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The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel

RICHARD KLEIN*

INTRODUCTION

As the number of indigents charged with crimes has increased, in part due to expanded funding for police and prosecutors to fight the national and local "war on drugs," there has not been a corresponding increase of funding to provide counsel for indigent defendants. In fact, due to widespread financial difficulties impacting local and state governments, the money available for court-appointed counsel and public defenders has actually declined in many localities.¹

Inadequate funding has created a situation wherein overburdened defense counsel cannot possibly provide competent representation to all of the clients they are assigned to represent. Counsel who have committed their skills, energy, and careers to representing indigent defendants cannot be expected to tolerate circumstances where they are compelled to render the ineffective assistance of counsel.

This Article examines potential remedies available for counsel who are confronted by a defense delivery system which fails to provide funding sufficient to ensure the constitutionally mandated effective assistance of counsel. It is often only the defense counsel within the criminal justice setting who are concerned with the government's failure to comply with the Sixth Amendment. These counsel must therefore take action to rectify the constitutional deficiencies present in the current system.

Past actions by defense counsel, however, have not led to success by any means. For example, attempts by private court-appointed counsel to unite for increased funding and to engage in a strike were thwarted by a 1990 decision of the Supreme Court.² Moreover, class action suits on

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1. For example, in 1992 the budget for the public defender office in Tennessee was cut by 5.3%, John B. Arango, *Tennessee Indigent Defense System in Crisis*, CRIM. JUST., Spring 1992, at 42, and for the 1991-1992 fiscal year, funding for the Kentucky Department of Public Advocacy was reduced more than 5%, William R. Jones, *Defense of Poor Crisis Needs Funding Help*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Apr. 1992, at 3.

2. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

behalf of defendants denied their Sixth Amendment right to effective counsel have not accomplished their intended goals,³ and public defender offices have been intimidated by threats of local governments.⁴ If defense counsel are to effect meaningful changes, they must use broad-based litigation strategies aimed at challenging inequities in the system for the delivery of defense services.

I. THE PRIVATE BAR: INADEQUATE FUNDING FOR COURT-APPOINTED COUNSEL

Whereas the focus of institutional defenders has commonly been on increasing funding in order to hire more lawyers or provide more services for lawyers, the private court-appointed counsel who represent indigent defendants have been outspoken critics of the inadequate compensation provided to them. Their position is not without support. One recent study concluded that "[v]irtually no assigned counsel program in the country is adequately funded. In fact, the funding situation nationally is frequently and accurately characterized as a crisis."⁵

The quality of representation provided by inadequately compensated appointed counsel suffers in many ways.⁶ A prime cause of incompetent representation is the need of the attorney who is dependent on assigned counsel work for the mainstay of his practice to compensate for the inadequate pay per case he receives by handling more cases than he can properly represent.⁷

3. See *infra* part V.A.

4. See *infra* notes 369-74, 384-87 and accompanying text.

5. Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 16, 18.

6. The concepts of poor representation and insufficient reimbursement for counsel go hand in hand. See, e.g., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 10.1(A) (A.B.A. 1988) [hereinafter APPOINTMENT GUIDELINES] (recognizing that adequate compensation of attorneys is indispensable to providing competent assistance). See also the conclusion of the 1989 report of the A.B.A. Task Force on Death Penalty Habeas Corpus that "[t]he American Bar Association is persuaded that the principal failings of the capital punishment review process today are the *inadequacy and inadequate compensation* of counsel at trial." TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, reprinted in Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (emphasis added) [hereinafter TASK FORCE ON DEATH PENALTY HABEAS CORPUS]. The Washington Defenders Association's *Standards for Public Defense Services* states that inadequate compensation and the resulting low quality of representation have led attorneys and clients to harbor cynicism toward the criminal justice system, and have undermined the public's confidence in the judicial process and in the integrity of the fact-finding procedures. STANDARDS FOR PUBLIC DEFENSE SERVICES Standard One commentary (Wash. Defenders Ass'n 1989).

7. Economic pressures on well-intentioned, court-appointed counsel to take more cases than is advisable is a nationwide phenomenon. The American Bar Association's *Criminal Justice in Crisis*

Another major problem that results from low compensation is the difficulty in attracting qualified attorneys to act as court-appointed counsel for the indigent.⁸ This can be brought home perhaps most vividly by the notice a judge recently posted at a Kentucky courthouse: "PLEASE HELP DESPERATE."⁹ The judge was searching for a lawyer to accept court appointment to represent an indigent in a capital case. The maximum fee permissible under Kentucky law was \$1,250, including all preparatory work and the trial itself.¹⁰ Indeed, poor pay has led to the perception that lawyers who accept representation of indigent defendants do so because they lack better-paying clients. For example, a book written to assist people in determining how to choose a lawyer cautions clients to ask

reported that a common complaint of court-appointed counsel is that the low level of compensation forces them "to carry more cases than a lawyer could effectively handle, because if you don't do that, you go broke. [The inadequate compensation] tends to develop a practice that is not what we would hope it would be for the indigent criminal defendants." SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 41-42 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS].

8. In some jurisdictions, the lack of lawyers willing to be on a list of counsel accepting appointments to represent indigent defendants has been so pronounced that trial courts are forced to assign *any* available counsel. The Eleventh Circuit described the press accounts of how some lawyers reacted to such appointments in a rural area of Georgia. *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986). One attorney said the appointment would mean an actual "loss of money." *Id.* at 1504. Another said, "I despise it, I'd rather take a whipping. It's worse than taking a dose of Colomel [a laxative]." *Id.* at 1522. The Administrator for the Assigned Counsel Plan for the First Department in New York State recently concluded that because of the low compensation rates, the most capable and experienced attorneys are no longer willing to take court-appointed cases. Geoffrey Q. Ralls, *In Defending the Poor, We Get What We Pay For*, THE DEFENDER (N.Y. State Defenders Ass'n), Mar. 1991, at 3, 3-4. In Washington State, judges have concluded that because of the low compensation level provided to court-appointed counsel, it is difficult to secure competent attorneys. STANDARDS FOR PUBLIC DEFENSE SERVICES Standard One commentary (Wash. Defenders Ass'n 1989). The quality of attorneys accepting assignments to represent indigent defendants confronting the death penalty in the South may be particularly poor due to low compensation. For example, as of January, 1990, six of the 26 individuals on death row in Kentucky had counsel who have since been disbarred or have had their licenses to practice law suspended. Stephanie Saul, *When Death is the Penalty; Attorneys for Poor Defendants Often Lack Experience and Skill*, NEWSDAY, Nov. 25, 1991, at 8; *see also* *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990) (noting that by allowing the recovery of actual expenses of court-appointed counsel, it is to be expected that there will be better participation by members of the bar).

9. Saul, *supra* note 8, at 8. The lawyer who finally responded to the judge's plea had no active practice or experience in death penalty cases, had a reputation for unethical and perhaps illegal conduct, and may well have been drunk when he appeared in court on this case. The defendant was convicted and sentenced to die in the electric chair. *Id.*

10. Many death penalty experts estimate that death penalty case preparation and trial requires 500-1,000 hours of work. *Id.* Full-time lawyers for the indigent certainly do not fare any better financially than court-appointed counsel. The starting salary for a public defender in Louisville, Kentucky, in 1991 was \$15,000 a year. Edward C. Monahan, *Who is Trying to Kill the Sixth Amendment?*, CRIM. JUST., Summer 1991, at 24, 27. The salary of the chief public defender in one Kentucky county is barely more than half that of the county's chief prosecutor. *Id.* at 52.

"why any competent attorney with a booming practice has time on his hands,"¹¹ implying that lawyers with enough free time to take on cases for indigent clients are not competent enough to attract paying clients.

When compensation for indigent representation barely covers overhead, an experienced attorney with an adequate supply of paying clients is not likely to seek court-assigned representation of the indigent.¹² A 1986 study by the Oregon Criminal Defense Lawyers Association found that, after deducting the average overhead expenses in Oregon, an attorney who was doing only court-appointed indigent defense work would have a net annual income of \$72.¹³ A 1988 study prepared for the Joint Subcommittee Studying Alternative Indigent Defense Systems for the Virginia General Assembly and the Criminal Law Section of the Virginia State Bar found that after taking into account counsels' overhead costs, the effective hourly rate that was paid to a survey sample of Virginia attorneys representing indigents in capital cases at trial was approximately \$13.¹⁴

Even those representing defendants in capital cases are plagued by inadequate compensation.¹⁵ Louisiana allows a maximum total compensation for court-appointed counsel in death penalty cases of \$1,000 per case.¹⁶ In Alabama, the maximum fee is \$1,000 for out-of-court capital case preparation.¹⁷ Oklahoma had a \$3,200 limit on death penalty

11. DENISE G. SHEKERJIAN, *COMPETENT COUNSEL. WORKING WITH LAWYERS* 52 (1985).

12. The lack of experienced attorneys willing to be assigned the cases of indigent defendants is an increasingly severe problem. For example, a recent report of the Virginia Bar Association found that there was an increasing and "disturbing trend among some attorneys, especially the more experienced attorneys, not to volunteer to be included on the court-appointed counsel list or, if they are on the list, to ask to be removed from the list after a number of years of service." SPECIAL COMM. ON INDIGENT DEFENDANTS, VIRGINIA BAR ASS'N, *THE DEFENSE OF INDIGENTS IN VIRGINIA: A CONSENSUS FOR CHANGE*, 15 (Oct. 1988) (final report of the Virginia Bar Association Special Committee on Indigent Defendants) [hereinafter *INDIGENT DEFENDANTS*]], quoted in REPORT OF THE JOINT SUBCOMMITTEE STUDYING ALTERNATIVE INDIGENT DEFENSE SYSTEMS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, HOUSE DOC. NO. 40, at 5 (Jan. 1, 1989) [hereinafter *ALTERNATIVE SYSTEMS*].

13. Gist, *supra* note 5, at 19.

14. *Id.* at 18.

15. The Supreme Court, during the 1991 term, took note of the problem by doubling the amount that is paid to represent indigent defendants in capital cases pending before the Court. The Court found that the \$2,500 maximum permitted under the Criminal Justice Act of 1964, 18 U.S.C. § 3006(A)(d)(2) (1964), may "deter otherwise willing and qualified attorneys from offering their services to represent indigent capital defendants." *In re Berger*, 111 S. Ct. 628, 629 (1991). The Court refused, however, to adopt a case-by-case approach to determine an appropriate fee, holding that such a determination would be "time consuming" and "imprecise." *Id.* at 630.

16. Saul, *supra* note 8, at 8.

17. *Id.* The report of the Alabama Judicial Study Commission's Task Force on Indigent Defense Services recommended that the case compensation limit for felonies, including post-conviction actions

cases until 1990 when the Oklahoma Supreme Court in *State v. Lynch*¹⁸ found the amount to be so paltry as to constitute an unconstitutional "taking of private property."¹⁹ In *Wilson v. State*,²⁰ a capital murder case in Mississippi, which, until 1990, had a \$1,000 statutory maximum for compensation in capital cases,²¹ the defendant's attorneys spent totals of 779.2 and 562 hours, respectively, representing the defendant.²² The Mississippi Supreme Court mandated that the reimbursement include, in addition to the \$1,000, a supplement of \$25 for each hour worked to cover the average overhead expenses for an attorney in Mississippi.²³

The effects of the frequently below minimum wage compensation provided to counsel for the indigent in capital cases can be seen in a recent report of the ABA Task Force on Death Penalty Habeas Corpus, which enumerated repeated instances of incompetent representation and concluded that inadequacy of counsel is one of the "principal failings of the capital punishment review process today."²⁴ The National Legal Aid and Defender Association similarly concluded that "many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance."²⁵

in capital cases, be increased to \$3,500. TASK FORCE ON INDIGENT DEFENSE SERVICES, REPORT TO THE CHIEF JUSTICE OF ALABAMA 5 (1989) (copy on file with the *Indiana Law Journal*).

18. 796 P.2d 1150 (Okla. 1990).

19. *Id.* at 1153. The Oklahoma Supreme Court ruled that counties must pay fees equal to the hourly rate earned by prosecutors with similar qualifications and reimburse reasonable overhead costs. *Id.* at 1161.

20. 574 So. 2d 1338 (Miss. 1989).

21. MISS. CODE ANN. § 99-15-17 (Supp. 1989).

22. *Wilson*, 574 So. 2d at 1339.

23. *Id.* at 1341.

24. Robbins, *supra* note 6, at 16; see also Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 803-07 (1986). A former law clerk to a United States Supreme Court Justice described his experience regarding death penalty cases as follows:

Again and again, in cases that I reviewed, potential mitigating evidence was readily available—medical experts who could testify to mental retardation or other evidence of diminished capacity; relatives who could help explain how and when this individual had been brutalized; fellow veterans who could testify about the defendant's combat valor, or about the haunting, warping effects of the battles they experienced together. Again and again, defense counsel made little or no effort to reach such witnesses.

Clifford Sloan, *Death Row Clerk in the Court of Last Resort: U.S. Supreme Court and Capital Cases*, THE NEW REPUBLIC, Sept. 16, 1987, at 18.

25. STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 3 (Nat'l Legal Aid and Defender Ass'n 1987). Justice Marshall indicated how inadequately represented a defendant was who, nevertheless, had not been able to obtain relief at the Supreme Court level:

Counsel did not inform the jury, during summation or at any other time, that petitioner had no prior criminal history, had been steadily employed, had an honorable military record, had been

A lawyer who does agree to accept court-appointed cases but who nevertheless feels that he is inadequately compensated may lack the motivation to spend the many hours required in preparing a case.²⁶ As the court in *White v. Board of Commissioners*²⁷ observed: "The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored."²⁸ A 1987 study of courts by the Rural Justice Center concluded that in rural areas the fee for court-appointed counsel is often so low that the attorneys cannot even recover their costs for the representation.²⁹ The study firmly concluded that "[t]he fee [in rural areas] is too low to encourage adequate case preparation."³⁰ A report prepared for the Virginia Bar Association found that 17.5% of the attorneys on the court-appointed counsel list who responded to a survey indicated that they had not done some work that would have been beneficial to their clients because of the low fees they received.³¹ Attorneys are likely to focus their energies on their paying clients because of the far greater income produced.³²

Trial courts may not only reinforce appointed counsel's inclination to do a minimal amount of work per case, but at times may feel compelled to explicitly remind counsel that, due to the overwhelming need and the

a regular churchgoer, and had cooperated with the police. Counsel did not give the jury a single reason why it should spare petitioner's life. The net result was that petitioner was without an advocate at the sentencing phase.

Messer v. Kemp, 474 U.S. 1088, 1090 (1986) (citation omitted) (Marshall, J., dissenting). It is widely acknowledged that special skills are required for counsel in death penalty cases. See APPOINTMENT GUIDELINES, *supra* note 6, Guideline 5.1; STANDARDS FOR CRIMINAL JUSTICE Standard 5-1.2(d) (A.B.A. 1990) (noting the "unique and time-consuming demands" of counsel in capital cases), reprinted in 49 Crim. L. Rep. (BNA) 2013, 2021 (Apr. 10, 1991).

26. I am convinced this is the case, notwithstanding the Alabama Criminal Appeal Court's declaration that there is no need to adequately compensate court-appointed attorneys because "[a] lawyer needs no motivation beyond his *sense of duty* and his *pride*." Grayson v. State, 479 So. 2d 69, 73 (Ala. Crim. App. 1984) (emphasis in original) (quoting State v. Rush, 217 A.2d 441, 444 (N.J. 1966)), *aff'd*, 479 So. 2d 76 (Ala. 1985), *cert. denied*, 474 U.S. 865 (1985).

27. 537 So. 2d 1376 (Fla. 1989).

28. *Id.* at 1380.

29. Mark Curriden, *Indigent Defense in the South: Begging for Justice*, A.B.A. J., Jan. 1991, at 64, 67.

30. *Id.*

31. ALTERNATIVE SYSTEMS, *supra* note 12, at 5 (quoting INDIGENT DEFENDANTS, *supra* note 12, at 23); see also Robert C. Boruchowitz, *Funding Crisis Threatens Right to Counsel*, WASH. STATE BAR NEWS, Jan. 1987, at 15 (noting that court-appointed counsel in Washington State are underpaid and have inadequate support staff, which threatens their ability to provide effective legal assistance).

32. Counsel preference for devoting time to cases for paying clients is encouraged by decisions such as that of the Arkansas Supreme Court, which stated that counsel on court-appointed cases need not be paid "fees based on their customary hourly charges or fixed fees for services in criminal cases of this nature." Arnold v. Kemp, 813 S.W.2d 770, 776 (Ark. 1991).

limited number of counsel for the indigent, large amounts of time should not be spent on any one case. For example, one court in Nebraska instructed the court-appointed attorneys in a first-degree murder case that they were to be "efficient in their representation due to the sparse population and tax base of the county"³³

An evaluation of the assigned counsel program in Massachusetts found that due to inadequate compensation, 36% of the attorneys failed to perform vital and basic tasks such as interviewing witnesses, investigating the facts, and filing appropriate pre-trial motions.³⁴ As the Florida Supreme Court noted, the adage "you get what you pay for" does indeed apply to legal representation in our society.³⁵

Appellate courts have frequently noted outrageous conduct by court-appointed attorneys who viewed their work as inadequately compensated. For example, the North Carolina Court of Appeals found that one attorney did not file an appeal because of financial considerations after his client was convicted of first-degree rape and sentenced to death.³⁶ In another

33. *In re Rehm*, 410 N.W.2d 92, 94 (Neb. 1987).

34. See NATIONAL LEGAL AID AND DEFENDER ASS'N, STATEWIDE EVALUATION OF THE MASSACHUSETTS BAR ADVOCATE PROGRAM 12-13 (Feb. 28, 1986) (copy on file with the *Indiana law Journal*). Similarly, in New York State, the Public Defense Backup Center, analyzing the assigned counsel program in an upstate New York county, concluded that there was little investigative activity by defense lawyers; in 86% of the cases there was no attempt to contact any witness, and in over one-half of the cases there was less than one hour of out-of-court time spent on case preparation. NEW YORK STATE DEFENDERS ASS'N, PUBLIC DEFENSE SERVICES IN ONTARIO COUNTY: A STUDY OF THE ASSIGNED COUNSEL SYSTEM 41 (Aug. 1985); see also NEW YORK STATE DEFENDERS ASS'N, PUBLIC DEFENSE SERVICES IN SCHENECTADY COUNTY: AN ASSESSMENT OF THE ASSIGNED COUNSEL PROGRAM 108 (Mar. 1984) (reporting that assigned counsel conducted few investigations, filed few motions, did little sentencing advocacy "or other indicia of a vigorous and competent defense"); NEW YORK STATE DEFENDERS ASS'N, PUBLIC DEFENSE SERVICES IN CLINTON COUNTY: AN ASSESSMENT OF THE ASSIGNED COUNSEL PROGRAM 44 (Jan. 1986) (finding that in only 3% of the cases did the lawyer visit the scene of the crime, in over half the cases no legal research was conducted, few discovery motions were made, and little investigative work was done); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 900-01 (1986-87) (noting that court-appointed attorneys engaged in little if any pre-trial preparation and lacked funds for full-time investigators).

35. *Makemson v. Martin County*, 491 So. 2d 1109, 1114 (Fla. 1986) (quoting *MacKenzie v. Hillsborough County*, 288 So. 2d 200 (Fla. 1973) (Ervin, J., dissenting)), cert. denied, 479 U.S. 1043 (1987). The court added that the quality of representation provided is inextricably linked to the compensation received. *Id.* One commentator has gone as far as claiming that financial realities "make it more profitable for an attorney to 'lose' quickly than to pursue every conceivable remedy for his client." Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980).

