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VOLUME 13, NUMBER 3

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**EDWARD V. SPARER SYMPOSIUM ISSUE**

NOW MORE THAN EVER:  
EXPANDING ACCESS TO JUSTICE IN TIMES OF CRISIS

ARTICLES

THE FUTURE OF CIVIL LEGAL AID: INITIAL THOUGHTS

*Alan W. Houseman*

EVIDENCE-BASED ACCESS TO JUSTICE

*Laura K. Abel*

IN PRAISE OF THE GUILTY PROJECT: A CRIMINAL DEFENSE LAWYER'S  
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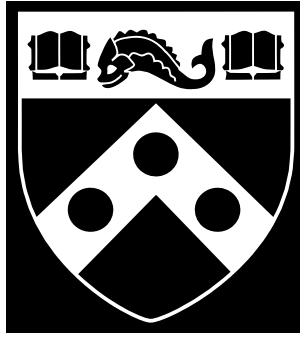
*Abbe Smith*

NATIONAL CRISIS, NATIONAL NEGLECT: REALIZING JUSTICE THROUGH  
TRANSFORMATIVE CHANGE

*Jonathan A. Rapping*



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## **Now More Than Ever: Expanding Access to Justice in Times of Crisis**

*Selections from the 29th Annual Edward V. Sparer Symposium*

Thomas Jefferson said, “There is a debt of service due from every man to his country.” Presenters and attendees at the 29th Annual Edward V. Sparer Symposium, “Now More than Ever: Expanding Access to Justice in Times of Crisis,” all recognized the importance of that mandate. They also recognized that, like any debt, public services must be paid for, a task made increasingly difficult by the lagging economy.

We all know that tight resources have always been a problem for the public interest law community; the recent economic crisis has only emphasized the problem further. Foreclosures and high unemployment have deeply affected our nation’s poor, and brought many working class families into their numbers. Our already strapped public defenders and legal services agencies have found themselves struggling to serve more, with less.

When the recession is over, this problem will not go away. The knee-jerk reaction to widespread crises can spark incredible change, but, like any reflex, attentiveness only persists for a moment. Yet no one goes into public interest law because they are afraid of a challenge. Ours is to make the most of this moment.

This year’s Symposium strove to be current and relevant, but also to look forward, into the future. We have seen homelessness, hunger and unemployment swell. But we have also seen the public interest community rallying, using the crisis to become better; seeing it as an opportunity, not a setback. With fewer resources to go around, we have seen a truly encouraging re-imagining of legal services and their provision, and the participants at the Symposium represented an impressive breath of innovative leaders who shared with us what they have learned and helped us develop strategies to continue to serve the indigent as efficiently and effectively as we can. We hope that by, in turn, sharing their work with you, we will invigorate the public interest legal community and encourage creative, innovative models for better serving client needs.

The problems of our nation's poor will not disappear, even when headlines no longer lament a nationwide economic crisis; but neither will the spirit of the public interest community. The Sparer Symposium, like the Journal of Law and Social Change, has a tradition of bringing together committed academics and practitioners to engage in a dialogue that informs their practice and helps them develop new skills, strategies, and aspirations. Now more than ever we need to be re-examining what we have, re-envisioning what we want, and working together to make it happen.

This issue has been brought to you by the Journal of Law and Social Change in conjunction  
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# THE FUTURE OF CIVIL LEGAL AID: INITIAL THOUGHTS

ALAN W. HOUSEMAN\*

## I. Introduction

The United States was founded under the fundamental principle of equal justice for all. In the Preamble to the Constitution, our forefathers stated clearly and forcefully the purpose of the government they were creating: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . .”<sup>1</sup> It is noteworthy that “establish Justice” precedes, and is the basis for, “domestic Tranquility,” and that both come before “provide for the common defense.” “Equal Justice for All” is also inscribed above the entrance to the Supreme Court of the United States.

Yet, equal justice is not a reality for millions of Americans. This is particularly true for low-income Americans who do not have meaningful access to legal information, advice, assistance, or actual representation in court. Specifically, because there is not a Constitutional civil right to counsel, millions of low-income Americans who cannot afford to pay a lawyer do not have access to necessary advice and representation in civil matters.

In 2005 the Legal Services Corporation (LSC) completed a study entitled, “*Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*,”<sup>2</sup> which examined the adequacy of available funding to meet the legal needs of the low-income population in the United States. The study was updated in 2009, employing the same methodology to document the continued need for civil legal aid among low-income Americans.<sup>3</sup> The studies revealed three main commonalities. First, both studies showed that for every client who received service from an LSC grantee, one eligible applicant was turned away.<sup>4</sup> In other words, 50 percent of potential clients that request assistance are turned away due to lack of resources on the part of the program. Second, the studies each looked at a number of individual state studies addressing the civil legal problems faced by states’ respective low-income residents conducted over the last four years.<sup>5</sup> Seven of the state studies validated the findings of the national study conducted by the American Bar Association (ABA) in 1994, which demonstrated that less than 20 percent of the legal needs of low-income Americans were being met.<sup>6</sup> Finally, the studies identified the number of legal aid lawyers in both LSC and non-LSC funded programs,

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\* Alan Houseman is the Director of the Center for Law and Social Policy.

<sup>1</sup> U.S. CONST. pmbl.

<sup>2</sup> See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (Sept. 2005), available at [http://www.lsc.gov/press/documents/LSC%20Justice%20Gap\\_FINAL\\_1001.pdf](http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf).

<sup>3</sup> See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS. AN UPDATED REPORT (Sept. 2009), available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [hereinafter HOUSEMAN, JUSTICE GAP].

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 13.

and compared that number to the total number of attorneys providing personal legal services to the general population.<sup>7</sup> The study determined that, at best, there is one legal aid attorney for every 6,415 low-income persons.<sup>8</sup> In contrast, the ratio of attorneys delivering personal legal services to the *general* population is approximately one for every 429 persons, or fourteen times more.<sup>9</sup>

Thus, a major problem in achieving meaningful access to a full range of high-quality legal assistance programs is the lack of programs with sufficient funding to provide the legal advice, brief service,<sup>10</sup> and extended representation necessary to meet the legal needs of low-income persons.

## II. Where We Are Today

A comprehensive system of civil legal aid would: (1) educate and inform low-income people of their legal rights and responsibilities, and of the options and services available to solve their legal problems; and (2) ensure that all low-income people, including individuals and groups who have little political or social capital, have meaningful access to high-quality legal assistance providers when they require legal advice and representation. The United States has made considerable progress in meeting the first of these two objectives, but has been slow in meeting the second. In most areas of the United States, there is not enough funding or pro bono assistance available to provide low-income people with legal advice, brief service, or, most particularly, extended representation. As a result, many low-income people who are eligible for civil legal assistance are unable to obtain it.

Civil legal aid in the United States is provided by a large number of independent, staff-based service providers funded by a variety of sources.<sup>11</sup> The current total funding for civil legal assistance in the United States is approximately \$1.3 billion.<sup>12</sup> The largest segment of the civil legal aid system is comprised of the 136 programs that are funded and monitored by LSC.<sup>13</sup> LSC

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<sup>7</sup> *Id.* at 20.

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

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

<sup>10</sup> Brief services consist of legal advice; short-term assistance such as writing a letter to a landlord, making a phone call to a welfare office; and other short-term activities that could resolve a client's problem. Many clients' problems can be resolved effectively by brief services.

<sup>11</sup> We do not know the exact number of existing civil legal aid programs. Using a variety of sources, I have identified approximately 500 civil legal aid programs around the country. If we also include the 160 programs affiliated with the Catholic Legal Immigration Network ([www.cliniclegal.org](http://www.cliniclegal.org)) and the law school clinical programs operated by the 204 law schools, then we reach a total of approximately 864. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009 2 n.1 (July 2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf> [hereinafter HOUSEMAN, UPDATE]; see also NAT'L LEGAL AID AND DEFENDER ASS'N, DIRECTORY OF LEGAL AID AND DEFENDER OFFICES AND RESOURCES IN THE U.S. AND TERRITORIES 2009-2010 (2010) (supplying a comprehensive directory of legal services providers).

<sup>12</sup> See HOUSEMAN, UPDATE, *supra* note 11, at 2.

<sup>13</sup> LSC was created in 1975 after Congress passed, and the President signed, the Legal Services Corporation Act of 1974. LSC funds 136 grantees that operate local, regional and statewide civil legal assistance programs. Generally, one field program provides legal services in a designated geographic area. In addition, LSC earmarks funds for migrant and Native American grants for specialized programs that deliver services to these populations. All legal services programs are private, nonprofit entities independent of LSC. LEGAL SERVICES CORP., FACT BOOK 2009 8 (June 2010), available at <https://grants.lsc.gov/>

is also the largest single funder of civil legal services, although considerable funds come from states as well as Interest on Lawyer Trust Account (IOLTA) programs.<sup>14</sup> Additionally, there are a variety of other funding sources, including local governments, other federal government sources, the private bar, United Way, and private foundations.

In addition to LSC-funded providers, there are a number other legal services providers supported by other sources. Most are small entities that provide limited services in specific locales or for particular client groups, but many are full-service providers that operate alongside the LSC providers in their jurisdictions. For example, in the District of Columbia, the largest general services provider of civil legal services is the Legal Aid Society of DC, a non-LSC funded provider.<sup>15</sup>

These staff-based providers are supplemented by approximately 900 pro bono programs, which exist in every state and virtually every locale.<sup>16</sup> These pro bono programs are either components of bar associations, component units of legal aid staff programs, or independent nonprofit entities with staff that refer cases to lawyers on pro bono panels. Pro bono programs do not generally provide services themselves, but refer clients to private attorneys who provide services from their private law offices. Law school clinical programs and self-help programs also supplement the staff delivery system. Self-help programs provide assistance to pro se litigants by helping them understand the law, the filing process, the court procedures and other aspects of how cases proceed. There remain a very few “judicare” programs – programs that create panels of private attorneys who receive reduced rates to handle civil legal aid cases – that are directly funded by either LSC or other funders. Indeed, LSC funds only one small judicare program, which now has staff attorneys and paralegals who deliver legal assistance in some cases.<sup>17</sup> It is very rare for a funder to directly fund, by contract or otherwise, individual lawyers or law firms. However, some staff attorney civil legal aid programs have created judicare components, or contracted with individual lawyers and law firms who are paid to provide legal assistance to certain groups of clients that the staff attorneys do not represent.<sup>18</sup>

The United States’ low-income civil legal services system also includes approximately thirty-eight state and support organizations that advocate before state legislative and

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Easygrants\_Web\_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2009.pdf (reporting that the 136 LSC funded programs had \$912,375,140 of the total \$1.3 billion in the civil legal aid system).

<sup>14</sup> IOLTA programs capture pooled interest on small amounts or short-term deposits of client trust funds used for court fees, settlement payments, or similar client needs that had previously been held in non-interest-bearing accounts.

<sup>15</sup> Interview with Jonathan Smith, Director, Legal Aid Society of the District of Columbia (Sept. 22, 2010).

<sup>16</sup> This estimate comes from Steve Scudder, who serves as Committee Counsel for the ABA Standing Committee on Pro Bono and Public Service. *See also* Standing Comm. on Pro Bono and Pub. Serv., American Bar Ass’n, Directory of Pro Bono Programs (Jan. 23, 2007) <http://www.abanet.org/legalservices/probono/directory.html#>.

<sup>17</sup> The LSC-funded judicare program is Wisconsin Judicare, Inc., in Wausau, Wisconsin. *See* WISCONSIN JUDICARE, INC., [www.judicare.org](http://www.judicare.org) (last visited Sept. 29, 2010).

<sup>18</sup> Data obtained from the LSC indicates that of the 93,168 cases closed through LSC-funded programs’ Private Attorney Involvement efforts in 2008, 31,052 came from judicare, reduced fee panels and contracts with private attorneys or law firms. *See* LEGAL SERVICES CORP., FACT BOOK 2008 26 (Aug. 2009), available at [https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2008forRIN.pdf](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2008forRIN.pdf).

administrative bodies on policy issues affecting low-income people.<sup>19</sup> Some of these organizations also provide training and technical support to local legal aid advocates on key substantive issues.<sup>20</sup> Moreover, there are more than 30 entities that advocate on behalf of low-income people at the federal level, fifteen of which were formerly part of the national support network funded by LSC.<sup>21</sup>

Over the last ten years, the civil legal aid system has begun in earnest to utilize innovations in technology to improve and expand access to justice. As a result, low-income people have achieved increased access to information about their legal rights and responsibilities, and the options and services available to them to solve their legal problems, protect their legal rights, and promote their legal interests. For example, technological innovation has led to the creation of websites that offer information on community legal education and pro se legal assistance, as well as the courts and other social services. Most legal aid programs now have websites, with over 258 such sites in existence.<sup>22</sup> Additionally, each state has a statewide website, most of which contain useful information for both advocates and clients. Dozens of national sites also provide substantive legal information to advocates, as well as delivery, management, and technology support. Many state, national and program-specific websites utilize cutting-edge software that offers extensive functionality. For instance, I-CAN projects in several states use kiosks with touch-screen computers that allow clients to produce court-ready pleadings and to access other services, such as help filing for the Earned Income Tax Credit.<sup>23</sup> Montana and several other states use video conferencing to connect clients in remote locations with local courthouses and legal services attorneys. And an increasing number of legal aid programs across the country, in partnership with the courts and legal community, use document assembly

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<sup>19</sup> See HOUSEMAN, UPDATE, *supra* note 11, at 3. See generally ALAN W. HOUSEMAN, THE PROJECT FOR THE FUTURE OF EQUAL JUSTICE, THE MISSING LINK OF STATE JUSTICE COMMUNITIES: THE CAPACITY IN EACH STATE FOR STATE LEVEL ADVOCACY, COORDINATION AND SUPPORT (Nov. 2001), available at [http://www.clasp.org/publications/missing\\_link.pdf](http://www.clasp.org/publications/missing_link.pdf) [hereinafter HOUSEMAN, MISSING LINK].

<sup>20</sup> HOUSEMAN, UPDATE, *supra* note 11, at 3; See generally HOUSEMAN, MISSING LINK, *supra* note 19.

<sup>21</sup> Pine Tree Legal Assistance (PTLA) lists twenty-four national advocacy centers on its website. Pine Tree Legal Assistance, National Support Centers, [www.ptla.org/ptlasite/links/support.htm](http://www.ptla.org/ptlasite/links/support.htm) (last visited May 26, 2010). The Sargent Shriver National Center on Poverty Law lists six additional centers on the inside back cover of the *Clearinghouse Review*.

<sup>22</sup> Pine Tree Legal Assistance lists 258 legal services sites on its webpage. *Legal Services Sites*, PINE TREE LEGAL ASSISTANCE, <http://www.ptla.org/ptlasite/links/services.htm> (last visited May 26, 2010).

<sup>23</sup> Legal Aid of Orange County operates the most well known of the I-CAN projects. To access their I-CAN! E-File service see I-CAN! E-FILE, [www.icanefile.org](http://www.icanefile.org) (last visited Sept. 30, 2010). For the first time, as part of the Free File Alliance – a group of organizations that provide free tax-filing services – the service can be accessed through the Internal Revenue Service website. INTERNAL REVENUE SERVICES, *Free File Home – Your Link to Free Federal Filing Online*, [www.irs.gov/freefile](http://www.irs.gov/freefile) (last visited Sept. 30, 2010). For the 2008 tax-filing season, EITC provided \$47 billion in refunds and offsets to tax liabilities. Of that total, I-CAN! E-File brought back more than \$33 million in refunds and credits to low-income workers in 45 states, demonstrating how an innovative technology project can make an impact in serving low-income families. See Press Release, Legal Services Corp., E-File System Returns Millions to Low-Income Tax Filers, LSC (Mar. 3, 2009), available at [http://www.lsc.gov/press/pressrelease\\_detail\\_2009\\_T248\\_R7.php](http://www.lsc.gov/press/pressrelease_detail_2009_T248_R7.php).

applications such as HotDocs to expand and streamline the provision of legal services to clients.<sup>24</sup> These projects generally focus on document assembly of pro se resources used by the public, and automated documents used by legal aid staff in order to more efficiently represent their clients.<sup>25</sup>

A more recent technological innovation grew out of work done in 1999 and 2000 by Ronald Staudt and colleagues at the Center for Access to Justice and Technology at Chicago-Kent College of Law. In 2004, Chicago-Kent College of Law joined with the Center for Computer-Assisted Legal Instruction to build Access to Justice Author (A2J Author), which was designed as a "tool to build tools." This technology uses HotDocs Online software to guide self-represented litigants through a web-mediated process designed to assess eligibility, gather pertinent information needed to prepare a set of simple court forms, and then deliver those forms, ready to be signed and filed. A2J Author is equipped with "just in time" help tools, including the ability to speak each word of the interview to the user in English or Spanish. The program can also direct the user to outside websites in order to obtain explanations of technical terms.<sup>26</sup> Several legal aid programs, including Iowa Legal Aid and Legal Aid of Western Ohio, are pioneering the use of A2J Guided Interviews as a means of directly supplying potential clients with access to their case management system over the web. This will allow a potential client to interview him or herself, determine financial eligibility, provide preliminary information to locate the client problem within the service coverage of the agency, and deliver it all at any time of the night or day.

In recent years there has been a rapid expansion of efforts on the part of courts, legal aid providers, and bar associations to support people attempting to proceed pro se. Many provide access to information about the law, legal rights, and the legal process through a variety of different media, including written materials, the Internet, videotapes, seminars, and in-person assistance. Others actually provide individualized legal advice, including help drafting documents and guidance on how to pursue legal claims. Programs often provide both printed and Internet-accessible forms for use by laypersons, and may also provide assistance in completing the forms.

A critical part of expanding access has been a range of limited legal assistance initiatives aimed at providing less than extended representation to clients who either do not need such extended representation to solve their legal problems, or who live in areas without direct access to lawyers or entities available to provide extended representation. Many legal aid programs now operate legal hotlines, which enable low-income persons who believe they have a legal problem to speak by telephone to a skilled attorney or paralegal and receive advice or brief service. Legal hotlines may provide answers to clients' legal questions, analyses of clients' legal problems, and advice on solving those problems so that the client can resolve the problem with the information provided during the phone consultation. Brief services may be performed when the problem is likely to be resolved quickly; if further legal assistance is necessary, the client may be supplied with a referral. Finally, more and more states have a central phone number (or several regional

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<sup>24</sup> HotDocs is software for document assembly and preparation that is used by many LSC-funded programs. For a discussion see Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1128-33 (2009).

<sup>25</sup> Many of these projects are nationally coordinated through National Public Automated Documents Online (NPADO), which is a project of Pro Bono Net. LawHelp Interactive, <https://lawhelpinteractive.org/> (last visited May 26, 2010).

<sup>26</sup> Staudt, *supra* note 24, at 1128-33.

phone numbers) that clients can call to be referred to the appropriate program or to obtain brief advice about their legal problems.<sup>27</sup>

Finally, there are many innovations in the delivery of civil legal aid that have created new ways of collaborating with providers of other services to low-income people. For example, Medical-Legal Partnerships (MLPs) integrate lawyers into the health care setting to help patients navigate the complex legal systems that often hold solutions to many determinants of health: income support for hungry families, utility shut-off protection during cold winter months, and mold removal from the homes of asthmatics. Doctors and lawyers are now partnered at over 180 hospitals and health centers nationwide in pediatrics, family medicine, internal medicine, oncology, and geriatrics. These new health care teams address families' unmet basic needs for food, housing, income, education and stability: needs that families report to their doctors, but which have legal remedies. MLPs rely on legal aid agencies for case-handling and expertise, and receive pro bono assistance from dozens of law firms across the U.S. Nearly half of LSC-funded legal services programs have an active or developing medical-legal partnership program.<sup>28</sup> In addition, dozens of private law firms provide pro bono assistance to MLP programs, over 15 law schools are currently engaged in MLP activities, and more than 20 post-graduate law fellows have been funded to work in medical-legal partnerships.<sup>29</sup>

### III. The Steps Ahead: A Broad Framework of Goals, Values and Vision

To ensure equal justice for all, the nation as a whole, and each state and jurisdiction individually, should develop a comprehensive and integrated system to deliver high quality civil legal assistance that actually resolves the legal problems of low-income people. Access to the justice system must be fully available to everyone, particularly those who need it most—the poor, culturally or geographically isolated populations, and those who may belong socially unpopular groups.

The American Bar Association developed a set of principles for such a system on the state level that, when generalized to the nation as a whole, provides a comprehensive framework for expanding and improving the civil legal aid system.<sup>30</sup> We need to achieve a system that encompasses ten broad directives.

First, a comprehensive system for the delivery of civil legal aid must provide services to the country's low-income and vulnerable populations, including those with distinct, unique, or disproportionately experienced legal needs. No vulnerable population or group that has experienced disparate treatment should be institutionally excluded from receiving legal assistance. These populations include those who cannot be served through federally funded programs for reasons such as income level, immigration status, incarceration, or other disqualifying eligibility

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<sup>27</sup> See, e.g., *Do you Need Legal Help?*, MONTANA LEGAL SERVICES ASS'N, <http://www.mtlsa.org/RTF1.cfm?pagename=Montana%20Legal%20Services%20Association%20Helpline> (last visited Sept. 30, 2010).

<sup>28</sup> *Legal Aid Agencies*, NAT'L CTR. FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org/mlp-network/legal-aid> (last visited Sept. 30, 2010).

<sup>29</sup> *SeeLaw Schools*, NAT'L CTR. FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org/mlp-network/law-schools> (last visited Sept. 30, 2010).

<sup>30</sup> See generally AMERICAN BAR ASS'N, AMERICAN BAR ASS'N PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf> [hereinafter ABA PRINCIPLES].

criteria. They also include the elderly and people with mental or physical disabilities, as well as those facing particular barriers to access to civil legal services, such as the homeless, institutionalized persons, children, migrant workers, Native Americans, and people lacking proficiency in English.

As the “justice gap” demonstrates, current resources are not sufficient to meet the full demand for services by low-income and vulnerable populations. Therefore, the system should identify the most compelling legal needs and determine how to allocate available resources in order to meet those needs most effectively. Underlying this process should be the goal that all groups of clients be represented in all appropriate forums. The priorities should be based on the identified needs of the clients and the communities served, and not on existing provider structures, funding source directives, or restrictions. In many states, this will require facilitating and supporting efforts by providers to set priorities and allocate resources accordingly.

Second, a comprehensive system for the delivery of civil legal aid must provide a full range of services in all forums. A full range of services includes information about legal rights and responsibilities; options among services; outreach and community legal education; legal advice and brief services; support and assistance for individuals capable of representing themselves; representation in negotiation and alternative dispute resolution; transactional assistance; representation in administrative and judicial proceedings; extended representation in complex litigation, class actions, and on systemic issues; and representation before legislative and administrative bodies that make laws or policies affecting low-income and vulnerable people. The civil legal aid system should strive to be free of inappropriate or undue government or political influence, and should educate officials about the need for providing the full range of services to all low-income and vulnerable populations in the state.

Third, a comprehensive system for the delivery of civil legal aid must provide services of high quality in an effective and cost efficient manner to low-income people and others who cannot afford counsel to meet their legal needs. All providers should comply with standards of practice and ethics developed by the state, and institutional providers<sup>31</sup> should comply with state and national standards of practice where appropriate, including the *American Bar Association Standards for the Provision of Civil Legal Aid*<sup>32</sup> and the LSC Performance Criteria.<sup>33</sup> Funders and other appropriate entities should evaluate programs and individuals providing services, who should themselves engage in self-evaluations. Staff compensation and workload should also be manageable enough to enable the provision of uniformly high quality, effective, and productive services. An appropriately diverse staff should be recruited, trained, supported, supervised, and provided with the necessary tools—including current technology—to provide high quality, effective, and cost-efficient legal services. Services should be provided in a cost-efficient manner to maximize access and limit unnecessary administrative and other costs.

All individuals participating in providing, supporting, or managing civil legal aid should receive ongoing training and participate in professional and leadership development activities. As

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<sup>31</sup> “Institutional Providers” is a term used to refer to non-profit organizations established to provide civil legal aid services, including staff attorney programs, pro bono programs, law school clinical programs and divisions of larger organizations that provide civil legal aid services.

