

The lawsuit filed to remedy this situation is *NYCLA v. Pataki*, filed by the New York County Lawyers' Association, representing 9,000 lawyers. Only a small percentage of NYCLA's membership practices criminal law, so to generate broader support, the association teamed up with lawyers representing clients in family courts, since they are similarly underpaid.

The lawsuit was filed only after an effort at a legislative appropriation failed. To build support in the legislature, the lawyers sought support from the New York City Bar, other bar associations around the state, and eventually the state bar. In addition, they reached out to district attorneys, law enforcement and judges. The legislature was unresponsive, claiming there was a lack of constituency for indigent defendants.

As a result, NYCLA filed suit. Initially, the state moved to dismiss on the grounds that the association did not have standing. NYCLA is responding that it does, because the bar in New York has a unique role in designating lawyers to serve on panels of court-appointed lawyers or in serving on screening committees to select these panels. The Association is also arguing that it has third-party standing under its charter to support legal reform in seeking best legal practices. One of the largest law firms in New York, Davis Polk and Wardwell, is representing NYCLA pro bono with a team of a dozen lawyers.

If the case survives the standing challenge, the court will be asked to declare the statutes setting the compensation rates for lawyers unconstitutional and require that they be set at current market rates. There are examples of the state using market rates in hiring lawyers for other matters; e.g., compensation for personal injury lawyers representing the state has been about \$175-\$200 an hour, and for lawyers to deal with bond issues, about \$350 an hour.

#### State constitutional claims in Florida

In Florida, litigation has proceeded on a relatively strong legal foundation, according to attorney Stephen Hanlon of the law firm of Holland and Knight in Tallahassee. Plaintiffs have used research showing a 70 percent reversal rate in death penalty cases to support their claims that an inadequately funded defender system results in inadequate trial representation. They have also argued that since Florida bars relief for inadequate representation in post-conviction matters, there must be an opportunity to challenge the funding inadequacies before conviction.

In recent litigation with which Hanlon's firm is involved, plaintiffs based their argument on the state constitution without mounting a federal claim. They argued that the state system was near collapse, with funding for indigent defense at \$5.5 million compared with the \$25 million needed to operate effectively. During the pendency of the litigation, the legislature increased the funding to \$8 million, and the court ruled the issue was moot. However, two judges did agree with the litigation's basic premise that there should be a fundamental right to competent post-conviction counsel based on the state constitution.

Thus, even with the unfavorable ruling in Florida, Hanlon views the process as a "beginning," and he has been asked to help with the litigation efforts in Mississippi.

### Suits by counties against the state of Mississippi

The indigent defense system in Mississippi is in critical condition, according to Robert B. McDuff, a civil rights litigator in Jackson, Mississippi. The state is among the poorest in the nation, and it spends less than any other state on indigent defense. Indeed, the state itself does not provide for indigent defense, so the burden falls on individual counties in which boards of supervisors make funding decisions.

As a result, only three counties have full-time public defenders, while the other 79 have private attorneys or part-time contract public defenders who receive between \$20,000 and \$30,000 for defending indigent clients while also engaging in private practice. Many attorneys sacrifice the quality of their work on their indigent caseload in order to have sufficient time for their more lucrative private practices.

In 1998, while the state legislature did establish a state public defender system, it also failed to appropriate any money for the program. It created a Public Defender's Commission, which presented a proposal for funding the following year. That proposal was opposed by prosecutors, and blocked by the Chair of the House Appropriations Committee and other legislators. These legislative efforts will continue in 2000 with the help of many lawyers in the state and outside organizations, including the NAACP. With the litigation proceeding at the same time, one effect may be to increase the state legislature's attention and motivation for indigent defense improvement.

Four lawsuits have been filed, three on behalf of poor rural counties claiming that they cannot pay for adequate indigent defense, that indigent defense is an unfunded state mandate, and that it should be the state's responsibility. The fourth suit is on behalf of a part-time defender who was assigned 700 cases and in one year, and disposed of 540 of them ineffectively because he had no investigators, no paralegal, and only a part-time secretary.

Among the counties' arguments are that inadequate indigent defense funding, and the resulting case delays, are harmful not only to indigent clients but also to crime victims, sheriffs with overcrowded jails, law enforcement officers and prosecutors who must deal with an inefficient system, and taxpayers who are supporting a system that does not work.

## ***Building Statewide Task Forces to Create or Enhance Systems***<sup>5</sup>

Institutional bias is among the most difficult obstacles to overcome in efforts to improve and garner support for indigent defense reforms, based on experiences in Nevada, North Carolina and Texas. Court officers – especially judges, bailiffs and clerks – feel threatened by many proposed reforms, viewing such changes as impositions on prerogatives or traditional roles.

However, a systematic approach to data collection, analysis, consensus-building and recommendations is proving increasingly effective at fostering support for improvement of indigent defense systems. Key to this positive development is the inclusion of stakeholders, including judges, lawyers, academics and elected and appointed government officials in the process.

### Greater Inclusion Needed in Nevada

Elgin Simpson, executive director of the Nevada Supreme Court Task Force on Indigent Defense, stressed that even after a multidisciplinary commission issues recommendations, the suggestions may be seen as a threat and encounter resistance. This can be avoided up front by ensuring that all those who eventually will be involved in implementation are involved in the study and planning – including defenders, prosecutors, judges, and representatives of criminal justice planning and funding agencies.

In Nevada, two counties, Washoe and Clark, use county-funded public defenders while the other 14 counties use state-funded public defenders. The task force found failings in the system as a whole. But when the legislature funded the task force to implement its proposed changes, the real battle began, as judges, prosecutors, bailiffs and clerks felt threatened by change. Involving those constituencies in the future – at the beginning of crucial studies or commissions – should help remove a large number of barriers to implementation.

### Task Force Recommendations Legislatively Embraced in North Carolina

In North Carolina, the state pays for indigent defense, but there has been little statewide management of public defender operations. The defender tends to be appointed by the senior judge in the county involved, with little oversight of payment or appointment. A statewide task force was appointed, a key goal being that everyone with a legitimate interest in the process and possible findings was at the table, according to Professor John Rubin of the University of North Carolina, a member of the task force. Legislation has been crafted to implement the recommendations of the task force.

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<sup>5</sup> Workshop B: Building Statewide Task Forces to Create or Enhance Systems. Moderator: Robert Spangenberg, President, The Spangenberg Group, West Newton, MA, [rspangenberg@spgangerberggroup.com](mailto:rspangenberg@spgangerberggroup.com). Elgin Simpson, Executive Director, Nevada Supreme Court Task Force on Indigent Defense, Las Vegas, NV; John Rubin, Professor, Institute of Government, University of North Carolina, Chapel Hill, NC, [rubin@logmail.log.unc.edu](mailto:rubin@logmail.log.unc.edu); Bill Beardall, Legal Director, Texas Appleseed, Austin, TX, [wbeardall@att.net](mailto:wbeardall@att.net); The Hon. Allan Butcher, Tarrant County Justice Center, Fort Worth, TX, [allanb@airmail.net](mailto:allanb@airmail.net); Michael K. Moore, Committee Member, State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters, Arlington, TX, [mmoore@uta.edu](mailto:mmoore@uta.edu).

The legislation will establish a statewide commission for indigent defense with responsibility to develop standards for the operation of public defender offices, staff qualifications, assigned counsel qualifications, attorney performance, conflicts, payment for expert and other services, and indigency screening. The Commission on Indigent Defense Services, whose 13 members must be broadly representative of the executive, legislative and judicial branches, as well as the bar, will decide what type or combination of systems to use in each county, set procedures and rates of compensation for assigned counsel and experts and other expenses, and be responsible for drawing up a statewide budget every year. An important consequence is that judges will no longer be directly involved in selecting or compensating assigned counsel.

One factor critical to the success of the commission is that it was a creature of the legislature, said Rubin, ensuring ongoing interest and oversight by elected officials. Other factors contributing to the success included the availability of an onsite staff, the involvement of heads of related law enforcement, prosecutorial and court programs, and an entirely open process complete with public hearings.

### Extensive Study but Elusive Consensus in Texas

In Texas, a public report on a survey of judges, prosecutors and defenders conducted by the State Bar Association's Committee on Legal Services to the Poor in Criminal Matters has met with some resistance, according to Judge Allan Butcher. Judges are suspicious of the report's motives in proposing changes in the judges' traditional power of ad hoc appointment of counsel, often fearing an infringement of their prerogatives.

The findings of the State Bar Report were remarkable: consistently no consistency. Procedures were determined largely by the discretion of the judge in the case rather than by the application of any minimum standards. Judges decided for themselves how fast counsel should be appointed, with appointments being the quickest where a jail magistrate was available. There was no uniformity of procedures in pretrial release decisions, and counsel in many cases tended not to be appointed until after indictment. The exercise of unchanneled judicial discretion left a wide variability in determining who was considered "indigent," with judges most often relying on some generalized rule of thumb. Fifty percent of judges conceded that defense appointments went to political supporters, and prosecutors reported they had been consulted about defense appointment decisions. Clients of court-appointed defenders were twice as likely to receive jail time as those clients receiving a private defense.

There was little interest in the legal community at large and among the public at first, but news reports helped raised the profile of the report. Baseline data gathered from attorneys practicing criminal law afforded usable comparisons of costs in determining appropriate fees for appointed counsel. Professor Michael K. Moore, another member of the State Bar of Texas committee, said confidence remains high in the study despite some of its stark findings.

Indigent defense in the 264 counties of Texas is furnished almost exclusively through unregulated assigned counsel, with procedures and rates entirely at local discretion. A critical goal is to increase understanding of indigent defense by both policy makers and the public, according to Bill Beardall, director of the Texas Appleseed Fair Defense Project, funded by the Open Society Institute and the Appleseed Foundation to improve indigent defense in Texas.

Consulting stakeholders up front was essential in evaluating the Texas court system's strengths and weaknesses, and in building consensus around structural improvements. The process involved conducting in-depth interviews with judges having criminal jurisdiction, with commission officials, prosecutors, public defenders and defendants, as well as analyzing documentation on how the appointed-counsel system works around the counties.

In all three states, whatever the actual outcome, commissions and task forces were able to agree that improved resources translate into better representation, and insufficient funding restricts the quality of representation for indigents.

## *Implementing and Enforcing Quality Standards*<sup>6</sup>

Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced and supervised, while the other gets a neophyte. The constitutional right to effective representation joins with the guarantee of equal justice to compel the nationwide implementation of indigent defense standards.

Currently, however, implementation of indigent defense standards varies widely. Adele Bernhard of Pace University Law School summarized the three main categories of standards:

- qualification standards, governing the level of training and experience lawyers need in order to be appointed to specific categories cases;
- performance standards, governing a defender's duties in an individual case, such as investigating, filing motions and keeping a client informed about case developments;
- structural standards, governing the administration of indigent defense delivery systems, in areas such as independence, parity of funding with the prosecution, vertical representation, prompt and confidential access to clients, training, and caseload limits.

Standards also can be classified according to –

- geographic applicability (national, state or local),
- method of adoption (e.g., by state statute, by supreme court rule or decision, by state or local public defender organization or oversight commission, by incorporation into a contract for public defense services, by national, state or local bar organization, or by ad hoc standards-based management audit),
- enforceability (e.g., linked to funding, to eligibility for appointment, or informally aspirational),
- type of delivery system (public defender, assigned counsel, or contract system), or
- type of case (e.g., felony, capital, juvenile, or defendants with mental illness).

A compendium of standards in use throughout the nation will be published later this year by the Bureau of Justice Assistance. The National Legal Aid and Defender Association (NLADA) has placed all of its black-letter national standards on its web site, at [www.nlada.org](http://www.nlada.org).

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<sup>6</sup> Workshop C: Implementing and Enforcing Quality Standards. Moderator: Adele Bernhard, Professor, Pace University Law School, White Plains, NY, [abernhard@law.pace.edu](mailto:abernhard@law.pace.edu). Tony Gagliana, Deputy Judicial Administrator, Louisiana Supreme Court, New Orleans, LA, [tjg@lajao.org](mailto:tjg@lajao.org); Robert Willey, Assistant Public Defender, Riverside County Public Defender's Office, Riverside, CA, [rwilley@co.riverside.ca.us](mailto:rwilley@co.riverside.ca.us); Larry Landis, Executive Director, Indiana Public Defender Council, Indianapolis, IN, [llandis@iquest.net](mailto:llandis@iquest.net); William F. Kluge, Attorney, Committee for Setting Standards for Indigent Defense of Capitally Charged Defendants, Ohio Supreme Court, Lima, OH, [kpsilaw@wcoil.com](mailto:kpsilaw@wcoil.com).

### Ohio: Supreme Court Capital Standards, Tied to State Funding

Ohio has state standards for representing indigent defendants in capital cases, which went into effect in 1988 as Rule 20, according to William Kluge, a member of the State Supreme Court's committee responsible for setting the standards. Rule 20 was the result of *State v. Johnson*, in which the Court recognized the need for promulgation of standards to ensure that defense counsel was effective in capital cases.

Under Rule 20, the Supreme Court sends to each county a list of lawyers who are qualified to represent indigent capital defendants. To earn a place on this list, lawyers apply to the state standards committee, which reviews each application. Among the requirements are 12 hours of Continuing Legal Education (CLE) in death-penalty training (increased from six hours after a petition from the standards committee), which is provided three times a year. In addition to basic requirements such as at least three years of experience as a lawyer, there are requirements specific to the lawyer's role in the case; for example, to be lead counsel in a capital case (there must be two lawyers), a lawyer must have served as co-counsel in at least two capital murder trials from opening statements through the verdict and mitigation phases. This system has produced a list of 400 qualified lawyers.

Standards are enforced by financial incentives. Counties receive reimbursement from the state only if they appoint lawyers who are certified under Rule 20.

The standards committee also works with the Supreme Court on appropriate procedural changes related to capital defense. In August, the standards committee plans to send a letter to the state Supreme Court asking it to extend the time period for the first direct appeal in a capital case that goes directly to the Supreme Court, because current time limits are brief and the burden falls almost entirely on the state public defender's office, which provides experts and handles most capital appeals.

### California: National Standards Applied Through a Management Audit

California's indigent defense services are organized on a county-wide basis, either by contract or by city agencies, according to Robert K. Willey, assistant public defender in the Riverside County, California public defender's office. In Riverside, which has a population of 1.5 million, the public defender's office has seven offices with 90 attorneys and 162 total staff members. It handles all criminal cases.

Although some guidelines have been promulgated by the state bar and the California Public Defenders' Association, each county is free to set its own standards.

Although Riverside County has not adopted indigent defense standards, national standards have been useful in helping the public defender office obtain additional funding. An extensive management audit of the public defender's office in 1987 raised questions about the leadership capabilities of the management team, attorney-client relationships, staffing levels, computerized management systems, funding levels, parity levels with the D.A.'s office, and other issues. In 1999, a comprehensive management audit based on national standards was conducted by a seven-

person team from the National Legal Aid and Defender Association, raising many of the same questions as the 1987 audit. The public defender's office used the 1999 audit to its advantage in discussions with Riverside County's Board of Supervisors, using the report to demonstrate the office's excessive caseload, and lack of staffing and training. As a result, the office received additional funding and the caseload in one branch was reduced from 2,100 cases per year per lawyer to 1,300. Although that reduction fell far short of the NLADA/ABA standards of 400 misdemeanor or 150 felony cases per year per lawyer, it was a start. The public defender's office is still seeking to reduce caseload levels, viewing these efforts as part of a "multiyear process."

An audit also can be helpful in changing the culture of an office. In Riverside, the audit, which included a 75-question survey of all employees and invited their comments about problems, encouraged staff members to confront the problems and be part of the solution in handling them. The staff also has been responsive and eager to participate in in-house training programs, such as computer training and mock courtrooms.

### Indiana: Standards Tied to State Funding in Non-Capital and Capital Cases

In Indiana, the public defender system is county-based, county-funded and deeply rooted in a home-rule style of politics that resists state control, noted Larry Landis, Executive Director of the Indiana Public Defender Council. The defender system was established in the 1980s to meet the requirements of *Gideon*, and each county system was given local autonomy, some state resources and independence from the judiciary.

Though each individual county would fund and manage its own public defender system, a state public defender commission was created in 1989 to set uniform standards for public defender services. It relied upon ABA and NLADA standards on caseloads, compensation and support services. The initial objective was for the state commission to link compliance with the standards to reimbursements to the counties, beginning with death penalty cases. Counties which complied with the state standards for death penalty cases were reimbursed for 50 percent of defense costs for those cases.

The commission then persuaded the Indiana Supreme Court to make the standards for death penalty cases mandatory, rather than voluntary; the court codified this standard in Criminal Rule 24 in 1992. In 1993, the legislature approved 25 percent reimbursement for defense costs in non-capital cases, without making compliance with the standards mandatory. In 1997, the reimbursement percentage was raised to 40 percent, and even though compliance is still voluntary, it has made a large difference in terms of the number of counties in compliance – 37 out of 92.

### Louisiana: Limited State Standards

In Louisiana, the judicial system is very fragmented and localized. The initial effort to improve indigent defense began in 1966, when the state legislature created district indigent defender boards to provide a uniform system for securing and compensating qualified counsel, resulting in 41 boards. However, no funding was provided until 1976.

A major problem in New Orleans is the source of the funding, which comes from traffic tickets, noted Tony Gagliana of the Louisiana Supreme Court. The amount of funding depends on collection efforts in each district, which is then dependent on the vagaries of law enforcement. For example, Gagliana noted, if a parish (the state's version of a county) forgot to order traffic tickets one month, funding for that period would be substantially reduced. Traffic citations vary seasonally, also affecting funding.

The Louisiana Indigent Defender Board, which was created in 1974 under the state supreme court, set three mandatory standards at its inception:

- The trial of capital cases would require two certified attorneys;
- Appeals cases would be handled only by certified attorneys; and
- Private attorneys working as full-time staff members on district boards could not practice criminal law in their respective districts, but could practice civil law only if it did not conflict with their duties.

Gagliana noted that “standards are very limited by funding.” He pointed out that the imposition of national caseload standards on the current system in Louisiana would require far more funding than the amount currently allocated. While Louisiana has the three standards originally embedded in the Supreme Court rule of 1974, other standards at this point are “aspirational.” Although the standards have been useful for setting the context for improvement of indigent defense, the only enforcement tool the state board has is to restrict or deny a parish funding for gross violations.

## *Supplementing Resources through Back-up Centers*<sup>7</sup>

National standards recommend the establishment of statewide indigent defense systems, to promote uniform quality and cohesive planning and budget allocation. But even where a full statewide trial-level indigent defense system has not yet been established, useful progress can be made toward improved efficiency, statewide sharing and coordinating of resources, reduced costs, and helping local defender systems deliver better quality representation, by establishing statewide backup centers.

States have widely varying models for providing backup support to local indigent defense providers in the form of training, technical assistance, development of resource materials, information sharing, and on-site and phone consultation services. Washington, New York and Michigan have developed different models to address the lack of uniformity of resources and quality at local levels.

### Washington: Training, Standards, Manuals and a Voice for Indigent Defense

The Seattle-based Washington Defender Association is a low-tech center serving 800 members statewide, according to the WDA's Executive Director, Christie Hedman. Trial-level public defense services in the state are decentralized, with local, county and city governments determining delivery structures. Some counties contract with nonprofit agencies while others have public defender agencies, assigned counsel departments, or contract relationships with private law firms. Some jurisdictions rely exclusively on appointed counsel.

Funded originally by the state's criminal justice training commission, the center was created to provide training and to give a voice to public defenders across the state. It now has expanded its target audience to include prosecutors, municipal attorneys and coroners. There is a \$125 yearly membership fee, and the center tries to meet the state's continuing legal education requirement.

The center moved to standards creation with an American Bar Association grant, and has used federal funding through the Byrne Formula Grant Program since 1988. Those standards were annotated, published, and studied by a statewide task force reviewing indigent defense services. The state legislature later incorporated the center's work into statutory standards for public defender services and for screening to determine indigency.

The center also used Byrne Grant funding to develop manuals. One, on drug case procedure, is essentially a trial manual. Another specifies the civil legal services juvenile defendants are entitled to receive.

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7 Workshop D: Supplementing Resources through Back-up Centers. Moderator: Joseph Trotter, Director, Justice Programs Office, The American University, Washington, D.C.; [justice@american.edu](mailto:justice@american.edu). Christie Hedman, Executive Director, The Washington Defender Association, Seattle, WA, [hedman@defensenet.org](mailto:hedman@defensenet.org); Charles F. O'Brien, Managing Attorney, New York State Defenders Association, Albany, NY, [cob@nysda.org](mailto:cob@nysda.org); James R. Neuhard, Director, State Appellate Defender's Office, Detroit, MI, [jneuhard@sado.org](mailto:jneuhard@sado.org).

Frequent references to the center in statutes have raised its profile with the legislature, which in turn has increased the influence of public defenders in the criminal justice system. The center is frequently asked to join state criminal justice commissions and task forces.

Staff includes the equivalent of two full-time resource attorneys, a full-time immigration staff attorney, a 75 percent-time attorney concentrating on juvenile issues and a quarter-time mental health professional. Of the center's 800 members, 600 are in organized offices and 200 are assigned counsel. The center's operating cost is approximately \$500,000 a year.

### New York: Full Service Support

New York offers different challenges, according to Charles O'Brien of the New York State Defenders Association. New York's 104 separate delivery systems are second only in number to New Jersey's, and it has the second lowest assigned counsel rate in the nation. NYSDA has seven lawyers, two immigration specialists and seven other support staff, who prepare and update trial manuals and other material and provide technical assistance and research services to county indigent defense offices. The association also files amicus curiae briefs in the appellate courts, operates as an information clearinghouse, develops internal databases and researches and disseminates ways for defenders to maximize their efficiency by taking advantage of the Internet for legal research, investigation, or scientific or other expert resources.

The association is the only group in New York collecting caseload data on public defense issues. It offers continuing legal education, an intensive trial advocacy program and maintains a web site ([www.nysda.org](http://www.nysda.org)) and mail services with news about changes in the law and funding opportunities. The web site will soon contain a case digest system. The association also publishes a weekly newsletter, Defense News.

### Michigan: On the Web

With 10 million people, Michigan has five public defender offices, and the vast majority of defender services come from the private bar. The Michigan State Appellate Defender's Office uses the Internet to provide assistance to defenders. James R. Neuhard, the director, said his office works to produce information lawyers really can use to do their work better. The office's web-based criminal defense newsletter, [www.sado.org](http://www.sado.org), has links to defender trial books organized into different trial categories. The site's focus is defense-oriented material, including statutory analyses.

The site is a subscription service, affording precise data about who is using the materials. The office uses lists provided annually by the state treasurer to notify assigned counsel of its services. The site now has 560 subscribers, who pay \$30 annually. It is searchable, and has a discussion forum of nearly 550 lawyers talking to each other electronically about defender and client issues.

A new program on the web site, designed to help lawyers statewide find experts and attorneys with particular experience, has been exceptionally helpful to lawyers in isolated areas. Information available to clients on the web site covers issues such as dealing with arrests, obtaining bond, and finding a lawyer. On the theory that too many lawyers opt out of a process

because of time constraints, the web site tries to make practical tools readily available, including motion forms with up-to-date citations, and a recent record of motions filed in front of particular judges.

