

Reforming Indigent Defense How Free Market Principles Can Help to Fix a Broken System

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Executive Summary

Criminal defense systems are in a state of perpetual crisis, routinely described as “scandalous.” Public defender offices around the country face crushing caseloads that necessarily compromise the quality of the legal representation they provide. The inadequacy of existing methods for serving the indigent is widely acknowledged, and President Obama has recently taken steps to give the problem a higher priority on the national agenda.

Proposals for improvement commonly stress the need for more resources and, somewhat less often, the importance of giving indigent defense providers legal independence from the government that funds them. Yet virtually every suggestion for reform takes for granted the feature of the current American system that is most problematic and least defensible—the fact that the indigent defendant is never permitted to select the attorney who will represent him.

The uniform refusal of American jurisdictions to allow freedom of choice in indigent defense creates the conditions for a double disaster. In violation of free-market principles that are honored almost everywhere else, the person who has the most at stake is allowed no say in choosing the professional who will provide him one of the most important services he will ever need. The situation is comparable to what would occur if senior citi-

zens suffering from serious illness could receive treatment under Medicare only if they accepted a particular doctor designated by a government bureaucrat. In fact, the situation of the indigent defendant is far worse, because the government’s refusal to honor the defendant’s own preferences is compounded by an acute conflict of interest: the official who selects his defense attorney is tied, directly or indirectly, to the same authority that is seeking to convict the defendant.

We see this situation as the source of grave problems. As a corrective, we propose a free market for defense services, one that would, so far as possible, function in the same way that the existing market functions for affluent defendants who are able to retain their own counsel. Though we do not doubt the importance of resource levels, we see budgetary vulnerability and implicit conflicts of interest as inherent in *any* system where the defendant’s attorney is chosen for him by the state. We seek to show that at *any* level of resources, freedom of choice for the indigent defendant can produce gains for both himself and for the public at large. We also discuss in detail how such a system could be implemented and why it can be expected to provide a practical and effective cure for many of the major ills of indigent defense organization.

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Introduction

Most citizens would consider it shockingly unethical for an attorney representing one side in a lawsuit to be selected or paid, even indirectly, by the opposing party. Yet this gross impropriety occurs daily in this country on a massive scale. In criminal cases, the great majority of defense attorneys are paid directly or indirectly by the prosecuting party—the state.

The great majority of people arrested and prosecuted are indigent, and the Supreme Court has ruled that the government has a constitutional obligation to provide lawyers for people who cannot afford to hire their own.¹ To meet this constitutional obligation, three basic defender systems have emerged in jurisdictions around the country. First, public defender organizations are staffed by government attorneys who represent virtually all the indigents in the jurisdiction. Second, some cities and counties have made contractual arrangements with individual attorneys or private law firms to handle indigent cases for a fixed fee. Third, still other jurisdictions use “assigned counsel” programs. That is, private attorneys are appointed on a case-by-case basis for indigent defendants.

The danger of a publicly funded defense should be obvious: the decisions of the attorney are bound to be affected by the desires of his employer. That is true for public defenders and assigned counsel in criminal cases just as it is for private attorneys in civil cases. While the lawyers and those who assign them to cases—judges, government officials, or private firms contracting with government—are no doubt interested in preventing conviction of the innocent, they are less strongly committed to that objective than are innocent defendants. And they are likely to have other objectives, such as getting criminals off the streets and reducing court backlog, that conflict with that goal.²

If attorneys for the indigent are to be paid at all, they must be paid by someone other than their clients. The resulting conflict of

interest is clearly undesirable, but how can it be prevented? This paper proposes what we believe is a realistic answer to that question and explores ways in which it might be implemented.

The problem is by no means merely theoretical. Authorities of all stripes routinely conclude that our criminal defense systems are “scandalous.”³ As one expert noted, “year after year, in study after study, observers find remarkably poor defense lawyering.”⁴ In one Tennessee county, for example, the public defender office had six attorneys handle more than 10,000 misdemeanor cases in a single year.⁵ An average of one attorney-hour per case is plainly wrong and unacceptable. To avoid the risk of malpractice charges, public defenders in Missouri started to refuse case assignments after their individual caseload exceeded 395 cases a year.⁶ They note that there is simply insufficient time to prepare an adequate defense, which requires time to investigate the case, to interview the client and witnesses, and to scrutinize the prosecutor’s evidence. Even as we write, New York’s highest court has given a green light to a class-action lawsuit alleging that the state’s provision of indigent defense fails to meet constitutional requirements.⁷ The grave inadequacy of existing systems for serving the indigent is widely acknowledged and widely discussed.⁸ In an effort to give indigent defense reform a higher priority on the national agenda, President Obama recently appointed Laurence Tribe, one of America’s leading constitutional law scholars, to a position in the Justice Department as a senior counselor for access to justice.⁹

Our proposed solution differs in two fundamental respects from other proposals for reform of indigent defense.¹⁰ First, although we are aware of the importance of resource levels, our approach largely takes as a given the resources allocated by prior political decision to indigent defense. We seek to show that at *any* level of resources, reorganization of an indigent defense system can produce gains for both the criminal defendant and society as a whole.

The second difference is the most basic. We do not take as our paradigm a large

defender organization providing the lion's share of indigent defense services for a city or county, and do not focus on efforts (desirable though they may be) to write charters that attempt to guarantee such organizations legal independence from the government that funds them.¹¹ Nor do we see any intrinsic advantage in the principal current alternative—the system in which judges or court administrators assign to the defendant an attorney selected from the private bar. We see budgetary vulnerability and implicit conflicts of interest as inherent in both the large defender model and any other system where the defendant's attorney is chosen for him by the state. Our alternative is a free market for defense services, one that would, so far as possible, function in the same way that the existing market functions for affluent defendants who are able to retain their own counsel.

Indigent defense plays a small role in the budgets of the governments that fund it but a very large role in the lives of indigent defendants. And of all the services that governments provide to the poor, it is arguably the one most defensible on libertarian (as well as other) grounds.¹² Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that government provides to the public as a whole—law enforcement and social protection. It is not proposed to leave that broader service to the private sector; that service is one of government's most basic tasks and indeed is typically seen as the primary *raison d'être* of the state. Within that framework, government support for defense of the indigent becomes essential, since without it the legal system is likely to engage in massive violations of individual rights by convicting defendants who lack the resources to mount an effective defense and punishing them for crimes they did not commit. Such a system is also likely to deliver its social protection services poorly by incapacitating the wrong people. A government that routinely convicts the innocent is failing in one of its most fundamental functions. The state uses the effort of the defense attorney as an input to the production of verdicts, and it is there-

fore both just and efficient for the government to pay its cost.¹³

The first section of this paper analyzes the structure of the attorney-client relationship and identifies the problems that contractual or institutional arrangements must seek to minimize. The second section describes existing methods for the delivery of indigent defense services and assesses their ability to address these problems. The third and final section describes and defends our alternative, a voucher model for indigent criminal defense. We believe that a voucher model would provide a practical and effective cure for many of the major ills of indigent defense organization, to the ultimate benefit of both defendants and the public at large.

Goals and Problems in the Attorney-Client Relationship

People who are accused of crimes are interested in winning acquittal or, if that fails, the lowest possible sentence, and in achieving these goals at the lowest possible cost. Criminal defendants facing substantial prison terms will spend large sums to produce even small increases in the chance of acquittal, but at some point diminishing returns presumably prompt most defendants to economize on the expenditure of their own or their family's resources. Conversely, defendants of moderate means may run out of funds while a potentially productive defense effort remains unfinished; they may regret the inadequacy of their available savings.

Criminal lawyers, whether assigned to indigent defendants or retained by affluent ones, must make hard choices—including decisions about how much work to do (whether to investigate factual leads, research legal issues, and file particular legal motions in court) and about what advice to render in matters of judgment (whether to recommend accepting a proposed settlement, holding out for a better offer, or going to trial in hopes of an acquittal). For all of these decisions, the lawyer's personal

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interest may diverge from that of his client.¹⁴ In the case of retained counsel, as opposed to public defenders, the problem is mitigated by the fact that the lawyer must attract and keep clients, and will do so by creating and maintaining a reputation for serving their interests even when they conflict with his own. The indigent defendant has no such protection. His counsel is chosen not by him but by the court, the public defender's office, or some private organization which contracts with the government to provide attorneys for the indigent. If the attorney wishes future cases, he must indeed maintain his reputation—but with those who provide him with business, not with potential defendants.

The attorney-client relationship thus poses three sorts of problems—those involving incentives for the attorney to act in his client's interest (incentive problems), the need for information about the quality and loyalty of alternative providers of defense services (information problems), and protection against the risk of unanticipated need for criminal defense services (insurance problems).

Incentive Problems

If the lawyer's fee is based on an hourly rate set at a figure that is low, relative to the lawyer's other opportunities, or if the total resources available for the case are too meager, attorneys may forego useful investigations and may avoid trial even when there are good chances for acquittal. If hourly fees are too generous and the available resources are unlimited, attorneys may pursue expensive and unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client's interest.¹⁵ This is a problem for the client if he is paying the bills, and a problem for taxpayers when, as in the case of an indigent defendant, the public is.