<sup>32</sup> AMERICAN BAR ASS’N, *AMERICAN BAR ASS’N STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID* (Aug. 2006), *available at* [www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf](http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf) [hereinafter ABA STANDARDS].

<sup>33</sup> LEGAL SERVICES CORP., *PERFORMANCE CRITERIA* (2007), *available at* <http://www.lsc.gov/pdfs/LSCPerformanceCriteriaReferencingABASStandards.pdf>.



part of a support system, management information and information about new developments in the law should be disseminated to all advocates and managers. Assistance should be provided on all legal issues, and advocates should coordinate their work on behalf of the client community. Providers in a state should work and coordinate with national entities and organizations to receive support and information about changes in law and policy, and to ensure that the interests and legal rights of low-income persons are taken into account by national bodies involved in civil justice and dispute resolution.

Fourth, a comprehensive system for the delivery of civil legal aid must provide services in sufficient quantity to meet the need by making the most effective use of all available resources dedicated to those services. The system should systematically seek out additional resources and maximize existing ones by developing and utilizing all potential financial, volunteer, and in-kind sources to ensure both the success and the cost efficiency of the system.

Fifth, a comprehensive system for the delivery of civil legal aid must fully engage all entities and individuals involved in the provision of those services, and service providers must be central to the administration of justice in the state. Those engaged must include legal aid providers, private attorneys (including those who work pro bono and those who provide such services for compensation), court personnel, law school clinics, human services agencies, paralegals, lay advocates, and other public and private individuals and entities that provide legal services to low-income and other vulnerable people who cannot afford counsel in the state.

Sixth, a comprehensive system for the delivery of civil legal aid must make services fully accessible and uniformly available throughout the state. The ability of low-income and vulnerable persons to obtain civil legal assistance should not depend on where in the state they reside. Achieving this result will take time, but efforts can be made now to ensure that services are relatively accessible and available throughout the state.

Seventh, a comprehensive system for the delivery of civil legal aid must engage clients and those populations eligible for civil legal aid services in order to obtain meaningful information about their legal needs, and must treat clients, applicants, and those receiving services with dignity and respect. Providers should demonstrate diversity and cultural competence in all their operations and have a culturally competent and diverse staff so that all groups of clients are welcomed and represented in a culturally appropriate manner. Providers should provide legal information and other forms of non-representational services in the language of those persons seeking and using their services. Services should be accessible at intake to all people regardless of their primary language. To guide coordination and planning, the system should obtain meaningful information from, and interact effectively with, low-income and vulnerable people and groups representing them. Guidance should also be sought from those communities that face disparate treatment within and unique barriers to the justice system, including new and emerging populations and categories of potential clients.

Eighth, a comprehensive system for the delivery of civil legal aid must engage and involve the judiciary and court personnel in reforming court rules, procedures, and services in order to expand and facilitate access to justice. The judiciary should ensure that the courts are inclusive, respectful of difference, and culturally competent. It should also ensure that they are accessible and responsive to the needs of all residents, including low-income and vulnerable populations, as well as those facing financial, physical, and other barriers to access. The judiciary should examine its rules and procedures to ensure that such rules do not hinder access to the courts, and, where necessary, change them to expand and facilitate accessibility. Courts should also provide a range of services, including assistance to pro se litigants where appropriate.

Ninth, a comprehensive system for the delivery of civil legal aid must be supported by an organized bar and judiciary that provides leadership and participates with legal aid providers, law schools, the executive and legislative branches of government, the private sector, and other appropriate stakeholders in ongoing and coordinated efforts to support and facilitate access to justice for all, particularly with respect to civil justice. Their involvement should take the form of collaboration with legal aid providers, the executive and legislative branches of government, IOLTA and other state funders, the private sector, and other appropriate stakeholders in formal structures and/or specific initiatives dedicated to this goal. The organized bar has a special obligation to provide leadership in efforts to maximize pro bono services.

Tenth, a comprehensive system for the delivery of civil legal aid must engage in both statewide and national planning and oversight in order to achieve the nine principles set forth above. The system should develop and maintain the capacity to administer and manage its civil legal assistance delivery system. Planning and oversight should be open and inclusive and should include individuals who are diverse, experienced with and sensitive to the ethnic, racial, and cultural makeup of low-income and vulnerable populations. Appropriate staffing and other resources should be provided for such planning. Effective communication initiatives should be developed to increase public awareness of the availability of and need for legal aid throughout the state and nation. Participants should work together in a coordinated and collaborative manner to provide a full range of high-quality services in a manner that maximizes available resources and eliminates barriers to access. Participants should also work with their counterparts in other states to learn from one another's experiences in improving the provision of civil legal assistance. Participants should also collaborate with the American Bar Association and other national legal aid entities and institutions, such as the National Legal Aid and Defender Association (NLADA) and the Management Information Exchange (MIE), to gain a national perspective on the improvement of civil legal aid, take advantage of collective resources, and join in national efforts to achieve equal justice for all. Legal needs, including new and emerging legal needs, should be identified periodically, and effective and cost-efficient methods of addressing them should be developed. Research and evaluation of civil legal aid delivery methods and providers should be undertaken to assure the quality, efficiency, and effectiveness of the services provided, and the system should respond appropriately to the results of such evaluations.

#### IV. Achieving a Comprehensive Civil Legal Aid System

##### 1. INCREASED FUNDING

While improvements and innovations in the delivery of civil legal aid are necessary, the only practical way to move forward is by increasing resources. Future funding for civil legal assistance will come from five sources:

- Federal government;
- State and local governmental funds;
- IOLTA funds;
- Private bar contributions; and
- Other private sources, such as foundations and United Way Campaigns.

### A. Federal Funding through LSC

Although non-LSC funding exceeds LSC funding in forty-one states plus the District of Columbia<sup>34</sup>, and new funding will continue to come from non-LSC sources, increased federal funding will remain essential for two reasons. First, civil legal service is a federal responsibility, and LSC continues to be the primary single funder and standard setter. Second, there are many parts of the country – particularly the South, Southwest, and Rocky Mountain states – that have not yet developed sufficient non-LSC funds to operate their civil legal assistance program without federal support.

Significant political barriers stand in the way of substantial expansion of federal funding for civil legal assistance. Although LSC leadership has made significant progress in developing a much stronger bipartisan consensus in favor of LSC funding,<sup>35</sup> political leadership, particularly in Congress, remains divided about the necessity of a federal program, and the appropriate scope of such a program, if one is to exist. However, the Obama Administration is strongly supportive of LSC, and has sought out increased funding and the removal of restrictions on activities as a key part of its civil rights agenda.<sup>36</sup>

Although there is much stronger support for LSC in the White House and in Congress, the current fiscal crisis at both at the federal and state levels will make it more difficult for LSC and state funding to grow. Nonetheless, increases – possibly significant ones – are expected in the LSC budget at some point in the future.

### B. State IOLTA and Governmental Sources

Since 1982, funding for the provision of civil legal services from state and local governments has increased from a few million dollars to over \$425 million.<sup>37</sup> Until recently, this increase has come primarily from IOLTA programs, which have now been implemented in every state.<sup>38</sup> But funding from court fees and general state revenue has since overtaken IOLTA funding in many states. In 2008, IOLTA funding had reached \$213,495,000. For 2009, 2010, and 2011, there will be reduced IOLTA funding, but it is unclear how extensive the actual reductions will be,

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<sup>34</sup> See ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, NATIONWIDE CIVIL LEGAL SERVICES RESOURCE DATA (Mar. 2009) [Hereinafter RESOURCE DATA] (on file with Standing Comm. on Legal Aid and Indigent Defendants).

<sup>35</sup> John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 110-11 (2000).

<sup>36</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011, 1283-84 (2010) available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/appendix.pdf>.

<sup>37</sup> The exact amount of state funding for civil legal assistance has not been fully documented because much of this funding has gone to non-LSC funded programs, which, unlike LSC-funded programs, do not have to report to any central funding source. See RESOURCE DATA, *supra* note 35.

<sup>38</sup> See *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (upholding the constitutionality of the IOLTA program; although the IOLTA program does involve a taking of private property – interest in escrow accounts that were owned by the depositors – for a legitimate public use, the owner did not suffer a pecuniary loss and so there was no violation of the Just Compensation Clause).

or what impact they will have on funding for civil legal aid. Some states report drastic cutbacks in IOLTA funding for civil legal aid, while others report far fewer reductions.<sup>39</sup>

Within the last seven years, substantial new state funding has come from general state or local governmental appropriations, as well as filing fee surcharges, state abandoned property funds, and other governmental initiatives. State governmental increases are likely to continue as long as state fiscal conditions remain in good shape. However, as a result of the current recession, state economic circumstances are now far worse than those at the federal level. States are facing huge budget deficits, and most do not have the capacity to deficit spend because of state constitutional provisions requiring a balanced state budget.<sup>40</sup> Therefore, we are likely to see decreases in state government spending for legal services in 2010 and 2011, but we do not yet know how large such reductions will be.

## 2. ELIMINATING THE RESTRICTIONS ON CIVIL LEGAL AID

While the lack of adequate funding is the most significant component of the “justice gap,” many low-income persons do not have equal access to justice because legal aid attorneys are not permitted to provide the full range of services clients need. Although there have always been some restrictions on LSC programs under the LSC Act,<sup>41</sup> and a number of additional restrictions were imposed on LSC funds during the 1980s and early 1990s<sup>42</sup>, a major change occurred in 1996 when Congress imposed on LSC grantees a large number of new restrictions. Congress limited the tools that would otherwise be available to attorneys serving low-income clients by imposing a number of prohibitions, such as restrictions on claiming and retaining attorneys’ fees and participating in class actions.<sup>43</sup> Access to legal assistance was severely restricted for certain low-income populations, and numerous administrative burdens were imposed on LSC recipients and their clients, many of which raised serious ethical issues and even endangered clients’ safety.<sup>44</sup>

### *A. Restrictions on Non-LSC Funds*

Perhaps most significantly, restrictions on the activities of LSC grantees, originally imposed as riders to the LSC appropriations bill, apply not just to those activities supported by Congressionally appropriated funds, but to all of an LSC grantee’s activities, regardless of the

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<sup>39</sup> See Press Release, Legal Services Corp., Annual Report Highlights 35th Anniversary of LSC's Founding (July 30, 2010), *available at* [http://www.lsc.gov/press/pressrelease\\_detail\\_2010\\_T261\\_R26.php](http://www.lsc.gov/press/pressrelease_detail_2010_T261_R26.php).

<sup>40</sup> See Elizabeth McNichol et al., Ctr. on Budget and Policy Priorities, Recession Continues to Batter State Budgets; State Responses Could Slow Recovery (July 2010), *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=711>; Ctr. on Budget and Policy Priorities, Policy Basics: The ABCs of State Budgets (Jan. 2010), *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=3067>.

<sup>41</sup> 42 U.S.C. § 2996 (1974).

<sup>42</sup> See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOCIAL POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 30 (Jan. 2007).

<sup>43</sup> *Id.* at 36-37.

<sup>44</sup> For a more detailed discussion of the restrictions, see Alan W. Houseman, *Restrictions By Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2189-2190 (1999). See also REBEKAH DILLER & EMILY SAYNER, BRENNAN CENTER FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR (June 2009), *available at* [http://www.brennancenter.org/content/resource/a\\_call\\_to\\_end\\_federal\\_restrictions\\_on\\_legal\\_aid\\_for\\_the\\_poor/](http://www.brennancenter.org/content/resource/a_call_to_end_federal_restrictions_on_legal_aid_for_the_poor/).

exact source of the funds used to support them. All of a grantee's resources are restricted, whether from the LSC appropriation, other federal funds, state or local appropriations, IOLTA programs, contracts, private donations, foundation grants or other funding sources. In some states, LSC grantees have been forced to set up entirely separate corporate entities, with costly and duplicative administrative structures, to accept and use non-LSC funds available for restricted activities.

A concerted initiative to eliminate the non-LSC funds restriction is being pioneered by the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), Brennan Center, the American Civil Liberties Union (ACLU), the United Auto Workers (UAW), Leadership Conference on Civil and Human Rights, and others. If this initiative succeeds, non-LSC funders could provide funds to LSC grantees for whatever purpose the public or private funder determines meets the needs of the given low-income client community, and under whatever conditions the non-LSC funder concludes are appropriate. For LSC grantees with significant non-LSC resources, this revision would significantly reduce the impact of the LSC restrictions on the ability of those programs to provide the full range of legal services necessary to meet the needs of low-income clients and to expand access to legal assistance. This revision would also permit LSC grantees to directly accept funds that are not presently available to them because the uses for which the non-LSC funders wish to see the funds put would violate LSC restrictions.

### *B. Restrictions on LSC Funds*

Nevertheless, even if Congress were to eliminate the restrictions on non-LSC funds, many LSC grantees would still be unable to provide the full range of legal assistance necessary to meet the needs of the low-income community due to a lack of non-LSC resources. Congress must thus eliminate many of the other restrictions that were imposed on LSC grantees in 1996.

#### *i. Legislative Representation and Rulemaking*

Under the 1996 restrictions, legal aid advocates are severely limited in the ways they can use LSC funds for participation in legislative representation and rulemaking on behalf of low-income clients and the low-income community.<sup>45</sup> Often, an effective solution to a client's legal problem cannot be achieved without changes to the statutes or regulations governing the issue. In other instances, individual representation may solve a particular person's legal problem, but without changes to legislation or regulation the issue will continue to reoccur, and advocates will be forced to repeatedly bring the same problem to litigation. Paying clients have the ability to hire private attorneys to engage in legislative and administrative advocacy on behalf of their interests, often in ways that have a negative impact on the low-income community. Advocates for low-income people should have tools at their disposal to ensure that poor people's needs and interests are considered by those crafting the laws and regulations that impact their lives.

#### *ii. Class Actions*

The 1996 restrictions also prohibit LSC recipients from filing or participating in class

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<sup>45</sup> See 45 C.F.R. § 1612 (2009).

action suits.<sup>46</sup> As with legislative or administrative advocacy, the use of class actions to address systemic problems saves limited legal services resources by eliminating the need to litigate the same issue time and again. A prohibition on class actions is unnecessary to address potential abuse by legal services lawyers because, under the rules of all state and federal courts, the court supervises and controls the class action process from beginning to end, and judges only certify the use of class actions when appropriate. Many legal problems faced by the poor are better resolved by proceeding in the form of class actions. Class actions may provide an effective remedy where no other remedy exists, are an economical means of obtaining relief, assure enforcement of judicial decisions, and deter unlawful conduct towards similarly situated individuals.

### iii. Aliens

Another significant barrier to legal representation for a substantial segment of the low-income community is the prohibition on the provision of legal assistance to certain aliens, many of whom are legally in the US under a variety of special visa programs.<sup>47</sup> Although once primarily concentrated in major urban areas and agricultural regions, large segments of the low-income immigrant population now live in small cities and suburban areas throughout the country. In many areas with large immigrant populations, particularly in the South and Southwest, LSC-funded programs are the only form of legal aid in existence, and receive very limited non-LSC funds. Thus, even if the restrictions were lifted on those programs' non-LSC funds, they would not have sufficient non-LSC resources to devote to the representation of immigrants who cannot currently be served by LSC grantees, but make up a potentially substantial percentage of the area's low-income population. Undocumented workers are often the most vulnerable and exploited members of the work force; their inability to receive free legal assistance from LSC-funded programs in matters such as wage and contract claims and often intolerable work conditions makes it virtually impossible for many to obtain legal assistance.

## 3. INCREASING PRIVATE ATTORNEY ENGAGEMENT IN CIVIL LEGAL AID

To help serve those who cannot afford counsel it is essential to expand the role private lawyers play in the delivery of civil legal assistance. It is unclear how much time and resources private lawyers, either paid or pro bono, devote to low-income clients. A new report by the American Bar Association's Standing Committee on Pro Bono and Public Services discloses the results of a 2008 survey of 1,100 lawyers throughout the country in private practice, corporate offices, government, and academic settings.<sup>48</sup> The study found that 73% of respondents provided pro bono services to people of limited means and organizations serving the poor, and 27% of the lawyers surveyed met the ABA's aspirational goal of providing at least 50 hours of pro bono services to persons of limited means. But however much pro bono work is currently underway, the need for civil legal aid cannot be met without the increased use of private attorneys, both pro bono and paid. Such increased participation will involve far more than tapping individual

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<sup>46</sup> 45 C.F.R. § 1617 (2009).

<sup>47</sup> 45 C.F.R. § 1626 (2009).

<sup>48</sup> THE ABA STANDING COMM. ON PRO BONO AND PUB. SERV., AMERICAN BAR ASS'N, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2009), *available at* <http://www.abanet.org/legalservices/probono/report2.pdf>.

attorneys for particular cases. To move forward with a more effective private attorney system, we must increase the supply, as well as expand the role and the scope of activities private attorneys perform in the provision of civil legal services to the poor.

The first step is to increase the number of lawyers providing such services, and the overall time they devote to the assistance of low-income persons. Pro bono work is an aspirational ethical goal in the U.S. It is included in Rule 6.1 of the ABA Model Rules of Professional Conduct<sup>49</sup> and has been incorporated into the ethical rules in most states. Considerable efforts to increase the supply of private lawyers who provide legal assistance to low-income persons have been made by the American Bar Association and numerous state bar associations, state Access to Justice Commissions, the Pro Bono Institute, LSC, a variety of state funders of civil legal aid, and law school groups. Several promising strategies are being pursued. One such approach is to require lawyers to report their contributions in time and financial assistance.<sup>50</sup> Although Rule 6.1 is aspirational and not mandatory, a few states have required that all members of the Bar report annually on their pro bono activity. Florida, the first state to institute such a requirement, experienced substantial initial growth in both forms of aid. However, that growth has since stagnated and by some accounts there has been a decline in attorneys providing direct pro bono services.<sup>51</sup> Today, seven states have adopted mandatory reporting requirements, and eleven have voluntary reporting. Seven other states permit attorneys who take on pro bono cases to earn credit toward mandatory legal education requirements. Additionally, 29 states and the District of Columbia permit retired lawyers who are no longer active members of the bar to volunteer pro bono assistance.<sup>52</sup>

To increase pro bono participation among private attorneys, the Pro Bono Institute established the Law Firm Pro Bono Project to challenge large firms around the country to contribute 3 to 5% of their total billable hours to the provision of pro bono legal services.<sup>53</sup> Today, 150 law firms are signatories to that challenge.<sup>54</sup> The Pro Bono Institute has also just introduced a new challenge for corporate in-house counsel to increase the number of significant pro bono activities among lawyers who work directly for corporations.<sup>55</sup> The Legal Services Corporation has been another leader in encouraging private attorney involvement. Since 1981, LSC-funded programs have been required to use a portion of their funding for private attorney involvement.<sup>56</sup> Currently, each LSC-funded provider must expend 12.5% of its LSC funding on

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<sup>49</sup> MODEL CODE OF PROF'L CONDUCT R. 6.1 (2005).

<sup>50</sup> See ABA STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, REPORTING OF PRO BONO SERV., <http://www.abanet.org/legalservices/probono/reporting.html> (last updated July 14, 2009).

<sup>51</sup> KELLY CARMODY & ASSOC., PRO BONO: LOOKING BACK, MOVING FORWARD (2008), available at <http://www.flabarfindn.org/downloads/pdf/pro-bono.pdf>.

<sup>52</sup> See ABA STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, EMERITUS RULES FOR PRO BONO (Sept. 14, 2010), <http://www.abanet.org/legalservices/probono/emertus.html>.

<sup>53</sup> PRO BONO INST., LAW FIRM PRO BONO CHALLENGE, <http://www.probonoinst.org/challenge.php> (last visited July 2, 2010).

<sup>54</sup> PRO BONO INST., LIST OF SIGNATORIES (Oct. 31, 2008), <http://www.probonoinst.org/challenge.sigs.php>.

<sup>55</sup> PRO BONO INST., CORPORATE PRO BONO CHALLENGE, <http://www.probonoinst.org/cpbo.php> (last visited July 2, 2010).

<sup>56</sup> 45 C.F.R. § 1614 (2009).

private attorney participation.<sup>57</sup> Of the 889,155 cases closed by LSC programs in 2008, 93,168 were handled by private attorneys.<sup>58</sup> Of these cases, 57,719 were done by pro bono attorneys, 31,052 by contract or judicare attorneys, and 4,397 by other PAI approaches such as co-counseling arrangements.<sup>59</sup>

In addition, the LSC Board of Directors adopted a resolution to encourage LSC-funded programs to undertake greater pro bono activity, and pledged to publicize and recognize the work of LSC-funded programs that pursue private attorney involvement initiatives.<sup>60</sup> As a result, most LSC-funded programs have adopted similar resolutions.<sup>61</sup> Moreover, LSC issued a Program Letter to LSC-funded programs in December of 2007 on how to utilize resources and innovative approaches to more effectively integrate private attorneys into the provision of high quality civil legal assistance.<sup>62</sup> Finally, LSC joined with the ABA to create the National Celebration of Pro Bono, held October 25-31, 2009.<sup>63</sup>

In addition to LSC initiatives, there continue to be substantial efforts by both the American Bar Association and state and local bar associations to increase pro bono activity among all segments of the practicing bar, including government attorneys and corporate counsel. A number of states have modified their Rules of Professional Conduct to promote pro bono service. The highest courts of several states have been very involved in promoting pro bono. The courts have used their judicial authority under state law to create formal statewide pro bono systems. Several states have also initiated major state pro bono recruitment campaigns led by the chief justice and bar presidents, or have initiated other efforts to expand pro bono service in the states. Most states now have extensive web-based resources to support pro bono attorneys.<sup>64</sup>

These efforts have produced results, and must persist so that the supply of private lawyers providing civil legal assistance to low-income persons continues to expand. Strategies that have shown success, such as mandatory reporting, should be aggressively pursued.<sup>65</sup> The ABA, state bar associations, state access to justice commissions, other state funders, and student and legal publications must also continue to focus on expanding pro bono activity and private attorney involvement. The growing ranks of retired attorneys also provide a potential pool of talent that has only recently been tapped. Legal services providers must continue to expend resources and efforts both to recruit private attorneys, and to ensure that private attorneys get adequate training, supervision, and mentoring.

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<sup>57</sup> *Id.*

<sup>58</sup> *See* FACT BOOK, *supra* note 18, at 22.

<sup>59</sup> *Id.*

<sup>60</sup> LEGAL SERVICES CORP., RESOLUTION IN SUPPORT OF ENHANCED PRIVATE ATTORNEY INVOLVEMENT WITH LSC-FUNDED PROGRAMS (adopted on Apr. 28, 2007), *available at* <http://www.lsc.gov/pdfs/LSCBoardResolution2007.pdf>.

<sup>61</sup> LSC RES. INFO., PRIVATE ATTORNEY INVOLVEMENT (PAI) (2010), [http://www.lri.lsc.gov/probono/board\\_pai\\_resolutions.asp](http://www.lri.lsc.gov/probono/board_pai_resolutions.asp).

<sup>62</sup> Program Letter from Helaine M. Barnett, President, Legal Services Corp., to All LSC Executive Directors, Guidance to LSC Programs for the Development of Enhanced Private Attorney Involvement (Dec. 20, 2007), *available at* <http://www.lsc.gov/pdfs/ProgramLetter07-2.pdf>.

<sup>63</sup> *Successful Pro Bono Week Concludes with Recognition from the White House*, ABA NOW (Nov. 11, 2009), <http://www.abanow.org/2009/11/successful-pro-bono-week-concludes-with-recognition-from-the-white-house/>.

<sup>64</sup> HOUSEMAN, UPDATE, *supra* note 11, at 22.

<sup>65</sup> *See supra* note 51.



An increase in supply cannot occur in a vacuum, and the effective participation of private attorneys is not solely an issue of numbers. Too often law firms and private attorneys are available to provide assistance, but fail to be utilized by civil legal aid providers.<sup>66</sup> This is the result of a number of factors, including concern among civil legal aid providers that private attorneys lack the specialized expertise to do the work, and will divert interesting cases away from staff attorneys. It may also be a result of ineffective pro bono recruitment on the part of civil legal aid providers. To address this problem, there must be a corresponding increase in demand by providers to use private attorneys in a variety of capacities. In addition, civil legal aid providers need to improve upon the integration of private lawyers into the delivery of services, as noted by Standard 2.7 of the *ABA Standards for the Provision of Civil Legal Aid*,<sup>67</sup> and make more effective use of private attorneys' time, resources and skills. Failure to take advantage of the skills, resources and interest of private attorneys remains a significant problem on the part of civil legal aid programs and other providers serving low-income clients.