## ***Coalition Building in the Legal and Lay Communities***<sup>8</sup>

*“If you are clear on your vision, your mission, your values, then you weigh everything you do when you’re in these coalitions. You can keep yourself from being co-opted and you have to be very clear and straight with all members of the coalition of where you are at all times.”*

– Sacramento County Public Defender Paulino Duran

Unlike some functions of the criminal justice system, such as policing or prosecution, the value of an effective and well-managed indigent defense agency is not always intuitively apparent to the elected or appointed officials who are responsible for funding it, or to the public they represent. Nor are those officials always intuitively receptive to the funding advocacy of the heads of those indigent defense agencies. What may be missing is an understanding of certain realities of the justice system: that the components and functions of the criminal justice system are interdependent; that quality, accountability and effective management are as prudent and cost-effective in indigent defense as in any other agency; and that maintaining high standards and adequate resources for legal representation for indigent defendants is critical to the integrity of the system and the public’s confidence in it.

When defenders join in coalitions with other key players in the justice system and the community, it can help foster interagency cooperation, promote understanding of the interconnectedness of justice agencies, and build consensus for needed improvements in indigent defense and other parts of the system. But in setting goals for building coalitions, all participants should remember that the defender’s first duty is to be a zealous advocate for clients. This workshop discussed the issues involved in using a public agency management model to forge relationships – i.e., build coalitions – inside and outside the criminal justice community.

### Kentucky’s Multidisciplinary Blue Ribbon Group

Joseph E. Lambert, Chief Justice of the Kentucky Supreme Court, said he believes coalitions elevate the legal profession as a whole. He applauds them because, as chief justice, his major responsibilities include improving justice, public confidence and professionalism overall. Coalitions may also correct the public’s perception that public defenders usually are not first-class lawyers. Coalitions can enhance the status of the defenders in the trenches.

Kentucky’s Blue Ribbon Group, on which Chief Justice Lambert served, was established in 1999 to “address the chronic problems of the Kentucky public defender system and propose solutions in light of national information and standards, in order to create a strategy for ensuring an appropriately funded indigent defense system for the 21st Century.” Members of the Blue Ribbon Group included leaders of the Kentucky Justice Cabinet, the Commonwealth Attorneys

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8 Workshop E: Future Partners: Coalition Building in the Legal and Lay Communities. Moderator: Kirsten D. Levingston, Director, National Defender Leadership Project, Vera Institute of Justice, New York, NY, [klevingston@vera.org](mailto:klevingston@vera.org); Erwin Lewis, Public Advocate, Department of Public Advocacy, Frankfort, KY, [elewis@mail.pa.state.ky.us](mailto:elewis@mail.pa.state.ky.us); The Hon. Joseph Lambert, Chief Justice, Supreme Court of Kentucky, Frankfort, KY, [cjlambert@mail.aoc.state.ky.us](mailto:cjlambert@mail.aoc.state.ky.us); Ron Coulter, Idaho State Appellate Public Defender, Boise, ID, [racoulter@sapd.state.id.us](mailto:racoulter@sapd.state.id.us); Paulino G. Duran, Public Defender, County of Sacramento, Sacramento, CA, [pduran@pd.co.sacramento.ca.us](mailto:pduran@pd.co.sacramento.ca.us).

Association, the judiciary, the legislature, and the state bar, as well as academics and private practitioners. The Group produced a 48-page report, with assistance from the research and consulting firm The Spangenberg Group. The report contains 14 specific findings about the inadequacies of the state's indigent defense system, relative to the systems of comparable states, and 12 specific recommendations, covering areas such as funding, staffing, workload, and collaborative planning. The report has been well received in the legislature, producing significant increases in funding and staffing, and an expectation of full implementation over the next several years, which in turn has improved workloads, the quality of indigent defense, and morale among public defenders, said Erwin Lewis, Director of Kentucky's Department of Public Advocacy and a member of the Blue Ribbon Group.

### Idaho's Coalition on Statewide Policy

In Idaho, a collaboration was formed between five key players on criminal justice policy: state appellate defender Ron Coulter; Kathy Ruffalo, advisor to the governor on law enforcement matters; Cathy Holland-Smith, Budget Analyst for the Legislative Service Office; Senator Denton Darrington, Chair of the Senate Judiciary and Rules Committee; and Representative Tom Moss, Chair of the House Judiciary Rules and Administration Committee. The coalition has helped the defense community have a voice in statewide policy issues involving the justice system. Coulter said that public defender managers who participate in such coalitions must understand and be adept at coalition-building.

Among the priorities agreed upon by the five members of the Idaho coalition are: to educate the state administering agency for the Byrne formula grant program, the Idaho Criminal Justice Council, regarding the applicability of Byrne grants to indigent defense programs; to provide grant-writing education for defenders; to provide orientation training for new police trainees about defense issues, such as racial profiling and search and seizure; to obtain state funding for public defender training; and to collaborate in support of legislation clarifying that when an appeals court sends a capital case back for resentencing, the state appellate defender's office should handle the relitigation, since those attorneys will have been recently immersed in the details of the case and can handle it more expeditiously than a new counsel appointed by the county.

The downside to operating in coalitions, particularly for public defender managers, is that staff may begin to wonder where your loyalties lie. It helps to discuss the importance of outreach on defender issues with the staff. It often takes time and patience to overcome suspicion.

### Sacramento, California: Information Systems Integration

Coalitions may provide a forum for more effective defender advocacy on systemic issues, said Paulino G. Duran, public defender for California's Sacramento County. Public defenders have a bit of a reputation for cultivating a siege mentality. Coalition-building helps limit the political and fiscal risks organizations or individuals take, while putting defenders firmly in the loop of information and resources. Defender involvement fosters acceptance by the community and funding bodies. Defenders come to be seen more collegially, not as "the enemy."

Duran is a member of the Integrated Justice Information Systems Project of Sacramento County's Criminal Justice Council. Its goal is to "improve the efficiency and effectiveness of justice agencies and the court, enrich the quality of justice and enhance the safety of Sacramento's citizens through the integration and timely sharing of criminal justice information."

Resistance to these goals has been an obstacle. Duran said many of his staff members have not fully accepted that collaboration with the community, probation departments and victims works in favor of clients. Such staff concerns must be met with the assurance that the director is clear on his or her vision, mission and values. It is equally important to be clear on these issues with all members of the coalition.

Everyone involved with public defense should understand that no matter how important a coalition might be, the public defender is first and foremost a client's advocate. Membership on any management team takes second place, and when there are conflicts, the advocate role prevails.

Chief Justice Lambert noted that any indigent defense coalition might find itself dealing with criticism and unpopularity. He has found that the public responds positively to arguments that basic fairness mandates adequate defender services.

Lewis stressed the importance of creating an atmosphere where coalitions are acceptable and warned that such linkages may require elected officials to take risks. Any data generated by coalitions must be reliable so that officials can trust it.

Measuring the success of coalitions may seem like an abstract exercise, but it is possible. Setting up performance benchmarks is essential to the process. Making those benchmarks realistically and quickly achievable is vital in the early stages of a coalition, Duran said, as is taking a long view when defining the project's overall success.

A healthy coalition requires all parties to bring a positive, confident attitude to the table, and to avoid criticism of other agencies.

## ***Judicial Role in the Appointment of Counsel and Assuring Quality Representation***<sup>9</sup>

All indigent defense standards are in accord on the imperative of indigent defense independence from the judiciary. When judges have plenary power to assign attorneys to cases, or to approve or reduce compensation for the attorney or reimbursement for expenses, or to hire or fire the public defender, there are grave risks that attorneys' obligation of zealous advocacy for their clients will come into conflict with their desire to please the judges. Nevertheless, the judiciary has a strong interest in promoting the quality of indigent defense representation, and a variety of valid ways of getting involved. Three judges discussed the realities of inadequate funding, increasing caseloads, and a diminishing pool of lawyers interested in or able to take indigent cases, and the variety of ways in which judges can act to assure better counsel.

### Washington: Judges on Task Force Recommend Assigned County Rate Increase

The King County, Washington indigent defense system, established about 30 years ago, has a budget of \$28 million, with \$22.8 million earmarked for agency contracts with four public defender agencies, and about \$2 million earmarked for privately appointed legal services. About \$1 million is spent for expert services, and another \$1 million pays for administrative costs. Of the 39,000 defendants who sought publicly appointed counsel last year, about 90 percent qualified.

Low assigned counsel rates have made it difficult to secure qualified, experienced lawyers in indigent cases. At \$33 per hour, King County pays assigned counsel one of the lowest rates in the country. The federal system in King County pays \$73 per hour, and attracts more participation.

Last September, judges participated in a county task force that also included prosecutors, public defenders, private defense attorneys and others in the criminal justice system. They agreed these rates were too low and recommended increases.

### New York: Approving Reasonable Expenses, Lobbying for Assigned Counsel Rates

Low fees are also a key problem in New York City. Before *Gideon v. Wainwright*, judges appointed counsel who had agreed to take cases on a pro bono basis. Following *Gideon*, the New York Court of Appeals ruled that all people accused of crimes, whether misdemeanors or felonies, were entitled to counsel. A new state law mandated counties to provide indigent defense through a public defender system, a contract with the Legal Aid Society, a panel of private attorneys, or a combination of these alternatives.

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9 Workshop F: Judicial Role in the Appointment of Counsel and Assuring Quality Representation. Moderator: Cait Clarke, Project Manager, Executive Session on Indigent Defense Systems, Kennedy School of Government, Harvard University, Cambridge, MA, [clarke@law.harvard.edu](mailto:clarke@law.harvard.edu). Hon. Betty Weinberg Ellerin, Justice, Appellate Division, First Department, New York, NY; Hon. Richard A. Jones, King County Superior Court, Seattle, WA, [richard.jones@metrokc.gov](mailto:richard.jones@metrokc.gov); Hon. Noel Anketell Kramer, Deputy Presiding Judge, Criminal Division of the Superior Court, Washington, D.C.

New York City adopted a plan that included a Legal Aid contract and panels of private attorneys. While Legal Aid had been the source of most attorneys in the pre-*Gideon* era, the private panels became the primary source under the new plan.

The panels are supervised by the Appellate Division, which consists of two departments: the First includes Manhattan and the Bronx, and the Second covers Brooklyn, Queens and Staten Island. There are panels in each division for misdemeanors, felonies and homicides. An advisory and screening committee, appointed by the Appellate Division and operating largely on a pro bono basis, selects the lawyers for each panel.

New York City lawyers are not well compensated; they receive \$25 an hour, and \$40 an hour for the small proportion of work which is in-court. The legislature has set low per-case caps: \$800 for any misdemeanor; \$1,200 for any felony and \$1,200 for any appeal. At a time when caseloads have been exploding in both criminal and family court, the number of lawyers on these panels has been declining, as many lawyers cannot afford to take these cases. The remaining lawyers are overburdened, carrying as many as 100 cases. In turn, this has led to many delays, and often the sleighting of out-of-court, investigative and other case preparation work.

While judges cannot change these basic payments, Judge Betty Weinberg Ellerin of the Appellate Division noted, the court does have some jurisdiction in the payment for ancillary services – doctors, psychiatrists and social workers – who are paid at much higher rates. Doctors receive about \$200 per hour; psychiatrists about \$125 per hour. The court does have the ability to approve higher caps under exceptional circumstances, and most of the time, when a lawyer submits a voucher for these additional services, the vouchers are approved.

In New York, Ellerin and other judges have asked the state legislature to raise these pay rates, and have sought to make the public aware that such low rates interfere with the right to counsel. Some prosecutors have supported this effort, but “the legislature has remained deaf to our pleas,” Ellerin noted.

### Washington DC: Finding the Best Lawyers to Take Assignments

In Washington DC, the public defender’s office is precluded by statute from taking more than 60 percent of the indigent cases, and usually handles a smaller percentage. The remaining cases are handled by a panel of lawyers appointed by judges, assisted by an administrative office run by the Public Defender Service which processes appointments and payment vouchers.

This arrangement has worked relatively well, said Judge Noel Anketell Kramer, perhaps because Washington has more than 70,000 lawyers on which to draw. The rate of pay is higher as well: \$50 an hour, with a cap of \$1,350 for misdemeanors and \$2,450 for felonies. The amounts can be increased in complex cases.

“We’re at the point where we are doing the best we can and are looking at what we can do better,” Kramer said. “At this very moment, we are in the midst of a massive project to find the best 250 lawyers for a panel that will be the sole lawyers, other than the public defender service, to represent indigent defendants in felonies and the most serious misdemeanor cases, and the next 100 best to handle the local DC and traffic cases.”

General questions were posed about how judges should deal with ineffective lawyers practicing in their courtrooms.

Judge Jones of Seattle/King County urged caution, noting that “as a judge you can’t interfere with the process.” Still, in one case, he called the supervisor of a defender who was not properly representing his client and invited the supervisor to observe the attorney or to view videos of the attorney’s performance; the result was an improvement in the defense performance. In a situation where a defendant has complained about a lawyer, Jones has closed the proceeding and has spoken with the lawyer and defendant privately to resolve the professional concerns.

By contrast, Judge Ellerin of New York said judges should intervene when a counsel’s performance is inadequate. If she notices deficits in an attorney before the trial stage, she will call the panel administrator and advise him or her accordingly. If a lawyer is not competent, she will have the lawyer removed. “In principle, a defendant is entitled to the counsel of his own choice, so in some sense, this is interfering,” she said. “But I feel in a criminal case, even though we’re supposed to be neutral, when a person’s liberty is at stake, sometimes you have to intercede or interject during the trial to make sure an injustice doesn’t occur.”

Judge Kramer of Washington, D.C., said judges should be proactive to ensure the competency of appointed defense lawyers. She noted, “We have to take responsibility as judges, as court representatives, to make sure ... that we know something about them, that we can vouch for them to some degree.” The panel agreed that each judge has a responsibility to ensure quality representation especially for indigent defendants; when concerns arise, each judge should handle problems in the manner deemed most appropriate for the particular situation. Judges do have a responsibility to take some form of discretionary action to address such problems.

## ***Toward Equal Justice: Improving Public Trust and Confidence in the Criminal Justice System***<sup>10</sup>

The glaring disparity between white and non-white experiences with the criminal justice system undermines public trust in the integrity and fairness of the system. By the time a minority defendant appears before a judge, various racially influenced discretionary decisions may have been made, consciously or subconsciously, by participants throughout the criminal justice system, resulting in biased judgments, and biased sentencing. The criminal justice system needs systemic change, including more drug treatment, and alternatives to incarceration, before it can regain public confidence and serve and protect all communities from harm. Judges, prosecutors, and defenders all have a role to play in making the criminal justice system more equitable.

There is stark evidence of the role of race in criminal justice decisions. In 1954, when *Brown v. Board of Education* was decided by the Supreme Court, African Americans made up 30 percent of people sentenced to prison in the United States. Today, African Americans make up 50 percent of the total. “We know from studies by the Justice Department that a black male born today has a 29 percent chance of doing time in a state or federal prison...an Hispanic boy, 16 percent. As we stand here today, we know that one of every nine black males in his 20s to early 30s is in a jail cell as we speak,” said Marc Mauer, assistant director of The Sentencing Project and author of the book *Race to Incarcerate*. The comparable rate for white males is four percent, or one in 25.

At the same time, victimization rates are disproportionately high in communities of color. A National Urban League study of New York City found that African Americans overwhelmingly favor police protection promoting public safety work in their neighborhoods, but that they also have high levels of fear, intimidation, and alienation because of their experiences with police. “We can’t have law enforcement provide the public protections necessary as long as these very intolerable relationships persist,” said Mauer.

Police consciously and unconsciously use race to make decisions about whom to stop, detain and arrest. More whites use drugs than African Americans, and most users obtain their drugs from someone of their own race – the logical inference being that most people entering the criminal justice system for drug offenses should also be white. On the contrary, however, most incarcerated drug offenders are African American, leading to the inference that this reflects skewed law enforcement priorities regarding where to patrol and make arrests, compounded by sentencing disparities (crack cocaine, etc.).

African-American crack users and small-time sellers who are supporting their habits get punishment, not treatment. “In the white community, the issue of drugs is treated as a health issue; in the black community, it is treated as a crime issue,” said William McGee, chief public defender in Hennepin County (Minneapolis), Minnesota.

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10 Plenary III: Toward Equal Justice: Improving Public Trust and Confidence in the Criminal Justice System. Moderator: Ronald S. Sullivan, Jr., General Counsel, Public Defender Service for the District of Columbia, Washington, D.C., [rsullivan@pdsdc.org](mailto:rsullivan@pdsdc.org). Michael Bryant, Staff Chaplain, District of Columbia Detention Facility, Washington, D.C.; William McGee, Chief Public Defender, Fourth Judicial Court, Minneapolis, MN, [william.mcgee@co.hennepin.mn.us](mailto:william.mcgee@co.hennepin.mn.us); The Hon. Nancy Gertner, U.S. District Court for the District of Massachusetts, Boston, MA, [honorable\\_nancy\\_gertner@mad.uscourts.gov](mailto:honorable_nancy_gertner@mad.uscourts.gov); Angela Davis, Professor, Washington College of Law, The American University, Washington, D.C., [angelad@wcl.american.edu](mailto:angelad@wcl.american.edu); Matthew Campbell, Deputy State's Attorney, Ellicott City, MD, [mcampbell@co.ho.md.us](mailto:mcampbell@co.ho.md.us); Marc Mauer, Assistant Director, The Sentencing Project, Washington, D.C., [mauer@sentencingproject.org](mailto:mauer@sentencingproject.org).

Once inside the prison, even non-violent drug offenders, who make up 52 percent of the U.S. prison population, do not get any services or treatment that would help them stay out of prison in the future. “I don’t see middle class people,” said Michael Bryant, staff chaplain of the Washington D.C. detention facility. “Most of our people are addicts, who have been in many times because they can’t get treatment in the prison or outside, and they’re back there because they’ve had trouble again with their addiction problem, they relapse.” Addicted inmates sit idle, bored, rehearsing negative thinking and becoming even less able to live in their communities than before.

Prisons fail to prepare inmates for a successful transition back to the community, and may actually increase the probability that an inmate will be arrested and convicted again. The recidivism rate for offenders who have been incarcerated is 70 percent for juveniles, 63 percent for adults. Prison inmates come to feel “institutionalized,” and to believe that they belong in prison. The thinking goes: “If you go back into a society, who’s going to hire you – if you have no credentials, haven’t even graduated from high school, you have an addiction that hasn’t been treated, a felon’s record, no vocational skills? You’re a liability to society, and you’re better off in prison,” said Bryant.

Alternative treatments are discouraged by the past decade’s sentencing guidelines. “The sentencing guidelines made an incredible decision – that the most important decision you can make in a case is jail/no jail, as though that is the alternative,” said Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts. Despite large budget surpluses throughout the U.S., there is little national debate on providing drug treatment for addicts. In court, when recommending drug treatment for addicts along with jail time, “I will then announce the statistics, in open court, for the extent to which X program has been cut...and the likelihood that this profoundly addicted person will wind up with any degree of treatment at all...to the extent I can, I am trying to flag the issue,” said Judge Gertner. Current “three strikes you’re out” and crack cocaine sentencing laws demand increasing sentences for defendants with prior criminal histories, without regard to the kind of record they have. This forces judges to incarcerate defendants who have been addicted since early youth, with no treatment, to federal prison for years. “This doesn’t make any sense,” said Judge Gertner. This issue needs to be addressed politically: laws need to be changed, to return discretion to judges.

Many critics charge that racial disparities arise from social and economic disparities, not from the criminal justice system. This is a false dichotomy, said Professor Davis. The criminal justice system is part of society, and is affected by the same forces as any other part. It needs to re-examine its role in addressing societal problems. The challenge, said Mauer, is to use the criminal justice system to reverse these trends and respond to some of the failures of social and economic institutions on the outside, even as we deal with the community at the same time.

Racial profiling, the war on drugs, and death penalty studies all show the influence of race in the criminal justice system. Other effects are more subtle, and more pervasive. Decisions at one point in the system affect decisions farther along in the process. “Every day, people in the system are making decisions about arrests, charging, sentencing, parole...many of which may be overlaid with racial or ethnic bias, not necessarily conscious and intended...but the use of discretion can have a very significant impact,” said Mauer.

Bail and pre-trial release decisions have a strong influence on sentencing. Offenders who are kept in jail prior to trial are more likely to be convicted, and receive longer sentences. Being kept in custody directly deprives defendants of resources that could lessen their sentences. For example, under both federal and state sentencing guidelines, offenders can qualify for sentence reductions by demonstrating “post-offense rehabilitation” – i.e., good works between the time of the offense and the time of sentencing. “If you’re in pre-trial detention, and you can’t get your GED, can’t address your drug addiction,” noted U.S. District Judge Nancy Gertner, “you never can get post-offense rehabilitation.”

Sentences also are increased for a prior criminal record. “If black people are stopped more, investigated more [than whites]...invariably, there will be more encounters with law enforcement...different records...and different sentences,” said Judge Gertner. Even pre-sentencing reports on the effect a jail term will have on families are biased. “They will say something like, ‘X who is a white defendant is about to be incarcerated, his kids will go on AFDC. That will be a tragedy.’ I’ll read one for a black defendant that will say, ‘His kids will go on AFDC. The family can take it.’ You’re talking about stereotypes,” said Judge Gertner.

Judges, prosecutors and defenders can all work to reverse this accumulating bias. “That’s what discretion is for...If people who have discretion could try to use it to eliminate racial disparities, we could make some progress,” said Professor Davis.

Federal guidelines allow judges to reduce sentences when there are “extraordinary family obligations.” This involves examining what is actually important to a family. “If the model of an ordinary family is Ozzie and Harriet, a lot of people are not going to measure up to that,” said Judge Gertner. Instead, she uses a comparison group of other people convicted of crack cocaine offenses in her jurisdiction, asking probation officers to collect presentence reports for every comparable offender in her jurisdiction. This allowed her to extend “extraordinary family obligations” recognition, and a sentence reduction, to one crack defendant who had an intact family, a steady job, and was a union member. “The pernicious part of the federal guidelines,” said Judge Gertner, “is that these are stereotypes that hide behind the system...it’s not even discussed, [but] the decision to charge, the decision to sentence, to get bail – all of it looks neutral, but it is not at all.”

Prosecutors can help by insisting that the system be fair and consistent. This requires listening, and work by the defense, to help prosecutors see biased practices that may be invisible from the prosecutor’s point of view. “Oftentimes defense attorneys are the ones who pick up first, and most rapidly, on the occasional...bad police officer who is consciously making profile stops, or a police strategy by a department that may be very well intended, but is nonetheless having a negative impact on a community,” said Matthew Campbell, Deputy State’s Attorney in Howard County, Maryland.

Campbell described a recent series of meetings he conducted when his office refused to indict a series of traffic stops by a police officer. “The trooper was African-American,” said Campbell. “When we told him we weren’t going to indict his cases, he went all the way up the chain of command, to the top officer.” Each successive meeting was larger and larger, to discuss the reasons for the decision. The meetings were worthwhile: “Those kinds of stops do a lot of harm, more harm than prosecuting possession of drugs in those stops could achieve,” said Campbell.

Prosecutors need a Hippocratic oath of their own. “Far too often...because of a war mind set...we do terrible injury...we should learn from doctors that the first obligation is to do no injury,” said Campbell. Prosecutors have been misled by repeated campaigns like the “war on crime” and “war on drugs.” “Our police and our prosecutors are not supposed to be at war with our citizens; they are to protect them – to enforce the law and protect them,” said Campbell.