As in any situation in which the choices of a buyer and seller are supported by a third-party payer with imperfect monitoring capabilities, expenditure is likely to skyrocket. Health care has been the classic case in point. Where the attorney is chosen and selected by the state, a further incentive problem arises,

since it is the state and not the client that the lawyer must satisfy if he wishes future employment.

Information Problems

In order for anyone—judge, state government, or defendant—to choose the best provider of defense services, he must have information on what will be provided. This is a particularly serious problem for the defendant, since he may have had little previous experience with the criminal justice system. The poor may be especially disadvantaged in this regard, since they generally have less access to lawyers and other sources of information about professional competence. On the other hand, because the poor are disproportionately represented among those accused of serious crime, an indigent defendant is more likely than a middle-class defendant to have faced charges before or to know someone who has.¹⁶

The information problem is less serious if the attorney is chosen by a judge or other court official, by a public defender allocating cases to lawyers under him or by a state agency contracting with an independent provider of defense services. Here the incentive and information problems are in tension. The defendant has the incentive to choose a vigorous, effective advocate but may lack the information to do so. A public official who chooses for the defendant is likely to have better information but a weaker incentive to make the best choice. The official, appraising an attorney's ability from the standpoint of the court system, has incentives to value cooperativeness, a disinclination to work long hours, and other qualities that might not win favor with defendants themselves. Providers may end up being selected according to how well they serve the court system, not how well they serve defendants.

Insurance Problems

Potential criminal defendants—which is to say, all of us—face the risk of having to incur the very high cost of an effective criminal defense. Being accused of crime is not wholly dissimilar to catching a potentially incapacitated

tating or fatal disease. Attempts to combat the problem can be enormously expensive and, in the end, may or may not prove successful. A large share of personal and family resources may be consumed in the effort. Not surprisingly, health insurance to spread the financial risks of catastrophic disease is widely available through the market. Yet insurance against the financial risks of becoming a criminal defendant is not.¹⁷ One function of a public defender system is to provide a substitute for the nonexistent insurance. Public funds are available only to the “indigent.” But middle-class or even wealthy individuals can be rendered indigent by the costs of defending against a serious criminal charge. When the affluent defendant runs out of funds, he can qualify for appointed counsel, either to complete his defense at the trial level or to pursue an appeal. The economic effect is comparable to that of an insurance policy with a very high deductible.

In considering how different institutions perform the insurance function, we find it useful to distinguish between two sorts of uncertainty: uncertainty as to whether someone will be arrested (and on what charge); and uncertainty as to how complex the case will be.

The second sort of uncertainty requires further explanation. By a complex case, we mean one in which additional expenditures on defense provide substantial benefits to the defendant up to a high level of expenditure. A simple case is one in which additional expenditures above a fairly low level produce, at most, small benefits for the defendant. Simple cases include both those in which the prosecution’s case is so weak that defense expenditures are almost unnecessary and those in which it is so strong that defense expenditures are almost useless.¹⁸

It is useful to further distinguish between two sorts of uncertainty regarding the complexity of the case. They are uncertainty that can be resolved before the attorney is chosen, and uncertainty that can be resolved only after the attorney begins work.

The various kinds of uncertainties affect the relative advantages and incentive problems of different kinds of payouts that an

insurance program might afford. Three basic payout methods may be distinguished: lump-sum payments, variable (fee-for-service) payments, and in-kind payments.

In the lump-sum payment approach, the insurance policy pays a fixed amount or, more commonly, one of several fixed payouts, depending on which of several risks (i.e., what sort of criminal charge) materializes. Lump-sum payments are common in disability insurance. The lump-sum system is also common in indigent defense; as we shall see, many jurisdictions pay appointed counsel a flat fee per case, with different amounts often specified for misdemeanor, felony, and capital cases.

Variable (fee-for-service) payouts are probably the most common form of health insurance coverage, and this system is also used in indigent defense; some jurisdictions compensate appointed counsel on an hourly basis for all reasonable effort both in and out of court. Fee-for-service payouts also exist in some commercial insurance policies for reimbursing counsel fees incurred in defending against civil claims.

In-kind payouts are the predominant form of coverage in health insurance provided by the Veteran’s Administration and Health Maintenance Organizations (HMOs), and in pre-paid legal service plans available through unions or employers.¹⁹ In commercial insurance against civil liability, the insurer typically undertakes to defend against any covered claim, using its in-house legal staff or selecting outside counsel at its sole expense. The in-kind payment system is also the dominant form of criminal defense “insurance” in jurisdictions that rely on a public defender.

Variable payouts present large incentive problems. The insured and the service provider have only weak inducements to control costs, and monitoring by the insurer may not be fully effective, as escalating health care costs have made clear. Lump-sum payments avoid the monitoring problem for the insurer (at the cost of possible overpayment on some claims) but leave the beneficiary self-insured for the risk that providers will be unwilling to take on his case because they readily identify it as an

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exceptionally complex one that cannot be treated for the lump-sum fee.

The problem is different when a complex case cannot be identified as such before a service provider accepts it. In that instance the lump-sum may be adequate to induce a doctor or lawyer to commit to providing the necessary services. The risk of unforeseen complexity then shifts to the service provider, but because the lump-sum fee affects his incentives, the monitoring problem is transformed. Surveillance, directly or through reputation, is no longer necessary to prevent excessive provider services (as in the fee-for-service model) but is now required to ensure that services are sufficient, and the responsibility for monitoring shifts from the insurer to the insured.

Unlike lump-sum payments, in-kind payouts protect the insured against the risk of complexity that a service provider could detect at the outset. Their disadvantage is the same as that which the insured faces under a lump-sum payment when complexity is initially disguised. The service provider bears the risk of exceptional complexity, but monitoring by the insured is essential to ensure that adequate service is provided.

The different mix of advantages and drawbacks in each payout method helps explain why all three approaches are found in most forms of insurance for legal and medical services. Lump-sum, variable, and in-kind payout packages coexist in the market, and the insured can select the payout system that best suits his situation. In one respect, however, indigent criminal defense is an exception. As we shall see in the next section, lump-sum, variable, and in-kind approaches are all important forms of indigent defense “insurance,” but neither before nor after the risk (the criminal charge) materializes is the person in need of services (the indigent accused) permitted to select the package that best meets his own needs.

The Present System

A series of Supreme Court decisions mandate publicly funded defense for indigent

criminal defendants, but not the institutional form of that defense.²⁰ As previously noted, existing methods are of three basic types: public defender programs, contract defense programs, and assigned counsel programs. In this section we consider the extent to which these approaches successfully address the problems of incentives, information, and insurance.

Public Defender Programs

In a public defender program, an organization staffed by full-time or part-time attorneys represents nearly all indigent defendants in the jurisdiction.²¹ In most jurisdictions, the defender organization is an agency of the executive branch of state or county government, and in more than half the others, the public defender is an agency of the judiciary.²² A minority, roughly 10–15 percent of the defender offices, are organized by private non-profit corporations, which perform the defender function under contract with the city or county.²³

Although all defender systems are funded directly or indirectly by the government, there are significant differences in the government's formal control. Usually county officials appoint the chief defender, but in some places he is appointed by a bar association committee, by judges, or in the case of a community defender, by the board of the nonprofit corporation. Public defenders are elected in Florida and in parts of California, Nebraska, and Tennessee.²⁴ Election of the defender guarantees his independence from county government and the court, but at the cost of accountability to voters who may not regard acquittal or early release of criminal defendants as especially desirable.²⁵

The various selection methods do not preclude appointment of chief defenders who will guard the independence and resource needs of their offices. Nearly all defenders are philosophically committed to protecting the indigent. Some have aggressively challenged defective arrangements by declining to accept new cases or suing the court system for inadequate financial support.²⁶ Defender staffs have sometimes gone on strike to protest excessive

caseloads, which the lawyers felt were forcing them to render inadequate service.²⁷ Still, most chief defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs.²⁸ Thus, for most defenders, most of the time, accommodation to the case management and budgetary priorities of the court and county government is a fact of life.²⁹ And as a result, the great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider essential for a minimally tolerable defense.³⁰

As a solution to the problems of incentives, information, and insurance considered above, the defender approach is plausible but imperfect. The information effects are straightforward. Subject to his budget constraints, the chief defender can hire the best attorneys possible and can know their abilities firsthand before assigning them to cases. He is probably more able than the defendant to select the best attorney for the case, at least if the meaning of “best” is unambiguous. But if the chief defender values attorneys for their ability to resolve cases quickly and to persuade reluctant defendants to plead guilty, the accused might be better off making his own, poorly informed, choice. This problem is not lost on the supposedly unsophisticated defendants whom the public defender ostensibly protects from exploitation in the market. Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is “processing” and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: “Did you have a lawyer when you went to court?” “No. I had a public defender.”³¹

The twin incentive problems are to ensure that defenders do not slight the client’s interest in adequate service or the taxpayer’s interest in controlling costs. The latter concern is met directly by government power to fix the

defender budget and its control or influence over the choice of the chief defender. The chief defender, in turn, may lobby for more resources (just as the district attorney might), but once the appropriation is determined, he will be forced to insist that his staff allocate time and resources carefully to provide the best possible service to the clientele as a whole, within the limits of budget constraints.