The increased use of individual private attorneys is only one area on which legal services providers and pro bono attorneys need to focus their attentions. Effective use of law firms is also a crucial step toward the improvement of the delivery of civil legal services. Law firms have the ability to take on complex cases that legal aid providers are not capable of litigating due to activities restrictions like the prohibition on class actions or because such cases require resources beyond those available to legal services programs. Law firms could take on whole categories of cases or legal problems (for example, landlord tenant or housing development), develop expertise in these areas, and then provide in-house expertise to pro bono attorneys taking on such cases. Law firms could also place associates with civil legal assistance providers for significant periods of time, such as six months to a year or more. A small silver lining of the latest economic downturn is that attorneys with inadequate paid work have had time to develop expertise in meeting urgent social needs, and these attorneys could continue to serve as a valuable resource in the provision of civil legal services. Law firms could also act as co-counsel alongside a staff program on a series of cases or specific types of cases. Law firms and legal services providers each have unique areas of expertise, and the co-counsel relationship creates opportunities for mentorship, as well as a chance to appreciate the skills and experience each set of attorneys brings to the table. For instance, private attorneys are likely to have resources unavailable to legal service providers, expertise in litigating complex matters and a fresh set of eyes to bring to a particular type of legal problem. The providers have experience working with local officials who may be able to address the matter, knowledge of their client base, and an in-depth understanding of systemic issues. Law firms may also be able to train and mentor legal assistance staff attorneys and paralegals in the development of trial advocacy skills.

Private lawyers and law firms can bring the power of the large firm to bear on problems of low-income persons by forming effective partnerships with those advocates in daily contact with client problems, as well as with key state and national advocacy groups. Law firms are able to undertake critical lobbying and policy advocacy before legislative and administrative rulemaking bodies. In conjunction with such advocacy groups, private attorneys can help legal services providers and other advocates engaged in policy advocacy to garner the business community's support on issues of mutual interest, such as welfare-to-work and job training. Finally, using transactional legal skills and expertise, private attorneys and law firms can aid legal

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<sup>66</sup> Interview by Alan W. Houseman with Esther Lardent, President, Pro Bono Inst. (Feb. 23, 2010).

<sup>67</sup> ABA STANDARDS, *supra* note 33, at 70.

services providers – or undertake such work directly – in assisting community organizations, as well as state and municipal governments, improve welfare-to-work services, revitalize low-income communities, and create jobs, including community services employment opportunities.

The initiatives laid out above may make better use of the time, resources and skills of private lawyers and law firms than are being utilized at present. Too often, law firm pro bono programs do not strategically integrate private attorneys into more sustained civil legal services activities. Pro bono programs need direction, and a process for case selection and oversight that takes into account both participant and public interests. One cost-effective approach is to target compelling unmet needs that tap firm members' particular concerns and capacities. Ongoing partnerships with groups working in a given field can help identify appropriate projects and leverage assistance.

The Volunteer Legal Services Program (VLSP) of the San Francisco Bar Association is a prime example of how an innovative pro bono program can effectively make use of private attorneys.<sup>68</sup> VLSP provides services to 20,000 people each year, primarily through the mobilization of volunteers.<sup>69</sup> For example, in 2009 VLSP conducted a family law project, an eviction defense project, a housing negotiation project, a homeless advocacy project, a consumer project, a social services project and a low-income taxpayer clinic, among other initiatives.<sup>70</sup> VLSP has adopted a "holistic" approach to providing services that goes beyond merely seeking legal remedies for client problems, and instead attempts to meet the full range of client needs. The in-house provision of social services developed by VLSP, which is supported by a team of volunteers and social services professionals, was achieved through partnerships and collaborations with existing service providers in order to streamline systems of service and cut down on duplicative services.<sup>71</sup> Legal volunteers are trained to determine when clients need resources other than legal assistance, and informed of the resources available. For instance, VLSP would assist a battered woman and her children not only with obtaining legal protection from abuse, but also in securing child support, custody and divorce or separation.<sup>72</sup> They also connect clients with counseling services, emergency shelter, affordable housing and employment opportunities.<sup>73</sup>

Increasing the number of private attorneys who deliver civil legal assistance and improving initiatives aimed at increased participation are difficult challenges for an underfunded and overtaxed delivery system. But the development of more meaningful participation among private attorneys has enormous potential to reduce the gap between the need for legal representation and the capacity to provide it. Thus, a key component of the strategy to address the legal needs of low-income persons must be to expand private attorney involvement initiatives, and to take better advantage of the resources of law firms that can be used to serve low-income populations.

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<sup>68</sup> VOLUNTEER LEGAL SERVICES PROGRAM, BAR ASS'N OF S.F., THE VLSP STORY, <http://www.sfbar.org/volunteer/story.aspx> (last visited July 2, 2010).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

#### 4. INCREASING STATE ADVOCACY

State level advocacy has played a critical role in the provision of civil legal assistance. The Office of Economic Opportunity (OEO), which until 1975 funded the federal legal services program, recognized the necessity of state level advocacy when it funded a number of new state support programs in the late 1960s. State support initiatives, including state level advocacy, developed in a majority of states in the 1970s alongside the inception of the Legal Services Corporation. The state system never fully took root in every state, however, and over the years many state level advocacy organizations were downsized or went out of existence. In 1996, Congress eliminated the \$10 million of funding set aside for state support in the LSC budget, which led to further decline in state level advocacy.

Despite these cutbacks, state level advocacy is a necessary component in the protection of low-income persons' interests. Many critical decisions that affect the legal rights of such persons are made at the state level, either by state legislative bodies, state administrative agencies, Governors' offices or state court systems. For example, family laws, consumer protection laws, landlord-tenant laws and significant employment and labor laws are all enacted at the state level.<sup>74</sup> States help finance and administer critical federal programs, such as AFDC, food stamps, Medicaid, and unemployment insurance, and often determine eligibility levels and grant amounts for these programs.<sup>75</sup> Many states also operate their own welfare "general assistance" programs, supplemental SSI programs, mental health, and public health care programs.<sup>76</sup> Many federal programs give states wide discretion on which populations to serve and services to provide, including in childcare and social services block grant programs.<sup>77</sup> States bear substantial responsibility for education, and many states have state housing finance agencies. Most civil legal aid cases are tried in the state court system, and state court rules and procedures provide the framework for most litigation.<sup>78</sup> In short, among governmental entities, state governmental entities play the most significant role in funding and enacting the programs and policies that most affect low-income persons.

Since the mid-1970s, and even more significantly since 1995, states' role in matters affecting low-income persons has *increased* as a result of devolution: the shift in responsibility for social programs from the federal to the state level. A prime example of devolution is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which eliminated the federal AFDC program that provided cash assistance to low-income families with dependent children, and replaced it with a block grant program known as Temporary Assistance for Needy Families (TANF). Other examples include Medicaid programs, the use of federal childcare funds, the Workforce Investment Act and the State Children's Health Insurance Program.

In light of devolution, state level advocacy has become even more essential to ensuring that the rights and interests of low-income persons are protected and enhanced. Moreover, devolution has led to fundamental changes in the way that civil legal aid will be able to provide legal assistance to underserved populations, necessitating different methods of delivering legal

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<sup>74</sup> See Houseman, MISSING LINK, *supra* note 19, at 12.

<sup>75</sup> *Id.*

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

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

services, innovative forms of training and much more effective coordination and collaboration among a range of providers.<sup>79</sup> What is needed is broad, state level advocacy in all forums, including representation in courts and before administrative agency adjudicatory forums, rulemaking and/or policy making bodies, state legislative bodies and other public and/or private entities.<sup>80</sup> Not only should each state's civil legal aid system provide state level advocacy, it must also have an ongoing system to coordinate and provide concrete advice and assistance to the lawyers and paralegals undertaking such advocacy. For example, with respect to litigation, such a system would identify cases of statewide importance or that would have significant impact on low-income persons at the trial level, and then provide the necessary advice and assistance to the advocates involved, including co-counseling when appropriate. A coordinated system would also identify appeals that may result in precedents of statewide importance or significant impact. In addition, the system would provide advocacy teams for appropriate state-level projects, assist pro bono and other private attorneys engaged in cases of statewide importance, and identify and coordinate amicus work in such cases. Similar systems are also needed for administrative agency adjudicatory forums, regulatory or legislative issues, and other matters (e.g. court rules) of statewide importance.

In addition, each state's civil legal aid system needs to develop substantive areas of advocacy in response to emerging critical legal needs, as well as those that have been overlooked by local providers. Some needs may arise because of changes in policy, such as the need for tax advocacy in light of the expansion of EITC and the child tax credit for low-income working families. Other needs may arise because of changes in client demographics or populations. Still others may arise because of changing economic conditions, such as the current foreclosure crisis. State advocacy entities should play an essential role in highlighting these changes and developing effective responses.

Each state should also have the capacity to capture stories, photographs, and examples of client injustices so that they can use them effectively in statewide litigation and policy advocacy, as well as in media campaigns that support such efforts. Finally, each state's civil legal aid system should have liaisons with all major institutions affecting or serving low-income people in legal matters, including state, local, and federal courts, administrative agencies, legislative bodies, alternative dispute resolution bodies, and other public or private entities providing legal information, advice, or representation.

## 5. INCREASING NATIONAL ADVOCACY

National advocacy has also served as a critical component of civil legal assistance since the early days of the federal legal services program. The Office of Economic Opportunity (OEO) funded twelve national advocacy and support centers in the late 1960s.<sup>81</sup> During the 1970s, five more were added with the advent of LSC.<sup>82</sup> Like state support funding, funding for national legal

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<sup>79</sup> See Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Act of 1996*, 30 CLEARINGHOUSE REV. 932, 933-934 (Jan.-Feb. 1997) (describing how there will be fewer legal rights to assert and more fact-based advocacy needed to protect client interests).

<sup>80</sup> HOUSEMAN, MISSING LINK, *supra* note 19, at 7-9.

<sup>81</sup> See John A. Dooley & Alan W. Houseman, *Legal Services History*, at 7-8 (Nov. 1985) (unpublished manuscript) (on file with National Center on Poverty Law).

<sup>82</sup> *Id.* at ch. 3, at 28.

services support centers ceased in 1996.<sup>83</sup> Since 1996, most of the then-existing centers have persisted, and several have grown in both size and stature.<sup>84</sup> Private foundations, in addition to a few state funders of civil legal aid, primarily fund the centers still in operation.<sup>85</sup> However, national advocacy is not solely the province of former LSC-funded entities. Many key national advocacy organizations that focus on issues important to low-income people have existed outside of the old LSC network.<sup>86</sup>

National advocacy remains a critical need for any civil legal aid system in order to ensure that the rights and interests of low-income persons are represented before Congress and federal agencies. Even though state governments play a major role and enjoy substantial discretion in implementing a number of federal policies, it remains that Congress and federal agencies establish the laws and policies, set the framework, and fund many of the key programs that affect low-income persons. There are many organizations engaged in advocacy at the federal level in key areas of concern to low-income persons. However, there remain critical gaps in national advocacy on important issues facing the poor (transportation policy is just one example), and deficient advocacy, systematic research and strategy development on emerging issues such as climate change legislation.

More specifically, the civil legal aid system needs the capacity to:

- (1) Represent low-income persons before federal agencies and department rulemaking and policymaking bodies;
- (2) Represent low-income persons before Congress;
- (3) Represent low-income persons before the White House, including the Domestic Policy Council and the Office of Management and Budget; and
- (4) Provide up-to-date information about federal legislative, regulatory, and policy developments affecting low-income persons and civil legal aid practice through national websites and other methods of communication.

The responsibility to engage in national advocacy does not rest solely with national entities. Local and state civil legal aid programs can also effectively participate in national advocacy consistent with restrictions on funding. For example, civil legal aid programs can participate in national networks of advocates, work directly with national entities, provide concrete examples of how existing programs are or are not effectively serving low-income people, identify low-income people who have been hurt or helped by existing programs to testify or otherwise be highlighted as examples in national advocacy efforts, and undertake state and local grassroots advocacy as part of a national advocacy campaign.

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<sup>83</sup> See HOUSEMAN & PERLE, *supra* note 43, at 37.

<sup>84</sup> *Id.* at 41. For example, the National Consumer Law Center has grown considerably, and has widened its focus beyond the poor to include all consumers.

<sup>85</sup> See, e.g., *Funders*, NAT'L CONSUMER LAW CTR., [http://www.nclc.org/index.php?option=com\\_content&view=article&id=94&Itemid=65](http://www.nclc.org/index.php?option=com_content&view=article&id=94&Itemid=65).

<sup>86</sup> Examples include the Center on Budget and Policy Priorities, the Center for Law and Social Policy, the National Women's Law Center, the Children's Defense Fund and Families USA.

## 6. REBUILDING THE CIVIL LEGAL AID INFRASTRUCTURE

The national infrastructure of civil legal aid in the United States has been decimated over the last 28 years. When LSC began operations in 1975, it had organizational divisions devoted to training, support, and research on the delivery of civil legal aid, and its budget included funding for state and national support. When Congress substantially reduced funding for LSC in 1982, LSC ended its research funding altogether and converted its in-house training and support operations into grants to non-profit organizations to maintain its training and support capacity.<sup>87</sup> In 1996, Congress eliminated funding for national and state support centers and training programs altogether. As a result, LSC could no longer fund the national infrastructure that had included 15 national support centers and five regional training centers. In addition, the loss of over \$10 million in LSC's state support funding took a significant toll on the state support structure that had helped to ensure coordination and assistance for all legal services providers and their partners.

Since 1996, there has been considerable change in the demographics of the low-income community, and many new legal problems affecting the poor have emerged as a result. In addition, there has been a fundamental change in how legal services are delivered, and how support can be provided via the information technology revolution that has affected all aspects of the civil legal aid system. The system in place in 1995 and earlier may not be the system that should remain in place in the future. Even so, we now have a good idea of what changes need to be implemented to ensure effective and efficient legal representation, as well as innovation in legal strategies and the delivery of civil legal aid.

### *A. Training*

Civil legal aid lawyers and paralegals require skill-building substantive training and opportunities for professional development. Executive Directors and managers need access to management and administrative training, as well as means for professional development. There should be appropriate training for all civil legal aid program staff members and for the board of directors. Education and training activities should be available for all individual and institutional providers within the state in order to:

- Develop expertise in all major areas of legal services practice within a state;
- Update advocates on new developments and emerging trends in law and policy affecting low income persons;
- Ensure the use of new strategies, tools, skills, and techniques of advocacy;
- Develop effective communications and media advocacy skills;
- Develop skills to ensure that civil legal assistance programs have effective managers and new leaders; and
- Maximize opportunities for professional development for staff at all experience levels.

Training should include training and mentoring activities carried out at the workplace and, when necessary, training programs conducted outside of the office. Training should utilize all available new technologies that facilitate the efficient delivery of civil legal services. Civil legal aid programs should also coordinate with continuing legal education programs offered by state or

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<sup>87</sup> See HOUSEMAN & PERLE, *supra* note 43, at 30.

local bar associations or other entities. Finally, all legal services providers should provide opportunities for staff to participate in national and regional training, and collaborations relevant to civil legal assistance activities in the state.

While there is currently considerable civil legal aid training available at the national, regional, state, and local levels, there is widespread agreement that more is needed to ensure that all staff have the skills and professional development opportunities necessary to function effectively and efficiently.<sup>88</sup> There is also agreement that a national training system is necessary to facilitate these goals. However, there is currently insufficient funding from key civil legal aid funders, and insufficient commitment from local programs to apply their own funds, to establish such a system.

### i. State Support

In addition to the coordinated statewide education and training activities described above, each state should also develop a comprehensive system of information and support. While many states have robust support structures and engage in most or all of the functions set out below, many others lack the capacity to carry out key support functions at the state level.

A comprehensive system would begin by providing effective monitoring, analysis, and timely distribution of information regarding all relevant legal developments (e.g. case law, regulatory and legislative developments, court rules, etc.) to all individual and institutional legal aid providers and others participating in the statewide system. State justice systems must create and maintain an efficient state-of-the-art information dissemination network for advocates that includes at least four elements:

- (1) Statewide civil legal assistance websites to provide up-to-date information about state legislative, regulatory and policy developments affecting low-income persons, as well as other information relevant to the delivery of civil legal assistance, including community legal education and economic development;
- (2) Statewide electronic libraries of pleadings, briefs, forms, fact sheets, and policy analyses; electronic document assembly applications, such as HotDocs; best practices and client information materials, accessible to all institutional providers and private attorneys that provide civil legal assistance to low-income clients;
- (3) A coordinated statewide research strategy integrating Internet usage, online services, and other resources; and
- (4) A coordinated data management system to facilitate information-sharing and case file transfers.

A state's civil legal aid system should also convene regular statewide task forces and coordinate periodic statewide meetings of attorneys, paralegals, and lay advocates working within the civil legal system to discuss common issues, problems, subject areas, client constituencies, advocacy techniques, and strategies to make the most effective and efficient use of resources. The use of modern conferencing technologies and electronic communication may alleviate the need for

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<sup>88</sup> A number of organizations presently offer training, including the National Legal Aid and Defender Association, the Management Information Exchange, the Center for Legal Education, regional consortiums in New England, Ohio, Michigan, West Virginia and Virginia, and state based training entities in California, New Jersey, New York, Tennessee, Kentucky, Florida, Texas, Minnesota and elsewhere.

in-person meetings. These task forces and meetings must include both LSC and non-LSC funded advocates; private attorneys; law firms; and attorneys working for governmental entities, in addition to corporations, labor unions and human services providers involved in the provision of services to the low-income community. These task forces and meetings should focus on a wide range of issues, including legislative and administrative developments that affect the rights and interests of low-income persons, and should be linked by email lists and other electronic means to ensure constant and ongoing communication among advocates.

In addition to training, information dissemination, and coordination – functions that are traditionally characterized as state support – there are other critical functions that each state’s civil legal aid system should have the capacity to perform. First, each state should engage in ongoing initiatives to instill the values of equal justice work and the commitment to the promotion of equal justice for all among all staff members. In addition, the state civil legal aid system should develop initiatives to help all staff understand what constitutes systemic advocacy and the value of such advocacy to clients. Finally, there should be a repository in which to preserve the history of each state’s civil legal aid system, as well as ongoing communications and forums about that history.

Second, each state should designate a single provider (or state support entity, where one exists) to track and coordinate community education initiatives and programs, provide assistance to advocates across the state on the development of community education programs and materials, and ensure that materials are shared between programs. Clients and non-advocates should also have easy access to statewide websites with critical information about client rights and information about how to protect and enhance legal rights. Such websites should be developed with the user in mind, and employ language and other techniques of communication that are readily understood by the low-income or elderly end-user.

Third, the civil legal aid system in each state should have the capacity to systematically undertake substantive policy and delivery research or provide access to such research when the capacity lies elsewhere. This includes efforts to identify and promote “best practices” in areas such as intake, needs assessment, priority setting, case management, advocacy techniques, and strategy development. Also, there should be research on relevant demographic trends and new and emerging legal problems that affect low-income people within the state.

Fourth, because policy and legal developments in one state often affect similar developments in other states, it is important for advocates in the state civil legal aid system to be informed about the experiences of other states. State policy bodies such as legislatures and executive departments often look to other states when developing particular social policies, and courts in one state are often influenced by the decisions of courts in another. Similarly, efforts to improve the provision of civil legal assistance in one state often have critical influence on decisions in other states. Moreover, there will be occasions when a number of states may want to coordinate responses to common legal developments.

Finally, advocates in each state’s civil legal aid system should coordinate with national entities and organizations involved in advocacy on substantive issues affecting the low-income population. This includes former LSC national support centers, as well as a host of other national anti-poverty, civil rights, child advocacy, and other entities that were not part of the LSC national support network, but consistently work on issues that have an impact on low-income people and communities. Such coordination involves a range of efforts including the dissemination of newsletters, participation in audio conferences and email lists, the creation and use of manuals and materials, attendance at conferences and training events, the provision of advice and assistance



when needed, and the sharing of information about developments at the state and local level that have national implications.

## ii. National Support

Just as there is a need for national advocacy within the state civil legal aid system, the capacity for national support is necessary to undertake activities that are truly national in nature. Such an infrastructure nonetheless parallels many of the state support functions described above.

There needs to be training on new national developments in all of the areas of poverty law that are affected by federal developments and national trends. However, such training need not be provided only at national training events. Experts with knowledge of federal developments and national trends need to be involved in the entire range of training necessary to the civil legal aid community.

In addition, there needs to be effective monitoring, analysis, and timely distribution of information regarding all relevant national legal developments (e.g. case law, regulatory and legislative developments, court rules, etc.) to all individual and institutional legal aid providers. National entities should conduct audio conferences and email lists, prepare manuals and materials on federal developments, provide advice and assistance when needed, and collect and share information about developments that have national implications at both the state and local level. National entities should also run national task forces and hold periodic national meetings of attorneys, paralegals, and lay advocates working within the civil legal assistance system to discuss emerging trends and new legal issues and strategies. Here too, use of modern conferencing technologies and electronic communication may alleviate the need for in-person meetings and facilitate timely distribution of essential information.

There is also a need to conduct research on new anti-poverty initiatives and ideas that civil legal aid programs can use to address poverty in their states and localities. The civil legal aid system would also benefit from demographic and other analyses that would assist civil legal aid programs to plan, set priorities, and build the foundation for a future client cohort that may differ considerably from the client cohort of past decades.

At present, many of these functions are being undertaken by an array of national entities – some from the old LSC system, and many that have always existed independent of the LSC system. Yet there are significant gaps in all of these functions, and the capacities outlined above do not exist in all areas of poverty advocacy or potential poverty advocacy. Nor is there a single entity within the civil legal aid system or outside of that system responsible for exploring new anti-poverty strategies and ideas and for developing demographic and other analyses directly related to civil legal aid advocacy.

## iii. Research on the Delivery of Civil Legal Assistance

Many civil legal aid systems in Europe and Canada have entities that conduct research on the civil legal aid system and pilot demonstration programs to improve the delivery of civil legal aid.<sup>89</sup> Some entities are components of the national civil legal aid system itself, such as in the

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<sup>89</sup> See, e.g., LEGAL SERVICES RESEARCH CTR., LEGAL SERVICES COMM'N (United Kingdom), [http://www.legalservices.gov.uk/civil/innovations/independent\\_research.asp](http://www.legalservices.gov.uk/civil/innovations/independent_research.asp) (last updated Nov. 17, 2007); DEPT. OF JUSTICE, RESEARCH AND STATISTICS DIV.(Canada), <http://www.justice.gc.ca/eng/pi/rs/index.html>(last modified July 31, 2009).

United Kingdom, while others exist outside the system as part of the government, as is the case in Canada. The United States' system had such a component from 1976-1981 during the first era of the Legal Services Corporation.<sup>90</sup> The Research Institute on Legal Assistance conducted research on new poverty law developments, as well as on the delivery of civil legal aid.<sup>91</sup> It carried out the study of special groups mandated by section 1007(h) of the LSC Act reauthorization amendments of 1977.<sup>92</sup> The Institute also conducted several demonstration programs to test out new ideas and develop new delivery approaches, and pioneered the use of information technology in civil legal aid. In addition to the Research Institute, the LSC also conducted a congressionally mandated study of the delivery system itself, the Delivery System Study.<sup>93</sup>

The Research Institute was closed during the funding and political crisis of 1981. Because of statutory restrictions in the LSC Act, its functions could not be granted out to independent entities.<sup>94</sup> Since 1982, there has not been a funded entity within the United States that is responsible for researching the delivery of civil legal aid or conducting demonstration projects to test new ideas and innovations. The American Bar Association along with a number of states have undertaken legal needs studies, and LSC has conducted studies of the justice gap in the United States. Apart from these efforts, delivery research related to the civil legal aid system in the United States has been episodic, and research is usually carried out with very limited funding.