Though a defender can sometimes seem to be “the most powerless person in the courtroom,” defenders have an important role, said Ronald S. Sullivan, Jr. of the Washington D.C. Public Defender Service. “We are the guardians of constitutional rights, and we are advocates for our clients,” said McGee. In some cases, this may mean bringing up issues of race that the defendant feels are important, even if the defender feels they are irrelevant. “Does he or she believe it? They’re the ones who have to suffer the consequences of decisions that take place, and I really believe that those ultimate decisions should be left to the client,” said McGee.

Defense lawyers also ensure that individuals do not lose their dignity just because they are in the criminal justice system. “What does equal justice mean? Does it mean that people similarly situated should be treated similarly? Or does it mean that sometimes in order to treat people equally, you have to treat them differently?” said McGee.

Police have also had a powerful, positive role in tackling racial and ethnic bias in the criminal justice system. “It is among police...where the leadership has come for the concept of community policing, problem-oriented policing, whose whole philosophy is to solve the problem...but not necessarily fill the jails fuller,” said Campbell.

The problems of chronic, cumulative bias need to be addressed throughout the criminal justice system. The Sentencing Project has put together a manual titled “Reducing Racial Disparity in the Criminal Justice System”, to help practitioners address intentional and unintentional bias on a daily basis in their jurisdictions, and to talk about the issue with others. “Progress in one area can be offset by resistance in other areas,” said Mauer. Public defenders, prosecutors, judges and probation officers all need to examine these problems, and work together “at the same table” to solve them.

## *Tennessee Weighted Caseload Study*<sup>11</sup>

Indigent defense agencies, prosecutors and the judiciary face similar challenges in approaching legislators and funding agencies for their annual budget needs. Funders question their methodologies and assumptions about caseloads, staffing, facilities, support, and funding. The fact that each agency independently develops its own methodologies, assumptions and projections tends to reinforce funders' perception that the budget submissions may be somewhat subjective and flexible. Budgets that were intended to be lean and tightly justified may end up being arbitrarily reduced. Each criminal justice agency goes through this ordeal separately each year – even though all are involved in processing the same body of cases through a single system.

One solution is for the three major adjudication-system agencies to work together on a process of budget and workload planning – to agree jointly upon shared assumptions and methodologies that can form a common foundation for budget proposals and present a united front to legislators and funding agencies. Tennessee has led the way in this area, with a joint weighted caseload study meant to improve coordinated planning and budget efforts among courts, prosecutors and public defenders. The design of this study was the subject of the most well-attended workshop at the 1999 DOJ indigent defense symposium. A workshop at the 2000 Symposium examined the completion of the Tennessee study and the status of its implementation.

The study has provided insight into the structure of the state's court system, in particular into its shortcomings, while making judges, district attorneys and public defenders aware of the importance of working together. State Comptroller Phillip Doss, the study project's director, said the study illustrated the challenge of collecting caseload data and showed that balance is vital to the state justice system. It also highlighted the importance of local courts to that system and how often they are ignored.

Because of unrelated budget shortfalls, no recommendations from the study requiring funding were implemented in the current session of the Tennessee Legislature. But Doss said leaders of the state's justice system remain confident many recommendations will be funded in the future.

An early goal of the Tennessee study was to depoliticize the state's judge-selection system. As the goals of the study expanded, public defenders and district attorneys were included. Local courts were not included originally, which has led to major obstacles to implementation at those levels, but Doss reported that implementation has been more than satisfactory at the state court level. A data system has not been available at the local level.

Consultants played a major role in the study. Planning a consultant's role carefully contributes greatly to their usefulness. It is important to be ready for them when they are brought in and to plan any follow-up after they have left. It is also important to reach out to public defenders and district attorneys and to solicit support from legislatures and other interested organizations.

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11 Workshop G: Tennessee Weighted Caseload Study. Moderator: Phillip Doss, Project Director, Tennessee Weighted Caseload Study, State Comptroller's Office, Nashville, TN, [pdoss@mail.state.tn.us](mailto:pdoss@mail.state.tn.us). Elaine Nugent, Director of Research, American Prosecutors Research Institute, Alexandria, VA, [elaine.nugent@ndaa-apri.org](mailto:elaine.nugent@ndaa-apri.org); Denise Denton, Senior Legislative Research Analyst, Tennessee Weighted Caseload Study, State Comptroller's Office, Nashville, TN, [ddenton2@mail.state.tn.us](mailto:ddenton2@mail.state.tn.us); Karen Gottlieb, Court Consultant, Nederland, CO, [gottlieb@bio-law.net](mailto:gottlieb@bio-law.net); Robert Spangenberg, President, The Spangenberg Group, West Newton, MA, [rspangenberg@spangenberggroup.com](mailto:rspangenberg@spangenberggroup.com).

Denise Denton, senior legislative research analyst for the study, said early on researchers found little information from the general sessions courts, where most Tennessee cases are handled. A major first step in the study involved establishing a method to collect caseload data from those courts, as well as from the Public Defender Conference system.

The collection system was designed to automate, standardize and integrate data. Early problems included the lack some important elements: a central depository for general sessions court data, standard case terminology, and timely collection of data. A two-year Byrne grant was sought to improve state and local coordination and caseload data collection, involving close collaboration with the Tennessee Administrative Office of the Courts, in order to develop an integrated criminal justice system.

The biggest design challenge by far was standardization of caseload data. Most courts had their own methods of counting and defining cases, which often differed widely from the definition required by the study.

Researchers finally defined a case as a single charge – or set of charges – arising out of a single incident, involving one defendant in one court proceeding. This standard is slowly being implemented, with about 25 percent of courts now using definitions proposed by the study. The project's staff is continuing to work with other courts, helping collect information using both the court's method and the method needed by the study's protocols.

Continuing analysis indicates that the building blocks of integration are commitment and cooperation from leadership in the legislative and judicial branches of government, including enabling legislation, funding and support from inter-governmental coordination committees. Tennessee now has all but the funding. One successful element has been the work of court clerks in collecting information. The study found that, overall, teamwork is more important to the success of integration than technology.

Research in the future should include tracking of whether courts have standardized case definitions and have automated their data collection. It will be important to consider the amount of time and number of resources necessary to collect data, the degree of cooperation that can be expected from data collectors, and the potential turf conflicts among the players who must be persuaded to collaborate for the good of the project.

The study's state-of-the-system survey indicated that Tennessee needed 125 additional assistant district attorneys and 58 additional public defenders. That recommendation remains unfunded.

The Legislature has allowed the Administrative Office of Courts to leave some judgeships vacant in certain areas where the study indicated there was an excess of judicial resources – that is, more judges than necessary – and has approved transferring funds to areas that need more resources.

Karen Gottlieb, the principal researcher for the court component of the study, on behalf of the National Center for State Courts, said an indisputable benefit of the study is its numerical detail. Legislatures like to work with numbers, and they like it when researchers can quantify information. The Tennessee study shows how a judge, prosecutor or public defender spends his or

her day, including travel, casework and other chores legislators must be aware of when considering funding.

Ms. Gottlieb said three essentials of a good weighted caseload study are very good disposition data counted consistently statewide, good standardized filings data, and time studies tracking daily activities of public defenders, prosecutors and judges.

Panelists recommended that any agency contemplating doing a weighted caseload study should try to keep its relationships with consultants simple. Doss said Tennessee had found that subcontracting through the main contractor created problems.

Weighted caseload systems eventually will become widespread. Robert Spangenberg, President of the Spangenberg Group, the principal researcher on the indigent defense component, said weighting is a valid measure of workload. Such a system looks at the time lawyers and judges spend on particular kinds of cases, providing a realistic look at the court system's effectiveness. Lawyers and judges may not be happy – at first – about the time it takes to note down what they do during the day, but the required work-time usage forms only take about five minutes a day to complete. They deliver great benefits for a small investment of time. The system is also a good management and training tool for lawyers.

Elaine Nugent, director of research at the American Prosecutors Research Institute and the principal researcher on the prosecution component, added that from a managerial perspective such tools draw useful distinctions by looking at overall workloads as well as caseloads. Weighted caseload studies may have added value because they not only consider the amount of time available to a lawyer in dealing with cases, but also include vacation time, sick time, etc. In particular, the Tennessee study revealed the amount of time lawyers may spend on a case before it actually becomes a case – a factor seldom weighed in traditional time studies.

## *Assisting Law Enforcement in Identifying and Eliminating Racial Disparities*<sup>12</sup>

Many jurisdictions are struggling with the public perception or the reality that racial or ethnic profiling is being used by police in deciding whom to stop for various types of offenses, from traffic violations and loitering to drugs and gang activity. Increasingly, defenders, police, prosecutors and legislators are moving proactively to determine whether such problems exist, and to craft solutions. Assisting law enforcement in identifying and eliminating racial disparities requires accurate data collection to determine the nature and extent of disparities, cooperation and acknowledgement by law enforcement of such data collection efforts, state executive branch oversight, litigation or legislation where necessary, and a sustained effort to change the culture in which such disparities exist.

Positive progress in addressing the problem of racial profiling has been achieved in many jurisdictions around the country, including North Carolina, New Jersey and New York.

In North Carolina, one of the first states to require that police conduct at traffic stops be monitored, the state Highway Patrol recognized early on the need for a code of ethics requiring fair and impartial treatment of citizens and some means of enforcing it. Colonel Robert Holden, the Highway Patrol's commander, said the state began by giving courses in cultural awareness and integrity. The Federal Bureau of Investigation helped with training.

Training must be accompanied by policies and procedures designed to make individuals accountable for their actions. Officers should have a clear reason to make a traffic stop. Monitoring is done by observation and by video camera. North Carolina's monitoring system alerts the Highway Patrol's Internal Affairs Department if an officer becomes involved in two or more questionable incidents. The police commander is also made aware of the incidents.

Recent developments in New Jersey illustrate the impact that litigation can have on racial disparities in law enforcement procedures. Fred B. Last, a state assistant deputy public defender, said the public defender's office didn't "assist" law enforcement there in eliminating racial profiling, but "dragged them and their lawyer, the Attorney General of the state of New Jersey, kicking and screaming for nine years" before having much effect. "It was mainly politics – or at least, greatly politics – that affected where they went and when they got there," in the course of several lawsuits, he said.

That experience proved that numbers aren't everything, especially when referring to studies comparing the number of traffic stops involving minorities and non-minorities. In New Jersey, discovery yielded internal memoranda, promotion records and other items that indicated a failure to supervise, which proved very useful in the case and provided opportunities to counter spurious explanations of the traffic stops.

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12 Workshop H: Assisting Law Enforcement in Identifying and Eliminating Racial Disparities. Moderator: Paul Butler, Associate Professor, George Washington University Law School, Washington, D.C., [pbutlergwu@aol.com](mailto:pbutlergwu@aol.com). Col. Robert Holden, Commander, North Carolina State Highway Patrol, High Point, NC, [rholden@ncshp.org](mailto:rholden@ncshp.org); Mark Peters, Deputy Chief, Civil Rights Bureau, New York Attorney General's Office, New York, NY; Fred Last, Assistant Deputy Public Defender, State of New Jersey, Woodbury, NJ, [Last\\_f@opd.state.nj.us](mailto:Last_f@opd.state.nj.us).

Paul Butler, the panel's moderator and a professor at George Washington University Law School, observed that since racial profiling per se is not illegal, it often is difficult to bring moral authority to bear on the issue. Police officers have to be persuaded that they have a stake in changing their attitudes and institutions.

The basis of racial profiling litigation in New Jersey was an equal protection/selective enforcement claim rather than a Fourth Amendment claim. The plaintiffs used a statistical model from employment litigation to pursue the statistical parts of the case. Finally, the state government admitted racial profiling was a problem, and the attorney general and governor joined in seeking to address it.

Eliminating racial disparities in enforcement procedures of the New York City Police Department offered different challenges, but statistical findings there are proving helpful as well, said Mark Peters of the New York State Attorney General's Office. A report issued late last year on the department's stop-and-frisk practices revealed that NYC police stopped members of minority groups more frequently and with less justification than they did non-minorities. Before the study, there was little solid evidence to encourage the city to grapple with the issue.

Researchers obtained 175,000 copies of the stop-and-frisk form officers in the city are required to complete, even if no arrest is made. The forms included information on the individual's race and the location and purpose of the stop. The study was designed to find out if members of minority groups were being stopped disproportionately and if explanations for stops were legitimate.

Analysis indicated that disproportionate stops of minorities were in fact being made. The police department justified the stops by suggesting that more crimes are committed by members of minority groups, and that officers stopped people in areas with high rates of crime. But after taking crime rates into consideration, the study showed that African-Americans were 23 percent, and Latinos 39 percent, more likely to be stopped by police in New York City than whites. The analysis also indicated that minorities were not more likely to be stopped improperly than non-minorities.

The study results indicate a need for increased education of line police officers on racial profiling, said Peters, with strong efforts focused on individual officers as well as precincts. Leadership is essential. Commanders have the ability to encourage changes in attitude and operations, but some are reluctant. Litigation can be quite effective at forcing major, department-wide changes.

Public trust is a critical element in making changes that will reduce or eliminate racial disparities. Col. Holden stressed that the public must be certain the police will act when complaints are made. And individual officers must be reminded of their oaths, obligations and ethics. Improper conduct should not be rewarded.

## *The Criminalization of Poverty: Collaborative Strategies to Respond*<sup>13</sup>

When people enter the criminal justice system because they are too poor to pay fines, poverty itself becomes a crime. Leaders of indigent defense and all other justice-system agencies have an institutional and personal responsibility to collaborate to ensure that the sanctions inflicted upon low-income individuals are not more harsh and punitive than those borne by more well-to-do individuals for the same conduct.

In Seattle, a city law directs police officers to impound cars for driving with a suspended license. Since most licenses are suspended for failure to pay fines, this law has had a disproportionate impact on poor drivers, particularly on poor African-American drivers. With the help of a U.S. Bureau of Justice Assistance (BJA) grant, the Seattle-King County Public Defender Association, the Seattle Municipal Court, and law enforcement have been able to work together to reduce the number of impoundings, and the disproportionate racial impact of this law.

The first government group to recognize the impounding's impact was the Public Defender Association. The association started its work on the impounding law after receiving a grant for a "racial disparity project" from BJA.

The state's commission on minorities and justice had already done studies documenting racial disparities throughout the system, particularly in bail and sentencing decisions; the BJA grant allowed the association to hire a full-time attorney to "stop studying and do something about it," said Robert Boruchowitz, Executive Director of the Public Defender Association. Initially, the new attorney was going to focus on bail and sentencing. When the association talked with people in the community, however, the impounding law was high on their agendas. "One of the first things they said was, 'The system's not fair,' " said Boruchowitz.

Although it is illegal to drive anywhere in the U.S. with a suspended license, Seattle's impounding law can quickly turn a series of minor events into an irreparable loss for drivers who cannot afford to pay fines immediately. "It's a drastic response to a victimless crime," said Boruchowitz. Typically, the process begins when a driver commits a minor traffic violation – failing to yield, driving with a broken tail-light – and receives a citation. Often, drivers have broken tail-lights because they cannot afford to fix them. If drivers fail to appear in court, and do not pay the fines, their licenses are suspended, once again penalizing drivers who do not have enough money to pay. To make matters worse, the city often sends notices to the wrong addresses, because officers refuse to record any address except the address shown on a driver's license. Drivers with outstanding citations never receive notices, and their licenses are suspended without their knowledge.

When drivers are stopped again, their cars are impounded for Driving With License Suspended, 3rd degree (DWLS3) – even if the driver does not own the car. "The Court is concerned about fairness and justice, and what we were aware of is that 70 percent of the people whose cars were impounded didn't own the cars they were driving. The cars that were impounded were not theirs,"

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13 Workshop I: The Criminalization of Poverty: Collaborative Strategies to Respond. Moderator: Robert C. Boruchowitz, Director, Washington Defender Association, Seattle, WA, [rcboru@aol.com](mailto:rcboru@aol.com). The Hon. Mary Yu, Judge, King County Superior Court, Seattle, WA, [mary.yu@metrokc.gov](mailto:mary.yu@metrokc.gov); The Hon. Judith Hightower, Judge, Seattle Municipal Court, Seattle, WA, [judith.hightower@ci.seattle.wa.us](mailto:judith.hightower@ci.seattle.wa.us); Fabienne Brooks, Chief, Criminal Investigations Division, County Sheriff's Office, Kent, WA, [fabienne.brooks@metrokc.gov](mailto:fabienne.brooks@metrokc.gov).

said the Honorable Judith Hightower, judge in the Seattle Municipal Court. In essence, police officers are acting as judges in these cases. “If the stop is no good, or the underlying suspicion is invalid, a lot of issues come up,” said Boruchowitz.

After impounding, the car is towed, stored, and auctioned off if the driver cannot pay the administration, towing, and storage fees. In one typical case, a woman’s car was stopped while her granddaughter was driving. The car was impounded because of the granddaughter’s DWLS3. “Her storage fees totaled \$547, but the grandmother’s income was only \$700 a month; her car was sold at auction for \$97.74.”

When the Seattle ordinance passed, the Defender Association was the sole opponent, on the grounds that it would have a disproportionate effect on poor and minority residents. The Council passed the law, but did take the Association’s suggestion that the city collect quarterly statistics on the race of drivers whose cars were being impounded. “Without that, there would be no articles in the paper and no attention to the problem,” said Boruchowitz.

In one period, while African-Americans made up 9 percent of the area’s drivers, they received 18 percent of traffic citations, and made up 40 percent of impoundings. Eighty-five percent of suspensions in the state were for failure to appear in court or failure to pay fines. “These were...for not responding to a ticket, or not paying a ticket, not reckless driving or drunk driving,” said Boruchowitz. Seattle does not track Latino/Hispanic impoundings, which may make up a disproportionate share of impoundings as well.

This disparity raised the question of racial profiling. The Seattle Police Department is currently analyzing traffic citations by geographical area and population to see if there are profiling patterns, said Fabienne Brooks, of the King County Sheriff’s Office. Her office follows several principles for dealing with racial profiling:

- meet with community groups;
- recognize that leadership begins at the top levels of law enforcement;
- provide police training on what is and is not acceptable conduct;
- provide supervision, and make sure supervisors know what is going on;
- make sure there is an open and effective complaint procedure; and
- work with the state police association.

While Seattle is documenting the number of DWLS3 cases, it is not yet comprehensively documenting racial demographics during traffic stops. Brooks said this can be difficult because of the volume of stops, and social tension surrounding race. “People will get angry if they get stopped and asked what their race is,” said Brooks. “The situation can escalate, endangering the officer. In Washington State, several questions about this data persist; for example, what about contacts where the officer does not issue a citation? How does an officer track race if there is more than one person in the car? Is this about public safety, or politics?” said Brooks.

By contrast, the State of California is collecting a vast amount of data, including driver race/ethnicity, age, gender, reason for the stop, whether a search was conducted, and whether there was a legal basis for the search.

The local press and media have been extremely important in helping Seattle’s Defender Association bring the racial impact of the impounding law to the public’s attention, and in

preventing the county from passing a similar law. The Seattle Times published a full-page account of the tragic effects of the Seattle impounding law. “By our informing and briefing reporters, we were able to prepare an article with enormous impact on the day the public hearing was held,” said Boruchowitz.

The Defender Association has worked on this issue with every part of the justice system – the community, police officers, the mayor’s office, the county executive’s office, and the city council. “The defenders are in a unique position to articulate to the government the concerns of the clients, and to articulate to the clients the concerns of the government, and be a technical advisor to both sides,” said Boruchowitz. However, that does not mean that the government is always willing to listen.

When the topic of the criminalization of poverty comes up, “prosecutors intuitively respond in a very defensive way to that,” said Mary Yu, Judge in King County Superior Court. “Immediately there’s a sense of, ‘Am I being blamed for something?’” The Defender Association’s collaborative approach has allowed them to work effectively in areas without criticism. “Because...we focused on partnerships, some of the people who might get upset are people we’re working with – judges, prosecutors, council people,” said Boruchowitz.

At first, the Defender Association worked on individual cases, and changing the law. “There is no right to counsel for people with impounded cars, but we have represented a couple of dozen people,” said Boruchowitz, and the defenders have had some cases reversed. Over time, it became obvious that the law was not changing, and the Defender Association did not have enough resources to defend every impounding case. The city needed an alternative.

Although the Seattle city attorney was not interested in creating alternative sentencing, the King County prosecutor’s office agreed to work with the defenders on the issue. “Frankly, the Prosecutor’s office wanted to get out of the business of this stuff. It was 40 percent of the cases in District Court. It made absolutely no sense to be tying up prosecutorial resources on DWLS3 cases,” said Yu. The Defender Association and the county prosecutor’s office proposed a diversion plan, so that clients could either pay off their fines over time, do community service, or have their fines reduced and taken from the collection agency. Drivers could then have their licenses immediately restored, so they could drive legally. This proposal was met with resistance by city officials, who called it a “halfway measure,” although the local press supported the move. More importantly, this diversion would keep clients from entering the criminal justice system in the first place.

The City Council resisted the plan for immediate restoration of licenses, but through collaboration, the community, courts, defense associations and prosecutors were able to set up another alternative. District courts also opposed complete diversion of cases, because they were in the midst of evaluating their workload, and did not want the number of cases artificially lowered during the count. Instead, the district court allocated money for a full-time employee to work on relicensing. The prosecutor’s office agreed to have cases filed, so that the court could count them, but immediately divert cases to a payment plan, where people could convert fines to community service.

The Trial Court became involved by reviewing its performance under the Trial Court Performance Standards (TCPS). “TCPSs are standards by which a court can look at how well it’s doing in

meeting its mission of doing justice,” said Hightower. The Court was not meeting standards of public trust and confidence, and integrity – its ability to effectively enforce court justice – because of the impounding program.

The court’s first approach was to manage accounts receivable to keep drivers from becoming delinquent, by taking many of the Defender Association’s suggestions, but applying them before the cars were impounded. The court made arrangements to determine what people could afford to pay, and set up payment plans so that drivers could retain their licenses as long as they kept up with their payments. The National Center for State Courts has a program titled “Collections and Fines and Fees,” which the court used to establish effective business practices for enforcing judgments. The program takes into account both offenders’ ability to pay, and the staggering cost of jail time for failure to pay.

“In the first year, we recovered \$1.7 million in previously uncollected revenue, just by having an amnesty, allowing people to make timed payments – and giving them hope that they could be relicensed,” said Hightower. The Trial Court also pursued pre-suspension strategies, such as ensuring that they had the right addresses for drivers, and calling drivers to remind them about court appearances. The court arranged with collection agencies to allow drivers to make timed payments, and in the case of truly indigent offenders, had the drivers return to court to make arrangements for community service.

The Court’s program to “relicense” drivers was so successful that in November 1999, the Court held a “relicensing summit.” Sixty-five participants from 16 courts, the prosecutor’s office, the licensing department, suburban city governments, and the department of licensing met to talk about relicensing as a regional issue.

The Seattle city council recently voted five-to-four to continue impounding cars for DWLS3, although the city is now providing taxi vouchers so that drivers can get home after their cars are seized. “The criminal justice system is part of society,” said Boruchowitz. Until Seattle honestly confronts the racial impact of its laws, many communities will not believe that the criminal justice system, or society, is fair.