The other incentive concern is more problematic. One might ask why the defender or his staff would bother to do *anything* for their clients, beyond the minimal effort required to avoid professional discipline. One answer is personal pride and a commitment to professional values. Many defender offices develop an esprit de corps, in which they view acquittals as victories and severe sentences as defeats in a continuing competition with the prosecutor’s office.

To the extent that idealistic motivations are operative, the defender approach provides a distinctive way to reconcile the twin incentive problems. When government controls compensation case-by-case, as in the assigned counsel systems considered below, its need to prevent excessive service is, at every step, in direct tension with the defendant’s need to ensure adequate service. In the defender approach, the state exercises its cost control function wholesale, leaving the monitoring function at the “retail” level to the chief defender and other supervisors in his office. Their annual budget leaves them (like the prosecutors) the flexibility to invest enormous resources in a particular case if their sense of justice requires it, free of the chilling effect of case-by-case external review. But even when mediated in this way, the cost-control function constrains the management of nearly all cases nearly all of the time. The annual bottom line may even create a more powerful and pervasive cost-control ethos than would exist for a private attorney who had to justify a single claim for fees in an individual case.

Considerations of narrower self-interest may join with idealism in providing incentives for adequate service. To win the esteem of colleagues, adversaries, and judges, and to pave

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the way for subsequent career moves, the staff attorney needs a reputation for vigor and effectiveness.³² The reputation effect can operate powerfully at trial but is unlikely to constrain an attorney's low-visibility decision to recommend a time-saving plea.³³ The reputation effect may even distort his advice by inducing him to recommend trial in a case that would be a "good vehicle" or to plead out some defendants in order to permit better preparation in high-visibility cases. In any event, self-interested reasons for effective performance, as reinforced by idealism and office esprit de corps, must compete with office attitudes that run in the opposite direction—that of restraining costs and cooperating in the court's desire to move cases. The adversarial attorney thus may *lose* collegial esteem or the chief defender's approval as a result of vigorous efforts. In one highly publicized case, the Atlanta public defender demoted a staff attorney because she had filed a motion asking the local judges to appoint her to no more than six cases per day.³⁴

The insurance problems are a function of the incentive issues just canvassed. Like any insurer that provides an in-kind payout, the defender has in-house control to prevent excessive effort, but it bears the risk of unforeseen complexity, and the insured (the accused) must monitor performance to prevent shortcuts and inadequate service. In one respect the criminal defendant is better placed to control counsel's effort because the decision whether to settle is legally his alone to make; the insured defendant in civil litigation often has no such protection. On the other hand, the criminal defendant has less capacity to assess litigation risks than many civil defendants, usually hospitals or manufacturers, with their own legal staffs.

An alternative possibility for monitoring is the after-the-fact suit for malpractice or constitutionally ineffective assistance, roughly analogous to the civil defendant's suit for an insurer's wrongful refusal to settle.³⁵ But the malpractice suit is virtually a nonexistent remedy for the criminal defendant.³⁶ An ineffective assistance claim is almost equally improbable

as a monitoring device. First, many departures from fully adequate service do not rise to the level of constitutionally ineffective assistance. The constitutional standard is low, and what the defendant wants to ensure is not just a minimally adequate effort, but the effort that an attorney with the right incentives would provide. In addition, the severe penalties that can follow conviction at trial mean that an attorney's recommendation to plead guilty can almost never be proved unreasonable, however much it may be influenced, consciously or subconsciously, by resource constraints.³⁷ Finally, ineffective assistance claims can often be brought only in post-conviction proceedings, and such claims *must* be brought in a post-conviction proceeding when conviction is on a guilty plea; thus the defendant's only tool for monitoring is one he must invoke without a constitutional right to professional help.³⁸

The weakness of available incentives to ensure adequate services and the absence of effective after-the-fact monitoring leave the public defender as a highly flawed solution to the incentive, information, and insurance problems. Although idealism undoubtedly motivates many defenders to seek the best outcome for their clients, the system as a whole is driven by political goals that often conflict with that objective. A court system troubled by full dockets and high crime rates may well decide that lawyers with an idealistic commitment to getting their clients acquitted, a strong aversion to guilty pleas, or a determination to ensure the lowest possible sentences are not the lawyers it wishes to put in charge of indigent defense.

Contract Defense Programs

In a contract defense program, individual attorneys, bar associations, or private law firms agree to handle a specified volume of indigent defense cases for a specified fee.³⁹ Although a contract defender could, in theory, devote all his time to indigent defense work, contract defenders invariably maintain a substantial private practice. Unlike the public defender, a contract defender normally handles only a part of the jurisdiction's indigent

defense caseload, and counties that use this approach may have several independent attorneys or firms under contract. Contract defender programs are becoming more popular, but nationally only about 10 percent of all counties use this type of program as their primary system for delivering indigent defense services.⁴⁰ Many others, however, use the contract method as their back-up system for cases that the public defender cannot accept.

Two types of contracts are common. In the “global fee” approach, the contract defender agrees to accept all cases of a certain type—for example, all felonies or all juvenile cases—for a single annual retainer. Many county officials prefer this approach because it keeps the indigent defense budget predictable and puts a cap on total expenses. That leaves the contract defender with the risk of unforeseen increases in caseload. In effect, he is selling the county not only legal services but insurance. Compared to the county government, the contract defender has much less ability to control the court’s caseload, which is largely a function of the district attorney’s charging discretion. Yet, about a third of all contract programs take this form.⁴¹

Information, incentive, and insurance problems arising in contract-defense programs largely parallel those in the public defender service. As in a public-defender program, the accused bears the burden of monitoring, and effective tools for carrying out this function are largely absent.

The information problem in a contract system arises in two stages: officials must award contracts to attorneys and then assign individual cases to one of the previously designated contract recipients. Often the first decision is made by county government and the second decision is made by a court administrator. At both stages, officials are in a good position to evaluate attorney competence. Indeed, competitive bidding focused on quality of service offers a powerful vehicle for ascertaining what qualifications and support services are available through competing providers.⁴² And compared to some assigned-counsel programs discussed below, there is more prospect that

officials will use their superior knowledge to choose the best available defender, because the county’s defense costs are not affected by the choices made—at least when the contract price is fixed in advance and excluded from negotiation or competitive bidding. There is one qualification, however. Although defense costs are independent of which attorneys are selected, total court costs are not. Thus, officials might hesitate to choose attorneys known for filing many motions, driving hard bargains, or insisting on trials, even if the lawyers are providing these services at no extra charge.

Contract programs, like public-defender programs, address only one side of the incentive problem. Because fees are fixed, either per case or per annum, attorneys have a powerful incentive to avoid *unnecessary* service, but there are few direct incentives for *adequate* service. Indeed, fixed-fee contracts give the attorney a powerful disincentive to invest time and resources in his indigent cases. Public defenders may cut costs on some cases to free up resources for others, but they cannot take home unspent cash at the end of the year. The contract defender, in contrast, is in business for a profit. Money saved on defending one case need not be spent on another; it may simply enlarge the Christmas bonus. Perhaps worse, time saved in handling indigent cases is freed up for more lucrative business, and a busy attorney is unlikely to turn away paying clients when he has the alternative of cutting low-visibility corners in his indigent case commitments. These dangers are intrinsic to all contract-defender programs and have produced seriously deficient service in many.⁴³

As a result, the contract system is seriously flawed. The existence of competing service providers in the contract system should be advantageous, but the potential benefits are lost because court officials, rather than clients, control the flow of cases to the attorneys.

Assigned-Counsel Programs

In an assigned-counsel program, a member of the private bar is appointed on a case-by-case basis for each criminal defendant. About 20 percent of American counties use assigned

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counsel as their sole method of ensuring indigent defense, and most others rely on assigned counsel for cases in which public and contract defenders are disqualified or unavailable.⁴⁴

The judge responsible for the case, or another court official, usually makes the assignment decision. Sometimes the selection system is entirely informal, and appointments are distributed ad hoc to attorneys the judge knows or to those who happen to be present in court. More typically, the assigned attorney is chosen from a list established in advance by the court, the local bar association, or by each judge for his own cases. The choice may be determined by a formal rotation plan, or it may be less systematic. All members of the bar may be eligible for the list, or there may be a few simple prerequisites, such as a certain number of years of experience. Some of the assigned-counsel jurisdictions have more elaborate systems to screen applicants for inclusion on the list and monitor their performance.⁴⁵

Nearly all courts have authority to appoint an unwilling attorney, and such a power is probably an essential backup for cases that involve extensive conflicts of interest or an extraordinarily unpopular defendant. But in many jurisdictions, conscription of unwilling attorneys is a routine feature of the assignment system; *all* eligible attorneys are included on the list, and they are obligated to serve when called.⁴⁶

A variety of compensation systems are used in assigned-counsel programs. In some, attorneys receive a flat fee per case or per appearance, usually with different amounts specified for juvenile cases, misdemeanors, and felonies. Other jurisdictions pay on an hourly basis, often with one rate for time spent in court and a somewhat lower rate for time spent in preparation.