A national civil legal aid system should have the ongoing and institutionalized capacity to conduct research on the delivery of civil legal aid and to conduct and evaluate demonstration projects to test new ideas and innovations for possible system-wide replication. If the core values of a civil legal aid system are innovation and experimentation, we need to actively promote such innovation and to evaluate the effectiveness of the experiments that are undertaken. While the responsibility for funding such an entity might seem like a good fit for national foundations, past efforts along these lines have not been successful. Under the current LSC statutory framework, such a national system would likely have to be developed in-house at LSC.

#### iv. Assessment

The process of rebuilding the civil legal aid infrastructure should begin with a thorough assessment of training, support, and research needs within the civil legal aid community, and of the current capacity across the country to meet those needs. Until we understand those needs and the range of capacities that are currently available, we will not be able to fully determine how best to address them. Such an assessment should begin with an analysis of the changing legal needs of the low-income community.<sup>95</sup> The assessment should also examine the need for skills and substantive training, access to research capacity, and professional development for legal aid attorneys and paralegals, as well as the need for management and administrative training and

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<sup>90</sup> Dooley & Houseman, *supra* note 82, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 22.

<sup>93</sup> *Id.* at 31.

<sup>94</sup> Section 1006(a)(3) of the LSC Act prohibits funding by grant or contract for broad general legal and policy research unrelated to the representation of eligible clients.

<sup>95</sup> For an early analysis of the changing legal needs of clients, see ALAN W. HOUSEMAN, CTR. FOR LAW AND SOC. POLICY, WHO ARE OUR CLIENTS? WHAT ARE THEIR EMERGING LEGAL PROBLEMS? WHAT ARE THE IMPLICATIONS FOR STATE JUSTICE COMMUNITIES? (2001), available at [http://s242739747.onlinehome.us/publications/who\\_are\\_our\\_clients.pdf](http://s242739747.onlinehome.us/publications/who_are_our_clients.pdf).

professional development for grantee executive directors and other program management staff. It may also examine the types of substantive information necessary for effective legal aid advocacy and the gaps in knowledge that currently exist. It should examine the best ways to use technology to provide information and research to grantees and their staffs, and to use skilled and experienced substantive experts and litigators to provide technical assistance and co-counseling. Finally, it should consider whether the civil legal aid system itself would benefit from the research capacity to examine the delivery of civil legal assistance, and then stimulate innovation in accordance with that research. Based on these assessments, a plan could be developed to ensure the availability of training, support, and research to address documented needs in a cost effective manner. While the civil legal aid community should be centrally involved in these assessments, it may be the case that only a revitalized LSC has the capacity and credibility to actually undertake the study and promote its recommendations.

## 7. RIGHT TO COUNSEL IN CIVIL CASES AT STATE EXPENSE

Within the last several years, civil legal aid advocates, bar associations, and academic scholars have come together in the National Coalition for a Civil Right to Counsel, and have been promoting a renewed strategy to establish a right to counsel in a category of cases “where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”<sup>96</sup> Building on this resolution, a number of state access to justice commissions and other similar entities have proposed guaranteeing counsel in limited categories of cases, or creating pilot programs to evaluate such guarantees.<sup>97</sup> There has also been a substantial increase in scholarship from the academic world and several law review symposia on the issue.<sup>98</sup>

In the United States, there is no general right to state-funded counsel in civil proceedings. The United States Constitution does not provide an explicit right to state-funded counsel in civil proceedings, although the Fourteenth Amendment does prohibit a State from depriving “any person of life, liberty, or property, without due process of law” or denying “to any person within

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<sup>96</sup> The quote is taken from an ABA Resolution on the right to counsel in civil cases. *See* ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., REPORT WITH RECOMMENDATION (2006), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. In 2005, the President of the American Bar Association established a Commission on Access to Justice in Civil Legal Aid. One of its two tasks was to develop a policy statement on the right to counsel at public expense in civil cases. The ABA House of Delegates endorsed the Commission’s recommendation at their 2006 Annual Meeting in August. The policy statement provides:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

*Id.*

<sup>97</sup> *See* ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ACCESS TO CIVIL JUSTICE FOR LOW-INCOME PEOPLE: RECENT DEVS. 11-12 (2010) [hereinafter ACCESS TO CIVIL JUSTICE]. *See also* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., REPORT WITH RECOMMENDATION (2010), *available at* [http://www.abanet.org/legalservices/sclaid/downloads/BasicPrinciplesReportRec\\_06232010.pdf](http://www.abanet.org/legalservices/sclaid/downloads/BasicPrinciplesReportRec_06232010.pdf).

<sup>98</sup> *See* Recent Legislation, *California Establishes Pilot Programs To Expand Access to Counsel for Low-Income Parties*, 123 Harv. L. Rev. 1532, 1534 (2010) (outlining much of the recent scholarship).

its jurisdiction the equal protection of the laws.”<sup>99</sup> Unlike *Gideon v. Wainwright*,<sup>100</sup> in which the United States Supreme Court held that a right to counsel exists in criminal cases in which the defendant faces imprisonment or the loss of physical liberty, the Court refused to find a constitutional right to counsel in civil cases when first faced with the issue in 1981. In *Lassiter v. Department of Social Services*,<sup>101</sup> the Supreme Court held in a 5-4 ruling that the due process clause of the Federal Constitution did not provide for the guaranteed appointment of counsel for indigent parents facing the termination of parental rights. Rather, “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review.”<sup>102</sup>

In limited categories of cases, some state legislatures have enacted statutes requiring state-funded counsel to be appointed for one or more parties,<sup>103</sup> and the highest courts in some states have ruled that state-funded counsel should be provided as of right to some parties.<sup>104</sup> These state-funded counsel provisions or court rulings are generally in the family law area with respect to civil commitment. There are a few federal statutory requirements for appointment of counsel in civil cases, but they are very limited.<sup>105</sup> However, in the vast majority of civil cases, there is no constitutional or statutory right to state-funded counsel.

Although it is not often easy to predict what the United States Supreme Court will do, most commentators do not believe that there will be any significant right-to-counsel developments at the federal level because of the current make-up of the Court. Instead, the National Coalition and its allies have focused on litigating a state-funded constitutional right to civil counsel in *state* cases where “basic human needs are at stake.”<sup>106</sup> So far, there have not been any recent state court decisions expanding the right to counsel in civil cases beyond the areas described above.<sup>107</sup>

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<sup>99</sup> U.S. CONST., XIV amend., § 1.

<sup>100</sup> 372 U.S. 335, 344 (1963).

<sup>101</sup> 452 U.S. 18 (1981).

<sup>102</sup> *Id.* at 32.

<sup>103</sup> Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (July-Aug. 2006).

<sup>104</sup> Clare Pastore, *Life after Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (July-Aug. 2006) (providing a thorough exploration of state cases since *Lassiter*). See also Patricia C. Kussmann, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R. 5th 379 (2001) (providing a detailed analysis of state court cases involving the termination of parental rights and developments subsequent to *Lassiter*); Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 367 (2005) (noting that thirty-nine states now provide free counsel for parents in state-initiated termination-of-parental rights actions, up from thirty-three at the time of the *Lassiter* decision). See generally Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247 (1997) (noting in particular Tables I and II, at 276, 277).

<sup>105</sup> See Abel & Rettig, *supra* note 104, at 252-270.

<sup>106</sup> See generally 40 CLEARINGHOUSE REV. (July-Aug. 2006) (discussing various theories and state initiatives throughout the volume).

<sup>107</sup> See, e.g., *Frase v. Barnhart*, 840 A.2d 114, 126 (Md. 2003), in which the Maryland Court of Appeals refused to reach the issue of the right to counsel; three of seven justices stated in a concurring opinion that the court should have addressed the question, and decided in favor of a civil right to counsel in certain cases. *Id.* (Cathell, J., concurring). See also *King v. King*, 174 P.3d 659 (Wash. 2007) (refusing to find a right

A second approach has been to draft model state legislation and then seek to persuade state legislative bodies to adopt all or parts of the model. A task force of the California Access to Justice Commission prepared model legislation for a civil right to counsel in certain cases.<sup>108</sup> So far, no state legislative body or local legislative body has adopted such proposed legislation.

The most promising approach in the short run may well be the development of state and local pilot programs that provide for the right to counsel in civil cases at state expense in situations that go far beyond the few areas that now provide for such counsel. Massachusetts began such pilot projects in 2009. The two projects will explore the impact of full representation in eviction cases. The pilots grow out of the work of the Boston Bar Association's Task Force on Expanding the Civil Right to Counsel, as described in its 2008 report, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*.<sup>109</sup> The pilot projects test the theory that an expanded civil right to counsel should target the cases in which counsel is most likely to affect the outcome. Representation will focus on scenarios of key importance, as identified through a survey of housing experts in the state: (1) where the eviction was tied to a mental disability, (2) where it involves criminal conduct, and (3) where a viable defense exists, and enumerated factors reveal a power imbalance likely to deprive a tenant of an affordable apartment.<sup>110</sup> One pilot project is situated in a specialized housing court and another is in a generalized district court because evictions occur in both types of courts.<sup>111</sup> Funding supports representation through two legal aid offices.<sup>112</sup> Evaluative tools, including a randomized experiment, will attempt to measure the efficacy of the program, and test the theory that representation preserves housing. The projects also hope to provide an estimate of the number of these types of eviction cases statewide in the event that the program becomes the basis for a statewide proposal.<sup>113</sup>

The Texas Access to Justice Foundation has recently funded two pilot civil right-to-counsel projects for a 20-month cycle from January 1, 2010 to August 31, 2011. The two projects are joint collaborations with courts in underserved counties and two legal aid programs. The Tenant Defense Project, conducted by Lone Star Legal Aid, provides for appointment of counsel to persons involved in eviction appeals in three counties.<sup>114</sup> The Border Foreclosure Defense Project, conducted by Texas Rio Grande Legal Aid, is partnering with courts in six counties to represent low income persons in foreclosure hearings involving equity loans, tax loans, and reverse mortgages.<sup>115</sup> The two projects are also required to collect data that will be used for

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to counsel in a case involving disputes over who should have primary residential care over children from a former marriage).

<sup>108</sup> See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (July-Aug. 2006). See also Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196 (July-Aug. 2006).

<sup>109</sup> TASKFORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, BOSTON BAR ASS'N (Sept. 2008) available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf).

<sup>110</sup> See ACCESS TO CIVIL JUSTICE, *supra* note 98, at 11.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> News Release, Texas Access to Justice Found., Texas Access to Justice Found. Awards New Grants for Pilot Projects Impacting the Tex. Legal Delivery Sys. (Dec. 15, 2009), available at <http://www.txiolta.org/news/releases/Special-Board-Impact-Grants.aspx>.

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

further development by the Texas Access to Justice Commission, bar associations, and the state legislature.<sup>116</sup>

In 2009, California adopted legislation to establish pilot projects that guarantee counsel for low-income people in civil matters involving housing, domestic violence, and civil-harassment restraining orders, probate conservatorships, guardianship, elder abuse, and child custody proceedings.<sup>117</sup> Counsel will only be available where there is an independent determination that the client may benefit from representation.<sup>118</sup> The Judicial Council of California, the statewide court administrative agency, will fund pilot projects over a six-year period based on proposals submitted jointly by local courts and certain civil legal aid agencies.<sup>119</sup> These pilot projects will be funded by a \$10 increase in certain court fees beginning in 2011.<sup>120</sup> The projects will provide representation particularly for people who face represented opponents.<sup>121</sup> They will also develop best practices for assisting *pro se* litigants facing represented opponents.<sup>122</sup> The legislation also requires data collection and evaluation of both the civil representation and court-innovation components in order to provide a basis to potentially revise and extend the legislation.<sup>123</sup>

## V. Conclusion

This article sets out a broad framework for the development of a comprehensive and integrated system for the delivery of high quality civil legal assistance that actually resolves the legal problems of low-income people in the United States as a whole, and in each of the individual states and jurisdictions. A move toward such a system will require innovation and delivery improvements, increased funding, the removal of restrictions on what can be done and who can be served, and increased use of private attorneys. We must also bolster state and national advocacy, and rebuild the civil legal aid infrastructure. These are some of the critical steps that should be pursued to ensure equal justice for all.

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<sup>116</sup> *Id.*

<sup>117</sup> *See* Recent Legislation, *supra* note 99, at 1534.

<sup>118</sup> *Id.* at 1535.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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

<sup>123</sup> *See* Recent Legislation, *supra* note 99, at 1535. For a description of the process by which the legislation was adopted, and of the actual framework established by the legislation see Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REV. 550 (Mar.-April 2010).

# EVIDENCE-BASED ACCESS TO JUSTICE

LAURA K. ABEL\*

## I. The Need for Information Regarding When to Use Which Access to Justice Tools

The call for evidence-based practice permeates the fields of medicine, social services, education and criminal justice.<sup>1</sup> The 2010 federal healthcare reform legislation, for example, funds research regarding the effectiveness of medical treatments, as did the 2009 federal stimulus bill.<sup>2</sup> The No Child Left Behind Act and Individuals With Disabilities Education Act (“IDEA”) each encourage the use of scientifically validated education methods.<sup>3</sup> The Education Sciences Act of 2002 even created a unit within the Department of Education charged with using scientifically valid methods to investigate “the effectiveness of Federal and other education programs.”<sup>4</sup> The National Institute of Justice promotes the use of criminal justice methods that have been proven effective.<sup>5</sup>

As this article discusses, a comparable evidence-based approach is notably absent from the many efforts to expand access to the justice system for people facing such civil legal problems as foreclosure, eviction, child custody disputes, domestic violence, or consumer fraud claims. During the past decade, state courts and civil legal aid programs around the nation have begun using a variety of tools to expand access, including simplified court procedures, advice-only

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<sup>1</sup> See Jeanne Charn & Jeff Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, MGMT. INFO. EXCH. J., Winter 2007, at 31, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126444](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126444) (“Sister professions — including medicine and social work — are in the midst of evidence-based movements which can inform our thinking and action.”).

<sup>2</sup> See H. COMMS. ON WAYS AND MEANS, ENERGY AND COMMERCE, AND EDUC. AND LABOR, 111TH CONG., HEALTH INSURANCE REFORM AT A GLANCE: INNOVATIVE DELIVERY SYSTEM REFORM (2010), available at [http://docs.house.gov/energycommerce/DELIVERY\\_REFORM.pdf](http://docs.house.gov/energycommerce/DELIVERY_REFORM.pdf); Robert Pear, *U.S. to Study Effectiveness of Treatments*, N.Y. TIMES, Feb. 16, 2009, at A1. See also Alvin I. Mushlin & Hassan Ghomrawi, *Health Care Reform and the Need for Comparative-Effectiveness Research*, 362 NEW ENG. J. MED. E6 (2010) (arguing for cost-effectiveness research in order to ensure the goals of health care reform are met).

<sup>3</sup> See, e.g., 20 U.S.C. § 1416(e)(1)(A)(ii) (2000) (authorizing the Secretary of Education to provide assistance to states in “identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research” under the IDEA); 20 U.S.C. § 6301(9) (2000) (including among the purposes of the No Child Left Behind Act, “ensuring the access of children to effective, scientifically based instructional strategies”).

<sup>4</sup> Education Sciences Reform Act of 2002, Pub. L. No. 107-279, §§ 111(b), 112 (2002).

<sup>5</sup> See NAT’L INST. OF JUST., NIJ TESTS AND EVALUATES PROGRAMS, PRACTICES AND EQUIPMENT (2010), available at <http://www.ojp.usdoj.gov/nij/about/testing-evaluation.htm>; U.S. GEN. ACCOUNTING OFFICE, JUSTICE OUTCOME EVALUATIONS: DESIGN IMPLEMENTATION OF STUDIES REQUIRE MORE NIJ ATTENTION 1 (2003) (stating that “it is important to know which programs are effective in controlling and preventing crime so that limited federal, state, and local funds not be wasted on programs that are ineffective.”).

hotlines, pro se clerks' offices and help desks, form pleadings, self-help manuals and computer terminals (including guided, online interviews resulting in filled-out court forms), nonlawyer assistance, unbundled legal services (in which the attorneys perform some lawyering tasks but not others), and full legal representation.<sup>6</sup> In the absence of a standard name for these tools, I will call them "access to justice interventions" or "access to justice tools."

The overwhelming unmet need for civil legal aid and the courts' desire to improve the ways they handle pro se cases have spurred the development of these access to justice tools.<sup>7</sup> Views about when courts and legal aid programs should use these tools vary widely. Some observers argue that at least some of the tools will always be necessary to try to level the playing field not only between unrepresented and represented parties, but also between parties who can afford high-quality representation and those whose financial limitations force them to pay for less competent representation.<sup>8</sup> Some view the tools as emergency measures necessitated by the shortage of civil legal representation for the poor.<sup>9</sup> Others assert that, at least in some cases, full representation is not necessary, and other access to justice tools may suffice.<sup>10</sup> What litigants need, they argue, is a graduated approach, in which they receive only the level of assistance necessary to litigate their cases successfully.<sup>11</sup> Under this scenario, litigants with more complicated cases or with fewer abilities would receive more assistance. Litigants with less complicated cases or greater abilities would receive less assistance. In some scenarios, the level of assistance would depend, too, on the importance of the matter at stake in the litigation.<sup>12</sup> Yet others warn that using access to justice tools, in lieu of full representation, may amount to no more than "a fig leaf over the shame of a fundamentally unfair judicial process."<sup>13</sup>

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<sup>6</sup> Russell Engler, *Toward a Context-Based Civil Right to Counsel Through Access-to-Justice Initiatives*, 40 CLEARINGHOUSE REV., July-Aug. 2006, at 196, 200. See generally DEBORAH L. RHODE, ACCESS TO JUSTICE 100 (2004).

<sup>7</sup> Margaret Lucas Agius, *Michigan Supreme Court Announces Solutions on Self-Help Task Force*, DETROIT LEGAL NEWS EXAM'R, Apr. 14, 2010, available at <http://www.examiner.com/x-14309-Detroit-Legal-News-Examiner~y2010m4d14-Michigan-Supreme-Court-announces-Solutions-on-SelfHelp-Task-Force>.

<sup>8</sup> Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 78 FORDHAM L. REV. 969, 972 (2004).

<sup>9</sup> Reeve Hamilton, *Many Texans 'Going It Alone' In the Courtroom* (CBS11 (TX) Apr. 14, 2010), available at <http://cbs11tv.com/local/legal.representation.lawyers.2.1631994.html> (discussing views of lawyer Stewart Gagnon).

<sup>10</sup> Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV., Mar.-Apr. 1997, at 1178, 1179.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472 (2010); MODEL STATE EQUAL JUST. ACT § 301.4.4 (Calif. Access to Justice Comm'n), available at [http://www.brennancenter.org/page/-/download\\_file\\_38656.pdf](http://www.brennancenter.org/page/-/download_file_38656.pdf).

<sup>13</sup> Jonathan Smith, *Lawyers Should Not Only Be for the Rich*, MAKING JUSTICE REAL BLOG, (Mar. 31, 2010) <http://www.makingjusticereal.org/lawyers-should-not-only-be-for-the-rich>; See also Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 873 (2004) ("Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified.").



Regardless of their differing fundamental philosophies, leaders in the “self representation movement,” judges, and academics all agree that there is insufficient evidence about what type of intervention is appropriate when.<sup>14</sup> This lack of evidence is a problem not only for justice system planners, but also for the civil legal aid, pro bono, and judicial self-help programs which must constantly choose which type of access to justice intervention to offer to which litigants.<sup>15</sup>

One reason for this lack of evidence is that no generally accepted metric for evaluating access to justice tools exists. Courts and civil legal aid programs implement access to justice interventions for a wide variety of reasons, such as ensuring the fairness of the judicial process; moving judges’ dockets with the smallest drain on judicial budgets and judicial staff time;<sup>16</sup> and ensuring that litigants leave with a positive view of the judicial process.<sup>17</sup> These are all essential functions. However, in order to substitute adequately for full representation, an access to justice intervention must also ensure that litigants are able to obtain an accurate decision from the court, and this accuracy is only possible when the litigants are able to make necessary decisions and present relevant information and legal arguments.<sup>18</sup>

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<sup>14</sup> See, e.g., Connie J.A. Beck et al., *Collaboration Between Judges and Social Science Researchers in Family Law*, 47 FAM. CT. REV. 451, 454-58 (2009) (stating that “most interventions used in family law have not been subjected to” randomized, controlled trials); SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS AND RESOURCES 35 (2008), available at [http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/best\\_practices\\_7-08.pdf](http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/best_practices_7-08.pdf) (“In particular, we do not know what situations and what litigants require what levels of service to ensure access to justice.”); See generally, BONNIE HOUGH, EVALUATION OF INNOVATIONS DESIGNED TO INCREASE ACCESS TO JUSTICE FOR SELF-REPRESENTED LITIGANTS 9, available at <http://www.ajs.org/prose/Midwest%20Notebook%20Contents/Tab%207/Paper%209.pdf> (analyzing effectiveness of self-help services for self-represented litigants and suggesting direction of future research in the field); Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1048 (2010) (discussing the need for “an examination of cost and quality trade-offs among different modes of service delivery”); Deborah Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1021 (2004) (“[W]e know far too little about the performance of programs for the delivery of legal aid and pro bono services: the satisfaction of clients, the quality of assistance, and the impact on parties and their communities.”); RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FOR THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 137 (2002), available at [http://www.lri.lsc.gov/pdf/03/030111\\_selfhelpct.pdf](http://www.lri.lsc.gov/pdf/03/030111_selfhelpct.pdf) (noting that while many self-help innovations have been developed, “it has been largely impossible to research and compare their effectiveness”); Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2646 (1997) (“Despite thirty years of organized legal services for the poor, poverty lawyers have not adequately measured the effectiveness of our work.”).

<sup>15</sup> See discussion *infra* Part IV.

<sup>16</sup> JOHN M. GRAECEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 11-12 (2002).

<sup>17</sup> See Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1019-20 (2002) (describing the role that the judiciary’s desire to engender public trust plays in motivating the courts to adopt access to justice innovations).

<sup>18</sup> This is not the same as litigants believing that they have been provided with the tools they need. As the British legal aid expert Richard Moorhead reminds us, “[c]lient viewpoints, while important, tell us very little about the key issues for quality, such as correct advice and appropriate help.” Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 785 (2003). Nor do client viewpoints tell us whether litigants receiving help actually were able to

Many judicial and academic commentators have endorsed this goal. In 1979, for instance, the European Court of Human Rights issued a groundbreaking decision holding that Council of Europe member states must provide lawyers for civil litigants who cannot afford them unless the litigant's "appearance before the [court] without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."<sup>19</sup> Likewise, the California Access to Justice Commission's Model State Equal Justice Act states that limited representation, as opposed to full representation, can be provided if it "is sufficient to provide fair and equal access to justice."<sup>20</sup> Justice Earl Johnson offers a similar formulation, writing that there should be a presumption against self-representation that "could only be overcome where a court can legitimately certify the particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack representation."<sup>21</sup> And the ABA has written that in deciding whether an access to justice intervention other than full representation is adequate, "the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer."<sup>22</sup>

If ensuring the fairness of a proceeding were the only criterion, we would probably choose to offer lawyers to all litigants, because many judges and scholars agree that representation by a competent lawyer is the best way to achieve that goal.<sup>23</sup> However, cost is also an important factor, given the severe, ongoing national shortage of funding for both civil legal aid and the courts.<sup>24</sup> For this reason, our goal must be an access to justice system that uses the least amount of legal aid and court resources necessary to enable judges to render fair and accurate decisions.<sup>25</sup>

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perform the tasks required of them or whether they prevailed in their cases as a result. See Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 393, 410 (1993) (questioning "whether subjective perceptions of fairness on the part of applicants or litigants in informal hearings should be a sufficient goal, or whether fair procedures must be related to just outcomes"); Blasi, *supra* note 13, at 870 (discussing differences between "objective" and "subjective" justice).

<sup>19</sup> *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, 315 (1979).

<sup>20</sup> MODEL STATE EQUAL JUSTICE ACT § 301.4.4, *supra* note 12.

<sup>21</sup> Earl Johnson, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 220 (2003). See also James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. OF SOC. JUST. 383, 388 (2005) (proposing a "meaningful access" standard that assesses whether the litigant can make important choices and present appropriate facts and evidence to the judge); Andrew Scherer, *Report of the Working Group on Assessment of Systems for Delivering Legal Services*, 67 FORDHAM L. REV. 1869, 1870 (1999).