36. *In re Dale*, 247 S.E.2d 246 (N.C. Ct. App. 1978). State statutes commonly provide for maximum payment for counsel in a homicide case regardless of the number of hours the attorney works on his client's case. But see *In re Armani*, 371 N.Y.S.2d 563 (Hamilton County Ct. 1975) (holding that maximum fee for homicide case was unconscionable); *Makemson*, 491 So. 2d 1109 (holding that \$2,000 maximum for homicide cases was arbitrary, capricious, and should be disregarded).

case, the West Virginia Supreme Court concluded that a court-appointed attorney did not seek a justified mistrial because he knew he would receive inadequate remuneration if the case were retried.³⁷

There are two major types of systems for the appointment of private counsel to represent indigent defendants.³⁸ The first is a coordinated assigned counsel system wherein a full- or part-time administrator assigns an attorney to each case, approves and controls payment to the counsel, and, depending on the size of the program, may provide training or investigative services. The administrator may also design standards that must be met before an attorney can be placed on the list of attorneys qualified for court appointment. The second is an ad hoc assigned counsel system where the court maintains a list of private attorneys who have volunteered to be assigned to the cases of indigent defendants, and counsel are assigned by a judge or court clerk on a rotational basis.³⁹

In both systems, it is commonly the trial judge who must sign the final authorization for payment for the counsel's services, even though this is in clear violation of the ABA's *Standards for Criminal Justice*.⁴⁰ Standard 5-2.4 states, "[w]here the discretion to approve payment claims is vested in the judiciary, the necessary independence of counsel is compromised. Defense lawyers ought not be placed in the position where the amount of their compensation may be influenced by the degree to which the court is pleased with the representation."⁴¹ Under such a system, since the *defendant's* satisfaction with the representation provided is not sought out in any way, the lawyer knows whom he must please to receive both payment and future work. It is not uncommon for counsel to have to beg a reluctant court for full reimbursement. For example, a trial judge in Nebraska persisted in awarding the attorney in a murder trial only 20% of what was requested, finding that since police reports were available, the time spent on investigation and depositions was unwarranted.⁴²

37. *State v. Pelfrey*, 256 S.E.2d 438 (W. Va. 1979).

38. Private counsel often have opposed instituting full-time defense counsel in a legal aid or public defender format. At times, this opposition has been based on the belief that the creation of a full-time public defender would cut into the business of private lawyers.

39. Counsel are often assigned to meet the needs of the court rather than the needs of the defendants. *See, e.g., McConville & Mirsky, supra* note 34, at 901 (noting that judges and court clerks assigned cases to those counsel who would take a case at a moment's notice, and routinely assigned to one counsel the cases of co-defendants despite potential conflicts of interest).

40. STANDARDS FOR CRIMINAL JUSTICE Standard 5-2.4 (A.B.A. 1990).

41. *Id.*

42. *State v. Ryan*, 444 N.W.2d 656, 661 (Neb. 1989). The Nebraska Supreme Court subsequently sharply criticized the trial judge:

Payment for private, court-appointed counsel typically is based on an hourly scale which may differ for hours that counsel spends in court and those spent out of court.⁴³ At the federal level, the Criminal Justice Act (CJA) provides for court-appointed counsel fees.⁴⁴ A 1990 panel appointed by Chief Justice Rehnquist concluded that compensation should no longer be based on any perception that such work ought to be done on a pro bono basis and called on Congress to enact a fee schedule for CJA attorneys which would cover reasonable overhead and a reasonable hourly wage.⁴⁵

States vary widely in setting fees. For example, in Colorado in 1991, the hourly rate for court-appointed attorneys for a non-capital felony case was raised from \$25-45 per hour to \$45-50 per hour,⁴⁶ and in 1989 the hourly rate in California was raised to a maximum of \$75 per hour.⁴⁷ Additionally, states usually set a maximum compensation total per case, regardless of the number of hours the attorney has worked.⁴⁸ As state

For this court to approve [only] the amount awarded to applicant by the trial court would be to send a message that the sixth amendment to the U.S. Constitution and article I, § 11 of the Nebraska Constitution have no real meaning. It is not appropriate to subject attorneys, appointed or otherwise, to the treatment seen in the fee hearing in this case. In such hearings, it is not appropriate to require appointed attorneys to submit income tax records to the court, as was done in this case, nor to submit such things as the attorney's notes made in preparation for final argument.

Id.

43. In the vast majority of states, the legislature determines the level of compensation of court-appointed attorneys. In Iowa, however, the legislature granted judges the authority to control the county expenditures for counsel. The courts shared the legislature's concerns for holding fees to a minimum, and the Iowa Supreme Court, noting that the number of criminal cases in the state had increased 600% between 1956 and 1980, ruled that courts must be sensitive to legitimate budgetary concerns of county officials and that there is a duty to allow fees only for "necessary services." *Hulse v. Wilfvat*, 306 N.W.2d 707, 713 (Iowa 1981).

44. 18 U.S.C. § 3006 (1988).

45. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 159 (1990).

46. Spangenberg Group, *Non-Capital Felonies*, CRIM. JUST., Summer 1990, at 45, 45 (table prepared for the A.B.A. Bar Info. Prog.), reprinted in THE DEFENDER (N.Y. State Defenders Ass'n), Mar. 1991, at 26, 26. Some courts have held that there is no need to compensate lawyers at all for representation of the criminal defendant. In *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982), the court found that it was not unconstitutional to require such representation without paying the counsel. *But see DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (reversing earlier holdings and finding that a lawyer who is assigned a criminal case must receive such compensation as that "received by the average competent attorney operating in the open market"); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67-68 (Mo. 1981) (stating that a lawyer has a "right to earn a livelihood for himself and his family and to be free from involuntary servitude"); *Kovarik v. County of Banner*, 224 N.W.2d 761, 765 (Neb. 1975) (stating that lawyers who are appointed to represent indigents are entitled to reasonable compensation).

47. Edward C. Monahan, *Attorneys Must be Paid Fairly*, CRIM. JUST., Summer 1990, at 16, 43, reprinted in THE DEFENDER (N.Y. State Defenders Ass'n), Mar. 1991, at 13, 24.

48. Arkansas, for example, had a statutory maximum of \$350 for noncapital felony cases. Spangenberg Group, *supra* note 46, at 26. Georgia provides for maximum compensation of \$250 when

budgetary problems and greater antagonism toward those charged with crimes have heightened, some states have actually *decreased* permitted maximums.⁴⁹ In Kansas, for example, there was a 12% cut imposed on billed expenses and fees in appointed-attorney criminal cases.⁵⁰

Courts, however, have not always taken kindly to state-imposed maximums.⁵¹ New Hampshire had set a \$500 maximum fee for misdemeanor cases which "shall not be exceeded."⁵² The New Hampshire Supreme Court found, however, that the rule might result in unfairness and amended the rule to read that the maximum can be exceeded "for good cause shown in exceptional circumstances."⁵³ Lest it appear, however, that as a result of the court's holding the defense of the indigent might subsequently be considered by some as warranting compensation *equal* to that of a typical paying client, the court made it clear that such was not the case.⁵⁴ Compensation for those who choose to represent the

a client pleads guilty and \$350 if the attorney goes to trial in a noncapital felony case. Trisha Renaud & Ann Woolner, *Meet 'Em and Plead 'Em*, FULTON COUNTY DAILY REP., Oct. 8, 1990, at 1, 2.

49. Lawyers in civil litigation are not subject to the whims and moods of the legislatures. The United States Supreme Court in *Blum v. Stenson*, 465 U.S. 886 (1984), ruled that the standard for determining attorney's fees for the prevailing party under 42 U.S.C. § 1988 is "the prevailing market rates in the relevant community." *Id.* at 895. The Legal Aid Society in that case was awarded fees of \$95-\$105 per hour. *Id.* at 901.

50. Monahan, *supra* note 47, at 21.

51. The New Hampshire Supreme Court has determined that the courts have "exclusive authority" to determine the compensation level for court-appointed counsel. *Smith v. State*, 394 A.2d 834, 838 (N.H. 1978). The court added that "[w]ithout proper court control of court-appointed counsel, and indeed without adequate compensation for those attorneys, it might be impossible to obtain valid criminal convictions in future prosecutions of indigent defendants." *Id.* at 839. Some courts, however, have concluded that the issue of the adequacy of compensation for court-appointed counsel for the indigent is not for the courts to decide, but rather is properly within the province of the legislature. *See, e.g., State v. Ruiz*, 602 S.W.2d 625, 627 (Ark. 1980). In some instances, the courts may acknowledge that the power to set fees is the legislature's, and then proceed to pressure the legislators to act "appropriately." In *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976), the West Virginia Supreme Court of Appeals concluded that the compensation for court-appointed counsel was inadequate and that "the appropriate remedy is to order only that the lawyers of this state may no longer be required to accept appointments as in the past." *Id.* at 323. The court delayed entry of its order for one year to give the legislature time to "take the necessary action to modify or replace the present system of appointing attorneys to represent indigents." *Id.*, *see also Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (noting that a system providing no compensation for court-appointed counsel cannot be continued since it was in violation of both the Commonwealth and U.S. Constitutions); *State v. Rush*, 217 A.2d 441, 449 (N.J. 1966) (noting that the Supreme Court of New Jersey delayed for ten months its order that court-appointed counsel must receive compensation and could no longer be unpaid so that the legislature could determine whether it wanted to institute a public defender system or design a new program for assigned counsel). *But see Sparks v. Parker*, 368 So. 2d 528 (Ala. 1979) (rejecting the claim that underpayment of court-appointed attorneys in Alabama violated the constitutional guarantee to counsel).

52. *State v. Robinson*, 465 A.2d 1214, 1215 (N.H. 1983).

53. *Id.* at 1216.

54. *Id.* Courts have not been unimaginative in formulating the value of work done for the indigent compared to work done for paying clients. For example, the Florida Supreme Court determined that assigned counsel in juvenile disciplinary proceedings should receive compensation in the amount of 60%

indigent,⁵⁵ the court commented, must take into account "the ethical obligation of a lawyer to make legal representation available."⁵⁶

In *Makemson v Martin County*,⁵⁷ the counsel who was appointed on a capital case in Florida devoted 250 hours to the client's defense. The maximum fee permitted in Florida was \$3,500, which would have compensated counsel at a rate of \$14 an hour.⁵⁸ Although the Florida Supreme Court held the statute specifying the ceiling fee constitutional, it found that in this instance, and other "extraordinary and unusual capital" cases, the maximum fee would be unconstitutional when applied in a manner which could interfere with effective representation.⁵⁹ Three years later, the Florida court expanded the ruling by finding that virtually every capital case would fall within the "extraordinary and unusual" criteria.⁶⁰

In 1991, the Arkansas Supreme Court in *Arnold v Kemp*⁶¹ concluded that the state had "perpetuated, throughout the years, a system of appointment without just compensation."⁶² The court then proceeded to declare the \$1,000 maximum attorney fee allowed for a death penalty case unconstitutional.⁶³ In Kentucky, the maximum reimbursement permitted for appointed counsel remains at \$1,250—regardless of the type of case, unless the court finds that "special circumstances warrant a higher fee."⁶⁴

of the fee that a client of ordinary means would pay a modestly successful counsellor. *In re D.B.*, 385 So. 2d 83, 92 (Fla. 1980); *see also* *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987) (finding that the formula to be used in determining compensation is "such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses"); *In re Armani*, 371 N.Y.S.2d (N.Y. Sup. Ct. 1975) (noting that compensation provided to appointed counsel need not equal that paid to private counsel).

55. The Eighth Circuit has held that it is constitutional to *compel* lawyers, even those who have not expressed any interest in criminal cases, to represent indigent defendants without any compensation. *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982).

56. *Robinson*, 465 A.2d at 1216; *see also* *Danes v. Markoff*, 555 P.2d 490, 492-93 (Nev. 1976) (holding that attorneys are ethically bound to provide representation to indigent defendants for the statutory fee, limited though it may be).

57. 491 So. 2d 1109 (Fla. 1986).

58. *Id.* at 1112.

59. *Id.* at 1115.

60. *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1380 (Fla. 1989). In *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989), the West Virginia Supreme Court reviewed the constitutionality of the statute providing for compensation of \$25 per in-court and \$20 per out-of-court work hour, with a ceiling of \$1,000 for any one case. The court, emphasizing the relationship between inadequate remuneration and ineffective assistance of counsel, ruled that compensation in the future was to be \$60 and \$45 per hour. *Id.* at 547.

61. 813 S.W.2d 770 (Ark. 1991).

62. *Id.* at 774.

63. *Id.* at 775.

64. KY. REV. STAT. ANN. § 31.170(4) (Michie 1985). The statute also provides that compensation is to be no higher than \$35 per hour for time spent in court and \$25 per hour for time spent out of court. *Id.* These 1992 rates were barely higher than the 1972 rates of \$30 and \$20, even though the

The Kentucky Court of Appeals in 1991 concluded in *Lavit v Brady*⁶⁵ that a capital murder case is *ipso facto* a special circumstance, and thus warrants additional compensation.⁶⁶

Setting maximum limits does not encourage the lawyer to do everything required to properly represent the indigent client.⁶⁷ It would be a rare individual who continues to work on a case knowing there will be no additional compensation because he has already worked the number of hours provided for by the maximum fee payable per case.⁶⁸ Setting statutory ceilings also seems to violate Standard 5-2.4 of the ABA's *Standards Relating to the Administration of Criminal Justice*, which states that "[a]ssigned counsel shall be compensated for *time and service performed*."⁶⁹

Setting maximum fees in many situations may cause a conflict of interest between the attorney and his client. Once counsel has spent the number of hours on a case that warrants the maximum compensation, it will be to the attorney's financial detriment to continue to vigorously represent the client's best interest. The attorney may choose to act in his *own* interest and spend the additional time on either paying clients or other court-appointed cases.⁷⁰ At this point, of course, it is in the attorney's financial interest for the defendant to plead guilty so that the counsel's work will no longer be required.⁷¹ In fact, some lawyers will accept a court-appointed case only if it is apparent that the defendant will plead guilty.⁷²

Consumer Price Index increased 213% between the years 1972 and 1990. Ed Monahan, *Catching Up With Current Realities*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1991, at 7, 9.

65. No. 89-CA-2360-MR (Ky. Ct. App. 1991), *printed in* THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1991, at 3.

66. *Id.*

67. TASK FORCE ON DEATH PENALTY HABEAS CORPUS, *supra* note 6, at 22 (reporting that maximum fee limits are counterproductive to vigorous representation).

68. Such rare individuals, those idealistic counsel committed to representation of the indigent regardless of the financial sacrifice, do exist. For example, one New York attorney devoted over 400 hours to the successful defense of an indigent defendant accused of murder, yet the county proposed to pay him only the \$2,400 maximum permitted by state law—a rate of \$6 an hour. Editorial, *Need for Uniformity*, THE TIMES UNION (Albany, N.Y.), Aug. 14, 1990, at A6, *reprinted in* Marty Rosenbaum, *Two Classes of Justice: The Need for Assigned Counsel Reform*, THE DEFENDER (N.Y. State Defenders Ass'n), Mar. 1991, at 5, 6.

69. STANDARDS FOR CRIMINAL JUSTICE Standard 5-2.4 (A.B.A. 1990).

70. If counsel is inadequately compensated, he is unlikely to spend the necessary time required for appropriate representation: "In such situations, the temptation is too great for a lawyer to shortchange the client." APPOINTMENT GUIDELINES, *supra* note 6, at 79.

71. See *Wilson v. State*, 574 So. 2d 1338, 1342 (Miss. 1990) (Robertson, J., concurring) (noting that a statutory cap on reimbursement significantly inhibits the provision of effective assistance of counsel).

72. See Rosenbaum, *supra* note 68, at 7.

It is understandable that court-appointed counsel might not share a legislature's view that it is appropriate for the attorney to sacrifice his own financial well-being so that the state may satisfy the constitutional mandate of counsel.⁷³ Courts have at times supported lawyers in their criticisms of legislatures. The Alaska Supreme Court, for example, while holding that counsel is entitled to reasonable and appropriate compensation, commented that "requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole."⁷⁴ Similarly, in 1991, the Supreme Court of Arkansas declared the public defense system counsel reimbursement schedule unconstitutional because the participating attorneys were required to "financially subsidize the State's responsibility of indigent representation."⁷⁵ The Nebraska Supreme Court was also sympathetic to under-compensated attorneys; it not only ruled that defense counsel in a murder case were entitled to four times the compensation which the trial judge had authorized, but also proceeded to chastise the lower court judge: "Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty"⁷⁶

II. THE RESPONSE OF COURT-APPOINTED COUNSEL IN WASHINGTON, D C.

The problem of inadequate funding for court-appointed counsel in Washington, D.C., led in 1983 to a concerted action by attorneys desperately seeking to improve conditions. The legality of the "strike" by

73. The vital necessity for adequate compensation for court-appointed counsel in death penalty cases was forcefully stated by the report of the American Bar Association Task Force on Death Penalty Habeas Corpus: "Competent and adequately compensated counsel from trial through collateral review is thus the *sine qua non* of a just, effective and efficient death penalty system." TASK FORCE ON DEATH PENALTY HABEAS CORPUS, *supra* note 6, at 17.

74. *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1986); *see also State v. Robinson*, 465 A.2d 1214, 1217 (N.H. 1983) (noting that the legislature has no right to thrust the expense of representing the indigent on those citizens who happen to be attorneys).

75. *Arnold v. Kemp*, 813 S.W.2d 770, 775 (Ark. 1991). The court found that the services of an attorney are property subject to the protection of the Fifth Amendment, and that the fee structure therefore constituted an unconstitutional taking of property. *Id.*

76. *State v. Ryan*, 444 N.W.2d 656, 662 (Neb. 1989). The court ruled that the two court-appointed attorneys were entitled to compensation at the rate of \$50 an hour. *Id.* at 660.

the court-appointed attorneys was not resolved until 1990 when the Supreme Court decided *FTC v Superior Court Trial Lawyers Association*.⁷⁷

Compensation for court-appointed counsel in the District of Columbia in 1983 had not been increased from the level first instituted by Congress in 1970: \$30 per hour for in-court time and \$20 per hour for out-of-court work.⁷⁸ In contrast, the Consumer Price Index had increased 140% since 1970.⁷⁹ By 1975, the amounts were widely viewed as being too low; a joint report of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar concluded that court-appointed counsel were inadequately compensated and that the low rates inhibited the District's ability to attract new lawyers and diminished the willingness of experienced attorneys to represent indigent defendants.⁸⁰ The report recommended increasing the fees to at least \$40 per hour for both in-court and out-of-court work, doubling the maximum permitted⁸¹ for misdemeanors to \$800, and increasing the felony maximum from \$1,000 to \$1,600.⁸² The report did not lead to any increases in fees.

In 1982, a report by the Court System Study Committee of the District of Columbia Bar recommended an increase in rates to at least the level recommended in the 1975 report.⁸³ The Bar Association itself passed a resolution supporting the Committee's recommendations, and a bill was introduced in the District of Columbia City Council to increase the rate

77. 493 U.S. 411 (1990).

78. 18 U.S.C. § 3006(d)(1) (1970) (amended 1984). The District of Columbia Criminal Justice Act (DCCJA), enacted in 1974, established a Joint Committee on Judicial Administration of the District of Columbia courts which had authority to set maximum rates for compensating court-appointed counsel. D.C. CODE ANN. § 11-2604(a) (Michie 1989). Judges had the discretion to provide less than the amount requested by DCCJA counsel. *Id.* § 11-2604(d); see also Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Association at 4, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393) [hereinafter Respondent/Cross-Petitioner's Brief].