Hourly rates vary from low in some jurisdictions to derisory in others. A June 2007 survey found many jurisdictions still paying only \$40 or \$50 per hour,⁴⁷ rates that are inadequate even to meet the attorney's office overhead.⁴⁸ Low rates are not exclusive to Southern or mainly rural states. Hourly rates

for out-of-court time stand at \$65 for Connecticut, \$50 for Massachusetts and New Jersey, and \$40 for Oregon and Wisconsin.⁴⁹

The low caps imposed in the 1980s⁵⁰ have been raised considerably.⁵¹ But as of June 2007, the maximum fee for a non-capital felony was still only \$650 in New Mexico, \$1,250 in Illinois, \$1,500 in Tennessee and Kentucky, and only \$500 in one county of Oklahoma.⁵² In Virginia, the maximum is \$445 for felonies carrying a sentence of up to 20 years, and for felonies punishable by sentences over 20 years it is a mere \$1,235—enough to fund less than two days' work at the authorized rate of \$90 dollars per hour. Some jurisdictions regard indigent defense as a "pro bono" obligation, and appointed counsel, usually conscripts, receive no compensation at all.⁵³ Although the no-compensation approach is exceptional, flat fees or fee caps are so low in many jurisdictions that hourly compensation in cases that go to trial is virtually nil.

In terms of the information, incentive, and insurance problems we have canvassed, assigned counsel programs pose numerous obvious problems. Judges and court officials who select counsel can obtain good information about attorney effectiveness, but they have little incentive to acquire such information, and even less reason to act upon it. Their own interests are best served by assigning an attorney known to be cooperative rather than aggressively adversarial.⁵⁴

With respect to the attorney himself, the goal for society as a whole is to induce sufficient, but not excessive, effort. Low hourly rates, low fee caps, and mandatory pro bono service nicely solve the latter half of the problem but leave the assigned attorney with powerful reasons to minimize the time and effort devoted to the case. The more generous states—a small minority—face different problems. Hourly rates close to market levels and an absence of fee caps give the right incentives for adequate service, but they risk unnecessary attorney effort and excessive cost. Most of these more generous jurisdictions rely on reputation effects, along with case-by-case review of attorney fee submissions, to provide cost-

control incentives, but monitoring of this sort is expensive and not always successful.⁵⁵

Monitoring may fail for another reason when that responsibility falls to an elected judge, who may benefit less from controlling costs than from encouraging campaign contributions from attorneys who receive well-compensated appointments. In Harris County (Houston) Texas, where all indigent defense is supplied by counsel selected and monitored by an elected judiciary, some attorneys have earned over \$300,000 a year from an indigent defense practice in which they enter guilty pleas for large numbers of assigned clients with whom they have minimal contact.⁵⁶ And even if not abused, a program of compensation at near-market rates puts unpredictable budget demands on the county and tends to cost more than specialized contract defenders or a public defender.⁵⁷

In terms of insurance problems, the compensation structure is crucial. If fees are paid at near-market levels, the county is, in effect, self-insured for both the risk of unusual case complexity and the risk of unforeseen increases in case volume. The defendant escapes most of the need to monitor the adequacy of service, if he can assume that the assigned attorney has no motivation to cut costs. But the county has an intense need to prevent excessive costs. And since the county may meet that need by assigning attorneys predisposed to be cooperative, the defendant still needs—but largely lacks—some vehicle for effectively monitoring the adequacy of service. In fixed-fee and low-cap systems, the county still bears the risk of unexpected increases in case volume, but the assigned attorney now bears the risk of unusual case complexity, and the burden of monitoring now falls entirely on the party least able effectively to protect his interests—the indigent accused.

The Free Market Alternative: Defense Vouchers

Existing systems resolve, with varying degrees of success, the incentive, informa-

tion, and insurance problems presented *for the state*, but in all three areas, the indigent defendant is left largely unprotected. There are few reliable mechanisms to ensure that attorneys for the indigent vigorously protect their clients' interests when those clash with the interests of the attorneys themselves, with those of the court system, or with those of the government that pays their fees. Before describing an institutional alternative, we can help focus the issues by describing three general tools for solving the client loyalty problem, which is the central difficulty each approach must address.

One such tool is to rely on incentives other than individual or institutional self-interest, in particular the attorney's personal pride, professional ethics, and idealistic commitment to helping the accused.⁵⁸ This is the solution implicit in all existing institutions. Its power is not negligible, but for reasons already discussed, we believe it is by itself an inadequate counterweight to strong organizational and financial pressures that push in other directions. A West Virginia court explained the point with irrefutable force:

We have a high opinion of the dedication, generosity, and selflessness of this State's lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.⁵⁹

While one wants to be sure that institutional reforms do not impair the valuable role of personal and professional ideals, there is a need to supplement idealism with concrete inducements and to diminish the power of countervailing pressures.

There is a need to supplement idealism with concrete inducements.

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A second solution is to use direct incentives to align the interests of defense counsel more closely with those of the defendants. This could be done, within a system in which the state selects defense counsel, by making reimbursement in part conditional on the outcome of the case, with outcomes more favorable to the defense resulting in more compensation. But there are at least two problems with this solution—the incentives and the knowledge of those running the program.⁶⁰ We want direct incentives because we suspect that the government's interest is in conflict with that of the defendant; setting up a system of discretionary rewards controlled by the state would have a certain air of hiring the fox to guard the chicken coop. Those in charge of administering such a reform could defeat its purpose by writing rules that rewarded the most cooperative lawyers rather than the most effective ones.

Even if the system were run with the intention of serving poor defendants as well as possible, those in charge might not have the information necessary to do so. This is a common problem in institutions that substitute administrative rules for market incentives. How a defendant would wish his counsel to trade off the costs and benefits of different strategies is a complicated issue, especially in deciding whether to accept a particular plea offer. Any administrative rule setting the reward as a function of the outcome will represent only a crude approximation of the correct incentives. What we want, after all, is not to reward attorneys either for persuading their clients to accept plea bargains or for persuading their clients not to accept them, but to reward attorneys for persuading their clients to accept desirable bargains and reject undesirable ones—not an easy thing to measure.

A third solution, and the one we propose, is to transfer the power to select the attorney from the court system to the defendant. So far as his own interests are concerned, the defendant has precisely the correct incentives. If available information is good enough to allow a defendant to appraise alternative providers of defense services, such a system solves the

client's problem. Even if the defendant cannot judge perfectly among alternative counsel, at least the decision will be made by someone with an interest in making it correctly; consumer sovereignty is, despite imperfect information, the mechanism that most of us use most of the time to control the quality of the goods and services we buy. And, insofar as judges or others within the court system have relevant expert knowledge, they can always make it available to defendants—as advice offered to them rather than choices imposed upon them.

One can imagine a range of reforms offering more freedom of choice to indigent defendants. We will designate as a voucher model any system in which lawyers who serve the poor have freedom to organize their practice as individuals or firms, with or without specialization, and to compete for the business of indigent clients. The voucher would be the guarantee of state payment that the accused can take with him to any individual or group provider of criminal defense services.

Because government would not control the organizational form employed by indigent defense providers, a number of different approaches would be likely to materialize—solo lawyers, small groups of practitioners, and larger firms. Providers would vary not only by size but by kind of practice, just as they currently do in most areas of legal work. Some might be generalists who occasionally take a criminal case. Most would probably be specialists—in litigation, in criminal practice, or even in a particular kind of criminal practice, such as drunk-driving cases or major felonies. These variations already exist among those who represent nonindigent defendants; the large client pool created by a voucher system would permit further specialization. We expect that most criminal defense specialists, whether individuals or firms, would serve both poor and affluent clients, though some might specialize in serving the indigent.⁶¹ Finally, we would not exclude the possibility of a government-run staff of salaried public defenders, financed by vouchers collected from clients. A public defender of this sort would not com-

promise the value of a voucher system, provided that defendants remained free to reject the public option and that private service providers accordingly emerged as alternatives.

We hypothesize that this proliferation of possibilities for the indigent defendant would provide a much needed spur for innovation, effectiveness, and loyalty to client interests. The principal risk of such an approach is twofold. Would it successfully protect the state's legitimate interest in avoiding excessive costs, and if so, would it still successfully elicit quality defense services for the poor? To explore these questions, we need to examine in detail the form of reimbursement that the voucher would guarantee. We consider two possibilities: lump-sum payments and variable payments based on services rendered.

Lump-sum Payments

A lump-sum voucher would grant a fixed amount to cover the cost of defense, with the amount presumably depending on the nature of the charge, with different rates for capital cases, other felonies, and misdemeanors. The voucher could be cashed by any provider, chosen by the defendant, who is legally eligible to practice before the relevant court.

