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June 3, 2015

Senator Charles E. Grassley
Chairman
Attention: Jason Covey
Hearing Clerk
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you again for the opportunity to testify before the Committee on the right to counsel. Thank you also for the supplemental questions on behalf of Senator Vitter. Here are my responses to those questions.

1) **Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?**

In *Gideon v. Wainwright*, the Supreme Court held that the assistance of counsel in a criminal prosecution is so "'fundamental and essential to a fair trial'" that it fit within that class of rights that are "fundamental" and thus incorporated against states under the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) *quoting Powell v. Alabama*, 287 U.S. 45, 68 (1932). I agree with the Supreme Court that having counsel is fundamental to a fair and reliable criminal justice system. Within the selective incorporation framework, I believe that also makes it appropriate for incorporation against states. *See McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 759-66 (2010) (tracing the history of selective incorporation jurisprudence). That conclusion has not been seriously challenged since *Gideon* was decided more than fifty years ago.

2) **As you mentioned, Indian Civil Rights Act of 1968 incorporated many constitutional protections, but did not include the right of indigents to appointed counsel in**

criminal cases because the Federal Government recognized the different political and cultural status of the tribes. Some of your suggestions in your testimony would undermine the sovereignty of Indian tribes to make their own laws and policies, such as eliminating the requirement to exhaust tribal court remedies before seeking habeas relief in federal court. Do you have specific suggestions for addressing the expansion of Indian rights while also respecting the sovereignty of Indian tribes?

Any suggestions addressing this question must be considered first in light of the interplay of federal criminal law and the laws of tribal governments. Second, it must be considered in light of the long history federal Indian law and its impacts, often detrimental, to the sovereignty and independent functioning of tribal governments.

My suggestions at the hearing were intended to target how federal law promotes or undermines the right to counsel. To that end I would say again: federal law should never permit a conviction without counsel to serve as an offense element, predicate offense for sentencing enhancement based on recidivism, or sentencing enhancement. That has been done, however. For example, 18 U.S.C. § 117 punishes assault of domestic partners following two or more convictions for domestic abuse in federal, state, or tribal court. In my experience, and the experience of other Indian Country practitioners I have spoken with, tribal court convictions are commonly obtained without counsel. Counsel may simply be unavailable or, more commonly, regardless of availability a defendant who is detained is told that if the enter a guilty plea they will receive a time served sentence but will remain detained until counsel can be appointed. The defendant thus chooses to get out that day rather than waiting for an uncertain result at some later point. While the practice of "plea for release" also occurs in state courts, through application of the Sixth Amendment, such uncounseled convictions could not be used for a prosecution under 18 U.S.C. § 117.

At least two Circuit Courts of Appeals have upheld this use of convictions obtained without counsel to serve as elements of a federal offense. *See United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011). Thus, federal law is using a conviction obtained without counsel to be an element of a federal offense. This is not a question of tribal sovereignty, it is a question of whether federal law is respecting the right to counsel or not.

In a similar vein, the Indian Civil Rights Act itself imposed limits on the sovereignty of tribal governments through application of some aspects of the Bill of Rights which did not apply to tribal governments before ICRA's passage. *See Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (constitutional limits do not apply to tribal governments). ICRA's purpose was to extend protections under the United States Constitution to a class of citizens, Indians, who did not have the same protections as all other citizens of the United States. However, ICRA did not extend the right to counsel, leaving Indians as the only American citizens who could be subject to criminal prosecution and incarceration without a lawyer. Later, the Tribal Law and Order Act did provide that counsel must be provided, but only for cases involving incarceration for more than one year. Thus federal law specifically allows a class of American citizens, and only that class, to be incarcerated for up to a year without a lawyer. This too seems not so much a question

of tribal sovereignty as respect for the rights of all American citizens and equal protection of the laws.

It might be a different question had Congress simply not acted in either circumstance. Tribal governments, acting under their pre-constitutional authority, could have structured their own systems of justice (and historically did so). However, in both instances rather than arguably respecting by tribal sovereignty by not acting, federal law affirmatively provided Indians with fewer constitutional protections than other citizens. If Congress acts in these areas, it should do so in a way that does not disadvantage Indians in the name of tribal sovereignty.

Secondly, the history of interaction with tribal justice systems is not one of promoting or respecting tribal sovereignty. In *Ex Parte Crow Dog*, the Supreme Court affirmed a tribal government's resolution of a murder through its traditional system and held that federal law enforcement had no role in the matter. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The almost immediate federal response was to enact the Major Crimes Act, which provided federal criminal jurisdiction over certain enumerated crimes, including murder. 18 U.S.C. § 1153. This effectively eliminated the ability of tribes to make and be governed by their own laws for the most serious criminal offenses because those cases could, and would, be prosecuted federally regardless of how the tribes might otherwise have handled them.

Traditional tribal systems of justice were destroyed over the course of decades of federal Indian law and policy. In the 1880's, Courts of Indian Offenses were imposed by the Bureau of Indian Affairs and with them, the western model of an adversarial justice system. *See generally, Barbara Creel, The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative, 18 Michigan Journal of Race & Law,* 317, 338-42 (2013). This process continued with enactment of the Indian Reorganization Act of 1934. Under the IRA, tribes were encouraged to adopt constitutions and law codes, but only with the approval of the Bureau of Indian Affairs, which resulted in systems that moved from traditional tribal practices to replicas of the western justice system, typically in the form of "model" constitutions and codes put forth by BIA. *See Creel* at 341-44.

Tribal governments have long ago been forced into systems of law and order that are not theirs. With that reality in mind, Congress should not take additional steps that leaves Indians, or non-Indians subject to tribal court jurisdiction pursuant to the Violence Against Women Act Reauthorization of 2013, with fewer protections that all other American citizens are entitled to in all other courts within the United States.

It is light of this background that I offer suggestions about how to proceed to balance federal criminal law and expansions of tribal court jurisdiction with tribal sovereignty. First, my suggestion about eliminating the requirement for tribal court exhaustion prior to seeking a writ of habeas corpus is intended to provide an effective and expeditious remedy for violations of the right to counsel under ICRA, TLOA, and VAWA. The reality of my experience in Indian Country is that, even setting aside whether counsel is available as a matter of law, geographic isolation and sparse population makes getting a lawyer a very difficult problem practically. That problem is paired with the fact that detention is often continued while counsel is sought or remedies pursued. Expediting a remedy of the rights guaranteed under these jurisdictional statutes is a necessary concomitant to providing the expanded jurisdiction. It is not an

undermining of tribal sovereignty, but a necessary protection of the rights of individual criminal defendants.

Second, as part of expanded jurisdiction under TLOA, additional resources for tribal governments should be explored. Under TLOA, Special Assistant United States Attorneys are authorized and can appear concurrently in tribal and federal courts on matters of concurrent jurisdiction. Changes to TLOA and the Criminal Justice Act could be made to authorize Special Assistant Public Defenders who could provide counsel to individuals for both matters as federal and tribal prosecutions often occur in parallel for some offense conduct. These individuals could also provide additional training and other support for tribal public defender offices. Along the same line, expanded funding and authority to the Defender Services Office, or to state and local public defenders, could be provided to assist tribal public defenders. Programs for that purpose exist within the Department of Justice but it is ultimately a difficult pairing for the same entity that is charged with prosecuting offenders to train and fund those defending them.

Third, as an alternative to expanded jurisdiction under TLOA and VAWA, the authority of tribes to utilize traditional tribal justice systems should be restored. As part of that, a formal consultation process should be implemented so that if the tribe chooses to use its traditional justice practices that federal charges do not follow. This would truly promote tribal sovereignty and self-determination.

It is may be difficult to balance tribal sovereignty and individual rights. That is true for any government, however. It the largest part of the history of the United States Constitution. From scratch a different balance may have been struck. Working from the history and reality that we must, however, it is critical in my judgment that we assist tribal courts to provide the American citizens prosecuted in their courts full Constitutional protections while providing tribes with real choices on whether to accept the adversarial western criminal justice system for some, all, or none of the crimes that occur within their jurisdiction. That would be a true balance.

3) England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

Recent history in England demonstrates that, fundamentally, any system of indigent defense must be provided adequate funding, staff, and resources. Without adequate resources, no system can provide effective assistance of counsel.

England's system, including the choice of counsel, was highly regarded. *See* In Search of Gideon's Promise: Lessons from England and the Need for Federal Help, 55 Hastings L.J. 835 (2004); Public Provision of Legal Services in the United Kingdom: A New Dawn, 24 Fordham Int'l L.J. 143 (2000). At that time, England provided per capita funding for indigent defense that was triple that provided in the United States. *See* Norman Lefstein, *Criminal Defense Representation in England and the United States*, Int'l Society for the Reform of Criminal Law - 18th International Conference (August 2004). However, England recently made drastic cuts to

its indigent defense system and imposed a stringent system of financial means testing for eligibility for counsel. *See* Margo Patrick, *U.K. Legal Brawl Puts Spotlight on Public-Defense Office*, The Wall Street Journal (May 23, 2014); Samira Shackle, *How legal aid cuts are harming the voiceless and most vulnerable*, NewStatesman (Jan. 13, 2014). Without adequate resources, England's program has suffered as have those receiving counsel through it.

In my opinion an effective system of indigent defense must have certain key attributes. First, counsel must be available, in both structural and practical terms. As I described at the hearing, in many tribal courts counsel is not provided and is often simply not practically available due to geographic isolation and limited numbers of lawyers. Another widespread problem that was discussed (in tribal, state, and local courts alike) was facing the choice of significant delays to obtain counsel which results in continued detention prior to trial, admissions against interest, and other significant tactical errors that can compromise the ability to defend the case, and the disturbing and widespread practice of simply pleading guilty without counsel to "move on," without a full understanding of the collateral consequences that often follow even misdemeanor convictions. To be effective, a system of indigent defense has to make counsel actually and readily available at all proceedings.

Second, any system of indigent defense must have adequate resources. Those resources need to be on par with those available to the prosecution. As discussed at the hearing, many public defenders labor under excessive caseloads, without adequate investigative or expert resources, and without ability to get additional resources or training. It is hard, if not impossible, to identify a "typical" case and the resources needed to handle it. Some high level felony prosecutions ultimately involve very straightforward facts, legal issues, and consequences while some lower level offenses can involve significant resources including mental health experts or technical experts (such as chemists in driving under the influence cases) and implicate complicated legal issues such as immigration status, eligibility for subsidized housing, and impacts on the ability to be employed in certain positions. Setting a "standard cost" for any offense or class of offenses risks not making adequate resources available.

Lastly, there must be independence. Those providing indigent defense must have the ability to be loyal first, last, and completely to the best interests and decisions of their clients. That need exists both under the rules of professional responsibility for lawyers and for effective representation. The structures of any indigent defense system must be attentive to preventing improper influence through the appointment, management, or compensation processes.

I identify these three bedrock aspects of a robust indigent defense system because I think they inform the discussion of how such a system can and should be structured. I would not argue that a pilot project for vouchers is impossible. In fact, due to conflicts in multi-defendant cases (e.g., drug conspiracies) involvement of private attorneys through appointment is necessary even with a dedicated indigent defense office. That is central to provision of indigent defense in the federal courts under the Criminal Justice Act. In light of that involvement, a hybrid system allowing for client choice is certainly possible. I do think, however, that a system of public defender offices being the primary means of indigent defense has advantages. I think it is easier to obtain the necessary conditions of availability, adequate resources, and independence through those offices. The expertise developed through doing only criminal defense results in better

service to clients more efficiently. The relationships developed with other stakeholders in the criminal justice process promotes the identification of and proposed solution of issues within the system. Public defender offices do not have to solicit clients, handle civil cases, or otherwise be distracted from effective representation of the client. While I recognize that this system is not the only possible system, I do think it is the best system.

Thank you again for the opportunity to address this important issue and these questions. I would be happy to provide any additional information to the Committee at any time.

Sincerely,

Neil Fulton
Federal Public Defender

NF/ng

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Articles

IN SEARCH OF GIDEON'S PROMISE: LESSONS FROM ENGLAND AND THE NEED FOR FEDERAL HELP

Norman Lefstein [a1]

*836 Introduction

The landmark decision of the U.S. Supreme Court in Gideon v. Wainwright [1] was rendered in 1963--just over forty years ago. Guaranteeing the right of legal representation to indigent defendants in state felony prosecutions, the decision launched what might be called this country's "right to counsel revolution" in criminal and juvenile proceedings. [2]

In 1967, in In re Gault, [3] the Supreme Court recognized the right to legal representation in juvenile delinquency proceedings; this was followed in 1972 by Argersinger v. Hamlin, [4] in which the Court extended the right to counsel "to any criminal trial, where an accused is deprived of his liberty." [5] Rejecting the argument that the seriousness of the case should determine whether the right to counsel attaches, the Court held that "absent a knowing, and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." [6]

***837** Although there are decisions in which the Court has refused to extend the right to counsel in criminal cases, [7] these decisions are the exception. Even today, despite a Supreme Court clearly more conservative than during the Warren era, [8] a majority of the Court continues to recognize the enormous importance of counsel. Thus, in 2002--thirty-nine years after Gideon and thirty years after Argersinger--in Alabama v. Shelton, [9] the Court extended Argersinger, holding that a suspended sentence may not be imposed unless the defendant was offered an attorney. No longer is Argersinger's requirement of "actual imprisonment" critical in order for the right to counsel to attach.

In Gideon, Justice Black eloquently explained why lawyers for the accused must be available in criminal cases:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [10]

Just after the above passage, Justice Black quoted often-cited language from Powell v. Alabama, [11] in which the Supreme Court offered additional, compelling justifications for furnishing counsel to the accused:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and ***838** educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [12]

The goal in providing lawyers, as Gideon emphasized, is to assure fairness in our adversary system of justice and prevent the conviction of innocent persons. Yet, forty years after Gideon, this nation is still struggling to implement the right to counsel in state criminal and juvenile proceedings. Sadly, there is abundant evidence that systems of indigent defense routinely fail to assure fairness because of under-funding and other problems. [13] It is also more evident now than ever before that innocent persons, sometimes represented by incompetent, unqualified, or overburdened defense lawyers, are convicted and imprisoned. [14]

On every major anniversary of Gideon, it has become a ritual for national organizations concerned with providing adequate legal representation to recall the extent of the nation's problems in furnishing counsel for the indigent. To commemorate the twentieth anniversary of Gideon, the American Bar Association (ABA) conducted a public hearing, the results of which were summarized in 1982 in a booklet titled, Gideon Undone: The Crisis in Indigent Defense Funding. [15] The ABA report ***839** concluded that the "financing of criminal defense services for indigents is generally inadequate," resulting in numerous problems. [16]

During 2003, the ABA held a series of hearings in various parts of the country in an effort once again to document the many problems involved in furnishing effective indigent defense representation. [17] Similarly, the National Association of Criminal

Defense Lawyers (NACDL) published a special commemorative issue of its magazine --The Champion--titled, The Right to Counsel: Gideon v. Wainwright at 40. [18] In an introduction to the magazine, the Executive Director of NACDL explained that Gideon could not really be celebrated because the resources for "meaningful representation" were unavailable. [19]

This Article derives from my dismay with the continued failure of states and counties to provide truly effective defense services for the poor. In the fall of 1963, just a few months after Gideon was decided, I ***840** represented indigent defendants in criminal cases in Washington, D.C. [20] Since then I have studied defense systems in the United States [21] and assisted in developing standards for providing legal representation of indigents. [22] Currently, I chair both a state public defender commission [23] and an ABA group that deals with indigent defense issues nationwide. [24] After forty years in search of Gideon's promise, I have come to believe that unless there are fundamental changes in this nation's approach to providing defense services to the poor, the struggle to do so will continue indefinitely.

In an effort to explore alternative ways of providing indigent defense representation, I undertook a study of criminal legal aid in England during 2002-2003. [25] What I discovered was a different approach to providing ***841** legal services to the accused, but one that contains certain elements that may be suitable for replication in the United States, as discussed later. [26] Moreover, the description of the English system contained in this Article can be useful to persons in the United States who want to consider alternative modes of delivering defense services to the indigent accused.

One of the ways in which England and the United States differ relates to the source of funding, in that all financing of defense services in England is provided by the central government. [27] In the United States, the change that could have the greatest positive impact on indigent defense would be for the federal government to provide financial support to assist state and local governments in fulfilling their duty to implement the right to counsel. Almost twenty-five years ago the ABA endorsed the creation of an independent, federally funded program to help state and local governments discharge their obligation to provide counsel for indigent defendants. [28] The arguments in support of such a program are just as persuasive today as they were in the late 1970s when the ABA embraced the concept of federal support for indigent defense. It is the same logic, moreover, that has led many members of Congress to support adoption of an Innocence Protection Act applicable to death penalty prosecutions in state courts. [29]

***842** Before discussing the English system of criminal legal aid and lessons we may want to borrow from England, I first summarize the current state of indigent defense in the United States and comment on the provision of adequate defense representation and its importance in preventing wrongful convictions. At the end of the Article, I return to the subject of federal financial support for defense services.

I. Criminal Defense in the United States

A. Structure of Defense Service Programs

Neither in Gideon nor in any of its other right to counsel decisions has the U.S. Supreme Court discussed the way in which defense services for the indigent should be structured nor the unit of government responsible for paying lawyers. [30] The expense of providing counsel also was ignored in Gideon, but in several subsequent right to counsel decisions the Court demonstrated some concern both for the cost of counsel and the availability of sufficient numbers of lawyers to provide the necessary representation. For example, in a footnote in Argersinger, responding to comments in Justice Powell's concurring opinion, the majority said that it was satisfied that "the Nation's legal resources are sufficient to implement the rule we announce today." [31]

While the majority in Argersinger was correct--there were then and there are now sufficient numbers of lawyers to provide the required legal representation [32] --the cost of providing counsel is quite another matter. In his concurring opinion, Justice

Powell labeled "available funding," ***843** among others, as an "acute problem" in making counsel available for indigents in misdemeanor cases.[33] In a footnote, Justice Powell elaborated: "The successful implementation of the majority's rule would require state and local governments to appropriate considerable funds, something they have not been willing to do."[34] Similarly, thirty years later--in Alabama v. Shelton--the Court's majority implicitly conceded that some states might be "unable or unwilling" to shoulder "the costs of the rule we confirm today."[35] The most extensive discussion in a Supreme Court opinion of compensation and the right to counsel is contained in Justice Blackmun's dissent in McFarland v. Scott,[36] dealing with the right to counsel in capital cases. There Justice Blackmun bitterly complained that "the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense."[37]

When considered together, the U.S. Supreme Court's historic decisions, designed to implement the federal Constitution's Sixth Amendment right to effective assistance of counsel, constitute an enormous unfunded mandate imposed upon the states.[38] It should come as no surprise, therefore, that not only have states resisted adequate funding of indigent defense systems, but they also have differed about whether state ***844** or local jurisdictions should provide funding and have developed a variety of delivery methods.

A review of the fifty states reveals that about half fund all indigent defense services at the state level, whereas the rest have predominantly county-funded systems, although in almost all of these some state funds are provided.[39] The delivery methods include (1) salaried defenders employed either in a public agency or by a private organization; (2) assigned counsel appointed either ad hoc or systematically and compensated on an hourly basis or paid a flat fee per case; and (3) attorneys compensated pursuant to contracts in which they agree to handle all or some of the cases in the jurisdiction, sometimes for a flat fee.[40] Frequently these delivery models operate simultaneously in the same jurisdiction.[41] Moreover, when jurisdictions rely primarily on public defenders, private attorneys invariably participate, especially in order to represent co-defendants in multiple defendant cases and in other conflict of interest situations.[42]

*845 B. Adequacy of Funding

Despite many differences among states in funding and delivery of indigent defense services, it is still possible to generalize about the availability and quality of such services nationally. While the country as a whole has made considerable progress in providing legal representation since Gideon was decided,[43] overall this nation's systems for providing counsel to the indigent are still very inadequate.

When Janet Reno was U.S. Attorney General, the Department of Justice (DOJ) held unprecedented national symposia on indigent defense in 1999 and 2000.[44] The invited guests at these Washington, D.C. conferences were from all fifty states and included judges, prosecutors, defense lawyers, academics and others.[45] The DOJ's final report on the 2000 conference summarized presentations in which speakers emphasized a lack of adequate resources for indigent defense, insufficient fee rates for assigned counsel, high caseloads of public defenders, and lack of independence for the defense function, among many other problems.[46]

Also, during Attorney General Reno's administration, the Bureau of Justice Assistance (BJA) of the DOJ commissioned two special monographs dealing with problems in indigent defense. The first of these, issued in 2000, deals with contracts for defense services and recounts examples in which contract systems posed significant problems because of insufficient funding.[47] The second report, dealing with defender workloads, was published in 2001.[48] There, the authors observe that "[e]very day, defenders try to manage too many clients. Too often, the quality of service suffers. . . . Individual attorneys who contract to accept an unlimited number of cases in a given period often become overwhelmed as well. Excessive workloads even affect court-appointed attorneys."[49]

***846** The conference report of the national symposia in 2000, as well as the two monographs dealing with the delivery of indigent defense services, is similar to many other efforts to summarize the state of indigent defense in the United States. In 1988, for example, the ABA's Special Committee on Criminal Justice in a Free Society issued a report titled Criminal Justice in Crisis. [50] The committee concluded that "[i]n the case of the indigent defendant, the problem is . . . that the defense representation is . . . too often inadequate because of underfunded and overburdened public defender offices." [51] Further, the report observed that "as a society, [we are] depriving the system of the funds necessary to ensure adequate defense services." [52]

There also are numerous law review articles in which the deplorable state of indigent defense has been exposed, emphasizing the connection between lack of adequate funding and the quality of representation. [53] ***847** The grossly inadequate funding for indigent defense in capital cases has been a special problem, and this story has been documented as well. [54]

The fees paid to assigned counsel for representation of defendants in capital and non-capital felony cases differ from state to state, although in all states the fees are quite modest, so that attorneys willing to represent the indigent accused are forced to do the work at a significant discount. [55] Standard hourly billing rates for lawyers in private practice nationwide average $265 per hour for equity or shareholder partners; $247 per hour for non-equity partners; $179 per hour for associate lawyers; and $178 per hour for staff lawyers. [56] Although fees at these levels are typically paid to private attorneys who represent the federal government in civil matters, [57] they are not available in either federal or state criminal courts ***848** when a person's liberty is at stake. In state felony prosecutions--whether a death penalty case or a non-capital felony--the fees paid are normally much less than $90 per hour [58] and funds are not provided to cover attorney overhead expenses. [59] Many states, moreover, have caps on the amount that can be earned in a particular case. [60] Although after a case is over, most states permit the fee cap to be exceeded with permission of the trial judge, this places the defense lawyer in the unenviable position of seeking the court's permission for additional compensation and not knowing before completing the work whether excess compensation will be authorized. [61]

The ABA Standards for Criminal Justice recommend that lawyers who provide defense services should receive "a reasonable hourly rate." [62] Although "reasonable" is not defined, the commentary to the standard cites the 1967 report of President Lyndon Johnson's crime commission, which suggested that defense counsel's fee should be "comparable to that which an average lawyer would receive from a paying client for performing similar services." [63] As the commentary to the ABA standards explain, ***849** "where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of representation often suffers when adequate compensation for counsel is not available." [64]

Symptomatic of the enormous problems confronting indigent defense systems is the remarkable amount of litigation throughout the country concerning the delivery of indigent defense services. [65] During the past twenty-five years, there have been cases dealing with the adequacy of compensation paid to lawyers, [66] excessive caseloads, ***850** [67] and challenges to systems of providing counsel. [68] Other litigation has dealt with whether it is the state's duty to pay for indigent defense or whether the cost must be borne by the county. [69] There is even one case in ***851** which a court's regularly appointed lawyers went on strike in an effort to obtain higher compensation rates, which they believed would lead to better representation and make it possible for them to accept fewer appointed cases. However, their action ultimately was held by the U.S. Supreme Court to be a violation of antitrust laws. [70]

During 2002-2003, developments in a number of states reflected the constant problems that confront the delivery of indigent defense services. As you review the following potpourri, notice that these examples are from all parts of the country and are

of recent origin; these are not events that occurred years ago, just after Gideon or Argersinger were decided. In each instance, moreover, the problems cited are due either in whole or in part to inadequate funding. [71]

In May 2002, The Spangenberg Group, well known for its expertise in the study of indigent defense services, completed a lengthy, first-ever report about defender services in Pennsylvania. [72] Extensive data were ***852** gathered on-site in twelve of the state's sixty-seven counties, including four of the state's most populous. [73] The study concluded that "under-funding of indigent defense has resulted in inadequate attorney performance and poor morale among public defenders and conflict attorneys." [74] The report further observed that "Pennsylvania suffers from a lack of any centralized authority to provide coordinated planning, oversight or management of the defense function." [75]

In December 2002, the Chief Justice's Commission on Indigent Defense in Georgia issued its final report. [76] The Commission, after two years of extensive study, concluded that Georgia was "not providing adequate funding to fulfill the constitutional mandate that all citizens have effective assistance of counsel available when charged with a crime." [77] Further, the Commission noted that there was a lack of state-wide oversight of indigent defense; [78] a failure "to impose minimum eligibility requirements" for attorneys who defend indigents; [79] a lack of funds for expert witnesses and investigators; [80] and a lack of "an effective approach to providing counsel for juvenile defendants." [81] The Atlanta Journal-Constitution's headline about the report was succinct: "Indigent Defense Rates F." [82] The article pointed out that the overhaul recommended by the commission will "cost the state tens of millions of dollars at a time when the government is cutting back because of falling revenues." [83]

***853** In November 2002, a lawsuit was filed by associations of criminal defense lawyers in Detroit's Wayne Circuit Court, challenging the fees paid to assigned counsel. [84] The fee schedule, one of the lowest in the nation, allocates only $250 for the investigation and preparation of felony cases, including even the most serious cases such as first-degree murder. [85] The lawsuit alleges that lawyers who accept appointments at this fee rate are discouraged from doing all that is required to adequately represent their clients, tend to take more cases than they should, and that some lawyers will simply not accept cases for these modest fees. [86] In fact, the number of defense lawyers available to accept court-appointed cases in Wayne County has fallen from 465 in 1999 to 317 in 2002. [87] The court's chief judge expressed sympathy for the defense lawyers, but said that the requested fee increase to $90 per hour would cost an additional $11 million, and the court's finances are not sufficient to cover this. [88]

At a hearing on indigent defense conducted during the ABA Midyear Meeting in February 2003, the Chief Appellate Defender of Montana told of deficiencies in that state's system, noting a lack of uniformity in quality and oversight of the work performed by defense counsel. [89] He referred to two recent convictions overturned in Montana due to DNA evidence, explaining that in both cases the defense attorneys did little to challenge bogus expert testimony presented by the state. [90] In February 2002, the American Civil Liberties Union (ACLU) filed a lawsuit against Montana and seven counties, alleging that due to a "failure to supervise and fund indigent defense [programs] adequately . . . [attorneys for indigent defendants] cannot confer with clients in a meaningful manner, . . . conduct necessary pre-trial investigations, secure necessary expert assistance, ***854** or prepare adequately for hearings or trials." [91] The lawsuit asks that an indigent defense system be put in place that complies with the U.S. and Montana Constitutions. [92]

At this same hearing during the 2003 ABA Midyear Meeting, the chief criminal judge of the King County Superior Court in Seattle testified that there is much that his county must do "before the promise of Gideon v. Wainwright has been fulfilled." [93] He explained that "[t]he perennial problem for all public defenders and legal aid services is funding and caseload levels, and Washington state is no exception in this regard." [94] For example, he noted that the Washington legislature had adopted caseload standards, which also are endorsed by the state bar association, but that "the caseloads in many jurisdictions far exceed this

standard." [95] In addition, the chief judge noted that in misdemeanor cases assigned counsel are not appointed until well after the defendant's first court appearance, with some defendants pleading guilty without ever speaking to a lawyer, and that there is not an effective system for monitoring assigned counsel and defender agencies to determine if their clients are being effectively represented. [96]

Also, in February 2003, a trial court judge in New York City held that the assigned counsel fee rates in Family Court, Criminal Court, and the Criminal Term of Supreme Court--$40 per hour for in-court work and $25 per hour for out-of-court work--were unconstitutional. [97] Based upon the evidence of forty-one witnesses and 435 exhibits, he concluded that
1) assigned counsel are necessary; 2) there are an insufficient number of them; 3) the insufficient number results in denial of counsel, delay in proceedings, excessive caseloads, and inordinate intake and arraignment shifts; further resulting in rendering less than meaningful and effective assistance of counsel, and impairment of the judiciary's ability to function; and 4) the current assigned counsel compensation scheme . . . is the cause of the insufficient number of assigned counsel. [98] ***855** The judge was especially critical of the "pusillanimous posturing and procrastination of the executive and legislative branches" of New York's state government, which had failed for years to increase assigned counsel fee rates. [99] To remedy the situation, the court ordered that fee rates be increased to $90 per hour. [100]

On December 3, 2002, the Capital News Service in Maryland reported that the Office of Public Defender in Maryland was "so bogged down in cases that it would have to hire more than 300 attorneys just to meet the American Bar Association's minimum standard." [101] According to the head of the office, "[t]he average Maryland public defender can only dedicate eight minutes a day per case . . . ." [102] Despite significant caseload increases, the size of the public defender's office has not increased during the past five years. [103] The article also noted that lawyers employed by the Attorney General's Office are better compensated than public defenders, prompting some defenders to leave the office ***856** in order to join the Attorney's General's. [104] Moreover, assigned counsel fee rates in Maryland are $35 per hour for in-court work and $30 per hour for work performed out-of-court. [105]

In January 2003, the ABA Journal reported that due to a state budget shortfall, the Oregon judicial department was required to reduce its expenditures by $13.6 million. [106] Because indigent defense is a line item in the budget of the state's judicial department, this "will drastically reduce the indigent defense fund." [107] An official of the Oregon state bar acknowledged that "legal and constitutional issues were likely to be raised." [108] In February, the ACLU in Oregon filed an original mandamus action in the Oregon Supreme Court challenging cuts in funding necessary to compensate attorneys to represent indigent defendants from March 1 through June 30, 2003. [109] The lawsuit also sought restoration of $10.1 million previously cut from the Judicial Department's Indigent Defense Account. [110] In March 2003, the Oregon Supreme Court denied the ACLU petition. [111]

Also, in March 2003, the NAACP Legal Defense and Educational Fund, Inc. issued a report summarizing the terrible plight of criminal and juvenile representation for the poor in Mississippi. [112] As the report notes, it is not the first time an organization has attempted to point out the state's shortcomings: "Reports commissioned by the Mississippi Bar Association in 1995, 1997, and 1998 found that 'funding for indigent defense in Mississippi is totally inadequate,' and 'results in poor quality service and representation.'" [113] Among other problems, the report cites lengthy delays before lawyers are appointed and consult with their clients, high caseloads for court-appointed lawyers who operate with no standards or supervision, and a lack of investigations and other kinds of basic support ***857** for the defense function. [114] The report calls for a number of reforms, including "adequate state funding" for indigent defense, [115] a "statewide indigent defense oversight entity" [116] to "monitor performance" of counsel, [117] and "[m]aximum caseload guidelines." [118]

In January 2003, former Governor George Ryan of Illinois announced his now famous decision to commute the death sentences of all persons on that state's death row. [119] His action was prompted by his conviction that the capital punishment system in Illinois did not effectively sort out the innocent from the guilty and by the fact that at least seventeen innocent persons had been sentenced to die by Illinois courts. [120] In announcing his decision, the former governor stated that in addition to the seventeen defendants who were freed during his tenure, "there were at least thirty-three other people wrongly convicted on murder charges and exonerated. . . . How many more cases of wrongful conviction have to occur before we can all agree that the system is broken?" [121] The former governor also noted that there were thirty-three persons on death row in Illinois who were "represented . . . at trial by an attorney who had later been disbarred or at some point suspended from practicing law." [122]

***858 C. Wrongful Convictions**

Since Gideon was decided in 1963, it has become clear beyond any doubt that innocent persons are regularly convicted in the nation's criminal courts and are sometimes even sentenced to death. When Powell v. Alabama [123] was decided in 1932, the U.S. Supreme Court spoke about the difficulty of innocent persons proving their innocence in the absence of counsel, [124] but until recent years I suspect that most persons believed that innocent persons rarely were convicted. Now, however, we know that wrongful convictions occur with some frequency, which ought to make government officials especially interested in making certain that adequate defense services are provided to the indigent. Not only is this important to assure that innocent persons are not imprisoned, but also because every wrongful conviction means that the crime's real perpetrator remains at large and able to commit new offenses.

The evidence of wrongful convictions can be found in a variety of sources, including law review articles, [125] books, [126] and websites. [127] There is also a notable report issued in 1996 by the National Institute of Justice of the DOJ, which covers twenty-eight cases of convicted defendants who were cleared due to DNA evidence. [128] In twenty-three of the cases, victims ***859** of crimes had positively identified the defendant as the perpetrator, clearly demonstrating the fallibility of eyewitness identification. [129]

At the time this Article was completed, the website of the Innocence Project recounted the stories of 142 persons, convicted of both capital and non-capital crimes, who had been exonerated due to DNA evidence. [130] Another website contains a list of more than 300 persons wrongfully convicted, a list of the thirty-eight states in which the wrongful convictions occurred, and the basis for classifying a case as one of wrongful conviction. [131] The painstaking research of Radelet and Bedau documents the cases of nearly 400 innocent persons who were convicted, some of whom were sentenced to death. [132] Another study estimates that even if the error rate in serious felony cases was only one-half of one percent, the number of wrongful convictions annually is as high as ten thousand nationwide. [133]

The studies of wrongful convictions cite a number of reasons why mistakes occur. In addition to eyewitness errors, there are informants who give false information, police-induced false confessions, and various other kinds of police and prosecutorial misconduct. [134] Of course, another ***860** major factor that contributes to wrongful convictions is the inadequacy of legal representation. [135]

The case of Jimmy Ray Bromgard, who was released in the fall of 2002 after serving fifteen years in a Montana prison, provides a vivid illustration of what can happen when defense representation is inadequate. [136] In 1987, a brutal rape of an eight-year-old girl occurred in Billings, Montana. Bromgard, who was then eighteen years old, was arrested because a policeman believed that he resembled a composite sketch of the girl's assailant. [137] The victim was never certain that Bromgard was her attacker; prior to trial she said she was "60 or 65 percent sure." [138] At trial, she was asked to rate her confidence in her identification

of Bromgard, and she replied, “I am not too sure.” [139] Bromgard's lawyer, who was under contract with the county to provide defense services for a flat fee regardless of the number of hours that he worked on a case, failed to challenge the girl's courtroom identification of Bromgard, undertook no investigation, gave no opening statement, did not prepare a closing argument, and failed to file an appeal in the case. [140] The lawyer also failed to object when the state's expert witness testified, without scientific basis, that the chances were only one in one hundred thousand that scalp and pubic hairs found at the crime scene were not Bromgard's. [141] But for DNA evidence, Bromgard would still be in a Montana prison today.

Neither the number of mistakes attributable to defense counsel errors nor the exact number of wrongful convictions can ever be known. For policymakers, however, it ought to be sufficient that there are many wrongful convictions and that one of the most important ways to avoid mistakes is to have skillful, well-trained defense lawyers. Former Attorney General Janet Reno stated it well: “[i]n the end, a good lawyer is the best defense against wrongful conviction . . . .” [142] But in order to have good lawyers, the country must be willing to pay for them.

*861 II. Criminal Defense in England

Since the legal system in the United States is derived from England, it might be expected that our systems of public defense would resemble each other. Yet, as an English scholar who has studied both the English and U.S. systems has said, “[A]merican readers may note with wonderment how it is that two cultures, which share so much in their common law origins and procedures, should have diverged so widely in the practical application of broadly similar principles of justice.” [143]

My own study of criminal defense in the United States and England confirms that there are numerous and significant ways in which our systems differ and that the comparisons are unflattering to the United States. An examination of the historical development of public defense in England is useful in understanding the country's current system and how it achieved, in the words of one of England's experts on legal aid, “what is probably the most comprehensive system of state-funded legal assistance to criminal suspects and defendants in the world.” [144]

A. Brief History of Criminal Legal Aid

In England, unlike the United States, furnishing legal counsel to the poor in both criminal and civil cases has long been regarded as the duty of the central government, much the way the English government provides health care for its citizens through the National Health Service. [145] Moreover, while the right to counsel in the United States has developed through court decisions, [146] legislation has been the vehicle in England. [147]

The first legislation to fund legal services in Britain--the Poor Prisoners' Defence Act--was enacted in 1903. [148] However, the law “was limited to those of insufficient means who were on trial on indictment for serious offences, and then only in cases where it appeared to the court ‘desirable in the interest of justice’ that they should be legally represented.” [149] Although the scope of defendants covered was somewhat expanded ***862** in 1930, payments to lawyers under that act have been characterized as inadequate. [150]

Then, in 1949, well before most of the U.S. Supreme Court's landmark right to counsel decisions, [151] the Legal Advice and Assistance Act was passed. [152] This law called for legal representation at public expense for all persons of insufficient financial means in Magistrates' Courts, where the vast majority of criminal cases originate and are prosecuted. [153] The law also provided for counsel whenever the court deemed it to be “in the interests of justice,” as well as “reasonable” payments to lawyers who would be paid from government funds. [154] In addition, the act extended legal services to civil cases and was regarded by the

Labor government, which backed the legislation, as "the 'second arm of the Welfare State' (the first one being the National Health Insurance)." [155]

During the 1960s, partly because of differences in the ways courts applied the "interests of justice" test for providing counsel, the Departmental Committee on Legal Aid in Criminal Proceedings (known as the Widgery Committee, after the name of its chairman) was formed. [156] Among the Widgery Committee's recommendations was a series of criteria for determining when legal aid should be granted in Magistrates' Courts. [157]
Thus, legal aid would be made available only where the defendant was in "real danger" of imprisonment or loss of employment or reputation if convicted; where the defence involved substantial questions of law or tracing and interviewing witnesses; or because representation of the defendant was necessary to conduct cross-examination of prosecution witnesses or in the interest of someone other than the defendant. [158]

The Widgery Committee also rejected "an American-style public defender service" in favor of continuing to have lawyers bill the government for their legal services on a case-by-case basis. [159] Although these recommendations were adhered to for many years, the compensation scheme for lawyers has now been changed and a few public defender offices ***863** recently were established, as explained later. [160] On the other hand, another of the committee's recommendations has endured, namely, that courts should not assign solicitors to represent defendants, but instead should permit defendants to select their own counsel. [161]

During the 1970s and 1980s, the number of criminal cases increased, as well as the volume of cases in which counsel was authorized by the courts to provide representation under what became known as the "Widgery criteria." [162] In addition, during the 1980s, two "duty solicitor" programs were introduced in which solicitors were made available to assist defendants wanting representation in police stations and Magistrates' Courts.