79. Respondent/Cross-Petitioner's Brief at 4, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

80. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 530-31 (1986). The report concluded that the low compensation resulted in "reduced services" and that "a system which is heavily weighed against the indigent defendant in terms of compensation that his attorney will receive raises serious questions of equal protection." Respondent/Cross-Petitioner's Brief at 5, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

81. Respondent/Cross-Petitioner's Brief at 5, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). The amount of time involved preparing a criminal case had significantly increased in the years 1970-1983 as procedural and evidentiary rules created significant rights and grounds for motions on behalf of the accused. The time required for investigation and research correspondingly increased. *Id.* at 4.

82. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 531.

83. Respondent/Cross-Petitioner's Brief at 5, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

to \$50 per hour.⁸⁴ The bill, however, died in committee and the fee structure remained.⁸⁵

In 1982, there were 1,200 lawyers on the District of Columbia Criminal Justice Act⁸⁶ (DCCJA) list of attorneys available to receive a court appointment to represent indigent defendants.⁸⁷ In reality, however, there were 100 DCCJA "regulars" whose court-appointed cases constituted the greatest percentage of their practice.⁸⁸ These regulars formed the core of the Superior Court Trial Lawyers Association (SCTLA). Due to the low fee structure, these lawyers typically worked out of their own homes, did their own typing, and had to undertake a high caseload to the detriment of proper preparation and investigation.⁸⁹

The lawyers most active in the SCTLA formed a professional judgment that their low level of compensation was increasingly responsible for the inadequate representation that they were compelled to provide.⁹⁰ They sought unsuccessfully to gain support from the chief judge of the superior court.⁹¹ They lobbied the mayor's office for support, and were told that no one in city government opposed their requests.⁹²

84. Brief for Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Respondent/Cross Petitioner at 8 n.13, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

85. *Id.*

86. D.C. CODE ANN. §§ 11-2601 to -2609. The District of Columbia Criminal Justice Act was modeled after the federal Criminal Justice Act of 1964 (CJA), 18 U.S.C. § 3006A (1988), which was designed to provide a payment system for defense services provided to indigent defendants in the federal courts. The 1970 Amendments to the CJA, Pub. L. 91-447, 84 Stat. 916 (1970) (codified at 18 U.S.C. § 3006A), authorized the establishment of federal public and community defender organizations in localities where there were 200 or more appointments of counsel annually. In the period from 1964 to 1992, the number of appointments under the CJA grew from 16,000 to 80,000. Criminal Justice Act Review Committee: Interim Report, 51 Crim. L. Rep. (BNA) No. 20, at 2338 (Aug. 19, 1992).

87. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 522 (1986).

88. *Id.* at 518. For example, the President of the Superior Court Trial Lawyers Association derived 90% of his practice from DCCJA cases, and 99% of the Vice President's work consisted of DCCJA assignments. *Id.*

89. *Id.* at 532-33.

90. The SCTLA leaders claimed that fighting for increased levels of compensation was the single most important thing they could do to improve the quality of representation. *See* Respondent/Cross-Petitioner's Brief at 6, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). One of the leaders of the strike stated that, "[t]he issue was a decreased caseload, not a pay raise per se. The pay raise was the mechanism through which the decreased caseload would be accomplished." Brief for the Individual Respondents at 8, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

91. Amicus Curiae's Brief at 8 n.13, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). The leaders of the SCTLA had been meeting monthly with Chief Judge Moultrie, and although Moultrie stated privately he believed an increase was deserved, he told the lawyers that they would have to generate political support for any increase because it was a political, not a judicial problem. Respondent/Cross-Petitioner's Brief at 7, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

92. *See* Respondent/Cross-Petitioner's Brief at 6, *Superior Court Trial Lawyer Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

In early 1983, in response in part to the lobbying efforts of the SCTLA attorneys, a bill was introduced in the District of Columbia City Council to increase the hourly rates to \$35 per hour for both in-court and out-of-court time.⁹³ At the hearings held in consideration of the bill, many court-appointed "regulars" testified, as did leaders of the Public Defender Service.⁹⁴ The District of Columbia Bar Association, which only once before had taken a position on the merits of pending legislation, supported the bill because of its "importance to the Bar, as well as to the public."⁹⁵ Not one witness spoke in opposition to the bill on its merits.⁹⁶ However, no funds were appropriated to increase compensation for court-appointed counsel.

The SCTLA decided that concerted and dramatic action was required to bring attention to the public and the legislators about the dire conditions under which the lawyers were working. The vast majority of the "regulars" signed the following statement: "We the undersigned private criminal lawyers in D.C. Superior Court agree that unless we are granted a substantial increase in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act."⁹⁷ The SCTLA's goal was not to raise the yearly maximum payment of \$42,000 that lawyers for court-appointed cases could receive; that ceiling was not an issue in the strike.⁹⁸ The lawyers wanted to be able to take fewer cases and provide more thorough, competent representation.

This was not, therefore, the classic strike situation. Although the lawyers were refusing to accept additional cases, they continued to handle those already accepted.⁹⁹ Thus, the lawyers did not completely stop work. One of the lawyers involved stated that the message of the "strike"¹⁰⁰ was that:

93. See Linda Greenhouse, *Supreme Court Says Strike By Lawyers Violated Law*, N.Y. TIMES, Jan. 23, 1990, at D1.

94. Respondent/Cross-Petitioner's Brief at 8, *Superior Court Trial Lawyer's Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

95. *Id.*

96. *Id.* Indeed, a *New York Times* story written at the time concluded that almost no one at all disagreed with the lawyers' case for an increase in fees. Leslie M. Werner, *Lawyers for the Poor Enter a Poverty Plea*, N.Y. TIMES, Sept. 1, 1983, at B10.

97. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 511 (1986).

98. Individual Respondent's Brief at 3, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). In the year following the strike, the Joint Council on Judicial Administration raised the ceiling to \$50,000. Respondent/Cross-Petitioner's Brief at 6, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

99. Respondent/Cross-Petitioner's Brief at 11, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

100. The terms "strike" and "boycott" were used interchangeably to describe the lawyers' action. *Id.* at 2 n.1. Previously, the U.S. Supreme Court defined boycott: "The generic concept of boycott refers

[T]he system had sold our clients out by saying that we don't really care what kind of job you do.

So what we said essentially is, we will no longer be a party to the system's desire to only have a warm body beside you. And that, in fact, we cannot in good conscience continue to take cases under the present circumstances.¹⁰¹

Since the court-appointed lawyers handled 85% of all the cases involving indigent defendants in the District of Columbia,¹⁰² any action taken by them would have significant impact.

Responding to the SCTLA lawyers' statement of intent to strike, the mayor of the District of Columbia stated openly that he supported the legislation for increased compensation, that an increase was long overdue, and that the court-appointed lawyers were working at extraordinarily low rates.¹⁰³ The SCTLA sought and achieved favorable news coverage of the strike¹⁰⁴ and the chief judge of the superior court finally and publicly supported an increase in the rate of compensation.¹⁰⁵

The strike was over in two weeks. The District of Columbia City Council unanimously approved the bill increasing the hourly fees to \$55 for in-court time and \$45 for out-of-court time.¹⁰⁶ The Mayor promptly signed the legislation.¹⁰⁷ Almost immediately the number of attorneys

to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire and Marine Insurance Co. v. Barry*, 438 U.S. 531, 541 (1978).

101. Respondent/Cross-Petitioner's Brief at 11 n.3, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393) (citation omitted).

102. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 522-23. By statute, the Public Defender Service can represent only those charged with crimes punishable by a prison sentence of six months or more, and can represent no more than 60% of such individuals. *Id.* at 563. Eighty-five percent of criminal defendants in the District of Columbia financially qualify for court-appointed counsel. *Id.* at 521.

103. Respondent/Cross-Petitioner's Brief at 12, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

104. *Id.* "The strike was covered [in articles appearing] in *The New York Times*, *USA Today*, and *The Economist*." *Id.* at 13. *The Washington Post* published an editorial favorable to the SCTLA. *Conspiracy in the Lawyer's Lounge?*, WASH. POST, Sept. 26, 1983, at A12.

105. One week after the strike began, the chief judge said he was "totally supportive" of giving the court-appointed counsel a raise, although he strongly opposed the strike. Ed Bruske, *Moultrie Backs Raises, Decries Lawyers' Strike*, WASH. POST, Sept. 13, 1983, at C4. Other judges had been supportive all along. One judge, for example, commented from the bench a week before the strike began that he backed the lawyers because during the same thirteen year period wherein the salary for the attorneys had not increased at all, the salaries of the judges went from \$30,000 per year to \$68,000. Al Kamen & Ed Bruske, *Lawyers*, WASH. POST, Aug. 29, 1983, at B2.

106. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 231 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

107. Respondent/Cross-Petitioner's Brief at 18, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). The Mayor stated in a press release that he signed the bill because "I believe

volunteering to take court-appointed cases substantially increased, while the caseloads of the "regulars" correspondingly decreased.¹⁰⁸ A series of meetings occurred between the SCTLAs' president and the administrative law judge for the District of Columbia Criminal Courts to discuss measures to improve the competence level of court-appointed counsel.¹⁰⁹ The first united effort leading to a strike by court-appointed attorneys representing indigent defendants ended in a smashing victory, at least for the time being.

III. THE FEDERAL TRADE COMMISSION SELECTS ITS TARGET FOR THE FIRST ANTITRUST SUIT BROUGHT AGAINST LAWYERS: COUNSEL FOR THE INDIGENT DEFENDANT

Three months after the SCTLAs' victory, the Commissioners of the Federal Trade Commission (FTC) voted to charge the SCLTA with illegal price fixing¹¹⁰ and to obtain a cease and desist order prohibiting any similar action by the SCLTA in the future.¹¹¹ The FTC vote was based on the claim that the sellers (the court-appointed counsel) of a product (their representation of indigent defendants) acted together to coerce the buyer (the District of Columbia) to pay more for their services.¹¹² The FTC acted even though the object of the lawyers' strike (the District of Columbia government) had not sought the FTC's intervention.

The FTC claimed that the court-appointed counsel were competitors for purposes of antitrust law: they were individual business people providing the same service and therefore were capable, by restricting output, of

in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District." *Id.*

108. *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 238.

109. Individual Respondents' Brief at 7, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

110. *FTC Charges Lawyers' Group for Alleged Boycott Against Local Government*, Daily Rep. for Executives (BNA) A-7 (Dec. 16, 1983). One commissioner did not support the FTC action, another abstained, and three voted in favor. *Id.* The three in favor were all appointed by President Reagan, and some lawyers considered the FTC intervention here to constitute a political attack on labor by a conservative FTC director and a Republican-dominated Commission. W. John Moore, *FTC Probes Labor Antitrust Exemption*, LEGAL TIMES, Oct. 3, 1983, at 1.

111. The FTC brought its action under 15 U.S.C. § 1 (1988) of the Sherman Antitrust Act.

112. See generally *San Juan Racing Ass'n v. Asociacion de Jinetas*, 590 F.2d 31 (1st Cir. 1979) (holding that race track jockeys' collective refusal to race at the state-controlled track's price constituted unlawful price fixing). The FTC claimed that no First Amendment principle provides lawyers with greater rights to advocate additional funding for legal services than are accorded any other suppliers of services. Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit at 9, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

forcing a higher price for their services.¹¹³ A former FTC Commissioner under the Carter Administration called the suit “utterly wrongheaded it’s astonishing that after three [and one-half] years of bringing virtually no antitrust suit of any kind, they bring a price fixing case against a bunch of kids who haven’t had a raise in 13 years.”¹¹⁴

The FTC claim was litigated before an administrative law judge in a three week hearing. The judge recommended dismissal of the case¹¹⁵ in part because the victim was “elusive” and the “seller’s action [was] accompanied by the buyer’s knowing wink.”¹¹⁶ Of greater import, however, to Administrative Law Judge Needleman was his conclusion that there was “no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case [could] be disposed of on a more pragmatic basis—there was no harm done.”¹¹⁷

Needleman, in fact, went even further. His decision portrayed the striking lawyers as individuals who sacrificed their own economic well-being to accomplish what clearly was needed:

[T]he evidence strongly indicates that in this instance the boycott was viewed by city officials as the only feasible way of getting a rate increase which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment.¹¹⁸

113. There is a “labor exemption” to the antitrust laws but the SCTLA never claimed to be a labor organization for purposes of this exemption. The counsel were not all employees of the same employer so they were not entitled to the protection of the National Labor Relations Act. In addition, had they been governmental employees of the District of Columbia and gone on strike, imprisonment or fines might have been imposed. See 5 U.S.C. § 7311 (1988); 18 U.S.C. § 1918 (1988).

114. Al Kamen & Ed Bruske, *A Protest to the FTC*, WASH. POST, Apr. 4, 1984, at D2. The former Commissioner, Robert Pitofsky, then Dean of Georgetown University Law Center, made the comment one week before the trial before the administrative law judge. One hundred and seven District of Columbia law school professors joined with Pitofsky in a statement protesting the FTC action. *Id.* An editorial in *The Washington Post* also supported the strikers: “The commission would be well advised to drop the idea of using the trial lawyers’ boycott as a test case for regulating the legal profession. There is also a great deal of public sympathy in the community for these lawyers, whose work is valuable and difficult and whose pay hadn’t been increased for 13 years.” *Conspiracy in the Lawyers’ Lounge?*, *supra* note 104, at A12.

115. Superior Court Trial Lawyers Ass’n, 107 F.T.C. 510, 562 (1986).

116. *Id.* at 560.

117. *Id.* at 561. In response, the Commission declared: “Every dollar that the city was required to pay to end a lawyers’ boycott left it with that much less money to spend to feed the hungry, shelter the homeless, fight drugs, disease and crime, or accomplish any number of other perennially underfunded public missions that compete with indigent legal care for limited public funds.” Petitioner/Cross-Respondant’s Reply Brief at 17, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393). However, the one Commissioner to vote against the FTC suit shared the concern of the administrative law judge. Commissioner Pertschuk said the litigation “represents a poor exercise of prosecutorial discretion.” *FTC Charges Lawyers’ Group for Alleged Boycott Against Local Government*, *supra* note 110, at A-7.

118. *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. at 603.

The FTC appealed the ruling, and the same Commissioners who voted initially to *bring* the action now had to rule on the validity of the decision to *dismiss* the action.¹¹⁹ The Commissioners reversed.¹²⁰ The Commissioners found that the per se standard established by the Supreme Court in *National Society of Professional Engineers v. United States*¹²¹—that when the agreements of the participants are “so plainly anticompetitive[,] no elaborate study of the industry is needed to establish their illegality”¹²²—applied to the action of the court-appointed counsel.¹²³

The Commission emphasized the commerce aspect of the court-appointed counsels’ work, and diminished the importance of the service component. The Commission cited *Goldfarb v. Virginia State Bar*¹²⁴ wherein the Supreme Court held that the practice of a Virginia bar association to set a minimum fee schedule for a lawyer conducting a title examination was price fixing and, therefore, per se illegal.¹²⁵ That a title search is clearly a commercial transaction and is quite unlike the constitutionally mandated act of representing indigent defendants did not interest the Commission: “A lawyer who provides legal representation for an indigent defendant also provides a service, and the exchange of this service for money is also commerce.”¹²⁶ The FTC failed to appropriately consider an important factor distinguishing the SCTLA situation from *Goldfarb*: it was not the lawyers’ group that set the fee, as in *Goldfarb*, but rather the *legislature* for the District of Columbia.¹²⁷

119. These Commissioners may have been intent on “getting” the lawyers before the strike even began. *The Washington Post* reported more than a week before the job action began that “FTC sleuths are keeping close tabs on the Lawyers’ pre-strike activities, monitoring when they hold the meetings and what goes on there.” Kamen & Bruske, *supra* note 105, at B2. Once the strike was underway, the FTC sought tapes from television stations which contained interviews with striking lawyers. Bruske, *supra* note 105, at C4.

120. *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. at 603.

121. 435 U.S. 679 (1978) (invalidating the National Society of Professional Engineers’ ethical canon which prohibited competitive bidding).

122. *Id.* at 692.

123. *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. at 572-73. The Commission concluded “that the SCTLA lawyers’ concerted refusal to deal for the purpose and with the effect of raising prices is price fixing and is therefore subject to the *per se* rule.” *Id.* at 574.

124. 421 U.S. 773 (1975).

125. *Id.* at 793.

126. *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. at 574. This view of labor is inconsistent with the Clayton Act’s statement of policy that “[t]he labor of a human being is not a commodity or article of commerce.” 15 U.S.C. § 17 (1988).

127. The opinion concluded that the “mere fact that the government, as the only purchaser of services, was the target does not protect their boycott from regulation.” *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. at 599.

What is perhaps most bothersome about the FTC's position is its clear lack of concern for the issues underlying the lawyers' strike.¹²⁸ This is perhaps best exemplified in a statement by the FTC's chief counsel in charge of the litigation: "[P]eople feel sympathy for these lawyers because their rates are very low . . . but that's just irrelevant. There were enough lawyers to do this work at *minimal* quality"¹²⁹

The Sixth Amendment guarantee to counsel has perhaps never before been interpreted by a leading government attorney as requiring only *minimal* competence. The *Code of Professional Responsibility*¹³⁰ and the *Model Rules of Professional Conduct*¹³¹ could certainly be interpreted as requiring a lawyer who consistently provides only *minimal* effectiveness to be professionally *disciplined*.¹³²

The SCTLA raised two primary defenses in the lengthy hearings before the Commission, each of which emphasized the SCTLA's entitlement to immunity from antitrust competition because the Association's actions were protected by the First Amendment.¹³³ First, the SCTLA claimed that its actions fell within the *Noerr-Pennington* doctrine¹³⁴—that

128. The disdain and disrespect the FTC Commissioners felt for the court-appointed counsel who were receiving the same out-of-court compensation rate of \$20 an hour that they had 13 years before is illustrated by a comment maligning the counsel for wanting "the privilege to coerce the District of Columbia to pay *Oldsmobile* prices, so that they can profit from the result." *Id.* at 588 (emphasis added).

129. David O. Stewart, *Trust-busting*, A.B.A. J., Apr. 1990, at 48, 50 (emphasis added). The Commission similarly claimed in its opinion that since there were lawyers who were accepting cases at the prevailing rates, "the city's offering price before the boycott apparently was sufficient"
Superior Court Trial Lawyers Ass'n, 107 F.T.C. at 570.

130. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

131. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

132. For example, Disciplinary Rule 7-101 of the *Model Code* requires the lawyer to act *zealously*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980) (emphasis added), and the first Rule of the *Model Rules* states that competent representation requires legal knowledge, skill, thoroughness, and preparation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). For a full discussion of the applicability of these professional standards to disciplining a criminal defense lawyer for incompetent representation, see Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171 (1988).

133. The lawyers' position won support from other professional groups concerned with their own First Amendment freedoms. For example, the American Medical Association stated:

[T]he AMA believes that the Commission's approach to this case shows insufficient regard for the First Amendment rights of professional associations and their members. The AMA's interest in this case is to support the right of professional associations to use effective means to express their views to the government, including their views on appropriate levels of reimbursement.

Brief of Amicus Curiae AMA in Support of Respondent/Cross-Petitioner at 2, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393).