When first implemented in a county currently using lump-sum payments for appointed counsel, this approach would cost no more than the prior system of representation; in principle, each voucher would be worth exactly what the county had previously been paying per case for indigent defense services. Over time, plan administrators might find it cost-effective to make the schedule of voucher payments more discriminating—for example, linking lump-sum amounts to the particular offense charged and perhaps to other observable features of the case, such as whether it is resolved by guilty plea or by trial. But initially at least, average payments per case would be no higher than before.

Over time, the voluntary choice features of a voucher system for both attorney and client might exert upward pressure on the indigent defense budget. If the payments offered were insufficient to attract sufficient numbers of

qualified attorneys, a county that had previously relied upon conscription would have to raise the amount of its vouchers. The resulting addition to the county's budget would not represent an increase in real economic cost but only a transfer to the public of costs that had previously been borne by attorneys conscripted at below-market rates.

Just as in the market for ordinary legal services, defense firms will wish to establish a reputation for effectiveness in order to attract clients. A lawyer might be tempted to pocket the lump-sum fee and then stint on the time he devotes to the case, but this danger already exists in the fixed-fee appointment systems that a lump-sum voucher would replace. The difference under a voucher plan is that, as in any market transaction for service at a fixed price, stinting on service risks client dissatisfaction and, through reputation, a loss of future business.⁶² There is no such prospect for preventing meager service when the flow of future clients is controlled by the county or the court.

How well reputation will work depends in part on how well informed potential clients are about attorney performance. While the state's primary role in such a system is providing the voucher, there is no reason why it cannot also provide information. The court or county government could maintain a list of attorneys and firms it considers particularly well qualified to defend the indigent. Such lists might appear to involve unseemly favoritism, but of course nearly all indigent defense systems bestow such favoritism on designated attorneys already. And the favoritism that currently exists is far more pernicious because it carries not just a positive recommendation, but a guarantee of business. In a voucher system, defendants would be free to discount the recommendation if they suspected that the state was more concerned with its own interests than with their own. Such an arrangement allows defendants to have both the informational advantage of state choice of provider and the incentive advantage of defendant choice.

So long as a lump-sum voucher is set at a level sufficient to make it attractive to crimi-

In a voucher system, indigent defendants would be free to discount the attorney recommendation if they suspected that the state was more concerned with its own interests than with their own.

The Canadian province of Ontario has used hourly-rate vouchers for some time, apparently with considerable success.

nal defense practitioners, this approach provides one way to solve the incentive problem. Not only does it use consumer sovereignty to constrain the lawyer to act in his client's interest, it also fixes the payment obligations of the state and thus eliminates any potential for the lawyer to increase his income at taxpayer expense.

The lump-sum voucher has another valuable incentive characteristic. Since the amount provided will normally increase with the seriousness of the charge, the voucher model would tend to deter prosecutors from inflating the charge. A prosecutor who follows such a strategy, to bluff the defendant into pleading guilty to a lesser count, increases the resources available to the defense and thus makes conviction more difficult.

A lump-sum voucher provides the defendant insurance against the risk that his case will turn out to be unexpectedly complex after an attorney has accepted it. Such insurance is implicit in the provider's agreement to accept the case. Defendants choose providers in terms of the total package they offer, including service for both complex and simple cases. As long as the cases cannot be distinguished in advance, a provider has an incentive to offer good service on complex cases as part of a package intended to attract clients because this is the only way to get simple cases.

The most serious disadvantage of the lump-sum voucher is that it provides no protection for the defendant who has an unusually complex case identifiable as such before the lawyer accepts it. Because the provider gets a fixed payment, he will prefer, so far as possible, either to take only simple cases or to take complex cases only on the understanding that he will not try very hard to win them. One cannot solve this problem by merely requiring providers to agree, like common carriers, to accept all comers. All a firm need do to protect itself against complex cases is do an inadequate job of defending them, thus saving money and developing a reputation that will keep away future clients with complex cases.

This might be a serious argument against a voucher if the current system of indigent defense provided substantial insurance against this danger. But it does not. At present, many counties provide only a lump sum for indigent defense, and thus replicate this disadvantage of the lump-sum voucher without its advantages. Other counties provide variable compensation but with a low ceiling, in effect offering either a lump sum or only minimal insurance. For jurisdictions that currently compensate counsel by a lump-sum payment or an hourly rate with a low cap, a voucher structured in the same way would cost taxpayers no more and would leave defendants unequivocally better off.

Nonetheless, the problem of unusual complexity evident from the outset suggests that the lump-sum voucher is far from ideal. It is therefore important to explore possible ways to improve it. The next section analyzes several more fine-tuned forms of voucher payment.

Hourly-rate Vouchers and Other Variations

One alternative would be for the voucher to authorize payment at a predetermined rate per hour, with a firm or presumptive cap and some possibility for a court administrator to review whether the time spent on the case was reasonable. The Canadian province of Ontario has used such a model for some time, apparently with considerable success.⁶³

The hourly-rate voucher improves the system as insurance (because both lawyer and client escape the risk of unusual complexity), but it brings back some of the incentive problems that a lump-sum voucher avoids. If the hourly rate is compensatory, it leaves the attorney with an incentive to work more hours than necessary. Government review of fee claims is therefore essential in an hourly-rate voucher plan, as it is in existing programs that compensate appointed counsel at an hourly rate. Unfortunately, from the taxpayer's perspective, government review is a costly and imperfect monitoring device, while from the defendant's perspective it provides the court system with a tool for punish-

ing attorneys who serve the interests of their clients rather than those of the court.

These drawbacks would count as serious defects in this sort of voucher, except that each of them is equally present in existing hourly-rate plans for appointed counsel. The voucher approach is no worse in these respects and at least has the advantage of using the defendant's power of choice as a reason for the attorney to take his client's interests into consideration. Once a jurisdiction has opted to compensate appointed counsel on an hourly-rate basis, there are unequivocal welfare gains in offering defendants a "portable" voucher with the same compensation structure.⁶⁴

Since an hourly-rate voucher gives the taxpayer less security than a voucher for a lump-sum payment, logic alone cannot dictate the choice between these two methods of compensation. To some extent the relative merits of these alternate approaches will depend on local conditions and on the level at which lump-sum and hourly payments are set. These matters would provide fruitful areas for investigation, perhaps through small demonstration projects, as would the possibility of giving defendants a choice between lump-sum and hourly-rate vouchers. Current experience suggests that hourly rates, combined with after-the-fact monitoring, lead to more responsible and effective representation, without uncalled-for demands on the state budget.⁶⁵

Objections to Voucher-Based Reforms

Will a Voucher Approach Prove Effective in Practice?

Our primary goal in proposing a voucher approach has been to use the engine of free choice and consumer sovereignty to improve the effectiveness of indigent defense services. But several practical concerns raise questions about whether a voucher approach would really work. We examine both economic and noneconomic concerns.

Resource levels. Until now we have put aside the question of how generously indi-

gent defense services will be funded; we have simply argued that, with whatever resources society allocates to indigent defense, freedom of choice will enhance the quality of the services delivered. Among those committed to the improvement of indigent defense, however, there is an understandable preoccupation with funding levels. There are legitimate concerns that without large increases in the resources devoted to indigent defense, other reforms may make little difference. We recognize that funding levels have a major impact on the quality of defense services and will continue to do so under the voucher regimes we propose. But whatever the level of funding, the attorney's independence from his adversary (the government) is the *sine qua non* of zealous representation, and freedom of choice for the client therefore remains a critical element in any plan for achieving effective defense services.

If funding levels remain low, the pool of attorneys who serve the indigent will continue to include both able, altruistic lawyers, as well as minimally competent attorneys with few other opportunities, and highly skilled attorneys who are adept at cutting corners so that they can limit the harm to their clients while maintaining a decent income for themselves. Our proposal to end conscription, if combined with low resource levels, might reduce the number of able attorneys serving the poor. But the attorneys lost would be those who prefer not to serve and, if compelled to, can be expected to minimize the time they devote to indigent defendants. The end of conscription would not preclude able attorneys from serving at below-market rates, and in fact would help ensure that those who do serve are participating out of genuine altruism and concern for client interests.

In the absence of some version of a voucher system, raising resource levels would improve the predicament of the indigent accused in some respects and in some jurisdictions. But paradoxically, it could actually make the indigent defendant's position *worse* in others. With increased funding, public defenders and appointed attorneys may no longer find it impos-

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sible to devote adequate time to their cases, but apart from altruism, such attorneys will still lack an affirmative incentive to do the best job for their clients. In fact, if compensation is raised, fewer of the attorneys involved will be attracted primarily on the basis of altruism, so the indigent defense lawyers in the pool will have, on average, less motivation to put client interests first and even stronger reasons than at present to curry favor with court officials upon whom their positions depend. So client choice will remain essential, even with ample funding, to ensure that attorneys focus on satisfying clients rather than the court.

Noneconomic concerns. A noneconomic element also affects prospects for a voucher system. What risks do we run in making the profit motive more prominent in indigent defense practice? At present, idealism attracts many able lawyers to serve the poor, and these attorneys provide one of the few bright spots in the otherwise dismal picture of American indigent defense systems. In a more profit-oriented atmosphere, would fewer lawyers of this sort be drawn to this work? Would attorneys in profit-oriented firms lose their idealism? Parallel concerns arise with many other proposals to substitute market arrangements for various forms of public service.