In 1982, in Magistrates' Courts, a duty solicitor scheme, originally organized by local law societies, [163] became a national program. [164] Thus, steps were taken to assure that in all Magistrates' Courts eligible defendants would have prompt access to the legal services of a duty solicitor, although defendants remained free to select their own counsel if they preferred. [165]
Then, in 1984, pursuant to the Police and Criminal Evidence Act (PACE), which dealt with a number of police procedures, a national duty solicitor scheme was introduced to ensure that lawyers would be present in police stations before and during police interrogations. [166] Like duty solicitors in Magistrates' Courts, duty solicitors in police stations were to be paid by the government from legal aid funds. [167] In addition, at government expense, since 1959 persons who qualify under a means test have been able to obtain legal "advice and assistance" from solicitors ***864** concerning criminal law matters even though the persons have neither been arrested nor charged with a crime. [168]

Although government funds were used to pay solicitors and barristers who provided defense services, the country's legal aid program was administered for many years by The Law Society, [169] which is "the professional body for solicitors in England and Wales" . . . [that seeks] to improve access to the law." [170] In 1988, however, the government created the Legal Aid Board (LAB), which became responsible for the administration of legal aid under the jurisdiction of the Lord Chancellor's Department. [171]

Under the LAB during the 1990s, significant changes were introduced, which have shaped England's current system of legal aid. First, in lieu of reimbursing lawyers for their time based upon their hourly billing rates, the LAB adopted standard fees for some legal work. [172] In addition, the LAB introduced quality standards for solicitors, [173] Transaction Criteria for use in auditing law firms, [174] and, on a voluntary basis, began to "franchise" firms of solicitors based on "their adopting improved procedures for case management and information-recording on cases." [175] A system for accrediting police station representatives also

was begun, although the actual accreditation testing continues to be conducted under the supervision of the Law Society by independent assessment organizations. [176] Finally, much of the bureaucracy responsible for administering ***865** the current legal aid program was organized under the LAB since by 1991-1992 the board already had a staff of 1,300 persons. [177]

However, the government became increasingly alarmed about the amount of public funds being spent on legal aid. [178] Thus, on several occasions government ministers and reports discussed the growth in the cost of legal aid and the need to do something about the expenditures. This is likely surprising to American readers since in the United States state governments almost never spend sufficient funds on public defense and government officials rarely, if ever, complain that too much money is being spent to defend the poor.

In 1992, in an address to the Law Society, the then Lord Chancellor expressed concern about civil and criminal legal aid costs:

> Expenditure on legal aid is now over £1.1 billion gross. . . . The net cost to the taxpayer in 1991-92, after allowing for legal aid contributions and costs recovered, was more than £900 m. The net figure . . . will exceed £1 billion during [1992-93], more than double what it was a mere four years ago. . . . This rate growth, and that's what I'm speaking of, cannot be allowed to continue. Every extra pound for legal aid means a pound less for the NHS [National Health Service], for schools, for social security, or for the infrastructure of the economy. [179]

Although in the 1990s eligibility for legal services in civil cases was restricted and fees for solicitors in criminal cases effectively reduced, legal aid expenditures continued to climb. [180] In 1996, therefore, the Lord Chancellor's Department presented a White Paper to Parliament recommending a significant overhaul of legal aid. In this report, Striking the Balance: The Future of Legal Aid in England and Wales, [181] the government again commented on the cost of legal aid and sketched the general direction of future changes:

> In 1995-96, legal aid cost the taxpayer £1.4 billion, twice as much as five years ago. It is forecast to rise by more than £100 million in each of the next three years. More cases, inflation and the development of new services account for part of that steep increase. However, the average cost of legal bills continues to rise faster than inflation. . . . The future of legal aid must be seen in the context of the wider pressures on public spending. The Government is committed to maintaining and improving the competitiveness of the national economy. We are therefore determined to contain overall public spending. . . . The Government cannot ***866** be expected to increase legal aid's share of taxpayer's money. . . . This means that the rapid expansion of legal aid in the past cannot be allowed to continue, and any improvements in the scheme that call for resources will in the future have to depend to a very considerable extent on getting more for the money available than we do now; and/or being able to redirect existing resources. It also follows, more bleakly, that if the cost of legal aid continues to rise, it might well become necessary to take steps that would reduce the level and perhaps quality of services. [182]

According to the White Paper, the changes to legal aid would be “radical . . . [because] [n]othing less will do.” [183] To counter ever-rising legal aid costs, the report proposed the extensive use of contracts with solicitors while simultaneously promoting “quality” in criminal legal aid. [184]

The Conservative Government issued Striking the Balance in 1996, but it was left to the new Labor Government, elected in 1997, to make further changes in England's system of legal aid. Legislation to do so was accompanied by a second White Paper, which dealt with numerous criminal justice issues, including legal aid. Like its predecessor, Modernising Justice [185] addressed the cost of legal aid and the objectives in changing the system.

Thus, the report compared amounts spent on civil and criminal legal aid between 1992-1993 and 1997-1998, noting that there had been a forty-four percent increase in legal aid costs compared to a thirteen percent increase in inflation. [186] The report's greatest concern was reserved for fees paid for defense representation in Crown Court, in which the most serious and complex criminal cases are prosecuted. [187] In these courts, the cost increase was 58% over the same five-year period, although the number of new cases each year remained unchanged. [188] The report also pointed out that "[i]n 1996-97, 42% of legal aid spending in the Crown Court (almost £116 million) was on just 1,000 (1%) of the cases; an average of £115,627 per case." [189]

Nevertheless, the report declared that, in changing the criminal legal aid system, defendants must "receive a fair hearing" and the defense ***867** must be "on an equal footing with the prosecution." [190] Moreover, the report expressed support for the independence of the defense function, observing that the "the defence must be free from influence by the prosecution or the courts." [191] At the same time, the report proclaimed the government's commitment to achieving its objectives "at an affordable cost to the taxpayer, and in a way that secures services of the right quality, for the best possible value for money." [192]

B. Access to Justice Act and the Legal Services Commission

The bill to revamp the legal aid scheme in England was introduced in Parliament in 1998 on the same day that Modernising Justice was published by the government. [193] The Access to Justice Act, [194] enacted by Parliament in 1999, established the Legal Services Commission (LSC) under the jurisdiction of the Lord Chancellor, who is authorized to appoint the commission's members. [195] The commission consists of two parts: the Community Legal Service to oversee the provision of civil legal aid and the Criminal Defence Service (CDS) for the purpose of "securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require." [196] In April 2001, the LSC replaced the LAB and assumed ***868** responsibility for England's programs for criminal and civil legal aid. [197]

The Access to Justice Act also eliminated a means test in order to qualify for criminal legal aid in both Magistrate and Crown Courts. [198] During 1997-1998, when a means test was used and defendants sometimes ordered to pay for their representation, the amount collected was £6.2 million, whereas the cost of assessing and collecting these monies was about £5 million. [199] In the Crown Court, however, pursuant to the new law, at the end of a case a special CDS unit may investigate a convicted defendant's financial capability and a judge may order the defendant to contribute to the cost of his or her defense. [200] The government's goal in eliminating a means test was do away with a system regarded as "ineffective" and "wasteful," while assuring that a wealthy person convicted of an offense would still be required to pay something towards their defense. [201] Prior to the new law, less than one percent of defendants were refused legal aid for financial reasons. [202]

As a result of these changes, there is little retained criminal defense work in England. Several solicitors told me that the only persons who retain private counsel now are celebrities, who do not want to be seen relying upon legal aid, and defendants charged with corporate misconduct. [203] In fact, the Head of Public Legal Services for the Lord Chancellor's Department commented that more persons retain private physicians in lieu of the National Health Service than defendants in criminal cases retain private lawyers. [204]

Given its responsibilities for civil and criminal legal aid throughout England, the LSC's administrative staff is now approximately 1500 persons, located in the commission's principal office in London and in ***869** twelve regional offices. [205] The LSC budget for administration in 2001-2002 was £71.4 million. [206]

C. Criminal Defence Service

The CDS is authorized to enter into contracts with persons to provide representation and to employ persons to provide representation. [207] The latter provision is the authority for the CDS to establish England's first ever public defender offices, which are discussed later. [208]

The CDS is also authorized to "accredit" those providing its services, to monitor their performance, and to withdraw accreditation because of "unsatisfactory quality." [209] At the same time, both the CDS and Lord Chancellor are admonished to "aim to obtain the best possible value for money." [210] In addition, the statute guarantees individuals the right to select their own legal representatives, [211] but as a practical matter the representatives selected must be persons approved by the CDS to provide services and thus eligible to receive payments for doing so.

1. Funds for the CDS

From an American perspective, since government monies for public defense in the United States sometimes run out, surely one of the most intriguing aspects of the Access to Justice Act is the following provision: "The Lord Chancellor shall pay to the Commission such sums as are required to meet the costs of any advice, assistance and representation ***870** funded by the Commission as part of the Criminal Defence Service." [212] Does this mean that in any given fiscal year adequate funds for criminal defense representation in England and Wales will be available?

Historically, criminal legal aid in England has been a "demand-led" program, in which the government was duty bound to find the requisite funds to cover its cost. [213] The above-quoted provision is intended to continue the government's promise to appropriate sufficient funds for criminal defense. In his treatise on the justice system, Lord Windlesham reprints a lengthy letter that he received from the then Lord Chancellor when the Access to Justice Act was passed by Parliament. [214] The Lord Chancellor's letter discusses this provision of the Act, explaining that if "demand rises ahead of supply" he either would seek to find additional resources from within his own budget or ask for more monies from the Exchequer. [215] As the Lord Chancellor elaborated, "[o]ur international obligations require that legal representation is available to all those charged with a criminal offence. This means that the CDS will have a prior claim on the available funding." [216] The reference to "international obligations" refers to the European Convention on Human Rights, which provides that a person has a right to "legal assistance" to defend himself and "to be given it free when the interests of justice so require." [217] Although this European Convention was signed by the United Kingdom in 1951, it was incorporated into "the Human Rights Act 1998" and thus "converted into an enforceable Convention right in the British courts . . . ." [218]

The overall level of funds required by the CDS is dependent to a considerable degree on the level of fees paid to lawyers pursuant to contracts. The more lawyers are paid for their legal services, the more the Lord Chancellor's allocation for criminal legal aid must increase. On the other hand, if the numbers of magistrate representation orders increase beyond expectations--a matter beyond the Lord Chancellor's control -- ***871** this provision assures that sufficient funds to compensate lawyers will be available. [219]

2. Specialist Quality Mark

As noted earlier, the LAB introduced franchising of criminal legal aid providers on a voluntary basis. [220] In Striking the Balance, as well as in Modernising Justice, the government promised that contracts with solicitors would be used extensively as a means of controlling the cost of legal aid. [221] The Access to Justice Act, moreover, authorized the new LSC to enter into contracts for the provision of legal services. [222] Now, solicitors can perform criminal defense work and be compensated by the government

only if they are first awarded a "general criminal contract." [223] But in order to execute a contract with the LSC, solicitors must first satisfy the "specialist quality mark" (SQM), which applies both to criminal law and civil law practitioners. [224]

To explain the SQM to American readers is a difficult task simply because its requirements are totally different from those that have been devised in the field of public criminal defense in the United States. [225] To be sure, there are a wide variety of standards related to indigent defense in the United States dealing with a myriad of subjects. [226] But the vast majority of U.S. standards are not binding on the lawyers who provide representation [227] and few of them contain requirements similar to those necessary to qualify for the SQM designation.

In April 2002, the LSC published two lengthy, explanatory books about the SQM, one of which is titled "Specialist Quality Mark Standard" [228] and the other titled "Specialist Quality Mark Guidance." [229] The ***872** material in the "Standard" volume is described as "mandatory" in order for solicitors to obtain the SQM designation and contract, whereas the material in the "Guidance" volume is "provided to assist you in complying with the requirements" and "to provide background detail about some of the requirements or definitions." [230]

According to the "Standard" volume, the "prime purpose [of the SQM is] ensuring [that] services are well organised and managed, giving quality advice and client care." [231] Further, the volume explains that the SQM uses "a well-run organisation as a proxy for the quality of advice." While the LSC claims that it has developed the SQM "with regard to the need to reduce bureaucracy wherever possible and to focus more directly on the quality of advice, competence of advisers and client care," [232] many solicitors are extremely critical of the LSC and its regulations. [233]

To obtain the SQM designation, solicitors must satisfy requirements related to the following seven "key quality areas, known as the Quality Mark Framework": [234]

Access to Service: Planning the service, making others aware of the service and non-discrimination;

Seamless Service: Signposting and referral to other agencies, and awareness of any appropriate CLS [235] partnership arrangements;

Running the Organisation: The roles and responsibilities of key staff, and financial management;

People Management: Equal opportunities for staff, training and development, supervision and supervisors' standards;

***873** Running the Service: Case management, independent review of files and feedback to caseworkers;

Meeting the Clients' Needs: Providing information to clients, confidentiality, privacy and fair treatment, and maintaining quality where someone else delivers part of the service; and

Commitment to Quality: Complaints, other user feedback and maintaining quality procedures. [236]

Grouped under the above seven areas are eighty-two separate requirements that firms of solicitors must fulfill in order to quality for the SQM designation. [237] But since virtually each of the requirements contains multiple sub-parts, in reality there are literally hundreds of requirements that must be satisfied. [238] The following examples illustrate SQM requirements.

Under "Access to the Service," solicitors must disclose their business plan, including information about how their services will be promoted and the quality mark logo of the CDS displayed. [239] Solicitors must also adopt a policy which makes it clear that the firm does not discriminate in providing services "on the grounds of race, colour, ethnic or national origins, sex, marital status or sexual orientation, disability, age or religion." [240]

To comply with the requirement of a "Seamless Service," there must be a "process . . . to ensure that records for all referrals identify, as a minimum, the client or case, who made the referral, the matter type, to whom the client was referred (justifying the selection of any service without a Quality Mark), and the reason for the referral . . . ." This provision recognizes that sometimes clients require the services of other lawyers, including civil practitioners or government and private agencies.

To satisfy requirements related to "Running the Organisation," there must be documents that show current jobs in the organization and lines of responsibility, and the names and titles of those responsible for the organization's management and financial control. [241] This section also requires disclosure to the CDS "of any adverse findings made or formal investigations undertaken by the Office for the Supervision of Solicitors (OSS) . . ." and "all professional indemnity claims paid out (in the last six years) . . . ." [242] The law firm is also called upon to demonstrate that it is ***874** capable of rendering independent legal advice "in the client's best interests." [243]

"People Management" requires a written non-discrimination policy governing "the selection, treatment and behaviour of staff"; [244] documents containing the duties of staff and their requisite skills and experience; [245] a policy covering the behavior of staff towards one another; [246] the organization's process for recruiting new staff; [247] an orientation program for new staff, [248] and staff training of at least six hours in each twelve-month period. [249] In addition, there are extensive rules covering supervisors, including their prior experience and training in the area of law in which they are providing supervision, [250] and each staff member must be reviewed annually and made the subject of a written appraisal. [251] The regulations also require that the organization document "that time is designated for supervision and . . . justify the number of caseworkers supervised by each supervisor." [252] The size of a solicitor's caseload is dealt with as a matter of supervision, as the rules require that "[s]upervisors must be able to demonstrate that staff are allocated only work that is appropriate for their role . . . and that it falls within their limits, in terms of skills, experience and available time." [253]

Under "Running the Service," there are regulations concerning file management (e.g., "identifying potential conflicts of interest; maintaining a backup record of key dates; monitoring files for inactivity at pre-determined intervals"); [254] and procedures for the review of files (e.g., solicitors must be able to document and justify the number and frequency of files to be reviewed). [255]

To comply with requirements for Meeting the Clients' Needs, solicitors must record and confirm information offered to clients [256] (e.g., "[t]he ***875** requirements or instructions of the client; [t]he advice given and/or action to be taken by the organisation"); [257] demonstrate how they will deal with complex cases (e.g., solicitors must prepare a case plan, give it to the client, and periodically review and update it); [258] and they must have written procedures related to confidentiality. [259]

To satisfy the "Commitment to Quality," there must be procedures for dealing with complaints, including giving information to clients about what they should do if they have a problem with the services provided. [260] There must also be a "client satisfaction feedback procedure," [261] a quality manual that documents all procedures and policies of the organization, [262] and a person designated "for overseeing all quality procedures." [263] Finally, there must be a risk management strategy and a person in the organization responsible for its oversight. [264]

Once a firm of solicitors submits its application, the LSC determines whether the firm is entitled to the SQM designation. [265] Initially, a "desktop audit" is performed and, if the firm passes this review, "[a] temporary CDS contract may be granted . . . to allow sufficient work to be performed in the area of criminal law to enable LSC auditors to ascertain that the Specialist Quality Mark will be operationally effective at subsequent audits." [266] The next step is a "preliminary audit" held on the firm's premises at which documents are examined and one or more staff interviews conducted. [267] Subsequent audits include a "pre quality mark" audit, usually conducted between four and six months after the preliminary audit, and a "post Specialist Quality Mark audit" normally conducted nine to twelve months later and annually thereafter. [268] At the end of these audits, "the auditor will report on the evidence they have found to demonstrate that the Specialist Quality Mark requirements have been met." [269] When auditors identify a matter requiring corrective action, organizations are afforded twenty-eight days to remedy the deficiency. [270]

***876** 3. Contracts and Fees

Ultimately, the SQM designation enables a firm of solicitors to receive a "general criminal contract" to provide criminal defense representation. [271] While contracts to provide public defense services have become common in the United States during the past twenty years, [272] I am reasonably confident that there is not a defense services contract anywhere in this country that even remotely resembles the standard contract used by the LSC. It is nearly 200 pages in length and seemingly covers every administrative subject imaginable. It even provides that "[y]ou [the contractor] must not try to bribe any of our personnel, or any person who may perform services for, or is associated (in any way) with, the Legal Services Commission." [273]

Like the requirements for the SQM designation, few of the terms of the contract relate to substantive matters of the kind contained in the Defense Function Standards [274] of the ABA or in the Performance Guidelines for Criminal Defense Representation [275] of the National Legal Aid and Defender Association (NLADA). These documents spell out in considerable detail the numerous actions defense lawyers are expected to take in representing a defendant in a criminal case. [276] In contrast, the ***877** general criminal contract simply states that the contractor must "perform all Contract Work . . . in a timely fashion and with all reasonable skill, care and diligence." [277] One of the few specific substantive provisions relates to police station advice cases: solicitors are required as a condition of the contract to respond to calls for police station representation within forty-five minutes. [278]

The following items suggest the broad range of administrative provisions covered in the contract, as well as the authority of the CDS over the solicitors who provide the representation. Thus, the contract provides that in the event of an "official investigation," [279] contractors (i.e., solicitors) must make available all documents related to the representation of current and former clients as requested by the CDS and give access to their premises to CDS staff. [280] The CDS also retains authority "to carry out surveys of Clients and [contractors] must provide us [i.e., the CDS] with such information as we may require for such purposes." [281] In addition, the CDS "may commission research on the operation of our contracts" [282] and contractors are required to cooperate fully with the researchers, including sharing information concerning current and former clients. [283] For its part, the CDS promises that "we and any Researchers shall keep all information of a confidential nature concerning you and your Clients' and Former Clients' affairs or business strictly confidential . . . ." [284]

***878** As noted earlier, a major concern with contracts for defense services in the United States has been the tendency to require lawyers to represent a fixed number of defendants for a predetermined price. [285] Contracts for defense services in the United States, therefore, are sometimes simple arrangements that do not involve hourly fees. [286] However, the fee structure spelled out in the general criminal contract is unlike fee arrangements in most U.S. contracts. Not only does the fee structure make extensive use of hourly rates, [287] but there also are provisions for exceeding the hourly rates due to special circumstances [288] and a method for dealing with very high cost cases. [289] As required by the Access to Justice Act, the goal of the fee structure

must be "to secure the provision of services . . . by a sufficient number of competent persons" while being mindful of "the cost to public funds, and . . . the need to secure value for money." [290]

Thus, for representation in the Magistrates' Courts, the contract specifies a number of hourly fees that solicitors cumulate for a variety of defense activities, although the final amount charged is determined by what is known as the "standard fee" formula, which enables solicitors to receive greater compensation if a case is tried or prepared for trial rather than resolved through a guilty plea or dismissal. [291] In addition, fees may ***879** be enhanced if "(a) the work was done with exceptional competence, skill, or expertise; or (b) the work was done with exceptional dispatch; or (c) the case involved exceptional circumstances or complexity." [292] Solicitors also may be reimbursed for numerous types of expenses. [293]

To illustrate the fee structure, set out below are the hourly fees applicable to what is known as "Police Station Advice and Assistance." [294] The reference to "unsocial hours" refers to "the hours between . . . 5:30 p.m. and 9:30 a.m. on any business day and any time on a day which is not a business day." [295] As suggested by the table, hourly fees that solicitors can bill are sometimes higher for London than for the rest of England.

Table 1

Police Station Advice and Assistance [296]

	National	London
Availability during Duty Period	4.20 (to a max of 100.80)	4.24 (to a max of 102.00)
Police Station Advice and Assistance other than by telephone		
Duty solicitor [297] (unsocial hours)	69.05	69.05
Duty solicitor (other hours)	52.00	56.20
Own solicitor [298]	52.00	52.00
Traveling and waiting		
Duty solicitor (unsocial hours)	69.05	69.05
Duty solicitor (other hours)	52.00	52.00
Own solicitor	28.80	28.80
Police Station Telephone Advice fixed fee (including all telephone calls whether "routine" or "advice")	30.25 per Claim	31.45 per Claim

***880** Additionally, there are tables containing hourly fee rates for other activities, such as "advice and assistance," [299] as well as representation in Magistrate and Crown Courts. [300] The highest standard hourly rate is £81.90 per hour, [301] which at exchange rates during the summer of 2003 was approximately $130 per hour. [302] The lowest fee rate is for routine letters and phone calls at £3.70 per item (national rate) and £ 3.85 (London rate). [303] Compared to the United States, one of the more unusual tasks for which fees may be claimed is for reviews of files. [304] As noted earlier, there must be procedures for file reviews as part of a supervision program [305] and compensation is allowed for in-person reviews of files and for "paper file reviews." [306]

Solicitors may also seek reimbursement for a number of expenses. These include compensation for barristers who are "instructed" to provide legal assistance in Magistrate and Crown Court cases, [307] as well as fees for experts, travel expenses, and various other out-of-pocket costs. [308] Although permission from the CDS for some expenditures can be obtained ***881** in advance, prior approval is not required. [309] As the contract states, "[a]pplying for authority is not mandatory. If permission is not sought or refused, the costs may still be allowed on Assessment if the expenditure was reasonably incurred." [310] Legal research may be reimbursed if "the case involves a novel, developing, unusual or complex point of law . . . ." [311] On the other

hand, there is no explicit authority under the contract to retain persons to conduct fact investigations and to be reimbursed for such expenditures. [312]

In the event of a trial in Magistrate or Crown Courts, solicitors in London normally arrange for a barrister to handle the case, although outside of London solicitors usually try the case themselves. [313] The amount paid to the barrister in Magistrate's Court is a matter of contract between the solicitor and barrister, with barristers often agreeing to handle cases for minimal sums in order to encourage solicitors to select them or their chambers for trial work in the Crown Court. [314] Barristers are better compensated in the higher court, with almost all payments made as part of a "graduated fee" program. [315]

Payments to solicitors by the CDS are made monthly, which assures law firms of a consistent cash flow to operate their practices. [316] Based upon the prior year's payments, each contract specifies the monthly amount to be paid to the contractor [317] and, at the end of each year, the CDS performs a reconciliation to determine whether subsequent payments need to be adjusted either to recoup overpayments or to compensate for underpayments. [318] However, the CDS reserves "the right to ***882** Assess a Claim at any time within the two years following its submission . . . ." [319]

While the vast majority of criminal cases are handled by the CDS under the general criminal contract, those entailing "very high costs" can be dealt with through specially negotiated contracts and monitored by the Criminal High Cost Cases Unit (CHCCU). [320] A "very high cost case" is defined as one "that is likely to last for twenty-five days or more at trial and/or is likely to incur total defence costs (per defence team) of £150,000 or more." [321] Additional factors bearing on whether a case involves "very high costs" may include whether "(a) the case raises complex issues of law, fact or procedure; (b) detailed consideration of extensive documentary evidence . . .; [and] the defendant is charged with a large number of offences." [322]

All firms are required to notify the CDS of cases within the above definition and, after reviewing the situation, the CHCCU "can insist" that the case be handled pursuant to a special contract. [323] There is also a "specialist fraud panel" of solicitors to handle Very High Cost Fraud cases, and these, too, are overseen by the CHCCU. [324] However, as of 2003, not all Very High Cost cases have been brought under the jurisdiction of the CHCCU. Some of these cases, for the time being, are still being ***883** dealt with under the former system, in which bills are submitted, post-trial, to what is known as the National Taxing Team. [325]

I interviewed a solicitor from a large London law firm in charge of a unit of twenty-two persons (consisting of eleven solicitors and an equal number of paralegals) who represent defendants in very high cost cases pursuant to contracts with the CDS. [326] The law firm also has handled cases under the former system, in which its fees for services were submitted to the National Taxing Team. In addition, the firm does retained work in complex fraud and other high cost cases.

I inquired of the solicitor whether he regarded the new system of special contracts with the CDS to be an improvement over prior practice. Without directly answering the question, he noted that firms are now compensated promptly in accordance with their contracts, which is very beneficial from a cash flow standpoint. Under the National Taxing Team, there were often long delays before payments were received, and reimbursement claims were sometimes arbitrarily reduced. However, the fees received under the new special contracts are less than the amounts allowed by the National Taxing Team and less than the £200 to £350 per hour, depending upon the experience of the solicitor, charged by the firm for similar retained work. In contrast, the CDS has developed an elaborate fee rate structure, in which the amount of the reimbursement depends upon the experience of the solicitor and barrister and whether the case is rated as a level one, two, three, or four. For example, in level one cases (which are serious and complex fraud prosecutions), hourly rates for preparation are from £180 per hour for a "level A" solicitor to £100 per hour for a "level C" solicitor. Also, in the event of a trial in which a solicitor engages a barrister, daily rates are stipulated for the barrister's advocacy. [327]

***884** 4. Public Defender Service

As noted earlier, the Access to Justice Act authorizes the LSC to employ persons to provide legal representation. [328] Although the statute does not require public defenders, the government made clear in Modernising Justice [329] that it intended to have the CDS set up the first public defender offices in England's history. [330] The report claimed that "[e]vidence from other countries suggests that properly funded salaried defenders can be more cost effective and provide a better service than lawyers in private practice." [331]

To date, a total of eight "Public Defender Service" offices have been opened. [332] The first four were begun in 2001 (Birmingham, Liverpool, Middlesbrough, and Swansea). [333] Two more were opened in 2002 (Cheltenham and Pontypridd) and two additional offices in 2003 (Chester and Darlington). [334] Except for Birmingham (England's second largest city with more than one million persons) and Liverpool (about 460,000 population), the offices are primarily in smaller, more rural areas. [335]

***885** Each of the public defender programs, directed by a head solicitor and staffed by solicitors, paralegals and administrative assistants, [336] is situated in a ground floor store-front office. [337] They are authorized to provide representation in all of the same kinds of cases that private solicitors handle, and thus they defend persons in police stations, Magistrate, and Crown Courts. Eventually the programs will hire lawyers with higher rights of audience [338] and also be given a budget to retain "specialist advocates, whether solicitors or barristers." [339] Prior to beginning operations, each of the offices was required to achieve the SQM designation, [340] thus complying with the same requirements imposed upon private solicitors under contract with the LSC. [341]

According to the LSC website, these new public defender offices are intended, inter alia, to furnish "independent, high quality and value for money criminal defence services to the public"; enable the LSC and Lord Chancellor's Department to better understand "the issues facing criminal defence lawyers"; provide "an additional option to ensure the provision of quality criminal defence services in geographic areas where existing provision is low or of a poor standard"; and "share with private practice suppliers best practice, in terms of forms, systems, etc., developed within the PDS to assist in the overall improvement" of criminal defense representation. [342] These purposes are consistent with the government's initial promise in Modernising Justice, i.e., to have a "mixed system" of legal services in which public defenders are an alternative means of delivering effective defense representation. [343]

***886** The new public defender offices differ from those in the United States in the way in which they acquire their cases. As noted earlier, the Access to Justice Act grants individuals the right to select their own lawyers. [344] Accordingly, when a court enters a representation order because the defendant satisfies the "interests of justice" test, [345] public defender offices must compete with local private attorneys to provide legal services. [346] The new public defenders have obtained their cases by serving on duty solicitor rotations in police stations and in Magistrates' Courts, [347] by accepting the cases of walk-in clients who were attracted by the store-front offices of the public defenders, and from repeat business of clients formerly represented by the public defender solicitors when they were in private practice. [348] Given this system for selection of counsel, it has taken a while for public defender offices to develop sufficient caseloads. [349]

These new public defender offices also differ from their counterparts in the United States because they are regarded as a "pilot" program and are being subjected to an extensive, university-based four-year research ***887** study commissioned by the LSC. [350] The government has promised, when the research is completed, to "review the Service and make decisions about future development." [351] The professors conducting the study have stated that their objectives include analyzing the cost effectiveness

and quality of representation of public defender offices compared to private solicitors who have contracts with the LSC. [352] Ultimately, the researchers will address "whether the PDS should form part of future service provision." [353]

Since there has been a long tradition of private lawyers providing all criminal legal aid in England, it is not surprising that the private bar has complained vociferously about the introduction of public defenders. [354] For example, private solicitors have worried that public defenders will take cases from private lawyers; [355] that public defenders are "grossly expensive" and a "waste of valuable resources"; [356] that there is not a "level playing field" between private solicitors and public defenders since all of the latter's overhead expenses are furnished; [357] and that the research ***888** numbers comparing private solicitors and public defenders might be "rigged." [358]

When plans for the new public defenders were first announced, concerns were expressed that the defenders would not be sufficiently independent of the government. During parliamentary debates on the Access to Justice Act, a former defense counsel chastised the government's proposal with typical British eloquence:
As the independence of the prosecutor is swept away, there emerges-- ten days ago--predictably undiscussed, without warning to the public or [the] profession, what I would call the sinister figure of the state salaried defender, paid, selected and controlled by the state. That fine warrior is to be sent out to do battle on the field of liberty and human rights, with his opposite number, his local colleague at arms, the salaried state prosecutor-- an all-state contest. As many others have long predicted, introduce a state prosecutor and the state defender follows as night follows day--the dark night of dependence and control, the other side of the coin.

What next? Instead of the interests of justice being paramount, the culture of negotiated justice will prevail. . . . Plea bargaining already exists [,] but not behind closed doors. However, there will be plea bargaining behind closed doors, pressures to abort trials, cosy relationships between prosecution and defence to maintain the conviction count and the volume of cases and to minimize the cost. The cosiness will soon extend to the court itself, which will be anxious to rid itself of the stubborn and determined advocate who wastes the judge's time. [359]

Several national organizations in England concerned with criminal legal aid also have voiced concerns about the independence of the new public defender offices. [360] For example, England's Legal Action Group (LAG) has argued that while it favors the public defender experiment, it believes that the offices should not be managed by the LSC. [361] Instead, LAG would like there to be "an arm's-length body" to oversee the public ***889** defender offices. [362] The approach is reminiscent of the position of the ABA, which suggests that an effective way to secure the independence of a public defender program is to have a private board of trustees. [363]

Because the LSC understands the concerns respecting independence of its public defenders, it has provided for a "Professional Head of Service" and appointed a well-respected London solicitor, who is also a Commission member, to serve in this capacity. [364] According to the first annual report of the Public Defender Service, the Head of Service chairs a Public Defender Service (PDS) Management Committee, whose members include the heads of the PDS offices and the head of the CDS. [365] During an interview with the Head of Service, I learned that he routinely visits each of the public defender offices, attends orientation programs for new solicitors, and asks to be advised of all complaints from clients. [366]

The Annual Report also states that the Head of Service "has specific responsibilities for the professional standards and independence of the service in the way it, and the staff within the offices, represent clients." [367] One of his principal duties is to ensure staff compliance with the Code of Conduct for Public Defenders, which the Access to Justice Act required to be prepared. [368] Several of the code's provisions relate directly to the issue of public defender independence and the quality of

work. Thus, the code provides that "a professional employee shall do his or her utmost to promote and work for the best interests of the client and . . . provide the client with fearless, vigorous and effective defence . . . ." [369]

The code's section dealing with "excessive caseload" provides that if a professional employee believes that the acceptance of additional cases is "reasonably likely to lead to inadequate representation of existing clients," the matter should be brought to the attention of the head of the office "who shall notify the professional head of service." [370] During my interview with the Head of Service, I asked how the rule dealing with excessive caseloads operates in practice. He advised me that the rule had not yet been invoked by any public defender, probably because the offices are still involved in developing adequate caseloads. He also told me ***890** that he would not be sympathetic to complaints about caseload unless the defender had devoted at least 1200 "billable hours" during the year on his or her cases and none of them had yet done so. [371]

5. Police Station Representation

No facet of defense services in England is more unlike the United States than the routine practice of providing legal representation for suspects in police custody. Following the wrongful conviction of three young persons for murder and a Royal Commission to consider criminal procedure reforms, Parliament enacted in 1984 the Police and Criminal Evidence Act (PACE), which guarantees suspects in police custody the right to legal advice. [372] Section 58 of PACE provides as follows: "A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time." [373]

The implementation of this right to counsel is dealt with in an addendum to PACE titled, "Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers," which sets forth in detail exactly what the police can and cannot do in dealing with persons in custody. Respecting legal representation, Code C requires that suspects in police custody be "informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available ***891** from the duty solicitor." [374] Thus, the statute contains neither a means test nor a merits test. [375]

Additionally, Code C requires that if the suspect declines to speak with a solicitor, the police must ask the reason for not wanting legal advice, and must record the suspect's response. [376] There also is a requirement that the police "prominently" display "[a] poster advertising the right to legal advice . . . in the charging area of every police station." [377] At the start of police interviews or the re-commencement of any interview, the police must usually re-advise suspects of their right to speak to a solicitor and that the interview will be delayed until legal advice can be obtained. [378] Moreover, subject to certain exceptions, interviews of suspects must be tape-recorded [379] and solicitors are entitled to attend while police interview suspects. On the latter point, Code C provides that "[a] detainee who has been permitted to contact a solicitor shall be entitled to have the solicitor present when they are interviewed unless . . . awaiting [the solicitor's arrival] would cause unreasonable delay to the process of investigation." [380]

In response to PACE, as noted earlier, [381] a national duty solicitor program was established so that legal assistance would be available twenty-four hours a day to persons in police custody. [382] Initially, the Law Society operated the duty solicitor system, but the Legal Services Commission runs it now. [383] Persons may request that their own solicitor be called instead of the duty solicitor. [384] Although section 58 of PACE refers to a person's right to consult with a "solicitor," sometimes the person ***892** who responds to the call for representation is a non-solicitor who has been trained through an accreditation program. [385] About 40% of the persons in police custody avail themselves of the opportunity to obtain legal assistance. [386]

The availability of solicitors in police stations to advise suspects during interviews took on even greater importance in 1994 when Parliament enacted the Criminal Justice and Public Order Act ("CJPOA"), which altered traditional rules regarding the

right to remain silent. [387] Historically, the rule in England was the same as in the United States, i.e., a person did not have to say anything to the police and a person's silence could not be used against him or her in court. [388] Now, under the CJPOA, adverse inferences may be drawn by courts or juries from the silence of suspects if, during questioning, suspects "fail to mention facts which they later rely on as part of their defence and which it is reasonable to expect them to have mentioned." [389] Because of this rule, solicitors are faced with the enormously important and difficult decision whether to advise suspects to answer police questions. [390]

*893 D. Summing Up England's Defense System

1. In General

As discussed earlier, England used to provide criminal legal aid under a system in which an eligible defendant could "retain" any solicitor he wanted; and the solicitor would send a bill for services to the government upon completion of the case. [391] Now, in order to be paid by the government for criminal legal aid, a solicitor must be "licensed," i.e., the solicitor must meet quality standards, sign a contract with the LSC, and agree to various audits. Although there are some new experimental public defender programs, these offices, too, must satisfy the same practice requirements imposed on private solicitors. Defendants continue to be able to select the solicitors they prefer, assuming the solicitor is licensed, and thus even public defenders must compete for client business.

England's system of criminal legal aid provides more extensive coverage than do indigent defense programs in the United States. Since in England a means test to qualify for legal aid has been eliminated, everyone is eligible initially to receive a lawyer without charge. [392] In England, even if a person has financial capacity, he is not required to contribute towards his defense except in serious cases prosecuted in Crown Courts. [393] Also, in contrast to the United States, England routinely provides lawyers for defendants in police custody [394] and, subject to a means test, lawyers are compensated when they provide "advice and assistance" to persons under police investigation who have not been charged with an offense. [395] As discussed later, the per capita cost of criminal legal aid in England is substantially higher than indigent defense services in the United States, but this is due only partially to the greater coverage of England's system. [396]

2. Quality of Representation

During my research of England's defense program, I was intrigued about the quality of the legal representation provided by solicitors and whether the Specialist Quality Mark (SQM) and the auditing of case files required by the CDS has affected defense services. [397] My interest in these ***894** issues was largely due to a scholarly study published in 1994, which contained a harsh indictment of the practices of solicitors who provide criminal legal aid.