## ***Technology: Linking Public Defenders and Other Justice Agencies***<sup>14</sup>

Technology integration and information sharing between indigent defense and other justice system agencies, as well as parity of technological resources, can reduce redundancy, improve the efficiency of the entire system, and promote earlier disposition of cases and more appropriate, individualized and effective sanctioning of convicted offenders. Integrating public defenders into criminal justice information systems requires that public defenders be at the table when such systems are designed, and that they participate on the governing board of an integrated system.

Such a presence, said G. Thomas Sandbach of Justice Technology Consulting, ensures public defenders will have access to information that otherwise may be denied, and will have input on issues regarding system-wide access. Since court records normally are open and criminal histories normally closed, key issues requiring a public defender's attention on such a board will involve individual agency access, including that of the public defender. A board presence may help ensure statutory authority allowing adequate access.

An effective infrastructure should be in place prior to constructing a system. The creation of the integrated system in Delaware included automation of the discovery process, a step with which prosecutors agreed. Again, system designers gathered information on the basic needs of the court system before beginning. Designers first created an on-line warrant procedure, then moved all information to the Justice of the Peace court system, then to the case-management system developed for upper courts. Public defenders and attorneys general were able to follow the movement of individual cases.

The Delaware system, which now keeps track of data on individuals from arrest to disposition, is managed by a board composed of five components: prosecutors, defenders, courts, police and corrections. The system provides defenders with access to warrants and probable cause statements to the court's case-management system, including dockets, criminal histories of defender clients and the correctional status and location of inmates.

Information on the Delaware Criminal Justice Information System (DELJIS) and other successful integrated systems including public defender agencies are included in *A Defender Guidebook to Technology Integration in Criminal Justice Information Systems*, a 1999 publication of the National Legal Aid and Defender Association. The guidebook also discusses various aspects of integration from a defender perspective, identifies ten defender interests in technology integration, discusses six areas of challenges for defenders in such systems, and contains sample materials useful in the implementation of defender-inclusive integrated systems.

Identifying problems early tends to speed development of information systems. The initial structure of such systems can take various forms and face a wide variety of obstacles. The evolution of such a system in Florida's Ninth Circuit is a case in point. The circuit was saddled

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14 Workshop J: Technology: Linking Public Defenders and Other Justice Agencies. Moderator: G. Thomas Sandbach, Consultant, Justice Technology Consulting, Wilmington, DE, [Tom.sandbach@usa.net](mailto:Tom.sandbach@usa.net). John Stone, Administrative Director, Public Defender's Office, Orlando, FL, [jstone@circuit9.org](mailto:jstone@circuit9.org); Gary Cooper, Executive Deputy Director, SEARCH Group, Inc., Sacramento, CA, [Gary.cooper@search.org](mailto:Gary.cooper@search.org); Richard Zorza, Consultant, Zorza Associates, New York, NY, [Richard@zorza.net](mailto:Richard@zorza.net).

with diverse systems that did not work well within individual agencies, let alone function efficiently in an integrated fashion.

Committees established to address the problem made little progress toward integration until they identified the main obstacle: a failure to identify both the problems and especially the benefits to those who would be affected by the changes, said John Stone, of the Orlando public defender's office. Teams of technicians and managers began working together, diagramming each agency's workload and thus learning each agency's requirements. Once the problems were identified, the new system progressed.

If planned well, first steps can be effective, even something as basic as using e-mail systems. The Ninth Circuit set up a plea-offer system using e-mail which, Stone said, has had a profound effect on office efficiency because it does not require prosecutors and defenders to meet face-to-face to work out pleas. This can also reduce confrontational friction and barriers in such negotiations.

Similarly, the Ninth Circuit put one small computer program to use, and reduced the time from arrest to disposition by sending arrest information directly to the state's attorney's office. This saved three days in the procedure on average, resulting in a savings of \$3.1 million, based on inmate population statistics. Against such a savings, a software/hardware cost of \$600,000 for further development was not difficult to justify to funding authorities.

Stone noted that employees may resist high-tech innovation. In the Ninth Circuit, court clerks showed little interest in the new system until they were actually shown the benefits of transferring subpoena data electronically.

Development of an integrated system should adhere to some basic principles, said Gary Cooper of SEARCH:

- Use data captured at the originating point of the case throughout the process, and leverage existing resources and improving data quality.
- A system should be driven by the operational systems of participating agencies, so that agencies can keep control of their information. An integrated system does not mean an open-record system, in which information can be lost.

The key to a successful integrated system is ensuring that critical information goes to all involved parties at every decision point in the process. Agencies can control information if the system is planned properly. It is not necessary to develop a centralized system; decentralized databases can be networked together. Examples of current state systems, including governance structure, enabling legislation, implementing Memoranda of Understanding (MOU's), and contact points, are available at [www.search.org](http://www.search.org).

Cooper said that SEARCH, with BJA funding support, provides technical assistance in the development of integrated justice technology systems, including on-site planning, finding specialists, and reviewing Requests for Proposals (RFP's). But he also said that public defenders vastly underutilize this service; of the 400-500 technical assistance requests SEARCH receives in this area every year, perhaps one comes from a public defender

Substantial federal funding and technical assistance for integration initiatives is being made available to states and localities through various funding streams from the Office of Justice

Programs. Like other criminal justice agencies, public defenders may be, but need not be, included in the planning, design or implementation of integrated technology systems in order for the system to qualify for such federal assistance.

Technology consultant Richard Zorza displayed a computer monitor showing how relevant information could be used to empower court decision makers. Zorza's "decision support system" software displayed information from police, district attorneys, a pre-trial services interview, a state criminal record sheet, a local court record, additional case statistics, a record of compliance/noncompliance with mandated treatment programs and the result of a pre-trial release interview. This system can put an unusual amount of data in front of judicial decision makers in the form of a database that makes information available throughout the system.

Having such information at hand in the courtroom may change the litigation environment. The public defender should be able to become much more connected to all areas of the court system, and access to information should speed up the case, raise the level of representation and improve relationships with clients.

## *Zealous Representation and Problem-Solving Courts*<sup>15</sup>

The nation's criminal justice adjudication process by definition is coercive, but problem-solving courts are altering the judicial landscape and changing the roles of prosecutors, public defenders and judges. Such courts, including drug courts and mental health courts, pose unique dilemmas for public defenders and raise issues of obligations owed to communities, victims, and defendants.

The lawyer's primary responsibilities to the client remain unchanged, said Jo-Ann Wallace of the National Legal Aid and Defender Association, regardless of the forum or the judicial procedures. Public defenders have to be clear, direct, and honest about this with all stakeholders, including other adjudication agencies, the client and the community.

In essence, the defenders' role in problem-solving courts remains what it historically has been in traditional courts, provided that they are able to do their job effectively, have adequate resources and training, and are not dealing with an unworkable caseload. Under national standards of NLADA and the American Bar Association, defenders have an existing duty to, and do, provide a range of "problem solving" representational services to clients, whether within the framework of a problem-solving court or not. These duties include determining their clients' rehabilitative needs, contacting appropriate community-based service providers, preparing a diversion or sentencing plan reflecting these needs and services, and advocating with the prosecution and the court for the least restrictive and most rehabilitative sentencing options.

As one example, in a case where a judge orders a program of treatment with severe restrictions or sanctions before the entry of any plea or adjudication of guilt, the public defender has the responsibility to question the restrictions, in a problem-solving court just the same as in conventional case processing.

The potential for ethical dilemmas often is exacerbated in problem-solving courts, affecting the role of public defenders, prosecutors and judges. In such courts, traditional roles may well be dead, said Patrick McGrath of the San Diego District Attorney's Office. "Winning" often does not apply, and problem-solving courts require a different attitude more focused on the ultimate well-being of the defendant, often leading judges and prosecutors to complain they did not sign up to be social workers. But in many jurisdictions, that function, or something similar to it, has indeed become part of the jobs of lawyers and court officials. In these courts, defendants can be thought of as clients of the prosecutor, who has an obligation to the entire system – judge, court, defendant, and victim.

That obligation is magnified from the bench, where in essence, everyone involved in the process – defendant, the people, complainants, and the process – are the judge's clients, said Judge Matthew D'Emic of Brooklyn. By nature, such courts may not be as efficient as criminal courts focused on case processing, and the whole judicial process may suffer to some degree.

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15 Workshop K: Zealous Representation and Problem Solving Courts. Moderator: John Feinblatt, Director, Center for Court Innovation, New York, NY, [vargas@courtinnovation](mailto:vargas@courtinnovation). The Hon. Matthew D'Emic, Court of Claims, Kings County Supreme Court, Brooklyn, NY, [mdemic@courts.state.ny.us](mailto:mdemic@courts.state.ny.us); Patrick McGrath, Deputy District Attorney, District Attorney's Office, San Diego, CA, [pmcgra@sdca.org](http://pmcgra@sdca.org); Jo-Ann Wallace, Chief Counsel, National Legal Aid & Defender Association, Washington, D.C., [jwallace@nlada.org](mailto:jwallace@nlada.org).

Conflict always will be present in such courts, Wallace said. Problem-solving courts can increase the options available to the judge and to the defendant, but not at the expense of fairness and due process; good problem-solving courts are careful not to be overly coercive. Indeed, there is a delicate balance among the goals of maintaining traditional due process, taking advantage of the greater options available in a specialty court, and using the coercive power of the process to ensure that defendants receive appropriate treatment.

Some research indicates that coercion may increase the chances of a defendant's success in a treatment program. D'Emic cited a Brooklyn treatment court which has reported a 70 percent success rate over the last two years. John Feinblatt of the Center for Court Innovation stated that several studies have found that mandatory treatment is more successful than voluntary treatment, perhaps twice as effective.

At the same time, standards promulgated by the National Association of Pretrial Services Agencies emphasize that guilty pleas are not vital to rehabilitation, Wallace said. There is value in admitting criminal conduct, but that acknowledgment can take place in more ways, more constructively, than through a formal legal pleading.

Problem-solving courts create perplexing problems for prosecutors who must decide whether to seek guilty pleas in advance of treatment. Obtaining a guilty plea up front, prior to treatment, often provides a guarantee that a case will not be scheduled for trial one or two years later when prosecution may become impossible, McGrath noted. But demands for up-front pleas pose problems for public defenders, who argue that a good problem-solving court truly is diversionary and does not require a plea and surrender of rights as a condition of entry.

The processes in problem-solving courts allow defendants more time to make decisions than in a normal criminal-court setting and, McGrath noted, the amount of time spent per defendant is "incredibly higher" than in normal court. For example, in domestic violence cases, individuals on probation are appearing before the court twice as often as several years ago. Such extension of the process also creates a difference, from the defense side, in the ability to talk to clients and consider options.

If it appears that the justice system has turned into a type of social-work system, it may be a case of the system responding to social problems. In domestic violence court, cases are often time-consuming and labor-intensive. D'Emic cited the workings of his court where resource coordinators work closely with both prosecutors and defense counsel, but coercion to the extent of forcing a plea at first appearance does not occur.

This system makes the judge not paternalistic but active. It benefits everyone if an appropriate case can result in a non-jail disposition or program. In Brooklyn, for example, probationers in domestic violence cases have a violation rate half that of the general felony population, according to recent studies.

A key to maintaining an appropriate balance among the various forces in a specialty court is ensuring that public defenders are at the table when such courts are designed, including addressing issues such as participant eligibility criteria, selection of service providers, and the design of monitoring and evaluation processes. The success of problem-solving courts depends upon defenders' willingness to recommend to their clients that they participate in them, and to

ensure the necessary level of buy-in, defenders must be involved in the design of central aspects of the court's structure and procedures, including privacy and confidentiality protections, protection against self-incrimination for statements made during treatment, informed consent to participate, adequate time for counsel to investigate cases before advising clients about participation, preservation of trial rights if the participant should withdraw from the program, and resource parity with the prosecution.

The public defender must be viewed as an equal partner sharing information essential to the process, Wallace observed. The place to be collaborative is at the table, designing the system. But being at the table should not undermine aggressive advocacy when the public defender enters a courtroom with a client.

## *External Forces for Change*<sup>16</sup>

In efforts to reform the criminal justice system, public defenders and others can seek out external groups who can become partners or otherwise be helpful. One major source of assistance is the media, particularly the print media, where reporters can provide in-depth coverage of an issue and put a personal face on it that can help in gaining public support. Private foundations, social service providers and churches also can be partners, providing funding, media relationships and political support.

### Gaining Access to the Media

The media can be a source of great support in getting out a message about problems in the criminal justice system, said Caitlin Francke, a reporter for the *Baltimore Sun*. The most effective way to do this is simply to “tell them,” she said. Start by talking to reporters and getting to know them. As relationships develop, one can discuss issues with them on a background basis and invite the reporters to look into given subjects more deeply. For example, after such discussions, Francke pursued a story about cases not being tried in her area for several years after they had been filed.

There is no need to be afraid of reporters, since it is not in their interest to burn bridges by alienating people who give them information. Reporters who do that lose their sources and have little of substance to write. “If we publish an article in which we burn you, we can never go back to you for a story idea or as a source,” Francke said. This fact provides an incentive to reporters to protect sources who wish to talk confidentially.

Print reporters are an especially good vehicle for getting a message out, since they are more likely to have time to delve more deeply into a story. “Print reporters are a lot smarter and interested in covering things in depth than TV reporters,” Francke suggested. “TV people listen to scanners and cover fires and shootings, and we don’t do that.”

One example of a reporter’s work benefiting a public defender’s office was Francke’s series of stories on inadequate indigent defense at the Baltimore courthouse. Cases were not being tried for up to four years. The public defender’s office could not staff two new drug courts sufficiently, and were sending defendants letters rather than lawyers. Defendants, without the advice of counsel, were pleading guilty to felony sentences; later their sentences were suspended. Discovery processes were inadequate and information exchanges among different parts of the system were slow.

When Francke began writing stories about the situation, State Public Defender Stephen Harris was angry. Eventually, he saw that the media could be helpful in explaining the real story: the chronic underfunding of the Public Defender’s Office. After the series began running, many people provided her with information, such as case numbers of especially outrageous cases. Thus, she

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16 Workshop L: External Forces for Change. Moderator: Michael P. Judge, Chief Public Defender, Los Angeles County, CA. Caitlin Francke, Reporter, Baltimore Sun, Baltimore, MD, [caitlin.francke@baltsun.com](mailto:caitlin.francke@baltsun.com); Tanya Coke, Director, Gideon Project, Open Society Institute, New York, NY, [tcoker@sorosny.org](mailto:tcoker@sorosny.org); Marc Schindler, Staff Attorney, Youth Law Center, Washington, D.C., [mschindler.ylc@erols.com](mailto:mschindler.ylc@erols.com).

was able to write many in-depth articles about the serious situations that showed how the Baltimore courthouse was “at a halt since there were not enough public defenders.”

As a result of her articles, problems were acknowledged, and the public defender’s office received funding for additional staff.

### Ways of Raising Awareness for a Program or Strategic Initiative

Working with the media also has been helpful to the San Francisco-based Youth Law Center to raise awareness of its programs. The organization has worked for over 20 years on behalf of children in the juvenile justice and child welfare systems.

Marc Schindler, a staff attorney in Washington, DC, went to the Center after four years as a public defender in Baltimore’s juvenile division. His approach in Baltimore had been to have little contact with the press. He was not allowed to comment officially, although when he received calls from reporters, he occasionally provided them with background information. Generally, like most public defenders, he felt hesitant to talk to the press.

His relationship with the media changed when he joined the YLC in 1997, soon after the U.S. House of Representatives passed the Youthful Predator Act of 1996. Schindler received calls from the press on his second day at work and was interviewed by National Public Radio for the program “All Things Considered.” Soon, he found that a key aspect of YLC projects was using the media for public education.

This approach proved especially successful with a project now in its second year called Building Blocks for Youth, which focuses on the processing of minority youth through the justice system. Although the Center has become known for its litigation on conditions of confinement, its philosophy and programming are “multistrategic.” Its two primary goals are to raise public awareness by discussing racial bias in the system, which has mostly focused on bias in the adult criminal justice system; and to encourage changes in political practices that will lead to a fairer and more effective system.

As part of this effort, the YLC has commissioned new research to help educate policymakers and the public on current practices affecting minority youth, and it is releasing 10 publications – five this year and five in 2001. Among those already published is “And Justice for Some,” which examines and compares nationally the treatment that minority and non-minority youth receive for similar offenses.

The YLC took steps to gain media coverage by making the publications “user friendly and useful to advocates in their work.” The center worked with a public relations agency and communications group to help get out its message. It also partnered with several other organizations with an interest in the issue, including the National Association for the Advancement of Colored People and the National Urban League. The result has been extensive media coverage and an increase in public understanding of the issues.

YLC also has worked with local juvenile public defenders to get local media coverage of how the national results in its study were reflected in local jurisdictions. In Kentucky, for example, the

state released a report showing that African American juveniles were overrepresented in the criminal justice system. The report received little coverage until YLC helped local advocates tailor a “boiler-plate press release” about the YLC report to discuss both the national and the state and local statistics. The YLC also helped local advocates encourage local media outlets to cover the story. As a result, the Kentucky story received front-page coverage in the state’s three largest papers. In another case, the YLC worked with the Kentucky Commission on Civil Rights to help it get media attention, which supported the commission’s efforts to obtain \$250,000 in funding.

### Other Ways of Using Public Education to Build Support for a Program

Private funding sources also can be important allies, said Tanya Coke, director of the Gideon Project, which is part of the Open Society Institute funded by George Soros. The Open Society Institute is involved in a wide range of issues, including campaign finance reform, anti-gun violence, racial discrimination, and the death penalty.

Foundations and other private funders usually are seeking not merely to fund good programs but to leverage their resources in order to promote systemic societal change. Donors really are “seeking to invest in a strategy that will pay off across jurisdictions and across the field,” Coke said. To this end, there are two major roles that private funding sources can play in the criminal justice field:

- Creating and supporting model programs that help establish innovative community-oriented legal practices.
- Supporting public education in an effort to increase external pressures for systemic change.

Public education strategies include:

- Promoting new policy initiatives such as alternatives to incarceration for juveniles, or an at-risk youth program that also promotes public safety.
- Seeking increased media coverage of important issues, using a two-step approach. The first step involves drawing attention to individual cases by using personal stories and anecdotes that demonstrate, for example, unfairness in the system. Commonly, Coke noted, the inflexible and harsh laws which create unfairness have been “anecdote or incident driven, whether it’s Megan’s Law, Jenna’s Law, or Kendra’s Law,” and those who propose to correct these problems should make similarly powerful use of compelling individual stories. The second step is to provide research about the systemic problems illustrated by the particular cases. A good example of this process has occurred in the death penalty field, where there has been a combination of individual cases of wrongful conviction and data showing that this is a systemwide problem.
- Building relationships with a variety of allies, including unusual ones, by thinking creatively about areas of common interest in order to gain broader support for systemic reform. These alliances can be especially helpful when defense attorneys are unable to serve as spokespersons on an issue.

## Ways to Be Proactive in Seeking Media Attention, Funding and Resources

Michael Judge of the Los Angeles public defender's office suggested several ways to generate media attention, funding and better access to resources:

- Develop a strategy to obtain media coverage. For example, the Los Angeles public defender's office prepared several opinion articles on a variety of subjects for the local newspaper. When a relevant news event occurred, the office offered an appropriate article to the newspaper's op-ed editor.
- Be prepared to succinctly express concerns during an interview.
- Contact local cable stations and suggest new programming; local stations are constantly searching for new content.
- Establish outreach programs to the local educational system by conducting workshops in the schools or involving students in projects.
- Offer speakers or other programs to local community groups.
- Partner with local community groups to gain access to the revenue sources that are available to such groups.
- Pursue creative funding possibilities. For example, the Los Angeles public defender's office wanted a secure video line so lawyers could maintain better contact with clients. The office obtained \$1 million from an environmental agency – the Air Quality Management Department (AQMD) – because videoconferencing reduces pollution by reducing automobile travel by defenders to visit detained clients.
- Seek support from churches, which have strong connections to their communities. Ministers, for example, often hear complaints about the public defenders and police, and the churches are often well-connected politically. Thus, a public official will take a call and listen when a minister calls.
- Attend community forums, including those at churches, to hear and respond to concerns.
- Seek assistance from local bar associations. In Los Angeles, the bar association has joined in advocating for student loan forgiveness for public defenders, and has supported public defenders on issues related to juries.
- Use local educational institutions to obtain student volunteers.
- Partner with social services agencies, which often have the same clients as public defenders. These agencies can provide clinical social workers to perform assessments of juvenile clients, and identify community resources that can be helpful.

- Seek support from ethnic affinity, immigration rights, and other advocacy groups when seeking services for clients.
- Attend community awards ceremonies. They are a good place to network with potential partners.

## ***Collaboration: the Key to Improved Indigent Defense and a More Accurate and Fair Justice System***<sup>17</sup>

“Collaboration” is an increasingly important means of increasing support for indigent defense and engaging all components of the justice system in shared goals of reducing wrongful convictions and promoting “problem solving” approaches which can reduce recidivism. But many prosecutors and defense attorneys are limited by a narrow view of their responsibilities. At the same time, front-line practitioners are working across political divisions, and using pragmatic, problem-solving approaches to issues like drugs and domestic violence. In the future, the Internet-savvy public will use their access to information to demand more accountability from the justice system, making the system healthier and more just for all.

The concept of “collaboration” is being bandied about in government, with universal approval. “Who, after all, would openly confess that they’re opposed to working well with others?” said The Honorable Laurie Robinson, former Assistant Attorney General for the Office of Justice Programs. But collaboration does not come naturally to most humans – and government agencies – who are more inclined to guard hard-won turf than share power and information. Collaboration is hard work, and can only be achieved with stubborn persistence. “It requires constant commitment, and commitment for a very long haul,” said Robinson.

In local communities, “front line” criminal justice workers are leading the way in developing effective and pragmatic approaches to intractable justice-system problems. “They ... are not stuck in the ideological debates that we often see on Capitol Hill and elsewhere over crime,” said Robinson. They have worked on community policing, drug courts, innovative approaches to domestic violence, community-based indigent defense efforts, drug treatment, and more. This problem-solving approach reflects a maturing of the criminal justice field.

Unfortunately, immaturity, in the form of narrow role perceptions, plagues each segment of the criminal justice system. “Too many people are still wearing blinders,” said Robinson. Both prosecutors and defense attorneys are to blame for limited vision and a lack of leadership.

Prosecutors are not willing to admit that the system is fallible, she said. The growth in DNA exonerations serves as a window into the criminal justice process, scientifically documenting that mistakes can and do occur. Still, prosecutors are failing to provide aggressive leadership to change their system in the light of clear error. “The government should be leading the charge to ensure we are doing all we can to ensure there are not mistaken convictions,” said Robinson. Illinois governor Ryan, Attorney General Janet Reno, and Bob Johnson, the incoming president of the National District Attorney’s Association, have focused on DNA testing and innocence issues; but stronger and more pronounced leadership is needed from prosecution and law enforcement.

Prosecutors need to work in four areas to improve indigent defense:

- Providing leadership to endorse, or propose alternatives to, the proposed Innocence Protection Act in Congress, which focuses on DNA testing and competent counsel;
- Creating “peer pressure” on colleagues who are resisting post-conviction DNA tests;

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<sup>17</sup> Opening Remarks, Friday, June 30, 2000. Laurie Robinson, Former Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Washington, D.C.