These risks should not be taken lightly, especially in an area where, as in indigent defense, idealism has played a vital role. The structure of a voucher model suggests one answer to the problem. Voluntary arrangements and free choice do not mandate a preoccupation with profit. Bar leaders could still form nonprofit corporations and hire idealistic lawyers on salary, just as happens now in Community Defender Associations. Defenders organized as government agencies could likewise emphasize public service in their recruiting and daily operations. Such organizations should have no difficulty attracting clients (and vouchers) if their performance lives up to their ideals. And if altruism permitted such firms to hire attorneys at below-market rates, they would have an advantage that should translate into larger staffs, lower caseload ratios, and more support services

than profit-oriented firms could provide. The market approach we urge in this paper is not inconsistent with preserving what is best in existing systems for indigent defense.

Are Improvements in Indigent Defense Socially Desirable?

In arguing for freedom of choice and a system of vouchers to improve the quality of defense services, we have taken for granted that such improvements would be a good thing. A substantial portion of the general public may disagree. That disagreement, though seldom openly articulated, may play a large behind-the-scenes role in explaining resistance to improving indigent defense. We believe it useful to try to make explicit the reasons for that resistance and our response to them.

One source of skepticism about the value of an effective defense is a widespread view about the way that an effective lawyer can help his client. Do the special skills of the high-priced lawyer typically serve to demonstrate the innocence of someone who was falsely charged, or do they more often enable a guilty person to get off on a technicality? Much of the resistance to providing better indigent defense no doubt reflects the latter view. If that view is correct, then the main effect of improving the quality of defense services will be to make conviction of the guilty more difficult, thus reducing the deterrent effect of criminal punishment and increasing the amount of crime.

We do not know of any way to establish whether effective lawyers help the guilty more often than they help the innocent. But even if that pessimistic view is empirically correct, it represents an obvious normative mistake. Rules of criminal procedure that permit the guilty to escape on technicalities may need to be reconsidered on their merits, but there is no justification for undermining those rules covertly by making them hard for one subset of defendants—the indigent—to invoke. So long as such rules remain on the books, they reflect presumptively legitimate goals, whether related to or distinct from

protection of the innocent, and counsel for all sorts of defendants should be equally able to invoke those rules effectively in order to promote the social values they serve.

A related but even broader claim is that virtually all defendants presently convicted by our criminal justice system are in fact guilty, so that improvement in the quality of indigent defense is unimportant. Judge Richard Posner, for example, has argued that police and prosecutors, faced with tight budgets and high crime rates, have enough to do convicting the guilty and are therefore unlikely to waste scarce resources trying to convict the innocent.⁶⁶

We find arguments of this sort unconvincing on several grounds. Even if prosecutors consistently select only their easiest cases, there is no guarantee that ease of conviction will correlate closely with actual guilt—especially for poorly represented defendants. Indeed, high crime rates, scarce resources, and a weak system of defense may drive prosecutors to seek an easy conviction of the first suspect at hand rather than pursuing a more thorough investigation that might exonerate the initial suspect.⁶⁷

In addition to making it less likely that innocent defendants will be convicted, an improvement in the quality of defense services has other desirable effects. One is to reduce the injury the legal system does to innocent defendants who are eventually acquitted, but would have been released sooner and at lower cost to themselves if they had been adequately represented.⁶⁸ A second effect is to provide more complete information at sentencing and thus to make it more likely that judges will impose appropriate punishments on the guilty.

We recognize that improvements in indigent defense, however desirable, cannot be pursued indefinitely, regardless of cost. But since a voucher system can be instituted with whatever resources a state decides to allocate to defense services, the argument against our proposal is, in effect, an argument that improvements in indigent defense are undesirable even if they entail no additional cost. That argument constitutes an objection to the very nature of our adversary system.⁶⁹ It

implies that lawyers who try hardest to get their clients acquitted are, on net, an obstacle to justice, even when they are doing their job with very limited resources. This perspective strikes at the heart of our system of criminal justice. It is of interest, in part, because it draws attention to the degree to which our present system has become, at least for indigent defendants, inquisitorial in substance, even if adversarial in form.

Conclusion

Common-law jurisdictions outside the United States have long afforded indigent defendants the right to select their own counsel at government expense, and it may be that only inertia prevents us from bringing that option into American law as well.⁷⁰ If so, now is an ideal time to begin moving away from the American status quo. With pressure for reform rising and with unprecedented Justice Department interest in new initiatives, it would be a simple matter to institute a voucher plan on an experimental basis in a few federal districts, or even in cases before selected federal judges who might volunteer to participate. State governments should consider a paradigm shift as well, since most criminal cases are processed at the local level. We do not claim that our voucher proposal will solve every problem—especially if resource constraints generate a wide gulf between the demand for competent defense attorneys and the available supply. What we do claim is that at *any* level of funding, our voucher model can produce gains for both criminal defendants and society generally.

In particular, we maintain that defense vouchers will improve the quality of legal representation for the poor. Better legal representation will, in turn, produce at least three benefits to the community:

- Improving defense services will reduce the likelihood of mistakes. That is, it will be less likely that innocent persons will be wrongfully convicted of crimes.

Improving defense services will reduce the likelihood of mistakes.

By denying freedom of choice to the indigent defendant, the current system represents a breach of our ideals of personal autonomy and freedom from government control.

- Improving defense services will also minimize adverse consequences to the innocent persons who would have been acquitted under current systems of indigent defense. That is, a better defense means it is more likely that those innocents will be released from custody even sooner (pre-trial) and with less disruption to their lives and the lives of their family members.
- Improving defense services will bring more complete information to the sentencing phase of the criminal justice system—making it more likely that just punishments will be imposed on those who are guilty of committing criminal offenses.

We see only two grounds (other than inertia) on which a reasonable person might defend existing institutions for defense of the indigent. One is the belief that defense lawyers are so bound by their professional ethics that they will consistently sacrifice their own interest to the interest of clients to whom they are assigned. Another, and less optimistic, belief is that almost all indigent defendants are guilty, if not of the offense charged then of something else, and that the real business of the court system is the administrative task of allocating punishments while maintaining a polite fiction of concern for defendants' rights.

These arguments are both unconvincing and inconsistent with the underlying premises of our adversary system of justice. Even more, by denying freedom of choice to the indigent defendant in what will often be the most important matter of his lifetime, the current system represents a glaring breach of our ideals of personal autonomy and freedom from unwarranted government control. We conclude that present institutions for criminal defense ought to be replaced with a voucher system, in order to provide indigent defendants with freedom of choice and to provide attorneys with the same incentive to serve their clients that attorneys have always had when they represent clients other than the poor.

Notes

This paper is based in part on an earlier article by the authors, "Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants," *American Criminal Law Review* 31 (1993): 73. Readers can find in that article a more detailed discussion of the issues canvassed here.

1. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).
2. One public defender "was . . . told by a county supervisor that he 'should join the District Attorney in his effort to keep the streets of Essex County safe.'" The Constitution Project, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," pp. 80–81, <http://www.constitutionproject.org/manage/file/139.pdf>.
3. See Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," *Yale Law Journal* 103 (1994): 1843.
4. Ronald F. Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory," *Iowa Law Review* 90 (2004): 221.
5. Remarks by Attorney General Eric Holder, Brennan Center for Justice Awards Dinner, November 16, 2009.
6. *Ibid.*
7. *Hurrell-Harring v. New York*, no. 03798 (May 6, 2010); the appeals court decision permitting the case to proceed is at <http://www.courts.state.ny.us/ctapps/decisions/2010/may10/66opn10.pdf>.
8. For a detailed presentation of the problem and proposals for dealing with it, see "Justice Denied."
9. See Carrie Johnson, "Renowned Harvard Law Professor Joins Justice Department; Laurence H. Tribe to Lead Efforts to Improve Legal Access for the Poor," *Washington Post*, February 26, 2010; Charlie Savage, "For an Obama Mentor, a Nebulous Legal Niche," *New York Times*, April 7, 2010.
10. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court ruled that a person's conviction could be reversed if he could persuade a court that his defense attorney's performance was (a) deficient, and (b) the deficient performance was so bad that it deprived the defendant of a fair trial. This is known as the "ineffective assistance of counsel" doctrine. Many advocates of indigent defense reform argue that the legal threshold for

establishing an ineffective assistance claim has been set too high. Even if that is true, we place little store in reliance on case-by-case litigation of ineffective assistance claims. Though doctrinal change could probably improve the quality of indigent defense services to some extent, claims of ineffective assistance on the record of a particular case can have little influence on the *overall* operations of an indigent defense system.

11. We thus disagree with Attorney General Eric Holder's view that even in present circumstances—which deny defendants a role in choosing their counsel—"every state should have a public defender system." Remarks by Attorney General Eric Holder, National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010.

12. See Loren E. Lomasky, "Aid without Egalitarianism: Assisting Indigent Defendants," in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*, ed. William C. Heffernan and Jan Kleinig (New York: Oxford University Press, 2000), pp. 84–97.