134. The *Noerr-Pennington* doctrine derived from the Supreme Court decisions in two cases: *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

political activity undertaken with the goal of obtaining government action and to influence public officials, even though undertaken for anticompetitive purposes, is immune from antitrust laws.¹³⁵ The Commission, however, held that the actions taken by the SCTLA did not fall within the *Noerr-Pennington* protections because the counsel had engaged in a coercive boycott and not mere petitioning.¹³⁶

Even if *Noerr* was found not to apply to the actions of the court-appointed counsel, the second argument of the SCTLA was that there ought to be a First Amendment exception to the antitrust laws for nonviolent expressive conduct on issues of public concern.¹³⁷ The SCTLA claimed that this was a political boycott undertaken with the political objective of furthering the Sixth Amendment rights of indigent defendants by attempting to obtain conditions which might lead to more

135. The Supreme Court stated in *Noerr* that "no violation of the [Sherman Antitrust] Act can be predicated upon mere attempts to influence the passage or enforcement of laws" and that the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had." *Noerr*, 365 U.S. at 135, 140. In *Pennington*, the Supreme Court, reaffirming the *Noerr* holding, stated that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670. To get their facts within the *Noerr-Pennington* doctrine, the SCTLA brief to the Supreme Court phrased the question presented as follows: "Whether a legislative petitioning boycott, directed at both furthering the Constitutional rights of indigent criminal defendants and the economic benefit of their 'striking' lawyers, is beyond the scope of the antitrust laws." Brief for the Individual Respondents at 1, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). Compare this to the statement of the issue in the brief of the Federal Trade Commission: "Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is immunized from all antitrust scrutiny by the First Amendment." Brief for the Petitioner/Cross-Respondent at 1, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

136. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 582 (1986). The SCTLA had argued that their boycott was protected under *Noerr*, notwithstanding its coercive aspect, because the purpose of the conduct was to influence the passage of legislation. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (stating that the claim that expressions had the intention of exerting coercion does not remove the actions from the protection of the First Amendment).

137. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990). The SCTLA, in their brief to the Supreme Court, posed this issue as follows: "Whether a legislative petitioning boycott, in which the primary motive of the boycotters is to engage in political expression, is beyond the scope of the antitrust laws, even if such conduct causes incidental commercial effects." Individual Respondents' Brief at 1, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393). The Commission responded that the governmental interest in prohibiting restrictions in competition outweighed any "negligible inhibitions that application of the law here might impose on the respondents' freedom of expression." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 595; see also Brief for Amici Curiae Washington Council of Lawyers, Nat'l Legal Aid and Defender Ass'n and Ass'n of Am. Trial Lawyers in Support of Respondent/Cross-Petitioner at 5, 6, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393) (arguing peaceful boycotts against the government are mainstream political activities and therefore encompassed by the *Noerr-Pennington* doctrine).

competent representation.¹³⁸ But whereas the administrative law judge had determined that the fee increase was necessary to satisfy the political and constitutional requirements of effective assistance,¹³⁹ the Commission concluded that the goal of the striking lawyers was to obtain economic benefits and not to accomplish political ends: "The members of SCTLA explicitly sought to force concessions from the District government in its role as a buyer of services rather than its role as a policymaker."¹⁴⁰ The Commission added, "we find unpersuasive the respondents' argument that they undertook their coercive course of conduct for altruistic rather than for commercial purposes."¹⁴¹

It was two years before the District of Columbia Circuit Court of Appeals decided the appeal.¹⁴² The circuit court agreed with the FTC that the court-appointed counsel acted as "competitors,"¹⁴³ and that, although "[d]istinguishing between political and economic motives is a daunting task," the case was more economic than not.¹⁴⁴ The court also agreed that the case did not fall within *Noerr*¹⁴⁵ because the lawyers did not limit their activities to the technique of persuasion.¹⁴⁶

The District of Columbia Circuit decision, however, differed from the Commission's opinion in one crucial respect. The court concluded that the SCTLA boycott contained an element of expression that deserved First Amendment protection.¹⁴⁷ Therefore, in accordance with *United States v. O'Brien*,¹⁴⁸ restrictions on the protected conduct could be no greater than that required to preserve competition.¹⁴⁹ Judge Ginsberg applied the rule of *O'Brien* in his majority opinion and held that regulation of the attorneys' actions would be appropriate only if a "sufficiently important

138. See *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1050 (D.C. Cir. 1981) (noting that boycotts are a staple of political activity).

139. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 560.

140. *Id.* at 582.

141. *Id.* at 586.

142. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

143. *Id.* at 235.

144. *Id.* at 246. The court relied on a SCTLA statement prior to the boycott that counsel would take no more cases unless the fees were increased. However, in his concurring opinion, Judge Silberman concluded that the determination of the appropriate fee for court-appointed counsel was a political issue despite the self-interest of the SCTLA in raising the matter. *Id.* at 253 (Silberman, J., concurring).

145. See *supra* note 135.

146. *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 244.

147. *Id.* at 248. The court rejected the SCTLA claim of absolute First Amendment immunity. *Id.*

148. 391 U.S. 367 (1968). The Supreme Court in *O'Brien*, while upholding the conviction of a Vietnam War protestor who had burned his draft card, expressed the need to balance any claimed governmental interest against the right to First Amendment expression. *Id.* at 367-77.

149. *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 248.

government interest in regulating the nonspeech expression can justify incidental limitations on First Amendment freedoms.”¹⁵⁰ The court vacated the Commission’s ruling and remanded the matter to ascertain whether there was proof of SCTLA “market power” which would make the boycott economically coercive and not merely a political pressure tactic.¹⁵¹ The SCTLA had argued that the boycott had been successful because of political persuasion and lobbying, not because the SCTLA had market power.¹⁵² Indeed, the SCTLA had enlisted the support of politicians, the D.C. Bar, judges, and the media in their lobbying efforts.

The FTC petition for reconsideration was denied.¹⁵³ The FTC then petitioned the Supreme Court for certiorari and the SCTLA cross-petitioned.¹⁵⁴ The Supreme Court granted certiorari on both petitions in April, 1989.¹⁵⁵ The Court found that the boycott was clearly

150. *Id.* at 248 (quoting *O'Brien*, 391 U.S. at 376).

151. *Id.* at 249-50. Having concluded that there was a per se violation of the antitrust laws, the Commission had not inquired into the SCTLA’s market power. The SCTLA maintained that they had not had market power since there were many lawyers in the District available to receive court-appointment to represent indigent defendants who were not members of the SCTLA. It is also true that the courts could have required any lawyer to accept an appointment to represent an indigent defendant. See *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (holding attorneys are officers of the court and are therefore required to render service when instructed by the court). The *Model Rules* state that a “lawyer shall not seek to avoid appointment by a tribunal to represent a person except for a good cause.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1983). The District of Columbia City Council chose to respond to the boycott by raising fees; it could have elected to increase the staff of the defender office and, as is done in many jurisdictions, assigned virtually all cases to the defenders.

152. The FTC was fully aware of the difficulty it would have had in showing that the SCTLA did indeed have the power to control the market price of their legal services. The FTC referred to the “unprecedentedly onerous character of the ‘market power’ burden thrust on antitrust plaintiffs.” Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit at 19, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393). In fact, the administrative law judge’s initial decision was based, in part, on his conclusion that the level of fees set by the D.C. Criminal Justice Act had little to do with ordinary market forces. *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. 510, 559 (1986). The Public Defender Service coordinated efforts to have private counsel who did not usually take court-appointed cases take such cases during the strike. And in fact, lawyers from some of the District’s largest firms—Arnold & Porter, Covington & Burling, and Wilmer, Cutler & Pickering—did agree to represent the indigent defendants. Kathleen Sylvester, *After 12 Years Without an Hourly Rate Rise, D.C.’s Court-Appointed Lawyers Go on Strike*, NAT’L L.J., Sept. 19, 1983, at 40. The public defender staff lawyers themselves accepted as many as 32 cases per day, approximately three times as many as usual. Michael Isikoff, *FTC Panel Calls Lawyers’ Strike Illegal*, WASH. POST, Oct. 11, 1983, at B1.

153. *Superior Court Trial Lawyers Ass’n v. FTC*, 897 F.2d 1168 (D.C. Cir. 1990), *vacated and order of denial re-entered*, No. 86-1465, 1990 WL 166448 (D.C. Cir. Oct. 2, 1990).

154. *Superior Court Trial Lawyers Ass’n v. FTC*, 57 U.S.L.W. 3590 (U.S. Feb. 22, 1989) (No. 88-1393).

155. *FTC v. Superior Court Trial Lawyers Ass’n*, 490 U.S. 1019 (1989).

economic,¹⁵⁶ that *Noerr* did not apply,¹⁵⁷ that the per se analysis was appropriate,¹⁵⁸ and that the boycott had violated antitrust laws.¹⁵⁹ The FTC's order was reinstated by a 6-3 decision of the Court. The 100 lawyers who were providing a constitutionally mandated service at a compensation level acknowledged to be outrageously low¹⁶⁰ and which had not been increased during the thirteen years preceding the strike were found to have violated section 1 of the Sherman Antitrust Act. By insisting on adopting the marketplace basis for its analysis, the Court sacrificed the interests of the lawyers and their indigent clients.

Justice Stevens, writing for the majority, considered the social or political motive of a price-fixing agreement of no consequence.¹⁶¹ He rejected the attorneys' claim that the boycott was a form of political expression entitled to First Amendment protection.¹⁶² Regardless of counsels' "altruistic" motivation, the crucial factor was their desire to achieve an increased price for their services.¹⁶³ Justice Stevens did, begrudgingly, acknowledge both the legitimacy of the lawyers' claim for increased compensation and the need for the strike: "[T]he preboycott rates were unreasonably low, and the increase has produced better legal representation for indigent defendants Without the boycott

156. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990).

157. *Id.* at 428.

158. *Id.* at 434-36.

159. *Id.* at 436. One irony here is that the lawyers' strike, instead of representing an *anticompetitive* action, actually resulted in *increased* competition among lawyers since the fee increase made the work more attractive to many. Even one of the FTC commissioners agreed that "[t]he system is working better than before." Martha Middleton, *DC Attorneys Face Antitrust Charges Over Strike*, NAT'L L.J., Jan. 2, 1984, at 5.

160. See *supra* note 45 and accompanying text. Interestingly, the *Report of the Federal Courts Study Committee* recommended a full review of the sufficiency of compensation provided for in the federal Criminal Justice Act, and called for an amount adequate to cover overhead and an hourly fee.

161. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990). This is in direct contrast to the primary claim of the American Civil Liberties Union: "[A] boycott which, as here, promotes the constitutional rights of otherwise underrepresented or powerless groups should be protected from the chilling application of antitrust law." Brief of Amicus Curiae ACLU in Support of Respondent/Cross-Petitioner at 2, *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (Nos. 88-1198, 88-1393).

162. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 427-28. In contrast, the Eighth Circuit found in *Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980), that the NOW boycott of Missouri, designed to persuade the state to ratify the Equal Rights Amendment, was encompassed by the *Noerr* doctrine protection of political activities to petition the government. *Id.* at 1315 n.16. Other cases which protected boycotts that exerted economic pressure in order to accomplish a change in governmental policies include: *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980), *aff'd mem.*, 676 F.2d 684 (3d Cir. 1982); and *Coastal States Marketing Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).

163. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 424-25.

there would have been no increase in District CJA fees at least until the Congress amended the federal statute.”¹⁶⁴ According to Justice Stevens, the *Noerr* provision of antitrust immunity for political boycotts did not, however, encompass a boycott conducted by business competitors who stood to profit from the “lessening of competition in the boycotted market.”¹⁶⁵

Justice Blackmun, however, focused on the lawyers’ lack of market power and found that political, rather than economic, concerns *had* controlled the decision to strike: “District officials themselves may not have genuinely opposed the rate increase, and may have welcomed the appearance of a politically expedient ‘emergency.’”¹⁶⁶ Justice Brennan characterized the majority holding as “insensitive,” and one which ignored the historical importance of the boycott as a means of political communication.¹⁶⁷ But the Court’s majority viewed the boycott as a cartel restricting its supply, and political issues and political mobilization were of no import.

The Supreme Court’s decision is a major setback to counsel representing the indigent defendant.¹⁶⁸ As was true with the SCTLAW lawyers, a strike would, in any event, be only a matter of last resort. Court-appointed counsel have few options. In addition, indigent defendants have no political clout and few politicians dare to advocate the allocation of additional funds for their legal representation.¹⁶⁹ In this era of

164. *Id.* at 421.

165. *Id.* at 427.

166. *Id.* at 454 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun did not agree with the majority that the per se antitrust rule applied to the boycott. He did, however, agree that the *Noerr* doctrine did not provide immunity and that the First Amendment concerns did not require sanctioning the boycott. *Id.*

167. *Id.* at 437 (Brennan, J., dissenting in part). Justice Brennan also concluded that political pressure rather than economic coercion was the crucial determinant. *Id.* at 441-42. Justice Brennan opined that the majority decision ignored the long history of the trial attorneys’ attempts to win political support and the virtually unanimous support which was achieved once the boycott occurred. *Id.* at 443.

168. The significance of this case was not lost on other court-appointed counsel programs. Fourteen states signed on as Amici Curiae in support of the FTC, claiming that any expansion in First Amendment protections for counsel would cause a loophole in antitrust regulation that would impede the efforts of the states to preserve and encourage competition. Brief of Amici Curiae 14 States in Support of Petitioner at 1, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393); see also Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit at 17-21, *Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (Nos. 88-1198, 88-1393) (asserting that the erroneous holdings of the D.C. Circuit Court threatened effective antitrust enforcement far beyond this matter).

169. For example, the New York State Legislature has repeatedly failed to increase compensation rates for assigned counsel despite recommendations from bar associations, legislative committees, and newspaper editorials. In a 1989 address, the former Chief Judge of New York, Sol Wachtler, urged that the “rate of compensation for attorneys appointed by the court must be increased as soon as

governmental deficits and cuts in expenditures at the county, state, and federal levels, the problems of counsel are steadily becoming exacerbated.¹⁷⁰ If those representing the indigent cannot unite¹⁷¹ to fight for more funding to protect the constitutional rights of their clients,¹⁷² the criminal justice system as a whole is sure to suffer.¹⁷³

possible." Sol Wachtler, 1989—*The State of the Judiciary*, N.Y. L.J., Dec. 4, 1989, at 52, 55. The Legislature not only failed to comply that year, but in 1991 as well. Compensation in New York remains at the 1985 level of \$25 per hour for out-of-court, and \$40 per hour for in-court work. Spanenberg Group, *supra* note 47, at 28. The failure of the rates to even take into account cost of living increases has caused attorneys to withdraw from lists of those willing to accept court appointment. See Rosenbaum, *supra* note 68, at 7 (reporting that between 1985 and 1988, one county in New York had a 25% decline in the number of lawyers on the appointment panel while at the same time there was a 106% increase in felony cases). The only "political" support defenders get is typically the platitudes and "appreciation" from judges. For example, the Chief Justice of the Kentucky Supreme Court recently stated: "[There] is the need for more full-time public defenders and a generous increase in the compensation of these dedicated and hard working men and women. While theirs is not a 'popular' cause, [t]heirs is an invaluable dedication to public service without which many would be denied access to justice." Monahan, *supra* note 64, at 7 (quoting Chief Justice Stephens). See also the comments of United States District Judge Edward Johnstone that defense counsel "shoulder the burden of seeing that, in the criminal justice system, individual liberties and dignity are not side-stepped or cheapened. This burden has often been shouldered in the face of overwhelming caseloads, public abuse and meager pay." Edward H. Johnstone, *Some Bicentennial Observations on the Sixth Amendment Right to Counsel*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Aug. 1991, at 6 (footnote omitted).

170. The fee in Tennessee for court-appointed counsel had been \$20-\$30 per hour until the financial difficulties of the state led to a cut back to \$5-\$7.50 per hour. David Margolick, *Volunteers or Not, Tennessee Lawyers Help Poor*, N.Y. TIMES, Jan. 17, 1992, at B16. In Seattle, Washington, assigned counsel receive \$22 an hour, an amount unchanged in over 11 years, with the result that experienced attorneys are withdrawing their names from the list of counsel willing to take court-appointed cases. STANDARDS FOR PUBLIC DEFENSE SERVICES Standard 1 commentary (Wash. Defenders Ass'n 1989). The Chief Justice of the Alabama Supreme Court appointed a Task Force on Indigent Defense Services which recommended a doubling in the compensation rate for out-of-court work done by appointed counsel and a 50% increase in the rate for in-court time. However, in 1991, the Board of Bar Commissioners voted down the recommendations, causing the Chair of the Alabama State Bar's Indigent Defense Committee to resign, stating: "We have a real crisis on our hands here in Alabama." Monahan, *supra* note 10, at 28 (quoting Dennis Balske, former Chair of the Alabama State Bar's Indigent Defense Committee).

171. One FTC official stated that it was indeed the purpose of the FTC intervention to prevent future collective actions by counsel and that a "clear signal" was needed to show the legal community that such conduct was impermissible. Isikoff, *supra* note 152, at B8; see also Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510, 602 (1986) (discussing the initial cease and desist order as designed specifically to "prohibit the respondents from initiating another boycott" whenever they became disaffected with the results or pace of the legislative process).

172. The administrative law judge, on first considering the legality of the SCTL strike, said of the lawyers involved: "[T]here is plenty of evidence that within the corps of CJA regulars are dedicated lawyers from public interest backgrounds who consider representation of the poor as the highest calling of the legal profession." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 521.

173. Washington, D.C., presents a good example of the current problem confronting court-appointed counsel. The District's criminal courts' fee for services has not changed eight years after the boycott, even though lawyers appearing as court-appointed counsel in criminal cases in the *federal* courts in Washington receive \$75 per hour. The District of Columbia Criminal Justice Act, which specifies the

IV THE PUBLIC DEFENDER OFFICE: RECENT DEVELOPMENTS IN THE CASELOAD CRISIS

Theoretically, an office staffed by full-time public defenders working exclusively on cases representing indigent defendants is preferable to a system which relies on private, court-appointed counsel. A public defender office, consisting of full-time specialists, relieved of the financial concerns of running a profitable law office, would be a forceful advocate of the rights of indigents accused within the criminal justice system. There would be paralegals, training programs, supervision and assistance, brief banks, resources for investigators, and time for brainstorming particular problems.

The reality, however, is far different. To the county or state which is constitutionally required to provide representation to the indigent defendant,¹⁷⁴ the main advantage of the public defender system may be that it is a cheap method of representing as many cases as possible in the least amount of time. The assembly line has proven most productive in many areas of the American economy, and the public defender so perceived could deliver the required product (any warm body standing next to an accused) at the lowest possible cost.¹⁷⁵

The ABA created the Special Committee on Criminal Justice in a Free Society in 1986 to conduct a multi-year examination of crime and crime control in the United States.¹⁷⁶ The Committee's report, entitled

compensation level, had been modeled after the federal Criminal Justice Act and for many years the compensation provided for by each Act was comparable. Court-appointed counsel in the District are confronted with a District government in very weak financial condition unwilling to allocate more funds for counsel, a Supreme Court ruling banning them from organizing to take collective action, and morale so low that lawyers are increasingly becoming discouraged from representing poor people accused of crime. See Daniel Klaidman, *Defining 'Market Force'*, LEGAL TIMES, Jan. 29, 1990, at 7.

174. The Sixth Amendment to the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

175. The phrase "assembly-line justice" has been used over the years to describe the operations of urban public defender offices. The concept may have originated in *The Challenge of Crime in a Free Society*. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT IN ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967). The report described the factory-like mass processing of defendants by the criminal justice system, noting that the defendants were not treated as individuals by anyone, including the overburdened defense counsel. The report concluded that the defendants "are numbers on dockets, faceless ones to be processed and sent on their way." *Id.* A somewhat similar description occurred 20 years later, referring to the quality of representation provided to defendants in New York City: "[L]awyers for the poor in criminal cases infrequently test the state's case and insufficiently protect defendants' rights. The rights of poor people charged with crime have a life only in the rhetoric of the system." McConville & Mirsky, *supra* note 34, at 901.