The study, conducted by the Legal Research Institute of the University of Warwick School of Law, is contained in a full-length book --Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain. [398] The defense practitioners I interviewed in England were familiar with the study even though it was published almost a decade earlier. This is probably due to the study's findings, the reputations of the scholars who conducted it, and because it was based upon extensive empirical data collected over several years, beginning in 1988. Altogether, "forty-eight firms of solicitors and three independent agencies in various parts of the country were observed in detail . . . ." [399]

Some of the most serious charges in the study included widespread impersonal interviewing and abrupt treatment of clients, [400] a failure to prepare cases adequately and to conduct appropriate investigations, [401] and a lack of sufficient in-service training. [402]

The researchers also found "that many solicitors do not check whether there is a factual basis for a plea of guilty." [403] Referring to solicitors serving apprenticeships, the study contains this statement:

> Almost all our respondents came to see criminal defence practices as geared . . . towards the routine production of guilty pleas. A minority of them found this to be a source of injustice for clients and of disillusionment for themselves, given their earlier expectations of the defence lawyer's role in an adversarial system. [404]

Later the study elaborated on the attitude of solicitors towards guilty pleas:

> The idea that the prosecution should be "put to the proof"--required to establish a case against the defendant--is not accepted as "valid" or "realistic" by defence solicitors. . . . [S]o strong is their presumption of guilt and their faith in the prosecution's case, that they fail to see their own role in the production of [guilty] pleas . . . . [405] ***895** During interviews, I inquired whether the findings in Standing Accused were still appropriate characterizations of defense practice. Invariably, I was told that the profession had changed and that the study's findings are out of date. One of the principal authors of the study explained to me that a new generation of defense lawyers had grown up who are better trained and have a more professional and adversarial approach to their work. [406] He attributed improvements to a variety of factors, including Legal Aid Board quality standards that were forerunners of the SQM [407] and the accreditation program for non-solicitor police station legal advisers, which he described as having had a positive "ripple effect" among solicitors. [408] Because defense practices have changed, he worried that persons reading Standing Accused today might erroneously conclude that it continues to reflect the ways in which defense lawyers in England practice. [409]

The administrative head of England's Criminal Law Solicitors Association also claimed that the defense bar was performing more effectively, and he attributed changes that had occurred partly to Standing Accused. [410] Moreover, while lamenting the bureaucracy and the administrative burden of the SQM and other requirements imposed by the CDS, he conceded that they were part of a "necessary evil." He explained that the SQM produced a "consistency of operation" and "practice habits" that were quite positive for the profession. Similarly, the Head of Service for public defenders in England told me that because of SQM standards, solicitors are delivering a "better service" to their clients than previously. [411] He also pointed to the "review and supervision" requirements of the SQM, which he characterized as a "remarkable success." Now, he said, because solicitors have to record everything that they do, they are better organized and supervisors can review a file and discern "whether the representation was done right." [412]

***896** Yet several interviewees conceded that it was possible for a solicitor to satisfy the SQM requirements and obtain a contract from the LSC when he ought to be found ineligible for legal aid work. For example, the head of the London Criminal Courts Solicitors Association told me of a lawyer whom they would not admit to the association because he was not paying the fees of barristers, as required, but still managed to sign a contract with the LSC. [413] Even the Executive Director of the LSC acknowledged that there were solicitors who qualified for contracts who should not be furnishing criminal legal aid because they were "not doing what that they should" in representing their clients or were overcharging for their time. [414]

The caseloads of solicitors were another matter about which I inquired because I wondered whether in order to maximize income, it was possible for a solicitor to take on an excessive number of cases, resulting in inadequate client representation. The CDS does not impose any limits on the numbers of cases that a solicitor may handle, [415] but solicitors of whom I inquired claimed that excessive caseloads were not a problem since solicitors depend heavily on their reputations and repeat business of

clients. If an excessive caseload were to prevent a solicitor from being attentive to clients, the solicitor would in the end lose business and the problem would thus correct itself. [416] In other words, according to practitioners, the market forces that operate in private practice are at work in legal aid, and they effectively discourage lawyers from accepting too many clients. Also, as one solicitor explained, the mandatory supervision of lawyers required by the SQM protects against solicitors developing excessive caseloads. A solicitor-supervisor who saw that one of his or her lawyers had too many cases would insist that some of the cases be transferred to others in the firm. [417]

One of the issues not dealt with in the SQM requirements relates to continuous representation by the same solicitor. [418] While solicitors with whom I spoke agreed that continuous representation by the same solicitor ***897** was desirable and practiced to the extent possible, they maintained that in busy law practices it often was necessary for one solicitor to substitute for another at court proceedings and on other occasions. [419] One solicitor explained that his firm's practice was to confirm in writing to the client the name of the solicitor with primary responsibility for the case but inform the client that other lawyers from the same office "team" may occasionally have to substitute for the lead lawyer. [420]

Fact investigations are another critical component in furnishing quality legal representation to defendants. In the United States, ABA standards long have recognized that defense lawyers "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." [421] The duty to investigate "is not discharged by the accused's admission of guilt to the lawyer or by the accused's stated desire to enter a guilty plea." [422] It is well accepted in the United States, moreover, that the duty to conduct an investigation extends to the interviewing of prosecution witnesses whenever necessary. [423] Because of the importance attached to investigations, public defender offices in the United States often employ full-time investigators and ordinarily at least some government funds are available for private attorneys who incur investigative expenses. [424]

In England, there are no national standards for defense practice of the kind developed in the United States, although there are general admonitions related to advocacy contained in a code developed by The ***898** Law Society. [425] Although the CDS expects that solicitors will talk to witnesses who are "in support of the client," neither the SQM standards nor the "Transaction Criteria" form used in the auditing of case files [426] mentions interviews of prosecution witnesses. [427] Nor is it entirely clear whether the CDS is willing to reimburse solicitors if they submit claims for investigators retained to interview prosecution witnesses. [428] Further, a member of the Commission commented that routine reimbursements for such investigative expenses "would blow the budget." [429]

Several solicitors acknowledged that there is "no tradition" in England of defense lawyers or investigators interviewing witnesses for the prosecution, probably because the defense receives in advance of court proceedings all witness statements furnished to the police. [430] If prosecution witnesses were sought for interviews, solicitors said, the witnesses probably would feel obliged to inform the prosecutor and either "permission would be denied" or the prosecutor would insist upon being present during the interview. [431]

But the practice of not interviewing prosecution witnesses is inconsistent with settled principles of ethics and professionalism in England. In The Law Society's Guide to the Professional Conduct of Solicitors, the following statement appears: "It is permissible for a solicitor acting for any party to interview and take statements from any witness at any stage in the proceedings . . . ." [432] Moreover, a book on criminal defence in England published in 2002 cites the foregoing authority but concedes that "English and Welsh defence solicitors have had a distinct disinclination to interview prosecution witnesses." [433] While noting that there may be ***899** risks, the authors suggest that "[t]here are persuasive arguments for interviewing prosecution witnesses." [434]

Absent a far more searching inquiry, I cannot offer categorical judgments about the overall quality of defense representation among England's solicitors. From an American perspective, the failure of solicitors or investigators to interview regularly witnesses for the prosecution suggests that the adversary system is not functioning as it should. On the other hand, it seems likely that the SQM requirements have made a difference in the approach of solicitors to their work. Not only do the SQM standards assure annual training, in-office supervision, and a host of progressive business practices, [435] but also there are audits that deal directly with the performance of counsel.

Each year twenty closed files of solicitors are selected at random and reviewed by CDS staff to assess the accuracy of billing. In addition, in the case of new law firms and when there are questions concerning the quality of a firm's work, the files are analyzed in order to assess counsel's performance. [436] This is achieved through the use of a detailed, twenty-page "Transaction Criteria" form, first developed by the Legal Aid Board in the 1990s, which enables the reviewer, inter alia, to discern the extent of the solicitor's preparation and the advice given to the client. [437] For example, under the heading "Advice on Proceedings," a reviewer is prompted to consider what the client was told when a guilty plea was discussed. Question fifty-four reads, in part, as follows: "Does the file show that the client was advised as to:

What the prosecution will have to prove?

***900** The strength of the prosecution's evidence?

Reasons for advice as to plea?

The likely sentencing options in the client's particular case?

The implications of an early plea?" [438]

While a reviewer probably cannot determine from a file whether a case was fully and carefully investigated and whether a solicitor's judgment about pleading guilty was appropriate, the fact that files are subjected to this sort of inquiry should cause conscientious solicitors to consider the important issues in a case before recommending that a client plead guilty. A reviewer who is concerned about the content of a file may refer the case for further review within the CDS, and occasionally experienced defense solicitors will conduct peer reviews of files. [439]

The Transaction Criteria are not without their detractors. For example, one researcher has suggested that they were intended to make solicitors more efficient and cost effective, with the risk that the practice of law would become more "a matter of form rather than substance." [440] The researchers who developed the Transaction Criteria have responded as follows:

> These process measures have attracted . . . criticism. . . . From the outset practitioners and other interest groups objected to the notion that quality could be gauged from an audit of files, which measured compliance with a check-list rather than the adequacy of the advice given or the action taken. . . . Indeed, the accusation was made that the criteria encouraged routinisation and standardisation of practice. . . . It was felt, however, that in most cases it would lead to a levelling up rather than a levelling down in standards. . . . In the eyes of the researchers, transaction criteria, properly applied and audited, constituted a robust yet affordable approach to establishing a quality floor, as opposed to the highly expensive option of peer review, much favoured by critics such as the Law Society and the Legal Action Group. [441]

3. Future of Criminal Legal Aid

In February 2003, The Law Society issued a report titled, The Future of Publicly Funded Legal Services, which states that the legal profession ***901** has grown "disillusioned with [civil and criminal] legal aid." [442] This is because "[l]egal aid is at best marginally profitable" since "[d]uring the last ten years . . . the costs of running a solicitors' practice rose by 67.52% whilst legal aid rates increased by 26.35%." [443] In addition, the report notes that the "administrative burden" of operating under contracts of the Legal Services Commission has further eroded the profitability of legal aid practice. [444] According to a Law Society telephone survey conducted during 2002 and included as an appendix to the report, more than a fourth of the law firms questioned said that they were likely to give up their criminal legal aid practices during the next five years. [445] Graduates of law schools, who often have considerable debt upon completing their legal education, are also described as "reluctant to take poorly paid training contracts with legal aid firms." [446]

However, the report does not argue for a significant increase in the government's budget for legal aid, [447] noting that it has argued for increases ***902** in the past to no avail. [448] Instead, accepting that there are not going to be increases beyond three percent per annum over each of the next three years, which is the sum projected by the Lord Chancellor's Department, [449] the report seeks the profession's comments and advice among four quite distinct options: (1) maintain the status quo, which means having most criminal defense work performed by private attorneys; (2) continue with private practitioners but with "block funding"; (3) increase substantially the number of Public Defender Service offices, thereby providing more choice to clients among legal service providers; and (4) expand the number of Public Defender Service offices so that salaried lawyers can provide the bulk of the legal representation. [450] Whether any of these alternatives would be less expensive than the current system is not addressed in the report.

My interviews with solicitors confirmed that many are, in fact, "disillusioned" with criminal legal aid. As one lawyer told me, "the number of firms [doing criminal legal aid] is shrinking, life is not fun any more"; he said that he "bumps into firms all over that are closing out of criminal legal aid." [451] Another solicitor said that the "administrative burden" of the regulations of the CDS has contributed to a decline in the number of firms willing to do criminal legal aid. [452] As this lawyer explained, the more profitable areas of legal practice in laws firms are not willing to continue indefinitely to subsidize an area of the practice that is much less profitable. [453] Still another lawyer said that if there are not eventually increases in fee rates, the "best lawyers will be driven out--the best suppliers will be lost." [454] All of the solicitors I interviewed told me that fee rates for criminal legal aid are considerably below what clients are charged in civil cases and in the occasional retained criminal case. [455]

***903** There also have been a number of news articles in English law publications that have recounted the dissatisfaction of criminal legal aid lawyers. In one publication a solicitor wrote that "[m]any firms that I have been in contact with . . . have in fact decided to close their criminal defence department because they have not been able to recruit . . . . In my twenty years of practice the current recruitment crisis in criminal defence work is the worst that I can recall." [456] The author claims that the current state of affairs is a "crisis," attributable to the level of remuneration and the government's failure to give lawyers annual increases. [457]

As discussed later, even though there have not been significant fee increases for lawyers in criminal cases in recent years, government expenditures for criminal legal aid have gone up by more than £300 million just in the last four years. This is due primarily to magistrates approving more representation orders following the removal of a means test for legal aid and to more arrests by the police. [458] The increase in spending undoubtedly contributes to the unwillingness of the Lord Chancellor's Department to raise fees for legal aid work.

Despite the comments of solicitors and the Law Society's report on the future of legal aid, it was unclear to me as of the summer of 2003 whether there was a serious, current crisis involving criminal legal aid. Although the CDS does not track how many lawyers are engaged in criminal defense work, the agency maintains an exact count of the number of law firms who have fulfilled SQM requirements and signed contracts to provide criminal representation. As of March 31, 2002, there were 2909 law

firms under contract with the LSC to provide criminal defense services, whereas on March 31, 2003, the number under contract was only nineteen fewer--2890. [459] In addition, the number of duty solicitors for police stations and Magistrates' Courts has remained steady at about 5500, which is the same number of approved duty solicitors when the Legal Aid Board administered the program. [460]

The Chief Executive of the LSC was quite firm in stating that there was not a current crisis, although he conceded that there might be at some future time. He also acknowledged that there were some problems respecting the availability of solicitors in rural areas and difficulties in recruiting ***904** recent law graduates to undertake careers in legal aid. [461] The Head of Public Legal Services for the Lord Chancellor's Department told me that except for some "patchiness in rural areas," there were really no immediate problems with the supplier base. As he put it, "people are not about to go unrepresented--the system is not about to stop operating." [462]

I expect that during the next several years there will not be major changes in the delivery of criminal defense services; that the alternatives to the status quo identified in the Law Society's report on legal aid will not be pursued because none would likely be any less expensive than the current program; and that ultimately the government will spend what is necessary to maintain the program's viability, including raising fees for lawyers, if necessary. This latter prediction is based on history because clearly England is prepared to invest in criminal legal aid. [463] As the Head of Public Legal Services for the Lord Chancellor's Department said, "you cannot continue to pay the same rates ad infinitum, although it's impossible to predict the timing" when rates might be raised. [464]

III. Learning from England

Much of what England does in the field of criminal legal aid is obviously not suitable for replication in the United States. For example, the suggestion that U.S. jurisdictions eliminate a means test to qualify for counsel in criminal cases would surely induce a mixture of jeers and hearty laughter from legislators of all political persuasions. [465] Nor are states ever apt to adopt programs in which persons under suspicion of criminal activity can consult with a lawyer at public expense. Similarly, ***905** the widespread, routine availability of lawyers in America's police stations is never likely to be accepted, although England's successful deployment of solicitors and accredited representatives in police stations should at least support efforts in the United States to persuade police departments to record or videotape interrogations of suspects. [466]

On the other hand, some of England's approaches to criminal legal aid merit serious consideration in the United States. I refer to England's emphasis on quality representation, payments to counsel, and the right of clients to select their own solicitor.

A. Assuring Quality

England's system seeks to assure that quality criminal legal aid is provided to defendants. The accreditation of duty solicitors for police stations and Magistrates' Courts, the Specialist Quality Mark (SQM), audits of case files, and occasional peer reviews of files are all aimed at increasing the likelihood that solicitors perform effectively. [467] While there can be debate about whether these measures of quality are appropriate and how much difference they have made, there cannot be any dispute that a major effort to assure quality in England's criminal legal aid program has been underway for some years.

In contrast, state and county governments in the United States do not monitor the quality of the defense services for which they pay. Nor ***906** are the vast majority of defenders, assigned counsel, and contract programs monitored by independent quasi-governmental or private organizations to assure the quality of the legal services they provide. [468] This absence of external oversight to assure quality ought to be a source of major concern, especially since there is overwhelming evidence that defense representation in the United States often is egregiously inadequate. [469]

Since the late 1960s, the ABA and the NLADA have adopted a number of well-accepted standards related to indigent defense representation. In particular, provisions of the ABA's chapters on Providing Defense Services, [470] the Defense Function, [471] and NLADA's Performance Guidelines for Criminal Defense Representation [472] spell out critical elements of sound indigent defense systems and steps that defense lawyers should take in representing their clients. These publications are designed not only to guide attorneys but also to assist state criminal justice policymakers improve defense services and, if deemed appropriate, adopt their own standards for indigent defense. [473] And during the past fifteen years, by virtue of legislation, rules of supreme courts, and state commissions or other entities, a wide variety of standards and guidelines dealing ***907** with defense representation have been adopted in many states. [474] Unfortunately, most of the standards and guidelines are no more binding on the lawyers to whom they are intended to apply than are the ABA and NLADA models on which they are based. [475] There are a number of states, moreover, where there are no standards or guidelines at all.

To illustrate just how useless standards are in the absence of effective monitoring and enforcement, consider the ABA standard dealing with attorney workloads, which admonishes defense counsel to avoid accepting too many cases if doing so will lead to representation "lacking in quality or to the breach of professional obligations." [476] If lawyers have too many cases, the standard recommends that they "take such steps as may be appropriate to reduce their pending . . . caseloads, including the refusal of further appointments." [477] Courts also are advised not to "require" lawyers or defender programs "to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." [478] The commentary to this black-letter provision cites the caseload standards first suggested more than twenty-five years ago by the National Advisory Commission on Criminal Justice Standards and Goals, which set forth maximum numbers of different kinds of cases that an attorney should undertake to represent during a twelve-month period. [479]

***908** Despite the ABA's standard, lawyers providing public defense often have overwhelming caseloads far in excess of the standards. In fact, the problem is so pervasive that the DOJ's Bureau of Justice Assistance (BJA) commissioned a monograph to address excessive defense workloads and strategies to keep workloads manageable. [480] Obviously, if lawyers and judges were dealing effectively with the problem of excessive defender workloads, there would have been no need for BJA's publication. Among the report's recommendations is that jurisdictions "[d]evelop a way to enforce or encourage compliance with workload standards." [481] Similarly, a BJA publication dealing with contracts for defense services notes that "few systems have managed to implement a coherent and independent review process that examines compliance with standards as well as individual attorney performance." [482]

However, at least two states--Massachusetts and Indiana--have developed mandatory standards, including rules covering workloads, in which compliance is monitored and sought to be enforced by withholding funds in the event of violations. The activities in these states are especially noteworthy because they represent serious efforts by independent, quasi-governmental bodies to assure that effective defense services are provided. These efforts, therefore, are reminiscent of what the CDS does to assure quality legal representation in England. The Massachusetts program, moreover, has developed extensive procedures to monitor the performance of assigned counsel and provide peer evaluation of their representation. [483]

***909** In its structure, overall design, and policies, the Committee for Public Counsel Services (CPCS) in Massachusetts is probably more like the LSC and its CDS than is the program for indigent defense of any other state. CPCS is created by statute and governed by fifteen persons appointed for three-year terms by the justices of the state's Supreme Court. [484] Its purpose is to "plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by all salaried public counsel, bar advocate and other assigned counsel programs, and private attorneys serving on a per case basis." [485] A majority of the criminal defense representation in Massachusetts is provided by 2000 assigned counsel certified to do so by the CPCS, with the balance

of defense services delivered by the 112 "public counsel" lawyers employed by the CPCS. [486] The agency is headquartered in Boston and has thirteen regional offices, with an administrative staff of about twenty persons, directed by a chief counsel. [487]

Attorneys seeking certification in District Courts to provide representation in misdemeanors, felony arraignments, and bail hearings must attend a five-day training seminar run by the CPCS. [488] There also are special certification requirements for other classes of cases, including Superior Court felonies, juvenile delinquency and youthful offender cases, ***910** criminal appeals, and other post-conviction matters. [489] Moreover, for first- and second-degree murder cases, the procedures stipulate specific experiential requirements and individual approval by the chief counsel, who "may consider any and all additional information that s/he deems relevant . . . . In reaching this decision, the Chief Counsel receives a recommendation on each application from a Certification Advisory Board consisting of senior private practitioners from around the state." [490]

The CPCS also has adopted the most extensive "performance standards" of any state, modeled on those of the NLADA, [491] and "intended for use by the Committee on Public Counsel Services in evaluating, supervising and training" assigned counsel. [492] The standards also state that assigned counsel "must comply" with the standards, as well as the Massachusetts Rules of Professional Conduct. [493] In addition, there are procedures for dealing with complaints against lawyers and with audit issues arising from their claims for compensation. [494] If there are adverse findings against lawyers arising from either client complaints or claim submissions, an attorney's certification to provide representation can be canceled. [495]

The performance standards of the CPCS include strict caseload limits, in which the number of new cases that an attorney may accept during the course of a twelve-month period is specified. [496] Thus, an attorney may not provide representation in more than 200 Superior Court criminal cases, more than 400 District Court criminal cases, or more than 300 juvenile delinquency cases. [497] If an attorney exceeds the caseload limits, the CPCS will not pay for the additional work that the attorney undertakes, although the lawyer still will be expected to perform all of the necessary work. [498] The CPCS also limits attorneys to 1800 billable hours of assigned counsel service during a year. [499] In these ways, the CPCS enforces caseload limits and seeks to assure that lawyers do not assume representation in excessive numbers of cases.

***911** In Indiana, there is also a system to enforce caseload standards, but the program is very different from the one in Massachusetts. Enforcement is achieved in Indiana through the Indiana Public Defender Commission (IPDC), which can either grant or withhold payments to counties who participate in a reimbursement program that the commission administers. [500] Like the CPCS, the IPDC is an independent, quasi-governmental entity established by statute, consisting of eleven persons appointed by government officials to serve three-year terms. [501] Unlike the CPCS, it provides no direct representation and has only one staff member. [502]

The duties of the IPDC include the authority to reimburse Indiana counties 40% of their defense expenditures in felony and juvenile cases if the defense program of the county complies with IPDC standards, which (like the caseload standards adopted by the CPCS) impose limits on the number of cases that a lawyer may handle during a year. [503] When counties file periodic claims for reimbursement, they must submit documentation on the caseloads of the defense attorneys furnishing representation. If the caseload limits are exceeded, the county will not be reimbursed for its indigent defense expenditures. Through this monitoring function, the IPDC, like the CPCS in Massachusetts, seeks to assure the quality of legal representation provided in the state. (The Massachusetts and Indiana programs have something else in common--both are experiencing serious financial difficulties.) [504]

***912** That the quality of defense representation in the United States should be monitored by an external body or group that is separate and distinct from the lawyers or defender organization providing the services has been accepted in principle in the death penalty area. In February 2003, the ABA adopted a revised version of its Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases. [505] Guideline 3.1 envisions a "Responsible Agency," independent of the judiciary, to "recruit and certify attorneys as qualified" to handle death penalty cases; "publish certification standards and procedures" advising attorneys how to become qualified for death penalty assignments; "monitor the performance of all attorneys providing representation in capital proceedings"; "withdraw certification from any attorney who fails to provide high quality legal representation"; "conduct, sponsor, or approve specialized training programs" for death penalty litigators; and "investigate and maintain records about 'the performance of attorneys providing representation in death penalty cases and take appropriate' . . .action . . . ." [506] The commentary to this guideline explains that the responsible agency should gather information about attorneys from all "sources" that it "deems appropriate, including in-court observations, writing samples, and information-gathering from the applicant, from judges before whom the applicant has appeared, and from attorneys, supervisors, and former clients who are familiar with the applicant's professional abilities." [507]

During 2003, an Innocence Protection Act, similar in some respects to ABA Guideline 3.1, was introduced in Congress. [508] Although not enacted, this bill would have authorized grants to states with death penalty laws if they maintained "an effective system for providing competent legal representation." [509] Such a system, according to the proposed legislation, would require an independent "entity" to "establish and maintain a roster of qualified attorneys," "provide for periodic [attorney] training," and "monitor the performance of attorneys" and "remove from the roster attorneys who fail to deliver effective representation." [510] The legislation ***913** also called for the independent entity to determine whether attorneys furnishing death penalty representation have been sanctioned for unethical conduct or been found "to have rendered constitutionally ineffective assistance of counsel in a felony case in Federal or State court." [511]

This proposed legislation, as well as the ABA's Guidelines in Death Penalty Cases, are significant because they are among the first national efforts to recognize the importance of comprehensive monitoring of the quality of defense services by an independent, external authority. Such efforts to assure quality are similar to what England has been doing for nearly a decade, except that in England the means used to measure quality differ from what has been proposed in the death penalty area. Moreover, the LSC is essentially an independent "responsible agency" or "entity" of the kind envisioned by the ABA's Death Penalty Guidelines and the proposed Innocence Protection Act. [512]

While the ABA has not developed standards for monitoring the performance of counsel beyond death penalty cases, the need to assure quality services in other areas of defense representation is vitally important as well. I doubt that governments would be willing to pay doctors for their services if their routine surgeries led to frequent medical complications or to the deaths of their patients. The response surely would be to investigate and to insist that medical societies take essential measures to assure that quality care is provided. [513] But in the criminal defense area, despite serious concerns about lack of quality, this has not happened. And it is quite unlikely to occur unless, as in the death penalty area, the legal profession devises systems to oversee attorney performance and works diligently for their adoption. One of the ways to improve quality is to link funding to attorney performance, as is done in Massachusetts and Indiana and as proposed in the Innocence Protection Act.

***914 B. Payments to Lawyers**

England has developed various ways to compensate solicitors for their defense services, and the approaches are more varied and innovative than those of any in U.S. jurisdictions. In developing its compensation system, the goals have been to control costs while assuring that solicitors have adequate incentives to represent their clients effectively. [514]

While solicitors must execute contracts with the LSC in order to provide criminal legal aid, the contracts are unlike those for criminal defense in the United States. [515] As noted earlier, the LSC contract uses lower and higher standard fees and affords an opportunity for solicitors to be paid more than the higher standard fee if the demands of the case require additional time. [516] In addition, the CDS retains authority in all cases to allow enhanced fees if circumstances warrant. [517] Moreover, for lengthy

or especially costly cases, specially negotiated contracts are used. [518] Since supervision of lawyers who furnish criminal legal aid is required, solicitors who serve as supervisors are compensated. [519]

Some facets of the English compensation system merit serious consideration in the United States. For example, payments to encourage supervision of less experienced criminal defense lawyers in assigned counsel and contract systems make considerable sense as a means of assuring quality representation. In addition, the use of special contracts for high cost cases can be a reasonable means to control costs without sacrificing counsel's incentive to serve his or her clients. A similar recommendation was endorsed by the Judicial Conference of the United States dealing with federal death penalty cases. [520] Finally, to encourage exceptional services, it makes sense to authorize additional payments, which is what is done in U.S. civil rights cases when private lawyers provide especially outstanding representation. [521]

*915 C. Selection of Counsel by the Client

The right of indigent defendants in England to select counsel of their choice was noted earlier. [522] The Access to Justice Act recognizes the right, which means that even public defender offices must compete with private solicitors for their clients. [523] In fact, England long has permitted defendants to select their own solicitors, and their experience is strong evidence that such a system is workable.

In interviews with solicitors, I was told repeatedly that one of the great strengths of England's legal aid system is that clients select their own lawyers. [524] The advantages include an attorney-client relationship of trust and confidence and a strong incentive for solicitors to provide the best possible representation since “repeat business” is essential for lawyers practicing criminal legal aid. [525] Not only might the client need a solicitor in the future, but defendants often have relatives and friends who will someday need a defense lawyer.

Empirical evidence suggests that the attorney-client relationship is enhanced when clients are permitted to select their lawyers. A study based upon data collected in Edinburgh, Scotland, comparing private solicitors selected by their clients with public defenders whose clients were not given a choice of counsel, showed that the latter group of solicitors enjoyed consistently lower “levels of trust and satisfaction” from their clients. [526] Further, while eighty-three percent of the clients of private attorneys said that they would use the same law firm again, only forty-six percent of the public defender clients said that they wanted to be represented again by the office. [527] While other factors may have influenced ***916** these results, the study found that “clients resented being directed to use the [public defender] and this directly affected their views.” [528]

A system of client choice does not mean that defendants should be required to select their own lawyers or that clients should be permitted to delay court proceedings while searching for counsel. England's system, for example, does not require that defendants choose their own lawyers and a sizeable minority of defendants accept representation from duty solicitors who confer with them in either the police station or Magistrate Court. [529]

In the United States, both state and federal courts almost uniformly have held that the designation of counsel is vested in the court's discretion and that indigent defendants have no legal right to the attorney of their choice. [530] This rule has been applied regardless of whether the attorney desired by the defendant is qualified and available to accept representation in the case. [531] Moreover, in Morris v. Slappy, the U.S. ***917** Supreme Court held that a defendant does not enjoy a Sixth Amendment right to a “meaningful attorney-client relationship.” [532] In this case, the Court sustained the trial judge's denial of defendant's motion for continuance, after defendant's original lawyer became ill on the eve of trial and was replaced by another public defender.

A variety of arguments have been used by courts to deny defendants the right to select their own counsel, including the belief that judges know best whom to appoint and thus are able to protect defendants from making a poor selection of counsel; [533] that defendants lack sufficient information to make informed choices; [534] that appointments of counsel should be distributed to the private bar in rotation; [535] that the most popular lawyers will be overwhelmed with cases; [536] and that judicial efficiency requires that defendants be precluded from selecting their own counsel since counsel's unavailability might lead to delays in court proceedings. [537]

***918** None of these arguments is especially compelling, especially if lawyers providing criminal defense are qualified to do so and their representation is monitored. But if clients do need help in identifying lawyers, one way to assist them would be to provide a list of lawyers who are on an approved panel. That the courts know whom best to appoint since clients lack information about lawyers and thus need to be protected from their mistakes is not only condescending of defendants but ignores, like the rest of the arguments, that persons of wealth charged with a crime are in exactly the same position when they need to hire an attorney. Moreover, if some of the attorneys providing defense services are not qualified, the solution should be to exclude them from providing representation, not to deny defendants the right to select counsel of their choice. An English researcher, undoubtedly influenced by England's system of client choice, has written an effective response to the notion that courts must protect defendants from making a poor selection of counsel:

> Many customers of criminal legal aid are repeat purchasers. They have often been through the system. They usually choose lawyers on the basis of past experience or recommendation, so they have information on which to base their decisions. One should guard against the snobbery which suggests that because most clients are poor, ill-educated and socially disadvantaged they are incapable of making rational choices. Instead, it is fair to assume that the poor know more about surviving the system than the rest of us, and tend to be more adept at recognising condescension or disrespect. [538]

Distributing appointments in rotation among private lawyers should surely not rank higher than achieving client satisfaction with the selection of counsel, and even with a system of client choice there still would be many cases for which attorneys would need to be appointed. In addition, appointments should not be "distributed" to lawyers unless clients are satisfied with their performance, so in a market system of client choice the less effective lawyers should have fewer clients. Ultimately, lawyers who are not adequately representing their clients will either have reduced caseloads or be driven from the system entirely. These same principles ought to be applied to public defenders as well, just as they are to the eight new public defender offices opened in England. [539] If public defenders are serving their clients well, clients will want their services, and ***919** there is evidence that defendants will not always prefer private counsel. For example, in Quebec, where clients are allowed to choose either private counsel or a public defender, a study found that a strong majority of clients preferred representation by the public defender. [540]

Rejecting client choice because popular lawyers would receive too many requests for representation ignores counsel's duty not to accept more clients than an attorney can competently represent. [541] Arguments based upon judicial efficiency, while important, really depend on the degree of leeway given to the defendant to obtain a lawyer. If clients are restricted in the amount of time they have to obtain counsel, the prompt disposition of cases should not be a problem.

ABA Standards do not address the idea of client selection of counsel. [542] Instead, the standards recommend that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs." [543] The commentary to this provision explains that "[r]etained lawyers are neither chosen nor approved by the courts, and there are no compelling reasons for defenders and private assigned counsel to be treated differently." [544] But defendants are treated differently under the ABA's recommendation since clients who can afford counsel are not required to accept the lawyer "arranged" for them by the "administrators of the defender and assigned-counsel programs."

***920** The commentary also explains that if judges do not appoint the lawyer, this "should help to alleviate the fear of clients that the defense lawyer is working for the judge or court official in charge of appointments." [545] But if this is true when those making the appointments work for a defender or assigned counsel program, then it should be even more true when the client selects the lawyer.

Defendants in the United States have considerable autonomy when they are charged with a crime. Not only do they have a right to counsel, but they retain a constitutional right to self-representation. [546] They also are entitled to make numerous critical decisions affecting the outcome of their case, including whether to plead guilty, whether to waive a jury trial, and, in the event of trial, whether to testify. [547] But the decision about counsel's selection--arguably the most important decision that an indigent defendant can make--is vested in others. The United States would do well to heed England's example and begin to permit defendants to make their own selection of counsel.

IV. Comparative Costs and Federal Financial Assistance

A. Comparing England and U.S. Expenditures

During a meeting with the head of public legal services for the Lord Chancellor's Department, I recounted the complaints that I had heard from solicitors about the lack of fee rate increases for lawyers doing criminal defense work. While acknowledging an awareness of solicitor concerns, he commented that "there is no possible way that you can say that the government is unwilling to spend funds on criminal defense." [548] Clearly, this is correct, since there is perhaps only one other jurisdiction in the world that on a per capita basis exceeds England's expenditures for defense representation. [549] England's commitment to criminal legal aid is underscored by the Access to Justice Act, which provides that the Lord Chancellor shall pay to the CDS such funds as are necessary. [550]

***921** The Lord Chancellor's Department furnished to me expenditures for all criminal legal aid in England for the last eight years: [551]

1995-1996 £616 million

1996-1997 £669 million

1997-1998 £734 million

1998-1999 £779 million

1999-2000 £783 million

2000-2001 £873 million

2001-2002 £982 million

2002-2003 £1.098 billion (estimated amount)

The data clearly reveal that since 1995-1996 England's expenditures for criminal legal aid have risen by almost eighty percent despite the absence of significant fee increases for solicitors. [552] Thus, the government has not successfully limited expenditures

for criminal legal aid through the use of contracts with solicitors. [553] Given the population of England and Wales at fifty-two million, the expenditure on criminal legal aid for 2002-2003 was approximately $34 per capita. [554]

***922** England's expenditures for criminal legal aid are in stark contrast to the amount spent per capita on indigent defense in the United States. During 2003, The Spangenberg Group completed an updated survey of defense expenses for the fifty states, the District of Columbia, and the federal government's Criminal Justice Act (CJA) program. [555] The survey, which covers fiscal year 2001-2002 and is available on the ABA's website, [556] shows an increase in state indigent defense expenditures since the last comprehensive defense survey published in 1986. At that time, expenditures for indigent defense among the fifty states and D.C. totaled nearly $1 billion. [557] The more recent survey reveals that this sum has grown to about $2.8 billion for the fifty states and D.C. When CJA expenditures of $485 million are included, total state and federal indigent defense expenditures in the United States during 2001-2002 were approximately $3.3 billion, [558] which for the U.S. population is about $11.72 per capita. [559]

For the fifty states, where concerns about the adequacy of indigent defense spending are greatest, the expenditure was about $10 per capita. [560] However, among the states, the amounts spent on defense services vary considerably, so that the quality of representation that a person receives may depend on the jurisdiction in which the defendant is prosecuted. Of the fifty states and D.C., twenty-nine jurisdictions spent less than $10 per capita and seventeen states spent between $10 and $15 per capita. Only five jurisdictions spent more than $15 per capita for criminal defense services. [561]

***923** Since England does not have a means test for criminal legal aid, [562] provides solicitors for persons when they have not yet been charged with an offense, [563] and routinely arranges for solicitors in police stations, [564] it is not surprising that its per capita expenditures are higher than those in the United States. However, these additional expense items do not fully explain the disparity of expenditures between the two countries. When the means test was eliminated in England, the additional cost to the LSC was about £65 million annually; “advice and assistance” expenses for persons not charged with an offense is less than £3 million per year; and police station representation costs about £165 million annually. [565] If these expenditures were deducted for 2002-2003--a total of £233 million--England still would have spent $26.67 per capita for criminal legal aid. [566]

Nor are there other obvious explanations, such as the incidence of recorded crime, that would account for England's per capita expenditures for criminal legal aid being so much higher than those in the United States. [567] Instead, the real explanation for the disparity in defense expenditures ***924** between the United States and England is simply that England spends more on criminal legal aid than this nation's counties and fifty states, which collectively determine U.S. expenditures for defense representation. Indeed, England's commitment to legal services has resulted in its spending more on public defense than on prosecuting criminal cases, which is also in distinct contrast to the United States. [568] Despite complaints of solicitors about a lack of fee increases, England's criminal defense system is considerably better funded than is its U.S. counterpart.

B. A Center for Defense Services

For many years, the U.S. government has funded the Legal Services Corporation to assist poor persons needing legal assistance in civil matters. [569] The Corporation has endured even though the courts do not recognize a constitutional right to counsel in civil cases. [570] It is anomalous, ***925** however, that in the criminal area, where there is a constitutional right to counsel, there is not a federal program to assist state and local governments in providing legal representation in criminal and juvenile cases. For state and local governments, the right to an attorney is a major financial burden imposed upon them by U.S. Supreme Court decisions beginning forty years ago with Gideon, and they have been struggling with the burden ever since.

In 1979, in an effort to address the lack of federal support for indigent defense, the ABA House of Delegates adopted a resolution, proposed by its Standing Committee on Legal and Indigent Defendants (SCLAID), endorsing “the establishment

of an independent federally funded Center for Defense Services." [571] The report that accompanied the resolution explained its rationale:

> The primary responsibility for providing defense services has traditionally fallen upon local governments. However, local governments are the least capable fiscally to allocate sufficient financial resources for the adequate provision of counsel. In some cases, there is the feeling ***926** that it is unfair to place upon the local government the entire burden of meeting the Supreme Court's mandate. Too often lack of political or community support has resulted in only token funding of public defender programs. Whatever the causes, state and local governments cannot solve the problem alone. [572]

The funding difficulties identified in 1979 persist, although there has been a movement towards greater state financing of defense services and hence reduced reliance upon county governments. Today, twenty-three states provide all of the funding for defense services. [573] In the rest of the states, a combination of state and county funds are used, except in Pennsylvania and Utah where no state funds are provided. [574] It has long been believed that shifting the burden of indigent defense financing from counties to state governments would lead to additional funding for defense services. [575] This probably accounts in part for the increased funding available in 2003 compared to 1986, as noted earlier. [576] However, virtually every state confronted unprecedented fiscal problems in 2003, so that most states now are no more capable than county governments to provide adequate funds for defense services. [577]

In December 1979, based upon the ABA's resolution, Senators Dennis DeConcini (R-Ariz.) and Edward Kennedy (D-Mass.) introduced legislation, calling for a national Center for Defense Services--a private corporation with a seventeen member Board of Directors appointed ***927** by the President and confirmed by the Senate. [578] No more than half of the members were to be from the same political party and at least five members were to "have had substantial experience in providing organized defender services." [579] Under the leadership of an Executive Director, the Center was "to make grants and contracts to [defense] programs" that "substantially comply with nationally recognized standards," which were to be "approved by the Center or the Board as acceptable guidelines for the provision of defense services." [580] In return for receiving a grant or contract, the Center was authorized to require that recipients furnish "matching funds." [581] In addition, the Center could make grants or contracts for "research, or other technical assistance," as well as "training and model demonstration projects in furtherance of the purposes of this Act." [582] Finally, the Center would have been authorized to make "grants or contracts, for the review, monitoring, and evaluation of the provision of defense services." [583]

In 1998, the ABA passed another resolution embracing the principles on which the Center proposal was based. In this resolution, the ABA called upon states and local jurisdictions "to adopt minimum standards for the creation and operation of its indigent defense delivery systems" and to "require substantial compliance with such minimum standards . . . as a condition for receiving funds." [584] The report accompanying the resolution noted that "[a]n approach linking funding to compliance with standards shows particular promise in fostering improvements in indigent defense systems." [585] To support its point, the report cited activities in Indiana and the work of the IPDC. [586]

Just imagine what might have happened if a Center for Defense Services had been established, with adequate appropriations from Congress during the past two decades. Funding nationwide would have increased due to a combination of new federal monies and greater spending by the states; defense representation would have been provided in compliance with national standards as required by the Center, resulting in reasonable caseloads for public defenders, assigned counsel, and contract attorneys; ***928** counsel would have been trained for the services they provided and their qualifications would have matched the seriousness of the cases they were called upon to represent; there would have been less disparity among states in terms of their defense expenditures; fewer concerns about the quality of defense representation in capital cases and other prosecutions; fewer

reversals of convictions; and fewer cases in which innocent persons were wrongfully convicted. Finally, much like the CDS in England, the Center could have begun to assess various means of delivering defense services and evaluating the effectiveness of the legal representation provided. [587]

Conclusion

Major goals of this Article have been to provide an assessment of the difficulties facing indigent defense forty years after the Gideon decision and to compare defense programs in the United States with what is done in the nation from which we derived our legal system. While criminal legal aid in England is not without problems, [588] clearly it is far better funded than defense services in the United States. [589] England's program, moreover, contains features that we would do well to emulate, such as permitting clients to select their own counsel. [590] Also, England endeavors to assure that quality legal representation is provided, which is something to which governments in this country have paid insufficient attention. [591]

While England's defense system is financed by its central government, funding in the United States derives from states and counties. Efforts to persuade these governments to allocate sufficient monies for defense will surely continue, but now, with the perspective of forty years since Gideon, it is clear that sole reliance on states and counties means that defense services will be starved indefinitely for adequate financial support. The best hope for significant improvement, while enforcing national ***929** standards to enhance the quality of representation, is for the federal government to provide assistance through a program like a Center for Defense Services. [592]

The arguments in support of sufficient resources for the defense function are compelling. The right to an effective lawyer is not just about meaningful implementation of constitutional guarantees. Ultimately it is about justice for persons charged with crimes and assuring that only those who are truly guilty are convicted. No persons should be publicly blamed and censured, let alone deprived of liberty or life, unless they are guilty of the charged offenses. But to make the right to counsel meaningful--to make certain that the guilty are punished and to prevent miscarriages of justice--requires that governments establish and maintain well-funded public defense systems that deliver quality legal representation. Whether the United States will continue to tolerate a vast disparity between constitutional obligation and performance of counsel-- whether the United States can eventually achieve the promise of Gideon --says much about the kind of society we are.