13. This implies that perhaps the government ought to subsidize defense for the nonindigent as well. We will not consider that question here, beyond noting that the problems of maintaining the independence of defense attorneys paid by the state provide a pragmatic argument for private funding where it is practical.

14. See Stephen J. Schulhofer, "Criminal Justice Discretion as a Regulatory System," *Journal of Legal Studies* 17 (1988): 53–60 (discussing how compensation arrangements for lawyers can lead to conflict with clients); and Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," *Yale Law Journal* 84 (1975): 1179 (asserting that the criminal justice system's reliance on the guilty plea puts defense lawyers in conflict with their clients).

15. Improper action in such situations, whether by prosecutors or defense counsel, need not be the result of conscious misfeasance. Strong financial rewards or penalties may subconsciously color the attorney's judgment on debatable questions of trial tactics or negotiating strategy.

16. Though indigents probably represent no more than 10–20 percent of the population, they account for 80 percent of those charged in felony cases. See Andy Court, "Is There a Crisis?" *American Lawyer* (January/February 1993), p. 46.

17. The principal exception of which we are aware is the availability of limited reimbursement for the cost of defense against certain criminal traffic offenses, as part of the benefits of American Automobile Association membership. See *Chicago*

Motor Club, Members Handbook (n.d.), pp. 11–12.

18. See Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?" *Harvard Law Review* 97 (1984): 1080 (noting that in a sample of felony bench trials, defendants won acquittal in 33 percent of cases in which defense counsel made no effort to cross-examine prosecution witnesses and offered no witnesses in defense).

19. Some prepaid legal services programs use an "open panel" plan, in which members select their own attorneys and obtain reimbursement on a fee-for-service basis, often subject to some cap on hourly rates, hours expended, or both. Far more common, however, is the "closed panel" plan, in which members must use attorneys who have been retained or employed in advance by the plan. See Thomas J. Hall, comment, "Prepaid Legal Services: Obstacles Hampering Its Growth and Development," *Fordham Law Review* 47 (1979): 851–57.

20. See *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring state courts to appoint counsel for poor defendants in capital cases); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing the right of indigent defendants to appointed counsel in all criminal proceedings in federal courts); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending the right to appointed counsel in state courts to all indigent defendants charged with a felony); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to all criminal prosecutions involving a sentence of imprisonment); and *In re Gault*, 387 U.S. 1 (1967) (according juveniles charged with delinquent acts the right to appointed counsel). Courts have declined, however, to recognize any right of the indigent defendant to a role in selecting his attorney, even where the attorney he prefers is willing, available, and qualified. For a discussion of the cases, the arguments for them, and our response, see Stephen J. Schulhofer and David D. Friedman, "Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants," *American Criminal Law Review* 31 (1993): 105–112.

21. Conflicts of interest occasionally preclude appointment of the public defender. The most common conflict situations are those in which the defender already represents a codefendant and those in which one of its staff was a victim of the alleged offense.

22. U.S. Department of Justice, Bureau of Justice Statistics, "Criminal Defense Systems: A National Survey" (August 1984), p. 3.

23. Ibid. These offices are sometimes called community defenders rather than public defenders. See 18 U.S.C. § 3006A(g)(2) (West Supp. 1993) (distinguishing between community defenders and public defenders).

guishing between “Federal Public Defender Organization” and “Community Defender Organization”).

24. “Criminal Defense Systems,” at 17.

25. *Ibid.* at 216–18.

26. See *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980) (public defender won right to withdraw from a case on grounds of excessive caseload, even though Florida statutes imposed duty to represent all indigents); John B. Arango, “Tennessee Indigent Defense Systems in Crisis,” *Criminal Justice* (Spring 1992): 42 (Tennessee public defender successfully asked to be relieved from accepting new misdemeanor cases, and thus forced state to assign private counsel).

27. Michael McConville and Chester L. Mirsky, “Criminal Defense of the Poor in New York City,” *New York University Review of Law & Social Change* 15 (1986–87): 586–90.

28. See Alison Frankel, “Too Independent,” *American Lawyer* (January/February 1993), pp. 67–70, reporting, for example, that the U.S. Court of Appeals for the Fourth Circuit refused to rehire Maryland Federal Defender Fred Bennett. Circuit Judge Paul Niemeyer reportedly argued that Bennett’s aggressiveness might make him ineffective. In the words of a Baltimore assistant defender, “[The system] creates an awkward situation for clients. We’re representing them, but we’re controlled by the court. When the head of our office is essentially terminated by the court [for being too aggressive], it’s hard to explain.” *Id.* at 70.

29. An internal study commissioned by the Legal Aid Society of New York in the late 1970s provides one telling illustration. It found:

Reacting to increased workload and proportionately diminished staff, the management and staff agreed to place greater emphasis on disposing cases through guilty pleas, clearing court calendars, and reducing backlog. . . . [T]he Society’s institutional concerns with meeting its contractual obligations triumphed over the need for systemic reform. The Society . . . subordinated vigorous advocacy—‘diligent,’ ‘vigorous,’ and ‘individualized’ defense—to the need for productivity and efficiency.

McConville and Mirsky, at 687–88 (footnotes omitted).

30. Few knowledgeable observers would question the proposition in text, but several cases have illustrated the depth of the problem. See Mark Hansen,

“P.D. Funding Struck Down,” *ABA Journal* (May 1992), at 18 (New Orleans trial judge held the city’s entire indigent defense program unconstitutional because it required public defenders to handle upwards of 300 cases at once); American Bar Association, “Indigent Defense Information” (Spring 1990), at 3 (caseloads in some Florida cities stood at 1,200 misdemeanors per attorney per year and felony caseloads ranged from 371 to 539 per attorney per year, even though national standards suggest caseloads of no more than 400 misdemeanors or 150 felonies per attorney per year); Rodger Citron, note, “(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services,” *Yale Law Journal* 101 (1991): 490 (in Fulton County (Atlanta), Georgia, some defenders were handling more than 500 felony cases per year). For a dissenting view, see Roger Hanson, *Indigent Defenders Get the Job Done and Done Well*, National Center for State Courts, May 1992, cited in Andy Court, “Is There a Crisis?” *American Lawyer* (January/February 1993), at 46 (arguing that people represented by privately retained counsel on the whole obtain the same results as those represented by publicly financed defenders).

31. Jonathan D. Casper, “Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender,” *Yale Review of Law and Social Action* 1 (1971): 4.

32. See Schulhofer, “Plea Bargaining,” at 1099–1100 (discussing the need for assertiveness to achieve success within the public defender’s office and to move into private practice).

33. Schulhofer, “Criminal Justice Discretion,” at 53–60.

34. “Reports and Proposals,” *Criminal Law Reporter* (BNA) 51 (June 24, 1992): 1285. At the time of her motion, the attorney had been assigned to handle 45 cases at a single arraignment session, leaving her only 10 minutes for each felony client.

35. See *Consolidated American Insurance Company v. Mike Soper Marine Services*, 951 F.2d 186 (9th Cir. 1991).

36. See *Shaw v. State of Alaska, Department of Administration*, 816 P.2d 1358 (Alaska 1991) (obtaining postconviction relief is prerequisite for filing action against original defense lawyer for malpractice); see also Paul D. Rheingold, “Legal Malpractice: Plaintiff’s Strategies,” *ABA Section of Litigation* 15 (1989): 13 (“Criminal cases present two barriers that make victory in a later legal malpractice suit almost impossible.”).

37. See Stephen J. Schulhofer, “Effective Assistance on the Assembly Line,” *New York University*

Review of Law & Social Change 14 (1986): 140–43 (discussing when public defenders recommend guilty pleas for their clients and why); see also Gary Goodpaster, “The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases,” *New York University Review of Law & Social Change* 14 (1986): 80–83 (discussing the difficulty of evaluating whether counsel was effective where the public defender entered a guilty plea on behalf of his or her client).

38. See *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding indigent death row inmate has no constitutional right to appointed counsel to pursue constitutional claim in post-conviction litigation).

39. Almost three-quarters of the contract programs rely on individual practitioners. See Robert L. Spangenberg and Patricia A. Smith, *An Introduction to Indigent Defense Systems* 14 (American Bar Association, 1986).

40. Scott Wallace and David Carroll, “The Implementation and Impact of Indigent Defense Standards,” *Southern University Law Review* 31 (2004): 245; Lawrence D. Spears, “Contract Counsel: A Different Way to Defend the Poor,” *Criminal Justice* (Spring 1991), at 30.

41. Spangenberg and Smith, at 13.

42. On the other hand, it is harder for third parties to compare quality bids than price bids, and thus harder to judge whether the contract is really being awarded to the best bid.

43. See ABA Standards for Criminal Justice § 5-3.1 at 46 (3d ed. 1992) (discussing “uniformly dismal” results in early contract programs).

44. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 4 (U.S. Dept. of Justice 2000).