- Publicly stating their outrage when a defense attorney is clearly and regularly providing blatantly incompetent representation in serious criminal cases;
- Calling for and publicizing post-mortem reviews of cases that went wrong, so that as a system we can learn what happened, and try to remedy it in the future.

Many defense attorneys, on the other hand, are unwilling to work with law enforcement to solve problems facing the system. Many police chiefs have master's degrees, JDs or PhDs, and are creating intelligent new programs in community policing and public safety to revitalize their communities. Many defense attorneys do not recognize this work. "Most lawyers and justices look down at law enforcement leaders, giving short shrift to the burdens and challenges law enforcement workers confront daily, often at great personal risk. This is not just unfortunate, but a mistake," said Robinson. Law enforcement officials could be allies, helping defense attorneys correct many problems facing the system, ranging from racial profiling, to competent crime scene management and effective handling of eye witnesses. "We will not successfully address these issues if we do not treat law enforcement professionals as colleagues," said Robinson.

Still, there is cause for optimism. The Internet-savvy public has access to a great deal of information, and expects a great deal from institutions. With an inquiring, relentless media, the public will continue to ask more hard questions of the government, and demand accountability from all parts of the government, including the criminal justice system. They will re-open debate on key issues, resulting in safer communities, and ensuring that there will be justice for all.

## ***Crisis as Opportunity: What Happened in Baltimore***

*“Unless all aspects, every entity in the [criminal justice] system operated at some level which was equivalent to the level that the others were operating, one could not have the degree of success, or efficiency, or effectiveness that is necessary for us to achieve, as nearly as we possibly can, that concept called justice, and that’s what we’re all looking towards achieving.”*

– Judge Robert M. Bell

In January 1999, when a Baltimore City circuit judge released three people charged with homicide because they could not get a trial within the time permitted by state law, a crisis that had been building for several years became front page news. What led to these dismissals? How did the various agencies in the criminal justice system contribute to them? What steps are being taken to ensure that such a system breakdown is not repeated? Representatives from Baltimore City’s judiciary, legislature, corrections department, public defender’s and state’s attorney’s offices traced the roots of this system failure and explained their role in its repair.

In the mid-1990s, the Baltimore City police began massive neighborhood sweeps, introducing increasing numbers of defendants into the court system. From 1990 through 1999, the number of felony defendants doubled and those charged with misdemeanors increased 150 percent. The majority of these new cases involved drugs. However, with these increases, there was no increase in resources for the adjudication process, and a lack of planning. As delays and backlogs increased, Commissioner of Corrections Lamont Flanagan reported that the crisis took the form of excessive pretrial detention of up to two years.

From the public defender’s standpoint, already understaffed and lacking in resources, the situation was made worse by the initial remedies – more courts. In 1996, the judiciary of Baltimore City opened up two additional courtrooms to try the increasing number of drug cases. A new domestic violence court was created, but indigent defense agencies were told they would receive no additional funding or staffing. Without any additional resources, State Public Defender Stephen Harris believed that the integrity of the trials in these courts would be in question and refused to staff them. As a result, the delays in trials grew longer and longer, culminating in the very public debacle of the forced release of three high profile felony defendants in January 1999.

In 1998, Maryland’s General Assembly issued a Joint Chairman’s report addressing the problems in the criminal justice system which called for, among other remedies, a full-time judge in central booking to speed up arraignments. Just prior to January 1999, Circuit Court Judge David Mitchell had called for the formal establishment of a Criminal Justice Coordinating Council which would include all members of the system to address and deal holistically with the problems.

After the incident in January 1999, the General Assembly forced the leadership in the criminal justice system to develop a plan to address the crisis, by withholding \$17.8 million in funding from the public defender’s office, judiciary, Department of Corrections, and state police. There had existed in Baltimore City a Criminal Justice Coordinating Council, which operated out of the mayor’s office; yet, due to lack of funding and staff, it had been reduced to a non-entity. In setting out to revive the council, Judge Mitchell decided that the judiciary must be the point of leadership and, spurred by the General Assembly’s actions, the chiefs of all agencies in the criminal justice system met to develop a plan.

The problems in Baltimore City were myriad. There was an extremely high number of postponements of trials (up to 15 times in individual cases). As a result of the understaffing, some 50 percent of cases were being dismissed or nol prossed, without trial. Three quarters of these were drug offenders or drug dependent, in need of treatment, who were put back on the street only to be rearrested and returned to the system. Though only 13 percent were charged with felonies, 52 percent were being detained pretrial, with an average bail of only \$5,000. Exacerbating these problems was the lack of communication between the various agencies, which often resulted in prosecutors and defenders being assigned to try two cases at the same time in different courtrooms. In one case, it took ten days for the judge's order that a defendant be released to be communicated and the defendant to be released.

The judiciary presented the General Assembly with an implementation plan that addressed these immediate issues, and the withheld funds were released. For indigent defense, the General Assembly provided \$4 million and an additional 51 positions for the initiative in fiscal 1999, and has earmarked \$6.7 million and 85 new positions in the 2001 budget.

With the Criminal Justice Coordinating Council in place, the various entities began to work together to address the problems. In order to speed up the processing of arrestees and reduce the number of offenders requiring trials, the Council implemented several remedies at the post-arrest and pre-trial stage. In central booking, there is now a full-time judge responsible for bail review, which has shortened the jail stays of those arrested. There is an increased emphasis on diversion, including efforts to coordinate with community organizations for those offenders who require drug treatment and other services.

The judiciary began to take a more active role in denying unnecessary postponements. In 1998, there was an average of 1,000 postponements a month, a number that has now been reduced by 44 percent. The implementation of a Discovery Court to monitor discovery and eliminate this as a pre-trial issue was a key factor in this decline. Additionally, the Coordinating Council has implemented a Differentiated Case Management System to better coordinate and plan for the disposition of defendants. Through this system, cases are weighted by their complexity and the anticipated length of trial allowing the courts to better manage the docket.

The Coordinating Council, in collaboration with the police department and the State's Attorney's office, has been working at the point of arrest to reduce the number of individuals entering the court system. Whereas the police department has historically been responsible for developing initial charges against all defendants, the State's Attorney has begun to take up this responsibility. A pilot of this program in four of Baltimore City's nine police districts has shown initial success. Begun early in 2000, there has been an overall drop of 13 percent in the number of cases coming through the system; 10 percent were dropped for insufficient probable cause and 3 percent had charges reduced from a felony to a misdemeanor. The program is scheduled for full implementation in June 2000.

All of these initiatives will become greatly enhanced when Baltimore City implements its plan to create e-mail connectivity and database sharing among indigent defense and other agencies over the existing fiber optic network. With \$400,000 in funding and a vendor chosen, this project will eliminate the duplication of effort that has been occurring at every stage of the system and facilitate cooperation between agencies.

Through intense collaboration facilitated by the Criminal Justice Coordinating Council, Baltimore City has begun to address the real problems in its criminal justice system. As a result of the intense public scrutiny after the January 1999 incident, all agencies have recognized the need to work together and are seeking shared solutions. Issues such as a lack of resources are still present. Eight out of ten counties in Maryland still provide no defense representation at bail hearings, and the legislature has cut the public defender's funding requests for bail representation. New policy changes resulting in more arrests are still being made, such as adoption of the "broken windows" theory of policing focusing on low-level "quality of life" offenses. Nevertheless, through combined efforts, progress is being made.

In reflecting on the crisis, Judge Bell noted, "I was not pleased with the focusing of attention on the Baltimore City courts. I thought they were unfair to us in many respects. But I am pleased that there is coming out of this a Coordinating Council, a coordinated effort, a criminal justice system that recognizes the importance of the cooperation, the coordination and efficient operation of every entity in the system."

## ***Fulfilling the Promise of Gault: Better Outcomes for Children***<sup>18</sup>

In 1967, the U.S. Supreme Court ruled in the case of *In re Gault* that juveniles are entitled to the same due process rights as adult defendants, including the right to counsel. Today, there is widespread concern that many of the rights granted by *Gault* have been stripped away. Additionally, juveniles are increasingly being adjudicated and sentenced as adults.

Fifteen-year-old Gerald Gault was arrested in 1964 in Gila County, Arizona after a neighbor received an obscene phone call. No one told Gault's parents he had been arrested and was in jail. He was not allowed to call a lawyer. He was faced with a petition that failed to inform him of the charges. He faced the judge without an attorney to challenge the "facts" in the case. Prosecutors presented no evidence or witnesses, yet the young man was sentenced in juvenile court to six years in reform school. The Supreme Court's historic ruling concluded that such "Star Chamber proceedings have no place in the U.S. system of justice." The presence of counsel is the "keystone" of fair proceedings, the Court said – the "lifeblood of due process" for juveniles.

The courts and juvenile system today are not meeting the promise of *Gault*, and juveniles should be given more of a chance at reform and rehabilitation than they are being allowed, agreed the panelists in this Symposium plenary. Interventions need to be made via the advocacy process, with a right to a jury trial, or at the dispositional stage, possibly using a balanced and restorative justice approach, as advocated by Sister Cathy Ryan of the Cook County (Illinois) State Attorney's Office.

The earliest juvenile court system in the United States was established in Cook County, Illinois in 1899 by three pioneer reformers – Lucy Flower, Julia Lathrop and Jane Addams. They wanted courts to be "kind and just," to help "wayward and destitute youth in need of guidance." As explained in the video *A Second Chance*, shown at the Symposium, they believed juveniles could learn from their mistakes and be given supervision and alternatives to incarceration. The Cook County system was replicated in other jurisdictions. Although the system was not perfect, it offered juveniles a better chance of a future than the adult system.

In the 1990's, the juvenile court system came under attack. Forty-one states made the laws against juveniles harsher. The laws reduced confidentiality protections and made it easier to charge juveniles as adults. Today, according to Amnesty International some 200,000 youths under age 18 annually are tried as adults, and the need for a strong juvenile court system is more important than ever.

Juvenile courts give children and young adults tools and opportunities to deal with problems in their lives, to change their behavior, and to learn skills and empathy to become responsible citizens. The video offered many stories of children who have been provided this opportunity:

- One boy had no prior record, and was able to turn his life around and go to law school.

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18 Plenary V: Fulfilling the Promise of Gault: Better Outcomes for Children. Moderator: Steven Drizin, Senior Lecturer, Children and Family Justice Center, Northwestern University School of Law Legal Clinic, Chicago, IL, [s-drizin@nwu.edu](mailto:s-drizin@nwu.edu). Randolph Stone, Clinical Professor of Law, University of Chicago Law School, Chicago, IL, [m-stone@uchicago.edu](mailto:m-stone@uchicago.edu); The Hon. Jay Blitzman, Associate Justice, Juvenile Court Department, Boston, MA; Sister Cathy Ryan, Chief, Juvenile Justice Bureau, Cook County States Attorney's Office, Chicago, IL.

- Another boy joined a gang, lost many friends and became consumed with hate; but with the help of the juvenile court, he turned his life around and became a poet and writer.
- Another juvenile was able to go to an alternative school and put himself on the right track.
- Another said he would be in jail or dealing drugs without the help of the juvenile court system.
- Another boy said he went from being a gang member to a peer counselor. He was in a B.A. degree program and has worked with children to help them get second chances.

How well is the need for competent and zealous representation implied by *Gault* being addressed at the trial level?

Randolph Stone, a clinical professor of law at the University of Chicago, said juveniles are not being represented very well. Still, he said, there has been some progress. In Chicago, it is no longer the most inexperienced lawyers who are appointed to represent juveniles, or the most inexperienced judges to whom the cases are assigned. Under the direction of experienced lawyers, law students in Mr. Stone's clinical law program represent children charged with very serious crimes, primarily those transferred from juvenile to adult court because of the nature of the crimes.

When representing children, counsel should particularly examine questions of guilt and innocence and, in the dispositional phase, should focus on how to "reorient the child back to life" after he or she is out of the corrections system, Professor Stone suggested. For many children, a conviction is the "death of childhood." Those with felony convictions are not eligible for college student loans, and their employment opportunities and life chances in general become more limited. Thus, good trial representation is vital. In many urban areas, juvenile defenders are in an overburdened, resource-constrained system, stacking the deck against a juvenile receiving quality representation before the case even begins.

To understand the child, it is critical to combine zealous advocacy with a multidisciplinary approach. "If you're a zealous advocate, counseling follows," said Jay Blitzman, an associate justice with the juvenile court department with the Massachusetts Trial Courts in Boston, "since the counseling role follows from your ethical responsibility to be a zealous advocate." Justice Blitzman expressed concern about the *McKeiver* decision that modified *Gault* in 1972, when the U.S. Supreme Court reasserted the principle of *parens patriae* (the doctrine that the state may act as a guardian of a person under legal disability – here, acting as guardian for a child) and upheld the authority of a state not to give a juvenile a right to a trial by jury, which is a hallmark of the adult judicial process.

Treatment of juveniles today has been influenced by the perception that adolescence has changed dramatically in the last generation. The early progressives who founded the court system thought juveniles were immature and malleable, with psyches that could be influenced. Now, even though Federal Bureau of Investigation statistics show that though juvenile crime is at its lowest since 1964, and the vast majority is nonviolent, the public is influenced by a perception of a growing problem of hardened, violent young offenders. In Justice Blitzman's view, the system should get back to a greater focus on the juvenile – to look at the offender more than the offense. And as a judge, he urges attorneys to be explicit about why judges should adopt this focus.

Professor Stone and Justice Blitzman endorsed jury trials for juveniles in the juvenile trial court setting. Although only a small percentage of juvenile cases go to trial, trials attract better lawyers

and raise the level of practice. “It helps to demythologize kiddy court as not a real court,” Justice Blitzman said. Trial should be an option, he said, because the stakes are much higher for juveniles facing state prison sentences. Professor Stone endorsed the option of jury trials in juvenile court for serious offenses, because the jury-trial possibility would help to “keep the system more honest.” Judges and others in the system would be encouraged to “elevate the level of practice and professionalism and involve more of the public in the process.”

The prosecutor in charge of the Cook County (Illinois) Juvenile Justice Bureau, Sister Cathy Ryan, had several reasons for opposing jury trials. The majority of juvenile arrests – perhaps two-thirds to three-fourths of all cases, depending on the jurisdiction – are handled out of court and never reach trial. Even when cases do go to court, most of them are not high-stakes cases – which tend to involve violent crimes, and in some states such as Illinois, drug offenses. Another reason is that the greatest concentrations of juvenile homicide and violence are in just eight cities; Americans tend to extrapolate from those few locales and think that juvenile crime is worse than it actually is. In Sister Ryan’s view, the dispositional hearing in juvenile court can be an appropriate place to evaluate the defendant’s actions. The more time spent on adjudicative hearings, she said, “the less we have for dispositional hearings.” Furthermore, she said, “I’m not convinced the jury trial gets to the truth better than the bench trial. If we have it, more lawyers will want to practice there, but I’m not sure that’s the test of whether the juvenile court works.” The dispositional hearing could be used to assess how to deal with the juvenile, based on input from the victim, family, members of the community – and the juvenile offender.

Other themes and issues raised by the panelists included:

- Lawyers representing juveniles should use an interdisciplinary approach. In addition to employing investigators to find out the facts, attorneys should use social workers to learn more about a client. This could help not only in the dispositional phase, but in the adjudicative phase when raising diminished-capacity or competency issues.
- Preparing for a dispositional hearing begins as soon as a case is assigned. In Professor Stone’s clinic, law students and social welfare students work on the case. They start with a social history and look at the child’s needs, deficits and adult influences. If necessary, they bring in other professionals, including psychologists and psychiatrists, to assess and test the child if necessary. In Illinois and other jurisdictions, the ability of the child to voluntarily and intelligently waive their *Miranda* rights is a big issue. Advocates there conduct an early assessment in serious felony cases. They also look past the legal case at how they can help the child with his or her life afterwards. An important part of dealing with juveniles is helping the child once the legal proceedings have concluded and the child has returned to the community.
- The advantage of the balanced approach is a much closer connection with the community, since the approach involves all of the stakeholders in the juvenile justice process. This includes the victim, offender, family and members of the community. The focus is on addressing the injury, seeing that it does not happen again and figuring out how to help the offender do better in the future. It is also important to air cases in public. If the public is not aware of different options in the juvenile justice system, they may think the only response to crime is incarceration. In some cases, it may be necessary to separate the young person from the community. If that is necessary, it may be determined at a dispositional hearing.

## ***Improving Conditions of Confinement for Children in Juvenile and Adult Correctional Systems***<sup>19</sup>

Juvenile detention systems are often overcrowded, and many institutions do not provide sufficient programs and services, including mental health, education and vocational training. Many juveniles are sent to detention facilities, even though they are low- or moderate-risk cases, and would be much better off in an alternative community-based program.

There is a need to develop new alternatives to confinement, as well as to increase awareness of the existing alternatives. This session focused on different approaches to improving conditions of confinement as well as reducing the need for confinement.

Conditions at many of these juvenile facilities are now at a crisis point. Increases in physical assaults, accidents, injuries, and even deaths have been documented. In some situations, juveniles are subject to cruel and unusual punishment, in violation of their constitutional rights. By 1995, 62 percent of juveniles in public detention facilities were in places where the population exceeded capacity.

The Youth Law Center (YLC) addresses problems resulting from inadequate facilities. The Center sometimes uses litigation, but primarily works with facility administrators and state and local officials to find solutions, said Michael Finley, a Center staff attorney.

Two recent projects in Maryland illustrate their approach.

- In interviews with children in the Baltimore City jail and other Maryland jails, the YLC found children held in Alcatraz-like conditions in some cases, often for five or six months, or longer. Once they returned to court, many were released for time served. Typically, the juveniles were in cells 23 hours a day, were not receiving any programs because they had been separated from the juvenile population for whom programs were designed and provided. The juveniles often were very depressed. When they were released, they were sent back into the communities where they had gotten into trouble, and received no support. YLC has worked with defenders whose clients are incarcerated in these facilities in order to further document the unacceptable conditions.
- The YLC evaluated conditions at the Cheltenham Youth Facility, the largest detention center in Maryland, and wrote a very critical report. The Center found more than 100 juveniles in a dorm designed for 27. YLC agreed not to sue the facility if it would take steps to improve. So far, Cheltenham has taken great strides to improve its physical facility, but overcrowding and a lack of programs are still major problems. The YLC worked with defenders at Cheltenham through a detention response unit, created by the state. The unit is composed of an attorney and a social worker who are at the facility on a regular basis, and are a great source of

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19 Workshop M: Improving Conditions of Confinement for Children in Juvenile and Adult Correctional Systems. Moderator: Gina Wood, Director, South Carolina Department of Juvenile Justice, Columbia, SC, [woodg@main.djj.state.sc.us](mailto:woodg@main.djj.state.sc.us); John Rhoads, Chief Probation Officer, Santa Cruz County Probation, Santa Cruz, CA, [prb001@co.santa-cruz.ca.us](mailto:prb001@co.santa-cruz.ca.us); Judy Preston, Senior Trial Attorney, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C., [judy.preston@uscoj.gov](mailto:judy.preston@uscoj.gov); Michael Finley, Staff Attorney, Youth Law Center, Washington, D.C.

information about conditions. The social worker has been able to establish good relationships with the juveniles and has been able to learn more about their problems within the facility. Because the social worker is onsite, she was able to notify the defender when conditions worsened, and the defender then notified the YLC.

The federal government's efforts to improve confinement conditions for children are based on two federal statutes, according to Judy Preston of the Justice Department's Civil Rights Division.

One statute, the Civil Rights of Institutionalized Persons Act (CRIPA), was passed in the 1970s in the wake of the Attica Prison riots in New York and a television report by journalist Geraldo Rivera on abysmal conditions at the Willowbrook facility for the mentally disabled in New York. It protects the basic civil rights of persons whose liberty has been deprived by institutionalization – such as in a prison or mental health facility. State lawyers had argued that the federal government did not have standing to sue in such cases; CRIPA provided the basis for federal intervention.

Initially, CRIPA was enforced only in prisons, institutions for the mentally disabled and psychiatric hospitals, but not in juvenile facilities. However, in part because Attorney General Janet Reno has placed juvenile issues high on the agenda, the government is investigating some 100 juvenile facilities around the country. It has settled a number of cases and is monitoring conditions under these settlements.

Under CRIPA, the Civil Rights Division investigates a facility and reports its findings. The state then has 49 days in which to negotiate a settlement. If it is not successful, the Justice Department can sue the facility.

The second statute, enacted as section 210401 of the Violent Crime Control and Law Enforcement Act of 1994, was a response to the 1991 Rodney King beating by Los Angeles police. It established a federal offense for employees of any governmental juvenile justice agency or juvenile incarceration facility to engage in a pattern or practice of violating juveniles' rights under the Constitution or federal law. Inherent in the statute is authority for the Attorney General to conduct investigations of states' juvenile justice systems, and the Civil Rights Division has used that authority to target officials and states not providing appropriate levels of support for juveniles in institutions.

States have three major problems in their facilities, reported Ms. Preston:

- **Overcrowding.** Children cannot be properly supervised, treated, or protected from violence or abuse in an overcrowded facility. One parole violator was put in a two-person cell with four youths incarcerated for armed robbery, and was beaten and abused sexually by them over the weekend that he was in jail.
- **Inappropriate Placement.** Many children in juvenile facilities should instead be placed in the mental health system. About 60 percent of juvenile detainees have mental health problems, and about 25 percent are mentally disabled. These children are especially prone to victimization by others.

- **Eligibility for Special Education Services**. Forty to 80 percent of children probably would qualify for such services under various government programs, but juvenile facilities usually do not provide these services. The Civil Rights Division has used the authority of the Americans with Disabilities Act and the Individuals with Disabilities Education Act (IDEA) to press for special education programs, such as those that help juveniles receive their GEDs, or obtain vocational skills.

Finding alternatives to incarceration is a responsibility of individual counties. When Chief Probation Officer John Rhoads first went to Santa Cruz County, California in 1997, the 42-bed juvenile facility housed an average of 60 to 70 youths. Rhoads worked with the YLC and the Annie E. Casey Foundation ([www.aecf.org](http://www.aecf.org)), which provided technical assistance, to reduce the overcrowding. He worked with law enforcement officials to revise the criteria for determining whether juveniles should receive citations or be detained, and to encourage citations when possible. It took about six months before law enforcement officials began to feel comfortable with and implement the program, and there was an extended transition period before the program was fully implemented.

Santa Cruz County also has developed an instrument to evaluate the types of services required by children in different risk categories. Offenders classified as low risk can be released back into communities, without confinement, and assignment to appropriate services can wait until their court appearance, based on an assessment of minimal risk of reoffending in the interim. Middle-range-risk individuals can be released with the support of some services, such as home monitoring and supervision, to help keep them out of trouble and to encourage them to make their court appearances. If home monitoring fails, electronic monitoring can be used.

It is important to adapt the program to each community. For example, 60 to 70 percent of the juveniles detained in Santa Cruz County are Latinos from the south county area, where many immigrant families live and work in agricultural jobs. Language and cultural barriers were exacerbated by the lack of bilingual staff and services. Rhodes' department hired many people from the community, and it is now 47 percent bilingual.