Footnotes

a1 Professor of Law and Dean Emeritus, Indiana University School of Law--Indianapolis. LL.B. 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center. I gratefully acknowledge the assistance provided to me in this Article's preparation by the following persons, all of whom reviewed a copy of the manuscript and offered many helpful suggestions and corrections: Professor Florence Wagman Roisman, Michael D. McCormick Professor of Law, Indiana University School of Law--Indianapolis; Lord David Windlesham, Oxford, England; Tim Collieu and Katherine Pears, Criminal Defence Service, Legal Services Commission, London, England; and Shubhangi M. Deoras, Assistant Committee Counsel, American Bar Association Standing Committee on Legal Aid and Indigent Defendants. In addition, special thanks are due to Gerald L. Bepko, IUPUI Chancellor Emeritus and Indiana University Trustee Professor and Professor of Law, who arranged for my academic leave during 2002-2003, thereby enabling me to spend considerable time living in England and studying that country's criminal legal aid system. I also am indebted to all of the persons who consented to be interviewed for this Article and whose names appear in the Article's footnotes. Last, but certainly not least, I thank my student research assistants who made invaluable contributions to this Article's preparations and without whom its publication would not have been possible: Bradley Bingham, a second-year student at the Indiana University School of Law--Indianapolis; and Margaret Molloy and Inge Porter, now 2003 graduates of the law school.

1 372 U.S. 335 (1963). This decision also spawned a classic book by renowned New York Times journalist, Anthony Lewis, see Anthony Lewis, Gideon's Trumpet (1964), as well as a made-for-television movie starring Peter Fonda, see Gideon's Trumpet (CBS television broadcast Apr. 30, 1980).

2 On the same day that Gideon was handed down, the Supreme Court held in Douglas v. California, 372 U.S. 353, 358 (1963), that convicted indigent defendants accorded the right to an appeal are constitutionally guaranteed appellate counsel if they cannot afford a lawyer.

3 387 U.S. 1, 41 (1967).

4 407 U.S. 25 (1972).

5 Id. at 32.

6 Id.

7 See, e.g., Murray v. Giarrantano, 492 U.S. 1, 4 (1989) (no right to court-appointed counsel in post-conviction hearings); Scott v. Illinois, 440 U.S. 367, 369 (1979) (state not required to appoint counsel where defendant is charged with an offense punishable by fine only); Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973) (indigent probationer or parolee has no unqualified right to be represented by counsel at revocation hearings).

8 Chief Justice Earl Warren was appointed to the United States Supreme Court by President Eisenhower and took the oath on October 5, 1953 and departed the Court on June 23, 1969. During his tenure as Chief Justice, in addition to Gideon, In re Gault, and Douglas, the Supreme Court decided United States v. Wade, 388 U.S. 218, 237 (1967) (extending the right to counsel to post-indictment lineups).

9 535 U.S. 654, 658 (2002). Shelton was a 5-4 decision, with Justices Scalia, Rehnquist, Kennedy, and Thomas dissenting.

10 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

11 287 U.S. 45, 68 (1932) (state trial court is required to appoint counsel in a capital case).

12 Gideon, 372 U.S. at 344-45 (quoting Powell, 287 U.S. at 68-69).

13 See infra notes 44-122 and accompanying text.

14 See infra notes 125-42 and accompanying text.

15 See ABA, Gideon Undone: The Crises in Indigent Defense Funding (John Thomas Moran ed., 1982). The following problems in indigent defense services were listed:
(1) The financing of criminal defense services for indigents is generally inadequate, constituting only 1.5% of total expenditures for criminal justice matters by state and local governments.
(2) Nationally, public defenders have too many cases and lack support personnel.
(3) Compensation for private, appointed counsel is insufficient, and payments are administered in an arbitrary and capricious manner.
(4) On the misdemeanor level, defendants are often not advised of their right to counsel, and their waiver of counsel often fails to meet constitutional standards.
(5) Indigent defense caseloads are increasing. The rate of felony defendants requiring appointment of counsel has gone from 48% in the recent past to a current rate of 55% to 60%.
(6) County officials, concerned about rising costs and shrinking budgets, are considering various alternatives, such as a second public defenders' office, or contract systems in lieu of a public defender. In the latter situations, there have been some serious abuses.
(7) State financing, rather than county funding, is a more viable option: counties are generally underfunded.
(8) Adequate funding of defense services is very unpopular in this era of Proposition 13 and demands for tougher sentencing.
(9) Inadequate compensation puts pressure on appointed private lawyers to plead their cases out as quickly as possible.
Id. at 1. The emphasis during this ABA hearing was on defense services for adults in criminal courts. This Article also focuses on criminal defense for adults. However, the problems of legal representation in juvenile delinquency proceedings, due to a lack of adequate funding, are equally distressing, if not worse. In December 1995, the Juvenile Justice Center of the ABA, in cooperation with other organizations, issued a lengthy national assessment of juvenile defense representation funded by the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention. See ABA Juvenile Justice Ctr. et al., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 7-12, 67 (1995), available at http:// www.abanet.org/ crimjust/juvjus/cfj.html. The report's findings, inter alia, were that “public defenders carry enormous caseloads,” which are “the single most important barrier to effective representation”; a large percentage of youths waive their right to counsel, but probably many waivers are constitutionally deficient because not knowing and intelligent; few appeals are taken of juvenile court delinquency

findings; and there are inadequate budgets for training of defenders and insufficient staffs of social workers and other necessary personnel essential for juvenile defenders to do their work effectively. Id. The report's number one recommendation was that "[s]tate and local jurisdictions should increase the resources available to support representation in juvenile delinquency proceedings." Id.

16 ABA, supra note 15, at 1.

17 Information about these hearings is available at http:// www.abanet.org/legalservices/sclaid/defender/projects.html.

18 Champion, Jan.-Feb. 2003.

19 Ralph Grunewald, Commemorating Gideon at 40, Champion, Jan.-Feb. 2003 at 5. In an editorial commemorating the fortieth anniversary of Gideon, The New York Times also noted how much still needs to be done to implement effectively the Gideon decision. See Gideon's Trumpet Stilled, N.Y. Times, Mar. 21, 2003, at A18.

20 This representation was undertaken during 1963-1964 in Washington, D.C. as a member of the E. Barrett Prettyman Fellowship program at the Georgetown University Law Center.

21 During the early 1980s, I undertook a national study of indigent defense services on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. My research was published in Norman Lefstein, Criminal Defense Services for the Poor Methods and Programs for Providing Legal Representation and the Need for Adequate Financing (ABA 1982). In the introduction to the study, I offered the following summary:
Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained.
Id. at 2.

22 During the late 1970s I served as the reporter for the second edition of the ABA Standards Relating to Providing Defense Services, The Defense Function, and The Prosecution Function. I also chaired the Task Force that developed the ABA's current editions of these standards, which were approved in 1990. See ABA Standards for Criminal Justice Providing Defense Services (3d ed. 1992) [hereinafter ABA, Providing Defense Services]; ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993) [hereinafter ABA, Prosecution Function or ABA, Defense Function].

23 Since 1990 I have served as chairman of the Indiana Public Defender Commission, which is established pursuant to Ind. Code § 33-9-13-1 (2003).

24 The committee--the Indigent Defense Advisory Group (IDAG)--functions under the auspices of the ABA Standing Committee on Legal Aid and Indigent Defendants. The primary responsibility of IDAG is to oversee the activity of the Bar Information Program, which encompasses the ABA's efforts throughout the country to improve indigent defense services.

25 Throughout this Article, the reference to England also includes Wales because legislation enacted by Parliament in the legal aid area extends to both. On the other hand, Scotland and Northern Ireland have considerable legislative autonomy. See http:// www.ukonline.gov.uk/CitizenSpace/GuideToGovernmentArticle/fs/en?CONTENT_ ID =4002621&chk=Ozs0CA (Devolution in the UK). Parliament enacts primary legislation for all of the United Kingdom, except for matters that are devolved to the Scottish Parliament and the Northern Ireland Assembly. See Overview of UK Government, at http:// www.ukonline.gov.uk/CitizenSpace/GuideToGovernmentArticle/fs/en?CONTENT_ ID=40028&hk=wtv/a4. The Scottish Parliament and Executive have responsibility for most aspects of domestic, economic, and social policy, while the UK Parliament retains control of foreign affairs, defense and national security, macro-economic and fiscal matters, employment and social security. Background Information on the Devolution Settlements, Office of the Deputy Prime Minister of UK, at http://www.devolution.odpm.gov.uk/ (last visited May 15, 2003). In contrast, the responsibilities and authority of the National Assembly of Wales are not as broad as the Scottish Parliament. In particular, the National Assembly of Wales does not have the power to enact primary legislation, and the UK Government retains responsibility for the police and legal system. Id. The Northern Ireland Assembly has legislative and executive powers similar in range to the Scottish Parliament. Id. The populations of England and Wales in 2001 were 49,138,831 and 2,903,085, respectively. United Kingdom Census

2001, at http://www.statistics.gov.uk/census2001/default.asp (last visited July 2, 2003). The populations of Scotland and Northern Ireland in 2001 were estimated at 5,062,011 and 1,685,267, respectively. Id.

26 See infra notes 467-546 and accompanying text.

27 See infra notes 145-47 and accompanying text.

28 Standing Comm. on Legal Aid and Indigent Defendants, ABA, Report to the House of Delegates (Feb. 1979) available at http://www.abanet.org/legalservices/downloads/sclaid/121.pdf.

29 The Innocence Protection Act is discussed infra at text accompanying notes 508-12. It was first introduced during the 106th Congress. Innocence Protection Act, S. 2073, 106th Cong. (2000); Innocence Protection Act, H.R. 4078, 106th Cong. (2000). At the close of the 107th Congress in November 2002, the Senate version of the bill (S. 486) was supported by thirty-two Senators, and the House version of the bill (H.R. 912) was supported by 250 Representatives. Kyle O'Dowd, It's Not All Bad: 108th Congress Offers Hope of Indigent Defense Improvements, Champion, Mar. 2003, at 41. During the 108th Congress, the bill was re-introduced in the Senate on January 7, 2003, and referred to the Senate Judiciary Committee. See Justice Enhancement and Domestic Security Act of 2003, S. 22, 108th Cong., § 6201 (2003). In addition, a House subcommittee has held hearings concerning some of the same subject matters dealt with in the Senate bill. See Advancing Justice through the Use of Forensic DNA Technology: Oversight Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Comm'n on the Judiciary, 108th Cong. (2003) (statement of Peter J. Neufeld, Co-Director, Innocence Project).

30 The unit of government responsible for compensating counsel, as well as the organization of defense services, has sometimes been litigated. See infra notes 68-69 and accompanying text. The ABA's position on funding and the governmental unit responsible for footing the bill is contained in ABA, Providing Defense Services, supra note 22, Standard 5-1.6 (“Government has the responsibility to fund the full cost of quality legal representation for all eligible persons....The level of government that funds defender organizations, assigned-counsel programs or contracts for services depends upon which level will best insure the provision of independent, quality legal representation.”).
Gideon also failed to address “the broad outlines of what might serve as a benchmark of [effective] representation....What we know with the benefit of hindsight is that the Court missed an important moment to use the Gideon decision as a vehicle to shape expectations of what effective representation entails.” Kim Taylor-Thompson, Tuning Up Gideon's Trumpet, 71 Fordham L. Rev. 1461, 1463 (2003).

31 Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972).

32 In 1972 there were 355,200 attorneys in the United States, which amounted to one attorney for every 600 persons. Id. at 56. Based on a current population estimate of 281,421,906, infra note 559, and a current estimate of 1,058,662 attorneys, Mkt. Research Dep't, ABA, Nat'l Lawyer Population by State (2003), available at http:// www.abanet.org/marketresearch/2002nbroflawyersbtstate.pdf, the current ratio is approximately one attorney for every 265 persons.
In my forty years of discussing indigent defense issues with lawyers from all over the United States, I have never heard persons suggest that there are not enough lawyers to handle the cases so long as governments provide reasonable compensation for their services.

33 Argersinger, 407 U.S. at 59 (Powell, J., concurring).

34 Id. at 61 n.30 (Powell, J., concurring). Justice Powell relied upon a study conducted in 1970, which stated that “in 1971, the State of Kansas spent $570,000 defending indigents in felony cases--up from $376,000 in 1969. Although the budgetary request for 1972 was $612,000, the legislature has appropriated only $400,000.” Id. (Powell, J., concurring). Prior to serving on the Supreme Court, Justice Powell served as president of the ABA. During his tenure, Powell chose to make the “availability of legal counsel to all as one of three top priorities for the Association during his term.” Earl Johnson, Jr., Justice and Reform: The Formative Years of the OEO Legal Services Program 55 (1974).

35 Alabama v. Shelton, 535 U.S. 654, 670-71 (2002). The Court further explained that states unwilling to appoint counsel could use “pretrial probation” as a means of circumventing the Shelton rule. “Under such an arrangement, the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program, which includes conditions typical of post-trial probation. The adjudication of guilt and imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions.” Id. at 671. The first study of a state's compliance with Shelton was completed by The Spangenberg Group on behalf of the Administrative Office of the Courts of Georgia. The report, which was based upon extensive observations and interviews in

nineteen of Georgia's counties, concluded that failure to comply with Shelton's requirements was widespread. See The Spangenberg Group et al., Admin. office of the Courts of Georgia for the Chief Justice's Comm'n on Indigent Defense, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Comm'n on Indigent Defense, Part II: Analysis of Implementing Alabama v. Shelton in Georgia (2003).

36 512 U.S. 1256 (1994) (Blackmun, J., dissenting).

37 Id. at 1257 (Blackmun, J., dissenting).

38 See Unfunded Mandate Reform Act of 1995, 2 U.S.C. §1501 (2000). The Act was approved on March 22, 1995 and enacted in Pub. L. 104-4, §2, 109 Stat. 48. Constitutional rights are excluded from its coverage. State constitutions also guarantee the right of the accused to the assistance of counsel in criminal proceedings. See, e.g., Ill. Const. art. I, §8; Miss. Const. art. III, §26; N.Y. Const. art. I, §6; Neb. Const. art. I, §11; S.D. Const. art. VI, §7; Mont. Const. art. II, §24.

39 The Spangenberg Group, ABA, State and County Expenditures For Indigent Defense Services in Fiscal Year 2002, at 1 (2003), available at http:// www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf; see also Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, 58 Law & Contemp. Probs. 1 (1995).

40 The Spangenberg Group, ABA, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview 1-2 (2003), available at http:// www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratesnoncapital2003.pdf [hereinafter Non-capital Rates of Compensation]. The ABA lists various elements to be covered in contracts for defense services. These include the types of cases in which representation will be provided; attorney workloads and a process for dealing with excessive caseloads; experience levels of attorneys and their qualifications for handling different types of cases; a policy on conflicts of interest; and arrangements for support services, supervision, training, and professional development. ABA, Providing Defense Services, supra note 22, Standard 5-3.3.
See also The Spangengerg Group, U.S. Dep't. of Justice, Contracting for Indigent Defense Services, A Special Report (2000) [hereinafter Contracting for Defense Services] (documenting judicial and legislative attempts to deal with contracts for indigent defense and discusses national standards that govern these services); Meredith Anne Nelson, Quality Control for Indigent Defense Contracts, 17 Cal. L. Rev. 1147 (1988) (analyzing contract systems for indigent defense with suggestions for quality controls); Kelly A. Hardy, Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney's Tactics, 80 Marq. L. Rev. 1053 (1997) (explaining the evolution of the contract system with special emphasis on Wisconsin's fixed fee contracting system); Low-Bid Criminal Defense Contracting: Justice in Defeat, Champion, Nov. 1997, at 22 (giving a general discussion of the contract system); David Paul Cullen, Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions, 17 Okla. City U. L. Rev. 311 (1992) (comparing contractual based indigent defense in five un-named jurisdictions in Oklahoma).

41 Non-capital Rates of Compensation, supra note 40, at 2.

42 Id.

43 The total spent nationwide on indigent defense today is discussed infra at notes 555-68 and accompanying text.

44 Office of Justice Programs, U.S. Dep't of Justice, Nat'l Symposium on Indigent Defense 2000, at xiii (2000).

45 Id. at app. 2.

46 Id. at 3-5.

47 See Contracting for Defense Services, supra note 40.

48 The Spangenberg Group, U.S. Dep't of Justice, Keeping Defender Workloads Manageable (2001) [hereinafter Defender Workloads]. Both this report and the one dealing with contracts for defense services were prepared by The Spangenberg Group, a national consulting organization headquartered in West Newton, Massachusetts, which has extensive experience furnishing technical assistance in the indigent defense area in every state in the nation. The Spangenberg Group is also responsible for the data displayed on the ABA's website cited in this Article. See, e.g., supra notes 39-41 and accompanying text; and infra notes 55 and 556-57 and accompanying text.

49 Defender Workloads, supra note 48, at 2. When defense lawyers either accept or are required by their contract or public defender office to represent an excessive number of clients, they invariably violate their obligations as members of the legal profession. The first duty of a lawyer representing a client is to furnish "competent representation [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1 (2003). However, disciplinary authorities almost never pursue deficient representation of indigents, largely because such defendants rarely file complaints. If convicted, indigent defendants invariably challenge their convictions in the courts, often complaining about the performance of their lawyers.

50 Special Comm. on Crim. Justice in a Free Society, ABA, Criminal Justice in Crisis (1988).

51 Id. at 9.

52 Id. at 37.

53 See, e.g., Stephen B. Bright, Glimpses at a Dream Yet to Be Realized, Champion, Mar. 1998, at 12 (discussing the deteriorating state of indigent defense with reference to situations in Alabama and Kentucky); Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake, Ann. Surv. Am. L. 783 (1997) (examining the availability and quality of indigent defense services at each stage of the criminal justice process); Matthew J. Fogelman, Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial, 26 J. Legal Prof. 67 (2002) (noting the relationship between under funding, time constraints, caseload, and adequacy of counsel); John Gibeaut, Halls of Injustice?, A.B.A. J. 35 (2001) (dealing with public defender caseloads in Venago County, Pennsylvania); Richard Klein, The Constitutionalization of Ineffective Assistance of Counsel, 78 Md. L. Rev. 1433 (1999) (stating that the Supreme Court's test for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), has effectively sanctioned inadequate legal representation by failing to pressure defense systems to reform); Richard Klein, The Eleventh Amendment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel, 68 Ind. L.J. 363 (1993) [hereinafter Klein, The Eleventh Amendment] (stating that inadequate compensation for assigned counsel frequently attracts to defense work the least qualified attorneys who, in order to maximize their compensation, represent more clients than they can competently handle); Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625 (1986) (description of under funding of public defender systems and resulting inadequate representation by counsel); Margaret H. Lemos, Civil Challenges to the use of Low-Bid Contracts for Indigent Defense, 75 N.Y.U. L. Rev. 1808 (2000) (analyzing systemic challenges and defects of indigent defense representation with special emphasis on contract systems for indigent defense); Robert L. Spangenberg & Tessa J. Schwartz, The Indigent Defense Crisis is Chronic, 9 Crim. Just. 13 (1994) (authors discuss caseloads of public defenders and cost of under funding public defenders and court-appointed attorneys).

54 See, e.g., James S. Liebman, Opting for Real Death Penalty Reform, 63 Ohio St. L.J. 315, 328 (2002) (arguing that any stable system of quality capital-defense representation must include minimum lawyer qualifications, at least two lawyers per case, adequate compensation for lawyers and ample funds for experts and investigators, and appointment mechanisms that prevent patronage and cost-saving concerns from trumping quality); Kelly Reissmann, "Our System Is Broken": A Study of the Crisis Facing the Death-Eligible Defendant, 23 N. Ill. U. L. Rev. 43 (2002) (discussing inadequate funding as one explanation for ineffective assistance of counsel in death penalty cases); Penny J. White, Errors and Ethics: Dilemmas in Death, 29 Hofstra L. Rev. 1265 (2001) (enumerating and discussing inadequate funding as a cause of errors in capital cases); see also Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 Yale L.J. 1835 (1994) (examining reasons for deficient representation and the likelihood of improvement); Michael D. Moore, Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants, 37 Wm. & Mary L. Rev. 1617 (1996) (urging establishment of capital trial units to provide specialized legal services to all indigent capital defendants); Ashley Rupp, Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?, 71 Fordham L. Rev. 2735 (2003) (arguing that the enormous costs of prosecution and defense in capital cases results in an arbitrary application of the death penalty); Douglas W. Vinck, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329 (1995) (discussing resources provided for indigent defense services in death penalty cases); Albert L. Vreeland, II, The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation, 90 Mich. L. Rev. 626 (1991) (arguing that inadequate compensation places a financial burden on appointed counsel, impairs their ability to provide adequate representation, and creates a motivational disincentive to vigorous representation).

55 See Non-capital Compensation Rates, supra note 40, tbl. at 18-29; The Spangenberg Group, ABA, Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-by-State Overview, app. tbl. at 1-11 (2003) [hereinafter Capital Compensation Rates].

56 2002 Survey of Law Firm Economics Executive Summary 10 (Altman Weil, Inc. ed., 2002). This survey also shows the billing rates of lawyers in the upper quartile: $305 for equity partners/shareholders; $290 for non-equity partners; $205 for associate lawyers; and $200 for staff lawyers. Id.

57 During fiscal years 1999-2001, the federal government paid private attorneys an average fee of $242 per hour for consultation on litigation with the DOJ's Antitrust Division; an average fee of $256 per hour for private attorneys engaged in intellectual property consultation with NASA and the Veteran's Administration; and an average fee of $304 per hour for asset-forfeiture related services with the U.S. Marshals Service. Letter from Paul L. Jones, Director, Justice Issues, U.S. Gen. Acct. Off., to the Hon. William D. Delahunt, U.S. House of Representatives 5 (July 3, 2001); see also Knight v. Alabama, 824 F. Supp. 1022, 1032-33 (N.D. Ala. 1993) (awarding lead attorney hourly fee rate of $275 and other lawyers awarded rates ranging from $100 to $200 per hour in case involving discrimination in Alabama public education); R.C. by Ala. Disabilities Advocacy Program v. Nachman, 992 F. Supp. 1328, 1333 (M.D. Ala. 1997) (stating that reasonable hourly fee rate was $250 for plaintiff's lead counsel and $175 for plaintiff's secondary counsel in case involving constitutional and federal statutory violations in the Alabama Department of Human Resources' child welfare system); Mallory v. Harkness, 923 F. Supp. 1546, 1555 (S.D. Fla. 1996) (holding $275 per hour as reasonable hourly rate for plaintiff's attorney in case challenging constitutionality of state statute that discriminated on the basis of gender and race).

58 Non-capital Compensation Rates, supra note 40, tbl. at 18-19; Capital Compensation Rates supra note 55, app. tbl. at 1-11. The table dealing with compensation in non-capital felonies reveals that almost two-thirds of the states still compensate assigned counsel in the range of $30 to $65 per hour. A fee of $60 per hour is paid to appointed counsel in federal courts under the Criminal Justice Act, with a $5200 maximum that can be exceeded with permission of the trial court. 18 U.S.C. §3006A(d) (2000). The highest fee rate in the country for assigned counsel representation appears to be in federal death penalty cases, in which the government pays not more than $125 per hour. 21 U.S.C. §848(q)(10)(A) (2000).

59 Non-capital Compensation Rates, supra note 40, at 2. Although the payments are not especially meaningful, there are two states in which overhead expenses are paid to assigned counsel. In Alabama, in-court compensation rates are $90 per hour, but this is only because $30 for overhead costs is added to the statutory rate of $60 per hour. Moreover, there are per case maximums on the amount that can be paid in Alabama unless waived by the trial court, i.e., $3500 for class A felonies; $2500 for class B felonies; and $1500 for class C felonies. Id. table at 18. In Mississippi, the hourly rate varies from county to county, but $25 for overhead is added to the hourly fee rate. However, $1000 is the maximum payment for a felony case, and the trial court cannot waive this fee cap. Id. at 2, tbl. at 24.

60 Id. at 2.

61 Id. Unlike the other 48 states, Mississippi and Virginia do not permit a judge to increase the maximum fees provided for assigned counsel. Id.

62 ABA, Providing Defense Services, supra note 22, Standard 5-2.4, at 39 .

63 Id. Standard 5-2.4 cmt., at 40.

64 Id. Standard 5-2.4 cmt., at 42.

65 See generally Adele Bernhard, Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services, 63 U. Pitt. L. Rev. 293 (2002).

66 For cases rejecting claims of inadequate compensation, see, e.g., Ex parte Grayson, 479 So. 2d 76, 79-80 (Ala. 1985) (maximum fee of $1000 for capital case did not make effective assistance impossible because attorneys have ethical obligation to give their best efforts to their clients); Sparks v. Parker, 368 So. 2d 528, 530-31 (Ala. 1979) (underpayment of court-appointed attorneys did not violate right to effective assistance of counsel.); People v. Dist. Court, 761 P.2d 206, 210 (Colo. 1988) (rejecting claim of ineffective assistance of appointed counsel due to inadequate compensation of the scheduled maximum total fee for the defense of a class 3 felony of $2000 where defendant was unable to demonstrate any specific errors, but only alleged that counsel's representation might at some future time prove constitutionally deficient should case go to trial); Lewis v. Iowa Dist. Court, 555 N.W.2d 216, 217-20 (Iowa 1996) (where attorneys challenged fee guidelines that provided compensation at a rate of $40 to $60 per hour with maximum fees for certain

forms of court-appointed client representation, the court held that evidence of inadequate compensation for court-appointed attorneys did not justify presumption of ineffective assistance of counsel absent a showing of specific harm to indigent's constitutional rights); Postma v. Iowa Dist. Court, 439 N.W.2d. 179, 181-82 (Iowa 1989) (fee guidelines of $45 per hour with a $1000 cap do not create chilling effect on representation of indigent criminal defendants); Webb v. Commonwealth, 528 S.E.2d 138, 140 n.1, 144-45 (Va. Ct. App. 2000) (where defendant challenged Virginia fee schedule for indigent representation that provided "a maximum fee of $735 for representation of a defendant charged with a felony punishable by confinement for more than twenty years; for representation in connection with any other felony charge, $265; and for any misdemeanor punishable by confinement, $132," the court held that the fee schedule was properly based on the budgetary priorities of the legislature, and was narrowly tailored to serve the compelling governmental interest in providing the indigent defendant effective assistance of counsel). For cases sustaining challenges to the level of compensation, see, for example, Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991) (holding that mandatory fee caps constituted a "taking" of attorney's property); White v. Bd. of County Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989) (holding that statutory fee cap is unconstitutional when applied in such a manner that curtails courts' inherent power to secure effective, experienced counsel for indigent defendants in capital cases); Makemson v. Martin County, 491 So. 2d 1109, 1115 (Fla. 1986) (stating that departure from statutory compensation system is possible in extraordinary and unusual cases to ensure that the attorney would be compensated in accordance with his time, talents, and energy); Hulse v. Wifat, 306 N.W.2d 707, 712 (Iowa 1981) (stating that attorneys should be compensated for reasonable and necessary time); State ex rel. Stephan v. Smith, 747 P.2d 816, 850 (Kan. 1987) (Kansas fee system violated the Kansas Constitution); In re Recorder's Court Bar Ass'n, 503 N.W.2d 885, 888, 897 (Mich. 1993) (holding that fee schedule based on a fixed fee is unreasonable, but court elected to leave implementation of any specific system of compensation up to the discretion of the Chief Judge); State v. Robinson, 465 A.2d 1214, 1216 (N.H. 1983) (fee limit must sometimes be exceeded in order to protect indigent defendant's right to effective assistance of counsel); Madden v. Township of Delran, 601 A.2d 211, 219 (N.J. 1992) ("financial pressures on unpaid counsel can affect their performance"); State v. Lynch, 796 P.2d 1150, 1164 (Okla. 1990) (holding that Oklahoma compensation system is unconstitutional because of substantial probability that its application is defective); Bailey v. State, 424 S.E.2d 503, 508 (S.C. 1992) (stating that fee setting statutes should not be interpreted as setting maximum amounts of reimbursement since the statutes do not provide compensation to ensure effective assistance of counsel); Jewell v. Maynard, 383 S.E.2d 536, 544 (W. Va. 1989) ("It is unrealistic to expect all appointed counsel...to remain insulated from the economic reality of losing money each hour they work.... Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.") (emphasis in original); State ex. rel. Friedrich v. Circuit Court, 531 N.W.2d 32, 35 (Wis. 1995) (compensation at a rate exceeding the statutory fee schedule should be awarded when necessary to secure qualified and effective counsel).

67 See, e.g., Hill v. Reynolds, 942 F.2d 1494, 1496 (10th Cir. 1991) (public defenders' inability to file appellate briefs promptly due to excessive caseloads excused the defendant from exhausting his state remedies); Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990) (appointed counsel's failure to file appellate brief for five years constituted deprivation of due process); Yourdon v. Kelly, 769 F. Supp. 112, 115 (W.D.N.Y. 1991) (delay of nearly four years attributable to appointed counsel was sufficiently long to constitute ineffective assistance as matter of law); Harris v. Kuhlman, 601 F. Supp. 987, 992-93 (E.D.N.Y. 1985) (counsel's failure to perfect indigent defendant's appeal for approximately seven years was gross ineffective assistance of counsel); People v. Johnson, 606 P.2d 738, 747-48 (Cal. 1980) (excessive caseloads may violate defendants' right to speedy trial); Hatten v. State, 561 So. 2d 562, 565 (Fla. 1990) (failing to file briefs within the mandated time period was ineffective representation); State v. Peart, 621 So. 2d 780, 783 (La. 1993) (excessive caseloads and insufficient support services for public defenders created presumption that indigent defendants were not provided constitutionally required effective assistance of counsel). But see Williams v. James, 770 F. Supp. 103, 107 (W.D.N.Y. 1991) (delay of two and one-half years, even if attributable to counsel, was not sufficient to constitute ineffective assistance of counsel as matter of law).

68 See, e.g., State v. Smith, 681 P.2d. 1374, 1381 (Ariz. 1984) (contract bidding system created rebuttable inference of ineffectiveness of counsel because it overworked the contract attorneys, thereby violating defendants' rights to due process and counsel as guaranteed by Arizona and U.S. Constitutions); In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1138 (Fla. 1990) (Six county governments requested a review of a court's order restricting prosecution of criminal appeals by a particular circuit's public defender to appeals from that particular circuit. The Florida Supreme Court modified the order slightly to make it more consistent with existing legislative directions by stating that where excessive backlogs existed, the courts could appoint private counsel.); Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999) (evidence of systemic defects insufficient to trigger a presumption of ineffective assistance); Coleman v. State, 703 N.E.2d 1022, 1039 (Ind. 1998) (evidence of systemic defects did not justify a presumption of ineffective assistance of counsel); Games v. State, 684 N.E.2d 466, 481 (Ind. 1997) (evidence of systemic defects did not constitute a presumption of ineffective assistance of counsel since defendant failed to establish that individualized

errors due to systemic errors undermined the reliability of his conviction); Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996) (indigent defendants failed to establish sufficient substandard assistance of counsel).

69 See, e.g., State v. Crittenden County, 896 S.W.2d 881 (Ark. 1995) (under Arkansas law the state is responsible for indigent defense fees); In re Order on Prosecution of Criminal Appeals, 561 So. 2d at 1138 (court has duty to appoint other counsel where public defender has excessive case backlog, with the county bearing the cost of appointed private counsel); In re D.B., 385 So. 2d 83, 87 (Fla. 1980) ("when counsel is constitutionally required, the county, rather than the state, must compensate appointed counsel"); Reist v. Bay County Circuit Judge, 241 N.W.2d 55, 66 (Mich. 1976) (cost of appointed counsel allocated to the county); State v. Quitman County, 807 So. 2d 401, 405 (Miss. 2001) (county has standing to challenge statute requiring it to fund representation of indigent defendants).

70 See FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990). This litigation is discussed in Klein, supra note 53, at 375-80.

71 The problems discussed below are from ten different states, but more states could have been included in this summary of recent difficulties in the indigent defense area. For example, the Gideon Project of the ABA Standing Committee on Legal and Indigent Defendants funded a study that covered the Calcasieu Parish Public Defender's Office in Louisiana. The report concluded "that there is a lack of client contact, little investigative and/or legal work performed on cases prior to trial, no use of experts, and minimal assertion of clients' legal rights." Michael M. Kurth & Daryl V. Burckel, Defending the Indigent in Southwest Louisiana 1 (2003). Additionally, the report noted that felony caseloads of attorneys were "three times greater than state caseload guidelines recommend" and that the defender's office "needs additional funding." Id. Similarly, a report of the National Legal Aid & Defender Association about the public defender's office in Clark County, Nevada, found that "attorney caseloads are in serious breach of national workload standards. The office has been historically understaffed and there is a serious crisis in adult felony and misdemeanor representation. Juvenile representation is beyond the crisis point and requires immediate attention to avert constitutional challenges of ineffective assistance of counsel." National Legal Aid & Defender Association, Evaluation of the Public Defender Office: Clark County, Nevada, at ii (2003). Moreover, just as this Article was being readied for publication, The Spangenberg Group, on behalf of the ABA, issued a devastating report about Virginia, which catalogued the many ways in which the state's system of indigent defense fails to protect the rights of the poor. The Spangenberg Group, A Comprehensive Review of Indigent Defense in Virginia (2004), available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf. In an editorial about the Virginia study, the Washington Post commented that:

[t]he central finding of the report...is that the commonwealth's system for providing lawyers for poor people accused of crimes "is deeply flawed and fails to provide indigent defendants the guarantees of effective assistance of counsel required by federal and state law." ...The rash of exonerations nationwide, including in Virginia, has proven that the defense of indigent people cannot be ignored. Justice Denied in Virginia, Wash. Post, Feb. 10, 2004, at A22. For additional examples of states with indigent defense systems in crisis, see No Exceptions: A Campaign to Guarantee a Fair Justice System for All, Vol. 2: The Caseload Crisis (2003).

72 The Spangenberg Report, A Statewide Evaluation of Public Defender Services in Pennsylvania (2002) (on file with Author). The Spangenberg Group is also discussed supra note 48.

73 Id. at 2.

74 Id. at 81.

75 Id. at 78.

76 See Report of the Chief Justice's Comm'n on Indigent Defense (2002), available at http:// www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc.

77 Id. at 3.

78 Id.

79 Id. at 4.

80 Id.

81 Id.

82 Bill Rankin, Indigent Defense Rates F, Atlanta J.-Const., Dec. 12, 2002, at 1A.

83 Id.; see also Bill Rankin & Rhonda Cook, Indigent Defense to Cost Millions, Atlanta J.-Const., Dec. 13, 2002, at 1E. For more information on indigent defense services in Georgia, see Bill Rankin, Three Systems: Is One Superior?, Atlanta J.-Const., Apr. 21, 2002, at 21A; Bill Rankin, Justice Delayed, Atlanta J.-Const., Apr. 21, 2002, at 1A.
On May 22, 2003, the Georgia Legislature passed the Georgia Indigent Defense Act of 2003. See 2003 Ga. Laws 32 (H.B. 770). The new legislation creates public defender offices in each of the state's judicial districts and also establishes a public defender standards council to set guidelines for public defenders throughout the state. The new public defender system is scheduled to begin operations in 2005. Funding to implement the new legislation has not yet been approved. Under the current Georgia program, pursuant to which counties receive grants from the state for indigent defense, the state expects to spend approximately $6.3 million in 2003 and $8.3 million in 2004. In contrast, Governor Perdue of Georgia estimated that the new system will cost $50-$70 million per year. Bill Rankin, Indigent Defense Gets Force But Needs Funds, Atlanta J.-Const., May 23, 2003, at 1F.

84 Compl. for Writ of Superintending Control at 2, In re Wayne County Criminal Defense Bar Ass'n, 663 N.W.2d 471 (Mich. 2003) (No. 122709), available at http://www.nadcl.org/public.nsf/DefenseUpdates/WayneCo/ $FILE/WaynoeCoComplaint.pdf. See also Shawn D. Lewis, Lawyers Sue Court for Raise, Detroit News, Nov. 12, 2002, at 1A; Suzette Hackney, Lawyers Sue Circuit Court, Detroit Free Press, Nov. 12, 2002; Defense Lawyers, Low Pay Buys Only Injustice for Poor Defendants, Detroit Free Press, Nov. 12, 2002. “The problem is national in scope. Around the country, counties and states are unwilling to spend more for defending those who are least able to defend themselves. Some counties actually contract with the lowest-bidding attorney for all their indigent cases.” Id. See also Frank D. Eaman, Michigan--48th in the Country in Assigned Counsel Fees, Champion, Dec. 2001, at 43.