45. U.S. Department of Justice, *Compendium of Standards for Indigent Defense Systems* (2000) vol 1-H, <http://www.mynlada.org/defender/DOJ/standardsv1/v1h.htm#Attorney>; Spangenberg and Smith, at 9.

46. See *State v. Rush*, 217 A.2d 441 (N.J. 1966) (upholding the practice in many New Jersey municipalities of conscripting attorneys to serve without compensation), reaffirmed, *Bolyard v. Berman*, 644 A.2d 1129 (1994) (“our [state] Supreme Court has expressly held that a defendant’s right to counsel . . . may be satisfied by the appointment of uncompensated private counsel”). See also *State v. Citizen*, 898 So.2d 331 (La. 2005) (“uncompensated representation . . . is a professional obligation . . . of practicing law” but the court must grant “reasonable” overhead costs); *Office of the Public Defender v. State*,

413 Md. 443 n.6 (Md. 2010) (“a lawyer has no constitutional right to refuse an uncompensated appointment”). See also David Margolick, “Volunteers or Not, Tennessee Lawyers Help Poor,” *New York Times*, January 17, 1992 (conscripting without pay); “Tennessee Lawyers Balk at Defending the Poor for Free,” *Atlanta Journal-Constitution*, January 8, 1992, at 3 (same). Cf. *Nichols v. Jackson*, 55 P.3d 1046–47 (Okla. 2002) (upholding the system of conscripting defense attorneys in capital cases, but mandating “adequate, speedy, and certain compensation”).

47. Rebecca A. Desilets, Robert L. Spangenberg, and Jennifer W. Riggs, *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* (Spangenberg Group, 2007); see also *Mooney v. Trombley*, 2007 U.S. Dist. LEXIS 15298, 30–32 (E.D. Mich. 2007) (flat rate of \$590 per case, which averaged less than \$6.00 an hour, was not prejudicial); *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (appointed attorney in Texas capital case was paid \$11.84 per hour).

48. Even 20 years ago, a court estimated that an attorney needs a fee of \$27–\$35 per hour just to cover overhead expenses for rent, library, and secretarial services. *State ex rel. Stephan v. Smith*, 747 P.2d 816, 837 (Kan. 1987). See also *Baker v. Corcoran*, 220 F.3d 276, 285–86 (4th Cir. 2000) (overhead for attorney in post-conviction proceedings was \$53 an hour); *Sheppard v. Jacksonville*, 827 So.2d 925, 931 (Fl. 2002) (\$40 an hour compensation renders counsel unable to cover overhead); *New York County Lawyers’ Association v. State*, 763 N.Y.S.2d 397, 416–17 (N.Y. Sup. Ct. 2003) (average overhead in N.Y. was \$42.88 an hour, with a range of \$26.80 to \$62.50 per hour); *State v. Young*, 172 P.3d 138, 140 (N.M. 2007) (overhead costs for a capital case was \$73.96 an hour).

49. Spangenberg Group, at 6–10.

50. See “Criminal Defense Systems,” at 5 (noting that compensation ceilings of \$500–\$1,000 were common for non-capital felonies, and in some counties ceilings were as low as \$200).

51. Maximums are now set at \$3,600 for the District of Columbia, \$3,000 for West Virginia and Hawaii, and \$2,500 in Florida and Nevada. See Spangenberg Group, at 2, 3, 6, and 9.

52. *Ibid.* at 1–10.

53. See Margolick (discussing conscription without compensation).

54. An article describing the Detroit Recorder’s Court reports:

Since court-appointed counsel depend upon the 29 Recorder's Court judges for their assignments, the system may discourage the lawyers from doing anything that might alienate the judge by impeding his or her efforts to move the docket.

In testimony given two years ago before a special master appointed by the Michigan Supreme Court in the dispute over the flat fees paid to indigent defenders, Recorder's Court judge David Kerwin spoke of "lawyers who just don't seem to really be interested in recognizing that it's an adversary process . . . that are more interested in presenting to you a situation that accommodates the moving of the docket, as though that's going to endear them to you and cause you, when you are on assignment [duty], to give them more cases."

Andy Court, "Rush to Justice," *American Lawyer* (January/February 1993), p. 58.

55. See Mark Hansen, "Indigent Defense Fee Abuses Found," *ABA Journal* (August 1992), p. 29 (describing abuses resulting from inadequate monitoring of attorney fee submissions).

56. See Judge Charlie Baird and William S. Sessions, "Public Defender Proposal Lacks Checks and Balances," *Houston Chronicle*, June 8, 2010; Texas Fair Defense Project, "Benefits of a Public Defender Office," White Paper, September 2009, pp. 3-4.

57. *Ibid.*

58. In the course of an opinion upholding conscription without pay, the New Jersey Supreme Court stated, "[A] lawyer needs no motivation beyond his sense of duty and his pride." *State v. Rush*, 217 A.2d 441, 444 (N.J. 1966).

59. *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989).

60. For a discussion of the same problems in the context of regulating a natural monopoly, see David D. Friedman, *Price Theory: An Intermediate Text*, 2d ed. (Cincinnati: South-Western Publishing Co., 1990), pp. 466-77.

61. The prospect of the legal equivalent of health care's "Medicaid mills" comes to mind as a cautionary note here, though we doubt that firms freely chosen could be any worse in this regard than many existing public-defender systems.

62. An article on Ontario's voucher system reports: "10-15 percent of the criminal certificate bar are 'constant pleader' types who rarely go to trial—and . . . clients know it. Layton Elijah, who has been rep-

resented on certificates several times since 1971, agrees that defendants know which lawyers will merely try to plead them out. 'You hear about it in jail about guys who just take the deal, lawyers who lead you astray,' he says." William W. Horne, "Canada's Cadillac," *American Lawyer* (January/February 1993), at 62-66 (discussing 1967 plan that allows qualified applicants to choose from 5,500 lawyers serving on legal aid panels). As of 2009, there were 4,382 private attorneys certified to serve on the legal aid panels. Legal Aid Ontario, "Fact Sheet: Panel Management," 1 (2009), <http://www.legalaid.on.ca/en/about/downloads/fact-sheet-panelmanagement.pdf>.

63. The Ontario Legal Aid Plan differs from a simple hourly-rate voucher in several ways. It combines payment by time with lump-sum payments for certain activities. A higher payment is provided to more experienced lawyers. Defendants who are not sufficiently indigent to qualify are in some cases able to get a partial subsidy for their legal expenses. OLAP seems to be widely regarded as a success in terms of the quality of service, but it is hard to tell whether that reflects the organizational structure, the level of funding, or features of the legal environment in which it works. Compared to New York City's legal aid plan, the OLAP is less expensive per taxpayer but substantially more expensive per matter handled. Horne, at 62-66. A recent evaluation shows a high level of satisfaction with the Ontario program among both lawyers and clients. See Legal Aid Ontario, "Fact Sheet: Legal Aid at a Glance" (2009); Legal Aid Ontario, "LAO Common Measurements Tool" (2008), http://www.legalaid.on.ca/en/about/downloads/2008_cmt-overview.pdf.

64. This remains so even though monitoring of attorney fee requests seems likely to be more effective when the state can restrict the pool of attorneys eligible to serve.

65. The comparison between the effectiveness of attorneys compensated on a lump-sum or hourly basis in current, non-choice regimes is clouded, however, by the fact that the level of authorized payments in existing lump-sum systems is typically quite low and the attorneys who serve in such regimes tend to be conscripts with powerful incentives to minimize the time they devote to the case.

66. See Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1993), p. 216.

67. See, for example, Michael Mello, "Second-guess Death," *National Law Journal* (May 21, 2001).

68. See Anthony Lewis, "The Soul of Justice," *New*

York Times, January 4, 1993, p. A15 (Indianapolis defendant spent 19 months in jail awaiting trial, including four months confined after the charge was dismissed; the public defender never told his client or prison authorities about the dismissal).

69. The argument against improving criminal defense, if correct, has some interesting implications. If improvements in indigent defense are a bad thing, if their main effect is to make it harder to convict the guilty, then so are improvements in defense for nonindigents.

Nonindigents improve their defense by spending more money on it. If even costless improvements in indigent defense, such as those that might result from moving to a voucher system, are undesirable, then costly improvements in defense are undesirable a fortiori. If improvements in indigent defense are undesirable even at the present low level of expenditure, it seems to follow that expen-

ditures on nonindigent defense above that same low level are also undesirable. So the argument holding that our reforms are undesirable precisely because they would provide improved defense for indigents also seems to imply that there should be a cap on defense expenditures by ordinary defendants, set at or below the present level of expenditure for indigents.

70. See Earl Johnson, Jr., "Equality Before the Law and the Social Contract," *Fordham Urban Law Journal* 37 (2010): 189–96 (discussing England, Ontario, and Quebec); Norman Lefstein, "In Search of Gideon's Promise: Lessons from England and the Need for Federal Help," *Hastings Law Journal* 55 (2004): 915–21; Tamara Goriely, "Evaluating Scottish Public Defense Solicitors Office," *British Journal of Law and Society* (Cardiff Law School, Cardiff Wales) 30 (2003): 84. With respect to Ontario, see also Horne.

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