Santa Cruz also has expanded the number of days of operation for juvenile intake and release from five to seven in order to reduce the overall numbers of children in the facilities at any one time. The expanded schedule allows more children to obtain court dates immediately or to be released, rather than being detained over a weekend.

It also may be necessary to consider options other than releasing juveniles only to a parent or grandparent. In the Latino community of Santa Cruz, many parents work long hours, some have more than one job, and are not available to supervise children who are released. Rhoads' department contracted with a local community-based Latino-oriented service, to do crisis-intervention work with this group of children so they could be released back into the community and could access services on a regular basis.

Rhoads encouraged looking into third-party releases, family friends, and "compadres" as another alternative for children being released from juvenile facilities.

Rhoads instructs his staff to operate on two basic premises:

- No child should ever leave the institution worse off than he or she came in.

- Treat every child in the institution as if he or she were your own.

As a result of these various alternatives to incarceration, juvenile confinement in Santa Cruz County has declined about 60 percent. By expediting cases, Santa Cruz has cut the average length of stay in a facility from 22 to 9.2 days.

Rhoads emphasized that defenders not only should visit their clients in facilities regularly, but also observe the quality of those facilities. If the children are out and about, participating in programs, “and smiling,” Rhodes said, chances are the facility is a good one.

## ***Reforming the System and New Models for Delivery of Juvenile Defender Services<sup>20</sup>***

*“When we went to law school we did not contemplate becoming social workers. But that is an integral part of our job – not just working with social workers, but thinking beyond the traditional parameters of the courtroom while still maintaining that commitment to performing like a lawyer when you’re in the courtroom.”*

– Catherine Stewart, Children and Family Justice Center, Northwestern University Law School Legal Clinic

The role of attorneys committed to defending juveniles needs to be redefined if juveniles are to receive effective and fair representation in the courts. Various innovative programs around the country are devoted to providing comprehensive legal services for juveniles. They share an underlying philosophy that working with children should be a specialty. Programs operating in the District of Columbia, Evanston, Illinois and New Orleans take a multidisciplinary approach involving a variety of expertise as critical to effective representation.

Both public defenders and prosecutors have long known that many juveniles end up in delinquency courts because they are having trouble at school, ranging from poor academic performance to low self-esteem, or because they are at risk for abuse or neglect at home, reported Kristin Henning of the Washington D.C. Public Defender Service.

The District of Columbia’s Juvenile Unit assembled a team from a variety of disciplines to address juveniles’ underlying issues – including staff attorneys with specialization in special education and civil legal services, other special education advocates, and social workers. Team members appear with clients in court, work together to prepare written pleadings and to seek dismissal of delinquency cases that should be treated as neglect or special education cases.

The special education advocates assess clients, identify and try to find appropriate school placements, arrange for special education evaluations, and represent juveniles at school disciplinary hearings, especially if the alleged conduct might lead to criminal charges. The social workers provide counseling and referrals to community-based programs. Civil legal services attorneys provide advice and assistance on related non-criminal legal issues, such as housing, public benefits, or protection from domestic violence or neglect.

The multidisciplinary approach has proved effective in offering alternatives to incarceration and thus in gaining acceptance. Judges have come to rely on the teams for special disposition plans that move children out of the system. All agree that the long-term goal is to reduce recidivism in juvenile court and prevent children who do get entangled in the juvenile system from graduating to adult criminal conduct.

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20 Workshop N: Reforming the System and New Models for Delivery of Juvenile Defender Services. Moderator: Patricia Puritz, Director, Juvenile Justice Center, American Bar Association, Washington, DC, [ppuritz@aol.com](mailto:ppuritz@aol.com). Kristin Henning, Juvenile Lead Attorney, Public Defender Service of the District of Columbia, Washington, DC, [khennig@pdsdc.org](mailto:khennig@pdsdc.org); Jelpi Picou, Jr., Director, Louisiana Indigent Defense Board, New Orleans, LA, [indigent@neosoft.com](mailto:indigent@neosoft.com); Catherine Stewart, Professor, Northwestern University Law School Legal Clinic, Evanston, IL, [cestewart@nwu.edu](mailto:cestewart@nwu.edu).

It is essential to have a broad conception of the role of an attorney who works with juveniles, said Catherine Stewart of the Northwestern University Law School Legal Clinic's Children and Family Justice Center. To represent clients effectively, lawyers have no choice but to think like social workers and think outside the parameters of the courtroom, especially when collaborating with the community.

The Children and Family Justice Center does three things that any defender system should do:

- Zealously advocate for clients.
- Adopt a team approach to ensure that a client receives the services of a social worker, psychologist or special education expert, as well as legal services.
- Extend representation beyond the individual, collaborate and build coalitions with community groups.
- Work with the community on systemic reform issues.

The Center provides several attorneys to represent children and adults in a variety of proceedings ranging from abuse and neglect to delinquency, immigration and domestic violence. Also on staff are social workers and law students working under supervision to supplement the work of the lawyers.

The Center has expanded its programs as the notion that a lawyer is not just a legal advocate has taken hold. After going into detention centers to talk with juveniles about their rights, law students at the center helped start a "street law" program. Lawyers and law students speak to school and community groups to tell young people what their rights are when they are stopped by police – and they educate the students about what the police can and cannot do. Street law classes also teach students what their responsibilities are in the system and in the community at large.

A "Girl Talk" program that started with female attorneys and law students going to detention centers to talk with young women has evolved into a mentoring program, now also staffed by previous detainees. And a community law clinic in Chicago's "West Town" neighborhood now brings in law students to help with social services, represents children at school suspension hearings, and trains private lawyers to do pro bono juvenile work. Another program makes an attorney available regularly to students in several high schools.

The center also collaborates with the first-offense legal aid program of the Chicago Public Defender's Office, providing round-the-clock access to representation for juveniles and adults at police stations.

Jelpi Picou, Jr., director of Louisiana Indigent Defense Board and of the new Southern Juvenile Defenders' Center, agreed that juvenile representation cannot be improved without redefining the role of the child advocate. The Center will address key issues – many unique to the South – before establishing programs, and will look at what has worked and what has not before spending additional money.

The Southern Juvenile Defenders' Center will provide services in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and West Virginia. Its programs will have to be shaped to work within a system "we know is dysfunctional" at dealing with juvenile offenders, said Picou.

One of the center's major concerns is to face the over-representation of minorities in the system. Racism is an omnipresent institutional and personal problem for lawyers and clients coping with a lack of access, not only to the courts but, in the South, to justice, Picou said.

## *Mental Health Issues and the Impact on the Juvenile Justice Process*<sup>21</sup>

In the past decade, the criminal justice system has undergone a cultural shift. Sentencing frequently concentrates more on the harm done to the victim than addressing the problems of the offender. More juveniles are being tried as adults, even though many of these children do not have the same capacity to think and make decisions as adults. With careful treatment and teaching, many of these immature juvenile offenders can become responsible adults, and return to society.

For many years, the justice system assumed that juveniles were amenable to treatment, and that it was more cost-effective to rehabilitate them than to simply lock them up and then return them to the street. In the early 1990s, that changed. “We became less concerned with who the individual was than the harm they did,” said Stephen K. Harper of the Miami public defender’s office. In this new legal and cultural context, juveniles are rapidly entering the adult justice system: 900 juveniles were transferred to adult status in Miami-Dade last year. “[For] kids in the adult system, kids who are being transferred – how can we begin to deal with who these kids are, what they need – and remember that they are kids?” asked Harper.

Teenagers are not miniature adults; they are different. “Decision makers in the justice system ... have forgotten what we all knew as adolescents.... They are different, and we all did things as adolescents that we wouldn’t do today,” said Harper. Even so, psychologists tend to base their judgments of juveniles on pathology, on the diagnosis of some mental illness, rather than where the adolescent is in his/her developmental path. “The trap that so many are falling into is to view diagnosis as yet another ... label that goes with an offense and takes us further from understanding where this young person is developmentally, and how that affected the offense,” said Dr. Marty Beyer, an expert on adolescent behavioral development.

Several aspects of adolescent development are important in understanding how a juvenile came to commit an offense, and how to help the juvenile keep from offending again. Adolescents’ thinking processes, identity formation, and moral development all influence their actions, especially in confrontations that lead to violent crimes.

Adolescents do not think like adults. In particular, they do not anticipate the consequences of their actions; their thinking is simply not mature enough yet. “Many juvenile clients will say, ‘It happened by mistake!’” said Dr. Beyer. Even if adolescents do think ahead to the results of their actions, when they are threatened, they may not see that there are alternatives to violence. They simply react out of fear, unable to see that they have another choice.

Adolescents also make bad choices because they are easily influenced by others. “Virtually all the girl delinquents I have worked with, and many of the boy delinquents ... have been involved in their offense as the result of the intimidation of an older person, or because they went along with peers,” said Dr. Beyer. Juveniles have unformed identities and are trying to gain a stable sense of self. It is important for them to feel as though they belong to a group and not stand out from the group. In many cases, they do not even realize that they have a choice to not follow the group, due to immature thinking. Many 16-year-olds do not yet have a strong enough identity to be able to act against “their” group.

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21 Workshop O: Mental Health Issues and the Impact on the Juvenile Justice Process. Stephen K. Harper, Coordinator, Capital Litigation Unit, Office of the Public Defender, Miami, FL, [sharper@pdmiami.com](mailto:sharper@pdmiami.com); Marty Beyer, Juvenile and Criminal Justice Consultant, Great Falls, VA, [martbeyer@aol.com](mailto:martbeyer@aol.com).

At the same time, adolescents are not amoral. Most of them have a religious upbringing, and know right from wrong. Two factors commonly lead adolescents to commit crimes. When they are using drugs or alcohol, they simply cannot use adult moral reasoning. “Afterwards, when we interview them in detention, they’re horrified by the offense ... they don’t want to believe that they could have been there, because they know it’s wrong,” said Dr. Beyer. Adolescents also commit offenses because they view themselves as defending someone, or protecting themselves. They believe that they had to do something wrong in order to “right another wrong.” Afterwards, many adolescents see that their behavior was wrong, but don’t see that it was avoidable. Many adults believe that, sometimes, a wrong cannot be righted by doing a wrong, which is very confusing to adolescents.

Adolescents can be taught to make better choices and avoid crime. “They are in the middle of a process we can influence to turn out well,” said Dr. Beyer. They need to learn how to think before acting, and gain a strong enough sense of identity not to follow others. Only then will they be able to assume accountability, and say “Here’s how I was responsible for an offense I previously saw as being in the wrong place at the wrong time.”

Unfortunately, most defenders and forensic psychologists ignore developmental issues in adolescents, partly because they are not trained in developmental psychology. Instead, they focus on assigning a diagnosis, and estimating the risk that this juvenile will commit future crimes. Risk assessment for adolescents is extremely difficult, “because they’re too much of a moving target,” said Harper. Teenagers are constantly growing and changing, a fact that no risk assessment takes into account.

To help justice system professionals see the “whole adolescent,” the Miami/Dade County public defender’s office developed a Comprehensive Mental Assessment. This assessment is not a tool, or an instrument with a score. Instead, the assessment is a list of a series of areas that should be reviewed in juvenile cases: strengths, moral development, maturity of thought, capacity for empathy, and others, especially whether the adolescent has experienced trauma. “We’ve tried ... to give decision makers better information on who this kid is,” said Harper.

Trauma may have a strong influence on juvenile offenders. Life-threatening situations can delay development, but there is very little research on the rate of significant trauma in the lives of juvenile offenders. One study found that 60 percent of the girls in a Pittsburgh detention center had been traumatized. Many juvenile offenders have lost one or both parents through death, have been physically or sexually abused, and have long child protective records – and yet their abuse has been ignored. “I never fail to be shocked at how often I get a delinquent’s record, and discover that their physical or sexual abuse is well documented, and they never received treatment,” said Dr. Beyer. Children are taken to foster homes, which removes them from immediate harm, but the lingering effects of trauma have not been dealt with.

Trauma generally causes delays in development. The degree to which development is delayed is unpredictable; an adolescent may be cognitively normal, but emotionally immature. Juvenile offenders who are trauma survivors generally overreact to scary situations. When they are threatened, these trauma survivors identify their victims with the person who abused them long ago – for example, “This is happening to me again, just like when my stepfather abused me,” said Beyer. They lose track of the fact that someone else is at risk because of their actions.

According to researcher Bruce Perry, trauma also can “hard wire” the brain to overreact to threatening stimuli. These adolescents may confront everyday stimuli – as when someone bumps into them in a crowd – as a threat, when other people would dismiss it as harmless.

Abused children can be taught new ways of responding to the world, instead of reflexively lashing out at “threats.” This work takes careful teaching, which can take place when the child has grown to be a teenager, but this work has not even begun for most juvenile offenders. “One of the myths in the system is ‘nothing works,’” said Harper. Research by James Alexander on “wraparound” programs shows that juvenile programs that involve intense, long-term interventions on a juvenile’s family, neighborhood, and school programs are effective. In particular, a Philadelphia program called “Glen Mills” shows a lower recidivism rate than for youth transferred into the adult justice system.

At the time of their sentencing, though, many juvenile offenders are simply incapable of making decisions about their trial, much less their sentencing. “Many of these kids are incompetent to stand trial,” said Harper. “They don’t possess the cognitive capacity yet to make the kind of decisions that they need to make in order to assist counsel.” The primary problem is “decisional competence,” even for adolescents as old as 17, as Dr. Beyer found in about half of her recent clients.

They were cognitively too immature to compare several alternatives and decide how to deal with their cases. They misunderstood plea bargaining, and could not see the risk involved in going to trial, because they could not anticipate the consequences of their actions. They also could not anticipate their future actions; none of them thought they would ever be re-arrested, so none of them felt there would be any risk to probation. Since they felt probation was 100 percent safe, they could not accurately compare probation to other sentencing options.

Identity formation also looms large for juvenile offenders; their efforts to define their own identities, and their tendency to ally themselves with groups, can make them incompetent as well. Many of them cannot tolerate the idea that they could be considered, or have their identity partially defined as, a person who committed an offense. Instead, they “wall off” the idea that they could be guilty, and become unable to discuss the consequences of their actions. Juvenile offenders also tend to try to please others, instead of working for the best outcomes for themselves. “Either they said what they thought their lawyer wanted to hear, they said what they thought would make their lawyer like them, or they did what their parents told them to do,” said Beyer. Lacking independent judgment, they could not evaluate their cases, even though they were intelligent enough to do so. Some feel that it is morally wrong to “snitch”, and will not even consider a plea bargain which involves informing on others.

Even juveniles’ sense of morality can lead to incompetence. “The thing that makes them incompetent is their insistence on fairness, which means that they become preoccupied with something that has occurred, maybe during their arrest, maybe during their detention ... and they can’t get off of that subject. That’s just being adolescent,” said Dr. Beyer. These adolescents are unable to move on, or to work with their lawyers on trial preparation. “The kid who’s preoccupied with righting that wrong will say, ‘You must not really be listening to me – this is what’s really important, and this is what we should be talking about,’” said Dr. Beyer.

In the end, many juvenile offenders are not “bad” kids, but people who have been shaped by their environment, and are adapting well to a deeply dysfunctional inner-city system. “When the young person is looking for a stable sense of self ... in a society which doesn’t value their culture, the group that they belong to, that makes it much harder to come out with a positive sense of self,” said Dr. Beyer. It can be difficult for an evaluator who does not come from the same environment to see an adolescent’s strengths.

As younger and younger juveniles are entering the adult system, often with arrested development, the question of competence becomes increasingly important. Lawyers can learn about child development by reading a legal description of juveniles in the justice system in an *amicus curiae* brief by the American Society for Adolescent Psychiatry and the Orthopsychiatric Association for *Thompson vs. Oklahoma*, a juvenile death penalty case in the U.S. Supreme Court.

The most important thing for justice professionals to remember is that juveniles can still grow up. “Instead of giving them a diagnosis, with a terrible prognosis, we can say this is where they are developmentally. And the good news is there’s a long way for them to go still ... they are not an unchangeable adult character. They are in the middle of a process we can influence, to turn out well,” said Dr. Beyer.

## ***Police Interrogations, False Confessions, and the Impact on Children and the Courts***<sup>22</sup>

Various high-profile cases have drawn attention to the increasing problem of false confessions by juveniles. Public defenders and researchers attribute the increase to a method of interrogating suspects known as the Reid technique which, among other things, gives suspects a series of “choices” to get to the disposition of their case in the least unappealing way. The technique extricates confessions from adults in more than 90 percent of the cases. With children, the rate of confessions is even higher.

The Reid technique was developed at John E. Reid and Associates, a Chicago law enforcement and security consulting firm founded in 1947. Among its services, Reid and Associates provides books, videotapes and training on interrogation techniques. The Reid technique is a nine-step process, in which the questioner uses behavioral techniques when questioning a suspect. Students of the technique are taught to create a sense of anxiety in the suspect by sketching out likely crime scenarios and motives for a crime, such as being angry or upset. They also may lie to a suspect and encourage him to give up his rights. The technique has been so effective at extracting confessions that Reid and Associates cautions interrogators to use the technique only if they are quite certain the suspect is guilty.

Richard Ofshe, a psychology professor at the University of California at Berkeley and the country’s leading expert on false confessions, testified as an expert witness in one of the most dramatic examples of the Reid technique applied inappropriately, with a child coerced into a false confession of murder. Anthony Harris, a 12-year-old from New Philadelphia, Ohio, was convicted by a judge in a trial without a jury, although there was no supporting evidence beyond his confession.

In June 1998, a 5-year-old local girl named Devin Donovan disappeared. The police canvassed the neighborhood and, 24 hours later, found her body. She had been stabbed fatally. Because Anthony Harris apparently had walked through the woods at the time she was thought to have been abducted, he became a suspect. The police took him in for what they said would be a voice-stress analyzer test. They told Anthony’s mother the test would clear her son. She agreed. She was not allowed to be in the room with her son, although she was able to watch – but not hear – the proceedings through a one-way mirror.

Very quickly, the “test” became an interrogation. Although Anthony repeatedly denied killing Donovan, after about an hour he broke down as the interrogator walked him through a confession, giving him the details of the crime which only the killer could have known. As often happens in false-confession cases, a juvenile court judge accepted Anthony’s confession as truth. The interview was audiotaped, however, so when the case went up to appeal, Anthony’s lawyers were able to prove the confession had been coerced. The appellate court reversed Anthony’s conviction and condemned the tactics used in obtaining his confession.

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22 Workshop P: Police Interrogations, False Confessions, and the Impact on Children and the Courts. Moderator: Steven Drizin, Senior Lecturer, Children and Family Justice Center, Northwestern University School of Law, Legal Clinic, Chicago, IL, [s-drizin@nwu.edu](mailto:s-drizin@nwu.edu). Rita Aliese Fry, Chief Executive, Cook County Public Defender, Chicago, IL, [ccpdo@www.com](mailto:ccpdo@www.com); Richard Ofshe, Professor, University of California at Berkeley, Berkeley, CA.

An episode of the ABC-TV program *20/20* examined the coercive techniques that led to Anthony's confession. Tom Vaughn, the police chief who questioned Anthony, is a certified Reid interrogator who used the method to question the boy.

Vaughn began by suggesting to Anthony that police already had evidence against him in the killing. When Anthony denied killing Donovan, Vaughn, as the Reid technique requires, repeatedly interrupted him, to keep his denials from becoming firm.

Vaughn drew for Anthony two scenarios of the crime. Either he had killed Donovan intentionally, in which case he faced nine years in jail, or he had killed her in the heat of the moment, which would make his sentence lighter. Vaughn implied that Anthony could get counseling and a second chance if he confessed. Vaughn did not raise his voice, yell or physically threaten the suspect during the interrogation, most likely enhancing the suspect's anxiety.

The Reid technique is clearly powerful. However, as Professor Ofshe, who was interviewed by the *20/20* program, emphasized, the technique never should be used with children, because they are so vulnerable and open to suggestion. Nor should they be interviewed without an adult guardian ad litem or lawyer present. The *20/20* investigation revealed that in the last two years nearly a dozen children who confessed to murder were later discovered to be not guilty.

In Anthony's case, the police ignored a promising lead after his confession. Search dogs had followed Donovan's scent and stopped near the home of a convicted child molester, who was questioned and then released. Once Anthony confessed, police stopped pursuing other leads. When the *20/20* piece aired, Anthony's case was still on appeal. Shortly thereafter, in June 2000, after he had spent two years in jail, Anthony's conviction was reversed and he was released.

According to Professor Ofshe, the Harris case went awry at the trial level because the judge had been convinced by the false confession, despite the efforts of the two defense attorneys and help from the NAACP. In its decision, the appellate court noted that evidence of police coercion had been very clear. Professor Ofshe also helped Anthony discussing the case with media contacts. He was able to interest *20/20* in the story. He also called an acquaintance at a Northwestern University legal clinic, who helped assemble a pro bono appellate defense team.

Professor Ofshe tends to get involved in cases in which he is convinced a person is innocent. "Sometimes it's just bad police behavior," he said. "In the main, I see bad cops and good victims.... I see the worst of the worst."

In a notorious Chicago case two years ago, aggressive police interrogators elicited false confessions of murder from two boys, aged seven and nine, accused of killing an 11-year-old girl, Ryan Harris. The case gives a glimpse of what Stephen King-like events can unfold when children end up in a police station house with a practitioner of aggressive interrogation methods, said Cook County Public Defender Rita Aliese Fry. Only after the case had stoked the nation to new heights of concern about the increasing depravity of its children were the charges dropped. Eventually, an adult was arrested and charged.

The two boys had seen Ryan Harris pass by them on her bike, then later saw her body in a field. Police interrogated them first as witnesses, and later as suspects. They got the 7-year-old to say he had hit Ryan and knocked her off her bike, and the 8-year-old to say they took off her pants and

“played with” her. Soon afterwards, the police were surprised when they found semen on Ryan’s underpants, since it is physically impossible for a 7- or 8-year-old to produce semen. For a time, police theorized that the boys had killed her, and afterwards an adult had come along and sexually assaulted her.

Generally, when a child is arrested, a youth officer – a police officer assigned to juveniles – is expected to be present to prevent coercion while the child is in custody. The role of the youth officer is problematic. They are police officers, not youth advocates. One of the youth officer’s jobs is to get in touch with the family, which is often difficult because many children do not know their addresses or phone numbers. While youth officers are trying to find the child’s family, often the interrogation begins without them.

Children are frequently told they can go home as soon as they tell the police “what happened.” As they did with Anthony Harris, police may suggest what happened. That frequently elicits a false confession. “When you offer a suggestion about what might have happened, he is happy to tell you that back if that will allow him to go home,” Fry said.

In most jurisdictions, the police do not tell children when their parent arrives, worrying that parents may impede the process. But parents also may undermine their children by telling them “just to tell the police what they need to know so you can go home,” a strategy more likely to get the child sent to a detention center than home.

In Chicago, as in many other cities, the public defender is not appointed until the client appears in court. Public defenders cannot go to the police department to start representing a person after an arrest. It is also difficult to get a private lawyer involved at the arrest stage. Although a private lawyer will go to the police station if called, the child has to know and understand his right to counsel to think to ask for a lawyer, and must know the name of a lawyer to call.

A bill that requires a lawyer to be present before a juvenile waives his or her *Miranda* rights is on the desk of the Governor of Illinois. Despite heavy law enforcement opposition, he is expected to sign it.