176. The Committee was chaired by Samuel Dash of the Georgetown University Law Center and included prosecutors, judges, defense counsel, law professors, and police representatives. CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 1, 2.

Criminal Justice in Crisis,¹⁷⁷ noted that as far as the indigent defendant was concerned, "the problem is not that the defense representation is too aggressive, but that it is too often inadequate because of underfunded and overburdened public defender offices."¹⁷⁸ The most significant problem, the Committee reasoned, was the lack of financial resources.¹⁷⁹ In the "chronically underfunded" criminal justice system, the Committee realized, "even the most well-intentioned lawyers cannot assess the best interests of their clients if they are continually facing caseloads which they know they cannot handle."¹⁸⁰ The Committee concluded that "indigent defense systems nationwide are underfunded."¹⁸¹

An underfinanced public defender office means too many cases for the staff attorney.¹⁸² A 1990 National Institute of Justice report surveyed 375 counties across the country as part of its National Assessment Program.¹⁸³ Eighty percent of the defenders contacted believed that there was a need for more attorneys to represent the indigent and that the number of defenders had not kept pace with their counties' increasing caseloads.¹⁸⁴ Ninety-five percent of defenders believed that their budget was less than that provided to prosecute indigent defense cases, and 77% found that the heavy caseloads created problems with retention of staff due to burnout.¹⁸⁵

177. *Id.*

178. *Id.* at 9.

179. *Id.* at 39.

180. *Id.* at 41.

181. *Id.* This was not the first time the ABA had articulated these concerns. The ABA House of Delegates in February, 1979 voted to approve the following:

RESOLVED, that the [ABA] supports in principle the establishment of an independent federally funded Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings.

A.B.A. Standing Committee on Legal Aid and Indigent Defendants, *Report to the House of Delegates* 1 (1979) (copy on file with the *Indiana Law Journal*). The Report summed up the comprehensive study by the Standing Committee which "revealed all too clearly that despite the mandates of the United States Supreme Court, the efforts of th[e] [ABA], and of many defender associations, our adversary system of criminal justice simply does not function effectively for the majority of poor defendants." *Id.* at 3.

182. The ABA Standing Committee on Legal Aid and Indigent Defendants deemed the caseload problem the primary reason for its call for a Center of Defense Services. See A.B.A. Standing Committee on Legal Aid and Indigent Defendants, *supra* note 181, at 4.

183. NATIONAL INST. OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: PRELIMINARY SURVEY RESULTS FOR PUBLIC DEFENDERS (1990).

184. *Id.* at 3.

185. *Id.* at 1-4. Sixty-six percent of the directors of defender offices found that the heavy caseload also made it hard to recruit attorneys. *Id.* at 4.

The chief public defender in an office has typically assumed the obligation to provide representation to all indigents arrested in the locale.¹⁸⁶ Therefore, as the numbers of those arrested increase, the chief will instruct the staff to take more and more clients. But what happens when the staff defender determines that he can handle no more cases without violating professional ethics rules and his clients' constitutional rights? What happens when his employer instructs him to take additional cases or else be fired?

It is this commentator's contention that the staff defender who decides that he cannot in good conscience accept additional cases must be supported in that decision.¹⁸⁷ There is more at stake than just a traditional employer-employee relationship wherein the employee can be fired either for any reason, or, if there is a union contract, for "just cause,"¹⁸⁸ which most certainly will encompass "insubordination."

There is also the issue of professional self-respect. No one can envision the incredibly harried and pressured defender as the embodiment of the professional ideal. Defenders subject themselves not only to possible suits for malpractice¹⁸⁹ and professional discipline for neglecting clients,¹⁹⁰ but also to contempt of court. For example, one overburdened defender who was required to be in several courts in one day was held in contempt and handcuffed to a chair for twenty minutes by a judge who was angry because the defender arrived late to that judge's courtroom.¹⁹¹

186. The fulfillment of that obligation, however, can vary sharply among the counties of any given state. For example, a recent statewide study conducted by the California State Bar's Standing Committee on the Delivery of Legal Services to Criminal Defendants "found that the quality of legal services varied from 'outstanding to woefully inadequate,'" and that there was no consistency in the level of legal services provided throughout the state. GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS IV (State Bar of Cal. Bd. of Governors Dec. 1990). As a result of the study, a statewide commission was formed which ultimately developed voluntary guidelines for systems delivering indigent criminal defense services. *Id.*

187. It is widely acknowledged that private counsel has an obligation not to accept more cases than they can handle. For example, the State Bar of California's *Standards of Representation* for court-appointed counsel states that counsel has the *responsibility* of "refusing to accept more cases than the attorney can competently handle." *Id.* at 12.

188. Approximately 96% of all employer-union contracts include provisions for an outside arbitrator to resolve disputes. ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 745 (11th ed. 1991).

189. For an analysis of malpractice litigation against public defenders, see Klein, *supra* note 132.

190. For a thorough analysis of the vulnerability of the public defender to professional discipline, see *id.* at 1171-1209.

191. Richard D. McFadden, *Legal Aid Lawyers Stop Work to Protest Judge's Treatment of One of Their Own*, N.Y. TIMES, Dec. 13, 1991, at B3. More than 100 lawyers staged a wildcat walkout to show their support of the handcuffed attorney. Legal Aid lawyers said they frequently had to appear at 10-15 hearings a day and often confronted unavoidable scheduling conflicts. *Id.*

The staff defender performs constitutionally mandated work. His performance, like that of all attorneys, is controlled by the *Model Code of Professional Responsibility*¹⁹² or the *Model Rules of Professional Conduct*,¹⁹³ depending on the jurisdiction in which he practices. It is his responsibility to ensure that each and every client he represents receives the effective assistance of counsel. If he determines that to take additional cases would interfere with the rights of his current clients as well as his new clients, he must be allowed to refuse to accept the additional cases.

Excessive caseloads for public defenders have been a problem for years.¹⁹⁴ In recent years, however, the difficulties have worsened. The ABA Standing Committee on Legal Aid and Indigent Defendants found that, as of 1990, there was an unmistakable trend showing that "caseloads of most public defenders [had] grown at an alarming rate."¹⁹⁵ The United States Department of Justice determined that, in the four years ending with 1986, caseloads for counsel of the indigent defendant increased 40%.¹⁹⁶ The project coordinator of the ABA's Bar Information Program stated regarding public defender offices: "With few exceptions, the whole country is inadequately funded. Some are desperate, some are only beginning to feel the effects of it."¹⁹⁷

What is perhaps most disconcerting about the caseload problem is that it is so longstanding and that it continues to worsen.¹⁹⁸ The caseload

192. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1980) ("[T]he Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.") (citations omitted); see also *Chaleff v. Superior Court*, 69 Cal. App. 3d 721, 724 (1977) (stating that the rules of professional conduct apply to all members of the state bar, including public defenders); *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (noting that the professional obligations of public defenders are identical to those of all attorneys, whether private or court appointed).

193. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

194. For a thorough discussion of the caseload problems of lawyers representing the indigent defendant, see Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656-81 (1986).

195. *Recent Trends in Indigent Defense Services*, INDIGENT DEF. INFO. (A.B.A. Standing Comm. on Legal Aid and Indigent Defendants' Bar Info. Program), Spring 1990, at 1.

196. U.S. DEP'T JUST., BUREAU OF JUSTICE STATISTICS BULLETIN 1 (Sept. 1988). Eight jurisdictions, including the District of Columbia, doubled or nearly doubled the number of cases involving indigent defendants. *Id.* at 6.

197. Stacey Colino, *When Justice Goes Begging: The Crisis in Indigent Defense*, STUDENT LAW., Oct. 1988, at 14.

198. The director of the Defender Division of the National Legal Aid and Defender Association commented on the effect of the recent recession on funding for public defender organizations: "At times like this, one of the first things governments do is look around and say, 'Why are we paying all this money to defend these criminals?' So they cut back on the already meager resources available to indigent defense programs." Margolick, *supra* note 170, at B16.

crisis can devastate the morale of often idealistic and dedicated attorneys.¹⁹⁹

The problems and obstacles in providing quality representation to indigent defendants are perhaps greatest in large urban areas. The situation in New York City illustrates the severity of the dilemma. The low quality of representation in the deluged New York system was noted as far back as 1963, when a state judiciary committee concluded:

In our judgment, the Legal Aid Society, Criminal Branch, is severely overtaxed. As a result, the indigent Criminal Court defendant is not assured of adequate representation. We believe that this fact is virtually mathematically demonstrable. Bearing in mind the limited number of attorneys, the large number of cases, the widespread courtroom locations, and the variety of charges that must be defended, it is inconceivable to us that even the most dedicated efforts can assure the average defendant a performance in the usual case on a parity with that of the average privately retained lawyer.

We fear that, consciously or not, the Legal Aid lawyer is so hampered by the case burden he must carry in the Criminal Court that he will seek shortcuts to the detriment of defendants.²⁰⁰

In 1968, a report of the chief judge of New York warned that "the addition of twenty Judges to the Criminal Court of the City of New York [was] an absolute necessity if the administration of criminal justice within the City of New York [were] not to suffer a breakdown."²⁰¹ That same year Governor Rockefeller referred to the "intolerable conditions" caused by calendar congestion in the New York City courts.²⁰² An investigative article reported that some court administrators and lawyers saw the Legal Aid Society as "just another cog in the criminal court apparatus" and that the Legal Aid lawyers joined in the general effort to get through the calendar as quickly as possible regardless of whether justice was being

199. See, e.g., *Wallace v. Kern*, 392 F. Supp. 834, 839 (E.D.N.Y. 1973) (reporting that the attorney in charge of the Brooklyn office of the Legal Aid Society testified that the excessive caseloads had completely undermined the morale of the conscientious, hardworking staff), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

200. REPORT OF THE JUDICIARY COMMITTEE OF THE NEW YORK STATE ASSEMBLY ON THE PRACTICES AND PROCEDURES IN THE CRIMINAL COURT OF THE CITY OF NEW YORK, LEG. DOC. NO. 37, 186th Sess. 17, 18 (1963).

201. THIRTEEN [sic] ANNUAL REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF NEW YORK (1968), *cited in* CRIMINAL COURTS COMM., ASS'N OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 8 (Jan. 7, 1983) [hereinafter *SAVING THE CRIMINAL COURT*] (copy on file with the *Indiana Law Journal*).

202. GOVERNOR'S MESSAGE ON JUDICIARY LAW, NEW YORK STATE LEGISLATIVE ANNUAL 407, 433 (1968), *cited in* SAVING THE CRIMINAL COURT, *supra* note 201, at 8.

done.²⁰³ In 1970, the presiding justices of the Appellate Divisions, charged with reviewing appeals arising from New York City courts, reported that an overwhelming number of cases had resulted in an increasing backlog, long delays, and "inadequate attention to individual cases and individual defendants."²⁰⁴ The justices noted that each of the three major New York City newspapers had recently reported the serious problems resulting from the overwhelming caseload.²⁰⁵

The New York Legislature in 1972 enacted a "finding" that "there is an emergency of grave dimensions in the processing of felony charge cases in the criminal courts in the metropolitan counties of the state."²⁰⁶ The legislature appropriated \$6,700,000 to be used for an emergency felony case processing program.²⁰⁷ The next year, following two days of public hearings, the chairman of the Board of Corrections of the City of New York issued a report emphasizing the caseload crisis facing Legal Aid attorneys:

As long as their caseloads remain at the present staggering levels, it is impossible for Legal Aid attorneys to form productive relationships with their clients, thoroughly investigate and prepare their cases, counsel their clients, and take an active role in the sentencing process. In short, an attorney with an active caseload of 100 felony cases cannot provide effective representation to his clients.²⁰⁸

Underfunding of the Legal Aid Society, a private, not-for-profit agency contracting with the city to represent indigent defendants, has been a perpetual problem, and indeed a most significant cause of inadequate representation. In 1972, although the Legal Aid Society represented 75% of all defendants in New York City, the Society's Criminal Defense Division received only 37% of the funds that the district attorney offices received.²⁰⁹ Legal Aid attorneys voted to strike in 1982,²¹⁰ partly in

203. Edward C. Burkes, *City Courts Face a Growing Crisis*, N.Y. TIMES, Feb. 12, 1968, at 41, 44.

204. *Lefcourt v. Legal Aid Society*, 312 F. Supp. 1105, 1115 (S.D.N.Y. 1970) (appendix) (statement of the presiding justices of the Appellate Division's First and Second Departments, May 3, 1970).

205. *Id.*

206. 1972 N.Y. Laws 496, § 1.

207. *Wallace v. Kern*, 371 F. Supp. 1384, 1385 (E.D.N.Y. 1974), *rev'd*, 499 F.2d 1345 (2d Cir. 1974), *cert. denied*, 414 U.S. 1135 (1974).

208. *Wallace v. Kern*, 392 F. Supp. 834, 843 (E.D.N.Y. 1973) (quoting report by William J. vanden Heuvel, chairman of the Board of Corrections of the City of New York, Mar. 25, 1973), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

209. Brief for Amicus Curiae Association of Legal Aid Attorneys of the City of New York, at 9 n.3, *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973) (No. 73-1826), *cert. denied*, 414 U.S. 1135 (1974).

210. The precipitating factor leading to the strike was the Legal Aid Society's firing of a lawyer days after he had sought caseload relief through a contractually provided arbitration mechanism and had informed the court that his excessive caseload imperiled the constitutional rights of his clients. See Letter

response to the "soaring workloads" which "constituted a threat to quality representation, and placed in unmistakable jeopardy the constitutional right of the indigent to adequately prepared counsel in criminal proceedings."²¹¹ The contractual settlement which ended the strike after ten weeks called for the creation of a joint labor/management committee designed to deal with working conditions.²¹²

In 1983, the Association of the Bar of the City of New York issued a report which seemed to realize the odds against any positive steps being taken: "This report is a *plea for attention* to the essential needs of the Criminal Court of the City of New York."²¹³ The tone of the report is one of exasperation. "Because of the staggering volume of its caseload and its inability to provide trials, the Criminal Court has been virtually incapacitated in the last few years. *Everyone exposed to the Court knows this*—victims, defendants, witnesses, police officers, lawyers on both sides, court personnel and judges."²¹⁴

Two years later, Legal Aid attorneys averaged caseloads of 439 clients per year,²¹⁵ and the quality of representation provided to the poor was criticized in perhaps the harshest of terms in a draft report prepared for the Committee on Criminal Advocacy of the Association of the Bar of the City of New York:

What passes for "representation" in this system is the presence of a body, any body, next to the defendant. It is not simply a question of incompetence, though that exists. It is not a question of poor quality

from Carl L. Gerstl, President, Association of Legal Aid Attorneys, to Mayor Edward I. Koch, New York City 3-5 (Apr. 21, 1983) (ALAA Response to the Keenan Commission's Report) (copy on file with the *Indiana Law Journal*); E.R. Shipp, *Dispute Over a Dismissal Causes Legal Aid Strike*, N.Y. TIMES, Oct. 23, 1982, § 1, at 29; Advertisement, N.Y. L.J., Nov. 30, 1982, at 5. The Association of Legal Aid Attorneys placed an advertisement five weeks after the strike began, entitled "The Legal Aid Society Fired Weldon Brewer but It Could Have Been Any of Us," because the association wanted "the legal community to be aware of the deteriorating conditions in [the] city's courts which result in assembly-line justice," and that excessive caseloads had become "the order of the day." *Id.*

211. Letter from Carl L. Gerstl, *supra* note 210, at 4. In the 18-month period preceding the strike vote, the number of indictments in New York City had increased 42% while the Legal Aid Society's staff had increased only 16%. *Id.* Defenders in one Kentucky county public defender office reacted differently to excessive caseloads due to inadequate funding—they all quit. Karen Herzog, *Public Defenders Quit*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Aug. 1990, at 13. One of the defenders reasoned that he was no longer "doing these people justice." *Id.*

212. Letter from Carl L. Gerstl, *supra* note 210, at 6.

213. SAVING THE CRIMINAL COURT, *supra* note 201, at 1 (emphasis added).

214. *Id.* at 2 (emphasis added).

215. Stanley Penn, *Seeking Justice: How Public Defenders Deal with the Pressure of the Crowded Courts*, WALL ST. J., July 5, 1985, § 1, at 1, 21.

or ineffective representation. In operational and structural terms, it is a system of *non-representation*.²¹⁶

The next year, the Queens office of Legal Aid voted to file an office-wide caseload grievance.²¹⁷ Indictments had risen almost 100% from the year before, yet the staff had decreased by more than 20%.²¹⁸

As was true elsewhere, but perhaps to the greatest extent in New York, the drug crisis of the late 1980s led to overcrowding of the criminal courts.²¹⁹ The number of felony drug indictments in New York City more than tripled between 1985 and 1990,²²⁰ and 36% of all indictments filed in New York State in 1987 involved drug charges in contrast to only 16% in 1983.²²¹ The *New York Times* reported in 1989 that:

New York City's criminal-justice system is in a state of crisis, just barely able to cope with a growing flood of new drug cases generated by the Police Department's drive against crack, according to judges, prosecutors, correction officials and Legal Aid lawyers [O]fficials say there are not nearly enough Legal Aid lawyers to represent indigent suspects.²²²

The problem, as usual, is one of finances.²²³ The police were allocated

216. David Margolick, *City Bar Panel Faults Lawyers for Poor*, N.Y. TIMES, July 25, 1985, at B3 (quoting a report by a committee of the New York City Bar Association). The final report of the Bar's Criminal Advocacy Committee in the fall of 1986 described the assigned counsel system as "thoroughly discredited and unworkable in its current form" COMM. ON CRIMINAL ADVOCACY, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A SYSTEM IN CRISIS: THE ASSIGNED COUNSEL PLAN IN NEW YORK: AN EVALUATION AND RECOMMENDATIONS FOR CHANGE 4 (1986). The report noted that defendants were being deprived of a decent defense by counsel who continuously fail them and concluded that the existing system "must be changed immediately." *Id.* at 14.

217. N.Y.C. Association of Legal Aid Attorneys, ALAA ORGANIZER, Mar. 1986, at 1.

218. *Id.*

219. Sixty-five percent of the increase in felony arrests for 1989 versus 1988 were attributable to drug arrests. See, e.g., Peter Kerr, *Drug Court Cuts New York Backlog*, N.Y. TIMES, Feb. 6, 1988, § 1, at 1. Whereas it certainly is true that the number of civil cases has risen across the country, the increase does not approach that of criminal cases, especially those which are drug related. For example, in California superior courts between 1978 and 1986, civil case filings increased 17% while criminal cases rose 114%. Alan Rothenberg, *Assembly Line Justice Threatens the Whole System*, L.A. TIMES, Mar. 13, 1990, at B7.

220. See Wachtler, *supra* note 169, at 52. The rapid increase in drug indictments was not limited to the city; suburban areas and upstate New York also had substantial increases. *Id.* The Chief Judge of the New York Supreme Court believed that the trend which has produced the record caseload increases would continue. *Id.*

221. *Drug Cases Clogging Criminal Courts*, N.Y. L.J., Nov. 22, 1988, at 1. Responding to the climate of the day, the prosecutors were treating the drug cases more seriously—in 1983 only 35% of felony drug arrests led to actual prosecutions, in contrast to 51% in 1987. The governor's director of criminal justice stated: "Drug crimes have assumed top priority with the state's prosecutors." *Id.*

222. David E. Pitt, *Surge in New York Drug Arrests Sets Off Criminal Justice Crisis*, N.Y. TIMES, Apr. 4, 1989, at B1.

223. The caseload crisis in the New York City Criminal Courts could have led to the formulation of the adage, "the more things change, the more they stay the same." In 1970, the presiding justice of

substantial special funding to focus on street-level drug purchases with no corresponding increase to the Legal Aid Society²²⁴ which must represent many of the additional people arrested with the same number of attorneys employed previously²²⁵

The situation has continued to worsen, and in 1989 the head of the Criminal Defense Division of the Legal Aid Society indicated that the office was drowning in new cases and needed additional funds just to survive.²²⁶ One hundred fifty-five new lawyers were needed just to return matters to where they had been just a short time before.²²⁷ The deputy chief administrative judge for the New York City courts warned that prosecutions in drug cases were "coming in too fast [and that] if we are not careful the system will come to a standstill."²²⁸

The primary concern of courts and judges in dealing with these new cases²²⁹ is not to ensure that quality, competent representation is

the New York appellate department responsible for supervising the City's courts stated:

During the past several months, each of the city's three major newspapers has called attention to the serious problems in processing an overwhelming number of cases in the Criminal Courts of the City of New York. These problems are manifested by an increasing backlog of cases, longer delays in processing cases to disposition, and inadequate attention to individual cases and individual defendants.