85 See Lewis, supra note 84.

86 Compl. for Writ of Superintending Control at 12-13, In re Wayne County Crim. Def. Bar Ass'n 663 N.W.2d 471 (Mich. 2003) (No. 122709).

87 See Lewis, supra note 84.

88 Id. Subsequently, the case was appealed to the Michigan Supreme Court, which denied all relief. See Wayne County Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471 (Mich. 2003).

89 See Chad Wright, Address at the ABA Midyear Meeting (Feb. 7, 2003).

90 See id.

91 Amended Compl. at 4, White v. Martz (filed Feb. 14, 2002) (No. C DV-2002-133), available at http:// www.aclu.org/CriminalJustice/ CriminalJustice.cfm?ID=11351&c=48 (last visited Aug. 14, 2003); see also Press Release, American Civil Liberties Union, ACLU Files Class-Action Lawsuit Against Montana's Indigent Defense Program (Feb. 14, 2002).

92 See Press Release, American Civil Liberties Union, supra note 91.

93 Chief Judge Michael S. Spearman, Remarks, Are We Keeping the Promise? The Right to Counsel 40 Years After Gideon v. Wainwright (Feb. 7, 2003).

94 Id.

95 Id.

96 Id.

97 See N.Y. County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. 2003).

98 Id. at 440.

99 Id. at 399.

100 Id. at 415. Although the trial judge ordered the State of New York to pay assigned counsel an “interim rate” of $90 per hour, the opinion indicates that the permanent injunction is only effective “until modification of County Law §722-b by the Legislature.” Id.

at 415. On May 15, 2003, both the Senate and the Assembly voted to override the Governor's veto (A.B. 2106, 226th Leg., Annual Sess. (N.Y. 2003)) of the bill that compensates assigned counsel at a rate of $60 per hour for in-court and out-of-court work in matters dealing with misdemeanors or lesser offenses; and a rate of $75 per hour for in-court and out-of-court work in matters dealing with felonies and appellate proceedings. See N.Y. County Law §722-b (McKinney 2003). The new rates become effective on January 1, 2004, and will be funded by the Indigent Legal Services Fund administered by the Commissioner of Taxation and Finance and the Comptroller. See N.Y. State Fin. Law §98-b (McKinney 2003). It is unclear what effect the legislature's action will have on the pending appeal of this case. However, the New York County Lawyers' Association "believes that the new law does not go far enough" and "remains committed to [the appeal] of its case." John Caher, County Lawyers' Group Sits Out Celebration Of Assigned-Counsel Rate Hike Legislation, N.Y. L.J., June 3, 2003, at 1.

101 See Tamara El-Khoury, Maryland Public Defenders Overburdened with Cases, Capital News Service, Nov. 27, 2002 (on file with Author). "The situation has gotten so desperate, as of spring, Baltimore's public defender's office has refused to take any more cases. Maryland's Public Defender, Stephen Harris, capped open cases per attorney at 60." Id. The ABA standard dealing with attorney workloads cites with approval recommendations on caseloads first developed in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, which provided:
that an attorney handle no more than the following number of cases in each category each year: 150 felonies per attorney per year; or 400 misdemeanors per attorney per year; or 200 juvenile cases per attorney per year; or 200 mental commitment cases per attorney per year; or 25 appeals per attorney per year.
ABA, Providing Defense Services, supra note 22, standard 5-5.3, cmt. at 72 (citing Nat'l Advisory Comm'n on Crim. Justice Standards & Goals, Courts 13.12 (1973)). The number of "open" or "pending" cases that a public defender has at a given time, which is what is referred to in the above news article, is different from the number of cases that a lawyer can handle during a twelve month period. The latter is the focus of the ABA's commentary to Standard 5-5.3.

102 El-Khoury, supra note 101.

103 Id.

104 Id. In response to the current caseload crisis, the Maryland legislature appropriated an additional $1,087,631 to the Office of the Public Defender. Budget Bill, H.B. 40, H.B. 40, 417th Gen. Assem. Reg. Sess. (Md. 2003) (making 2003 deficiency appropriations in the amounts of $803,598 and $284,033 for hiring new staff) .

105 El-Khoury, supra note 101.

106 See David L. Hudson, Jr., Courts' Cash Crunch, ABA J. Rep., Jan. 24, 2003.

107 Id.

108 Id.

109 American Civil Liberties Union, ACLU of OR Sues to Force Lawmakers to Fund Criminal Courts, at http:// www.aclu.org/ CriminalJustice/CrimnalJustice.cfm (last visited Feb. 10, 2003).

110 Id.

111 State ex rel Metro. Pub. Defender Servs, Inc. v. Courtney, 64 P.3d 1138, 1141 (Or. 2003).

112 NAACP Legal Defense and Educational Fund, Inc., Assembly Line Justice: Mississippi's Indigent Defense Crisis 2 (2003) [hereinafter NAACP Report, Assembly Line Justice].

113 Id. at 7.

114 Id. at 6; NAACP Legal Defense and Educational Fund, Inc., Forty Years After Gideon NAACP Legal Defense Fund Report Finds an Indigent Defense Crisis in Mississippi (2003).

115 NAACP Legal Defense and Educational Fund, Inc., supra note 112, at 22. "With the exception of death penalty cases, the State of Mississippi does not contribute one dollar towards the representation of poor defendants. Instead, it requires counties to shoulder the full obligation of providing lawyers for the poor. It is an obligation that many counties cannot or will not honor." Id. at 6.

116 Id. at 22.

117 Id.

118 Id.

119 See Governor George Ryan, Address at Northwestern University School of Law (Jan. 12, 2003).

120 Id.

121 Id.

122 Id. Since Governor Ryan's decision to commute the sentences of all death row inmates, the Illinois legislature has passed legislation to reform capital punishment in Illinois. See S.B. 472, 93rd Gen. Assem. Reg. Sess. (Ill. 2003) (creating capital punishment reform study committee (§ 2(a)), decertifying police officers who knowingly and willingly make false statements during homicide proceedings (§ 6.1(h)), and providing for post-conviction DNA testing); see also § 116-3(a), S.R. 17, 93rd Gen. Assem. Reg. Sess. (Ill. 2003) (urging Illinois Supreme Court to appoint a standing committee of judges familiar with capital case management to provide resources to trial judges who are responsible for trying capital cases); S.R. 18, 93rd Gen. Assem. (Ill. 2003) (urging Illinois Supreme Court to develop a digest of applicable law so that information regarding relevant case law and other resources can be widely disseminated to those trying capital cases); S.R. 19, 93rd Gen. Assem. (Ill. 2003) (urging Illinois Supreme Court to implement a process to certify judges qualified to hear capital cases either by virtue of experience or training); S.R. 20, 93rd Gen. Assem. (Ill. 2003) (urging Illinois Supreme Court to amend Illinois Rules of Professional Conduct to extend prosecutor's obligation to disclose evidence that tends to negate guilt of defendant even after conviction).

123 287 U.S. 45, 45 (1932).

124 Id. at 68-69.

125 See, e.g. Adele Bernhard, When Justice Fails: Indemnification for Unjust Conviction, 6 U. Chi. L. Sch. Roundtable 73, 75-80, 90-92 (1999) (discussing how innocent persons can be convicted and the difficult burden of establishing ineffective assistance of counsel); Penny J. White, Errors and Ethics: Dilemmas in Death, 29 Hofstra L. Rev. 1265, 1287-95, 1296-98 (2001) (investigating Illinois rules to eliminate causes of errors in capital cases and recommending additional remedies to provide a reliable system in capital defense cases); James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases 1973-1995, 78 Tex. L. Rev. 1839, 1844 (2000) (studying 4578 capital sentences reviewed in state appellate courts and 599 capital sentences reviewed in the federal courts and concluding that capital sentences spend much time under judicial review precisely because they are persistently prone to error).

126 See generally Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000); Wrongly Convicted: Perspectives on Failed Justice (Saundra D. Westervelt & John A. Humphrey eds., 2001); C. Ronald Huff & Arye Rattner, Convicted But Innocent: Wrongful Conviction and Public Policy (1996); Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases (1992); Martin Yant, Presumed Guilty: When Innocent People are Wrongly Convicted (1991).

127 See, e.g., Staff of the House Subcomm. on Civil and Const. Rts., Comm. on the Judiciary, 103rd Cong., Death Penalty Information Center, Innocence and the Death Penalty, at http://www.deathpenaltyinfo.org/innoc.html; Dr. Edmund Higgings, New Database Reveals Wrongful Convictions Epidemic, at http://www.dredmundhiggings.com; How the System Works, at http:// www.truthinjustice.org/systemworks.htm; The Innocence Project, at http:// www.innocenceproject.org.; Wrongful Conviction Reading Room, at http://www.law-forensic.com/wrongful_conviction_reading_room.htm.

128 See Edward Connors et al., U.S. Dep't of Justice, Nat'l. Inst. of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (1996) [hereinafter Nat'l Inst. of Justice Report]. See also Higgings, supra note 127.

129 Bernhard, supra note 125, at 75. The stories on establishing the innocence of these twenty-three individuals are collected in the Nat'l Inst. of Justice Report, supra note 128, at 34-76.

130 Innocence Project, supra note 127.

131 See Higgings, supra note 127.

132 See Radelet et al., supra note 126, at 19.

133 See id. at 54-62. It has been suggested that these estimates are too low since they are solely based on convictions of innocent people following trial, and there undoubtedly are persons innocent of the offenses to which they plead guilty. See Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 Rutgers L. Rev. 1317, 1343 (1997). Although ten thousand wrongful convictions may seem like a very high number, it is a mere one-half of one percent of the nearly two million persons incarcerated in the United States. See infra note 567, at 18.

134 See Huff et al., supra note 126, at 53-83 (listing the following reasons for wrongful convictions: eyewitness error, prosecutorial and police misconduct and errors, mistakes made during plea bargaining, community pressure, inadequacy of counsel, accusations by the guilty, criminal records, and race); George Castelle & Elizabeth F. Loftus, Misinformation and Wrongful Convictions, in Wrongly Convicted, supra note 126, at 31-32 (discussing effect of DNA testing on the conviction rate); Richard A. Leo, False Confessions: Causes, Consequences, and Solutions, in Wrongly Convicted, supra note 126, at 42-44 (explores cases where innocent individuals were induced by police to give false confessions); Clifford S. Zimmerman, From the Jailhouse to the Courthouse, in Wrongly Convicted, supra note 126, at 61-72 (analyzing the role of informants in wrongful convictions); Dianne L. Martin, The Police Role in Wrongful Convictions: An International Comparative Study, in Wrongly Convicted, supra note 126, at 77-80.

135 See, e.g., Scheck et al., supra note 126, at 231-33 (illustrating the importance of a capable lawyer); Huff et al., supra note 126, at 76-77 (discusses impact of counsel's adequacy on conviction of the innocent).

136 Innocence Project, Poor Defense Lawyering, at http:// www.innocenceproject.org/causes/badlawyering.php; Innocence Project, Jimmy Ray Bromgard, at http://www.innocenceproject.org/case/display_profile; Barry C. Scheck & Sarah L. Tofte, Gideon's Promise and the Innocent Defendant, Champion, Feb. 2003, at 39-40.

137 Scheck & Tofte, supra note 136, at 39-40.

138 Id. at 40.

139 Id.

140 State v. Bromgard, 948 P.2d 182, 183 (Mont. 1997). Bromgard was sentenced on three counts of felony sexual intercourse to three concurrent terms of forty years imprisonment. Id.

141 See id.

142 Nat'l Symposium on Indigent Defense, supra note 44, at vii.

143 Lord David Windlesham, Dispensing Justice 166 (2001).

144 Lee Bridges, Recent Developments in Criminal Legal Aid in England and Wales--Contracting, Quality and the Public Defender Experiment, Report to International Legal Aid Conference, Melbourne, Australia (June 2001) (unpublished manuscript) [hereinafter Recent Developments in Criminal Legal Aid]. Professor Bridges is the Director of the Legal Research Institute, University of Warwick School of Law, England.

145 Gary Slapper & David Kelly, The English Legal System 518 (5th ed. 2001); see also Lee Bridges, The Right to Representation and Legal Aid, in The Criminal Justice Process 138-42 (Mike McConville & Geoffrey Wilson eds., 2002) [hereinafter Bridges, The Right to Representation].

146 See supra notes 1-9 and accompanying text.

147 See Bridges, Recent Developments in Criminal Legal Aid, supra note 144, at 2-5.

148 Bridges, The Right to Representation, supra note 145, at 139.

149 Id.

150 Id.

151 See supra notes 1-6 and accompanying text.

152 Bridges, The Right to Representation, supra note 145, at 139.

153 Id. For a discussion of Magistrates' Courts, including their criminal jurisdiction, see Catherine Elliott & Frances Quinn, English Legal System 183-201 (4th ed. 2002).

154 Bridges, The Right to Representation, supra note 145, at 139.

155 Slapper & Kelly, supra note 145, at 518.

156 Bridges, The Right to Representation, supra note 145, at 139-40.

157 Id. at 140.

158 Id. The current basis for granting the right to representation, which is similar to the quoted material, is codified in the Access to Justice Act of 1999. Access to Justice Act, 1999, c. 22, sched. 3 (Eng.).

159 Bridges, The Right to Representation, supra note 145, at 140.

160 See infra notes 285-306, 332-53 and accompanying text.

161 See infra notes 344-46, 522-23 and accompanying text. The British legal profession is comprised of two separate branches: barristers and solicitors. Elliott & Quinn, supra note 153, at 122. Both groups can act as advocates in courts and also render other legal services; however, barristers generally spend a higher proportion of their time in courts. In addition, some types of legal services have been reserved to a particular branch. For example, conveyancing work has traditionally been the domain of solicitors, while advocacy in higher courts is handled by barristers. Id. The focus of this Article is on solicitors who provide the initial representation of defendants in criminal cases, represent their clients in courts except at trials, and arrange to bring barristers into cases in the event of trials. The "rights of audience" of solicitors in courts is discussed infra note 336.

162 Bridges, The Right to Representation, supra note 145, at 140-41.

163 "[The Law Society] is the profession's governing body controlled by a council of elected members and an annually elected President. Its powers and duties are derived from the Solicitors Act 1974." Slapper & Kelly, supra note 145, at 485. "There are 127 local law societies in England and Wales offering a range of services and support to solicitors within their region." The Law Society of England and Wales, Local Law Societies at http:// www.lawsoc.org.uk (last visited June 29, 2003).

164 Bridges, The Right to Representation, supra note 145, at 142.

165 Id.

166 See id. at 143.

167 Id.

168 Tamara Goriely, The Development of Criminal Legal Aid in England and Wales, in Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty 50 (Young and Walls eds., 1996); Elliott & Quinn, supra note 153, at 211, 222. The Lord Chancellor's Department has proposed to abolish "post-charge advice and assistance," which is available to a defendant who "has been charged but before the first hearing when either a Representation Order is granted or early hearing advocacy assistance provided." However, there are no plans to eliminate "pre-charge assistance," which is what is referred to here. Lord Chancellor's Dep't, Delivering Value for Money in the Criminal Defense Service §§ 3.1.1-3.1.3 (2003).

169 Bridges, The Right to Representation, supra note 145, at 144.

170 The Law Society, The Premier Legal Website, at http:// www.lawsoc.org.uk (last visited June 29, 2003).

171 Bridges, The Right to Representation, supra note 145, at 144. For a discussion of the role of the responsibilities and role of the Lord Chancellor's Department, see Elliott & Quinn, supra note 153, at 451-54.

172 Bridges, The Right to Representation, supra note 145, at 144. See discussion of standard fees infra at note 291 and accompanying text.

173 See infra text accompanying notes 220-70.

174 See infra text accompanying notes 437-41.

175 Bridges, The Right to Representation, supra note 145, at 144.

176 E-mail from Tim Collieu, Criminal Defence Service, Legal Services Commission, to Norman Lefstein (Sept. 18, 2003, 08:30:00 a.m., CST) (on file with Author); see also infra text accompanying notes 381-86.

177 Erhard Blankenburg, The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid, in The Transformation of Legal Aid 123 (Francis Regan et al. eds., 1999).

178 Slapper & Kelly, supra note 145, at 518-19.

179 Id. at 519. The sums listed in the quotation are for the cost of criminal and civil legal aid.

180 See Windlesham, supra note 143, at 136.

181 Lord Chancellor's Dep't, Striking the Balance: The Future of Legal Aid in England and Wales (1996).

182 Id. at 7-8.

183 Id. at 5.

184 Id. at 10-11.

185 Lord Chancellor's Dep't, Modernising Justice: The Government's Plans for Reforming Legal Services and the Courts 2-3 (1998) [hereinafter Modernising Justice].

186 Id. at 60.

187 For a discussion of the Crown Court and its jurisdiction, see Slapper & Kelly, supra note 145, at 139-47.

188 Modernising Justice, supra note 185, at 60.

189 Id. at 61.

190 Id. at 59.

191 Id.

192 Id. at 60.

193 Windlesham, supra note 143, at 143.

194 Access to Justice Act, 1999, c. 22 (Eng.).

195 The statute provides that the Legal Services Commission shall consist of seven to twelve members; however, the Lord Chancellor has discretion to change the number of members specified by the statute. Access to Justice Act, 1999, c. 22, § 1.3 (Eng.). The Legal Services Commission currently consists of a chairman and six members. Legal Services Commission, The Commission: Corporate Information, at http://www.legalservices.gov.uk/about_ us/how.htm (last visited June 29, 2003). In addition, the statute seeks to ensure that the Legal Services Commission is an independent authority in a manner substantially in accord with ABA Criminal Justice Standards regarding the provision of defense services. Compare Access to Justice Act, 1999, c. 22, §§ 2, 6, sched. I (Eng.) (“The [Legal Services] Commission shall not be regarded...as the servant or agent of the Crown....Before appointing a person to be a member of the Commission, the Lord Chancellor shall satisfy himself that that person will have no such financial or other interest

as is likely to affect prejudicially the exercise or performance by him of his functions as a member of the Commission."), with ABA, Providing Defense Services, supra note 22, Standard 5-1.3 ("[A]n effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees....Provisions for size and manner of selection of boards of trustees should assure their independence....Boards of trustees should be precluded from interfering in the conduct of particular cases."). In contrast to the discretion afforded to the Lord Chancellor in selecting members of the Legal Services Commission, the Legal Services Corporation, 42 U.S.C. §2996(b) (2000), requires that the President appoint eleven voting members to the corporation's board of directors; that the appointees meet Senate approval; and that no more than six of the Presidential appointees may be of the same political party. 42 U.S.C. §2996(c)(a).

196 Access to Justice Act, 1999, c. 22, §12.1 (Eng.).

197 Legal Services Comm'n, Specialist Quality Mark Standard 12 (1st ed., 2002) [hereinafter SQM Standard]; Elliott & Quinn, supra note 153, at 221.

198 Access to Justice Act, 1999, c. 22, §17.1 (Eng.).

199 Windlesham, supra note 143, at 142.

200 Access to Justice Act, 1999, c. 22, §17.2 (Eng.); Slapper & Kelly, supra note 145, at 538-39.

201 Id. at 539.

202 Windlesham, supra note 143, at 142; Elliot & Quinn, supra note 153, at 142.

203 Interview with Greg Powell, Powell Spencer & Partners, in London, England (Oct. 18, 2002); Interview with Richard Miller, Staff Head, Legal Aid Practitioners Group, in London, England (Oct. 15, 2002).

204 Interview with Derek Hill, Head of Public Legal Services, Lord Chancellor's Department, in London, England (May 2, 2003).

205 Interview with Tim Collieu, Criminal Defence Service, Legal Services Commission, in London, England (Oct. 18, 2002); E-mail from Tim Collieu, supra note 176. As noted earlier, during the early 1990s the administrative staff of the Legal Aid Board was about 1300. See supra text at note 177.

206 Legal Services Comm'n, 2001/02 Annual Report 53 (2002), at http:// www.legalservices.gov.uk/about_us/plans.htm.
At an exchange rate of $1 to £1.61, this is about $115,276,000. To put this sum in perspective, consider that the federal appropriation for the Legal Service Corporation is $338,848,000 for fiscal year 2003. Consolidated Appropriations Resolution, Pub. L. No. 108-7, 111 Stat. 11 (2003). The Legal Service Commission's annual expenditure for criminal legal aid is discussed infra at notes 551-52 and accompanying text.
During my visit to England in the spring of 2003 (April 6-June 1), the exchange rate varied from a low of $1.55 per pound, Key Currency Cross Rates, Wall St. J., Apr. 8, 2003, at C18, to a high of $1.65 per pound, Key Currency Cross Rates, Wall St. J., May 30, 2003, at B8. As of July 25, 2003, the exchange rate was $1.62 per pound, Key Currency Cross Rates, Wall St. J., July 25, 2003, at C14.

207 Access to Justice Act, 1999, c. 22, §§13.2(a)-(g), 14.2(a)-(g) (Eng.).

208 See infra notes 329-71 and accompanying text.

209 Access to Justice Act, 1999, c. 22, §12.4 (Eng.).

210 Id. §18(4). This section of the Act applies to the Legal Services Commission's funding of the Criminal Defence Service. The language regarding the Lord Chancellor is slightly different, but surely means the same thing. See id. §25(3)(c) ("When making any remuneration order the Lord Chancellor shall have regard to...the need to secure value for money.").

211 Id. §15(1) ("An individual who has been granted a right to representation in accordance with Schedule 3 may select any representative or representatives willing to act for him.").

212 Id. §18(1). For an example of a situation where government monies for indigent defense did, in effect, run out, see supra notes 106-11 and accompanying text, discussing Oregon's budget shortfalls.

213 Bridges, The Right to Representation, supra note 145, at 139; Slapper & Kelly, supra note 145, at 518.

214 Windlesham, supra note 143, at 160-63.

215 Id. at 162-63.

216 Id. at 163.

217 Id. at 134.

218 Id. at 149.

219 An increase in magistrate orders and its budgetary impact is discussed later. See infra note 458 and accompanying text.

220 See supra note 175 and accompanying text.

221 See supra notes 183-84 and accompanying text.

222 See supra note 207 and accompanying text.

223 SQM Standard, supra note 197, at 6.

224 Id. at 7; Legal Services Commission website, at http:// www.legalservices.gov.uk/contract/lafgas.htm (last visited July 17, 2003).

225 See, e.g., Bureau of Justice Assistance, U.S. Dep't of Justice, Compendium of Standards for Indigent Defense Systems (2000) [hereinafter Compendium of Standards for Indigent Defense Systems]. This compilation contains standards and rules issued by national organizations, state agencies, bar associations, public defender associations, state appellate and local courts. The various standards and rules are organized in five volumes under the headings administration of defense systems, attorney performance, capital case representation, appellate representation, and juvenile justice defense.

226 Id.

227 Id. See also ABA, Defense Function Standards, supra note 22.

228 SQM Standard, supra note 197. This book has 278 pages.

229 Legal Services Comm'n, Specialist Quality Mark Guidance (2002). This book has 118 pages.

230 SQM Standard, supra note 197, at 19.

231 Id. at 5.

232 Id. at 9.

233 See, e.g., Julian Gibbons, The Death of a Profession, 150 New L.J. 1366, 1366 (2000) (“The [LSC] has managed to produce a document [referring to the General Criminal Contract] calculated to undermine the good will and professionalism of those who do criminal defence work in England and Wales. In its place they seek to put a body of automatons, a system whose members can fill out forms, tick boxes and supervise and administer themselves to death. The [LSC] will in turn supervise them and analyse and monitor everything and anything to do with the mechanical process of administering criminal files, meeting targets and generating paper-work.”); Paula Rohan, A Dying Breed, 100 Law Soc'y Gazette 20, 23 (Jan. 30, 2003) (responding to a recent survey concerning the future of legal aid, one solicitor stated “I am fed up with the massive form-filling, low pay and very poor return on all the effort put into getting franchised. If I could get out of this toxic job, I would.”); Paula Rohan, No Gain, Much Pain, 99 Law Soc'y Gazette 16, 17 (2002) (“The LSC requires a standard of service from [solicitors] but fails to comply itself. It requires more and more records to be kept of this, that and the other, but is never going to use the information contained in those records.”).

234 SQM Standard, supra note 197, at 16.

235 CLS refers to the “Community Legal Service,” which is the arm of the LSC that deals with legal representation in civil cases. See Access to Justice Act, 1999, c. 22, §1.4 (Eng.).

236 SQM Standard, supra note 197, at 16-17.

237 Id. at 20-137.

238 Id.

239 Id. at 23-29.

240 Id. at 30-31.

241 Id. at 43-45.

242 Id. at 47.

243 Id. at 49.

244 Id. at 56.

245 Id. at 57.

246 Id.

247 Id. at 58-59.

248 Id. at 60-61.

249 Id. at 61, 78. The standards also require that individual training and development plans be implemented; and that records be kept detailing the "dates of external and in-house training courses attended (or given), the course titles, the names of course providers, and where qualifying for Continuing Professional Development (CPD) hours, the hours must also be recorded." Id. at 63.

250 Id. at 64-77.

251 Id. at 60-61.

252 Id. at 73.

253 Id. at 75.

254 Id. at 86. See generally id. at 84-87.

255 Id. at 88-93.

256 Id. at 96-98.

257 Id. at 96.

258 Id. at 104-11.

259 Id. at 112-13.

260 Id. at 122-25.

261 Id. at 126.

262 Id. at 132-33.

263 Id. at 130.

264 Id. at 134-37.

265 See generally id. at 142-164 (dealing with the "auditing process").

266 Id. at 141.

267 Id. at 142-43.

268 Id. at 143.

269 Id. at 144.

270 Id. at 145.

271 Legal Services Comm'n, Gen. Criminal Contract, Contract Documentation 10 (2003) [hereinafter Gen. Criminal Contract]. A three-year contract is awarded when the audit process is complete. If the audit process is ongoing, a one-year contract may be awarded. In addition to the general criminal contract, specialist contracts for prison law work and representation before the Criminal Cases Review Commission (CCRC) can be awarded. The CCRC is an independent, executive body created by the Criminal Appeal Act of 1995, whose primary purpose is to review the convictions of those who believe they have been wrongly convicted or sentenced; and if warranted, to refer those cases back to an appropriate court of appeal. Criminal Cases Review Commission website, at http://www.ccrc.gov.uk/aboutus/aboutus.htm (last visited July 20, 2003); see also Criminal Appeal Act 1995, ch. 35, §8 (Eng.); Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 Am. U. Int'l L. Rev. 1241, 1307-08 (2001) ("[T]he United States could enhance protections for persons who are wrongly convicted...[by creating] a meaningful forum for the receipt and investigation of new evidence....This forum could be modeled after the English CCRC, or it could be provided for within the present judicial structure by broadening rules for newly discovered evidence, lengthening state time limits for its introduction, or amending the federal habeas corpus statute specifically to allow review based on a claim of innocence."); Annabelle James, Miscarriages of Justice in the 21st Century, 66 J. Crim. L. 326 (2002) (noting that while the CCRC has improved how the English criminal justice process deals with miscarriages of justice, there is still much room for improvement); see also David Horan, The Innocence Commission: An Independent Review Board for Wrongful Convictions, 20 N. Ill. U. L. Rev. 91 (2000).

272 See ABA, Providing Defense Services, supra note 22, Standard 5-3.1 and cmt.

273 Gen. Criminal Contract, supra note 271, at 77.

274 See ABA, Defense Function Standards, supra note 22.

275 Performance Guidelines for Criminal Defense Representation, Nat'l Legal Aid and Defender Ass'n (1994) [hereinafter NLADA Performance Guidelines].

276 See, e.g., ABA, Defense Function Standards, supra note 22, Standard 4-4.1 (Duty to Investigate), Standard 4-6.1 (Duty to Explore Disposition Without Trial), Standard 4-7.2 (Selection of Jurors), Standard 4-7.9 (Posttrial Motions); NLADA Performance Guidelines, supra note 275, Guideline 3.1 ("The attorney should preserve the client's rights at the initial appearance on the charges by entering a plea of not guilty...requesting a trial by jury...seeking determination of whether there is probable cause...[and] requesting a timely preliminary hearing...."), Guideline 7.6(d) ("Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise.").

277 Gen. Criminal Contract, supra note 271, at 47.

278 Id. at 215. When a client is arrested and requests telephone advice, an attorney is expected to meet the forty-five minute contact target in at least eighty percent of his/her cases; however, if an attorney is requested to attend to a client at the police station, the attorney is expected to meet the forty-five minute contact target in at least ninety percent of his/her cases. Id.

279 Id. at 39.
"Official Investigation" means any investigation...(a) into suspected serious professional misconduct, breaches of the Act...or regulations, or dishonesty by you or your personnel...by (i) any organisation...which is responsible for regulating or disciplining you or your personnel, or (ii) the [LSC's] Investigation Section; or (b) any investigation...by the police into suspected criminal offences relevant to your operations.
Id.

280 Id. at 47.

281 Id. at 49.

282 Id. at 73.

283 Id. at 48.

284 Id. at 65. I inquired during interviews of several solicitors whether there was any concern that employees of the CDS might breach their duty of confidentiality. Invariably, I was told that this has not been a matter of concern among the legal profession and no one was aware of any instance where confidentiality had been breached.

285 See supra note 49 and accompanying text; see also State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984).

286 See Hardy, supra note 40, at 13 (“The most seriously criticized contract systems...[p]lace cost containment before quality; [c]reate incentives to plead cases out early rather than go to trial; [and]...[r]eward low bids rather than realistic bids.”). In order to counter these kinds of problems, consider ABA, Providing Defense Services, supra note 22, Standard 5-3.3(a) (“Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.”); and Standard 5-5.3(b) (“Contracts for services should include...reasonable compensation levels and a designated method of payment.”).

287 See infra notes 291, 296, 299-301, 304, 306 and accompanying text.

288 See infra note 292 and accompanying text.

289 See infra notes 320-25 and accompanying text.

290 Access to Justice Act, 1999, c. 22, §25.3(a)-(c) (Eng.).

291 Gen. Criminal Contract, supra note 271, at 208-29. “Standard fees” are different from any fee system devised in the United States to compensate lawyers for indigent defense representation. Initially, lawyers add up the amount to which they would be entitled based upon the number of hours worked and the allowable fees for the particular activity in which they engaged. Then, pursuant to the contract, they consult a schedule containing “lower standard fees” and “higher standard fees” and “lower limits” and “higher limits.” To illustrate, in London, in a category 1 case involving a guilty plea, there is a “lower limit” of £382.90 and a “lower standard fee” of £223.25. If the “lower limit” is not exceeded, the “lower standard fee” is paid. But if the amount to which the lawyer would be entitled exceeds the “lower limit” but does not exceed the “higher limit” of £646.85, a “higher standard fee” of £529.25 is paid. If the “higher limit” is exceeded, payment is based on the number of hours worked on the case. Under this “standard fee” system, solicitors sometimes receive less than they would otherwise be entitled based upon the number of hours worked on the case, but on other occasions they will receive more compensation than their cumulative hours would allow. Id.

292 Id. at 231.

293 See infra notes 307-12 and accompanying text.

294 For discussion of police station legal advice, see infra note 299 and accompanying text.

295 Gen. Criminal Contract, supra note 271, at 218.

296 Id. at 219. All amounts listed are in British pounds.

297 Id. at 37 (“‘Duty Solicitor’ means a Solicitor or employed barrister who is admitted to a Local Scheme under Arrangements.”).

298 Id. at 39 (“‘Own Solicitor’ means a Solicitor who provides Advice and Assistance to a Client other than as a Duty Solicitor.”).

299 As noted earlier, “advice and assistance” refers to providing representation to a person who is neither in police custody nor charged with an offense in court, but believes that it is necessary to confer with a solicitor. See text accompanying supra note 168. While there is no means test for police station representation or for representation in court, the “advice and assistance” category of representation is means tested. See Legal Services Comm'n, A Practical Guide to Criminal Defence Services 4-5 (2003), available at http://www.legalservices.gov.uk/leaflets/lsc/prac_guide_cds_apr03.pdf (last visited Aug. 5, 2003).

300 See Legal Services Comm'n, Claim Codes available at http:// www.legalservices.gov.uk/cds/claim_codes.pdf (last visited July 20, 2003). There are forty-five different "claim codes" set out by the LSC, each corresponding to discrete acts of representation and having their own specific charges.

301 Gen. Criminal Contract, supra note 271, at 234.

302 For information on exchange rates, see supra note 206.

303 Gen. Criminal Contract, supra note 271, at 219, 222.

304 Id. at 236.

305 See supra note 255 and accompanying text.

306 Gen. Criminal Contract, supra note 271, at 236. The contract specifies compensation of £31.18 per file for face-to-face file reviews, and £ 18.71 per file for paper file reviews. Id.

307 Id. at 134. In the context of the English legal system, the term "instruct" means to "authorize one to act as advocate." Funk & Wagnalls New Standard Dictionary of the English Language 1273 (18th ed. 1963). As indicated above, the English legal system is composed of solicitors and barristers, see supra note 161, with barristers essentially acting as "self-employed, referral professionals." The Bar Council, Instructing a Barrister, at http://www.barcouncil.org.uk/document.asp (last updated June 19, 2003). Although the main function of barristers is to act as an advocate for clients in a courtroom, barristers usually cannot be hired directly by the client. Elliott & Quinn, supra note 153, at 122, 129. Instead, for "any matter for all types of work" barristers may only be hired by "solicitors; other authorised litigators; Parliamentary agents, patent agents, trade mark agents and notaries; employed barristers and[/]or European lawyers registered with the Bar Council; or legal advice centers designated by the Bar Council." The Bar Council, supra. In certain specialized matters, barristers may also be hired by other individuals or groups. See id.

308 Gen. Criminal Contract, supra note 271, at 148-49, 198-201.

309 Id. at 147-49.

310 Id. at 148.

311 Id. at 198 ("We are entitled to assume that the work has been undertaken by a competent and experienced adviser and that work which is not appropriate for you to do will be referred by you.").

312 Whether a solicitor who retains an investigator to interview prosecution witnesses can be reimbursed for the expenditure is a matter of some uncertainty. See infra notes 428-29 and accompanying text.

313 E-mail from Tim Collieu, supra note 176. Interview with Judy Khan, Barrister, Two Garden Court Chambers, in London, England (May 1, 2003). Although the Access to Justice Act granted solicitors the same rights as barristers to conduct litigation in all courts, Access to Justice Act 1999, ch. 22, §36 (Eng.), the vast majority of solicitors still prefer to arrange for barristers to do the trial work. Interview with Greg Powell, supra note 203.

314 Interview with Judy Khan, supra note 313. Solicitors are able to bill for the time that a barrister spends on a case in Magistrate's Court in accordance with the "standard fee" schedule, but the amount paid to the barrister is controlled by the contract between the parties. Id.

315 See Archbold: Criminal Pleading, Evidence and Practice 271-314 (Supp. 2003)

316 Gen. Criminal Contract, supra note 271, at 61-62.

317 Id. at 12-13.

318 Id. at 61-62
We may amend your monthly payments at any time if we redetermine the average monthly amount payable in respect of your Claims. We will not reduce your monthly payments unless the amount payable in respect of your Claims is at least 10% less than the amount of your monthly payments paid in respect of Claims....If, following a reconciliation...there has been an overpayment, we may adjust

subsequent monthly payments to recover it within no fewer than three of them. If there has been an underpayment, we will make good the underpayment within one month.
Id.

319 Id. at 62.

320 Legal Services Comm'n, Criminal High Cost Cases Unit and Very High Cost Cases, at http://www.legalservices.gov.uk/cds/vhcc.htm (last visited July 21, 2003).

321 Id. (“A defence team is made up of the solicitors' firm, counsel and any experts instructed.”).

322 Legal Services Comm'n, Very High Cost Cases Arrangements 6 (2002), available at http://www.legalservices.gov.uk/cds/high_cost_cases/vhcc_ arrangements_2002.pdf (last visited July 21, 2003).

323 Legal Services Comm'n, supra note 320.
The first stage of the contracting process is for the solicitor to compile and return to us a case plan....The case plan should give an overview of the work which is likely to be conducted for the client and details of the proposed defence team. This should also include information regarding the seriousness and complexity of the case, which will help the Unit to assess the category of the case and hourly rate at which the case will be remunerated.... The stage plan should give an overview of the nature of the work which both solicitors and counsel expect to undertake during that stage.
Legal Services Comm'n, VHCC Contracting Process, at http:// www.legalservices.gov.uk/cds/contracting_process.htm (last visited July 21, 2003).

324 Legal Services Comm'n, Specialist Fraud Panel, at http:// www.legalservices.gov.uk/cds/sfp.htm (last visited July 21, 2003); see also Legal Services Comm'n, supra note 322 at 6 (providing guidance on Very High Cost Fraud Cases).

325 Legal Services Comm'n, supra note 320. In an effort to reduce costs, the Lord Chancellor's Department (LCD) has announced its intention to handle all Very High Cost Cases under individual case contracts, effective April 1, 2004. In making this announcement, the LCD noted that very high cost cases “consume a disproportionate amount of Crown Court legal aid expenditure: it is estimated that the top 1% of Crown Court cases by volume account for 49% of that expenditure.” Lord Chancellor's Dep't., Delivering Value for Money in the Criminal Defence Service: A Consultation on Proposed Changes to the Criminal Defence Service (2003), available at http:// www.dca.gov.uk/consult/leg-aid/cdserv.htm (last visited July 21, 2003).

326 Interview with John Harding, Kingsley Napley Solicitors, in London, Eng. (Oct. 14, 2002). The law firm employs about 160 persons, approximately half of whom are solicitors. Virtually all of the time of the twenty-two persons in the criminal defense unit is spent on complex and high cost crime cases.

327 Legal Services Comm'n, Very High Cost Cases Contract Specification 16, available at http://www.legalservices.gov.uk/cds/high-cost-cases/contract-specification.pdf (last visited July 21, 2003). The highest barristers' daily fee is £600 for a Queen's Counsel. Id. at 16.

328 Access to Justice Act, 1999, c. 22, §§13.2(a)-(g), 14.2(a)-(g) (Eng.); see supra note 207 and accompanying text.

329 Modernising Justice, supra note 185.

330 Id. at 63. As previously noted, Modernising Justice was released the same day that the Access to Justice Act was introduced into Parliament in 1989. Windlesham, supra note 143, at 143.

331 Modernising Justice, supra note 185, at 63. It has always seemed self evident to me that whether, in fact, public defenders are less expensive than private attorneys depends on numerous factors, such as the fees paid to private lawyers, the overhead and salaries of the public defenders, and the respective caseloads of each group. Although public defenders are sometimes efficient due to specialization, this does not necessarily assure that they will be less expensive. Oftentimes when public defenders are deemed less costly than private lawyers, it is because defender caseloads are too high and/or the private lawyers are not sufficiently compensated for their representation.