<sup>22</sup> American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 522 (2006).

<sup>23</sup> See *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007) (en banc) (stating that in deciding whether to appoint counsel under 28 U.S.C. § 1915(e)(1), "[t]he question is not whether a lawyer would present the case more effectively than the pro se plaintiff; if that were the test, district judges would be required to request counsel for every indigent litigant.") (quoting *Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006)) (internal quotation marks omitted); Ronald Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Justice*, 42 LOY. L.A. L. REV. 1117, 1130 (2001) ("When our design students observed the justice system in action in five different courts, they quickly decided that the complexity was so daunting that everyone in the system should have a lawyer.").

<sup>24</sup> LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP 4, 18 (2007), available at <http://www.lsc.gov/justicegap.pdf> (documenting the severe shortage of funding for civil legal aid); Elizabeth

In section II, below, I propose an outcome-based metric to measure whether a particular access to justice intervention enables judges to render fair and accurate decisions: whether a particular access to justice intervention leads to the same rate of wins and losses as full and competent attorney representation.<sup>26</sup> The outcome of cases involving full and competent attorney representation is an appropriate baseline measurement because we generally assume that attorney representation is a key indicator of fairness.<sup>27</sup> In proposing this metric, I acknowledge that it can be difficult to determine whether the result of a particular proceeding constitutes a win or a loss, particularly for the many proceedings or in which a party wins on some issues but not others.<sup>28</sup> Nonetheless, I am confident that social scientists and lawyers working together can identify reliable indicators of wins or losses for many types of cases.

Social scientists view the use of comparisons and control groups as the best empirical method for isolating the effectiveness of a particular intervention while excluding other explanations for the intervention's claimed effects. A social scientist using this method would randomly assign participants either to a group which receives the intervention (i.e. the "treatment group") or to a group which does not receive the intervention (i.e. the "control group"), compare the performance of the members of the two groups, and observe changes over time.<sup>29</sup> Variations

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Stawicki, *Minnesota's Court Budget Woes Are Part of Nationwide Trend*, (Minnesota Public Radio Dec. 30, 2008), available at [http://minnesota.publicradio.org/display/web/2008/12/29/national\\_court\\_budget\\_woes/](http://minnesota.publicradio.org/display/web/2008/12/29/national_court_budget_woes/).

<sup>25</sup> See Shriver Civil Counsel Act, 2009 Cal. Stat. 590, § 1(l) (eff. July 1, 2011) (finding that the state has an important interest in "ensuring the level and type of [access to justice] service provided is the lowest cost type of service consistent with providing fair and equal access to justice").

<sup>26</sup> Similar suggestions have been made by Gary Blasi, Jeanne Charn, Russell Engler, Deborah Rhode, and others. See, e.g., Blasi, *supra* note 13, at 876-77.

<sup>27</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("[I]n 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."); Blasi, *supra* note 13, at 879 ("[T]he most practical way to operationalize 'access to justice,' at least in the short term, may be to equate it with 'access to lawyers' and recognize why we are evaluating second-best and third-best options for those who cannot afford to obtain legal services in the private market.").

Of course, measures in addition to attorney representation are necessary, such as fair procedural rules and, in some cases, court interpreters and experts. Moreover, there is a vast range of attorney competence, which can affect case outcomes. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145 (2007); RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL (National Bureau of Economic Research Working Paper 13187, 2007).

<sup>28</sup> Gregg G. Van Ryzin & Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Services to the Poor: Conceptual and Methodological Considerations*, 67 FORDHAM L. REV. 2553, 2561 (1999).

<sup>29</sup> According to the National Institute of Justice, "[t]he scientific validity of evaluations is measured along a continuum from strong to weak. Randomized controlled trials provide the strongest measure of a program's effects. Randomly assigning test subjects to the experimental and control groups helps to isolate and measure the effectiveness of the program or intervention. However, this 'gold standard' is hard to achieve in some research situations. In these cases, we have other 'quasi-experimental' methods that may provide acceptable precision in detecting and measuring the program's effects." NIJ TESTS AND EVALUATES PROGRAMS, PRACTICES AND EQUIPMENT, *supra* note 5, at 1. See also Van Ryzin & Engelman Lado, *supra* note 28, at 2564-65, 2569-70; Education Sciences Reform Act of 2002, *supra* note 4, at § 102(19) (defining a "scientifically valid education evaluation" as one that "employs experimental designs using random assignment, when feasible, and other research methodologies that allow for the strongest possible causal

on this method, sometimes used when random assignment is impossible, include the use of statistical methods to account for differences in the composition of the treatment and control groups,<sup>30</sup> the use of econometric tools to consolidate and draw conclusions from the results of many different studies,<sup>31</sup> and the use of a “pre/post” methodology to examine a judicial system before and after implementation of a new access to justice intervention.<sup>32</sup>

In section III below, I discuss a second, process-based metric for assessing the fairness of proceedings in which litigants use a particular access to justice intervention: whether the intervention enables litigants to perform the tasks necessary to enable judges to reach accurate decisions. Of course, the utility of a particular intervention depends on both the nature of the litigant’s case and his abilities. Accurately assessing either is no simple matter. However, as this article suggests, we may achieve economies of scale by determining the tasks required of pro se litigants and the tools necessary to enable the typical pro se litigant to perform those tasks, and then screening litigants to identify those who need additional assistance.

## II. Outcome Analysis

In the United States there has only ever been one random assignment study using a control group to examine whether providing lawyers in a particular type of civil case affects the outcomes of those cases.<sup>33</sup> In that study, social scientists worked with the Legal Aid Society of New York to randomly assign tenants facing eviction to one of two groups: tenants in one group received legal representation; tenants in the other did not.<sup>34</sup> The results were striking: courts issued final judgments of eviction against roughly half of the unrepresented tenants, but against only a third of the represented tenants.<sup>35</sup> Because of the study’s randomized design, the researchers were able to conclude that “these differences in outcomes can be attributed solely to the presence of legal counsel and are independent of the merits of the case.”<sup>36</sup>

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inferences when random assignment is not feasible”); JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 2 (stating that the methodological quality of outcome evaluations depends on “whether evaluation data were collected before and after program implementation; how program effects were isolated (i.e., the use of nonprogram participant comparison groups or statistical controls); and the appropriateness of sampling, outcome measures, statistical analyses, and any reported results”).

<sup>30</sup> Van Ryzin & Engelman Lado, *supra* note 28, at 2569-70 (1999) (describing the use of “statistical controls” when random assignment is infeasible); Rebecca L. Sandefur, Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes 15-16 (March 26, 2008), (unpublished manuscript) (on file with the author).

<sup>31</sup> See, e.g., Sandefur, *supra* note 30, at 2.

<sup>32</sup> CALIF. CTR. FOR FAMILIES, CHILDREN & THE CTS., MODEL SELF-HELP PILOT PROGRAM – A REPORT TO THE LEGISLATURE 232 (March 2005), available at <http://www.courtinfo.ca.gov/programs/equalaccess/evalmod.htm> (describing “pre/post design”); JASON A. OETJEN, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION 5 (National Council of Juvenile and Family Court Judges ed., 2003), available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/watabriefcolorfinal%5B1%5D.pdf>.

<sup>33</sup> Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 419 (2001).

<sup>34</sup> *Id.* at 423-24.

<sup>35</sup> *Id.* at 426-27.

<sup>36</sup> *Id.* at 429. However, the authors do caution readers about generalizing the study’s results too broadly because, among other things, “the cases were selected in part on the basis of a [legal aid] attorney’s

Another study — a meta-analysis in which Stanford professor Rebecca Sandefur used econometric methods to deal with the fact that most existing studies in the area rely on non-randomized, non-controlled methods — upends common assumptions about the types of proceedings in which lawyers are most useful.<sup>37</sup> Common wisdom holds that the more formal a tribunal and the more complicated the substantive and procedural law, the greater the likelihood that legal representation will be the determining factor as to whether a litigant wins or loses.<sup>38</sup> Put differently, there is a common assumption that lawyers do not convey much, or any, advantage in relatively informal adjudicatory settings, such as administrative hearings.<sup>39</sup> Sandefur's study produced the surprising result that representation by a lawyer played the largest role in affecting case outcome, not when the case was more complicated, but rather when a tribunal handled cases in a routine, "perfunctory" manner or often violated its own procedures.<sup>40</sup> Sandefur attributes this outcome to the role a lawyer's presence plays both by requiring the tribunal to adhere to its own rules and predisposing the judge to believe that the client's case has merit because the lawyer took the case.<sup>41</sup>

These two studies provide reliable evidence regarding the types of cases in which full representation by lawyers makes a difference for their clients. However, no other studies have used similarly rigorous empirical methods to examine the outcomes of access to justice interventions other than full representation. As a result, we do not know definitively whether those interventions alter the outcomes of the cases in which they are used.<sup>42</sup> Nor can we know whether some interventions have a greater effect than others on case outcomes.<sup>43</sup>

The studies that have been performed to assess the outcomes that litigants achieved using access to justice tools other than full representation have all used non-experimental methods. Those methods include: 1) asking litigants, court personnel, and attorneys whether they believe the interventions affect case outcomes<sup>44</sup> and 2) reviewing the court files of litigants who used a

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judgment regarding expected benefits from the provision of legal assistance," the study took place only in one borough of New York City, some of the lawyers did not have much Housing Court experience, and the judges "have a reputation for fairness and for providing guidance to pro se litigants." *Id.* at 429-30.

<sup>37</sup> Sandefur, *supra* note 30, at 13-14.

<sup>38</sup> Genn, *supra* note 18, at 395-96, 398. *See, e.g.,* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 333-34 (1985) (stating the Court's belief that the risk of error in the absence of a lawyer is low, and consequently "counsel is not required in various proceedings that do not approximate trials, but instead are more informal and nonadversary").

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

<sup>40</sup> Sandefur, *supra* note 30, at 13-14.

<sup>41</sup> *Id.* at 30-32. *See also* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 48-50 (2010).

<sup>42</sup> *See* JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 50 (noting that because a National Institute of Justice-funded study of the domestic violence Civil Legal Assistance Program did not include any comparison groups, "NIJ cannot expect a rigorous assessment of outcomes from this evaluation").

<sup>43</sup> One exception is Rebecca Sandefur's meta-analysis, which reached the unsurprising conclusion that lawyers obtain higher win rates than non-lawyers. *See* Sandefur, *supra* note 30, at 28. Carroll Seron's New York City Housing Court study, discussed above, initially aimed to compare the effects of advice-only assistance from a lawyer, and paralegal assistance, to full attorney representation. Seron, *supra* note 33, at 423. However, Seron abandoned that goal during the study because the intake staff could not distinguish between cases that required a lawyer and those that needed only a lesser amount of representation. *Id.*

<sup>44</sup> *See, e.g.,* UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER FINAL REPORT 4 (2001), available at <http://www.courtinfo.ca.gov/programs/>

particular intervention, and then comparing the outcomes to those of litigants who did not use the intervention.<sup>45</sup> None of the studies randomly assigned litigants to receiving or not receiving the intervention. The studies had a range of conclusions, finding that litigants who relied on specific access to justice tools achieved more,<sup>46</sup> less,<sup>47</sup> or the same level of success<sup>48</sup> compared with litigants who did not receive any assistance. One study had the remarkable finding that none of the fifty-one tenants receiving paralegal help in drafting papers at the Los Angeles Municipal Court were able to successfully raise warranty of habitability defenses in their eviction cases.<sup>49</sup>

Although these are interesting conclusions, none of these studies can definitively show whether an intervention itself (as opposed to other factors) altered a case's outcome.<sup>50</sup> In particular, because none of the studies used random assignment, we do not know whether any of the reported outcomes resulted from the access to justice tools used in the case or from some other factor, such as the service provider's case selection (self-help programs might select cases with merit and reject those without) or litigant self-selection (those with stronger cases may have the confidence to represent themselves, or conversely may tend to seek help from self-help centers).<sup>51</sup>

equalaccess/documents/Final\_Evaluation\_Van\_Nuys\_SHC2001.doc. See also Engler, *supra* note 41, at 66 ("Until the past few years, the effectiveness of limited assistance initiatives seemed to be measured by the impressions people had of programs, rather than hard data.").

<sup>45</sup> See, e.g., UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 4.

<sup>46</sup> Engler, *supra* note 41, at 70, n.142 (describing study that found that a higher percentage of family court litigants assisted by a courthouse-based self-help center received child support than litigants who did not visit the center, and that litigants who visited the center had higher child support payments on average).

<sup>47</sup> *Id.* (describing a study that found that tenants assisted by a courthouse-based self-help center agreed to pay landlords more back rent than pro se tenants did).

<sup>48</sup> See, e.g., GRAECEN, *supra* note 16, at 25 (citing SUSAN LEDRAY ET AL., HENNEPIN COUNTY DISTRICT COURT PRO SE PROGRAMS: INFORMATION AND AN EVALUATION OF EFFECTIVENESS (2002)) (failing to find "systematic differences in outcome" between users of unbundled legal advice clinic at Hennepin County District Court and other litigants); UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 12 ("The outcomes of Center-assisted cases are . . . similar to those cases of defendants who did not seek the Center's help . . .").

<sup>49</sup> McNeal, *supra* note 14, at 2642 (describing results of an unpublished Executive Summary of the Report of the Blue-Ribbon Citizens' Committee on Slum Housing).

<sup>50</sup> A similar problem occurs in medicine, where patients who have received a particular medical treatment and then been cured or injured further believe that the intervention led to the result. See Scott R. Sehon & Donald Stanley, *A Philosophical Analysis of the Evidence-Based Medicine Debate*, 3 BMC HEALTH SERV. RES. 14 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC169187/> ("With something as complex as the human body, we will not be able to simply *observe* the exact effect of a particular therapy. (Of course, some people fail to understand this. Some people think that they can just *see* that, e.g., their breast implant caused some awful condition that developed subsequently.)") (internal citations omitted) (emphasis in original).

<sup>51</sup> Genn, *supra* note 18, at 398-99 (noting the criticism of many studies "for failing to take account of the possibility that representatives select the strongest cases"); Sandefur, *supra* note 30, at 15 (stating that "some evidence suggests that people choose forms of representation based on their own assessment of how complex the case will be, electing to handle cases themselves when they believe them to be relatively straightforward," while "[o]n the other hand, lawyers select cases on the basis of, among other things, whether they think their potential client has a chance of actually winning") (internal citations omitted); Blasi, *supra* note 13, at 876.

The results of these studies are, undoubtedly, useful for a variety of purposes. They may, for example, generate information regarding obstacles that litigants face when attempting to use a particular intervention. Such information can enable program administrators to improve the functioning of the intervention.<sup>52</sup> And the results may provide information regarding the extent to which access to justice interventions achieve goals other than affecting case outcomes. User surveys, in particular, appear to provide useful data regarding the extent to which litigants provided with various access to justice interventions leave court with a favorable view of the judicial process.<sup>53</sup> However, the results cannot provide definitive evidence regarding the effect of a particular access to justice intervention on case outcomes.

In contrast to the access to justice field, a large and growing body of evidence based on randomized controlled experiments guides the work of professionals in medicine, education, social services, and criminal justice.<sup>54</sup> Sometimes the evidence demonstrates that the most expensive approach is not necessary, providing promise that someday we might be able to rely on particular access to justice interventions with similar confidence. For example, a controlled experiment in Canada revealed that an entire community receives a sufficient level of protection against the flu when doctors vaccinate only the children in that community.<sup>55</sup> Based on that study, public health systems could justifiably vaccinate all children, without vaccinating all adults. Another controlled experiment revealed that reading out loud improves children's reading skills, but that the improvement does not depend on whether children read texts at their grade levels or more difficult texts.<sup>56</sup> One can imagine that such a study would help teachers decide what pedagogical approach to take with poor learners. Teachers might, for example, have slower learners read out loud to an adult every day, but not bother to exercise rigorous control over the difficulty of the books the children select.

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<sup>52</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 217 (containing "examples of how pilot self-help center staff have used . . . evaluation results to make adjustments to their programs"); JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 23 (noting that although National Institute of Justice-funded evaluations "were not sufficiently reliable or conclusive. . . DOJ program administrators told [the authors] that they found some of the process and implementation findings from the completed studies to be useful").

<sup>53</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 209 (reporting results of user survey in connection with assessment of the role of self-help centers in "promot[ing] public trust and confidence in the court system").

<sup>54</sup> See Beck et al., *supra* note 14, at 454-58; *About NIJ*, U.S. DEPARTMENT OF JUSTICE, <http://www.ojp.usdoj.gov/nij/about/welcome.htm> (last visited Sept. 28, 2010) (saying that the National Institute of Justice "provide[s] objective, independent, evidence-based knowledge and tools to meet the challenges of crime and justice, particularly at the state and local levels"); *What Works Clearinghouse*, U.S. DEPARTMENT OF EDUCATION SCIENCES, <http://ies.ed.gov/ncee/wwc/> (last visited May 30, 2010) (describing What Works Clearinghouse as "[a] central and trusted source of scientific evidence for what works in education"); *Evidence-Based Medicine for Primary Care and Internal Medicine*, BMJ JOURNALS, <http://ebm.bmj.com/> (last visited Sept. 28, 2010) ("Evidence-Based Medicine surveys a wide range of international medical journals applying strict criteria for the quality and validity of research. Practising clinicians assess the clinical relevance of the best studies. The key details of these essential studies are included in a succinct, informative expert commentary on their clinical application.").

<sup>55</sup> See Mark Loeb et al., *Effect of Influenza Vaccination of Children on Infection Rates in Hutterite Communities: A Randomized Trial*, 303 J. AM. MED. ASS'N. 943 (2010), available at <http://jama.ama-assn.org/cgi/content/full/303/10/943>.

<sup>56</sup> Rollanda E. O'Connor et al., *Improvement in Reading Rate Under Independent and Difficult Text Levels: Influences on Word and Comprehension Skills*, 102 J. EDUC. PSYCHOL. 1, 13 (2010).

Reliable evidence can also save money and protect clients by revealing that some treatments are ineffective or even dangerous.<sup>57</sup> For example, in March 2010, New York City Mayor Michael Bloomberg announced that he had abandoned his plans to expand one of his administration's signature programs intended to bring families out of poverty: paying for behaviors such as sending children to school, looking for jobs, and visiting the doctor regularly. Mayor Bloomberg based his decision on the results of a controlled experiment, which found that the program did not improve the school performance of most of the participating children.<sup>58</sup>

### III. Process Analysis

The outcome studies described above can reveal whether a particular intervention has a particular result, such as an increase in litigants' success rates in court. They do not, however, explain how that success rate is achieved. And without understanding that, we may not know whether we the results of an outcome study conducted in one jurisdiction on one set of litigants can be generalized to other jurisdictions or litigants.<sup>59</sup> For this reason, scientists also study how various interventions affect the processes which create a particular outcome. In medicine, such studies might attempt to identify the biological or other causes of a particular disease and then to examine whether and how a particular medical treatment affects those causes.<sup>60</sup> In the access to justice field, such studies would attempt to identify the tasks a litigant must perform, the obstacles litigants face when performing those tasks, and whether various access to justice interventions enable litigants to overcome those barriers.<sup>61</sup>

As with outcome studies, the legal profession is in the very early stages of learning how to conduct this type of process studies regarding access to justice interventions. We do not know

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<sup>57</sup> Beck et al., *supra* note 14, at 457 (stating that randomized controlled trials are "the primary source of evidence for identifying therapies that cause harm").

<sup>58</sup> Julie Bosman, *City Will Stop Paying Poor for Good Behavior*, N.Y. TIMES, March 30, 2010, at A1, available at <http://www.nytimes.com/2010/03/31/nyregion/31cash.html?scp=1&sq=Bloomberg%20gibbs%20%22opportunity%20nyc%22&st=cse>; JAMES RICCIO ET AL., TOWARD REDUCED POVERTY ACROSS GENERATIONS 6 (2010), available at <http://www.mdrc.org/publications/549/execsum.pdf>.

<sup>59</sup> See Jeremy Howick et al., *The Evolution of Evidence Hierarchies: What Can Bradford Hill's 'Guidelines for Causation' Contribute?*, 102 J. ROYAL SOC'Y OF MED. 186, 189 (2009), available at <http://jrsm.rsmjournals.com/cgi/content/full/102/5/186> ("[U]nderstanding the mechanism guides our generalization of a tightly controlled study to a wider population.").

<sup>60</sup> See *id.* (describing what they call "mechanistic evidence" that a medical treatment works); Sehon & Stanley, *supra* note 50, at 6 ("From our knowledge of human physiology, disease, and pharmacology we might be able to infer whether a particular drug would be effective in treating a given condition. With the basic science approach, we work up from our knowledge of physiology and biochemistry to a prediction of what will happen.").

<sup>61</sup> Staudt & Hannaford, *supra* note 17, at 1026-29 (describing attempts to identify tasks involved in civil litigation and then design web tools to help litigants perform those tasks); Millemann et al., *supra* note 10, at 1181 (describing evaluation of Maryland experiment conducted to "help pro se litigants protect basic rights, to identify the types of cases in which the assisted pro se approach might work, and to give our students experiences with alternative representational models"); McNeal, *supra* note 14, at 2641 ("One should ask what impediments hinder the client in translating the limited legal assistance into a successful resolution of the problem. The nature and extent of these impediments then determine the viability of appropriate limited legal assistance.").



enough about the tasks involved in litigating a particular case, the ability of litigants to conduct those tasks, or the extent to which particular access to justice tools enable litigants to overcome the obstacles facing them. Consequently, even if we are able to demonstrate that a particular access to justice intervention enables litigants to overcome a particular litigation obstacle, we cannot know whether that is sufficient to enable litigants to overcome all other obstacles and obtain a fair hearing. For example, we might determine that providing a simplified form pleading will enable litigants to adequately plead uncomplicated debt cases. However, based on that evaluation alone, we would not know whether the litigants will be able to conduct discovery, write briefs, conduct evidentiary hearings, or make informed decisions about whether to settle.<sup>62</sup> Nonetheless, because this sort of process analysis can provide valuable information, particularly when paired with outcome studies, I discuss below several pioneering attempts to develop this sort of analysis.

#### A. *Identifying the tasks required*

In 2000, a group of law students, graduate design students, and National Center for State Courts researchers identified 193 discrete tasks that pro se litigants must perform in various types of civil cases.<sup>63</sup> The tasks, identified through visits to five civil courts in different parts of the country, “rang[ed] from very simple tasks like, ‘wait in line,’ ‘take notes’ and ‘find appropriate court’ to more sophisticated tasks like, ‘develop strategy and position,’ ‘interpret and apply law,’ and ‘negotiate settlement.’”<sup>64</sup>

This list appears to be the most comprehensive list of self-representation tasks developed to date. The breadth of the list may result in part from the fact that the researchers, like many pro se litigants, were unfamiliar with the courts they visited. As the Self-Represented Litigation Network warns, “a judge or administrator may not even observe barriers that may exist for uninitiated members of the public in an environment that is so familiar to him or her.”<sup>65</sup> Indeed, courts routinely underestimate the tasks required for self-representation.<sup>66</sup>

Of course, the specific tasks a litigant must perform depend on the nature of the case. If the goal of an access to justice regime is to provide the cheapest intervention that will allow a litigant to successfully complete all tasks in the case, then we must know which tasks that case requires. Sometimes categorizing a case according to the tasks it requires is a relatively simple matter. For example, litigants generally know whether their divorces are contested or not and

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<sup>62</sup> A similar problem plagues medicine, where “we rarely, if ever, can be certain of both the safety and efficacy of a treatment without clinical testing, for our knowledge of the human body and how it interacts with the environment is far from complete.” Sehon & Stanley, *supra* note 50, at 6. *See also* Howick et al., *supra* note 59, at 189 (“Obviously, having evidence for a part of the mechanism is not as strong as evidence for all the links in the causal chain.”).

<sup>63</sup> Staudt & Hannaford, *supra* note 17, at 1021, 1027.

<sup>64</sup> *Id.* at 1023, 1027.

<sup>65</sup> *Tour Guide: A Self-Guided Tour of Your Courthouse from the Perspective of a Self-Represented Litigant*, SELF-REPRESENTED LITIGATION NETWORK (Apr. 2008), <http://www.courtinfo.ca.gov/programs/equalaccess/documents/tourguide.doc>.