Lefcourt v. Legal Aid Society, 312 F. Supp. 1105, 1115 (S.D.N.Y. 1970).

224. This imbalance may change somewhat. In May, 1990, New York State enacted a statute which mandated that funds received by the state from the Federal Government Drug Control and System Improvement Grant Program be allocated in accordance with a 60:40 formula: of every dollar allocated, 60 cents goes to the prosecutor's office and 40 cents to the Legal Aid Society. 1990 N.Y. Laws 192, § 2.

225. Pitt, *supra* note 222.

226. Daniel Wise, *Flip Side of Anti-Drug Drive Is Understaffed Court System*, N.Y. L.J., Mar. 23, 1989, at 1. In the eight month period between September, 1988, and April, 1989, the caseload of the Criminal Defense Division of the Legal Aid Society increased 30% and the society expected to lose 20% of its staff. Shaun Assael, *Legal Aid Seeks Funds for New Counsel*, MANHATTAN LAW., Apr. 11, 1989, at 8.

227. *Id.* Even in the days before crack cocaine, however, the New York City Legal Aid Society had not expended much money or allocated much attorney time for the cases the Legal Aid Society represented. An exhaustive analysis of the Legal Aid Society led researchers to conclude that the Legal Aid Society survived in New York City "because they engage in low cost, expeditious case processing." McConville & Mirsky, *supra* note 34, at 1261. McConville and Mirsky found that in the 1980s, as caseloads grew and the number of attorneys diminished, the Legal Aid Society's management "subordinated adversarial advocacy—'diligent,' 'vigorous,' and 'individualized' defense—to the need for productivity and efficiency." *Id.* at 687-88 (citation omitted).

228. Wise, *supra* note 226, at 1. The Criminal Court of New York may well be the busiest court of record in the world. See Wachtler, *supra* note 169, at 42. The two federal court districts encompassing New York City demonstrate this increase. As of June, 1991, pending criminal cases were up by 28.5% from the year before in the eastern district of New York, and were up by 15.3% in the southern district. Daniel Wise, *City's Federal Trial Courts Show Rise in Pending Cases*, N.Y. L.J., Sept. 11, 1991, at 1.

229. There are those who would argue that although caseloads in the courts have certainly increased, if the judges spent the time in the courtroom that they were supposed to, there might be no crisis at all.

provided to all, but rather that the cases be processed more rapidly than ever.²³⁰ A 1983 report of the New York City Bar stated that “[b]ecause of the staggering volume of its caseload and its inability to provide trials, the [New York City] Criminal Court has been virtually incapacitated for the last few years.”²³¹ The report noted that a “by-product of congestion itself is that judicial performance is measured by the ability to move cases. That is inevitable, but the intense pressure on judges to keep pace with volume leads sometimes to injustice.”²³²

The caseload crisis which was precipitated in large part by the surge in the number of drug cases is certainly not limited to New York.²³³ Caseloads have increased throughout the federal court system, creating what the director of the federal court system’s Administrative Office has characterized as “a tremendous squeeze on the Federal court system.”²³⁴ A 1990 “blue ribbon” panel appointed by Chief Justice Rehnquist to study federal court operations termed the caseload “enormous” and concluded, “[t]he federal court’s most pressing problems—today and for the

See Ellen J. Pollock & Timothy Sullivan, *Breakdown on Centre Street*, MANHATTAN LAW., May 30, 1989, at 1 (reporting that court-watchers went into criminal courts on one day and found that the judges were actually on the bench for an average of four hours and twenty-seven minutes per day).

230. There was a secondary concern: courthouse space to handle the new cases. See *Top Judge Tours Courthouse, Highlighting Space Shortage*, N.Y. TIMES, Apr. 14, 1989, at B3 (citing former Chief Judge Sol Wachtler’s comment that justice was degraded by conversion of small offices into courtrooms and by the desperate need for additional space); David E. Pitt, *Judge Calls for Sentencing on Rikers Island*, N.Y. TIMES, Apr. 18, 1989, at B1 (reporting that the space emergency resulted in jail space being converted into makeshift courtrooms for sentencing prisoners).

231. SAVING THE CRIMINAL COURT, *supra* note 201, at 2.

232. *Id.* at 17. Overcrowding of New York City’s jails had become so severe that the corrections commissioner feared it would be necessary to release thousands of inmates. Selwyn Raab, *More Jail Crowding May Force Release of Inmates*, N.Y. TIMES, July 14, 1991, § 1, at 25.

233. The National Institute of Justice in 1990 conducted an assessment of the needs of public defense organizations and found that excessive caseloads were a “major problem” for over half of the responding offices and that the increasing number of drug cases was a major problem for 65% of the offices. John Arango, *Defense Services for the Poor*, CRIM. JUST., Summer 1991, at 53; see, e.g., *Public Defender Cuts Cases Back*, N.Y. TIMES, Sept. 16, 1988, at B6 (reporting that the San Francisco public defender will stop representing indigents charged with misdemeanors and cut its felony caseload by 20% because of an enormous increase in drug cases). In Chicago, arrests for drug-related crimes increased 159% between 1984 and 1988; in Memphis, 60% of the criminal court cases are now drug offenses. Timothy R. Murphy, *Indigent Defense and the U.S. War on Drugs: The Public Defender’s Losing Battle*, CRIM. JUST., Fall 1991, at 14, 16.

234. Richard L. Berke, *Surging Criminal Cases Jam Federal Court System*, N.Y. TIMES, Sept. 26, 1989, at A24. The Executive Committee of the Judicial Conference of the United States was so concerned in 1991 that pending congressional legislation could lead to an even higher number of drug cases entering federal courts, that the Conference’s Committee on Criminal Law and Probation Administration attempted to block passage in the House of a bill that had been approved by a vote of 71 to 26 in the U.S. Senate. Michael deCourcy Hinds, *Citing Caseload, Federal Judges Assail 2 Provisions in Crime Bill*, N.Y. TIMES, July 14, 1991, § 1, at 19.

immediate future—stem from unprecedented numbers of federal narcotics prosecutions. More judgeships are essential.”²³⁵ The report recommended that many of the “new drug cases now flooding the federal system” be prosecuted in state courts, “returning the federal courts to their proper, limited role in dealing with crime.”²³⁶ The panel found that drug cases constituted 44% of federal criminal trials and 50% of criminal appeals, and “as a result, some districts with heavy caseloads [were] virtually unable to try civil cases and others [would] soon be at that point.”²³⁷

In San Francisco, the number of crack arrests more than doubled in 1988 and although the prosecutor’s office received additional funds to handle the increased caseload, the public defender’s office did not.²³⁸ Each defender handled an average of 260 cases a year.²³⁹ In Los Angeles, as of 1990, 75% of all criminal prosecutions were drug related.²⁴⁰ The situation was similar elsewhere in the region as well. The director of the western regional office of the National Center for State Courts stated that although the prosecutor offices and the law enforcement agencies have received additional funding for the new drug cases, neither the defender offices nor the courts have obtained any monies.²⁴¹

The chief public defender for a four-county area in Kentucky admitted that clients are not adequately represented because of insufficient staff due to inadequate funding.²⁴² He complained that the state’s prosecutor

235. FEDERAL COURTS STUDY COMMITTEE, *supra* note 45, at 35-36.

236. *Id.* at 36.

237. *Id.*

238. *Id.*

239. *Id.* In comparison, the standard for the maximum allowable number of cases which has been adopted by the National Advisory Committee on Criminal Justice Standards and Goals and endorsed by the National Legal Aid and Defender Association and the ABA is 150 felonies per attorney annually. See CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 42-43. The ABA report adds:

Emphasis should be placed on the fact that these guidelines set the *maximum conceivable caseload* that an attorney could reasonably manage. These numbers are unrealistic in the absence of ideal support conditions or if the public attorney is carrying any number of serious or complex cases or death penalty cases.

Id. at 68 n.87 (emphasis in original).

240. Rothenberg, *supra* note 219, at B7.

241. Jean Guccione, *Courts Seize Power Over Caseloads*, S.F. BANNER DAILY J., Jan. 3, 1990, at 1, 6; see also ROBERT L. SPANGENBERG ET AL., U.S. DEP’T OF JUST., NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 27 (1986) (observing that funding for indigent defense services is low compared to that of other criminal justice functions).

242. David W. Doan, *Pendleton, Robertson, Harrison, Nicholas Public Defender System*, THE ADVOCATE (Ky. Dep’t of Pub. Advoc.), June 1989, at 3; see also Lisha Gayle, *Defenders Face Money Woes, Director Says*, ST. LOUIS POST DISPATCH, Jan. 22, 1988, at A1 (reporting that the lack of funding by the state has led to a hiring freeze and erodes the quality of justice).

offices "have over 3 times the financial resources that we have. They have a huge investigative advantage over us. In fairness, our funding should be more in line with the prosecution's. Resources influence results."²⁴³ The public defender of Dade County, Florida, submitted a report to the Florida Judicial Council stating that there were so many cases that his staff was not able to handle them in a "timely and professional manner."²⁴⁴ Actual caseloads in 1989 approached 1,200 per attorney in Miami and Tallahassee.²⁴⁵

In 1990, the Philadelphia district attorney described that city's criminal justice system as being "on the verge of collapse."²⁴⁶ In Vermont, the need for more judges to work on the criminal docket, especially in light of cut-backs in funding from the legislature, led the Vermont Supreme Court to declare a five-month moratorium on jury trials in some civil cases in order to allow these courts to keep working on their criminal case backlog.²⁴⁷ All civil trials in San Diego Superior Court were suspended for three weeks in 1989 because the judges were needed to handle

243. Doan, *supra* note 242, at 3. Prosecutors everywhere, however, are not faring so well. The Seattle District Attorney's Office did not have sufficient staff to keep up with the 70% increase in felony cases in the period from 1986 to 1990, an increase attributed almost exclusively to drug cases. The chief prosecuting attorney proceeded to swear in 32 volunteer lawyers from private practice as "special deputies" to aid in disposing of a backlog of 500 cases. Robb Condon, *Volunteer Prosecutors End Backlog of Drug Cases*, N.Y. TIMES, Aug. 24, 1990, at B6; see also Ted Cilwick, *Deputy DA's*, A.B.A. J., Oct. 1990, at 28 (reporting that Portland, Oregon, and Spokane, Washington, have programs wherein private lawyers volunteer to prosecute cases for overburdened district attorney offices). See generally Hugh Nugent & J. Thomas McEwen, *Prosecutors' National Assessment of Needs*, NAT'L INST. OF JUST.: RES. IN ACTION (U.S. Dep't of Justice, Washington, D.C.), Aug. 1988, at 1 (noting that 58% of prosecutors surveyed indicated that the number of prosecutors has not kept pace with caseloads; staff shortages were considered by more prosecutors to be the "most serious problem" confronting the offices).

244. *Florida Public Defenders Call for Restructuring of Indigent Defense Funding*, INDIGENT DEF. INFO. (A.B.A. Standing Comm. on Legal Aid and Indigent Defendants' Bar Info. Program), Spring 1990, at 3.

245. *Id.*

246. Michael deCourcy Hinds, *Philadelphia Justice System Overwhelmed*, N.Y. TIMES, Aug. 15, 1990, at A1. The chief justice of Pennsylvania commissioned a report analyzing conditions in the state's criminal justice system. The report revealed that the average criminal case took 245 days from arrest to final disposition and that there was a backlog of more than 12,000 criminal cases; the sheriff's office regularly failed to bring the right defendant to the right courtroom on time; and judges were able to handle only about half as many cases as did their counterparts in other major cities. The report concluded, "Either the road to justice in Philadelphia is cleared and improved, or it will shortly become impassable." *Id.* at A24.

247. Charles-Edward Anderson, *Budget Woes Delay Justice*, A.B.A. J., May 1990, at 16. Interestingly enough, a lower federal court judge found the Vermont Supreme Court order to be unconstitutional because the order impeded the "historic importance" of the right to trial by jury. Charles-Edward Anderson, *Budget Trials: Lower Court Strikes Down Vermont Cost-Cutting Jury Moratorium*, A.B.A. J., June 1990, at 23.

criminal cases.²⁴⁸ The chief justice of California stated in his 1990 State of the Judiciary Address: "[D]rug cases are swamping the courts. The system has begun to take on so much water we are close to foundering. Too often, civil cases get drowned."²⁴⁹ In Michigan, drug arrests have increased 30%, resulting in unmanageable caseloads for public defenders throughout the state.²⁵⁰

In Atlanta, the rapidly increasing crime rate, compounded by a local "war on drugs," has led to a "breakdown"²⁵¹ and a "near collapse"²⁵² of the indigent defense system. Though arraignment days have been added, one superior court judge said that the courts were "drowning" in cases.²⁵³ Another judge routinely lines defendants up en masse to take their guilty pleas.²⁵⁴ Public defenders claim they can no longer provide effective representation, and the local daily law journal has concluded that in Atlanta the system has become "slaughterhouse justice."²⁵⁵ Recently, a group called "1,000 Lawyers for Justice" was formed in an effort to relieve the overburdened defense system. The group sent a letter to every lawyer in the Atlanta metropolitan area requesting them to represent for free at least one indigent defendant.²⁵⁶

However, an awareness of how the indigent defense system suffers from under-funding and excessive caseloads does not necessarily lead to change.²⁵⁷ In Alabama, ten reports over an eleven-year period dealt with

248. Rothenberg, *supra* note 219, at B7.

249. Timothy R. Murphy, *Indigent Defense: The Impact of the Drug Crisis and the Federal Response I* (1990) (briefing paper prepared for the Conference of Chief Justices and the Conference of State Court Administrators) (copy on file with the *Indiana Law Journal*).

250. *Id.* at 3. The Phoenix Public Defender Office handled twice as many drug cases in 1989 as it did in 1987. *Id.*

251. Renaud & Woolner, *supra* note 48, at 2.

252. *Id.* at 5 (comment of Vernon S. Pitts, director of the Atlanta Public Defender Office).

253. *Id.* at 2. Fulton County Superior Court Judge Joel J. Fryer elaborated: "We're drowning and we're going to get drownder." *Id.*

254. *Id.* at 1.

255. *Id.* The journalists explained that "[s]o crushing is the caseload and so unrelenting the demand for speed in Fulton Superior Court that lawyers representing indigents have a term for arraignment day: 'Meet 'em and plead 'em.'" *Id.*

256. *1,000 Lawyers for Justice*, A.B.A. PUB. DEFENDER F (A.B.A. Section of Criminal Justice Defense Servs. Comm., Washington, D.C.), Apr. 1992, at 1. The program is supported by the Atlanta Bar Association, the State Bar of Georgia, the Georgia Association of Criminal Defense Lawyers, and the Georgia Indigent Defense Council. *Id.*

257. Civil legal services programs have been plagued by some of the same caseload problems as the offices which represent indigents in criminal cases. See Leroy D. Clark, *Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department*, 47 J. URBAN L. 797, 809 (1970) (stating that legal services offices should not tolerate excessive caseloads; the issue should be brought to the courts and to the legislatures, which have the responsibility to ensure that some "semblance of justice prevails").

difficulties in the state's methods of providing representation to the indigent defendant.²⁵⁸ In 1988, the ABA's Bar Information Program prepared an analysis of the defense delivery system for the chief justice of the Alabama Supreme Court and found that lawyers representing indigent defendants worked under great hardship, that the system for providing defense lawyers was still "substantially underfunded," and that all the reports in the past have produced "little concrete result."²⁵⁹ A year later, the chairman of the Alabama Task Force on Indigent Defense observed that "the problems of indigent defense in our state have been studied to death."²⁶⁰

Problems recently have been exacerbated because defense services have not received the funding that has been given to prosecutors and law enforcement agencies as part of federal expenditures for the "war on drugs."²⁶¹ The staff attorney for the National Center for State Courts estimated that in 1990 more than 80% of individuals arrested for drug offenses were indigents entitled to court-appointed counsel.²⁶² The Bureau of Justice Assistance (BJA),²⁶³ which awards grants from the Drug Control and System Improvement Grant Program and the Discretionary Grants Program, routinely excludes state and local indigent defense offices from eligibility for the funds.²⁶⁴

The BJA's director has stated, "BJA's review of past and present state drug strategies has not identified separate criminal defense services as a priority area."²⁶⁵ An illustration of the rigidity of the BJA's policy is

258. Robert L. Spangenberg, The Spangenberg Group, Executive Summary: Review of the Indigent Defense System in Alabama 3 (June 1988) (prepared under the sponsorship of the A.B.A. Bar Info. Prog. for the Chief Justice of the Alabama Supreme Court and the Administrator of the Courts) (copy on file with the *Indiana Law Journal*).

259. *Id.* at 8-9.

260. Letter from Judge Robert L. Hodges, Chairman of the Task Force on Indigent Defense, to Chief Justice E.C. Hornsby of the Alabama Supreme Court 4 (Nov. 6, 1989) (copy on file with the *Indiana Law Journal*). The chief justice appointed the task force to review the recommendations set out in a 1988 ABA-sponsored study. TASK FORCE ON INDIGENT DEFENSE SERVICES, *supra* note 16, at 1.

261. The "drug war" is being waged at local levels as well. For example, felony drug arrests in New York City increased 20% in 1989 from 1988 levels, with the increase attributable to the newly created Tactical Narcotic Teams of the Police Department. See Murphy, *supra* note 249, at 400.

262. *Id.* at 404.

263. The Bureau of Justice Assistance was established by an act of Congress to provide funds and establish programs "to improve the functioning of the criminal justice system with emphasis on violent crime and serious offenders." Anti-Drug Abuse Act of 1988, 42 U.S.C. § 3751(b) (1988). The director of the Bureau is appointed by the President and reports to the U.S. Attorney General.

264. DEFENSE SERVICES COMM., AM. BAR ASS'N CRIMINAL JUSTICE SECTION, DEFENSE SERVICES FUNDING REPORT AND RECOMMENDATION 389, 392-93 (1990) (copy on file with the *Indiana Law Journal*).