332 Initially, the program was referred to as the “Salaried Defence Service.” See Lord Chancellor's Dep't, Consultation Response, Criminal Defence Service: Establishing a Salaried Defence Service (2001) [hereinafter LCD, Establishing a Salaried Defence Service]. This

awkward name for the new program was later discarded in favor of “Public Defender Service.” See Legal Services Comm'n, Public Defender Service Introduction, at http:// www.legalservices.gov.uk/pds/intro.htm (last visited July 21, 2003).

333 Legal Services Comm'n, supra note 332.

334 Id.

335 The estimated populations of Birmingham and Liverpool are 977,087 and 439,473, respectively. United Kingdom Office of Nat'l Statistics Census 2001, available at http://www.statistics.gov.uk/census2001/default.asp (last visited July 1, 2003). In contrast, Middlesbrough has a population of 134,855; Cheltenham 110,013; Chester 118,210; and Darlington 97,838. Id. Swansea and Pontypridd are located in Wales, which is comprised of twenty-two unitary councils or counties. See Councils within Wales, available at http:// www.oultwood.com/localgov/wales.htm (last visited July 1, 2003). The City and County Council of Swansea has a total population of 223,293 and covers an area of 378 square kilometers. City and County of Swansea Website, at http:// www.swansea.gov.uk/aboutswansea/ (last visited July 1, 2003). The population of Pontypridd Town was 2919, United Kingdom Office of Nat'l Statistics Census 2001, supra, and is located in the county of Rhondda Cynon Taff, which has a total population of 231,946. Id.

336 Public Defender Service, Legal Services Comm'n, 2001/02 Review of the First Year of Operation 7 (2002).

337 Id.

338 The term “rights of audience” refers to “the right of a certain type of lawyer to appear in a certain type of court.” Black's Law Dictionary 1325 (7th ed. 1999). Although the Access to Justice Act automatically granted solicitors a “right of audience before every court in relation to all proceedings,” Access to Justice Act, 1999, c. 22, §36 (Eng.), solicitors still have to undergo training in order to exercise these rights. Elliot & Quinn, supra note 153, at 144. Moreover, “[s]ome solicitors who have gained rights of audience have said they are unwilling to use them, particularly in the High Court, for fear that judges' bias against solicitor advocates may prejudice the chances of the clients they represent.” Id.

339 Public Defender Service, supra note 336, at 3.

340 Id. at 8.

341 See supra note 224 and accompanying text.

342 Legal Services Comm'n, supra note 333.

343 Bridges, The Right to Representation, supra note 145, at 147
The Government's stated intention is not to replace the present system of contracting with private solicitors for such services with a monopoly public defender service consisting of lawyers and other legal advisers directly employed by the LSC. Rather, the aim is to create a “mixed system” under which private solicitors with contracts will work in competition with the public defenders.
Id. This approach is consistent with the standards for providing defense services promulgated by the ABA.
The primary component in every jurisdiction should be a public defender office, where conditions permit. The secondary component is an administered assigned counsel panel, which assures an appropriate level of participation by the private bar. Bar participation also may occur through a contract for services....[A] “mixed” system of representation consisting of both private attorneys and full-time defenders offers a “safety valve,” so that the caseload pressures on each group are less likely to be burdensome.
See supra, note 22, Standard 5-1.2, cmt. PP4, 6

344 See ABA, Defense Function Standards, supra note 211 and accompanying text. “An individual who has been granted a right to representation...may select any representative or representatives willing to act for him; and, where he does so, the Commission is to comply with the duty imposed by section 14(1) by funding representation by the selected representative or representatives.” Access to Justice Act, 1999, c. 22, §15.1 (Eng.).

345 See supra notes 157-58, 196 and accompanying text.

346 See Public Defender Service, supra note 336, at 2

> [W]e believe it is right that clients should have a choice of quality assured suppliers and that the PDS in England and Wales should compete for clients on the basis of the quality of service provided. Nevertheless, it was recognised that this would have an impact on the speed with which the PDS offices would be able to establish a client base from scratch.
> Id.

347 At the Birmingham Public Defender Service, most of the new cases acquired by the office have been received through the duty day solicitor system. A client who receives assistance from a duty solicitor may elect to have that solicitor continue to provide representation throughout the defendant's case. Alternatively, after the initial court appearance the client can decide to replace the duty solicitor with a solicitor of his choice. Interview with Lee Preston, Solicitor Head of the Birmingham Public Defender Service Office, in Birmingham, Eng. (Oct. 25, 2002).

348 Interview with Lee Preston, supra note 347. See also Public Defender Service, supra note 336, at 16-18. The PDS annual report also points out that in several cities the solicitors for those offices came from outside the area and did not have any clients who were obtained while they were in private practice. Id. at 17.

349 Public Defender Service, supra note 336, at 16-18.

350 See LCD, Establishing a Salaried Defence Service, supra note 332, at 3-5; Lee Bridges et al., Methods for Researching and Evaluating the Public Defender Service (2002).

351 LCD, Establishing a Salaried Defence Service, supra note 332, at 3.

352 Bridges et al., supra note 350, at 6.

353 Id.

354 Elliot & Quinn, supra note 153, at 223 (“There has been strong opposition to the introduction of public defenders.”). The interviews that I conducted of solicitors revealed substantial concerns about the new public defender programs. The consistent refrain was that everything was being provided to the public defenders (e.g., office space, staff salaries, etc.) so that there was not a “level playing field” between the defenders and private solicitors. See, e.g., Interview with Rodney Warren, Administrative Head, Criminal Law Solicitors Association, in London, Eng. (Oct. 29, 2002). See also Christopher Frazer, The Criminal Defence Service: Lessons from Abroad, 151 New L.J. 670 (2001)

> The truth is that research from foreign jurisdictions simply does not justify the Government's claims about salaried defender schemes. No research has been carried out into the availability of, or access to, criminal defence services in the UK; the quality of advice, assistance and representation by criminal practitioners; or the reasons for the burgeoning legal aid bill.
> Id. at 671.

355 Gibbons, supra note 233, at 1367.

> This service [referring to public defenders] is supposed to develop its own client base. How is it to do this, other than by taking clients from a shrinking private sector? For more private firms to drop out of the market would undoubtedly suit the government agenda. We might have a little more respect for them if they were to come out and admit that this is their position.
> Id.

356 Jon Robins, The Salaried Defence Service: Pilot Error; Clash of the Clans, 97 L. Soc'y Gazette 28 (Nov. 19, 2000) (“Many are dead against the SDS [Salaried Defense Service] in principle and echo the damning view of the Criminal Law Solicitors Association (CLSA) that it is ‘unnecessary and grossly over expensive’ and a ‘waste of...valuable resources.”’).

357 Id. (“A chief concern for the CLSA is that there is a level playing field between public and private sector work to make a true comparison.”).

358 Paula Rohan, Hero to Zero, 98 L. Soc'y Gazette 16 (Nov. 21, 2001).

359 Windlesham, supra note 143, at 143 (quoting 595 Parl. Deb., H.L. (5th ser.) (1998) 1149).

360 Robins, supra note 356.

> [T]here are objections in principle to the public defender scheme. “The state arrests, prosecutes and sentences individuals involved in the criminal justice system,” the CLSA [Criminal Law Solicitors Association] argued.... “For the state to purport to defend that

individual will allow a breeding ground for miscarriages of justice." Certainly Mr. Fowler [former chairman of the CLSA] is anxious about the development of a "canteen culture" where deals are struck between crown prosecutors and public defenders over a coffee in the morning. Both lawyers would be on a salary and a pension, he argues, and neither would want to rock the boat.
Id.

361 See Rohan, supra note 358. The Legal Action Group is an organization whose purpose is "to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services." Legal Action (Legal Action Group, London, Eng.), Aug. 2002, at 2.

362 Rohan, supra note 358.

363 ABA, Providing Defense Services, supra note 22, Standard 5-1.3(b).

364 Public Defender Service, supra note 336, at 18.

365 Id. at 13.

366 Interview with Anthony Edwards, TV Edwards Solicitors and Head of Service, in London, Eng. (Oct. 28, 2002).

367 Public Defender Service, supra note 336, at 18.

368 Access to Justice Act, 1999, c. 22, §16 (Eng.).

369 Code of Conduct for Employees of the Legal Services Comm'n, Legal Service Comm'n §2.1 (2001).

370 Id. §13.1.

371 Interview with Anthony Edwards, supra note 366. A public defender could still have an excessive caseload even if he or she had not yet billed 1200 hours for the year. For example, a public defender who received fifty new felony cases in January would be overwhelmed with work by the end of the month, but obviously would not yet have billed 1200 hours for the year. Public defenders, like private attorneys, are required to record the time that they spend representing their clients. In 2002, average billable hours for partners and associates in U.S. firms were 1751 and 1827, respectively. Altman Weil, Inc., The 2002 Survey of Law Firm Economics Executive Summary 18 (Altman Weil Publications, Inc.) (2002).

372 Ed Cape, Assisting and Advising Defendants Before Trial, in The Criminal Justice Process, supra note 145, at 99, 99-101.

373 Police and Criminal Evidence Act, 1984, c. 60, §58.1 (Eng.). In contrast to the expansive right to counsel guaranteed to persons in England, the right to counsel in the United States is more limited. The Sixth Amendment guarantees an individual a right to counsel "in all criminal prosecutions." U.S. Const. amend. VI. However, the right to counsel only arises if "adversary judicial proceedings have commenced...and...the encounter is a 'critical stage' of the criminal proceeding....[T]he right to counsel does not come into play simply because a person is or becomes the 'prime suspect' or 'focal point,' or even when he is arrested (absent 'interrogation' or its equivalent)." Yale Kamisar et al., Modern Criminal Procedure 73 (10th ed. 2002). "[O]ur cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant...." United States v. Gouveia, 467 U.S. 180, 187 (1984).

374 U.K. Home Office, PACE Codes of Practice, Code C P 6.1, at 63 (rev. ed. 2003), available at http:// www.homeoffice.gov.uk/crimpol/police/system/pacecodes.html (last visited July 31, 2003) [hereinafter PACE Codes of Practice]. Pursuant to Code C, some delay in advising of the right to a solicitor is possible but does not often occur. See Cape, supra note 372, at 101.

375 Elliott & Quinn, supra note 153, at 211.

376 PACE Codes of Practice, supra note 374, at Code C P 6.5, at 65.

377 Id. Code C P 6.3, at 64.

378 Id. Code C P 6.6, at 64-65, P 11.2, at 81.

379 Id. Code E: Tape Recording Interviews with Suspects P 3.1, at 178. An interview is not required to be tape recorded where it is "clear from the outset there will not be a prosecution," id. Code E P 3.3(b), at 179; or where it is "not reasonably practical because

of equipment failure or the unavailability of a suitable interview room or recorder" and the custody officer reasonably believes that "the interview should not be delayed," id. Code E P 3.3(a), at 178. In addition, an interview is not required to be tape recorded if a suspect "refuses to go into or remain in a suitable interview room" and the custody officer reasonably believes the interview should not be delayed. Id. Code E P 3.4, at 179.

380 Id. Code C P 6.6(b)(ii), at 65, P 6.8, at 66.

381 See supra notes 166-67 and accompanying text.

382 Elliot & Quinn, supra note 153, at 211.

383 Ed Cape, Assisting and Advising Defendants Before Trial, in The Criminal Justice Process, supra note 145, at 102.

384 Id.

385 Id. at 111. The accreditation scheme was implemented following the discovery that a large percentage of suspects were being advised by unqualified, non-solicitor representatives. It was designed to ensure that all non-solicitors who give legal advice at police stations meet some "minimum level of competence." Id. Jointly administered by the Law Society and the LSC, the accreditation scheme has improved the quality of police station advice from both solicitors and non-solicitors. Id. See also Lee Bridges & Satnam Choongh, Improving Police Station Legal Advice: Research Study 31, Summary at viii (1998)
The research has produced mixed findings regarding the quality of police station advice following the introduction of the accreditation scheme. On the one hand, there have been measurable and significant improvements in quality across a large number of elements of police station advice provision and different types of adviser....On the other hand, there are still significant areas in which there is a low rate of compliance with the standards of performance laid down under the accreditation scheme across all types of adviser.
Id.

386 Cape, Assisting and Advising Defendants Before Trial, supra note 145, at 102. In contrast, shortly after the introduction of PACE, the proportion of suspects requesting legal advice was only twenty-five percent. This increase in the percentage of suspects requesting legal advice is partially explained by the fact that revisions of Code C have strengthened the right to advice. Id.

387 Id. at 105.

388 Elliot & Quinn, supra note 153, at 262.

389 Id. at 263; Criminal Justice and Public Order Act, 1994, c. 33, §34 (Eng.).

390 Ed Cape & Jawaid Luqmani, Defending Suspects at Police Stations: The Practitioners' Guide to Advice and Representation 192 (3d ed. 1999).
Whether to answer police questions...is usually the most important, and the most difficult, area of advice. Anything said by a suspect in the context of a police interview at which his/her lawyer was present will almost certainly be admitted at trial. On the other hand, things that are not said in the interview may, as a result of CJPOA...have a critical impact on both the decision whether to initiate criminal proceedings and on the outcome of any trial. Furthermore, the lawyer has to give advice in circumstances where s/he will usually have limited and uncertain information, both about the possible prosecution evidence and about the position of the client.
Id.

391 See supra text accompanying note 172.

392 See supra text accompanying note 189. In the United States, counsel is provided to persons who are unable to afford a reasonable attorney's fee. See generally ABA, Providing Defense Services, supra note 22, Standard 5-7.1 and cmt.

393 See supra note 200 and accompanying text. See generally ABA, Providing Defense Services, supra note 22, Standard 5-7.2 and cmt.

394 See supra notes 372-90 and accompanying text.

395 See supra note 168 and accompanying text.

396 See infra notes 551-66 and accompanying text.

397 See supra notes 228-70 and accompanying text and infra notes 436-41 and accompanying text.

398 Mike McConville et al., Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain (1994). A 1993 Royal Commission on Criminal Justice also disclosed "a number of problems with criminal legal aid." Elliott & Quinn, supra note 153, at 214.

399 McConville et al., supra note 398, at 15.

400 Id. at 67, 189.

401 Id. at 67, 237.

402 Id. at 71.

403 Id. at 189.

404 Id. at 71.

405 Id. at 210.

406 Interviews with Lee Bridges, Chair, Warwick Law School, Professor of Law and Director, Legal Research Institute of Warwick Law School, in Warwick, Eng. (Oct. 29, 2002), and London, Eng. (Apr. 30, 2003).

407 See supra text accompanying note 173.

408 Interview with Lee Bridges on Apr. 30, 2003, supra note 406. For a discussion of the accreditation program, see Bridges & Choongh, supra note 385.

409 The concern expressed by Professor Bridges appears to be well founded. There are several relatively recent sources that cite Standing Accused, supra note 398, without questioning whether its findings are still accurate. See, e.g., Andrew W. Boon & Jennifer Levin, The Ethics and Conduct of Lawyers in England and Wales 317-18 (1999).

410 Interview with Rodney Warren, supra note 354.

411 Interview with Anthony Edwards, supra note 366.

412 Id. The Head of Office for the Public Defender Service in Birmingham also said that he believed defense representation of solicitors had improved substantially since Standing Accused, supra note 398, was published. Interview with Lee Preston, supra note 348.

413 Interview with Robert Brown, Corker Benning Solicitors, in London, Eng. (Oct. 22, 2002).

414 Interview with Steven Orchard, Chief Executive, Legal Services Commission, in London, Eng. (Apr. 14, 2003).

415 Interview with Greg Powell, supra note 203.

416 Id.

417 Interview with Stephen Hewitt, Managing Partner, Fisher Meredith Solicitors, in London, Eng. (Oct. 19, 2002). I made no independent investigation of solicitor caseloads and thus have no information on actual caseloads of solicitors who provide criminal legal aid representation.

418 The standards of the ABA provide as follows: "Counsel initially provided should continue to represent the defendant throughout the trial court proceedings...." ABA, Providing Defense Services, supra note 22, Standard 5-6.2. The commentary to this provision argues that when a defendant has a series of lawyers the cost in "human terms" is significant since a "close and confidential relationship with the client" is jeopardized.

419 Interview with Lee Preston, supra note 348; interview with Anthony Edwards, supra note 366.

420 Interview with Anthony Edwards, supra note 366.

421 ABA, Defense Function, supra note 22, Standard 4-4.1(a). The U.S. Supreme Court recently emphasized the importance of investigations, noting that the decision not to investigate circumstances in mitigation of the death penalty may itself be unreasonable and grounds for finding ineffective assistance of counsel. See Wiggins v. Smith, 539 U.S. 510 (2003).

422 ABA, Defense Function, supra note 22, Standard 4-4.1(a) cmt. P 3. The recommendations of the National Legal Aid and Defender Association are quite similar. See NLADA Performance Guidelines, supra note 275, Guideline 4.1(a).

423 The commentary to the ABA, Defense Function, Standard 4-4.3, supra note 22, offers the following guidance:
Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case....
Similarly, NLADA Performance Guidelines, supra note 275, Guideline 4.1 (b)(3) contains the following advice: "Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused."

424 Standards in the United States recognize the importance of investigative assistance: "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation." ABA, Providing Defense Services, supra note 22, Standard 5-1.4.

425 See The Law Society, Guide to the Professional Conduct of Solicitors (8th ed. 1999).

426 See infra text accompanying notes 437-41.

427 The Transaction Criteria form reads as follows: "Where there are witnesses in support of the client: Has the adviser taken proof/s of evidence?" Legal Services Comm'n, Crime Transaction Criteria 12, question 52 (4th ed. 2002) [hereinafter Transaction Criteria]. This form is further discussed at infra notes 437-41 and accompanying text.

428 A senior staff member of the Criminal Defence Service told me that the commission would consider reimbursements for investigators to interview prosecution witnesses if the interviews were deemed reasonably necessary, but she also expressed doubts about the ethical propriety of such interviews. Interview with Katherine Pears, Senior Legal Advisor to the Criminal Defence Service and Tim Collieu, Criminal Defence Service, Legal Services Commission in London, Eng. (Apr. 14, 2003) (comments by Katherine Pears). On the other hand, an experienced defense solicitor told me that he didn't believe such reimbursements were possible. Interview with Rodney Warren, supra note 354.

429 Interview with Anthony Edwards, supra note 366.

430 Id.; Interview with Lee Preston, supra note 348.

431 Id.

432 Guide to the Professional Conduct of Solicitors, supra note 425, §21.10.

433 Roger Ede & Anthony Edwards, Criminal Defence: Good Practice in the Criminal Courts 9 (3d ed. 2002).

434 Id.

435 See supra notes 228-70 and accompanying text.

436 Interview with Katherine Pears and Tim Collieu (comments by Katherine Pears), supra note 428; Telephone interviews with Katherine Pears (Apr. 15 and 25, 2003). Ms. Pears explained that the CDS selects files randomly by computer and a greater number of files than are actually reviewed are sent to the CDS. Questions about a law firm's performance can arise, for example, when the CDS receives complaints about a lawyer from a judge or the police.

437 See Transaction Criteria, supra note 427. The Transaction Criteria does not contain any questions concerning whether or not the defense has interviewed prosecution witnesses. However, the form does contain questions about whether or not the defense has "requested or obtained...prosecution disclosure," which presumably includes statements of witnesses for the prosecution. There have been several major changes in the criteria form since it was first devised, as well as some minor adjustments. Interview with Avrom Sherr, Woolf Professor of Legal Education, Institute of Advanced Legal Studies, University of London, in London, Eng. (May 13, 2003).

> The transaction criteria were compiled by the researchers...from a study of client files, textbooks and practice manuals. The draft criteria were then sent to expert practitioners and other interested groups for comment and revision. The resulting "check-lists" were therefore an amalgam of empirical work and expert knowledge and opinion.
> Alan Patterson & Avrom Sherr, Quality Legal Services: The Dog That Did Not Bark, in The Transformation of Legal Aid 244 (1999).

438 Transaction Criteria, supra note 427.

439 This approach is consistent with recommendations in death penalty cases in the United States. See text infra accompanying notes 506-07.

440 Tamara Goriely, Debating the Quality of Legal Services: Differing Models of the Good Lawyer, 1 Int'l J. Legal Profession 159, 167 (1994).

441 Patterson & Sherr, supra note 437, at 244. The Legal Services Commission plans increasingly to use panels of experienced solicitors as peer reviewers who are paid a daily stipend for their services. Telephone interview with Katherine Pears, supra note 436 (Apr. 25, 2003); and interview with Steven Orchard, supra note 414.

442 The Law Society, The Future of Publicly Funded Legal Services 6 (2003) [hereinafter The Future of Publicly Funded Legal Services].

443 Id.

444 Id. at 10.

445 Id. at 46.
> Larger firms were the most likely to state that they would give up crime work for legally aided clients. Almost half (48%) of respondents from firms with 11-25 partners said that they did not think that their firms would be undertaking crime work for legally aided clients in five years time. Only a quarter of smaller firms (sole practitioners (27%) and 2-4 partners (25%)) said that they will have stopped crime work for legally aided clients in five years time.
> Id.

446 Id. Upon graduating from law schools, solicitors are required to complete a nine-month "Legal Practice Course" as well as a two-year training period with a solicitors' law firm during which they are paid. In order to encourage law graduates with educational debts to accept legal aid positions, the LSC announced in 2002 that it would provide "a three-year, £30,000 sponsorship for 100 LPC [Legal Practice Course] places and funding for 100 trainee places...in smaller urban and rural areas, where the LSC maintains that the shortage of new solicitors opting to work for legal aid firms is most apparent." An interview with an official of the LSC confirmed that these stipends are intended to encourage new solicitors to work in both civil and criminal legal aid practices. Interview with Katherine Pears and Tim Collieu (comments by Tim Collieu), supra note 428. Similar to the recruiting efforts of the LSC, legislation introduced in both houses of Congress would "encourage qualified individuals to enter and continue employment as prosecutors and public defenders." Prosecutors and Defenders Incentive Act, S. 1091, 108th Cong. §2(a)(a) (2003); see also Prosecutors and Defenders Incentive Act, H.R. 2198, 108th Cong. (2003). Under this legislation, if an individual agreed to serve as a prosecutor or public defender for at least three years, they would be eligible to receive up to $6000 of loan forgiveness per year, and could receive up to $40,000 in total debt forgiveness. Prosecutors and Defenders Incentive Act, S. 1091, 108th Cong. §2(a). Also, a report of the American Bar Association calls for intervention by the federal government, state governments, and law schools in creating programs designed to alleviate financial problems that debt-ridden law school graduates face when choosing to enter lower-paying public service jobs. See ABA, Comm'n on Loan Repayment and Forgiveness, Lifting the Burden: Law Student Debt as a Barrier to Public Service (2003).

447 The Future of Publicly Funded Legal Services, supra note 442, at 9.

448 Id. at 6.

449 Appendix B of the report shows the budget for civil and criminal legal aid as follows: 2002-2003--£1,748 million; 2003-2004--£1,819 million; 2004-2005--£1,874 million; and 2005-2006--£1,929 million. Id. at 40.

450 Id. at 30-31.

451 Interview with Robert Brown, supra note 413.

452 Interview with Rodney Warren, supra note 354.

453 Id.

454 Interview with Stephen Hewitt, supra note 417.

455 See supra note 291 for a discussion of "standard fees" paid to solicitors for rendering legal services. The LSC does not maintain data on average fees paid to solicitors for various types of cases. However, average fee rates are reported for various stages of case. For 2001-2002, for example, claims paid to solicitors for police station attendance averaged £246; for police station telephone advice only--£62; court duty solicitor sessions--£222; lower standard fees in Magistrates' Courts--£326; higher standard fees in Magistrates' Courts--£821; and for non-standard fees and exempt cases in Magistrates' Courts--£1632. Legal Services Comm'n, supra note 206, at 45. Based upon an exchange rate of $1.61 per pound, see supra note 206, these average fees equal $396 for police station attendance; $100 for police station telephone advice only; $357 for court duty solicitor sessions; $525 for lower standard fees in Magistrates' Courts; $1322 for higher standard fees in Magistrates' Courts; and $2628 for non-standard fees and exempt cases in Magistrates' Courts .

456 Ian Kelcey, Going Going Gone, 152 New L.J. 1877 (2002).

457 Id.

458 Interview with Katherine Pears and Tim Collieu, supra note 428.

459 Id.

460 Id.

461 Interview with Steven Orchard, supra note 414. Similar views were expressed by Lee Bridges, who believes that there are some difficulties in rural areas, but not in the cities where there is an oversupply of lawyers willing to undertake criminal legal aid work. Thus, he believes that if some firms in the larger cities cease doing criminal legal aid work, there will be others willing to step up to handle the work. Like Mr. Orchard, Professor Bridges was aware that there were problems in getting recent law graduates to accept a "training contract" to do criminal legal aid. Interview with Lee Bridges, Professor of Law and Director Chair Warwick Law School and Director, Legal Research Institute, Warwick Law School, in London, England (May 1, 2003).

462 Interview with Derek Hill, supra note 204.

463 See infra notes 549-54 and accompanying text.

464 Interview with Derek Hill, supra note 204.

465 ABA, Providing Defense Services, supra note 22, Standard 5-7.1, provides as follows: "Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship." State statutes are often quite similar. See, e.g., Wash. Rev. Code §10.101.010 (1)(d) (2004) (providing defense counsel to those "[u]nable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel."); N.M. Stat. Ann. §31-16-2 (2002) (providing defense counsel to persons who are "unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets").

466 There is considerable support in the United States for videotaping and/or recording interrogations. See Tex. Crim. Proc. Code Ann. §38.22(3) (Vernon 2003) ("[S]tatements of an accused made during custodial interrogation are not admissible in criminal proceeding unless an electronic recording is made of the statement."); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); Stephan v. State, 711 P.2d 1156, 1158 (Ala. 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible."); Act of July 18, 2003, Pub. Act 93-206, 2003 Ill. Legis. Serv. H.B. 223, §103-2.1 (West) (requiring police to electronically record all custodial interrogations and confessions in homicide cases in order for the statement of the accused to be admitted into evidence); Mandy DeFilippo, You Have The Right To Better Safeguards: Looking Beyond Miranda In The New Millennium, 34 J. Marshall L. Rev. 637, 705 (2001) ("[V]ideotaping should be made mandatory for all custodial interrogations."); Steven A. Drizin & Beth A. Colgan,

Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions, 32 Loy. U. Chi. L.J. 337, 341 (2001) ("[V]ideotaping interrogations will save valuable court time by reducing frivolous motions to suppress, will induce guilty pleas, and will protect honest police officers from false allegations that they abused defendants."); Richard A. Leo, The Impact of Miranda Revisited, 86 J. Crim. L. & Criminology 621, 681-682 (1996) ("[S]ubstantive due process requires that we legally mandate the electronic-recording of custodial interrogations in all felony cases. The use of audio or videotaping inside the interrogation room creates an objective record of police questioning to which all interested and potentially interested parties may appeal...in the determination of truth and in judgments of justice and fairness.").

467 See supra notes 163-66, 226-70, 436-41 and accompanying text.

468 By "independent quasi-governmental or private organizations," I am referring to entities that have oversight responsibility for indigent defense in the jurisdiction but do not employ or directly supervise the lawyers who provide the legal representation. The Legal Services Commission in England meets this definition, much like a number of state public defender commissions in the United States. See supra note 195 and infra notes 484-87, 500-02 and accompanying text.
One scholar has aptly noted the problem in achieving quality in this country:
The conventional political maneuver has been for government funding authorities to distill the duty to provide assistance to the indigent accused into an obligation to conduct volume business at rock-bottom prices. With their eyes fixed on ever-shrinking funds available to finance the growing obligations of government, these funders carefully and consistently evade the question of quality. Instead, as a matter of routine, they demand that indigent defense service providers set and then meet specific requirements to justify their budget allotments, measuring performance according to the defenders' ability to handle at discounted prices a set number of cases during a fiscal year.
Kim Taylor-Thompson, Tuning Up Gideon's Trumpet, 71 Fordham L. Rev. 1461, 1465 (2003).

469 See supra notes 43-122 and accompanying text.

470 See, e.g., ABA, Providing Defense Services, supra note 22, Standards 5-1.2, 5-1.3, 5-1.5, 5-1.6.

471 See, e.g., ABA, Defense Function, supra note 22, Standards 4-1.2, 4-1.3, 4-1.5, 4-1.6, 4-2.1, 4-3.1, 4-4.1, 4-5.1.

472 See, e.g., NLADA Performance Guidelines, supra note 275, Guidelines 1.1-1.3.

473 See ABA, Providing Defense Services, supra note 22, at xii ("These new changes should serve as a useful tool to both the policy-maker and the litigator who seeks legal and ethical guidance on the provision of defense services in state and federal courts."). In 2002, the ABA adopted ten principles for providing effective defense services based substantially on earlier standards that the association had approved. The purpose of these ten principles was to distill the most important ingredients of providing effective defense services, and to disseminate this information to policy-makers. See ABA, Ten Principles of a Public Defense Delivery Sys. PP 3-12 (2002), available at http://www.abanet.org/legalservices/sclaid/defenderpolicy.html (last updated Apr. 18, 2004).

474 See Compendium of Standards for Indigent Defense Sys., supra note 225.

475 In the death penalty area, a number of states have adopted binding rules related to capital cases, and these clearly have been influenced by the American Bar Association's recommended guidelines for defense counsel in death penalty cases. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 913-1090 (Rev. ed., Feb. 2003) available at http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf (last visited Aug. 1, 2003) [hereinafter ABA Guidelines in Death Penalty Cases]. See also, e.g., Cal. Rules of Court, R. 4.117 (West 1996 & Supp. 2003) (requires court to review "attorney's background, experience, and training to determine whether the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant"); Ind. R. Crim. P. 24 (requires two attorneys and establishes experiential requirements for those appointed and imposes some caseload limitations); N.Y. Jud. Ct. Acts Law §35-b (McKinney 2003) (establishes a "capital defender office" that provides the court with a list of qualified lead and associate counsel from which the court will choose two attorneys); Ohio Sup. R. 20 (West 2002) (requires at least two attorneys be appointed to represent indigent defendant in a death penalty case and establishes qualifications for appointed counsel).

476 ABA, Providing Defense Services, supra note 22, Standard 5-5.3(b) at 68.

477 Id.

478 Id.

479 See id. cmt. at 69-74; Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts, Standard 13.12 (1973)
The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.
Id.

480 Keeping Defender Workloads Manageable, supra note 48. For an example of a jurisdiction where the defenders have excessive workloads, see supra notes 101-05 and accompanying text.

481 Id. at 26.

482 Contracting for Indigent Defense Services, supra note 40, at 20.

483 Massachusetts law requires the Committee on Public Counsel Services to "monitor and evaluate" attorney performance. Mass. Gen. Laws Ann. ch. 211 D, §10 (West 2003). In order to carry out this responsibility, the agency contracts with independent, private not-for-profit corporations (usually known as "County Bar Advocates") in twelve of the states' fourteen counties. Telephone Interview with William J. Leahy, Chief Counsel; Andrew Silverman, Deputy Chief Counsel, Public Defender Division; and Patricia A. Wynn, Deputy Chief Counsel, Private Counsel Division, Committee on Public Counsel Services (Sept. 18, 2003); Telephone Interview with Patricia A. Wynn, Deputy Chief Counsel, Private Counsel Division, Committee on Public Counsel Services (Oct. 2, 2003). These organizations retain "staff counsel" to monitor the work of assigned counsel, provide training, and deal with complaints about counsel. Telephone Interview with Patricia A. Wynn, supra. Statewide, the number of staff counsel is twenty-three, as several of the most populous counties have more than one. Id. The staff counsel also arrange for "resource attorneys," who are paid an hourly fee, to mentor less experienced defense attorneys and conduct performance reviews in which the work and files of assigned counsel are evaluated in face-to-face meetings. Id. Annually, the Committee on Public Counsel Services contracts to have 600 performance reviews conducted statewide. Telephone Interview with William J. Leahy, Andrew Silverman, and Patricia A. Wynn, supra. For discussion of similar procedures for the review of defense services provided in England, see supra notes 436-41 and accompanying text.
Besides Indiana and Massachusetts, there are other states that have developed statewide standards, but enforcement of their provisions has been lacking. For example, Nebraska created a system that enables counties to be reimbursed for a portion of their indigent defense expenditures if they comply with standards of the state's Commission on Public Advocacy. See Neb. Rev. Stat. §29-3933 (2002). However, $1 million earmarked for indigent defense standards reimbursement was eliminated during 2002 and has not been restored. Telephone Interview with Dennis Keefe, Lancaster County Public Defender, Lincoln, Nebraska (July 7, 2003). Also, the Louisiana Indigent Defense Assistance Board, which provides some financial assistance to district indigent defender boards, has developed extensive standards for the performance of counsel in providing representation. Louisiana Indigent Defense Assistance Board, Standards of Indigent Defense for the State of Louisiana, Purpose and Scope of Standards, available at http://www.lidab.com/standards.htm (last visited July 7, 2003). The standards, by their terms, are "not a mandatory requirement for participation in the financial assistance programs of the Louisiana Indigent Defender Board." Id.

484 Mass. Gen. Laws Ann. ch. 211D, §1 (West 2003). In making their appointments, the justices are directed by the statute to "request and give appropriate consideration to nominees...[of] the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers." Id.

485 Id.

486 Comm. for Public Counsel Services, available at http:// www.state.ma.us/cpcs/ (last modified Oct. 20, 2003). The number 2000 for assigned counsel and 112 for "public counsel" were provided to me during a telephone interview with the chief staff of the Committee on Public Counsel Services. See Telephone Interview with William J. Leahy et al., supra note 483.

487 Telephone Interview with William J. Leahy, Chief Counsel, Committee for Public Counsel Services (July 9, 2003).

488 Comm. for Public Counsel Services, Assigned Counsel Manual, Policies and Procedures 3-2 (1999) [hereinafter CPCS, Assigned Counsel Manual].

489 See id. ch. 3.

490 Id. at 3-3.

491 See NLADA Performance Guidelines, supra note 275.

492 CPCS Assigned Counsel Manual, supra note 488, at 4-1.

493 Mass Rules of Prof'l Conduct and Comments, Mass. Rules of Sup. Jud. Ct., Rule 3:07 (West 2003).

494 CPCS, Assigned Counsel Manual, supra note 488, at 4-104-4-106.

495 Id.

496 Id. at 5-8, 5-9.

497 Id. at 5-9.

498 Id.

499 Id. The Massachusetts rules do not prohibit assigned counsel from devoting time in excess of 1,800 hours to other legal work. Id.

500 Ind. Code §33-9-14-5(a) (2003).
[U]pon certification by a county auditor and a determination by the public defender commission that the request is in compliance with the guidelines and standards set by the commission, the commission shall...authorize an amount of reimbursement due the county that is equal to fifty percent (50%) of the county's certified expenditures for indigent defense services provided for a defendant against whom the death [penalty] is sought... and...equal to forty percent (40%) of the county's certified expenditures for defense services provided in non-capital cases except misdemeanors.
Id.

501 Id. §33-9-13-2.

502 Id. §33-9-13-4 (“The division of state court administration of the supreme court of Indiana shall provide general staff support to the commission.”). Since I serve as chairman of the commission, I am familiar with the staff assistance provided.

503 Id. §33-9-13-3(2)(F) (authorizing public defender commission to establish minimum and maximum caseloads); Standards for Indigent Defense Services in Non-capital Cases, Indiana Public Defender Comm'n (effective Jan. 1, 1995; amended Oct. 28, 1998 and Sept. 1, 1999). Under the guidelines established by the Indiana Public Defender Commission, in a twelve-month period a public defender without adequate support services should not be assigned more than 120 non-capital murder and all classes of felony cases; more than 100 non-capital murder and class A, B, and C felony cases; more than 300 misdemeanor cases; or more than 200 juvenile delinquency cases. Id. However, a public defender with adequate support services may be assigned up to 150 non-capital murder and all classes of felony cases; up to 120 non-capital murder and class A, B, and C felony cases; up to 400 misdemeanor cases; or up to 250 juvenile delinquency cases. Id.

504 See William J. Leahy, CPCS Chief Counsel, Remarks at the Massachusetts Joint House and Senate Ways and Means Committee Hearing (Mar. 18, 2003); Letter from Norman Lefstein, Chairman, Indiana Public Defender Commission, to the Hon. Lawrence Borst, Chair, Indiana Senate Finance Committee, and Members of the Senate Finance Committee (Feb. 5, 2003) (on file with Author); Letter from Norman Lefstein, Chairman, Indiana Public Defender Commission, to the Hon. William A. Crawford, Chair, Indiana House Ways and Means Committee, and Members of the House Ways and Means Committee (Feb. 5, 2003) (on file with Author).

505 ABA Guidelines in Death Penalty Cases, supra note 475.

506 Id. §3.1.

507 Id. §3.1 cmt. at 26.

508 Justice Enhancement and Domestic Security Act of 2003, S. 22, 108th Cong. §6201 (2003).

509 Id. §6201(d).

510 Id. §6201(d)(2).

511 Id. §6201(e)(1)(B).

512 For discussion of the organizational structure of the LSC, see supra notes 194-96 and accompanying text.

513 Following enactment of the Medicare and Medicaid programs in 1965, "the federal government became increasingly concerned about cost and quality issues and enacted many laws and regulations that in some way regulated the practice of healthcare professionals." Mark R. Yessian & Joyce M. Greenleaf, The Ebb and Flow of Federal Initiatives to Regulate Healthcare Professionals, in Regulation of the Healthcare Professions 169, 171 (Timothy S. Jost ed., 1997). For example, in response to escalating Medicare costs in the early 1970s, Congress created what is now the Peer Review Organization (PRO) program "to determine whether services paid for by Medicare were medically necessary, met professional standards, and were provided in appropriate settings." Id. at 172. Although initially concerned with "cost control," PRO's evolved as a mechanism to assess the "completeness, adequacy, and quality of care provided" through Medicare. Id. at 173. By the 1990s, instead of focusing on individual quality-of-care problems, the PRO program aimed to improve "the mainstream of care for Medicare beneficiaries." Id. at 174-75.

514 The government, however, has not been successful in controlling criminal legal aid expenditures. See infra notes 552-54 and accompanying text.

515 See supra notes 291-322 and accompanying text.

516 See supra note 291 and accompanying text.

517 See supra note 292 and accompanying text.

518 See supra notes 320-23 and accompanying text.

519 See supra notes 304-06 and accompanying text.

520 See Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, Report of Subcommittee on Federal Death Penalty Cases, Committee on Defender Services 53-56 (1998) (Comm. Print 1998). The recommendations in the report were adopted by the Judicial Conference of the United States on September 15, 1998.