<sup>66</sup> *See* Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. 733, 742-43 (2006) (noting that in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court underestimated the “risks of error . . . in most contested and litigated cases when litigants are unrepresented”).

whether they involve child custody issues.<sup>67</sup> An uncontested divorce with no children may require the performance of only a few, relatively simple tasks, while a contested divorce with child custody issues may require the performance of additional, complicated tasks.<sup>68</sup>

For some types of cases, attorney review — and sometimes even fact investigation and discovery — are necessary to determine what kind of tasks the case will entail. For example, a residential foreclosure with no legal defenses may require only negotiation with the lender, which a trained financial counselor may be able to conduct.<sup>69</sup> On the other hand, if a homeowner has defenses to foreclosure under the Truth in Lending Act or Fair Debt Collection Practices Act, tasks may involve close reading of complicated loan documents, discovery, motion practice, and conducting evidentiary hearings.<sup>70</sup> However, the existence of such potential defenses may not be apparent until an attorney has obtained and reviewed loan documents.<sup>71</sup> A researcher would have difficulty distinguishing between the two types of foreclosure cases.<sup>72</sup>

*B. Identifying the obstacles preventing litigants from completing the required tasks*

Once the tasks involved in a case have been identified, an evaluator could identify which tasks litigants can conduct on their own and which require help. A litigant's ability to conduct specific tasks depends on characteristics such as the litigant's level of education, familiarity with computers, language skills, cognitive abilities, and communication skills.<sup>73</sup> Researchers should thus try to develop a profile of the typical litigant in that particular type of case in that particular jurisdiction. Reviewing dockets or court files can reveal some information regarding the typical litigant, such as the extent to which litigants appear pro se, the percentage of cases in which one party has representation and the opposing party does not, and the percentage of cases which are contested.<sup>74</sup> To obtain relevant information that is unavailable from court files, researchers can

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<sup>67</sup> Even these case attributes are not always apparent: "Any family law attorney can tell tales of the labyrinth of couplings, both marital and non-marital, that can underlie a response to so simple a question as, 'Are there children of the marriage?'" Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 500 (1996).

<sup>68</sup> See McNeal, *supra* note 14, at 2643 ("[L]itigants without children, resources, and property can end their marriages relatively easily, and those litigants may be successful with pro se assistance.") (citing Millemann et al., *supra* note 10, at 1183).

<sup>69</sup> But see MELANCA CLARK & MAGGIE BARRON, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 19-21 (2009), available at [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkvx.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkvx.pdf) (explaining that "[h]omeowners represented by legal counsel are often better able to negotiate meaningful loan modifications").

<sup>70</sup> *Id.* at 18.

<sup>71</sup> Mark Ireland, *Foreclosure Defense: Understanding TILA Basics Is Essential*, 43 CLEARINGHOUSE REV., May-June 2009, at 20, 23-24 (2009) (explaining the basic steps a lawyer must take to identify and file a TILA claim).

<sup>72</sup> Similar issues confront civil legal aid programs, courts, and others attempting to assign particular access to justice interventions to particular cases. For this reason, it may be advisable to provide a consultation with an attorney – or an attorney-supervised paralegal or housing counsel – to all low-income homeowners facing foreclosure before deciding what level of representation or access to justice intervention is warranted. CLARK & BARRON, *supra* note 69, at 38-39.

<sup>73</sup> See discussion *supra* at p. 7.

<sup>74</sup> See generally UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 17-18 (assessing a self-help center located in Van Nuys, CA).

interview a random sample of litigants at the courthouse.<sup>75</sup> Relevant information might include income level, primary language spoken in the household, education level, and familiarity with computers.<sup>76</sup> A drawback of this method is that it does not capture the many people who are served with papers but default.<sup>77</sup> In most instances, however, locating those individuals would be prohibitively expensive. Moreover, researchers must be aware that for some possibly relevant characteristics, such as literacy, self-reporting may be unreliable and more formal screening may be necessary.<sup>78</sup>

C. *Identifying the access to justice interventions that can enable a litigant to overcome the obstacles*

Once a researcher has identified the tasks involved in a particular type of case and the abilities of the typical litigant, a researcher using a process-oriented approach would seek to determine which access to justice tools will allow that litigant to perform those tasks. The few evaluations that researchers have performed to date provide intriguing evidence that some self-help interventions improve the ability of some litigants to perform certain tasks.<sup>79</sup> However, the evaluations do not show whether the interventions enabled the litigants to perform those tasks at a level sufficient to enable the court to reach a fair and accurate decisions.<sup>80</sup> For example, according to the California Center for Children and Families, plaintiffs in civil harassment cases who received assistance from self-help centers at various California courts

were able to prepare declarations containing enough specificity to greatly reduce the need for filing supplemental declarations. In unlawful detainer cases, self-help center assistance appears to contribute to defendants' abilities to raise affirmative defenses and to encourage landlords and tenants to reach settlements in such cases. Data also suggest that when dissolution petitioners receive assistance, they are more likely to raise all relevant issues correctly in their

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<sup>75</sup> OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 2 (2005), *available at* [http://www.nycourts.gov/reports/AJJI\\_SelfRep06.pdf](http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf); KIRA KRENICHYN & LAURA K. ABEL, RESULTS FROM THREE SURVEYS OF TENANTS FACING EVICTION IN NEW YORK CITY HOUSING COURT: EXECUTIVE SUMMARY 1 (2007), *available at* <http://www.brennancenter.org/page/-/Justice/Executive%20Summary%202-14-07.pdf>.

<sup>76</sup> See discussion *infra* at Part III.C.

<sup>77</sup> See NEW YORK APPLESEED & JONES DAY, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER DEBT CASES 2 (2010), *available at* <http://ny.appleseednetwork.org/LinkClick.aspx?fileticket=dFHdRj22CXY%3d&tabid=252> (reporting high levels of default in consumer debt cases in New York City); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 463 (2003) (describing large number of tenants who simply move out after receiving an eviction notice from their landlord).

<sup>78</sup> GRAECEN, *supra* note 16, at 20 (reporting on evaluation of civil legal aid client education program, in which evaluator concluded that some clients "may have been misrepresenting the level of their comprehension").

<sup>79</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 208.

<sup>80</sup> *Id.*

initial pleadings, to file proper accompanying paperwork, and to accomplish service of process.<sup>81</sup>

Of course, without the sort of controlled experiment described above, we cannot know whether these results were the product of the access to justice tool used, selection bias, or some other factor.

For certain types of tasks, early research suggests that self-help innovations may be ineffective, regardless of a litigant's abilities.<sup>82</sup> The tasks in this category include:

- conducting factual investigation, complicated discovery, or contested hearings;<sup>83</sup>
- presenting evidence in those courts that strictly adhere to the rules of evidence;<sup>84</sup> and
- drafting and filing traditional pleadings and motions.<sup>85</sup>

Similarly, for certain categories of litigants, some types of interventions may work better than others:

**Hotlines:** Hotlines are not particularly effective for litigants with low literacy, limited proficiency in English, or difficulty traveling to the courthouse because of transportation problems or inflexible work, school, or childcare schedules.<sup>86</sup>

**Pro se help offices and other forms of advice and assistance:** As with hotlines, studies have found that low levels of literacy, very low education levels, or low intelligence reduce the likelihood that a pro se litigant can represent himself after receiving legal advice and limited assistance.<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> Staudt & Hannaford, *supra* note 17, at 1021 (“[S]elf-represented litigants face a variety of obstacles in their attempts to resolve disputes and problems through the courts, only some of which are helped by the availability of model forms and instructions.”).

<sup>83</sup> See CAL. ADMIN. OFFICE OF THE CTS., GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS 7 (2008) (“Complicated discovery, characterization of mixed community assets, valuation and division of stock options, qualified domestic relations orders, medical malpractice, or product liability complaints — all are examples of cases and issues that may not be suitable for self-representation.”); NATHALIE GILFRICH ET AL., EXECUTIVE SUMMARY OF THE REPORT ON THE UNIVERSITY OF MARYLAND SCHOOL OF LAW’S FAMILY LAW ASSISTED *PRO SE* PROJECT IN ANNE ARUNDEL AND MONTGOMERY COUNTIES, AND RECOMMENDATIONS 5 (1996) (“We do not claim that pro se parties generally have the ability to conduct thorough factual investigations, complete discovery and represent themselves effectively at contested, or even some uncontested, hearings.”).

<sup>84</sup> Of the litigants who sought help from a self-help center in Los Angeles, “57% were not allowed to present any evidence they took to court.” GRAECEN, *supra* note 16, at 25.

<sup>85</sup> Millemann et al., *supra* note 10, at 1182 (reporting that lay advice and assistance was insufficient to help pro se litigants file pleadings and motions where plain English forms were not available).

<sup>86</sup> JESSICA PEARSON & LANAE DAVIS, THE HOTLINE OUTCOMES ASSESSMENT STUDY, FINAL REPORT PHASE III, ii (2002), available at <http://www.nlada.org/DMS/Documents/1037903536.22/finalhreport.pdf>.

<sup>87</sup> Millemann et al., *supra* note 10, at 1183.

**Web sites:** People who lack experience with computers and the Internet have difficulty using self-help web sites. However, when self-help center staff or other people are available to assist with access to the web sites, the results are better.<sup>88</sup>

Literacy is a barrier to using many of these interventions. Likewise, people with limited proficiency in English generally are unable to use any self-help tools or tribunals that are not available in a language they understand.<sup>89</sup> And large power imbalances between the parties, such as those created by domestic violence or present in landlord-tenant or employer-employee disputes, can also render self-representation impossible.<sup>90</sup>

As this section has made clear, more than one access to justice intervention may be necessary to ensure that a particular litigant can adequately present his or her case. Thus, any process-oriented evaluation of access to justice must take into account whether individual litigants are being screened to determine whether they need more assistance than the typical litigant does.<sup>91</sup>

#### IV. Conclusion

This article has described two types of empirical studies that would shed light on which access to justice interventions work for which litigants. These studies are desperately needed by civil legal aid programs and courts around the country, which constantly make decisions about which access to justice interventions to employ and when to employ them.<sup>92</sup> Here are just a few examples:

- **Delaware courts:** In June 2008, Delaware's Chief Justice created the Delaware Courts: Fairness for All Task Force, charging it with studying, among other things, "the needs of self-represented civil litigants in Delaware courts," and then "oversee[ing] implementation of efforts by the court system to address

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<sup>88</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 215 ("In-person support appears to be needed to assist people who are not traditional computer users. Self-help Web site content currently appears to be used by people who are regular users of the Internet.").

<sup>89</sup> McNeal, *supra* note 14, at 2642 (describing inability of pro se tenants to proceed in court that did not provide interpreters).

<sup>90</sup> *Id.* at 2643-44.

<sup>91</sup> PEARSON & DAVIS, *supra* note 86, at iii (recommending that pro se hotlines "should routinely question clients about a variety of barriers that affect their ability to address their legal problems and obtain successful outcomes").

<sup>92</sup> Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated With the Provision of Civil Legal Aid*, 9 SEATTLE J. OF SOC. JUSTICE (forthcoming); American Bar Association, *Principles of a State System for the Delivery of Civil Legal Aid*, Comment to Principle 10 (2006), available at <http://www.abanet.org/legal/services/sclaid/downloads/06A112B.pdf> (requiring that "[r]esearch and evaluation of civil legal aid delivery methods and providers are undertaken to assure the quality, efficiency and effectiveness of the services provided and the system responds appropriately to the results"); CAL. GOV'T CODE § 68651 (b)(7)(D) (effective July 1, 2011) (providing that in determining eligibility for services under the Shriver Civil Counsel Act, civil legal aid programs must take into account "[t]he availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case").

identified concerns and needs.”<sup>93</sup> The Task Force’s final report recommends that “[t]he Judicial Branch should expand the ways in which information is provided and the types of information available to assist self-represented litigants,” including through the use of “informational web sites,” “interactive forms,” and “a call-in line.”<sup>94</sup> It also suggests seeking additional funding for full representation by civil legal aid attorneys, and “expanding limited assistance by attorneys.”<sup>95</sup> The ultimate decisions about which intervention to offer when, and how much to invest in each intervention, will be made by court administrators, civil legal aid programs, and civil legal aid funders in Delaware.

• **Neighborhood Legal Services:** The services offered by Neighborhood Legal Services of Los Angeles County include full attorney representation, assistance filling out court forms and conducting legal research, workshops for domestic violence victims regarding how to prepare for restraining order hearings, and a hotline for people wanting to enforce healthcare rights.<sup>96</sup> Each year, the board and executive director must decide how much funding to allocate for each type of intervention.

• **Essex County Legal Aid Association:** This small New Jersey civil legal aid program, which does not receive federal Legal Services Corporation funding, operates out of a county courthouse. It describes its operation as: “perform[ing] a form of triage similar to an emergency room. Every one of our clients receives immediate emergency legal advice, legal paperwork preparation, and counseling from our small legal staff. . . . When appropriate, we also refer our clients to other organizations when it becomes clear to us that full legal representation is needed.”<sup>97</sup> Thus, staff must make decisions on a daily basis about which sort of access to justice intervention each client needs.<sup>98</sup>

It is critically important that resource allocation decisions such as these are made accurately because the stakes are high. The problems low-income individuals frequently face

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<sup>93</sup> Del. Super. Ct., Admin. Directive 168 (2008), *available at* <http://courts.delaware.gov/Courts/Supreme%20Court/Administrative%20Directives/?ad168.pdf>.

<sup>94</sup> DEL. SUPER. CT., DELAWARE COURTS: *FAIRNESS FOR ALL TASK FORCE 2* (2009), *available at* <http://www.nlada.org/DMS/Documents/1268922407.03/FAIRNESS%20Task%20Force%20Report%209%2009-1.doc/>.

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Special Projects*, NEIGHBORHOOD LEGAL SERVICES, <http://www.nls-la.org/special.php> (last visited Aug. 28, 2010); *Announcing . . . Health Consumer Center of LA County*, NEIGHBORHOOD LEGAL SERVICES, [http://www.nls-la.org/special\\_hcc.php](http://www.nls-la.org/special_hcc.php) (last visited June 28, 2010).

<sup>97</sup> *Welcome*, ESSEX COUNTY LEGAL AID, [http://eclaanj.org/Home\\_Page.html](http://eclaanj.org/Home_Page.html) (last visited Aug. 28, 2010).

<sup>98</sup> This is a typical function of a well-operating civil legal aid program. American Bar Association, Standards for the Provision of Civil Legal Aid, Standard 4.1, *available at* <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf> (stating that there should be an intake system that can “identify accurately the nature of each applicant’s legal problem and make a prompt decision regarding who will be helped and the type of assistance that will be offered”).

without legal representation tend to involve their most basic needs. Across the nation, most low-income people facing the loss of their homes as a result of eviction or foreclosure do so without a lawyer.<sup>99</sup> So do most victims of domestic violence seeking restraining orders.<sup>100</sup> A high proportion of child custody and other family matters involve at least one unrepresented party.<sup>101</sup>

Despite these high stakes, the legal academy has not yet viewed its mission as encompassing rigorous assessments of the utility of different access to justice tools.<sup>102</sup> Others have documented the incentives predisposing most legal academics to eschew empirical research.<sup>103</sup> The fact that poverty lawyers and the nation's civil trial courts are forced to innovate with little or no analytic support from the nation's law schools brings this trend into particularly sharp focus. It would be inconceivable for similar advances in education or medicine to proceed without empirical analysis of their effects by schools of education or medicine.

The government also bears some of the blame for the absence of the sort of rigorous empirical assessments I describe in this article. The Department of Education's Institute of Education Sciences uses its \$200 million budget to fund studies regarding the efficacy of educational interventions.<sup>104</sup> Other federal entities, such as the National Science Foundation, fund education research as well.<sup>105</sup> The National Institute of Health ("NIH"), which spends approximately \$30.5 billion annually on medical research, funds studies regarding the efficacy of medical interventions.<sup>106</sup>

The federal resources available for studies of access to justice tools are minuscule by comparison.<sup>107</sup> In FY 2010, the Legal Services Corporation ("LSC") will provide approximately \$3.4 million in Technology Incentive Grants to cover the development, testing, and implementation of new technology to provide civil legal aid.<sup>108</sup> During the same period, the State

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<sup>99</sup> Engler, *supra* note 41, at 47; CLARK & BARRON, *supra* note 69, at 2.

<sup>100</sup> Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 557 (2006).

<sup>101</sup> GRAECEN, *supra* note 16, at 6-7; OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, *supra* note 74, at 1.

<sup>102</sup> See Charn & Selbin, *supra* note 1, at 28-30; Charn, *supra* note 14, at 1045.

<sup>103</sup> Susan Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* 71 LAW & CONTEMP. PROBS. 17, 30-31 (2008).

<sup>104</sup> *About IES: Connecting Research, Policy and Practice*, INSTITUTE OF EDUCATION SCIENCES, <http://ies.ed.gov/aboutus/> (last visited Mar. 5, 2010).

<sup>105</sup> *NSF at a Glance*, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/about/glance.jsp> (last visited Sept. 5, 2010).

<sup>106</sup> *NIH Budget*, NATIONAL INSTITUTES OF HEALTH, (last visited Sept. 5, 2010). The 2009 federal stimulus bill contained approximately \$1 billion for research aimed at comparing the effectiveness of various treatments for illness and disease. See Robert Pear, *U.S. to Compare Medical Treatments*, N.Y. TIMES, Feb. 15, 2009, available at <http://www.nytimes.com/2009/02/16/health/policy/16health.html>.

<sup>107</sup> While the National Institute of Justice funds empirical research aimed at "improving the justice system and preventing crime," it generally does not fund such research on the civil side. *Research Agenda and Goals*, NATIONAL INSTITUTE OF JUSTICE, <http://www.ojp.usdoj.gov/nij/about/research-agenda.htm>; 42 U.S.C. § 3721(1) (2006) (stating that the purposes of the NIJ include "improving Federal, State, and local criminal justice systems and related aspects of the civil justice system").

<sup>108</sup> *Technology Incentive Grants Program*, LEGAL SERVICES CORPORATION, <http://tig.lsc.gov/> (last visited Sept. 5, 2010). The awards are available only to civil legal aid programs that already receive other LSC funding. *Technology Incentive Grants Program: Process*, LEGAL SERVICES CORPORATION, <http://tig.lsc.gov/process.php> (last visited Sept. 5, 2010). LSC's Research Institute, headed by Alan

Justice Institute, which funds state courts and their partners to engage in a variety of activities, including research regarding the effectiveness of court services, will have a \$5.1 million budget.<sup>109</sup> While other federal agencies have small amounts of money available for related research, little of that funding is spent to evaluate access to justice tools.<sup>110</sup> Even if all available TIG and SJI funds were used to evaluate access to justice interventions, the \$8.6 million available this year would constitute just 4% of the Institute of Education Sciences' budget and a tiny fraction of a percent of the NIH's budget. The lack of a significant federal role in funding assessments of access to justice tools contrasts unfavorably with the national governments of Great Britain and other developed countries, which do support such research.<sup>111</sup>

State governments are just starting to step into the void, but their own persistent and growing funding shortfalls — particularly for the judiciary — make any significant dedication of resources difficult.<sup>112</sup> The California judiciary is leading the way by using surveys, case file reviews, and other methods — although not yet controlled, random assignment studies — to assess the quality and efficacy of the many self-help tools the courts are adopting.<sup>113</sup> This effort received a boost in October 2009, with the enactment of the Shriver Civil Counsel Act, which requires California's Judicial Council to study the effectiveness of the legal representation and range of self-help services offered by new pilot projects that provide legal assistance in civil cases concerning basic human needs.<sup>114</sup> One goal of the evaluation is to determine "the impact of

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Houseman, was de-funded in the early 1980's and has never been re-established. ALAN W. HOUSEMAN, PAST AND CURRENT EFFORTS TO ENSURE QUALITY WITHIN THE CIVIL LEGAL ASSISTANCE COMMUNITY 4 (2004), available at [http://www.lri.lsc.gov/pdf/04/04houseman\\_quality.pdf](http://www.lri.lsc.gov/pdf/04/04houseman_quality.pdf).

<sup>109</sup> *FY 2010 Appropriation Will Enable SJI to Continue Focusing on National Court Issues*, STATE JUSTICE INSTITUTE, [http://www.sji.gov/article-sji\\_continued\\_focus.php](http://www.sji.gov/article-sji_continued_focus.php) (last visited Sept. 5, 2010).

<sup>110</sup> For example, the Department of Health and Human Services' Court Improvement Project funds some evaluations of lawyer representation in abuse and neglect cases. See Abel & Vignola, *supra* note 92, at 9. The Department of Justice has funding available to improve court functioning in juvenile justice, domestic violence, drug, mental health, and other types of cases. See *Grant Solicitation/Alternative Funding Resource Guide*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=GrtSol> (last visited Sept. 5, 2010). However, that funding is also available to a wide range of law enforcement and community organizations, so that only a small fraction goes to courts for evaluation purposes.

<sup>111</sup> Charn & Selbin, *supra* note 1, at 30.

<sup>112</sup> See William M. Welch, *Court Budget Cuts Swift Hand of Justice*, USA TODAY, Mar. 31, 2010, available at [http://www.usatoday.com/news/nation/2010-03-31-court-cuts\\_N.htm](http://www.usatoday.com/news/nation/2010-03-31-court-cuts_N.htm).

<sup>113</sup> See Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 CALIF. L. REV. 15, 24 (2010); MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 13-14 (describing California Administrative Office of the Courts' dedication of funding for implementation and evaluation of five pilot courthouse-based self-help programs). Washington State also has funded some interesting evaluations of the effect of improvements in the quality of representation for parents in dependency cases. OETJEN, *supra* note 32, at 7; CAROL J. HARPER ET AL., DEPENDENCY AND TERMINATION PARENTS' REPRESENTATION PROGRAM EVALUATION REPORT 31 (2005), available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2005%20Evaluation%20Report.pdf>.

<sup>114</sup> CAL. GOVT. CODE § 68651(c) (effective July 1, 2011). The Act is expected to generate approximately \$10 million for three years to fund the pilot projects. Mike McKee, *Assemblyman Introduces Civil Gideon Bill*, LEGALPAD, Mar. 4, 2009, [http://legalpad.typepad.com/my\\_weblog/2009/03/assemblyman-introduces-civil-gideon-bill.html](http://legalpad.typepad.com/my_weblog/2009/03/assemblyman-introduces-civil-gideon-bill.html) (last visited Aug. 2, 2010).



counsel on equal access to justice.”<sup>115</sup> Given that goal, the use of experimental techniques incorporating random assignment and control groups seems appropriate, although the judiciary has not yet settled on which methodology it will use.

Bar associations and nonprofit organizations also are trying to fund empirical examinations. In 2009, the Boston Bar Association began a pilot project using random assignment and control groups to examine the impact of providing legal representation to disabled and other at-risk tenants facing eviction from their homes.<sup>116</sup> And Oregon-based NPC Research has created a detailed proposal for a similar study and is in the process of seeking foundation support.<sup>117</sup> Neither effort has generated results yet.

Across the nation, courts are adjudicating rights, and in many cases extinguishing them, while people of goodwill try to provide a broad range of tools to help. But goodwill and common sense can only take us so far. The pressing question of our time is, simply, “What works?” The need for research is intense. We must identify the financial resources sufficient to fund the necessary inquiries. Our courts, our communities, and the most vulnerable members of our society should not have to feel their way.

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<sup>115</sup> CAL. GOV’T. CODE § 68651(c) (effective July 1, 2011). Other goals of the evaluation are examining the “effect on court administration and efficiency, and enhanced coordination between courts and other government service providers and community resources, . . . the benefits of providing representation to those who were previously not represented, both for the clients and the courts, . . . the impact of the pilot program on families and children [and] . . . the continuing unmet needs.” *Id.*

<sup>116</sup> BOSTON BAR ASS’N, NEWS RELEASE: MA CIVIL RIGHT TO COUNSEL PILOT PROJECTS LAUNCHED (July 13, 2009), available at [http://www.bostonbar.org/prs/nr\\_0809/PilotProject071309.htm](http://www.bostonbar.org/prs/nr_0809/PilotProject071309.htm).