A record of an interrogation is the key to truth in instances of coerced confessions, Professor Ofshe emphasized, and there has been some progress in getting these recordings. In the United States, Alaska has required recordings since 1985, and Minnesota since 1994. Many police agencies voluntarily record interrogations. Such recordings are critical to improving police practice with respect to confessions.

## ***The Public Weighs In***<sup>23</sup>

*“Americans are hearing more and more about the unfairness in the administration of the death penalty and the shortcomings of our system of indigent defense are becoming more and more apparent. Information about the failure of the system will ratchet up concern. At the same time, don’t forget, we cannot move forward without defining defenders as capable professionals who can deliver for their clients.”*

– Public opinion researcher John Russonello

Americans are ambivalent about the criminal justice system, but also clearly believe there are inequalities in the system that undermine justice, according to newly completed public opinion research. The research examined the American public’s view of public defenders, the value of their work and the fairness of the criminal justice system.

Americans know there are inequalities in the system and that a defendant who has the money to hire a good lawyer is likely to get “better” justice than one without the resources, reported John Russonello, of Beldon Russonello and Stewart, a public opinion research firm based in Washington DC. Americans also seem to know that the system is understaffed and underfunded. But the public is also critical of the criminal justice system, perceiving it as slow-moving, complicated and often ineffective, as exemplified in concerns that the system operates as a revolving door for repeat offenders.

But recent scholarly research on the death penalty, along with high-profile death-penalty cases in Illinois and Texas, has penetrated the national consciousness and created an opportunity to engage the public. “The nation appears to be at a ‘teachable’ moment on this issue,” said Russonello.

The Russonello firm conducted eight focus groups in different regions of the country (St. Louis, Missouri; Dallas, Texas; Baltimore, Maryland; and San Jose, California), over a two-month period. The 8-10 participants in each group were people who were voters, regular news readers, and active in their communities.

The public perceives that the lack of resources available for indigent defense is a violation of the fundamental Constitutional right to due process. People responded more positively to calls for reform that stressed unfairness and the impact on individuals rather than abstractions about problems in the criminal justice system or society at large. Advocates of indigent defense reform should emphasize the clear inequities of the current system, Mr. Russonello said.

The focus groups returned over and over to the disparity between defendants with money and those without. Many group members said they believe people who can pay for good legal representation get better representation than those who cannot. Several black and Hispanic focus group participants agreed that members of minority groups are likely to be treated worse than white Americans, while white Americans typically used the initials “O.J.” to represent the sentiment that the system favors wealthy individuals, Mr. Russonello said.

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23 Working Lunch: The Public Weighs In. Introduction: Nancy Gist, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Washington, DC.  
Speaker: John Russonello, Beldon Russonello & Stewart, Washington, DC, [johnrussonello@brspoll.com](mailto:johnrussonello@brspoll.com).

Some responses reflected the respondents – and presumably the public’s – questionable knowledge of the legal system. For example, Mr. Russonello found that some words used to describe police or prosecutorial action have an impact on how a case is viewed. A person who was “arrested” was seen in a more negative light than a person who was “accused,” presumably on the assumption that police typically gather enough evidence before making an arrest to make a presumption of guilt reasonable.

The groups viewed public defense work almost as an internship. Public defenders were seen as bright, young, inexperienced, overworked and dedicated – and ultimately likely to move on to “real lawyering” at a firm. Low public defender compensation, high caseloads, and the lack of related resources such as for experts, investigators, labs, and DNA testing, bothered the groups, particularly in comparison to the resources available to the government in prosecuting a case.

Many favored establishing national standards for indigent defense since the right to counsel and due process are Constitutional guarantees. Most would like to see these standards administered by state or local governments.

Despite some misconceptions about the law and the profession, group members had a grasp of legal fundamentals. Asked to name their rights if arrested, they first mentioned the right to an attorney. People felt that the components of an adequate defense are due process, competent counsel (with specific experience and training in criminal law), and support services, like an investigator. The groups agreed that a public defender should have a reasonable caseload and resources on a par with a prosecutor. The lack of resources for indigent defense and the disparity between defenders and prosecutors are seen as violations of basic fairness and the fundamental right to due process.

Messages to convey the need for adequate indigent defense are persuasive to the voters in the groups when they offer a simple appeal to fairness. These messages are:

- *The quality of justice a person receives should not be determined by how much money a person has.*
- *Public defenders are needed to prevent innocent people from going to jail.*
- *The right to counsel is a fundamental Constitutional right that is necessary for a fair and reliable determination of guilt or innocence.*

A fourth message, appealing to the value of self-preservation, was also very popular in the groups – *the idea that some day you or someone you know may need a public defender.*

## ***Innocence: Protecting the Integrity of the System***<sup>24</sup>

The growing sophistication and certitude of DNA evidence has dramatically raised society's understanding of the reality of wrongful convictions. Widespread doubts about the conviction of the innocent represent the most pressing current threat to the public's trust and confidence in the credibility and integrity of the criminal justice system.

There are many ways that innocent people may be drawn into the criminal justice system, including police or prosecutorial misconduct, forensic error, mistaken eyewitness identification, false confessions, or racial or other invidious assumptions, practices and prejudice which may infect every stage of the system. But there is one overarching way that innocent indigent people can be extricated from the system: by furnishing competent legal representation.

"The fairness thing," said Illinois Deputy Governor Bettenhausen, "comes down to competent counsel and resources."

The Innocence Project at Cardozo Law School studied 68 cases of DNA exonerations, including eight death penalty cases, to look closely at the causes of erroneous convictions. In 20 percent of the cases, convictions resulted from false confessions. In many cases there were problems with eyewitness identification. In half the cases, the study found evidence of police misconduct.

Ed Flynn, police chief of Arlington County, Virginia, noted that DNA is just one part of the evidence used to assess a suspect's involvement, and is only important in a small number of cases. He urged vigilance on the part of all players in the criminal justice system to avoid a "predisposition" toward the guilt of a suspect. The police face a "callousness problem" in dealing with people who may be innocent, he said. A majority of suspects are part of a pool of people who have been processed dozens of times. Accurate information can be difficult to get, since it is relayed verbally and, in cases involving both indigent defendants and indigent victims and witnesses, many people who would be questioned distrust the police and fear retaliation if they cooperate with authorities. Circumstantial and eyewitness evidence may have a tendency to "fall into place ... too easily." Police, prosecutors and defenders spend their careers being lied to, so it is a challenge to overcome the feeling that most people are guilty. Suspending disbelief on the question of guilt on a case-by-case basis is not always easy. We must exercise caution, Chief Flynn urged, "not to allow our cases to be a conveyor belt."

In a system that generally tilts toward conviction, competent counsel is the most critical safeguard against conviction of the innocent suggested Chief Flynn. "In a contest of unprepared counsel," he said, "my money's on the prosecution."

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24 Plenary VI: Innocence: Protecting the Integrity of the System. Moderator: Charles Ogletree, Jr., Jesse Climenko Professor of Law, Harvard University Law School, Cambridge, MA. The Hon. Gerald Kogan, Former Chief Justice, Florida Supreme Court, Coral Gables, FL, [gkogan@law.miami.edu](mailto:gkogan@law.miami.edu); Matthew Bettenhausen, Deputy Governor, State of Illinois, Chicago, IL, [mattbettenhausen@gov.state.il.us](mailto:mattbettenhausen@gov.state.il.us); Susan Herman, Executive Director, National Center for Victims of Crime, Arlington, VA, [sherman@ncvc.org](mailto:sherman@ncvc.org); Peter Neufeld, Director, The Innocence Project, Cardozo Law School, New York, NY; Cynthia Jones, Director, Public Defender Service for the District of Columbia, Washington, DC, [cjones@pdsdc.org](mailto:cjones@pdsdc.org); David Whetstone, District Attorney, Baldwin County, Alabama; Ed Flynn, Police Chief, Arlington County, VA.

Victims are in agreement with concerns about the conviction of innocent people. Susan Herman, executive director of the National Center for Victims of Crime in Arlington, Virginia, noted: “Victims don’t have any interest in having the wrong person convicted.” Rather, a major concern of victims is having the right to participate and to be notified about all stages of the legal process.

Even though DNA has come to be viewed as a critical factor in determining guilt or innocence, there is a forensic crisis in the country, according to Matthew Bettenhausen, deputy governor of Illinois. There are, for example, long delays in processing DNA evidence. In new cases in Chicago, because of the backlog in forensic labs, it takes 10 months to get DNA results, and there now are 2,800 pending cases waiting for DNA results.

In most cases, DNA evidence is not available at all, and prosecutors generally have to make decisions on low-probability circumstantial evidence, like blood evidence. David Whetstone, the district attorney for Baldwin County, Alabama, makes the initial decisions on whether to seek a death penalty, and tries most of the capital cases in his circuit, about four or five a year. “It’s a heavy burden, and you’d like the best available evidence,” he acknowledged.

The problem, Whetstone noted, is that the same types of errors that cause the wrongful convictions that DNA evidence is able to correct, are equally prevalent in cases where no biological evidence was left at the crime scene. “It’s a logical assumption,” he warned, “that the same error rate in DNA cases exists in non-DNA cases.” The obviousness of the breadth of the flaws, and the importance of scrutinizing all evidence closely enough to uncover the errors, demonstrates the importance of increased resources for all players, including the prosecution. “It’s a good opportunity for all of us” to improve our capacity to avoid wrongful convictions, he urged. But nothing will make the system infallible and eliminate the possibility of wrongful convictions or executions, he warned; “if you are willing to accept no risk of error,” he said, “then do away with the death penalty.”

Former Florida Chief Justice Gerald Kogan considered the role of judges in assessing innocence and assuring fairness. Judges must assure that prosecutors act as officers of the court and are “lawful in who they charge,” he said. Prosecutors’ major goal is to prosecute, but not if they doubt a person’s guilt.

Unfortunately, trial judges are often subject to political pressure that conflicts with the mandate for fairness and justice. As Chief Justice Kogan explained, the process can start off with an arrest that should not have been made in the first place. The prosecutor then files a case that should not be filed, and a judge proceeds with a case to avoid riling the feelings of a community. The result can be the conviction of innocent people.

Given recent revelations about inequities in death penalty sentencing, panelists said there is also a need for everyone in the criminal justice system to collaborate on developing new standards to address the various problems that lead to wrongful convictions. Everyone in the system, not just the prosecution and the police, has a stake in this process. Illinois, one of the systems under scrutiny for its application of the death penalty, has set up a commission involving all stakeholders, including law enforcement, prosecutors, judges and defenders, to examine the reasons for the system’s mistakes and to recommend solutions. The commission was appointed to follow up on the governor’s declaration of a moratorium on executions early in 2000 when the number of innocent people released from death row exceeded the number of people executed.

As they have learned in Illinois, the central problems are the competence of counsel and adequacy of resources for the defense. Following an investigation by the legislature, including polling and focus groups, the legislature passed the Capital Crimes Litigation Act, which established a trust fund to provide funds for both prosecution and defense to hire and use technicians, investigators and other experts.

Peter Neufeld of the Innocence Project called attention to the Rampart scandal in Los Angeles, where some 70 police officers in an anti-gang unit have been implicated in schemes to fabricate evidence and coerce confessions. If clearly innocent people are pleading guilty, the fault does not lie entirely with the police. Society counts on the public defender to test the evidence and expose the flaws. When defenders are failing to catch flagrant systemic abuses, it is a sign of a need for stronger standards governing quality and funding of indigent defense. The only time lawyers in this nation are disciplined by bar authorities is when they take money from a client, Neufeld suggested. In other words, lawyers can get in “more trouble if they take \$150 than if they screw up and cost a client his life.”

As Attorney General Janet Reno told the Symposium, “a good lawyer is the best defense against wrongful conviction.”

## *New Awareness – and Eternal Vigilance*

The world has begun thinking about justice in a new way. Scientific developments and DNA exonerations have opened a window onto the fallibility of the criminal justice system and the need for competent counsel, creating a unique opportunity to achieve the goal of an equitable system.

“Everyone in the criminal justice system has known that innocent persons are sometimes convicted, but we have never had the kind of evidence we now have,” said Norman Lefstein, dean and professor of law at Indiana University School of Law in Indianapolis, in remarks at the closing plenary of the Symposium. DNA provides clear and convincing evidence of guilt or innocence, because it is more than 99 percent proof positive in identifying someone via blood or semen.

Public opinion of the justice system has changed as well. There is now widespread recognition that the criminal justice system is fallible. This realization has broad implications for improving the criminal justice system and improving the amount of resources available not only for prosecutors and corrections, but also for defense.

Dean Lefstein emphasized that it is important to do more than provide every defendant with competent counsel. While it is important for the Department of Justice to continue working on indigent defense, it is the responsibility of national organizations like the National Legal Aid and Defender Association and the American Bar Association to work with the DOJ and maintain the emphasis on this very important area.

Dean Lefstein praised the attention given to the need for quality indigent defense and a balanced justice system by Attorney General Janet Reno. The Symposium itself is a sign of collaboration among stakeholders in the criminal justice system – police, prosecutors, judges, victims and defense attorneys – in working toward the shared goal of a fair, equitable system. He felt encouraged that the process would continue under the next Attorney General. And he highlighted some lessons to be taken away from this Symposium – and from recent history:

- This and preceding conferences have shown that defenders and assigned counsel need to join with other players in the criminal justice system. The workshops at the Symposium reflect what can be accomplished through collaboration. The workshop on litigation over systemic deprivations of the constitutional right to counsel demonstrates what occurs when collaboration fails – time and money spent in court.
- This is a time that offers many opportunities to make changes in the criminal justice system. Many of the changes in indigent defense have already been aided and encouraged by the ABA and its Bar Information Program (BIP), which is part of the ABA’s Standing Committee on Legal aid Indigent Defense. Since 1983, BIP has been a national source of technical assistance aimed at improving the indigent defense system nationwide. Now BIP and the Bureau of Justice Assistance are involved in a project to set up commissions in a number of states on indigent defense and have already had some success. In addition, BIP will soon be inviting applications for catalyst grants to improve state indigent defense systems in a program funded by the Open Society Institute.

- There has been a major movement toward improvement in a state with perhaps the gravest need for indigent defense improvement. The State Bar of Texas recently released a report on the state of indigent defense titled “Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas.” A national conference on indigent defense, sponsored by the state bar, is planned for December 7 and 8, 2000, in Austin.

“The struggle for indigent defense is well worth it, as it is a measure of our society,” said Dean Lefstein. Citing Thomas Jefferson’s warning that “Eternal vigilance is the price of liberty,” Dean Lefstein declared that “our history clearly suggests that no less vigilance is required to assure adequate defense services for the poor.”

“Improvement in the area of indigent defense will come about only with exceedingly hard work and diligent efforts. It takes perseverance and it takes time. It’s not for the sprinter, but for the long-distance runner.”

## ***Collaborative Recommendations for Action by State Delegations***

On each of the two days of the Symposium, delegations from all 50 states and the various territories gathered to brainstorm strategies for addressing issues in indigent defense and the integrity of the criminal justice system. The delegations, consisting of all the defenders, prosecutors, judges, legislators participating in the Symposium, each prepared their own list of recommended action items which they could implement upon returning to the home jurisdiction. The hundreds of responses received are here culled into categories to illustrate the most dominant shared themes among delegations attending the Symposium (the number of delegation recommendations appears in parentheses).

### **Action Items for Visible Leadership**

On the first day, after Attorney General Janet Reno addressed the Symposium regarding her leadership vision for improving indigent defense at the state and local levels, the delegations were tasked with meeting among themselves to craft 10 action items to demonstrate visible leadership on indigent defense. Dominant shared themes and creative approaches include:

#### **1. Direct collaboration with other justice agencies.** This took various forms:

- Collaborative projects to address specific issues in criminal case processing, including specialty courts like drug courts or mental health courts, or projects to promote correctional options or to relieve jail overcrowding (15).
- Joint planning bodies, to institutionalize a process of joint long-range planning on resource and policy issues – generally some form of a Criminal Justice Coordinating Council (16)
- Joint study of problems with or attitudes toward indigent defense (10), including conducting an outside audit of an indigent defense program according to national standards by an organization such as the National Legal Aid and Defender Association.
- Attend each other's meetings or hold joint meetings (13)
- Lobby for each other's funding needs (3)
- Joint statement on the value of quality indigent defense (2)
- Pursue integration of agencies' information technology systems/shared access to criminal history information databases (4)

**2. Impact analysis/fiscal note:** Require analysis of impact of resource increases for one part of the criminal justice system on other parts of the system (9)

**3. Cross-disciplinary training** – e.g., prosecutors, judges, police and defenders participating as faculty at each other's training or orientation programs (9). One proposal was to ask the Supreme Court Chief Justice to schedule a "court holiday" for all trial courts at least once a year, to facilitate regional meetings and trainings for judges, prosecutors and defenders. Variants:

- Joint training (prosecutors and defenders together) (4)

- Improved training for judges or defenders (4)

**4. Standards:** Work together to adopt and enforce indigent defense standards (24). Areas recommended: attorney performance requirements, specific types of cases (e.g., capital, juvenile). Variants:

- Standards for judges and prosecutors (2)
- Performance-based budgeting (i.e., measurements of outcomes/dispositions/work done, as a substitute for cost-per-case or other measurements which do not incorporate qualitative measurements) (2)

**5. Parity:** Reach agreement/methodology on achieving parity of resources and workloads between prosecution and defense (11)

**6. State symposia:** Convene a state-based symposium on indigent defense, with collaborative delegations, modeled upon this national symposium (11) (variants: hearings, or other one-time conferences).

**7. Spread word of the national symposium** to communities and agencies back home (19)

**8. Public education** (18). Variants:

- Speakers bureau, including representatives of all agencies, for all types of local audiences (2)
- Local cable TV shows, including joint public defender and district attorney presentations (2)
- Presentations in schools (2) (including establishing student courts within schools for teaching rights and principles of court system).

**9. Education/outreach to media, editorial boards** (7)

**10. Sentencing alternatives**, collaboratively implemented (11)

**11. Federal funding for indigent defense**, in some proportionality to federal support given to other criminal justice components (10) (includes proposals for federal funding of specific projects, such as mentoring of juveniles)

**12. Establish statewide indigent defense system**, to promote quality, uniformity, efficiency, accountability (7)

**13. Independence:** Remove judges from process of appointing/compensating defenders (5) (one delegation proposed making the public defender an elected position, as in Florida and Tennessee, to promote independence)

**14. Improve assigned counsel compensation and resources** (3)

**15. Litigate** – as a last resort (4) (one delegation would simply study outcomes in jurisdictions which did litigate).

### **Action Items for Demonstrating Public Value**

On the second day of the Symposium, there was a presentation of new public opinion research by the firm Belden Russonello & Stewart regarding the public's perceptions of indigent defense and the fairness of the criminal justice system. Afterwards, the delegations were tasked with meeting among themselves to craft five action items to demonstrate to a specific audience the public value of indigent defense and a fair and balanced criminal justice system. Dominant shared themes and creative approaches include:

**1. Work with the media to promote coverage** of successes and challenges facing indigent defense and the criminal justice system's ability to dispense justice fairly (19). Methods of outreach include: press releases, contacting reporters and editorial boards, creating public television or cable shows or Public Service Announcements, including involvement of judges and prosecutors in such video outreach formats. Recommendations for issues or events to cover include:

- Stories of innocent clients successfully vindicated
- Clients who turned their lives around due to effective and fair treatment in the system
- Stories of public defenders as champions of fairness for poor people; fighting problems such as governmental misconduct or racial profiling
- Televised "town meeting" of criminal justice system players discussing successes and challenges

**2. Public education materials and events** (20). Recommended ways to call attention to successes and challenges include –

- Profiles of cases of innocence or unfairness (e.g., harsh mandatory minimums, juveniles tried as adults, police or prosecutorial misconduct)
- Publicize other accomplishments of indigent defense office
- Testimonials by well represented clients
- Awards to exemplary practitioners, perhaps jointly with the bar, state university, or chamber of commerce

- Produce a video of defenders, clients, and the court process, for community groups, school audiences; obtain U.S. Justice Department grant support to fund production of the video
- Joint statements with prosecutors or victims on shared issues and values
- Database or written materials on subjects such as the changing role of defenders, the nature of crime, or who is in jail and what their lives are like
- Public forums in local communities around the state, with presenters from all justice agencies
- “Push polling” (surveys designed to educate as well as elicit public views)
- Hire a Public Information Officer to handle all such external outreach

**3. Web site** (4) as a vehicle for public education, perhaps jointly operated with courts and prosecutors, including Frequently Asked Questions, interactive capability, profiles of defenders and cases.

**4. Community speaking** (14), generally through some form of Speakers Bureau. Some suggested regularized speaking programs, e.g., a “Justice Literacy Project” or “Community Legal Education,” to discuss fairness issues, explain how the system works, or deal with public misperceptions about legal “technicalities.” Specific formats were suggested, such as town hall community meetings, and specific audiences, such as the Chamber of Commerce.

**5. Participate in community activities** (8). Examples:

- Joining with police in community events
- Law Day activities, e.g., with a fairness theme
- Open house at courthouse, perhaps with free sobriety tests
- “Hanging out” at local diner with “Breakfast Club”

**6. Outreach to schools and young people** (10), including schools from elementary up to law school, Boy/Girl Scouts and state summer youth programs; perhaps encourage children to visit court. The focus is on either general education about the system and the role of indigent defense, or on particular subjects, such as the death penalty or racial bias.

**7. Outreach to legislators** (5), both state and local. Either testify at hearings or request opportunity to make multidisciplinary presentations (i.e., with prosecutors, judges, client community) on issues such as fairness and problems with the death penalty.

**8. Broad consensus** among components of the criminal justice system, communicated through outreach to all community audiences and media (5), on issues such as racial disparities and representation of juveniles.

**9. Standards** (3), to promote public trust and confidence in fairness and the quality of representation.

**10. Train defenders** (3), on non-legal matters such as how to interact with the media, or to improve their “bedside manner” and professionalism

**11. Solicit information from the community** (3), e.g., through surveying public opinion toward indigent defense, placing a “suggestion box” in the courthouse or public defender office, or involving clients and their families and communities in defense decisions.

**12. Other suggestions:**

- Defender programs should help monitor or mentor clients in the community, e.g., in treatment
- Defender involvement in community crime prevention efforts
- Create an indigent defense commission, not just to improve quality, but to expand buy-in and understanding among community constituencies
  - Get judges to speak out on fairness, resources

## **Appendix 1**

### **Agenda: National Symposium on Indigent Defense**

**NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000**  
**REDEFINING LEADERSHIP FOR EQUAL JUSTICE**

Washington, DC  
June 29-30, 2000

**AGENDA**

**THURSDAY, JUNE 29**

7:00 a.m.-8:30 a.m.                      **Registration and Continental Breakfast**                      *Grand Ballroom Foyer*

8:30 a.m.-8:45 a.m.                      **Opening and Welcome**                      *Grand Ballroom*

*Symposium Moderator*                      Norman Lefstein  
Dean and Professor of Law  
Indiana University School of Law  
Indianapolis, IN

*Welcome*                      The Honorable Mary Lou Leary  
Acting Assistant Attorney General  
Office of Justice Programs  
Washington, DC

The Honorable Nancy Gist  
Director  
Bureau of Justice Assistance  
Office of Justice Programs  
Washington, DC

8:45 a.m.-9:45 a.m.                      **PLENARY SESSION I**                      *Grand Ballroom*  
***Redefining the Role of the Defender: The Courtroom and Beyond***

Some models of indigent defense representation seek to resolve not only the specific criminal charges in a case but to address the problems and deficiencies that contributed to the criminal conduct. The goal is to reduce the likelihood of reoffending, through a problem-solving approach comparable to that being adopted in other parts of the criminal justice system (i.e., community-oriented, problem-solving policing, prosecution, and adjudication). This plenary session will explore the value of this expanded approach to the system, to the community, and to the client.