521 In accordance with 42 U.S.C. §1988(b), a prevailing party in civil rights litigation may seek to recover attorney's fees. In calculating attorney's fees, a court must determine a "lodestar" amount, which is calculated by multiplying the number of attorney hours expended on the case by a reasonable hourly rate. Mathur v. Bd. of Trs. of S. Ill. Univ., 317 F.3d 738, 742 (7th Cir. 2003). Once calculated, the "court may adjust the amount up or down to take into account various factors [such as]...the time and labor required;...time limitations imposed by the client or the circumstances; the amount involved and the results obtained; [and] the experience, reputation, and ability of the attorneys...." Id. at 742 n.1; see Adcock-Ladd v. Sec'y of Treasury, 227 F.3d 343, 349-51 (6th Cir. 2000) (fact that attorney representing Title VII plaintiff achieved "exceptional results" highly important in calculating lodestar amount); Knight v. Alabama, 824 F. Supp. 1022, 1032 (N.D. Ala. 1993) (in determining lodestar amount, court found that lead attorney for successful Title VII plaintiff had "exhibited significant skill in his prosecution of [the] case," warranting compensation at higher hourly rate).

522 See supra note 344 and accompanying text.

523 Id.

524 Interview with Richard Miller, supra note 203; Interview with Lee Preston, supra note 348; Interview with Greg Powell, supra note 203; and Interview with Rodney Warren, supra note 354.

525 Interview with Greg Powell, supra note 203.

526 Tamara Goriely, Evaluating the Scottish Public Defense Solicitor's Office, 30 J. L. and Soc'y 84, 97 (2003).

527 Id.

528 Id. The public defender office in Edinburgh, Scotland, was established in October 1998 and clients were assigned to the office until July 1, 2000, when the law was amended and the office was required to compete with private solicitors for their clients. Interview with Alistair G. Watson, Director, Public Defender Solicitor's Office, in Edinburgh, Scotland (May 12, 2003). This change was strongly supported by the director of the public defender office, who believes that the level of trust and confidence between attorney and client is considerably stronger when clients are able to select their own solicitor instead of being directed to do so. Id.

529 See supra text at notes 164-65, 347-49.

530 See cases cited in Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 Am. Crim. L. Rev. 73 (1993); and Peter W. Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan. L. Rev. 73 (1974). In both of these articles, the authors argue that defendants should be given authority to choose their own attorneys. For cases refusing to permit indigent defendants to select counsel of their choice, see Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."); United States v. Espino, 317 F.3d 788, 798-99 (8th Cir. 2003) ("[A]n indigent defendant has no right to demand of a court that a particular attorney, or particular attorneys, be appointed to represent him."); United States v. Oreye, 263 F.3d 669, 671 (7th Cir. 2001) ("[An] indigent defendant has a right to competent counsel but not a right to counsel of his choice."); Hickey v. State, 576 S.E.2d 628, 630 (Ga. Ct. App. 2003) ("An indigent defendant is entitled to reasonably effective assistance of counsel, not counsel of his own choosing."); State v. Jimenez, 815 A.2d 976, 980 (N.J. 2003) ("[A]ccused is guaranteed the right to the assistance of counsel, but not the constitutional right to counsel of his choice."); State v. Feole, 797 A.2d 1059, 1067 (R.I. 2002) ("The right to counsel of one's choice is not unfettered or unlimited but must be balanced with the public's right to the efficient administration of justice.").

531 See, e.g., Drumgo v. Super. Ct., 506 P.2d 1007, 1009 (Cal. 1973) (indigent defendant's constitutional and statutory guarantees not violated by appointment of attorney other than one requested even though requested counsel had indicated his willingness and availability to act); Katzoff v. Super. Ct., 127 Cal. Rptr. 178, 182 (Cal. Ct. App. 1976) (appointment of counsel for juvenile "rests within the sound discretion of the trial judge" and does not require court to appoint particular attorney requested by a party even if such counsel has indicated willingness and availability to act); Alexander v. Super. Ct., 27 Cal. Rptr. 2d 732, 741 (Cal. Ct. App. 1994) ("fact that the requested attorney is willing and available to represent defendant does not compel the appointment of the requested attorney," but is merely one subjective factor court should take into account in exercising its discretion); Brewer v. State, 470 S.W.2d 47, 49 (Tenn. Crim. App. 1970) (finding no error in trial judge's refusal to appoint lawyer whom defendant requested, even though requested lawyer expressed willingness to serve as appointed co-counsel).

532 461 U.S. 1, 13 (1983).

533 See, e.g., People v. Fuller, 71 N.Y.S. 487, 488 (1901) (independent selection of counsel by court will permit assignment of counsel who are "eminent, able, and honorable"); People v. Fitzgerald, 105 Cal. Rptr. 458, 465 (Cal. Ct. App. 1972) (allowing indigent defendant to nominate counsel assigned to them "would be contrary to the best interests of most indigent defendants").

534 See, e.g., Fuller, 71 N.Y.S. at 488 (accused has relatively limited acquaintance of the capability and suitability of counsel, and is poorly situated to choose or recommend counsel).

535 See, e.g., United States v. Davis, 604 F.2d 474, 478 (7th Cir. 1979) ("Permitting the defendant to select the lawyer he wishes...[would] be achieved at the cost of serious disruption to the even-handed distribution of assignments.").

536 See, e.g., id. at 478 (more experienced criminal defense lawyers would be unavailable for other defendants); United States v. Ely, 719 F.2d 902, 905 (7th Cir. 1983) ("[I]ndigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer."); United States ex rel Mitchell v. Thompson, 56 F. Supp. 683, 688 (S.D.N.Y. 1944) ("[P]re-eminence at the bar would be the surest road to bankruptcy."); accord Wilson v. United States, 215 F. Supp. 661, 663 (W.D. Va. 1963).

537 See, e.g., Pizarro v. Bartlett, 776 F. Supp. 815, 819 (S.D.N.Y. 1991) (failure to guarantee indigent defendant counsel of choice "follows from the government's countervailing interest in the 'fair and proper administration of justice"); People v. Manchetti, 175 P.2d 533, 537 (Cal. 1946) ("']Reduced to its lowest terms, [allowing choice of counsel] would allow a popular attorney to have the courts marking time to serve his convenience."'); Fitzgerald, 105 Cal. Rptr. at 465-66 (allowing indigent defendant to choose assigned counsel could "give hostile or disruptive defendants an incentive to make impossible demands upon the court," such as

requesting “unavailable lawyers or lawyers unqualified to handle a particular matter”). See also Wayne D. Holly, Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent? 64 Brook. L. Rev. 181, 201 (1998) (“An indigent defendant's claim of right to be represented by an attorney of his choosing is frequently rejected with little explanation beyond rote citation to prior cases, which themselves articulate no rationale.”).

538 Tamara Goriely, Revisiting the Debate over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective, 5 Int'l J. Legal Prof. 7, 23 (1998).

539 See supra note 346 and accompanying text.

540 Goriely, supra note 536, at 23. “In a Quebec study,...71% [of clients] expressed a preference for a staff lawyer while 23% wanted a private lawyer. Their staff offices have never had any problems in getting enough clients: the numbers they handle are dictated only by their capacity.” Id. If defendants refuse to select the public defender, the problem will be with the office, perhaps because of burdensome caseloads, impersonal attention to clients, etc. On the other hand, if clients readily select the public defender, this can serve as a cost-free way of determining that its services are highly valued by the client community.

541 Consider, for example, Rule 1.3 of the ABA's Rules of Professional Responsibility: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Model Rules of Prof'l Conduct R. 1.3 (2002). The comment to this rule explains: “A lawyer's work load must be controlled so that each matter can be handled competently.” Id. R. 1.3 cmt. at P 2.

542 See ABA, Providing Defense Services, supra note 22, Standards 5-1.1-5-8.2. Because of my personal involvement with the standards, as discussed at supra note 22, I know that the option of client selection was never considered.

543 Id. Standard 5-1.3(a).

544 Id. Standard 5-1.3(a) cmt. at 17.

545 Id.

546 Faretta v. California, 422 U.S. 806, 807, 836 (1975).

547 See Model Rules of Prof'l Conduct, supra note 541, R. 1.2(a); ABA, Defense Function, supra note 22, Standard 4-5.2(a).

548 Interview with Derek Hill, supra note 462.

549 It has been suggested that as of 1994 per capita expenditures for criminal legal aid in Scotland, which has a totally separate system from England's and Wales's, had a higher per capita rate of expenditures. See Blankenburg, supra note 177, at 123. For a comparison of spending on criminal legal aid among England and Wales and several other countries (but not the United States), see Cyrus Tata, Comparing Legal Aid Spending: The Promise and Perils of a Jurisdiction-Centered Approach to (International) Legal Aid Research, in The Transformation of Legal Aid, supra, at 133 (Francis Regan et al. eds., 1999).

550 See supra notes 212-19 and accompanying text.

551 The financial data were given to me during my interview with Derek Hill. See supra note 462. Subsequent to my meeting with Mr. Hill, the Legal Services Commission reported the exact sum for criminal legal aid during 2002-2003 at £1095.7 million. See Legal Services Comm'n, Annual Report 47 (2002-2003), available at http://www.legalservices.gov.uk. The data that I received from Mr. Hill also included amounts spent on civil legal aid during prior years, as well as total legal aid expenditures. Annual amounts spent by the government on all legal aid (criminal and civil in millions of pounds) are as follows: 1995-1996: £1391; 1996-1997: £1477; 1997-1998: £1525; 1998-1999: £ 1623; 1999-2000: £1551; 2000-2001: £1664; and 2001-2002: £1716. In 2002-2003, expenditures totaled £1908 million. See id. The growth in CDS expenditures as a proportion of the legal aid budget has been substantial. In 1996, for example, expenditures for criminal legal aid were about forty-four percent of England's legal aid budget, but by 2001-2002 it was fifty-seven percent. See Delivering Value for Money in the Criminal Defence Service, A Consultation on Proposed Changes to the Criminal Defence Service (Annex B--Growth in the Criminal Defence Service Expenditure) (2003), available at http:// www.dca.gov.uk/ consult/leg-aid/cdserv.htm (last visited July 3, 2003).

552 Some of the reasons for the increase in expenditures were mentioned earlier. See supra text at note 458.

553 Other researchers have made similar observations. See, e.g., Blankenburg, supra note 549, at 123 (“Recent reform attempts present a remarkable story of failure to cut costs....While other countries have effectively curbed legal aid funds, in the UK they have doubled since 1990.”); Tamara Goriely, The English Approach to Access to Justice, Paper Presented to World Bank Workshop 10 (Dec. 11, 2002) (unpublished manuscript, on file with Author), available at http:// www1.worldbank.org/publicsector/legal/EnglandWhales.pdf (“[T]he reforms have not controlled costs.”). As discussed earlier, during the 1990s, both Conservative and Labor governments declared their intentions to control increases in legal aid expenditures. See supra notes 180-92 and accompanying text.

554 This per capita figure was determined by using 2002-2003 expenditures of £1,100,000,000 and an exchange rate of $1.61 per British pound, see supra note 206, yielding expenditures of $1,760,000,000 in U.S. dollars. This sum was then divided by 52,041,916, the combined population of England and Wales, see supra note 25, resulting in an exact sum of $33.82.

555 The survey was conducted at the request of the ABA's Indigent Defense Advisory Group, which I chair, as explained at supra note 23. The Spangenberg Group is discussed at supra note 48.

556 The Spangenberg Group, State and County Expenditures, supra note 39.

557 Id. at 1-2.

558 The exact amounts in the new survey of indigent defense expenditures are $2,823,562,619 for the 50 states and the District of Columbia, and an additional sum of $485,900,000 for the federal Criminal Justice Act program. Id. at next to last page of survey. For some states, the survey reports only estimated expenditures, “due to a lack of reliable data, either at the state or county level.” Id. The survey explains in footnotes the states for which estimates were used, how the estimates were determined, and discloses the one state (Michigan) for which no county expenditures are listed. Id. As a result of the difficulty of gathering exact figures, actual expenditures for the states and counties are probably somewhat higher than the numbers reported. On the other hand, if inflation were taken into account, the increase in indigent defense funding since 1986 is less than appears at first blush since $1 billion in 1986 is worth $1,676,090,000 in 2003 dollars. See Bureau of Labor Statistics, U.S. Dep't of Labor, Inflation Calculator, at http:// www.bls.gov/ (last visited Aug. 14, 2003).

559 The U.S. Census Bureau reported the population of the country as 281,421,906 as of April 1, 2000. See http:// www.census.gov/ main/www/cen2000.html.

560 The exact sum is $9.94, determined by dividing $2.8 billion (the amount spent by states and counties on indigent defense) by the population of the United States.

561 Although the report of The Spangenberg Group on the ABA's website, see supra note 556, does not list per capita state expenditures, these computations are possible by dividing state populations into the total expenditures of each state.

562 See supra text accompanying note 198.

563 See supra text accompanying note 168.

564 See supra text accompanying note 372-90.

565 Telephone Interview with Tim Collieu, Criminal Defence Service (May 20, 2003).

566 This per capita figure was computed by deducting £233 million from total criminal aid expenditures of approximately £1.1 billion, which yielded a net of £867 million in expenditures on criminal legal aid. Given an exchange rate of $1.61 per pound, see supra note 206, total criminal legal aid in U.S. dollars equals $1,387,200,000. This sum was then divided by 52,041,916, the population of England and Wales, see supra note 25, resulting in the sum of $26.67.

567 A report of the British Home Office, which contains data on England and Wales, as well as the United States, explains that recorded crime fell by eight percent in England and Wales during 1996-2000. See Gordon Barclay & Cynthia Tavares, International Comparisons of Criminal Justice Statistics 2000 (July 12, 2002), available at http:// www.homeoffice.gov.uk/rds/pdfs2/hosb502.pdf. However, there were increases during this period in violent crimes but significant declines in motor vehicle thefts (down by twenty-seven percent) and drug offenses (down by ten percent). Id. at 12-15. In the United States during 1996-2000, there was a fourteen percent decline in recorded crime, although from 1995-1999 drug trafficking offenses increased by sixty-two percent. Id. at 3. Meanwhile, the United States has a much higher homicide rate than England and Wales (5.87 per 100,000 population in the United

States compared to 1.5 per 100,000 population in England and Wales). Id. at 10. The United States also has a vastly larger prison population (1,931,859 in the United States in 2000 compared to 65,666 in England and Wales). Id. at 18. (Based on populations of 281,421,906 in the United States, see supra note 559, and 52,041,916 in England and Wales, see supra note 554, this means that 0.68% of the U.S. population is incarcerated compared to only 0.12% of the population in England and Wales.).

The report also discusses the pitfalls in making comparisons between countries:

Although most countries collect information on the number of crimes recorded or reported by the police, absolute comparisons of crime levels are often misleading. Recorded crime levels will be affected by many factors including: a) Different legal and criminal justice systems; b) Rates at which crimes are reported to the police and recorded by them; c) Differences in the point at which crime is measured....; d) Differences in the rules by which multiple offences are counted; e) Differences in the list of offences that are included in the overall crime figures; f) Changes in data quality.

Id. at 2.

568 The prosecution of cases in England is handled by the Crown Prosecution Services, which during 2001-2002 cost the government £400 million. This sum includes amounts spent to compensate barristers who present criminal cases in Crown Courts on behalf of the Crown Prosecution Services. In addition, £28 million was spent by the Serious Fraud Office and several specialized agencies that prosecute offenses (e.g., the Customs and Excise Office). Combined, these sums for prosecuting cases are less than half the amount spent on criminal legal aid in England during 2001-2002. Interview with Derek Hill, supra note 462. In the United States, the cost of 2341 state and local prosecutor offices for fiscal year 2001 was $4,680,000,000, and this sum does not include a figure for the cost of the ninety-three U.S. Attorney Offices administered by the Department of Justice. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2001 67 (29th ed. 2001).

569 Legal Services Corporation Act, 42 U.S.C. §2996 (2000). During fiscal 2002-2003, England spent a collective $1.358 billion compared to $900 million spent by the United States. That amounted to a per capita civil legal aid expenditure in England of $25.60, versus a per capita civil legal aid expenditure in the United States of $3.16. Earl Johnson, Address at IOLTA Meeting during American Bar Association Annual Meeting (Aug. 8, 2003) (on file with Author). There have been a number of efforts by Congress to limit the effectiveness of the Legal Services Corporation through funding cuts and restrictions on types of cases and clients that attorneys may represent with the use of corporation of funds. See Mauricio Vivero, From “Renegade” Agency to Institution of Justice: The Transformation of Legal Services Corporation, 29 Fordham Urb. L.J. 1323, 1325-33 (2002) (discussing the history of the LSC and tension with Congress); Deborah M. Weissman, Law As Largess: Shifting Paradigms Of Law For The Poor, 44 Wm. & Mary L. Rev. 737, 761-68 (2002) (discussing the efforts of the 104th Congress to eliminate the Legal Services Corporation, and the resulting restrictions placed upon it); James D. Lorenz, Jr., Almost the Last Word on Legal Services: Congress Can Do Pretty Much What It Likes, 17 St. Louis U. Pub. L. Rev. 295, 302-303 (1998).

As early as 1968, the Congress began restricting the kinds of cases legal services programs could handle and has been laying down prohibitions ever since....Despite the continual Congressional cutbacks on what legal services could do, they continued to receive larger and larger annual appropriations from Congress until the first years of the Reagan administration; and legal services did not suffer a catastrophic funding loss until the 1965-1996 [sic] Congress under Newt Gingrich when $122 million was cut from the legal services program.

Id. For a detailed list of annual appropriations to the LSC and the percentage change from the previous fiscal year, see Legal Services Corp., Annual LSC Appropriations 1980-2001, at http://www.lsc.gov/pressr/pr_alsca.htm (last visited Aug. 19, 2003).

570 See Joan Grace Ritchey, Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation, 79 Wash. U. L.Q. 317, 317-18 (2001).

[N]early four out of five Americans mistakenly believe that the Constitution guarantees free lawyers to poor people in civil cases as well as criminal cases....Americans find it difficult to believe that our legal system does not recognize a right as fundamental as the appointment of counsel to represent indigent litigants. However, the stark reality remains that U.S. citizens face losing their homes and other property, their compensation, and even their children in court every day without the assistance of counsel, often when they have sought and requested such assistance....[V]irtually all other mature industrialized societies are far more progressive than the United States in their protection of the right to counsel for all members of society, regardless of income.

Id.; see also Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 Geo. J. on Poverty L. & Pol'y 1, 2 (2003).

Indigent defendants are particularly vulnerable. An indigent civil defendant is brought into court against his will. Unlike a plaintiff, who can often induce a lawyer to take the case based on a prospect for recovery, the civil defendant generally lacks even that lure. The indigent civil defendant is alone, forced to confront a system in which “[t]he assistance of counsel is often a requisite to the very existence of a fair trial.” ...[It is presumed that the] right to appointed counsel comes only if the indigent person is in danger of

losing his or her personal freedom. This presumption has proved nearly impossible to overcome, and led to the widespread notion that appointment of counsel in a civil case is "a privilege and not a right."
Id.; Earl Johnson, Jr., The Right to Counsel in Civil Cases: An International Perspective, 19 Loy. L.A. L. Rev. 341, 341-61 (1985) (arguing for the right to counsel for indigent civil litigants in California, based upon historical right to counsel in Europe).

571 ABA Standing Committee on Legal Aid and Indigent Defendants, ABA Principal Indigent Defense Resolution No. 121, at 1 (1979), available at http://www.abanet.org/legalservices/downloads/sclaid/121.pdf.
At the time of the resolution's adoption, there was a major federal program-- the Law Enforcement Assistance Administration (LEAA)--to assist criminal justice systems of state and local governments. But few LEAA dollars were spent to help indigent defense. During 1972-1976, LEAA spent more than $3 billion, but less than one percent of this sum (about $30 million) was devoted to indigent defense. ABA Standing Comm. on Legal Aid and Indigent Defendants, The Ctr. for Defense Services: A Draft Discussion Proposal for the Establishment of a Nonprofit Corp. to Strengthen Indigent Defense Services, at B-1 (1977).

572 ABA Standing Committee on Legal Aid and Indigent Defendants, ABA Principal Indigent Defense Resolution No. 121, Report to the House of Delegats, at 3 (1979), available at http:// www.abanet.org/legalservices/downloads/sclaid/121.pdf.

573 The Spangenberg Group, supra note 39, table at end of document (50 State and County Expenditures for Indigent Defense Services FY 2002) (unnumbered pages).

574 Id.

575 ABA, Providing Defense Services, supra note 22, Standard 5-1.6, cmt. at 27-28.

576 See supra notes 556-56 and accompanying text.

577 National Association of State Budget Officers, Budget Shortfalls: Strategies for Closing Spending and Revenue Gaps 1 (3d ed. 2002), available at http://www.nasbo.org/publications.php (last visited Aug. 4, 2003).
The weak economy compounded by the events of September 11, 2001 and a declining stock market severely strained state budgets in fiscal 2002. In most states, conditions are worse in fiscal 2003. Economic growth is wavering, revenues are faltering, costs for health care (particularly Medicaid) and new homeland security continue to rise--further exacerbating fiscal problems that plagued nearly every state in fiscal 2002.... Traditionally, when cuts are made, K-12 education, higher education, Medicaid, debt service, public safety, and aid to towns and cities have been exempted. Due to political pressures against tax increases and as states exhaust budget reduction strategies, exempted programs are increasingly becoming subjected to budget cuts.
Id.; Nat'l Governors Ass'n & Nat'l Ass'n of State Budget Officers, The Fiscal Survey of States, at ix (June 2003), available at http:// www.nasbo.org/publications.php (last visited Aug. 4, 2003) ("States trimmed spending dramatically in fiscal 2003 and in governors' fiscal 2004 budget proposals....Thirty-seven states reduced fiscal 2003 enacted budgets by nearly $14.5 billion--the largest spending cut since 1979.").

578 Center for Defense Services Act, S. 2170, 96th Cong. §§4(a), 5(a) (1979).

579 Id. §5(a).

580 Id. §§3(7), 7(a)(1).

581 Id. §8(a)(2).

582 Id. §7(a)(2).

583 Id. §7(a)(3).

584 ABA Standing Comm. on Legal Aid and Indigent Defendants, ABA Principal Indigent Defense Resolution No. 115, at 1 (1998), available at http://www.abanet.org/legalservices/downloads/sclaid/115.pdf (last updated Apr. 18, 2003).

585 Id. at 5.

586 Id. at 5-6.

587 The cost of a Center for Defense Services would be a modest expense in relation to the federal government's annual expenditures and the size of the nation's economy. In 2002, the federal government spent over $2.01 trillion and held over $3.5 trillion of debt. Congressional Budget Office, The Budget and Economic Outlook: Fiscal Years 2004-2013 app. F, at 148 (2003), available at ftp://ftp.cbo.gov/40xx/doc4032/AppendixF_errata.pdf (last visited Aug. 4, 2003). The cost of the current United States involvement in Iraq is estimated to be about $6-9 billion per month. Letter from Dan L. Crippen, Director, Congressional Budget Office, to the Honorable Kent Conrad, Chairman, Committee on the Budget, United States Senate, and the Honorable John M. Spratt, Jr., Ranking Member, Committee on the Budget, United States House of Representatives (Sept. 30, 2002) (on file with Author). At this rate, one month's expense on the Iraq campaign should be more than sufficient to fund the yearly expense of the proposed defense services center.

588 See supra notes 442-62 and accompanying text.

589 See supra notes 551-66 and accompanying text.

590 See supra notes 522-45 and accompanying text.

591 See supra notes 397-441 and accompanying text.

592 See supra notes 569-84 and accompanying text.

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PUBLIC PROVISION OF LEGAL SERVICES IN THE UNITED KINGDOM: A NEW DAWN?

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This is a very interesting and critical time for the provision of publicly-funded legal services in the United Kingdom. On April 3, 2000, a new system was launched to fund and deliver legal aid in civil cases and to plan a new funding structure for criminal legal aid. The essential components of the new system include a Legal Services Commission (or "LSC"), which provides public funds made available by the Lord Chancellor's Department [1] to quality-assured suppliers, through contracts, via the Community Legal Service Fund for civil matters covered by legal aid and the Criminal Defense Service for criminal legal aid. A second essential element is the removal of certain cases, including almost all personal injury claims, from the scope of legal aid. These cases are to be funded through conditional fee agreements between solicitors and clients. A third aspect of the new system is the development of local Community Legal Service (or "CLS") Partnerships to plan and consult on the delivery of civil legal services at the local level. The new system involves funders which are principally the LSC, local authorities, and charities, such as the National Lotteries Charities Board, and suppliers which include advice and law centers and private practitioners who are involved in working and consultative groups. A fourth component is a Community Legal Service website to provide access to both a directory of legal providers and sources of information. It is hoped that such access will eventually lead to on-line advice. Finally, the system includes plans for a salaried Public Defender Service for criminal defense work.

In addition to this restructuring of publicly funded legal services, the Human Rights Act of 1998 [2] ("Human Rights Act") is due to come into effect in the United Kingdom on October 2, ***S144** 2000. It brings into U.K. law, for the first time, most of the provisions of the European Convention on Human Rights [3] ("ECHR"), violations of which will now be actionable in domestic courts and tribunals.

There are likely to be two effects on the provision and demand for legal aid. First, under Article 6 of the ECHR, there may be a requirement for free legal advice and representation for those whose civil rights are at issue in complex cases and who could not otherwise afford it. This may particularly affect representation before tribunals, which deal with matters for which no legal aid is currently available such as employment, welfare benefits, and immigration. Legal aid has already been promised for immigration and asylum tribunals. Second, there is likely to be a large amount of litigation in the areas of public and administrative law in an effort to explore the effect of the Human Rights Act; the public law division of the High Court, known as the Crown Office, is anticipating that its workload will double in the short and medium term. Thirdly, as I will go on to explain, there is likely to be enormous pressure on criminal legal aid, which may reduce the resources available, in a fixed budget, for civil legal aid.

I. HISTORY OF LEGAL AID AND ASSISTANCE

In the United Kingdom, the main source of free or subsidized legal advice has been the legal aid scheme. First introduced following the Rushcliffe Report in 1945, [4] civil legal aid has had three key elements. It was demand-led, it was largely delivered through and by lawyers in private practice; and the chief means for controlling its expenditure was by lowering the number of eligible recipients. Other sources of legal assistance for the less well off--pro bono work and salaried providers--are relatively under-developed, particularly pro bono work.

Initially, legal aid was provided through the Law Society, which is the representative organization of solicitors in England and Wales. By the 1980s, the independent Legal Aid Board, which was later transformed into the LSC, administered it. ***S145** There was a period, in the mid-1970s, when the pattern of declining eligibility levels and demand-led private practice delivery came close to breaking down. New models of legal advice provision were developed. In 1970, the first law center opened, and community advice centers and citizens' advice bureaux, staffed by paralegals and volunteers, appeared in many urban centers. These initially operated on a small amount of central government funding provided by the Lord Chancellor's Department and central government grants for inner-city regeneration programs.

At the same time, there was pressure to increase the scope and decrease the eligibility levels for legal aid, which had originally covered 80% of the population but had by then dropped to 40%. There was considerable debate among the advice and legal sector as to which should be the lobbying priority: the extension of legal aid or the development of a salaried, social welfare-oriented sector (or even a National Legal Service to parallel the National Health Service). The majority view focused on the former in order to preserve the principle that public funding for legal services was demand-led and independent.

Thus, in 1979, legal aid eligibility limits were lowered, so that the scheme again covered nearly 80% of the population, and the green form scheme [5] was introduced to allow solicitors to provide legally-aided initial advice and assistance for up to one hour automatically and extended with permission. But, the minimal central government funding for the salaried legal sector, and any concept of strategic planning for law and advice centers, was never developed. Law and advice centers continued to be set up in a haphazard way, dependent on local authority and charitable funding, usually on a year-by-year basis. Meanwhile, as the Legal Action Group [6] pointed out, the legal aid scheme helped to fund a large increase in the number of lawyers in private practice in the 1970s and 1980s, but only a small rise in the proportion of social welfare law they undertook. [7]

In the years since 1979, the downside of a demand-led system became ever more apparent. Faced with increased expenditure, ***S146** both overall and costs-per-case, [8] the government drastically cut eligibility levels so that virtually only those on state social support qualified for civil legal aid. [9] Legal aid rates of remuneration have also lagged well behind rates for private client work, making it unattractive, or even financially unviable, for solicitors in private practice.

Meanwhile, legal and advice centers are over-subscribed and the geographic distribution is uneven. The fragile and temporary nature of their funding base has made it difficult to plan ahead or strategically; and, their funders operate different and, sometimes, mutually contradictory assessment measures. The centers, also, have not been subject to any clear, standardized quality or skills criteria.

In addition, funding pressures undermined some of the principles that underpinned the 1970s vision, such as the importance of information, education, and preventive and group actions. Funders often demand measurable quantitative results (i.e., client numbers). Increasingly, law and advice centers are buying into case-driven and means-tested legal aid work in order to meet shortfalls in grant-aid funding.

The system has, therefore, suffered from some clear and systemic defects, which were well-documented in many reports from the main consumer and legal organizations. It was fragmented, in terms of geographic scope. It was lawyer-driven rather than client-oriented. It had the capacity to absorb money without any clear accountability, strategy, or quality controls, while at the same time, it starved out the less attractive, less acute, and less mainstream areas of legal activity.

The Community Legal Service is the cornerstone of the package of reforms now being put into place. It aims to replace the present fragmented and piecemeal system with a coherent, joined-up strategy both for funding and delivering legal services. ***S147** As the government's White Paper said," Our longer-term aim is to ensure that every community has access to a comprehensive network of legal service providers of consistently good quality." [10] This aim was given statutory form on April 3, 2000, when the Access to Justice Act of 1999, was implemented.

II. JOINED-UP FUNDING: REDISTRIBUTING LEGAL AID

The new LSC operates two funds: an open-ended Criminal Defence Fund and a cash-limited Community Legal Service Fund. The amount of money available to the LSC has remained broadly the same, as have the financial eligibility limits, which effectively limit civil legal aid to those on benefits or very low wages.

A. Quality Suppliers

Under both schemes, the LSC will only provide funds for contracted suppliers on agreed terms and subject to audited quality standards. Under the CLS Fund, those contracts may be awarded to lawyers in private practice, salaried lawyers and paralegals in the not-for-profit sector, and non-lawyer agencies such as advice centers. There is also, incidentally, a proposal for the Criminal Defence Fund to set up a pilot Public Defender Service to provide, for the first time, salaried criminal defence work.

Clearly, the aim is to increase quality. However, there are real concerns about the quantity and accessibility of legal aid provision. There has already been a huge drop in the number of solicitors in private practice who are now able to offer legally-aided services: from 11,000 last year to 5000 this year. Though the 5000 who remain did in fact provide 80% of legal aid services, it is nevertheless acknowledged that there has been a significant decrease in the amount, and the geographical availability, of legal aid provided through private practice. One of the aims of the new system is that that gap will be filled by the Community Legal Service Partnerships, which will bring in other funders and other suppliers.

The LSC is also itself pioneering new models of service delivery to try to meet some of these gaps, such as second-tier expert ***S148** advisers, particularly in areas such as immigration and human rights where local expertise may be lacking, and the provision of telephone advice services. It is too early to say whether these schemes are working, either in their own terms, or in terms of filling gaps in supply.

B. Funding Priorities

From the beginning, it has been clear that social welfare law has been one of the new Government's key priority areas, in terms of improving both the quality and quantity of legal advice and representation available.
A Community Legal Service will revolutionize ordinary people's access to information about their rights, and new avenues to good quality legal services. It will be a cornerstone of the Government's pledge to protect everyone's basic rights. The disadvantaged and socially excluded will find help with the issues that affect their everyday lives at the heart of the new service. As part of the Community Legal Service, legal aid spending will be refocused on the people and cases where it is most needed and can do most good. [11]

These principles are reflected in the statutory basis for the CLS Fund. It cannot fund cases which can be funded in other ways, such as a conditional fee agreement. [12] Thus personal injury cases, which can be funded through conditional fee agreements, are, in general, excluded from CLS funding. The Access to Justice Act also sets a higher merit test, in general, for cases to be funded, while allowing this test to be lowered in certain priority areas. Under the Access to Justice Act, the Lord Chancellor has the power to issue directions, which the LSC must take into account, on the priority areas for funding.

In February, 2000, the Lord Chancellor issued his first directions, giving top priority to child protection cases and cases where a client risks losing life or liberty. All cases in these two categories that meet appropriate merits criteria should be funded. After that, high priority should be given to other child ***S149** welfare cases, domestic violence cases, cases alleging serious wrong-doing or breaches of human rights by public bodies, and social welfare cases, including housing proceedings and advice about employment rights, social security entitlements, and debt.

Most recently, at the launch of the CLS on April 3, 2000, the Lord Chancellor also pledged an additional UK£23,000,000 to develop and provide advice and assistance to asylum-seekers who are now being dispersed around the country. An additional UK£23,000,000 will be allocated to mental health, community care, and other public law cases, particularly those involving claims under the Human Rights Act. The Lord Chancellor also announced an increase in the hourly legal aid rates that have been frozen for the last four years and had prompted a threatened strike by legal aid practitioners.

C. Pressures on the Fund and Its Suppliers

The new funding arrangements rest upon a new view of lawyering in private practice. Ministers have gone to great pains to lecture solicitors in particular that they must regard themselves as business people. Running a solicitors' firm, it is said, is no different from running any small business. It is a matter of managing resources, ensuring sufficient cash-flow, and making decisions on the profitability of work. Conditional fee agreements, which depend upon accurate prior risk assessment and careful financial management, exemplify the skills that the new solicitor will need to survive. At one level, it is correct for the government to insist on proper management of public money. However, there is considerable concern among solicitors, particularly those in social welfare and public interest law, that the principle of public service will be lost in the search for profitability.

As a result, smaller niche firms, particularly those that do outreach and pro bono work and those principally reliant on legal aid, may fail to survive. Indeed, some small but highly-rated firms specializing in community care, such as services provided for the mentally ill and other vulnerable groups, were initially unable to secure sufficient funding under the new contractual arrangements to be viable and voiced their opposition. Though the challenge was unsuccessful, the judges expressed concern at the decision-making processes and the possible consequences.

***S150** In addition, the cash-limited CLS Fund will collide almost immediately with the new funding demands that follow the implementation of the Human Rights Act. The Access to Justice Act, at least initially, is bound to stimulate litigation, in terms of both kind and volume. This will have direct and indirect consequences for the CLS Fund. Directly, the CLS Fund will suffer from the fact that the government has chosen not to set up a Human Rights Commission to take cases, provide advice and information, and monitor litigation. Moreover, the Human Rights Act specifically prevents public interest groups from taking human rights cases in their own names on behalf of groups or classes of person. All publicly-funded Human Rights Act-related litigation will therefore fall on the cash-limited CLS Fund, which will be faced with the extremely difficult task of prioritizing.

There is also an indirect threat to the CLS Fund. Though the Criminal Defence Fund is theoretically separate from the CLS Fund, the Lord Chancellor has made it clear in Parliament that both funds will be competing for money within his own, limited departmental budget. But it is not an equal competition. The Criminal Defence Fund is not, nor can it be, cash-limited, particularly when the Human Rights Act is in force with its specific requirement to provide free representation in criminal cases when the interests of justice demand it. In all other countries that have incorporated rights, such as Canada and New Zealand, criminal justice has been the area of law in which there has been the greatest explosion of work. The same will certainly be true in the United Kingdom. The CLS Fund, therefore, faces an increase in the volume of work and the threat of a decreased budget at precisely the time when public funds will be most needed to establish good legal precedents on behalf of those who cannot afford expensive court proceedings.

III. JOINED-UP DELIVERY: THE NEW MODEL CLS

The second plank of the government's plan is the creation of the CLS itself. Under the Access to Justice Act, the LSC is charged with another duty separate from the provision of civil legal aid through the CLS Fund. It is to establish, maintain, and develop the CLS.

The CLS will provide, in the order listed in the Access to Justice Act: 1) general information about the legal system and ***S151** legal services, 2) advice to individuals, 3) help in settling, or otherwise resolving, legal disputes, 4) help in enforcing decisions to resolve such disputes, and 5) help in relation to legal proceedings not relating to disputes.

There is, therefore, a very strong emphasis on initial advice and dispute resolution, rather than litigation. This reflects the view that front-loading is important since early and accurate diagnosis and advice can prevent or at least minimize legal problems and reduce the need for more costly later intervention. These are certainly extremely important elements of legal service provision, which have up to now been neglected or underfunded.

The LSC, and its network of legally-aided contractors, is only one of the players in the new CLS scheme. At the local level, legal advice, particularly initial front-line advice, may be provided by a variety of agencies, with a variety of funders. Citizens' advice bureaux exist in most localities and are usually funded by local authorities. They principally offer initial information, advice, and signposting, though some citizens' advice bureaux have lawyers (and may even have legal aid franchises). Local law centers and advice centers may also rely on local authority funding. There may also be specialist advice centers which cater to particular groups, such as people with disabilities or children, or particular areas of advice and law, such as debt or immigration. Some centers may be funded charitably. Most recently, the National Lottery Charities Board has become a significant funder of help and assistance that is directed towards disadvantaged groups and children.

A. Partnerships and Service Delivery

The aim of the CLS is to bring coherence to the present fragmented provision of legal advice and information. Local Community Legal Service Partnerships will be set up to co-ordinate, map, and network legal service providers and their funders at a local level and will seek to ensure clear and consistent quality criteria. The key players in those partnerships will be the two main funders of local legal services, the LSC and its regional committees, and the relevant local authority, who will work with local suppliers, both in private practice and in the salaried advice sector.

***S152** Over the last year, a group of Pioneer Community Legal Service Partnerships (“Pioneer Partnerships”) were set up. These were six local authorities representing a spread of rural and urban areas, who agreed to work with the Lord Chancellor's Department and the Legal Aid Board to develop a best practice blueprint for CLS Partnerships. Forty other local authorities have since joined as associate partners to pool their ideas.

The task for the Pioneer Partnerships was to establish best practice models for: 1) assessing local need and priorities for advice and information, 2) establishing networks of local providers of all kinds and referral arrangements, and 3) co-ordinating the plans of the different funding bodies such as local authorities, charities, etc.

An independent evaluator from the Institute of Advanced Legal Studies, London University, assessed this work. His report [13] sets out some of the general lessons to be drawn from these initial partnerships. He also offers good practice models for structuring partnerships, assessing levels of service provision, mapping supply, establishing sound referral networks, assessing need, and drawing up concordats for joint objectives and to encourage joint working where possible.

The problems that emerged from the Pioneer Partnerships are not surprising. They include: rivalry and distrust between some suppliers, both between and within the private practice/salaried divide; the tension between centrally-determined funding

priorities, for example those of the LSC, and locally identified need; funders' reluctance or inability to compromise their independence or aims; the difficulties of mapping supply and, in particular, need; the problems of setting up a trusted and reliable referral system; and whether and how to involve suppliers in executive decision-making. The Pioneer Partnerships are a long way from being able to overcome these difficulties and provide a truly integrated service, even assuming that this was possible or desirable, but they have clearly helped to build up trust and understanding among the varied funders and providers of legal advice locally.