<sup>117</sup> NPC RESEARCH, CIVIL RIGHT TO COUNSEL SOCIAL SCIENCE STUDY DESIGN REPORT 9-10 (2009).

# IN PRAISE OF THE GUILTY PROJECT: A CRIMINAL DEFENSE LAWYER'S GROWING ANXIETY ABOUT INNOCENCE PROJECTS

ABBE SMITH\*

## I. Introduction

There is nothing more compelling than a story about an innocent person wrongly convicted and ultimately vindicated. An ordinary citizen is caught up in the criminal justice system through circumstances beyond his or her control, spends many years in prison, and then one day, with the assistance of a dedicated lawyer, is freed. Like many people, I am drawn to such stories. I have even told one myself.<sup>1</sup>

This is the rare crime story with a happy ending. The vindicated person emerges from prison and falls into the loving arms of family and friends. The lawyer is embraced as well. The front page of the local newspaper carries a photograph of the celebration.<sup>2</sup> Sometimes even the victim is pleased.<sup>3</sup>

Often, when DNA is behind a vindication, not only is the innocent person exonerated but the true perpetrator is identified.<sup>4</sup> This is a significant achievement even though it can also lead

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<sup>1</sup> See generally ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY (2008) [hereinafter ABBE SMITH, CASE OF A LIFETIME] (recounting the story of Patsy Kelly Jarrett, an innocent woman who served nearly thirty years in prison for a murder and robbery she did not commit). Unfortunately, Jarrett will never be fully vindicated because, as in the vast majority of cases, there was no DNA evidence in the case. Her conviction was based on the shaky testimony of a single eyewitness. *Id.* at 26-27.

<sup>2</sup> Of course, this illustration is simplistic. Many wrongfully convicted lose more than their freedom. They lose family, community, livelihood, reputation, and any semblance of who they once were. See *id.* (describing how during Jarrett's incarceration both of her parents died and, by the time she was released, she had spent more time behind bars than outside of them). Most have a very hard time making the transition back into society. See generally Urban Institute, Prisoner Reentry, <http://www.urban.org/Pressroom/prisonerreentry.cfm> (last visited May 30, 2010) (noting the obstacles prisoners face when they are released from prison); JENNIFER GONNERMAN, LIFE ON THE OUTSIDE: THE PRISON ODYSSEY OF ELAINE BARTLETT (2004) (telling the story of a mother convicted of being a drug mule under New York's harsh Rockefeller drug laws, and the difficulties she faced when she finally emerged from prison).

<sup>3</sup> See generally JENNIFER THOMPSON-CANNINO & RONALD COTTON, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (recounting a victim's rape and her mistakenly identified perpetrator's wrongful conviction, exoneration, and aftermath). Needless to say, the coming together of Thompson-Cannino, the victim, and Ronald Cotton, the mistakenly identified perpetrator, is extraordinary. An exoneration is not usually "redemptive" for victims or their families. It cannot make the crime go away or bring back a loved one.

<sup>4</sup> See Thomas McGowan, Innocence Project, Freeing the Innocent and Identifying True Perpetrators, <http://www.innocenceproject.org/Content/1501.php> (Aug. 1, 2008) (telling the story of a former

apologists for the system—even police and prosecutors implicated in the wrongful conviction—to proudly declare that the system “worked.”<sup>5</sup>

Of course, the system did not exactly “work” for the innocent person who spent years in prison, and it is morally blind—or at least myopic—to suggest otherwise.<sup>6</sup>

Fictional—or fictionalized—stories of innocent people wrongly convicted have always abounded, drawing us to bookstores and movie theaters. From classic dramas like *The Wrong Man*,<sup>7</sup> *To Kill a Mockingbird*,<sup>8</sup> and, more recently, *A Lesson before Dying*,<sup>9</sup> to popular comedies like *My Cousin Vinny*,<sup>10</sup> who does not love a story about innocence? Not to mention true stories about innocence vindicated, like that of Rubin “Hurricane” Carter,<sup>11</sup> Ron Williamson,<sup>12</sup> Ronald Cotton,<sup>13</sup> and many others.<sup>14</sup>

The work of lawyers, journalists, and others involved in the “innocence movement”<sup>15</sup>—or, as one participant has called it, the “innocence revolution,”<sup>16</sup>—has been justly lauded. In the

Texas inmate exonerated by DNA after serving twenty-three years for a rape he did not commit, and noting that in nearly 40% of DNA exonerations the actual perpetrator is identified).

<sup>5</sup> See, e.g., Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, available at [http://www.nytimes.com/2006/01/26/opinion/26marquis.html?\\_](http://www.nytimes.com/2006/01/26/opinion/26marquis.html?_) (Oregon prosecutor and Vice President of the National Association of District Attorneys arguing that the error rate in the criminal justice system is miniscule and the appellate court system sufficiently protects the few innocents wrongly convicted at trial); see also Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508, 519-20 (2005) (arguing that few of the “exonerated” are innocent and that most have simply “wriggle[d] through some procedural cracks in the justice system”).

<sup>6</sup> Laurie Aucoin, *Righting Wrongful Convictions*, NW. MAG., Spring 1999, available at <http://www.northwestern.edu/magazine/northwestern/spring99/convictions.htm> (quoting death penalty lawyer Bryan Stevenson: “[t]o be told afterwards that the system works . . . is cruel”).

<sup>7</sup> THE WRONG MAN (Warner Bros. 1956). This movie, starring Henry Fonda and Vera Miles, was based on the true story of Christopher Emmanuel (“Manny”) Balestrero, a musician who was wrongly identified as a bank robber.

<sup>8</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); *TO KILL A MOCKINGBIRD* (Brentwood Prods. 1962).

<sup>9</sup> ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993); *A LESSON BEFORE DYING* (Ellen M. Krass Prods. 1999).

<sup>10</sup> MY COUSIN VINNY (Palo Vista Prods. 1992).

<sup>11</sup> See SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE: THE UNTOLD STORY OF THE FREEING OF RUBIN “HURRICANE” CARTER* (1991); *THE HURRICANE* (Universal Pictures 1999) (film version of *LAZARUS AND THE HURRICANE*, starring Denzel Washington); see also RUBIN “HURRICANE” CARTER, *THE SIXTEENTH ROUND: FROM NUMBER 1 CONTENDER TO #45472* (1974) (Carter’s memoir of his wrongful conviction and incarceration); BOB DYLAN, *Hurricane, on DESIRE* (Columbia Records 1976) (based on Carter’s book).

<sup>12</sup> See JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006) (nonfiction book about Ron Williamson’s wrongful capital murder conviction in small town Oklahoma).

<sup>13</sup> See generally THOMPSON-CANNINO & COTTON, *supra* note 3; *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997) (relating the story of Ronald Cotton’s wrongful conviction for rape in a documentary film format).

<sup>14</sup> See, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

<sup>15</sup> See Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 101-02 (2002); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134

relatively few years since prisoners began to be freed because of post-conviction DNA testing,<sup>17</sup> advocates for the innocent have accomplished “breath-taking . . . results.”<sup>18</sup> They have ushered in “an exciting new period of American criminal justice,”<sup>19</sup> a “transformation,”<sup>20</sup> that is truly “groundbreaking.”<sup>21</sup> Some have proclaimed the innocence movement “a new civil rights movement” of the twenty-first century.<sup>22</sup>

Because of the publicity attending exonerations, the narrative of innocence—with its tales of bungled or corrupt police work, mistaken or bought witnesses, coerced or false confessions, unethical or incompetent lawyers, and phony science—has caught fire, leading to important legislative changes and some new police practices.<sup>23</sup> Most importantly, the narrative may be trickling down to jurors. Armed with these stories, jurors might view questionable evidence with greater skepticism, and in so doing, ensure that the prosecution meets its burden of proof.<sup>24</sup>

Given all this—the draw of innocence, the importance of vindicating innocence, the fact that innocence advocacy may have helped level the criminal justice playing field, the *goodness* of defending the innocent<sup>25</sup>—how can a criminal defense lawyer have the *audacity*, the *nerve* to

(2008); Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 234 (2006) [hereinafter Findley, *The Pedagogy of Innocence*].

<sup>16</sup> Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) (emphasis added).

<sup>17</sup> See Innocence Project, Know the Cases, <http://www.innocenceproject.org/know> (last visited Apr. 24, 2010) (noting that exonerations began in 1989).

<sup>18</sup> Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 619 (2005) (“Despite the undisputable fact that the work done by the original Innocence Project and many of its progeny has been extraordinary in its quality and absolutely breath-taking in its results, the proliferation of the institutional form of the law school-based ‘innocence project’ raises some troubling issues within the larger world of criminal and capital defense.”).

<sup>19</sup> Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237.

<sup>20</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549 [hereinafter Medwed, *Innocentrism*].

<sup>21</sup> Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004); see also Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 5 n.6 (2009) (referencing forensic scientist Edward T. Blake’s groundbreaking DNA work).

<sup>22</sup> See Press Release, Innocence Project, As 100th Innocent Prisoner is Freed by DNA Tests, Innocence Network Convenes to Map the Future of “New Civil Rights Movement” in Criminal Justice (Jan. 17, 2002), <http://www.deathpenaltyinfo.org/article.php?did=280&scid=1>.

<sup>23</sup> See Medwed, *Innocentrism*, *supra* note 20, at 1549-50, 1554-55.

<sup>24</sup> See *id.* at 1566-67 (discussing the ways in which defense lawyers can use jurors’ exposure to wrongful convictions). Increased juror demand for high quality scientific evidence may also be the result of the so-called “CSI Effect,” in which the television show *CSI* and its progeny have helped to create new juror expectations regarding evidence at trial, and an increasingly technological society generally. *Id.* at 1567; see also Hon. Donald Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006).

<sup>25</sup> See generally Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) (discussing the importance of and challenges in defending the innocent). As to the general “goodness” of defending

complain?<sup>26</sup> Why can't Innocence Projects and "Guilty Projects"—the traditional law school criminal defense clinic<sup>27</sup>—coexist in peace, each making an important contribution? What possible concerns could be raised that are not rooted in envy?

In this essay I will discuss three growing concerns about Innocence Projects: first, the tendency toward innocence "one-upmanship" or arrogance; second, the focus on innocence—especially DNA-proven innocence—as the chief currency in criminal justice reform; and third, the popularity and increasing ascendancy of Innocence Projects at law schools.

## II. To My Friends in the Innocence Movement: Giving Credit Where Credit is Due

I acknowledge that people I know and admire run Innocent Projects. Some are dear friends. Most used to be indigent criminal defense lawyers—public defenders, mostly—before they took up the mantle of innocence. A few have expressed discomfort with the nomenclature; they would have preferred to call their program a post-conviction, criminal appellate, or prisoner advocacy clinic. But they acknowledge that they might not be running a program at all if it were not called an Innocence Project.

These are terrific lawyers who are doing important work. Not only are they getting innocent people out of prison, they are casting light on persistent, institutional problems in the criminal justice system, such as inadequate standards and pay for court-appointed counsel, reliance on junk science, lack of safeguards in the use of eyewitness testimony, lack of safeguards in the use of snitch testimony, unreliable "confessions," and resistance by police and prosecutors to disclosing exculpatory material.<sup>28</sup>

They are also terrific teachers, who think hard about the best way for students to learn about a range of matters—substantive, strategic, ethical—when representing factually innocent prisoners.<sup>29</sup> Most teach about and model the values at the heart of criminal defense ethics: hard

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innocents, when I mentioned to a good (nonlawyer) friend that I was writing an essay raising concerns about Innocence Projects, she was dismayed. "But everyone loves Innocence Projects," she said.

<sup>26</sup> Happily, I am not the only naysayer. See, e.g., Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001); Steiker & Steiker, *supra* note 18.

<sup>27</sup> See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1984) (making plain that the work of criminal defense lawyers is, by and large, defending the guilty, not the innocent); Stanley A. Goldman, *In Defense of the Damned*, 5 OHIO ST. J. CRIM. L. 611, 613 (2008) ("In the real world . . . criminal defense attorneys spend most of their time representing either those who probably are guilty or whose innocence will never be definitively established.").

<sup>28</sup> See also Emilie Lounsberry, *New Jersey Report Calls for Assessing Eyewitness' Validity*, PHILADELPHIA INQUIRER, June 22, 2010, available at [http://www.philly.com/inquirer/front\\_page/20100622\\_New\\_Jersey\\_report\\_calls\\_for\\_assessing\\_eyewitnesses\\_validity.html](http://www.philly.com/inquirer/front_page/20100622_New_Jersey_report_calls_for_assessing_eyewitnesses_validity.html) (noting the recognition by some jurisdictions of the need for safeguards against unreliable testimony). See generally ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 123-43 (2007) (discussing prosecutorial misconduct); Norman L. Reimer, *The Culture of Non-Disclosure*, THE CHAMPION, Jan./Feb. 2010, at 7 (same). For a collection of articles and other materials connected to a working conference on improving the disclosure of evidence by police and prosecutors held at the Benjamin N. Cardozo School of Law in 2009, see Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. (forthcoming 2010).

<sup>29</sup> See, e.g., Findley, *The Pedagogy of Innocence*, *supra* note 15; Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1135 (2002-2003) [hereinafter Medwed, *Actual Innocents*]. See generally Jan Stiglitiz et al., *The Hurricane Meets*

work, loyalty, and passionate commitment—along with the vital importance of thorough investigation.<sup>30</sup>

Some of my Innocence Project friends will wonder whether I am just being provocative here. I acknowledge that this would not be a wild accusation in view of some of the things I have written.<sup>31</sup> Although I believe in a certain amount of provocation—no institution, institutional actor, or purported *movement* should be beyond question or critique—this essay is also the product of a genuine, growing concern. Let me now get to that.

### III. The Arrogance of Innocence

A couple of years ago, an e-mail flyer made its way across the Internet announcing the renaissance of the Midwestern Innocence Project, sparked by a fund-raising event at which author John Grisham spoke. This led to the Project hiring its first, full-time executive director, and a full-time University of Missouri–Kansas City Law School clinical professor who would serve as legal director.<sup>32</sup>

As I read the e-mail flyer from the Midwestern Innocence Project, I became increasingly upset. It said: “The Midwestern Innocence Project is committed to exonerating innocent people who are serving time in prison for a crime they did not commit. We do this by providing pro bono legal and investigative services to inmates with a substantial claim of innocence.”<sup>33</sup> This was fine, but then I read further. In bigger font, it said:

WE DO NOT HELP GUILTY INMATES LESSEN THEIR SENTENCES OR GET OFF ON TECHNICALITIES.<sup>34</sup>

“Technicalities”? Why would an organization devoted to representing convicted prisoners ever use the term *technicality* to describe the work they perform? Do they mean contesting rulings from criminal trials under *Miranda v. Arizona*,<sup>35</sup> *United States v. Wade*,<sup>36</sup> or

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*the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2001-2002); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921 (2002).

<sup>30</sup> See generally Criminal Justice Section, American Bar Association, *Defense Function*, in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/dfunc\\_toc.html](http://www.abanet.org/crimjust/standards/dfunc_toc.html); Findley, *The Pedagogy of Innocence*, supra note 15, at 241-44 (discussing the centrality of factual investigation in Innocence Projects).

<sup>31</sup> See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) [hereinafter Smith, *Can You Be a Good Person and a Good Prosecutor*] (discussing the morality of prosecution under an unduly harsh criminal justice regime).

<sup>32</sup> Email newsletter from the Midwestern Innocence Project, “Justice For All” (winter 2008) (on file with author).

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

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

<sup>35</sup> 384 U.S. 436, 498-99 (1966) (requiring that suspects subjected to custodial interrogation be advised of their right to silence and to counsel).

<sup>36</sup> 388 U.S. 218, 236-37 (1967) (noting the problem of mistaken identification and holding that a pretrial lineup was a critical stage of the prosecution requiring the assistance of counsel).

*Brady v. Maryland*?<sup>37</sup> Do they mean challenging whether the accused received effective assistance of counsel under the nearly impossible to meet *Strickland v. Washington* standard?<sup>38</sup> How could these kinds of challenges be mocked as mere technicalities when Innocence Projects have shown that false confessions, eyewitness mistakes, police and prosecutorial misconduct, and incompetent counsel—the very subjects of these cases—are at the root of so many wrongful convictions?<sup>39</sup>

Adding insult to injury, the flyer then said: “*Our* clients were in the wrong place at the wrong time and are unfortunate victims of imperfections within the American criminal justice system.”

I do not know the intent behind the flyer, but is this kind of one-upmanship—this self-righteousness and *superiority*—necessary to uncovering individual injustice or promoting criminal justice generally? Why must we feel compelled to identify and distinguish the wheat from the chaff, the “deserving” from the “undeserving” poor,<sup>40</sup> the “truly suffering” from the “fakers” and “malingerers”? Not to mention that it can almost always be said that criminal defendants—both guilty and not—were “in the wrong place at the wrong time.”<sup>41</sup> By and large, if they were home in bed, they probably wouldn’t be in the fix they find themselves in.<sup>42</sup>

As to the notion of “misfortune” or “victimhood,” I worry that we as a culture have an increasingly narrow conception of what these things mean. Virtually no one who ends up in criminal court is fortunate. Criminal court, like most poor peoples’ courts, is the land of the unfortunate, the wretched, the cast out. I often tell my students they should thank their lucky stars that they were born with opportunities and ability, because it is a matter of luck that they do not have to live their clients’ lives. I certainly thank mine every time I leave a jail or prison.

The problem with “victimhood” is that it has come to mean only one thing: to be victimized by crime.<sup>43</sup> That one thing has been used to ratchet up punishment in this country to a level unheard of in the rest of the western world. Let me also note that victims and perpetrators

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<sup>37</sup> 373 U.S. 83, 87-88 (1963) (requiring the prosecution to disclose exculpatory and impeaching material that is material either to guilt or punishment).

<sup>38</sup> 466 U.S. 668, 687 (1984) (establishing a two-prong test for ineffective assistance of counsel: that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s performance, the result would have been different). *Strickland v. Washington* basically gutted the magnificent *Gideon v. Wainwright* decision, 372 U.S. 335 (1963), which held that the Sixth Amendment right to counsel is fundamental in criminal cases and thus requires the appointment of counsel to indigent defendants. *Id.* at 343-45; see also Abbe Smith, *Strickland v. Washington: Gutting Gideon and Providing Cover for Incompetent Counsel*, in *WE DISSENT* 188 (Michael Avery ed., 2009).

<sup>39</sup> See generally Rosen, *supra* note 19 (highlighting the role that mistaken identity, false confessions, and poor representation play in bringing about wrongful convictions).

<sup>40</sup> See generally HERBERT J. GANS, *THE WAR AGAINST THE POOR* (1995) (offering a critique and analysis of the rhetoric used to describe and stigmatize the poor).

<sup>41</sup> By and large, if they were home in bed, they probably wouldn’t be in the fix they find themselves in.

<sup>42</sup> Unfortunately, being home in bed is no protection from mistaken identification cases.

<sup>43</sup> See e.g., The National Center for Victims of Crime, Trauma of Victimization, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32371> (last visited July 15, 2010).

tend to come from the very same impoverished communities, they often suffer from the same kinds of deprivation, and today's victim may be tomorrow's perpetrator and vice versa.<sup>44</sup>

There is a level of self-righteousness that gets under my skin when people talk about Innocence Projects. I confess that even the name of the organization rankles. That is why I sometimes make a point of saying I run a Guilty Project.

At a conference in 2009, one of the founders of The Innocence Project, Barry Scheck,<sup>45</sup> remarked that he didn't consider himself a criminal defense lawyer because he had not represented a guilty person in twenty years.<sup>46</sup>

There are understandable rationales for this comment: Scheck may have been joking, or his expressed sentiment may have been the politically savvy thing to say. The Midwestern Innocence Project's Internet flyer and Scheck's remark arguably reflect political reality and organizational savvy. The conservative right often rails against Innocence Projects,<sup>47</sup> arguing that they exaggerate the number of wrongful convictions, that they try to undo too many convictions, and, ultimately, that they free criminals. In this respect, to the right, Innocence Projects are just like *my* Guilty Project. And yet, at least in principle, protecting the innocent is one of the few things in the criminal justice system that everyone can agree on—the left and the right, defense lawyers and prosecutors, police and the public.

In addition, in view of legislation pending in many states to ensure the preservation of DNA evidence or provide a right of access to DNA evidence by the accused—a signature issue for Innocence Projects<sup>48</sup>—innocence leadership might want to appeal to the broadest possible swath of legislators, many of whom ran for office on an anti-crime platform. Associating themselves with the traditional criminal defense bar—the chief *apologists* for criminals—might not be strategically wise.

But, there is also an arrogance to the “innocentrism”<sup>49</sup> of the innocence movement. They are the righteous ones, the virtuous ones. Unlike criminal defense lawyers, who are ethically

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<sup>44</sup> See generally Abbe Smith & Ilene Seidman, *Lawyers for the Abused, Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415 (2001) (noting the shared characteristics of poverty observable in the lives of many clients, whether they are victims of crimes or the accused.).

<sup>45</sup> Barry Scheck and Peter Neufeld founded The Innocence Project in 1992. See Innocence Project, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited May 2, 2010). As of June 2010, 255 people in the United States have been exonerated through DNA testing. The exonerated prisoners had served an average of thirteen years before being released. *Id.*

<sup>46</sup> The remark by Scheck was made at a conference he and I attended at Hofstra University School of Law (*Power, Politics & Public Service: The Legal Ethics of Lawyers in Government*) in September 2009. I consider Scheck a friend and a criminal justice hero. See generally Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 497-509 (1999) (listing eight “heroes, prophets, and saints of criminal defense”). Although Scheck is not among those listed, he could easily have been. See also Raymond, *supra* note 26, at 459 (arguing that a criminal lawyer “should not announce the innocence of a particular client, or even announce more generally that he ‘only represents innocent clients’” as a matter of professional responsibility).

<sup>47</sup> See Medwed, *Innocentrism*, *supra* note 20, at 1552-55 (responding to criticism from the right that the innocence movement exaggerates the number of wrongful convictions and that proposed reforms will mean more criminals will go unpunished).

<sup>48</sup> See Innocence Project, Model Legislation, <http://www.innocenceproject.org/fix/Model-Legislation.php> (last visited Apr. 25, 2010) (offering model legislation on DNA testing and evidence preservation).

<sup>49</sup> Medwed, *Innocentrism*, *supra* note 20, at 1549.



bound to pursue their clients' interests (even if that client is guilty), the innocence advocate looks after *everyone* in the system. As one commentator notes:

In the criminal justice system, neither side wins when an innocent person is convicted. The victim is denied justice because the real culprit remains unpunished. Police and prosecutorial resources are squandered. Public confidence in the system is undermined if and when the mistake is revealed. And, of course, the innocent person who is convicted suffers most of all.<sup>50</sup>

Innocence movement lawyers and their compatriots see this and trumpet it. They are saving the wrongfully convicted and the entire system.

Perhaps this crusading view has led to the construction of a related identity for those working within the innocence movement. Innocence advocates might come to see themselves as not merely righting a specific wrong—vindicating a wrongfully convicted person—but caring for everyone, redressing all systemic wrongs, and doing something that approaches *real justice*. Unlike changeable, whimsical *ordinary justice*—the kind of justice that is in the eyes of the beholder—no one would disagree with this justice.<sup>51</sup>

I have written about the problem of arrogance in the culture of prosecution.<sup>52</sup> The obligation to do justice, and related professional identity plays a role there, too. A similar acculturation process—the “occupational hazard” of defining and being in charge of *justice*<sup>53</sup>—might be at work here. Innocence advocates with DNA are armed with both justice and certainty, a lethal combination.<sup>54</sup>

This is not to say that criminal defense lawyers do not have our own arrogance; at the very least, we have the arrogance to call others arrogant.<sup>55</sup> But humility might be a more regular part of the job of defending the guilty. Even the very best defenders lose a lot. And when we do win, there is seldom public acclaim.

<sup>50</sup> Rosen, *supra* note 19, at 287. In addition, Rosen accurately notes that, with few exceptions, the innocence movement consists largely of lawyers from the criminal defense community. *Id.*

<sup>51</sup> See generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009) (documenting the elusiveness and randomness of justice in courtrooms across America). Many scholars have discussed the malleability of “justice.” See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1999).