*Session Moderator*                      Anthony Thompson  
Professor  
New York University School of Law  
New York, NY

*Panelists*                      Robin Steinberg  
Executive Director  
The Bronx Defenders  
Bronx, NY

E. Michael McCann

District Attorney  
Milwaukee, WI

Steven Carroll  
County of San Diego  
Department of the Public Defender  
San Diego, CA

Kim Taylor-Thompson  
Professor  
New York University School of Law  
New York, NY

Carlos J. Martinez  
Director of Program Development  
Dade County Public Defender Office  
Miami, FL

The Honorable Bonnie Michelle Dumanis  
Domestic Violence Court  
San Diego, CA

9:45 a.m. B10:00 a.m.

**Interactive Discussion With Participants**

10:00 a.m. B10:45 a.m.

**PLENARY SESSION II**  
***Assuring Quality Representation***

*Grand Ballroom*

The quality of indigent defense varies widely around the country, ranging from well-organized, adequately funded systems providing reasonably consistent levels of representation to jurisdictions with disorganized, underfunded, and perilously inadequate representation. This plenary session will examine the current state of indigent defense around the country and the importance of improvements to all stakeholders in the system.

*Session Moderator*

Christopher Stone  
President and Director  
Vera Institute of Justice, Inc.  
New York, NY

*Panelists*

Robert M.A. Johnson  
President-Elect  
National District Attorneys Association  
Anoka, MN

Stephen Bright  
Director  
Southern Center for Human Rights  
Atlanta, GA

10:45 a.m. B11:00 a.m.

***Break***

*Grand Ballroom Foyer*

11:00 a.m. B12 noon

**Plenary Session II Workshops**

**WORKSHOP A**  
***Improving Systems Through Litigation***

*Georgia Room*

This workshop will examine nationwide developments in state and local litigation to increase funding, reduce caseloads, and improve the quality of representation.

*Workshop Moderator*

Scott Wallace  
Director, Defender Legal Services  
National Legal Aid & Defender Association  
Washington, DC

*Panelists*

Robin Dahlberg  
Senior Staff Attorney  
American Civil Liberties Union  
New York, NY

Stephen F. Hanlon  
Holland & Knight  
Tallahassee, FL

Robert B. McDuff  
Civil Rights and Criminal Defense Attorney  
Jackson, MS

Norman L. Reimer  
New York County Lawyers= Association  
New York, NY

**WORKSHOP B**  
***Building Statewide Task Forces To Create  
or Enhance Systems***

*Massachusetts Room*

The panel will discuss how an organized body of stakeholders, including judges, lawyers, academics, and elected and appointed government officials, can build support for indigent defense reforms through data collection, analysis, consensus building, and recommendations.

*Workshop Moderator*

Robert Spangenberg  
President  
The Spangenberg Group  
West Newton, MA

*Panelists*

Elgin Simpson  
Executive Director  
Nevada Supreme Court Task Force on  
Indigent Defense  
Las Vegas, NV

John Rubin  
Professor  
Institute of Government  
University of North Carolina  
Chapel Hill, NC

Bill Beardall

Legal Director  
Texas Appleseed  
Austin, TX

The Honorable Allan Butcher  
Tarrant County Justice Center  
Fort Worth, TX

Michael K. Moore  
Committee Member  
State Bar of Texas Committee on Legal  
Services to the Poor in Criminal Matters  
Arlington, TX

**WORKSHOP C**  
***Implementing and Enforcing Quality  
Standards***

*New York Room*

The panel will review how indigent defense standards developed by national organizations such as the National Legal Aid & Defender Association and the American Bar Association have been implemented in the states, including by statute, supreme court promulgation, establishment of a statewide commission responsible for developing and enforcing standards, formal linkage to the availability of state funding, and audit of individual defender programs by national organizations.

*Workshop Moderator*

Adele Bernhard  
Associate Professor  
Pace University Law School  
White Plains, NY

*Panelists*

William F. Kluge  
Appointee, Ohio Supreme Court  
Committee for Setting Standards for Indigent  
Defense of Capitally Charged Defendants  
Lima, OH

Tony Gagliano  
Deputy Judicial Administrator  
Louisiana Supreme Court  
New Orleans, LA

Robert Willey  
Assistant Public Defender  
Riverside County Public Defender's Office  
Riverside, CA

Larry Landis  
Executive Director  
Indiana Public Defender Council  
Indianapolis, IN

**WORKSHOP D**  
***Supplementing Resources Through Backup***

*Pennsylvania Room*

### *Centers*

This workshop will examine how indigent defense programs, like other criminal justice system components, can improve efficiency, reduce costs, and improve quality and uniformity of representation by establishing a center for training, technical assistance, support, and sharing of information, legal materials, statistics, and other resources.

#### *Workshop Moderator*

Joseph Trotter, Jr.  
Director, Justice Programs Office  
School of Public Affairs  
The American University  
Washington, DC

#### *Panelists*

Christie Hedman  
Executive Director  
The Washington Defender Association  
Seattle, WA

Charles F. O'Brien  
Managing Attorney  
New York State Defenders Association  
Albany, NY

James R. Neuhard  
Director  
State Appellate Defender's Office  
Detroit, MI

### **WORKSHOP E**

*Grand Ballroom*

#### ***Future Partners: Coalition Building in the Legal and Lay Communities***

This panel will discuss the benefits of applying established principles of public agency management to establish relationships within and outside the criminal justice community in support of indigent defense improvement.

#### *Workshop Moderator*

Kirsten D. Levingston  
Director  
National Defender Leadership Project  
Vera Institute of Justice, Inc.  
New York, NY

#### *Panelists*

Ernie Lewis  
Public Advocate  
Department of Public Advocacy  
Frankfort, KY

Ron Coulter  
Idaho State Public Defender  
Boise, ID

The Honorable Joe Lambert

Chief Justice  
Kentucky Supreme Court  
Frankfort, KY

Paulino G. Duran  
Public Defender  
County of Sacramento  
Sacramento, CA

**WORKSHOP F**  
***Judicial Role in the Appointment of Counsel  
and Assuring Quality Representation***

*Rhode Island Room*

Panelists will discuss how to strike a balance between the judiciary's interest in being directly involved in promoting quality indigent defense representation and national standards that the indigent defender function should be independent and not be subject to judicial oversight beyond the level of oversight received by the private bar.

*Workshop Moderator*

Cait Clarke  
Project Manager  
Executive Session on Indigent Defense  
Systems  
Kennedy School of Government  
Harvard University  
Cambridge, MA

*Panelists*

The Honorable Betty Weinberg Ellerin  
Justice of the Appellate Division,  
First Department  
New York, NY

The Honorable Richard A. Jones  
King County Superior Court  
Seattle, WA

The Honorable Noël Anketell Kramer  
Deputy Presiding Judge  
Criminal Division of the Superior Court  
Washington, DC

12 noon-12:15 p.m.

***Break***

12:15 p.m.-1:30 p.m.

**LUNCHEON SESSION**  
***Strengthening the Future of Indigent  
Defense***

*State/East Rooms*

*Introduction*

The Honorable Eleanor D. Acheson  
Assistant Attorney General  
Office of Policy Development  
U.S. Department of Justice  
Washington, DC

*Speaker*

The Honorable Janet Reno

Attorney General  
U.S. Department of Justice  
Washington, DC

1:30 p.m. B2:15 p.m.

**Facilitated Delegation Discussions**

*State/East Rooms*

Luncheon seating assignments will gather state and local delegations together. At the conclusion of the Attorney General's presentation, each table will brainstorm and prepare recommendations on challenges presented by the Attorney General. Recommendations will be gathered and synthesized, without attribution, in the Symposium's official report of proceedings.

*Facilitator*

Justine Lewis  
Anderson School of Management  
University of California  
Los Angeles, CA

2:15 p.m. B2:30 p.m.

**Break**

2:30 p.m. B3:30 p.m.

**PLENARY SESSION III**  
***Toward Equal Justice: Improving Public  
Trust and Confidence in the Criminal  
Justice System***

*Grand Ballroom*

The responsibility for unwarranted bias in criminal case outcomes is shared by all components of the criminal justice system at every stage. This plenary session will examine the ways that indigent defense institutions, individually and in collaboration with other system components, can identify and ameliorate the factors that contribute to disproportionate criminal case outcomes against racial minorities or the poor, including decisions regarding pretrial release, sentencing, and probation, and the role and attitudes of prosecutors and defenders.

*Opening Remarks*

Marc Mauer  
Assistant Director  
The Sentencing Project  
Washington, DC

*Session Moderator*

Ronald S. Sullivan, Jr.  
General Counsel  
Public Defender Service for the District  
of Columbia  
Washington, DC

*Panelists*

Michael Bryant  
Staff Chaplain  
D.C. Detention Facility  
Washington, DC

William McGee  
Chief Public Defender  
Fourth Judicial District  
Minneapolis, MN

The Honorable Nancy Gertner  
U.S. District Court for the District

of Massachusetts  
Boston, MA

Angela Jordan Davis  
Associate Professor  
Washington College of Law  
The American University  
Washington, DC

Matthew Campbell, Jr.  
Deputy State's Attorney  
Ellicott City, MD

3:30 p.m. B3:45 p.m.

**Interactive Discussion With Participants**

3:45 p.m. B4:00 p.m.

**Break**

*Grand Ballroom Foyer*

4:00 p.m. B5:00 p.m.

**Plenary Session III Workshops**

**WORKSHOP G**

*Grand Ballroom*

***Tennessee Weighted Caseload Study***

A follow-up to last year's highly acclaimed workshop on the design of a joint weighted caseload study to allow coordinated planning and budgeting among courts, prosecution, and indigent defense. This session will examine the study's implementation.

*Workshop Moderator*

Phillip Doss  
Project Director  
Tennessee Weighted Caseload Study  
State Comptroller's Office  
Nashville, TN

*Panelists*

Elaine Nugent  
Director of Research  
American Prosecutors Research Institute  
Alexandria, VA

Denise Denton  
Senior Legislative Research Analyst  
Tennessee Weighted Caseload Study  
State Comptroller's Office  
Nashville, TN

Karen Gottlieb  
Court Consultant  
Nederland, CO

Robert Spangenberg  
President  
The Spangenberg Group  
West Newton, MA

**WORKSHOP H**

*Georgia Room*

***Assisting Law Enforcement in Identifying  
and Eliminating Racial Disparities***

This session will examine how defenders, police, prosecutors, and legislators can work cooperatively and proactively to assess and resolve questions of racial profiling. Discussion topics will include the value of data collection to chart the scope of the problem and to measure improvement and an examination of the processes by which system actors in various jurisdictions are successfully working together, including voluntary police recordkeeping, state executive branch oversight, or legislation.

*Workshop Moderator*

Paul Butler  
Associate Professor  
George Washington University School  
of Law  
Washington, DC

*Panelists*

Richard Holden  
Commander  
North Carolina State Highway Patrol  
Highpoint, NC

Mark Peters  
Deputy Chief  
Civil Rights Bureau  
New York State Attorney General's Office  
New York, NY

Fred Last  
Assistant Deputy Public Defender  
Woodbury, NJ

**WORKSHOP I**  
***The Criminalization of Poverty:  
Collaborative Strategies To Respond***

*Massachusetts Room*

For an indigent person, a traffic ticket can often escalate to fines and penalties, suspension of a driver's license, arrest for driving under suspension (DUS), car impoundment, jail time, loss of a job, and a family in crisis. This workshop will examine a Bureau of Justice Assistance-supported defense-led project that involves all players in Seattle's criminal justice system and the community to devise alternative payment plans for traffic citations, provide education, and develop non-incarcerative sanctions for dealing with DUS offenses.

*Workshop Moderator*

Robert C. Boruchowitz  
Executive Director  
Seattle-King County Public Defender  
Association  
Seattle, WA

*Panelists*

The Honorable Mary Yu  
King County Superior Court  
Seattle, WA

The Honorable Judith Hightower  
Seattle Municipal Court  
Seattle, WA

Fabienne Brooks  
Chief  
Criminal Investigations Division  
King County Sheriff-s Office  
Kent, WA

**WORKSHOP J**  
***Technology: Linking Public Defenders and  
Other Justice Agencies***

*New York Room*

This workshop will explore how technology integration and information sharing between indigent defense and other justice system agencies, as well as parity of technological resources, can reduce redundancy, improve the efficiency of the entire system, and promote earlier disposition of cases and more appropriate, individualized, and effective sanctioning of convicted offenders.

*Workshop Moderator*

G. Thomas Sandbach  
Consultant  
Justice Technology Consulting  
Wilmington, DE

*Panelists*

John Stone  
Administrative Director  
Integrated Case Management System  
Ninth Judicial Court  
Orlando, FL

Gary Cooper  
Executive Deputy Director  
SEARCH Group, Inc.  
Sacramento, CA

Richard Zorza  
Consultant  
Zorza Associates  
New York, NY

**WORKSHOP K**  
***Zealous Representation and Problem-  
Solving Courts***

*Pennsylvania Room*

The panel will discuss the impact drug treatment courts, domestic violence courts, and community courts have had on the traditional justice system and those who work in it, particularly the defender. The session will highlight the legal, ethical, and other concerns of these community-based, prevention-oriented adjudication innovations.

*Workshop Moderator*

John Feinblatt  
Director  
Center for Court Innovation

New York, NY

*Panelists*

The Honorable Matthew D'Emic  
Court of Claims  
Kings County Supreme Court  
Brooklyn, NY

Patrick McGrath  
Deputy District Attorney  
San Diego District Attorney's Office  
San Diego, CA

Jo-Ann Wallace  
Chief Counsel  
National Legal Aid & Defender Association  
Washington, DC

**WORKSHOP L**  
***External Forces for Change***

*Rhode Island Room*

This workshop will focus on how external resources—including the media and public attention, nonprofit think-tank and advocacy organizations, and funding entities, both public and private—can be harnessed and focused in support of improvements in indigent defense and criminal justice system fairness and integrity.

*Workshop Moderator*

Michael P. Judge  
Chief Public Defender  
Los Angeles County Public Defender's  
Office  
Los Angeles, CA

*Panelists*

Caitlin Francke  
Reporter  
*The Baltimore Sun*  
Baltimore, MD

Tanya Coke  
Director  
Gideon Project  
Open Society Institute  
New York, NY

Marc Schindler  
Staff Attorney  
Youth Law Center  
Washington, DC

5:00 p.m.

**Adjourn for the Day**

**FRIDAY, JUNE 30**

7:00 a.m. 8:30 a.m.

**Registration and Continental Breakfast**

*Grand Ballroom Foyer*

8:30 a.m. B9:00 a.m.

**Opening**

*Grand Ballroom*

*Speaker*

The Honorable Laurie Robinson  
Former Assistant Attorney General  
Office of Justice Programs  
Washington, DC

9:00 a.m. B10:00 a.m.

**PLENARY SESSION IV**  
***Crisis as Opportunity: What Happened in  
Baltimore***

*Grand Ballroom*

The City of Baltimore is undergoing a second renaissance, including a new agenda for improvements both in the quality of life and in the criminal justice system. A period of crisis resulted from extensive media coverage of crime control problems. This session will feature the leadership in the administration of justice in Baltimore to report on their collaborative effort to address systemic problems in the local court system and the implications for public safety.

*Introduction*

Norman Lefstein  
Dean and Professor of Law  
Indiana University School of Law  
Indianapolis, IN

*Opening Remarks*

The Honorable Robert M. Bell  
Chief Judge  
Court of Appeals of Maryland  
Baltimore, MD

*Session Moderator*

John Lewin, Jr.  
Project Coordinator  
Coordinating Council on Criminal Justice  
Baltimore, MD

*Panelists*

The Honorable David B. Mitchell  
Circuit Court for Baltimore City  
Baltimore, MD

Joan Cadden  
Delegate  
Maryland General Assembly  
Annapolis, MD

Sharon A.H. May  
Deputy State's Attorney  
Office of the State's Attorney for  
Baltimore City  
Baltimore, MD

LaMont Flanagan  
Commissioner of Corrections  
Division of Pretrial Detention and Services  
Baltimore, MD

Stephen E. Harris

Public Defender for the State of Maryland  
Baltimore, MD

10:00 a.m. B10:15 a.m.

**Interactive Discussion With Participants**

10:15 a.m. B11:15 a.m.

**PLENARY SESSION V**  
***Fulfilling the Promise of Gault: Better***  
***Outcomes for Children***

*Grand Ballroom*

As policymakers debate differing views of the most effective responses to juvenile crime, little attention is paid to the nature and quality of juvenile defense representation and its impact on the adjudication and correctional systems, on the juvenile offenders themselves, and on the juveniles' likelihood of reoffending. This plenary session will examine the value of interdisciplinary collaboration and the sharing of information about what works in responding to juvenile crime and the challenges of providing competent legal representation to juveniles.

*Session Moderator*

Steven Drizin  
Senior Lecturer  
Children and Family Justice Center  
Northwestern University School of Law  
Legal Clinic  
Chicago, IL

*Panelists*

Randolph Stone  
Clinical Professor of Law  
University of Chicago Law School  
Chicago, IL

The Honorable Jay Blitzman  
Associate Justice  
Juvenile Court Department  
Massachusetts Trial Court  
Boston, MA

Sister Cathy Ryan  
Cook County State Attorney's Office  
Chicago, IL

11:15 a.m. B11:30 a.m.

***Break***

11:30 a.m. B12:30 p.m.

**Plenary Session V Workshops**

**WORKSHOP M**  
***Improving Conditions of Confinement for***  
***Children in Juvenile and Adult Correctional***  
***Systems***

*Georgia Room*

This workshop will examine litigative and policymaking options for collaboratively responding to crises in conditions of confinement.

*Workshop Moderator*

Gina E. Wood  
Director  
South Carolina Department of Juvenile  
Justice  
Columbia, SC

*Panelists*

Michael Finley  
Staff Attorney  
Youth Law Center  
Washington, DC

John Rhoads  
Chief Probation Officer  
Santa Cruz County  
Santa Cruz, CA

Judy Preston  
Senior Trial Attorney  
Special Litigation Section  
Civil Rights Division  
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Washington, DC

**WORKSHOP N**  
***Reforming the System and New Models for  
Delivery of Juvenile Defender Services***

*Massachusetts Room*

The panel will present the latest in multidisciplinary, collaborative models of delivering problem-solving legal representation services to indigent juvenile clients.

*Workshop Moderator*

Patricia Puritz  
Director  
Juvenile Justice Center  
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Washington, DC

*Panelists*

Kristin Henning  
Juvenile Lead Attorney  
Public Defender Service of the District  
of Columbia  
Washington, DC

Jelpi Picou, Jr.  
Director  
Louisiana Indigent Defense Assistance Board  
New Orleans, LA

Cathryn Stewart  
Professor  
Northwestern University  
Evanston, IL

**WORKSHOP O**  
***Mental Health Issues and the Impact on the  
Juvenile Justice Process***

*Grand Ballroom*

Two of the nation's leading experts on adolescent psychological development and mental issues in criminal cases will discuss the state of the research on and

ways that the juvenile and adult systems can produce more accurate and effective outcomes for defendants who have significant mental issues.

*Workshop Moderator/  
Panelist*

Stephen K. Harper  
Coordinator  
Capital Litigation Unit  
Office of the Public Defender  
Miami, FL

*Panelist*

Marty Beyer  
Juvenile and Criminal Justice Consultant  
Great Falls, VA

**WORKSHOP P**  
***Police Interrogations, False Confessions,  
and the Impact on Children and the Courts***

*New York Room*

This panel includes the nation's leading expert on false confessions and the chief public defender from Chicago, home of a notorious case of aggressive police questioning that led to false confessions by 7- and 9-year-old murder suspects.

*Workshop Moderator*

Steven Drizin  
Senior Lecturer  
Children and Family Justice Center  
Northwestern University School of Law  
Legal Clinic  
Chicago, IL

*Panelists*

Rita Aliese Fry  
Chief Executive  
Office of the Cook County Public Defender  
Chicago, IL

Richard Ofshe  
Professor  
University of California at Berkeley  
Berkeley, CA

12:30 p.m. - 12:45 p.m.

***Break***

12:45 p.m. - 1:45 p.m.

**LUNCHEON SESSION**  
***The Public Weighs In***

*State/East Rooms*

A leading public opinion researcher will present the results of just-completed research on the public's view of public defenders, the value of their work, and the fairness of the system.

*Introduction*

The Honorable James Robinson  
Assistant Attorney General  
Criminal Division  
U.S. Department of Justice  
Washington, DC

*Speaker*

John Russonello  
Beldon, Russonello & Stewart

Washington, DC

1:45 p.m. B2:30 p.m.

**Facilitated Delegation Discussions**

*State/East Rooms*

Luncheon seating assignments will gather state and local delegations together. At the conclusion of the presentation on public opinion, each table will brainstorm questions relating to the public value of a criminal justice system in which the indigent defense component is funded comparably to other components. Recommendations will be gathered and synthesized, without attribution, in the Symposium's official report of proceedings.

*Facilitator*

Justine Lewis  
Anderson School of Management  
University of California Los Angeles  
Los Angeles, CA

2:30 p.m. B2:45 p.m.

**Break**

2:45 p.m. B3:45 p.m.

**PLENARY SESSION VI**

*Grand Ballroom*

***Innocence: Protecting the Integrity of the System***

The growing sophistication and certitude of DNA evidence has dramatically raised society's understanding of the reality of wrongful convictions. There are many ways that innocent people may be drawn into the criminal justice system, including incompetent legal representation, police or prosecutorial misconduct, forensic error, mistaken eyewitness identification, false confessions, or racial or other invidious assumptions, practices, and prejudices that may infect every stage of the system. But there is one overarching way that innocent indigent people effectively establish their innocence: through access to competent legal representation. This panel will examine the most pressing current threat to the public's trust and confidence in the credibility and integrity of the criminal justice system.

*Session Moderator*

Charles Ogletree, Jr.  
Jesse Climenko Professor of Law  
Harvard University Law School  
Cambridge, MA

*Panelists*

The Honorable Gerald Kogan  
Former Chief Justice, Florida Supreme Court  
President, Alliance for Ethical Government  
Coral Gables, FL

Matt Bettenhausen  
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Susan Herman  
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Arlington, VA

Peter Neufeld

Director  
The Innocence Project  
Cardozo Law School  
New York, NY

Cynthia Ellen Jones  
Director  
Public Defender Service for the District  
of Columbia  
Washington, DC

3:45 p.m. B4:00 p.m.

**Interactive Discussion With Participants**

4:00 p.m. B4:30 p.m.

**CLOSING PLENARY SESSION**

*Grand Ballroom*

*Speaker*

Norman Lefstein  
Dean and Professor of Law  
Indiana University School of Law  
Indianapolis, IN

4:30 p.m.

**Adjourn**

## **Appendix 2**

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# Indigent Defense Symposium

## Renaissance Mayflower

Washington, DC

June 29-30, 2000

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