265. Letter from Charles Smith, Director, Bureau of Justice Assistance, to Scott Wallace, Legislative Director, National Association of Criminal Defense Lawyers (Mar. 6, 1990), quoted in full in DEFENSE SERVICES COMM., *supra* note 264, at 413-15.

that a \$190,000 grant to the Philadelphia Court of Common Pleas' Probation Office was held up when the Bureau learned that \$28,000 was to go to fund a position in the public defender office.²⁶⁶ Not until that funding was completely eliminated from the proposal did the BJA fund the overall program.²⁶⁷

The situation in Kentucky shows how intolerable the financing problem has recently become. Drug arrests in Kentucky rose 114% between 1987 and 1991.²⁶⁸ In fiscal year 1990 alone, the police and prosecutors in Kentucky received \$4.6 million from civil seizures and forfeitures in drug cases; the defenders received none of this money.²⁶⁹ In one year, Kentucky's prosecutors and police received \$6 million in grants for drug prosecutions under the Federal Comprehensive Crime Control Act; Kentucky's defenders received nothing.²⁷⁰ When these funds are added to the standard operating budgets, the prosecutors and police received \$14 for each \$1 allocated to public defense.²⁷¹

The ABA Special Committee on Criminal Justice in a Free Society²⁷² was repeatedly confronted with accounts of under-funding of public defender offices and was "shocked by the intolerably overburdened condition of a public defender agency in [one] jurisdiction," noting that "the delays created because overworked defenders cannot prepare their cases promptly [are] the single largest problem facing the *prosecutor* there."²⁷³ One prosecutor reported to the Committee: "The major problem is the lack of public defenders. The only answer is for the State to grant more money to the Public Defender System. With more public defenders, cases would be disposed of more quickly."²⁷⁴ The irony of a *prosecutor* calling for more money for his adversaries points out the extent of the crisis and shows that the whole criminal justice system suffers when one primary part of that system simply cannot properly function.

266. See Murphy, *supra* note 249, at 411. The purpose of the Philadelphia project was to operate an accelerated drug-case management and early disposition program. *Id.*

267. *Id.*

268. Monahan, *supra* note 10, at 28.

269. *Id.* at 27.

270. *Id.*

271. *Id.* at 28.

272. See CRIMINAL JUSTICE IN CRISIS, *supra* note 7.

273. *Id.* at 43 (emphasis added). The various components of the criminal justice system, however, are interconnected. See, e.g., Tyler v. United States, 737 F. Supp. 531, 536 (E.D. Mo. 1990) ("A chain is no stronger than its weakest link. [I]ncreasing the productivity of one link in that chain without commensurate funding for the other links in the criminal justice system is to reap delay, failure, and continued mistrust of the courts and the criminal justice system.").

274. CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 68.

As one would expect, courts themselves at times recognize the ineffective assistance provided by public defenders. In *Sanchez v Mondragon*,²⁷⁵ the Tenth Circuit reviewed a claim by a defendant that he was denied competent representation by his defender, who was not prepared and did not even know "what was going on in the case."²⁷⁶ The court responded: "Given the *well-known, overworked state of many public defenders*, it is possible that Sanchez's lawyer was insufficiently prepared, and that his attempts to persuade Sanchez to plead guilty were affected by his lack of preparation."²⁷⁷

Some judges may tolerate the inadequacy of the public defender office for the *indigent*, but find unacceptable the idea that *only* a public defender may represent someone who had money but whose funds have been seized by the government under the Federal Fee Forfeiture Statute.²⁷⁸ While considering the constitutionality and ramifications of that statute, Judge Oakes commented in his dissenting opinion in *United States v Monsanto*:²⁷⁹ "Can we seriously contend that a proper balance would be effected in such cases by giving a defendant made 'indigent' by the government's assertion of a potential fee forfeiture claim, a young attorney from an *underfunded, overworked* public defender's office for the ensuing 6-15 month trial?"²⁸⁰

Such young, "overworked" attorneys are *on a daily basis* representing indigent individuals who face substantial jail time, life imprisonment, or even the death penalty. When liberty is at stake, it is *never* appropriate to have attorneys who are unable to adequately and competently prepare and investigate their clients' cases.

Although rare, courts have acted to prevent continued representation by overburdened public defenders.²⁸¹ The chief circuit judge of Fairfax County, Virginia, concluded that the county public defender office was so ineffective that he warned: "If we feel they cannot handle the number of cases they are accepting, we will put a cap on it and I feel an obligation

275. 858 F.2d 1462 (10th Cir. 1988), *overruled by* United States v. Allen, 895 F.2d 1577 (10th Cir. 1990).

276. *Id.* at 1466 (quoting defendant Andrew A. Sanchez).

277. *Id.* at 1466-67 (emphasis added).

278. 21 U.S.C. § 853(a) (1988).

279. 836 F.2d 74 (2d Cir. 1987) (Oakes, J., dissenting), *vacated*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 491 U.S. 600 (1989).

280. *Id.* at 86 (emphasis added).

281. For a comprehensive view of the more common judicial response to the overburdened defense counsel, see Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact of Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531 (1988).

to do that for the individuals they are representing."²⁸² Another judge in that jurisdiction argued that the under-funding had led to inadequate lawyering, and that there must be significantly greater funding.²⁸³

The defendants themselves are aware of the level of representation offered by many public defender offices, and it is not uncommon for a defendant to choose to represent himself or herself rather than to accept defender representation. In *United States v Pina*,²⁸⁴ the defendant refused to be represented by a public defender and asked the judge to appoint another attorney to represent him. The defendant argued that the lawyers in the defender office were simply not able to provide competent representation. The judge refused to appoint anyone other than a public defender. The defendant subsequently chose to represent himself.²⁸⁵

The same budget cutbacks affecting the public defender trial offices affect the appellate bureaus.²⁸⁶ In Chicago, for example, where the caseload of the Illinois appellate defender office was expected in 1989 to increase by 30%, there was nevertheless a reduced budget for the office which led to a 20% reduction in the staff.²⁸⁷

To maintain, however, that there is a need for more appellate defenders ought not to imply that appeals are often successful, especially when the claim on appeal is ineffective assistance of counsel at trial. The opinion of a Texas court of appeals in *Wallace v State*²⁸⁸ typifies the attitude of courts reviewing such claims:

We have previously expressed our displeasure with the frequency of groundless charges of ineffective assistance of counsel made by other counsel. It appears that judicial resources could and should be better utilized. Although this opinion would not ordinarily be published, we have ordered publication to place of record this problem

282. Caryle Murphy, *Virginia's Defenders' Offices Get Mixed Reviews*, WASH. POST, Nov. 14, 1988, at D1. The public defender office in Fairfax County, Virginia, was created by the state legislature several years earlier because the low compensation provided for court-appointed counsel had created a crisis situation wherein few lawyers were willing to accept assignments to represent indigent defendants. *Low Fees Cut Legal Service for the Poor*, WASH. POST, Mar. 30, 1987, at A1.

283. Murphy, *supra* note 282, at D5.

284. 844 F.2d 1 (1st Cir. 1988).

285. *Id.* at 6 (upholding denial of defendant's request for outside counsel).

286. There have been some recent, isolated pieces of good news for defender offices. In 1990, Kentucky increased by 17% the allocation to the state's public defender offices, raising entry-level salaries from \$16,600 to \$21,600. The public defenders in New Mexico received a budget increase of 39%, and Missouri's statewide defender program received funds for the hiring of 100 additional attorneys and support staff. Monahan, *supra* note 47, at 24.

287. Janan Hanna, *More Appellate Defenders Needed: Panel*, CHICAGO DAILY L. BULL., Dec. 27, 1988, at 3.

288. 761 S.W.2d 46 (Tex. Ct. App. 1988).

in the area of totally frivolous appeals. While we jealously guard the right of appellate review, the problem of overburdening our appellate courts with frivolous appeals needs to be addressed.²⁸⁹

The defendant in *Wallace* had been assigned defense counsel at the trial level who, according to the lawyer representing the defendant on appeal, had pressured the defendant to plead guilty.²⁹⁰

The problems of insufficient funding and too few defenders are compounded by the demands created by increasing case complexity.²⁹¹ As prosecutors respond to the get-tough-on-those-accused-of-crime climate of the day (especially as to drug possession and violent offenses), plea bargaining is limited or eliminated, thereby increasing the number of cases that must be prepared and brought to trial.²⁹² Days devoted to a trial mean time lost for the preparation of other cases, and the defender finds himself with an ever-increasing backlog of work that must be done. Prosecutors are tending also to elevate the severity of charges brought and to increase the number of charges per complaint.²⁹³ Bail is set at higher amounts, causing more pre-trial custody and the consequent expenditure of counsel's time to visit the jail to meet clients. Legislatures are raising penalties for many offenses and the practice of sentencing is becoming increasingly complex.²⁹⁴

There is perhaps no greater confirmation of the caseload problems of public defenders than the emergence of American private industry trying

289. *Id.* at 51 (emphasis added).

290. *Id.*

291. See, for example, *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991), wherein the Arkansas Supreme Court found the legislative limitation of fees given court-appointed counsel to be constitutionally inadequate in light of the recent drastic rise in the complexity of criminal litigation. Prosecutors are also affected by the additional work required per case. See Nugent & McEwen, *supra* note 243, at 2 (reporting that a survey of prosecutors revealed that 61% considered increased felony case complexity to be a factor in their overall difficulties of keeping up with their caseload; increases in motions filed per case and increases in motion hearings were cited by 60% of the prosecutors as contributing factors to case overload).

292. Diminished plea bargaining also affects prosecutors' abilities to cope with increased caseloads. See Nugent & McEwen, *supra* note 243 (finding that 38% of prosecutors surveyed concluded that an increase in the percentage of cases going to trial contributed significantly to difficulties in handling caseloads).

293. See Robert L. Spangenberg, *We Are Still Not Defending the Poor Properly*, CRIM. JUST., Fall 1989, at 11, 11-12 (reporting a study conducted for the United States Department of Justice, Bureau of Justice Statistics).

294. *Recent Trends in Indigent Defense Services*, *supra* note 195, at 1. In 1990, the National Institute of Justice conducted an assessment of the needs of public defense organizations. An analysis of the results showed that increased or mandatory sentencing and overcharging by prosecutors or police were major causes of the caseload problems of the offices. Arango, *supra* note 233.

to profit from the crisis. A mailing from U.E. Inc. of Norwalk, Connecticut, to public defender offices knew how to make the appeal:

Attention Public Defenders and Legal Aid Society Attorneys: If you need to improve your case tracking and productivity, *U.E. Can Help!* Legal Aid Societies and Public Defenders are faced with a chronic problem today: caseloads and services to be provided are increasing relentlessly, but funding is not keeping pace. Attempting to reconcile these trends puts a severe strain on an organizations' [sic] resources and people.²⁹⁵

But even private industry could not perform miracles on insufficiently funded defender offices. U.E. Inc. has since withdrawn from even attempting to aid defender programs.²⁹⁶

V LITIGATION STRATEGIES TO ATTACK SYSTEMIC FAILURES

Given the overwhelming caseloads of public defender offices, it might be expected that the directors of the offices would be in the forefront of a struggle to devise remedies for the situation. Such, unfortunately, is not the case. This Part will examine possible office-wide responses and attempt to explain why such actions are seldom taken.

Since the very clients whom the office is in business to represent suffer most directly from the underfunding of defender offices, affirmative litigation on behalf of those clients would serve a proper and potentially vital function. The focus of that litigation could be the claim that the defendants represented by the office are being systematically denied their constitutional right to the effective assistance of counsel because of insufficient funding of the office. When the lack of resources leads to structural impediments that interfere with even the most able lawyer's ability to provide proper representation, the state is failing to meet its obligation.

The Supreme Court has never decided a case concerned with claims of inadequacies of the *system* which provides defense services.²⁹⁷ In

295. U.E. INC., ATTENTION PUBLIC DEFENDERS AND LEGAL AID ATTORNEYS (1988) (brochure on file with the author).

296. Telephone interview with Ralph Hess, U.E. Inc. Director of Programs (July 17, 1991).

297. The first Supreme Court case to establish the right to counsel was *Powell v. Alabama*, 287 U.S. 45 (1932). That case, holding that the Due Process Clause of the Fourteenth Amendment required appointment of counsel for an indigent defendant in a capital case, in some way did present a situation wherein the process for the appointment of counsel was deemed to be inappropriate. (The trial court had appointed "all the members of the bar" to represent the defendants at arraignment. *Id.* at 45.) The Supreme Court declared "that [the] duty [to appoint counsel] is not discharged by an assignment at such a time or *under such circumstances* as to preclude the giving of effective aid in the preparation and trial

*Strickland v Washington*²⁹⁸ and *United States v Cronin*,²⁹⁹ when the Court finally did concern itself with the proper standard of representation to be required, the focus was on the services provided by the individual attorney to the individual defendant. However, when the underlying cause for the individual attorney's failings can be found in the *system* in which he operates, that system itself must be scrutinized.³⁰⁰ Justice Blackmun, in his dissent in *Polk County v Dodson*,³⁰¹ certainly indicated an awareness of the problem:

The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately retained attorneys.³⁰²

The ABA Bar Information Program of the Standing Committee on Legal Aid and Indigent Defendants funded an analysis of a sample of cases from 1970 to 1983 in which there had been findings of ineffectiveness of counsel. This study revealed that perhaps 70% of these cases could be identified as real or possible cases of "systemic failure in adequacy of representation."³⁰³ The analysis further found that "a closer review of these cases reveals that the errors of counsel were very frequently occasioned by a systemic impairment or restraint which worked to unfairly inhibit or even nullify representation by counsel, although counsel was 'bodily' in the courtroom, totally apart from counsel's personal skills or abilities."³⁰⁴

Although the Supreme Court held in *Gideon v Wainwright*³⁰⁵ that the Sixth Amendment right to counsel in felony proceedings was applicable

of the case." *Id.* at 71 (emphasis added). It might well be argued that the systematic appointment of counsel from a defender office which was already confronted with an excessive caseload, is a circumstance which would indeed preclude effective aid.

298. 466 U.S. 668 (1984).

299. 466 U.S. 648 (1984).

300. In *Cronin*, the Supreme Court acknowledged that at times there are circumstances which would make it highly unlikely that any lawyer, "even a fully competent one," could render effective assistance. *Id.* at 659 (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)). The *Cronin* court noted approvingly that it was therefore unnecessary in *Powell* to examine the actual performance of counsel at trial since it was unlikely that any lawyer, "even a fully competent one," could have provided effective assistance. *Id.*

301. 454 U.S. 312 (1981).

302. *Id.* at 332 (Blackmun, J., dissenting).

303. Brief of Amicus Curiae, the Nat'l Legal Aid and Defender Ass'n, the Ass'n of Trial Lawyers of America, and the ACLU in support of Respondent, at 27 n.12, *Cronin* (No. 82-660).

304. *Id.* at 27.

305. 372 U.S. 335 (1963).

to the states through the Due Process Clause of the Fourteenth Amendment,³⁰⁶ it was not specified how the states were to meet their new burden. The Criminal Justice Act,³⁰⁷ passed by Congress immediately after the *Gideon* decision, provided for remuneration in federal cases for representation of indigents by either a legal aid agency or by attorneys of the private bar. The states' obligations were greatly increased by the holding of the Court in *Argersinger v Hamlin*³⁰⁸ that an individual must have an attorney to assist in his defense if he is to be incarcerated at all, even if the charge is only a misdemeanor.³⁰⁹

A. Class Action Suits

Although a short-lived success, *Wallace v Kern*³¹⁰ was perhaps the most significant suit on behalf of indigents claiming that the defense delivery system was not providing effective counsel. In *Wallace*, a class-action suit was brought under section 1983 of the Civil Rights Act³¹¹ on behalf of all felony defendants detained in the Brooklyn House of Detention for Men. The plaintiffs were represented by the Center for Constitutional Rights, and the defendants were the State of New York, the City of New York, and the Legal Aid Society. The plaintiffs claimed that the heavy caseload of the attorneys in the Legal Aid Society had prevented the rendering of effective assistance.³¹² The federal district

306. The *Gideon* holding expressly overruled the Court's earlier holding in *Betts v. Brady*, 316 U.S. 455 (1942), that the Sixth Amendment was not applicable to the states. *Gideon*, 372 U.S. at 342. The right of counsel in a felony prosecution in *federal* court was established in *Johnson v. Zerbst*, 304 U.S. 458 (1938).

307. 18 U.S.C. § 3006A (1988).

308. 407 U.S. 25 (1972).

309. *Id.* at 37. Justice Powell's concurring opinion recognized that the new demands for state expenditures for counsel could well adversely affect the system. *Id.* at 52. Former Chief Justice Burger's concurrence, while recognizing the new burdens, confidently opined that "the dynamics of the profession have a way of rising to the burdens placed upon it." *Id.* at 44.

310. 392 F. Supp. 834 (E.D.N.Y. 1973), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

311. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

312. The court found that the Legal Aid Society represented approximately 90% of all those incarcerated on felony charges. *Wallace*, 392 F. Supp. at 836.

court held extensive hearings wherein there was testimony from top Legal Aid Society administrators, Legal Aid attorneys, private attorneys testifying as to what they would consider to be a manageable caseload, court personnel, and incarcerated clients of the Legal Aid Society. Testimony revealed that even though the attorney in charge of the Legal Aid Society office admitted that no attorney could handle more than forty cases and still cover institutional assignments such as arraignments, some attorneys nevertheless had over ninety cases.³¹³ The parties stipulated that a number of private attorneys working in the same court system as the Legal Aid attorneys would testify that they would not try to maintain more than twenty-five to thirty-five active cases.³¹⁴

In its decision, the court referred to two studies of the representation provided by the Legal Aid Society which had recommended that maximum caseloads be established. A commission appointed by two state appellate divisions concluded that if Legal Aid continued to accept additional cases, there would be "a continuation of a type of representation grossly overburdening to the Society, and which all, including the Society's attorneys, recognize as inadequate."³¹⁵ The second study found that:

As long as their caseloads remain at the present staggering levels, it is impossible for Legal Aid attorneys to form productive relationships with their clients, thoroughly investigate and prepare their cases, counsel their clients, and take an active role in the sentencing process. In short, an attorney with an active caseload of 100 felony cases cannot provide effective representation to his clients.³¹⁶

The *Wallace* court concluded that "[t]he facts show that Legal Aid attorneys have excessive caseloads and that the *conditions under which they must work are shocking*."³¹⁷ The court found that an average felony caseload of forty cases "strains the utmost capacity of a Legal Aid attorney under existing conditions," and that the present average caseload was substantially in excess of that number.³¹⁸ The court then issued an injunction prohibiting the Legal Aid Society from accepting any additional assignments, since to do so "would prevent [the Society] from affording its existing clients their constitutional right to counsel."³¹⁹

313. *Id.*

314. *Id.*

315. *Id.* at 842 (quoting Report of the Subcommittee on Legal Representation of the Indigent, at 12 (June 17, 1971)).

316. *Id.* at 843 (quoting report by William J. vanden Heuvel, Chairman of the Board of Corrections of the City of New York, 26 (Mar. 25, 1973)).

317. *Id.* at 844 (emphasis added).

318. *Id.* at 849.

319. *Id.* The injunction was to last until the average caseload of the attorneys fell to below 40 and until the attorney in charge of the office certified that in his professional judgment the attorneys were

Even though the justification for the court's injunction was to ensure effective representation for the clients of the Legal Aid Society, a goal one would expect the Legal Aid Society itself to share, the Legal Aid Society appealed to the Second Circuit Court of Appeals. The appeal was made even though the union of staff attorneys had formally advised the Legal Aid Society through a letter of grievance that "proper representation of clients according to professional standards is impossible," and pled for restrictions on case intake or for increases in staff.³²⁰ The staff attorneys were in universal agreement that the district court's findings were correct and that the relief ordered was appropriate.³²¹

The strength of the lawyers' belief that a caseload limit was needed to stop the continuation of unconstitutional representation is evidenced in the Amicus Curiae Brief of the Association of Legal Aid Attorneys (the union of staff lawyers) submitted to the U.S. Court of Appeals for the Second Circuit: "What is at stake in this suit is whether all our attorneys in Kings County [Brooklyn] should be compelled to provide our indigent clients with the ineffective assistance of counsel. This goes to the very heart of the professional responsibilities of us all."³²²

Some improvements in the quality of representation did occur in the period after the district court order (and before being vacated by the Second Circuit Court of Appeals), as the Amicus Curiae Brief notes:

The District Court order has already drastically improved the effectiveness of our representation to clients in Kings County Attorney caseloads in the trial parts have been reduced to between 45 and 50, and for the first time in two years, attorneys have begun to have longer interviews and improved contact with clients, time to research and prepare necessary motions, and to supervise investigations.³²³

On appeal, the Second Circuit Court of Appeals, while being "entirely sympathetic with the purposes" of the district court's order, was "constrained to reverse on the law"³²⁴ The circuit court found that the

able to give effective representation to their current and future clients. *Id.*

320. Brief for Amicus Curiae Association of Legal Aid Attorneys of the City of New York, at 3, *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973) (No. 73-1826), *cert. denied*, 414 U.S. 1135 (1974). The letter of grievance also stated: "[T]he typical attorney in the Brooklyn Supreme Court now carries a caseload of more than 100 clients for which he is responsible. It is impossible for any one attorney to represent so many defendants in an adequate manner." *Id.* at 8. It should be noted that the Brooklyn Supreme Court handles felony cases exclusively.