<sup>52</sup> See Smith, *Can You Be a Good Person and a Good Prosecutor*, *supra* note 31, at 375-79 (discussing the prosecutor’s duty to seek justice and the tendency toward self-importance, vanity, and grandiosity).

<sup>53</sup> Wendy Kaminer, *Games Prosecutors Play*, *THE AMERICAN PROSPECT*, Sept. 1, 1999, available at [http://www.prospect.org/cs/articles?article=games\\_prosecutors\\_play](http://www.prospect.org/cs/articles?article=games_prosecutors_play) (“The majority of prosecutors, police officers, and federal law enforcement agents are probably fair, ethical, and even compassionate public servants. But arrogance, self-righteousness, and a tendency to push people around are occupational hazards in law enforcement.”).

<sup>54</sup> See David Feige, *The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003 (Magazine), available at <http://www.nytimes.com/2003/06/15/magazine/the-way-we-live-now-6-15-03-essay-the-dark-side-of-innocence.html?pagewanted=1> (noting the “hubris of certainty” in the context of DNA-proven innocence).

<sup>55</sup> See SMITH, *CASE OF A LIFETIME*, *supra* note 1, at 32-33 (describing the culture of criminal defense).

#### IV. Is Innocence the Best Currency for Criminal Justice Reform?

There is no question that our criminal justice system is in need of reform. Although the number of wrongful convictions cannot accurately be tallied—DNA is available in only a tiny fraction of criminal cases, and the problems underlying the 250-plus DNA exonerations are not unique to those cases<sup>56</sup>—it is fair to say that serious problems plague our system.

The innocence story is important, because it reminds people of the extraordinary—disgraceful, really—number of people incarcerated in this country. As of the last Justice Department count, 2.3 million people are currently in US jails or prisons.<sup>57</sup> This is more than any other country in the world in proportion to the general population.<sup>58</sup> Perhaps the public would be less inclined to lock up so many people if it believed some were innocent. There is some evidence to suggest that, in the wake of DNA exonerations, juries are less inclined to impose death sentences.<sup>59</sup>

At their best, innocence stories include important, related stories about the state of criminal justice in this country: stories about the ever-present problems of mistaken identification, police and prosecutorial misconduct, defense lawyer incompetence, and so on. But, too often, the stories are regarded as isolated, individual tragedies that are ultimately uncovered and fixed by the system.<sup>60</sup>

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<sup>56</sup> See Samuel Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006), available at <http://www.michiganlawreview.org/articles/souter-passant-scalia-rampant-combat-in-the-em-marsh-em> (observing that “the true number of wrongful convictions is unknown and frustratingly unknowable”); Innocence Project, Know the Cases, <http://www.innocenceproject.org/know> (last visited June 28, 2010) (reporting that, as of June 2010, there have been 255 exonerations due to DNA evidence).

<sup>57</sup> See Matt Kelley, *U.S. Prison Growth is Slowing*, Change.org: Criminal Justice, Dec. 11, 2009, [http://criminaljustice.change.org/blog/view/us\\_prison\\_growth\\_is\\_slowing](http://criminaljustice.change.org/blog/view/us_prison_growth_is_slowing) (reporting that, according to Justice Department statistics, 2.3 million people were behind bars in 2008).

<sup>58</sup> Adam Liptak, *Inmate Count in U.S. Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html>.

<sup>59</sup> See Laura Sullivan, *Death Row Cases Decline in 2009*, NATIONAL PUBLIC RADIO: MORNING EDITION, Jan. 4, 2010, <http://www.npr.org/templates/story/story.php?storyId=122102218> (reporting that judges and juries handed down fewer death sentences in 2009, making it the year with the fewest people sent to death row since the death penalty was reinstated in 1976); Chris McGreal, *U.S. Imposes Fewer Death Penalties as DNA Evidence See More People Cleared*, THE GUARDIAN, Dec. 18, 2009, available at <http://www.guardian.co.uk/world/2009/dec/18/death-penalty-falls-us> (noting that the number of death sentences in the US fell to 106 in 2009, which was the seventh straight year the number has fallen).

<sup>60</sup> Unfortunately, the same system often fights claims of innocence, even those based on DNA. First, some prosecutors resist DNA testing. See Innocence Project, Fighting DNA Tests that Can Prove Innocence, <http://www.innocenceproject.org/Content/1998.php> (last visited Apr. 25, 2010). Second, when DNA exonerates a convicted rapist, some prosecutors suddenly change their theory, calling the exonerated man an accomplice even though they had never claimed there was more than one perpetrator. See Rose French, *Tennessee Ex-Death Row Inmate's DNA Not Found on Jeans*, CHATTANOOGA TIMES FREE PRESS, Apr. 2., 2009, available at <http://www.timesfreepress.com/news/2009/apr/02/tennessee-ex-death-row-inmates-dna-not-found-jeans/?print> (recounting the DNA exoneration and attempted retrial of Paul House, on the theory that others were involved in the crime along with House); Innocence Project, Tennessee Man Still on Death Row, <http://www.innocenceproject.org/news/Blog-Search.php?check=true&tag=255> (last visited Apr. 25, 2010) (same).

The dominance of the rhetoric of innocence<sup>61</sup> also comes at the expense of the not-quite-so-innocent but equally unfairly treated. Examples of the not-quite-so-innocent run the gamut. There are criminal defendants who are guilty of something but not the worst thing they are charged with. There are defendants who are guilty of something other than what they are charged with. There are defendants who committed the crime charged but with significant mitigating or extenuating circumstances. There are defendants who committed the crime but they had never done anything like this before, they lost control in a trying situation. There are defendants who committed the crime and it is no wonder in view of how they came into the world and what they endured after. There are defendants who committed the crime and have no excuse whatsoever but, as death penalty lawyer Bryan Stevenson says, “[e]ach of us is more than the worst thing we ever did.”<sup>62</sup> For every crime there is a story. Good lawyers find the story.

But the defendant with the factual innocence story throws every other defendant under the bus.

These not-quite-innocents—the ones whose lawyer too often had no file, had hardly met them, conducted no investigation, and could barely try a shoplifting case much less a capital murder—have no story unless they are also innocent. If they are not factually innocent, it does not matter whether they were coerced into confessing by a ruthless detective, prosecuted by an unscrupulous DA, or represented by a public defender carrying 900 cases.<sup>63</sup>

Compared to a story of factual innocence, these other stories will evoke a “cry me a river” eye-roll by prosecutors, judges, and the general public. The innocent will become the enemy of everyone else at every stage: pretrial, trial, sentencing, post-conviction, and parole.

Factual, DNA-proven innocence poses a threat to the fundamental legal principles underlying our system of justice, in particular to the *presumption of innocence*. The more we focus on those who can actually be proved innocent, the more we undercut the right of everyone to be presumed innocent unless the state proves otherwise.<sup>64</sup> Our system of justice emphasizes proof, not truth, because of the value we place on individual liberty and our abiding skepticism of state power.<sup>65</sup> To check that power we give the benefit of every reasonable doubt to the accused even if he or she *did it*. Thus, if proof is lacking, a factually guilty person may nonetheless be legally not guilty. A single-minded focus on factual innocence threatens this important safeguard, this check on the hubris of power.<sup>66</sup>

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<sup>61</sup> See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 387-88 (1995); see also Rosen, *supra* note 19, at 237-42.

<sup>62</sup> See SMITH, CASE OF A LIFETIME, *supra* note 1, at 227.

<sup>63</sup> See Marie-Pierre Py, *Public Defender System Fails Georgians and Their Lawyers*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 30, 2009, at 6A (a young public defender noting that, in thirteen months, she closed 900 cases, including felonies, and carried approximately 270 open cases at a time).

<sup>64</sup> See Feige, *supra* note 54 (“The obsessive focus on innocence runs the risk of eclipsing what should be the central issue of the criminal justice system—protecting the rights of everyone.”).

<sup>65</sup> See Alexander Volokh, *nGuilty Men*, 146 U. PA. L. REV. 173, 174 (1998) (creatively deconstructing Blackstone’s maxim that, it is “better that ten guilty persons escape, than that one innocent suffer”).

<sup>66</sup> See Goldman, *supra* note 27, at 622 (“How arrogant, lazy, and dangerously convinced of their own infallibility would police, prosecutors, and courts become if defendants had no advocate?”). *But see* Medwed, *Innocentrism*, *supra* note 20, at 1566-70 (arguing that a focus on factual innocence need not diminish “not guilty” and is not at odds with traditional criminal defense strategies).

A focus on factual, DNA-proven innocence also threatens to change the discourse about wrongful convictions. Convictions are wrongful even if the convicted person is guilty when there is demonstrable unfairness. Imprisonment is wrongful if the person in prison is serving a sentence disproportionate to the circumstances of the crime or who the person is or has become. Factual innocence has never been the gravamen of a wrongful conviction, and should not be.<sup>67</sup>

We are only a few years away from the fiftieth anniversary of the *Gideon* decision<sup>68</sup> and we have still not begun to fulfill its promise.<sup>69</sup> We continue to be a country in which there is rich man's justice and poor man's justice.<sup>70</sup> A focus on innocence alone will not breathe life into the right to counsel for the poor accused or convicted.

I worry, too, about what will happen when the DNA-exonerations dry up—as they one day will—and all the testing is on the front end. Will people say we do not need to look at these so-called systemic problems anymore because there are no innocent people in prison?

And then there is the question of prison. If we get all the innocent people out, does that mean prisons are no longer the brutal, dehumanizing places we know them to be?<sup>71</sup> Does it mean that the other-than-innocent people left in these institutions *deserve* to be there, and are unworthy of further concern?<sup>72</sup> Perhaps, too, with the innocent out, we do not have to think about either the conditions of confinement or the circumstances that lead some to prison and others to college.<sup>73</sup>

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<sup>67</sup> See generally Steiker & Steiker, *supra* note 18, 596-607 (questioning the normative distinctiveness of innocence as a problem in the administration of capital punishment in comparison with other, more endemic problems).

<sup>68</sup> *Gideon*, 466 U.S. at 343-45 (guaranteeing the right to counsel in criminal cases).

<sup>69</sup> See THE NATIONAL RIGHT TO COUNSEL COMMITTEE, THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52-101 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [hereinafter CONSTITUTION PROJECT] (documenting the continuing indigent criminal defense "crisis," because of underfunding, excessive caseloads, and other systemic problems); see also Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 741 (2006) (arguing that the quality of representation in criminal cases in the U.S. is a "product of fortuity . . . economic status, and . . . jurisdiction").

<sup>70</sup> See CONSTITUTION PROJECT, *supra* note 69, at 29-31, 50-64; see also David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762-63 (1993) (arguing that there are "two worlds of criminal defense" in the U.S., one for the poor and one for rich, and noting that the vast majority of defendants are represented by court-appointed lawyers who can barely "engage in individualized advocacy, let alone zealous advocacy"); Uphoff, *supra* note 69, at 744-67 (discussing the uneven right to counsel and the role of class in criminal defense).

<sup>71</sup> See, e.g., JOSEPH T. HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* (2003) (exploring life in and around American prisons, including an Illinois super-max prison); T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN'S PRISON* (2007) (memoir about a seventeen-year-old boy doing time in an adult prison); CRISTINA RATHBONE, *A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS* (2006) (journalist recounting day-to-day life for women in Massachusetts' Framingham Prison); see also TED CONOVER, *NEWJACK: GUARDING SING SING* (2001) (journalist's undercover account of prison life at Sing Sing Prison from a guard's perspective).

<sup>72</sup> See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911-12 (2009) (noting that the state owes a duty of care to prisoners not because of a prisoner's guilt or innocence but because of the state's choice to punish by incarceration); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 462-69 (2005) (discussing the conditions under which a state may legitimately limit citizens' freedom within a liberal democratic society).

<sup>73</sup> See generally WES MOORE, *THE OTHER WES MOORE* (2010) (telling the story of a young man who shares the same name, age, and background, as Rhodes Scholar Wes Moore, who was raised by a single

Innocence has been important currency in criminal justice reform, but it cannot be the only one. Too much of a focus on innocence can lead to de-emphasizing and devaluing other significant systemic problems.

V. The Ascendancy of Innocence Projects in Law Schools and What They Teach Students About Criminal Justice, Social Justice, and Themselves

Innocence Projects are increasingly popular in law schools. This makes sense for all of the reasons discussed in the Introduction. Innocence cases are compelling and intrinsically meaningful. Young law students are often looking for meaning in the generally cloistered legal academy. They want to know that, as lawyers, they can do something that matters, something *good*.

This is a fine thing, but there are hazards.

I worry that students in Innocence Projects representing only factually innocent people will think they can have a career in which, like Abraham Lincoln or Perry Mason, they represent only innocent people. Worse, I worry that they will come to think that it is somehow beneath them—as law students and lawyers—to represent people who actually did something wrong or bad.

One of the most important lessons students learn in a criminal defense clinic is that they are not so different from their clients, no matter who the client is or what he or she may have done. Students come away recognizing that we all make mistakes, do stupid things, lose our tempers, give in to temptation or greed, and fall in with the wrong crowd.<sup>74</sup> This is a transformative revelation for some. You cannot teach this generosity of spirit or lack of judgment when you represent only factually innocent people who have been wronged by the system. It is too easy to identify with an innocent person.<sup>75</sup> It is so much richer and more complicated to identify with a guilty one.<sup>76</sup> There is a *craft* to representing the guilty.<sup>77</sup>

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mother in the Baltimore ghetto, but is serving a life sentence for killing a police officer); JOHN EDGAR WIDEMAN, BROTHERS AND KEEPERS (1984) (comparing the life of John Edgar Wideman, Rhodes Scholar, novelist, and professor, who grew up in the Pittsburgh ghetto, with that of his brother, who is serving a life sentence for murder).

<sup>74</sup> See Babcock, *supra* note 27, at 179 (discussing the joy of learning from defending a woman “with a life as different from [the author’s] as could be imagined”).

<sup>75</sup> See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 264 (arguing that Innocence Project students “gain the perspective of those citizens who have been . . . banished from our communities . . . [and] come to see the humanity of individuals convicted of the most heinous crimes”). But note that these are *innocent people* convicted of heinous crimes and banished.

<sup>76</sup> See David Segal, *It’s Complicated*, N.Y. TIMES, May 2, 2010, at WK1 (discussing an increasingly complex modern world and noting that “a nagging sense of incomprehension is a perennial feature of the human experience”). I believe that this nagging *incomprehension*—exemplified by the fact that good people can do bad things, a fact which students in a criminal defense clinic inevitably encounter—makes criminal defense clinics the perfect setting for productive learning. See also Jane H. Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 24 (1997) (discussing the use of “disorienting moments” to teach social justice); Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 302-04 (2001) (same); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 51-52 (1995) (same).

I understand that innocent prisoners are in trouble and need and deserve excellent lawyers. I am not suggesting that no one represent them. Perhaps law professors who do not want to get their hands dirty—those who cannot handle the rough and tumble of criminal defense—should take Innocence Project cases.<sup>78</sup>

I worry that, because case selection or “screening” is the first thing that happens in Innocence Projects, students are being trained to be judges and juries, not advocates. First, they decide who is innocent. Then they defend them. The criteria for selection are, overwhelmingly, whether a client is innocent and whether students can prove it.<sup>79</sup>

This picking and choosing in the first instance—this *rationing* of access to justice—is not necessarily a good thing for young lawyers. It invariably emphasizes the idea that some clients are more deserving of the students’ efforts than others—based on exactly how innocent they are.<sup>80</sup> But, as George Sharswood wrote in the middle of the nineteenth century, the defendant has the “right to all the ingenuity and eloquence he can command in his defence . . . even if he has committed a wrong.”<sup>81</sup> To do otherwise, said Sharswood, would “usurp[] the functions of both judge and jury.”<sup>82</sup>

How will prospective defenders—a career path for many Innocence Project students—learn to defend without blinking or balking, usually without ever knowing the “truth,” if their training is all about picking worthy cases? If a lawyer is on the fence about taking on a case because it does not pass some kind of worthiness test, he or she may well be ambivalent and half-hearted about every aspect of client representation. This attitude undoubtedly underlies the bad lawyering at the root of many wrongful convictions: feckless or beleaguered lawyers feeling that their client is guilty anyway, so what the hell?

The right to counsel—and to high quality representation—cannot depend upon whether or not a lawyer believes the client is innocent. I worry that Innocence Projects fail to equip prospective lawyers with the tools, sensibility, and stamina to represent guilty, flawed people—people like most of us. This will translate into whatever legal career the student ends up choosing, not simply criminal defense. If you teach young lawyers that only some clients are deserving of representation, they might also think that some clients deserve a little more zealous representation than others.<sup>83</sup>

<sup>77</sup> See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1251-59 (2004) (discussing the craft in high volume public defense).

<sup>78</sup> I acknowledge that this is unfair, and that innocence cases can feel like any other post-conviction challenge. This is because *the other side seldom sees these cases as innocence cases*.

<sup>79</sup> See Medwed, *Actual Innocents*, *supra* note 29, at 1103-09 (describing case selection criteria for Second Look Program, an Innocence Project clinic at Brooklyn Law School).

<sup>80</sup> See *id.* at 1104 (“[W]e aimed to deploy our resources to what we perceived to be the *most deserving cases* and, not incidentally, make ourselves more attractive in grant proposals to prospective benefactors.”) (emphasis added).

<sup>81</sup> GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 39 (Philadelphia: T. & J.W. Johnson 1860).

<sup>82</sup> *Id.* at 27.

<sup>83</sup> See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 257 (recognizing that “the focus on innocence runs the risk of implicitly teaching students that only innocent prisoners are deserving of zealous legal representation”).

Of particular concern is arming young lawyers with the perspective, values, and “sustaining narratives” to become indigent criminal defenders who will not give up or burn out, something that is desperately needed.<sup>84</sup> We do not seem to be able to make a dent in the quality of indigent defense in many parts of the country, and we too often lose devoted, zealous defenders whose expertise and experience might make a difference in these punitive times.<sup>85</sup> I do not believe that students cutting their teeth on factual innocence cases only will help them to cope with high caseloads or hostile prosecutors, judges, and general public, later on.

Moreover, the innocence movement has yet to take on some of the most pervasive and important problems with criminal justice in this country, including the ubiquity of plea bargaining, which is often preceded by little or no investigation,<sup>86</sup> and the increasing power and discretion of prosecutors in investigation, charging, diversionary programs, whether the accused receives a jury or bench trial, and punishment.<sup>87</sup>

No doubt there are answers to all these questions, and thoughtful teachers and lawyers running Innocence Projects have addressed them in myriad ways.<sup>88</sup> But thoughtful teachers, lawyers, and law school administrators should also question the decision to create and fund an Innocence Project at all. There are trade-offs whether or not a law school replaces its existing criminal defense clinic with an Innocence Project,<sup>89</sup> or whether or not there is outside funding for such a Project so as not to threaten an existing program.<sup>90</sup> The question then, is why *this* clinic with its very few, very special clients, in a time when literally millions of people are incarcerated in this country with no access to lawyers,<sup>91</sup> and millions of people are struggling on the outside with consumer, disability, family, housing, and job problems, and no access to lawyers?<sup>92</sup>

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<sup>84</sup> Steiker & Steiker, *supra* note 18, at 621.

<sup>85</sup> See generally Py, *supra* note 63.

<sup>86</sup> See Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1225 (2005); see also Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005) (book review noting that 95.4% of adjudicated federal criminal cases are pleas of guilty or nolo contendere); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 n.17 (2004) (noting that in some jurisdictions, 99% of adjudicated criminal cases are guilty pleas).

<sup>87</sup> This has been the author’s experience practicing criminal law in Pennsylvania, New York, Massachusetts, Maryland, and the District of Columbia. See also Siegel, *supra* note 86, at 1231-37 (describing the extraordinary power prosecutors wield in criminal cases in South Carolina).

<sup>88</sup> See Findley, *The Pedagogy of Innocence*, *supra* note 15, at 250-61 (discussing how Innocence Projects teach ethics and values); Suni, *supra* note 29, at 930-69 (analyzing professional responsibility issues in Innocence Projects).

<sup>89</sup> See Suni, *supra* note 29, at 928 (noting that “full representation” Innocence Projects have usually been converted from existing defender clinics).

<sup>90</sup> See Medwed, *Actual Innocents*, *supra* note 29, at 1104 (noting that the decision to restrict the Second Look Program Clinic, Brooklyn Law School’s Innocence Project, to claims of actual innocence was partly to “make ourselves more attractive in grant proposals to prospective benefactors”).

<sup>91</sup> See generally MUMIA ABU-JAMAL, *JAILHOUSE LAWYER: PRISONERS REPRESENTING PRISONERS V. THE USA* (2009) (accounting of efforts, by longtime avowedly innocent death row inmate and jailhouse lawyers, on behalf of prisoners who cannot obtain actual lawyers).

<sup>92</sup> See Brennan Center for Justice, Letter in Support of Civil Access to Justice Act (S. 718, H.R. 3764) (Feb. 12, 2010), <http://www.brennancenter.org/content/resource/CAJACoalitionLtr/> (detailing the need for funding for lawyers to aid low-income individuals in civil cases).

## VI. Conclusion

Innocence Projects have more than made their mark in the criminal justice world. The 250-plus exonerations and accompanying publicity have cast a light on the conditions that give rise to wrongful convictions and have created a unique opportunity for reform. The work of Innocence Projects has galvanized a generation of law students, captivated the nation, and forever altered the way we think about criminal justice.

It is impossible not to recognize the importance of defending the innocent and freeing them from wrongful imprisonment.

But, compelling as these cases are, the conviction of innocents is not the only thing wrong with our criminal justice system. It may not even be the worst problem. We are the harshest, most punitive country on earth when it comes to incarceration, both in terms of numbers and the length of time we lock people up.<sup>93</sup> Mass incarceration—with its particular impact on impoverished nonwhite communities<sup>94</sup>—has become a hallmark of American life. Moreover, the conditions of confinement in U.S. prisons are so brutal that few prisoners emerge with the tools to make it on the outside.<sup>95</sup>

Getting innocents out of prison has done nothing to change this misguided approach to criminal justice.<sup>96</sup> Indeed, it may distract us from it.

There are important political, moral, and educational concerns raised by the growing dominance of the innocence movement in a time when so many are locked up and forsaken. I have tried to address some of these in this essay. Let us not forget about the guilty.

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<sup>93</sup> See *supra* notes 56-58 and accompanying text.

<sup>94</sup> See generally Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283 (2009) (discussing the impact of the current emphasis on incarceration on low-income communities and communities of color); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007) (same); NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2005) (same).

<sup>95</sup> See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Medea Chesney-Lind eds., 2002) (exploring the consequences of thirty years of harsh sentencing practices on prisoners, former prisoners, their families and communities); Sharon Dolovich, *Confronting the Costs of Incarceration—Forward: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237 (2009) (arguing that the U.S. criminal justice system relies too heavily on incarceration, which has become increasingly brutal); Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 129 (Almerindo E. Ojeda ed., 2008) (describing how lengthy imprisonment “breaks” prisoners, leaving them with “a very high risk of recidivism”).

<sup>96</sup> See Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307-11 (2009) (arguing that mass incarceration is not terribly effective at reducing crime or promoting public safety); Shawn D. Bushway & Raymond Paternoster, *The Impact of Prison on Crime*, in *DO PRISONS MAKE US SAFER? The Benefits and Costs of the Prison Boom*, 119, 144-45 (Steven Raphael & Michael A. Stoll eds., 2009) (noting the lack of evidence that our current criminal justice practices prevent crime).



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

JONATHAN A. RAPPING\*

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

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

## I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>93</sup> *Id.* at ¶ 2.

<sup>94</sup> *Id.* at ¶ 3.

<sup>95</sup> *Id.* at ¶ 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For information on suits in Michigan, visit [http://www.nlada.net/library/article/mi\\_supremecourt\\_orderinduncan04-30-2010\\_gideonalert](http://www.nlada.net/library/article/mi_supremecourt_orderinduncan04-30-2010_gideonalert). For information on suits in New York, visit [http://www.nlada.net/library/article/ny\\_highestcourttallowscasetoproceed05-06-2010\\_gideonalert](http://www.nlada.net/library/article/ny_highestcourttallowscasetoproceed05-06-2010_gideonalert).

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VI. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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