However, there appear to be two principal weaknesses, or dangers, as the Pioneer Partnership model becomes the main ***S153** way of delivering community legal services. The first is issues of accountability and independence. The Pioneer Partnerships do not seek, or want, direct involvement from the consumers of legal services. The consumers' main role is limited to responding to surveys or participating in focus groups. The idea of a consumer representative on the Pioneer Partnership steering groups is dismissed as tokenistic and unrepresentative. Suppliers do have a role in Pioneer Partnerships, but it is a limited one because it is felt that it would be difficult for them to make disinterested decisions in matters that affect their own income or that of their organization. The larger, and more centrally-directed suppliers, in particular the National Association of Citizens Advice Bureaux, can play a more strategic role. This strategic role, however, raises concerns for smaller, more locally-based suppliers, both in the advice sector and in private practice.

Funders clearly have the lead role. The LSC is the strongest and most focused player but it has a centrally directed vision and is, in turn, heavily dependent upon the government's funding, vision, and agenda. [14] This may conflict with the notion of addressing local need and priorities. Local authorities, the other main funding partners, may also have conflicts. As the research project into the Pioneer Partnerships identified, some local authorities may be keener to support welfare advice, which can raise living standards of local people without any cost to the local authorities, than housing advice, which may result in increased local authority spending on repairs.

The second question is whether there are the resources, or the will, to develop the ideas and possibilities thrown up by the Pioneer Partnerships. Those schemes aim to identify and deal with problems that have bedevilled the provision of legal services in the United Kingdom, such as their fragmentation, variable quality standards, and poor referral systems. However, there is no new money available and no central resource for training, information, or skills-sharing. Solving the problem of fragmentation involves more than simply pressing a “de-frag button.” Moreover, many would argue that the new provisions in practice ***S154** will amount to little more than rearranging the deckchairs on the Titanic, while simultaneously manufacturing a huge iceberg. Many view the new provisions as threatening the viability of many small solicitors' firms who will not be able to obtain contracts or sustain the cashflow requirements of conditional fees.

The provision of good quality front-line advice is clearly important, but it needs a hinterland of specialist and legal services for those cases and issues that are outside its competence or scope. If public interest lawyering in private practice is starved out, the front line will become the only line and front-loading will become down-loading.

B. Quality-Marking and Information Technology

Parallel with the work of the Pioneer Partnerships, a Quality Task Force was set up to develop core quality criteria for the provision of legal advice and assistance at the various levels of provision. The Quality Task Force included representatives of the legal profession, the advice sector, consumer representatives, local authorities, and other funders. The Quality Task Force, whose work was taken over by the Legal Aid Board, has now developed a Quality Mark, assimilated into the standards required of legal aid contractors, which was launched on April 3, 2000. Those providing legal advice and assistance under the CLS will need to reach the minimum Quality Mark standard for the service they provide, at one or more of the three Quality Mark levels: information, general help, and specialist help. The standards for each level are specified.

The final piece of the CLS jigsaw is the better use of information technology. The CLS website, “Just Ask!,” was also launched on April 3, 2000. It contains a directory of over 15,000 providers, searchable by area of law and level of service provision. It

provides information in six non-English languages and access to other online legal information and help websites. However, it does not yet attempt to give direct advice or information to users.

Again, these developments offer opportunities, rather than definitive returns. Some studies have shown that attempts to standardise quality and competence have depressed, rather than improved, standards because they are geared to the achievable and measurable. They tend to prioritize process over product ***S155** and to discourage innovation. Furthermore, awarding benchmarks of quality is extremely dangerous unless there is a structure for assessing and monitoring those who are quality-marked. The LSC will monitor and assess those it funds and it is assumed that local CLS partnerships, or their members, will do local evaluation and monitoring of other suppliers. However, funders who are under political pressure may, as they have in the past, be drawn to prioritising quantity and output over quality and real outcome. Equally important in the longer run, it is not clear how best practice models, or innovative or effective new models of delivery, are to be identified, publicised, and promoted and how staff are to be trained and supported.

While the use and development of information technology clearly offers new possibilities, in the medium term it is unlikely to be more than a signpost, pointing those with internet access to suppliers, who may or may not have the capacity, or in practice the specialist knowledge, to help them. The website is not yet linked to any local network providing more detailed information on the law or local providers, nor can it yet provide direct on-line advice to users; and that too will require the investment of considerable resources.

CONCLUSION

The new framework, and its implementation, have certainly stimulated a great deal of activity and ideas on the delivery of publicly funded legal services. For example, they have stimulated an interesting debate about the nature and function of front-line advice and its relationship with specialist and legal casework services; highlighting the fact that both require expert and specific skills.

There is a developing consensus that an effective support, referral, and mentoring network between the front-line and the specialist, or lawyer, is key. Too often referrals are not made, are made inappropriately, or cannot be made because there is no-one who will take them. Clients are sometimes dumped, rather than referred. Both the CLS development team and the Legal Services Commission are working on proposals for the effective use of second-tier agencies and exploring telephone advice support, the transfer of cases, and the possibility of some quasi-contractual relationship between generalists, which could include ***S156** "High Street" solicitors as well as advice centers, and specialists. If this develops, and, of course, if it is properly resourced, this would be a new concept in the United Kingdom, where lawyers and agencies have traditionally held on to cases and clients, and indeed have often been under financial pressure from their funders to do so.

Work is also being done to look at the appropriateness, quality, and cost of advice provided by paralegals and lawyers respectively. In some cases, it reveals that present assumptions and funding structures inhibit the most effective delivery systems, whoever is the provider.

For example, one study identified telephone advice as the most effective means of advice provision, particularly if it is backed up with information sheets which can be sent out to the client. Yet advice in the United Kingdom, whether provided by the private or salaried sector, relies overwhelmingly on personal contact, partly because most providers are funded only for the clients they physically see or write to and partly because of a perception that telephone advice is unreliable. Funding legal advisers not to do casework, but to provide clear and accessible information, via more sophisticated telephone and information technology systems, is also something that the new Legal Services Commission and the CLS could prioritise.

Other research has compared the quality and cost of initial advice given by solicitors and non-solicitor agencies. It challenges both the assumptions commonly made: that solicitors provide better quality advice but at greater cost. The initial research results show that, in general, the advice given by the non-solicitors was fuller and better, but the costs-per-case were higher, largely

because the non-solicitors spent more time on each problem. Crude cost-per-case analysis in other advice sectors bears out the general thesis that providing high quality initial advice, in the salaried sector, is not cheaper per case, but that it is likely to save the cost of expensively disentangling or litigating cases that have gone wrong for want of good early advice.

There are many good fairies, with extremely good intentions, at the christening of the new Legal Services Commission and Community Legal Service. The new regime offers an opportunity to tackle some of the underlying problems of legal service ***S157** provision in the United Kingdom, and also to build on its strengths, principally the commitment of those in the salaried sector and in private practice who work for relatively low salaries on behalf of disadvantaged and marginalised groups. And it is a long time since there has been such interest, and at such a high level, in the kind of law in which JUSTICE and other not-for-profit legal organizations have practised.

However, there is also considerable concern as to whether these large expectations and positive aims will be achieved. Public legal service provision remains centrally driven, funder-led, and case-led, and it is easy to see how its strategic aims can be undermined by financial constraints and the priorities of those who pay, rather than those who use. There are no powerful counterweights, either in the shape of serious and widespread pro bono work by private lawyers, or bottom-up community-based initiatives. The Community Legal Service is still a concept, rather than a structure, and rolling it out will require investments of time, resources, commitment, and organization from hard-pressed local bodies with divergent aims. Even the welcome emphasis on social welfare and poverty law could be a two-edged sword, allowing public legal provision to become poor law, in every sense of the word, with an over-reliance on front-line, non-specialist, overworked and under funded agencies, which lack the ability or skills to spot and progress matters that ought to be litigated, not mediated; or to deal with the underlying legal issues that cause individual problems.

We need to be very clear about the gains and objectives that we want to promote in these early and transitional days. For JUSTICE, those would include: 1) the development, and proper monitoring, of quality standards, 2) mutual recognition, by front-line advisers and specialist lawyers, of each other's skills and needs and a similar recognition by government and funders, 3) proper referral systems and an appropriate use, and funding, of telephone and second-tier advice, 4) the provision of accessible, accurate information via as many outlets as possible, 5) an acceptance by funders that the provision of early, good-quality and properly-resourced legal advice ultimately saves resources, and 6) a continued acknowledgement by government that access to legal advice is a fundamental civil right, in particular where the individual is facing larger and more powerful opponents.

A year ago, I thought that the jury was still out on whether ***S158** the United Kingdom could square the magic circle of delivering better-quality, more accessible social justice law without spending any more money. That jury has now been sitting for another year, and its verdict is still not settled. But what is clear is that the interplay of domestically enforceable human rights, a new community legal service and, soon, a public defender system for criminal cases is going to make for a very interesting time in public service lawyering in the United Kingdom.

Footnotes

1 The Lord Chancellor's Department is the government department with responsibility for courts, tribunals, legal aid, and the appointment of judges and magistrates. It is headed by the Lord Chancellor, who is a Minister in the Cabinet, as well as the Speaker of the House of Lords, and able to sit as a judge in the House of Lords judicial committee.

2 Human Rights Act, 1998, c. 42 (Eng).

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221.

4 Report of the Committee on Legal Aid and Legal Advice in England and Wales, 1945, Cmd. 6641.

5 Green Form was the legal aid system whereby solicitors could give free advice and assistance for up to two hours.

6 The main non-governmental organization in the United Kingdom which researches, publishes, and campaigns on legal services.

7 Legal Action Group, A Strategy For Justice 8 (1992).

8 Total expenditure on legal aid jumped from UK£ 620,000,000 in 1991-92 to UK£1,528,000,000 in 1997-98. Civil and family legal aid spending rose from UK£586,000,000 in 1992-93 to UK£793,000,000 in 1997-98, but the number of cases started each year over that period fell by 31%.

9 The Lord Chancellor's Department estimates that only 23% of the population is eligible for non-contributory legal aid in civil matters. In addition around 25% can obtain some contribution to their legal costs; this percentage includes individuals whose incomes are so low that they are eligible for additional state support. Some commentators considered these figures to be an over estimation of those eligible.

10 Lord Chancellor, Modernising Justice P 2.6 (1998).

11 Id.

12 Conditional fee agreements are now extended to all types of civil case, including family cases that involve property disputes; these agreements can also be used in cases which do not involve money, as the conditional fee will be reclaimable from the losing party.

13 Richard Moorhead, Pioneers in Practice: The Community Legal Service Pioneer Project Research Report (2000).

14 The new LSC Chairman's statement at the launch of the Commission supports this contention. He stated: ‘I am confident that all Commission members will contribute towards helping the Commission to develop and implement the Lord Chancellor's policy objectives.‘

CRIMINAL DEFENSE REPRESENTATION IN ENGLAND AND THE UNITED STATES

Norman Lefstein*

Prepared for the International Society for the Reform of Criminal Law

18th International Conference – August 2004
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Introduction

Even the most advanced democracies in the world struggle with providing adequate funding of criminal defense services for persons unable to afford a lawyer. For example, in Canada, as well as in England and the United States, there is significant concern about whether sufficient resources are presently being allocated for defense representation.

In Canada, for example, the website of the Canadian Bar Association complains about the lack of requisite funding for Criminal Legal Aid, noting that a recent budget increase in the federal government's spending "does not adequately address the chronic under-funding of…criminal…legal aid services for the last two decades."[1]

Similarly, in England,[2] in 2003 The Law Society concluded that the legal profession has grown "disillusioned with [civil and criminal] legal aid." This is because [l]egal aid is at best marginally profitable" since [d]uring the last 10 years the cost of running a solicitors' practice rose by 67.2% whilst legal aid rates increased by 26.35%." The report predicted that during the next five years many law firms were likely to give up their criminal legal aid practices.

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[1] *See* http://www.cba.org/cba/epIIgram/Oct2003/default.asp

[2] References to England in this paper also include Wales. Defense representation in Northern Ireland and Scotland is the subject of separate legislation enacted in these subdivisions of the United Kingdom.

And in the United States, there are numerous national and statewide studies of defense services in which organizations have concluded that funding of defense representation among the nation's 50 states is woefully inadequate. A whole host of reports, articles, and editorials documenting the dire state of public defense in the U.S. can be found on the websites of the American Bar Association, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defender Association.

This paper discusses the funding, organization, and structure of criminal legal aid in England and the U.S. The paper also suggests that the U.S. and other countries might profitably emulate several of England's approaches to providing legal services.

The English System of Criminal Legal Aid

England's current system for defense services is based on a 1999 Act of Parliament. Unlike the U.S. and Canada, all funds for legal aid are provided by the national government. The Legal Services Commission (LSC) administers the program, which covers both civil and criminal legal aid. The LSC is headquartered in London but has 12 regional offices and approximately 1,500 staff members.

Solicitors provide legal representation in the lower criminal courts (Magistrate Courts), whereas barristers along with solicitors provide representation in more serious criminal cases, which are tried in the Crown Courts. In the larger cities where there are sizeable law firms, there are entire firms that specialize in legal aid or have units of the law firm that practice legal aid exclusively. Until recently, there were no public defenders in England, but now eight experimental defender offices have been opened. Private solicitors (as well as barristers) are reimbursed by the LSC for their legal services according to fee schedules, whereas the LSC pays the salaries of public defenders and all of their other personnel and office expenses.

In 1999, England eliminated a means test for legal representation, although the government attempts to collect monies from persons of wealth who are

convicted of a crime in the Crown Courts. As a result of this change, there is now little retained criminal defense work in England, except in cases of celebrities and in corporate misconduct cases where the persons charged have financial resources.

There are at least four important ways in which the English system differs from practices in the United States.

First, in order to qualify for government reimbursements for providing criminal legal aid, solicitors must first qualify for a "general criminal contract," which means that they must be licensed to furnish defense representation at public expense. To qualify for such a contract, solicitors must demonstrate that they adhere to sound business practices, as the LSC uses a "well-run organisation as a proxy for the quality of advice." The new public defender offices also must qualify for a general criminal contract.

Second, a serious effort is made to monitor the quality of the work performed by solicitors. Not only does the initial licensing of solicitors help to assure effective representation but also with newly licensed solicitors LSC staff randomly review closed case files. In addition, case files are audited when questions arise about the quality of representation being furnished by solicitors. On some occasions, panels of experienced solicitors are retained to conduct peer assessments of the representation provided by solicitors.

Third, since 1984, by virtue of an Act of Parliament, defendants have the right to representation when they are in police custody, and approximately 40% of defendants avail themselves of this opportunity. This representation is made possible by virtue of a national police station duty solicitor system, with services furnished on short notice either by solicitors or by trained and accredited representatives. A defendant's solicitor or other representative, moreover, is entitled to attend police interviews of suspects, and the police must await the arrival of this person unless it would result in unreasonable delay of the suspect's interrogation.

And, finally, in England clients may choose their own solicitor rather than have a judge or some other person make the selection. Thus, if a person qualifies for the right to be represented at government expense – a right that extends to the

vast majority of criminal cases – individuals can select the solicitor to represent them (assuming that he or she is available) from among those who have signed a contract with the LSC. Even solicitors practicing in public defender offices must compete for their clients against the other solicitors in the community authorized by the LSC to provide criminal legal aid. The judiciary designates solicitors to provide representation only in situations where defendants want the assistance of the court.

Thus, the English system mirrors the way in which clients select lawyers in privately retained civil cases, with the goal of fostering mutually positive attorney-client relationships. Since clients choose their solicitors, clients are believed likely to trust their solicitors; and, in turn, solicitors have a powerful incentive to represent clients conscientiously in order to obtain their repeat business, as well as referrals from others needing defense representation.

The American System of Criminal Defense Representation

In the United States, the right to an attorney in state criminal and juvenile delinquency prosecutions is guaranteed to the indigent accused as a result of decisions of the United States Supreme Court, based upon interpretations of the U.S. Constitution. The first of these decisions, *Gideon v. Wainwright*, decided in 1963, guaranteed the right of an accused to an attorney in state felony prosecutions. This landmark decision was followed soon afterwards by a series of other important cases extending the right to counsel.

While the national government pays for defense services provided by federal public defenders and private assigned counsel when they represent persons in federal prosecutions in federal courts, the national government provides no financial assistance to state and county governments for defense representation provided in state courts. Thus, notwithstanding that the right to counsel derives from the nation's federal Constitution, the burden of funding defense services in state courts is squarely on the country's fifty states and county subdivisions.

Essentially, three kinds of structures for providing counsel have developed in the U.S., although they sometimes exist simultaneous in the same jurisdiction.

These include public defenders paid by the state or a county; private assigned counsel who represent defendants on a case-by-case basis for a fee; and contract systems, in which private attorneys contract with a unit of government to represent an agreed upon number of indigent defendants, usually for an agreed upon price.

In about half of the states in the U.S., the system of defense representation is funded entirely by the state's central government. In nearly all of the other states, funding is provided through a combination of state and county funds, often with a majority of the funds furnished by counties. In two states, however, counties provide all of the funds for defense services, with no financial assistance provided by the state's government.

Given the variety of structures for funding defense services and the different ways that services are provided, it is hardly surprising that there are significant disparities in defense services among the nation's fifty states. But whatever the source of funding and method of delivering defense services, there are enormous problems in the U.S. in providing effective representation of the accused. While there obviously are some defense programs that provide competent client services and are staffed by dedicated lawyers, significant difficulties in achieving quality representation for the poor overshadow the success stories.

Over a period of many years, national studies and reports of state and county systems of defense services have documented the woeful state of indigent defense in state criminal and juvenile courts. There also has been a remarkable amount of litigation challenging the adequacy of the representation provided. For example, in June 2004 a law firm in Massachusetts filed a class action lawsuit in that state's Supreme Judicial Court alleging that the criminal justice system "teeters on the brink of collapse," due largely to the inadequate fees paid to the private counsel upon whom the system is heavily dependent.[3]

The most common problems with defense services are staggering caseloads, insufficient support services (e.g., access to expert witnesses and investigators), and a lack of independence. Although the American Bar

[3] *See Suit Seeks Pay Raise for Public Defenders*, THE BOSTON GLOBE, June 29, 2004.

Association has recommended for many years that defense services should be independent of the judiciary, still in many places in the U.S. judges appoint private lawyers to provide representation and approve the vouchers that lawyers submit for fee reimbursements. In addition, public defenders are sometimes beholden to judges, rather than governed by independent boards of trustees as recommended by national standards.

In contrast to England, none of the distinguishing characteristics of defense services in that country, which were described earlier, are present in the U.S.

Thus, in the U.S., virtually nowhere are defense lawyers who provide representation, whether private attorneys or public defenders, licensed to do so. Although lawyers who provide representation in death penalty cases must sometimes meet objective criteria to qualify for appointments, the vast majority of attorneys who represent indigents in the U.S. are neither pre-screened nor specially qualified to do so.

Nor is the work of defense lawyers, who practice outside of public defender programs, monitored to assure the quality of the legal services provided. Virtually nowhere in the country are closed case files of private attorneys reviewed to assess their performances nor are there peer review assessments of the kind that are used by the LSC in England.

Also, contrary to English practice, defense lawyers rarely visit police stations just after a defendant is taken into custody and do not attend sessions in which defendants are interrogated by the police. Defendants in the U.S. are usually advised of their right to remain silent and of their right to an attorney, but if a defendant exercises this option the police normally cease interviewing the defendant, thereby rendering the need for counsel much less important. However, there is a movement in the U.S. to require police departments to videotape all police interrogations, and there are a few departments that now do so.

Lastly, contrary to England there is no tradition in the U.S. of permitting indigent defendants in criminal or juvenile delinquency cases to select their own lawyer. Invariably, when the issue has been litigated in American courts, judges have ruled that defendants have no right to an attorney of their choice. As a result,

attorney-client relationships in the U.S. sometimes suffer and defense lawyers in the U.S. lack the same positive incentives of their counterparts in England to provide the best possible representation for their clients.

Funding Comparisons

As noted at the outset, there is considerable consternation in England among solicitors concerning the level of funding for criminal legal aid. Primarily, solicitors complain that they have not had sufficient fee increases in recent years, and thus legal aid practice has become much less profitable. While some law firms have threatened to discontinue providing criminal legal aid, as of 2003, compared to 2002, the actual number of law firms nationwide with general criminal contracts decreased less than 1%, from 2,909 to 2,890 law firms.

Despite solicitor concerns about the adequacy of funding, clearly England has one of the best-funded and most extensive programs of criminal legal aid in the world. England's expenditures for criminal legal aid for 2002-2003 were approximately $34 per capita. In the U.S., the comparable figure for criminal defense expenditures in state courts is about $10 per capita, which means that England outspends the U.S. to defend accused persons by more than three to one.[4] If police station representation, the lack of a means test, and other special features of the English system are taken into account, England's expenditures still outstrip those of the U.S. quite considerably. The expenditures then are $10 per capita in the U.S. compared to almost $27 per capita in England.

Do these funding differences mean that more effective legal representation is furnished to the accused in England than in the United States? This is an exceedingly difficult judgment to make, especially based upon my relatively limited study of the English system during 2002-2003. However, widespread complaints about the quality of legal representation that are so prevalent in the U.S. do not seemingly exist in England. Although a university-based study of criminal legal aid published in England in 1994 contained a scathing attack

respecting the quality of representation furnished by solicitors, since its publication there are many who believe (including one of the study's principal authors) that the quality of representation has significantly improved due to the licensing of law firms, audits of attorney files, and other progressive practices.

Conclusion

In the U.S., considerable efforts are made by the American Bar Association and other organizations to compare states in their funding and practices in providing criminal defense representation. This is because states can learn from one another about structures and funding models for delivering effective defense services. Similarly, there is much that countries can learn from one another about providing defense services in criminal and juvenile cases.

Some of what the U.S. can learn from England already has been mentioned, such as the licensing of lawyers and the monitoring of their performance. In addition, England has created a Criminal Cases Review Commission, which is empowered to review cases where defendants may have been wrongly convicted. In the U.S., despite significant evidence that innocent persons are convicted with disturbing frequency, there is no such similar body, although recently the North Carolina Supreme Court established a commission to make recommendations about how to avoid wrongful convictions.[5]

Practitioners from England could also profit from study of the U.S. system. In the U.S., for example, a much greater emphasis is placed on fact gathering through investigations in advance of trial or other disposition, whereas in England practitioners seem content, for the most part, to rely on police reports that are furnished to the defense. To conscientious defense lawyers in the U.S., this seems to place undue reliance on the prosecution and police, in violation of standards for

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[4] The figure of $10 per capita includes expenditures by both states and counties. A table depicting expenditures for indigent defense in the U.S. may be found on an American Bar Association website. *See* http://www.indigentdefense.org.

[5] *See* http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html

defense investigation developed by national organizations. An English text on criminal defense published in 2002 seems to agree with this assessment, as it notes that there are "persuasive arguments for interviewing prosecution witnesses," while conceding that defense solicitors "have had a distinct disinclination" to do so.

Perhaps of all the comparisons between countries related to defense services, none are more important than comparisons of funding levels. That England outspends the U.S. so substantially in defense expenditures should serve as a wakeup call to legislators and others in the U.S. The disparity in funding lends credence to the constant complaints from the defense community in the U.S. that government expenditures are much less than required. While there may be some government programs that do not depend directly for their success on adequate expenditures, defense services are not one of them.

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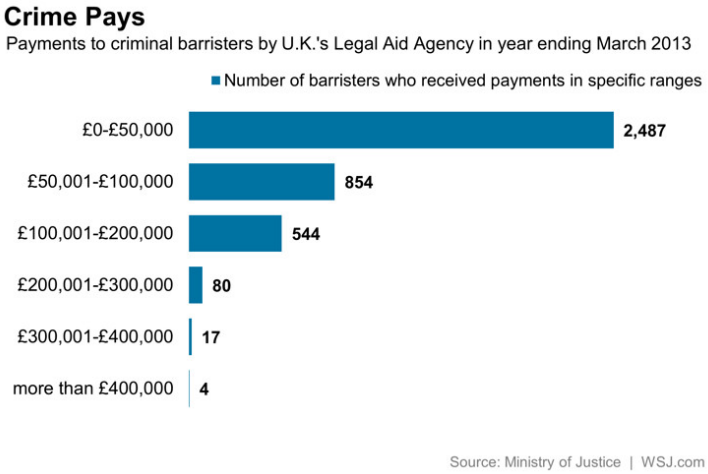
MARKETS

U.K. Legal Brawl Puts Spotlight on Public-Defense Office

Tiny U.K. Public-Defense Office Faces Big Test



By MARGOT PATRICK

May 23, 2014 7:08 a.m. ET

LONDON—Faced with the collapse of several high-profile fraud cases because defendants couldn't find affordable lawyers, the U.K. government this year appealed to a little-known agency, the Public Defender Service, to help out by providing lawyers.

Word came back: The service wouldn't be able to lend a hand. Two of its three qualified lawyers were on sick leave, and several new recruits wouldn't be in place for months.

The once-obscure public-defense office is at the center of an extraordinary and public tug of war. On one side is the British government, which has slashed the fees payable to defense lawyers in complex criminal cases. On the other is the criminal-defense bar, whose gown- and wig-wearing lawyers are refusing to work for the reduced fees.

The government is hailing a beefed-up Public Defender Service as the solution to the standoff, which has threatened to derail high-profile U.K. financial crime cases that have been years in the making. But it is a largely untested agency that until recently has only focused on minor cases.

Trial lawyers protesting the reduced legal aid fees outside the Old Bailey in London. *REUTERS*

The PDS's elevated role has put it in the cross hairs of self-employed criminal-defense lawyers, who describe the agency as playing a role akin to strikebreaking scabs.

"The Public Defender Service is being used to break the resistance of the independent bar. It's like calling in the army when the fire brigade goes on strike," said Matt Foot, a lawyer and co-founder of Justice Alliance, a group that is fighting the government's cuts in fees. A prominent British lawyer publicly ridiculed the PDS as the "Piddling Defender Service."

And the chairman of the Criminal Bar Association of England and Wales, which represents most of the countries' roughly 5,000 criminal barristers, wrote in a note to members this week that the group would consider kicking out anyone who joins the PDS.

Unlike in the U.S., where defendants who can't afford a lawyer are generally provided a public defender on the government payroll, the U.K. traditionally has outsourced most of that work through a system known as legal aid in which private lawyers are paid to represent needy defendants.

Last December, the British government slashed by 30% the legal-aid fees it provides to lawyers working on complex criminal cases, part of a broader budget-cutting exercise. To protest the reduction, the U.K.'s trial lawyers, known as barristers, have refused en masse to work on the cases.

That immediately imperiled a handful of high-profile fraud prosecutions. One case, involving alleged land-investment fraud, was temporarily thrown out of court this month because defendants couldn't find lawyers, either privately or through the PDS.

The U.K.'s Ministry of Justice argues that even if the barristers refuse to work, the PDS can pick up the slack.

Set up in 2001 under the Labour government to help bring down legal costs, the PDS until very recently has been a backwater. As of early last year, it had 34 staff—everything from lawyers to receptionists—spread around four offices. They spent most of their time dispensing legal advice to people who have just been arrested and are in custody, as well as representing defendants on such offenses as theft and drunk-driving.

The PDS rarely if ever worked on complex and long-running fraud cases. When the Ministry of Justice announced its sweeping legal-aid reforms last year, the PDS was only mentioned in passing.

That changed when self-employed criminal lawyers refused to accept the reduced legal-aid fees. Early this year, the Ministry of Justice embarked on a PDS hiring spree. It ran newspaper ads offering jobs with salaries up to £125,000 (about $210,000 at today's exchange rate). Workweeks are 37 hours. Benefits included 23 vacation days, paid maternity and paternity leave and a choice of retirement plans.

That kind of stability could be attractive for self-employed barristers, who operate like small businesses, paying for office space and expenses out of their gross earnings.

The average criminal barrister made around £72,000 last year on legal-aid work, according to the Ministry of Justice. Government statistics and private surveys show that close to 90% of all work by criminal barristers is done for the state.

The PDS recruitment drive yielded 22 hires, although many haven't started yet. The Ministry of Justice says it can recruit more lawyers to work on a half-dozen cases, including some involving alleged rigging of benchmark interest rates, that are at risk of being derailed by the legal-aid standoff.

The Ministry of Justice declined to make anyone from the PDS available for an interview. "We have made sure that the Public Defender Service has a number of suitably qualified advocates who could act in cases, and will proceed with plans to boost their numbers to cover other defendants if necessary," a ministry spokesman said.

But some defendants are reluctant to hire PDS lawyers because of the office's reputation.

"There is a deeply ingrained resistance" to hiring PDS lawyers, said Phil Smith, a solicitor for a defendant in the land-fraud case. (Solicitors, a type of non-trial lawyer, advise their clients on which barristers to retain for their trials.) "I'm not suggesting PDS lawyers would deliberately not do their best for their clients. The question is if their best is good enough."

Write to Margot Patrick at margot.patrick@wsj.com

NewStatesman

Samira Shackle

On the margins: a look at race, culture, and world affairs

RSS

How legal aid cuts are harming the voiceless and most vulnerable

Increasingly, some of the most vulnerable people in our society, such as young people in care, the homeless and migrants, are being forced to represent themselves.

BY SAMIRA SHACKLE | PUBLISHED 13 JANUARY, 2014 - 12:01

Liz was 16 when she realised she wasn't coping. Her daughter, Emily, was just over a year old. Her mother – who she lived with – was an alcoholic. Taking charge of her situation, Liz contacted Emily's father to ask if he could look after the baby, at the same time voluntarily putting herself into foster care. It didn't work out. Emily's paternal grandmother accused Liz of domestic abuse, and filed a legal claim for custody of Emily. Liz, by this time in foster care, did not contest the claim. But she was frightened and – like most people – couldn't understand the wording of the legal documents or the charges against her.

When a court hearing was scheduled, she sought advice from a lawyer, but was told she was not eligible for legal aid because the case was a private matter. Liz, a vulnerable young person in care, could not afford lawyer's fees. Her foster carer asked social services to help fund legal help for the hearing. Liz's social worker said that

Lawyers protesting outside Southwark Crown Court about the cuts to legal aid. Photo: Getty

social care could not supplement the short fallings of legal aid, although they would help her to understand the process, and highlight to the courts that she was at a disadvantage. JustRights, a youth charity, also gave Liz advice, but were not able to accompany her to the hearing.

Ultimately, she had to represent herself against a qualified barrister. Despite many parties being willing to help this distressed young person, doors were repeatedly closed because of drastic cuts to the legal aid budget. She was left highly traumatised by the experience.

Legal aid in England and Wales was established in 1949. It provides assistance to people who would otherwise not be able to afford legal representation or access to the court system. It is an integral part of the British justice system: by ensuring the right to counsel, it safeguards equality before the law and the right to a fair trial. Yet, as cases like Liz's show, the system is under threat.

The coalition has already taken £320m out of the annual legal aid budget, and plans to remove a further £220m each year until 2018. The scope of these cuts is dizzying, and will affect many areas of criminal law (when a crime has been committed) and civil law (where disputes are settled). The government's argument is that, with an annual budget of £2bn per year, England and Wales' legal aid system is the most expensive in the world and it needs reform.

In April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act (Laspo) came into force, with the aim of cutting the civil legal aid budget by a quarter (£320m) within a year. The bill was defeated 14 times in the House of Lords, eventually passing by a very narrow margin. For the first time, it removed legal aid for the majority of cases – with some specific exceptions – involving divorce, welfare benefits, clinical

negligence and child contact. It was these changes that meant Liz was not entitled to assistance. It also removed legal aid from all immigration cases apart from asylum, and from a range of housing and benefit cases.

Like Liz, many of those who lose out are vulnerable people. “Family law is one of the areas worst affected,” says Camilla Graham Wood, a solicitor on the executive committee of Young Legal Aid Lawyers and an activist with the Justice Alliance, a campaigning group. “Now, for example, you can only get help in private law family cases – like contact or divorce – if you can prove domestic violence. Many people are being turned down because they don’t have a letter from the GP or anything from the police to prove abuse. This shows a complete lack of understanding of the complexity of the issue.”

Legal reforms – even when they have potentially devastating consequences – are not headline news, perhaps because of the complexity and wide scope of the issue. This month one aspect of the cuts – reductions in fees for criminal legal aid – came under the spotlight. On Monday 6 January, barristers and solicitors working in criminal courts staged an unprecedented walk out to protest against further reductions. Designed to save £220m per year, the proposed cut would see lawyers’ fees cut by 30 per cent. Criminal cases have already had their budgets reduced by 40 per cent since 1997.

In response to the walk out, the Ministry of Justice released figures showing that the median income of a criminal barrister is £56,000. The aim was clearly to paint a picture of fat cats getting rich on the state. But, as most criminal barristers attest, this is far from the truth. The figure does not take into account travel, VAT deductions, and chamber costs, and does not reflect the difficulties for young barristers, who may initially earn as little as £10,000 per year (after accruing significant debt to train). Marie-Claire Amuah, a junior criminal barrister in London, tells me that in the early stages of their careers, barristers routinely attend magistrates’ courts where they earn between £50 and £80 a day before tax.

“The cuts proposed put you in a position where it’s simply uneconomic to go to work,” says Paul Prior, a criminal barrister based in Leicester. “Many barristers will not take on cases like burglaries, thefts, minor assault offences, because they cannot cover their costs. That could put small, local firms out of business, and create what Chris Grayling once referred to as ‘advice deserts’.”

If criminal law becomes unsustainable as a profession, it is a problem for everyone, not just for lawyers. “There’s the double impact of people not being entitled to legal aid but also law centres being unable to survive and closing,” says Graham Wood. “The cumulative impact of all those things is severely restricting access to justice.”

Lawyers have warned that the tightened restrictions on legal aid in criminal cases (those who do not face a prison sentence are highly unlikely to qualify; nor are those who do not pass a means test) as well as in civil cases (like Liz’s) has led to an increase in people being forced to represent themselves across the board. “As a prosecutor, it is so difficult to see somebody representing themselves when they really don’t know what they’re doing,” one barrister told me. “I’ve seen people defending themselves when they clearly don’t understand the point of the trial.” The consensus is that this is ultimately a false economy, where expensive court time is wasted and unsatisfactory verdicts end up being appealed and unnecessarily moving to higher courts. “The cuts effectively take from one pot of public funds, and leave another to pay for the delay in trials,” says Amuah.

Taken together, the effect on both civil cases (like family law and immigration) and criminal cases (like assault or theft) is devastating. “What we’re seeing is the unemployed, the poor, the marginal, being prevented from accessing justice,” says Ben Bowling, professor of criminology and criminal justice at King’s College London. “The first thing that will happen, to put it crudely, is that people will be put off taking action against state abuses, for example. At the moment we have justice by geography and this will be justice by wealth. Allowing ‘ordinary’ people to seek redress in court is, in a sense, a way of defending the poor – and that is not a vote winner.”

Some of the groups worst affected – young people in care, the homeless, migrants – are also society’s most voiceless. Ellen, 16, was the victim of sexual abuse while in the care of her local authority. She needed to collect highly sensitive evidence about the abuse she suffered for a compensation appeal. Like Liz, she was judged ineligible for legal aid. Like Liz, her only option was to turn to social services – but in Ellen’s case, this was the very same local authority that had failed to protect her from abuse. This was hugely distressing, and her case floundered.

Since the Laspo act was introduced in April, there have been numerous cases like this. The teenage refugee who does not qualify for legal aid to apply for permission for their family to come to the UK, and is left traumatised and isolated. The victim of domestic violence who had not logged incidents with the police so cannot get legal aid for an injunction against the abusive partner. The list goes on.

Those with uncertain immigration status are among the worst affected. “The overwhelming number of migrants who need legal advice no longer qualify for legal aid,” says Isaac Shaffer, immigration solicitor and founding member of the Save Justice campaign. “It is not politically unpopular to cut funds for migrants, but according civil rights to one set of people but not another seems like a retrograde move, away from the principle of human rights.”

As the government’s plan of £220m cuts every year until 2018 demonstrates, this is just the beginning of the road for legal aid reform. In addition to the cuts to the criminal bar that were highlighted this week, proposals for future cuts include a “residency test” that would mean that only those who are lawfully resident in the UK and can prove 12 months of lawful residency will be eligible for legal aid. (This would have hugely far reaching implications, affecting victims of trafficking and anyone with uncertain immigration status, as well as adding a layer of bureaucracy that could delay or restrict help for British citizens).

Tom, 25, was a beneficiary of legal aid last year. A homeless young man, he was denied temporary accommodation by his local authority and was on the brink of suicide. The expert assistance of legal aid lawyers from his local law centre meant that an injunction was swiftly obtained forcing the local authority to give him accommodation. “If I hadn’t had legal aid, I would be dead by now,” he says. Yet under proposed changes to judicial review (another hotly contested area of cuts), he would not be eligible.

Many lawyers working in legal aid – both civil and criminal – say that this is a "tipping point" and that the system could soon become almost entirely unsustainable.

"The government will have to answer politically for the destruction of a system which was once admired throughout the world," says Amuah. "Once it's dismantled, it's dismantled. That's a wide concern."

Comments for this thread are now closed.

23 Comments New Statesman Login

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mamaguru · a year ago
The current regime is engaged in a largely successful campaign to demonise the poor and vulnerable of this country, so it can be no shock that they seek to remove the right to justice from that same sector of our society. Unfortunately not many seem to care, and probably won't until they realise to their cost that these changes are likely to affect them also - by which time it will all be far too late.
19 · Share ›

groo · a year ago
As if the government has the power to impinge our right to justice!?

In my opinion we need some kind of constitution that could protect the British justice system from ever having to bear the brunt of maniacal austerity moves like these.

I feel genuinely nauseous after reading this article.
16 · Share ›

Laura W · a year ago
Fantastic article, I'm confused as to why the media keeps trying to pick up 'barrister pay cuts' rather than 'most vulnerable in society denied justice' as a party line. I'm not seeing enough of articles like this which arguably worries me more than the cuts themselves...
12 · Share ›

mrsjosephinehydehartley · a year ago
Maybe it's time to take down the famous statue of justice that stands on top of the old bailey.

There's something unbalanced about the whole set up - If it's true that persons don't know what they're doing in court, how can court findings be seen as balanced or fair?

We're not told the outcome of Liz's poor case - but was it ever really LIz's case?

One wonders who got their hands on Emily's child benefit..
5 · Share ›

Niksternick · a year ago
I agree with Gary Sunbeam's view completely, everybody knows that one studies law not through moral imperative but for the filthy lucre. The Law Society has us all by the short and curlys, they are middle men in the advantageous position of being able to pass any hurtful cuts or painful costs on to their client without receiving a scratch. It is one of the most secure confidence scams in the world. Take Note.
3 · Share ›

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