321. *Id.* The association noted that in certain respects it believed the district court should have granted further relief. *Id.* at 3 n.1.

322. *Id.* at 4.

323. *Id.* at 18.

324. *Wallace v. Kern*, 481 F.2d 621, 622 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974), and *cert. denied*, 420 U.S. 947 (1975).

district court had no jurisdiction under 42 U.S.C. § 1983 because the Legal Aid Society was a private not-for-profit institution and was not, therefore, acting under color of state law.³²⁵ It seems not at all persuasive to conclude that when the state is under the constitutional obligation to provide counsel to indigents in criminal cases, and the state meets that burden through the Criminal Defense Division of the Legal Aid Society, which is funded 100% by the state,³²⁶ that the Legal Aid Society is not acting under color of state law.

B. Habeas Corpus Relief

In *Gaines v. Manson*,³²⁷ the Connecticut Public Defender Office brought a suit on behalf of inmates alleging ineffective representation of counsel. Assisted by the Connecticut Civil Liberties Union, seven inmates initiated the action by petitioning for writs of habeas corpus alleging violations of their constitutional rights to timely prosecution of their appeals.³²⁸ In a unanimous decision, the Connecticut Supreme Court found that the state failed to provide a sufficient number of public defenders to effectively handle the appeals of indigent defendants.³²⁹ The lack of adequate staffing led to delays ranging from two to four and one-half years for the processing of the petitioners' appeals.

325. *Id.* The Legal Aid Lawyers Amicus Brief demonstrated that the lawyers were fully aware that the court might find that there was no state action, and attempted to impress upon the court their willingness to accept the burdens and responsibilities that may occur if the actions of the Legal Aid Society were to be deemed state action: "If a finding that the Criminal Defense Division is subject to Section 1983 jurisdiction for purposes of this suit means that it and its attorneys will be subject to suits in the nature of malpractice, the 450 staff attorneys Amicus represents are willing to accept the risk of litigation because our representation will be so improved that we will be able to render effective representation." See Brief for Amicus Curiae Association of Legal Aid Attorneys of the City of New York, at 11 n.4, *Wallace*, 481 F.2d 621 (No. 73-1826).

326. All of the funds for the representation of indigent defendants provided by the Legal Aid Society were from New York City. Although there were additional grants from the United States Law Enforcement Assistance Administration, that money went to the funding of special, supplemental projects. Brief for Amicus Curiae Association of Legal Aid Attorneys of the City of New York, at 6, *Wallace*, 481 F.2d 621 (No. 73-1826).

327. 481 A.2d 1084 (Conn. 1984).

328. Habeas corpus is available to individuals in state custody who allege that their confinement violates a provision of the United States Constitution. *Brown v. Allen*, 344 U.S. 443 (1953); 28 U.S.C. §§ 2254-2255 (1988) (outlining the procedural prerequisites for obtaining a writ of habeas corpus from a federal court). Federal habeas relief is available only for violations of federal law. *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

329. *Gaines*, 481 A.2d at 1088. The state argued that since the ultimate representation on the appeal was competent, that was sufficient. The court responded: "Although we agree that our criminal justice system is fortunate to have obtained the services of counsel as skilled and dedicated as those who serve in the public defender's office, we cannot accept this line of reasoning. [N]o such tradeoff can overcome an impairment of access which is as marked as these petitions manifest." *Id.* at 1094.

The court emphasized equal protection concerns, noting that defendants able to afford private counsel generally have briefs filed on their behalf in six months or less. The court found that "[t]he difference between four years and six months reflects a disparity in opportunity of access to the appellate forum that is constitutionally impermissible."³³⁰ However, since this was not a suit seeking injunctive relief, as had been the case in *Wallace v Kern*, the court only concerned itself with remedies for the seven inmate-petitioners.³³¹ The habeas route does not offer the prospective relief that is needed for public defender clients who in the future will also be "discriminate[d] against because of their poverty"³³²

Habeas corpus relief,³³³ while providing what may be an adequate remedy at law for the deprivation of an individual's constitutional rights in state proceedings,³³⁴ is not an aid in providing the kind of *systemic* change needed.³³⁵ Nor is appellate review of ineffective assistance of counsel claims, wherein any relief obtained applies only to the case before the court. Additionally, even if the trial counsel's representation in a given case is found to be ineffective, the Supreme Court's decision in *Strickland v Washington*³³⁶ means that the conviction will be upheld unless the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."³³⁷

Recent Supreme Court decisions indicate that counsel may not be appointed to assist a defendant who desires to appeal based on a claim of ineffective assistance of counsel. The Court in *Pennsylvania v. Finley*³³⁸ ruled that neither the Fourteenth Amendment Due Process Clause nor the

330. *Id.* (citations omitted).

331. *Id.*

332. *Id.* at 1095.

333. The remedy of a court in adjudicating habeas corpus petitions will depend on the constitutional right being vindicated. *See, e.g., Strunk v. United States*, 412 U.S. 434, 438-40 (1973) (holding that only the extreme remedy of a dismissal of charges against the defendant lies when the constitutional right abridged is that of a speedy trial).

334. The Supreme Court in *Strickland v. Washington* stated that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

335. *But see Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990) (stating that claims regarding ineffective assistance of counsel are best handled on a case by case basis); *State ex. rel. Stephan v. Smith*, 747 P.2d 816, 831 (Kan. 1987) (urging that in the rare case where counsel has been ineffective, the best solution is individual handling of the case by the appellate courts).

336. 466 U.S. 668 (1984).

337. *Id.* at 694.

338. 481 U.S. 551 (1987).

"meaningful access" guaranteed by equal protection requires state appointment of counsel for indigents seeking state post-conviction relief.³³⁹ In the 1989 case of *Murray v. Giarratano*,³⁴⁰ the Court held that even when a person has been sentenced to death, the state is not required to provide counsel for the state post-conviction proceeding.³⁴¹ Congress, however, did respond to the restrictiveness of the *Murray* holding by including in the Anti-Drug Abuse Amendments Act of 1988³⁴² a requirement that indigents sentenced to death be appointed counsel for all federal habeas proceedings.³⁴³

Many of the legitimate concerns of both indigent clients and public defenders are not of a constitutional dimension. The client whose defender was too busy to make an appropriate application for bail review or to speak to the defendant's family, whether to inform them of the bail required or just to tell them of the status of the case, has no remedy based on an appeal claiming ineffective assistance of counsel. The vast majority of cases never get appealed at all, and those appealed are rarely successful due to the increasing limitations placed on overturning a guilty plea.³⁴⁴ In any event, it is patently unfair to maintain that a remedy for an incarcerated defendant who has been convicted in part due to ineffective assistance of counsel is adequate if it may not occur until years after the conviction.³⁴⁵

Habeas petitions and appellate review are not regulatory mechanisms for ensuring competent representation by counsel.³⁴⁶ Reliance on post-conviction relief based on the trial record is inherently flawed since any

339. *Id.* at 554-59.

340. 492 U.S. 1 (1989).

341. *Id.* at 7-12 (Rehnquist, C.J., announcing the judgement of the Court in an opinion in which three other Justices joined).

342. 21 U.S.C. § 801 (1988 & Supp. 1992).

343. *Id.* § 848(q)(4)(B) (Supp. 1992).

344. The Supreme Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), set a new standard, one most difficult to meet, for overturning a plea based on an ineffective assistance of counsel claim. The defendant must show not only that counsel was incompetent and ineffective but also that there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted instead on going to trial. *Id.* at 58-60. For a full analysis of the impact of *Lockhart*, see Klein, *supra* note 281, at 547-52.

345. The district court judge who decided *Wallace v. Kern* commented: "The question at this time is not whether any verdict or plea may be upset because of ineffectiveness of counsel, but whether the practice of the state (and city) agencies charged with furnishing counsel meets the standards of the Sixth Amendment of the United States Constitution . . . " *Wallace v. Kern*, 392 F. Supp. 834, 844 (E.D.N.Y. 1973), *rev'd*, 481 F.2d 621, 622 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

346. Recent substantial incursions by the Supreme Court on the availability of habeas corpus relief have further reduced the legitimacy of reliance on collateral attack to remedy the problems of ineffective assistance.

record of a trial in which counsel was ineffective is likely to be incomplete and not truly indicative of all that could have been done by a competent attorney.³⁴⁷ Not all courts, however, share the view that direct appeals and habeas petitions do not provide meaningful relief. For example, when a civil rights action was brought against a county in Indiana alleging that the county was providing indigent defendants with constitutionally deficient representation, the court granted the county's motion for summary judgment.³⁴⁸ The court claimed that the plaintiffs' allegations could be raised more appropriately in individual cases through post-conviction appeal or via a writ of habeas corpus.³⁴⁹

One court struck a sort of middle ground between accepting jurisdiction of a section 1983 civil rights claim and holding that the habeas corpus remedy was sufficient in and of itself. In *Hadley v. Werner*,³⁵⁰ an inmate brought a section 1983 suit alleging that the fee schedule in a Michigan county designed to compensate appointed counsel was inadequate and proximately caused the ineffective assistance which resulted. The plaintiff claimed that only the least experienced and least capable attorneys in the county were attracted to indigent representation because of the low fees and that even those lawyers were unwilling to devote the requisite time to their clients' cases.³⁵¹ The defendants—the county, the county district court, the county board of commissioners, the county treasurer, and the State of Michigan—were all alleged to have known that the inadequate fees were depriving Hadley and other indigent defendants of their constitutional rights.³⁵² The Sixth Circuit, while vacating the district court ruling that Hadley had failed to state a proper cause of action, nevertheless dismissed the claim, but did so without prejudice in order to provide an opportunity for Hadley to refile if he could establish through a habeas corpus petition that he was denied effective assistance.³⁵³

347. "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads." *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984); see also *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring) (noting that an appeal from a conviction resulting from an uncounseled trial is of little help to the defendant since "the die is usually cast" when the judgment is initially entered).

348. *Noe v. County of Lake, Ind.*, 468 F. Supp. 50 (N.D. Ind. 1978).

349. *Id.* at 53-54.

350. 753 F.2d 514 (6th Cir. 1985).

351. *Id.* at 515.

352. *Id.*

353. *Id.* at 516.

C. Injunctive Relief

A suit that was not at all helpful in furthering the Sixth Amendment rights of the indigent was *Gardner v. Luckey*.³⁵⁴ In *Gardner*, convicted and incarcerated persons brought a section 1983 civil rights action seeking declaratory and injunctive relief against public defender offices in two judicial circuits in Florida. The plaintiffs claimed that the defenders' representation did not meet minimal, constitutionally mandated standards in that the lawyers failed to timely consult with their clients, failed to advise them of the broad range of their legal rights, and failed to provide adequate investigation into factual and legal defenses.³⁵⁵ The suit sought to enjoin the public defender offices from further representation until minimum standards of effectiveness were met, and rested on the premise that inadequate funding had led to excessive caseloads which created the problems.³⁵⁶ The district court dismissed the complaint, and the Fifth Circuit affirmed: "[W]e hold that appellants cannot get into federal court to make their sweeping challenge to the operation of the Florida Public Defender Offices."³⁵⁷ The court ruled that past exposure to illegal conduct does not show a present case or controversy, and that each plaintiff individually could challenge their incarceration through a habeas corpus petition.³⁵⁸

The Second Circuit in *Wallace v. Kern* had expressed no such concerns, yet the *Wallace* plaintiffs ultimately lost because the court found no state action. In *Gardner*, the plaintiffs still failed even though there clearly was state action, given that the counsel involved were governmental employees. There was, however, greater success in Alabama. In *Tucker v*

354. 500 F.2d 712 (5th Cir. 1974).

355. *Id.* at 713.

356. *Id.*

357. *Id.* at 715. Increasingly, plaintiffs are litigating their civil rights claims in state courts, alleging that their rights under the state constitution are being violated. This avenue may prove fruitful for indigent defendants because virtually all state constitutions guarantee assistance of counsel. *See, e.g.*, *Gaines v. Manson*, 481 A.2d 1084, 1095 n.15 (Conn. 1984); ARIZ. CONST. art. II, § 24 ("the right to appear and defend in person, and by counsel"); CAL. CONST. art. I, § 14 ("the defendant's right to counsel"); IND. CONST. art. I, § 13 ("the right to be heard by himself and counsel"); LA. CONST. art. I, § 13 ("entitled to assistance of counsel appointed by the court if he is indigent and charged with an offense punishable by imprisonment"); MD. CONST. declaration of rights art. XXI ("a right to be allowed counsel"); W. VA. CONST. art. III, § 14 ("shall have the assistance of counsel"). Only Virginia lacks an explicit constitutionally guaranteed right to the assistance of counsel, and the Virginia courts have construed the state constitution's due process clause, VA. CONST. art. I § 8, to provide for one. *Morris v. Smyth*, 120 S.E.2d 465, 466 (Va. 1961); *Sargent v. Commonwealth*, 360 S.E.2d 895, 896 (Va. App. 1987).

358. *Gardner*, 500 F.2d at 714-15.

City of Montgomery Board of Commissioners,³⁵⁹ individuals convicted of misdemeanors brought suit in the federal district court alleging that counsel was not being provided as required by *Argersinger v Hamlin*.³⁶⁰ The court held that the plaintiffs were entitled to an injunction prohibiting the municipal court from continuing the policy whereby the *Argersinger* requirement of prompt and effective counsel was not being met.³⁶¹ The court ordered the mayor of Montgomery to file a plan within thirty days specifying the means and methods to be used for furnishing counsel so as to meet constitutional requirements.³⁶²

Corenevsky v Superior Court,³⁶³ although dealing with somewhat different concerns, did show state court sympathy for the plight of defendants in counties desiring to spend as little money as possible in providing representation. The trial court had ordered the auditor of Imperial County, California, to allocate payment for four expert defense witnesses. Although the county claimed that the expense of \$13,314 would "bankrupt" the county,³⁶⁴ the trial court held the auditor in contempt for refusing to make the payment.³⁶⁵ The California Supreme Court upheld the contempt order: "To hold otherwise would be to encourage and facilitate local government intrusion into exclusive powers of the judiciary [I]t is solely a judicial question whether a given defendant shall be afforded requested defense services."³⁶⁶ The court, in language helpful for developing litigation strategies to challenge underfunding of public defender offices, emphatically rejected the concept of balancing the need for legal services against the other needs of the county "Such a rule would pose serious problems of equal protection: it would directly condition a defendant's right to ancillary services, and hence effectiveness of counsel, on the fisc of the county in which he is being prosecuted."³⁶⁷

359. 410 F Supp. 494 (M.D. Ala. 1976).

360. 407 U.S. 25, 34-40 (1972). The Supreme Court noted in *Argersinger* that misdemeanants especially, because of the sheer volume of cases which must be handled, are at risk of the courts' imposition of "assembly-line justice." *Id.* at 36. For this reason, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

361. *Tucker*, 410 F Supp. at 507.

362. *Id.* The court noted that the mayor was the object of the order because the mayor approved municipal court policies regarding expenditures and was therefore responsible for the policies that were not in compliance with *Argersinger*. *Id.* at 508-09.

363. 682 P.2d 360 (Cal. 1984).

364. *Id.* at 363-64. One county in Arizona refused outright to pay any costs associated with the defense of twenty members of an all-black church. The judge dismissed the case. *Arizona Judge Calls Off Trial of 20 Blacks*, N.Y. TIMES, Feb. 16, 1984, at A18.

365. *Corenevsky*, 682 P.2d at 364-65.

366. *Id.* at 371.

367. *Id.* at 367 n.13.

D Action by the Public Defender

Litigation brought by the public defender office itself has been extremely rare.³⁶⁸ Defenders are typically county or state employees, and the chief defender, who would have to approve any litigation, is in almost all instances beholden to the government for his continued employment.³⁶⁹ The county officials who would be the object of the litigation are typically the same individuals responsible for setting the defender's salary³⁷⁰ and determining the annual budget for the program.

Political control of defender offices continues in spite of the ABA standards warning against such control³⁷¹ and specifically prohibiting retaliation against "professional judgments made in the proper performance of defense services."³⁷² The U.S. Supreme Court in *Polk County v. Dobson*³⁷³ similarly concluded, "it is the Constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."³⁷⁴

The defender office, however, would be in the most advantageous position to conduct the litigation.³⁷⁵ Statistics showing staff caseloads

368. This is true even though county executives themselves are aware of their vulnerability to such litigation. For example, the chairman of the Fulton County (Atlanta) Commission recently admitted after a series of news stories highlighting the excessive caseload of defenders which had resulted from inadequate funding: "I think we have tremendous exposure with respect to the defense issue." Renaud & Woolner, *supra* note 48, at 2.

369. See, e.g., CAL. GOV'T CODE § 27703 (West 1988) (permitting the county board of supervisors to terminate "at its will" the appointment of any chief public defender); cf. STANDARDS FOR CRIMINAL JUSTICE Standard 5-4.1 (A.B.A. 1990) ("Neither the chief defender nor staff should be removed except upon a showing of good cause.").

370. See, e.g., CAL. GOV'T CODE § 27711 (West 1988).

371. STANDARDS FOR CRIMINAL JUSTICE Standard 5-1.3(a) (A.B.A. 1990). The Standards suggest a board of trustees to govern defender offices as a means of securing political independence. *Id.* Standard 5-1.3(b).

372. *Id.* Standard 5-1.6.

373. 454 U.S. 312 (1981).

374. *Id.* at 321-22. The failure of states to honor this mandate can be noted by the perceived need of the Kentucky Department of Public Advocacy in 1992 to recommend that Kentucky state laws be amended so as to ensure "professional and political independence" of the public defender services. Edward C. Monahan, *Indigent Defense Needs Revising*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Feb. 1992, at 5. The Department of Public Advocacy previously recommended such statutory revision in 1991 and in 1988. *Id.* at 8.

375. Support for such litigation comes from a new *Standard for Criminal Justice*. Standard 5-5.4 is titled *Impact Litigation* and reads as follows:

- (a) The legal representation plan should permit pursuit of litigation which affects:
 - (i) substantial numbers of similarly situated clients of the program, or
 - (ii) fundamental rights which cannot otherwise be effectively protected.
- (b) Any such litigation should be undertaken only when it is in the best interests of the affected clients.

and the amount of time an attorney was actually able to devote to each case would be readily available to defender offices. The chief defender could permit and even encourage the staff and supervisors to testify, office investigators could show how budget limitations curtail their abilities to perform thorough work for all defenders who need it, and secretaries could testify that because the office is so understaffed, motions and briefs may not be completed and filed on time.

Perhaps most significantly, any defender office seeing a need for litigation to attack the adequacy and viability of the system which provides defense services could plan ahead and prepare for the suit. Documentation could be provided for every case each lawyer had, showing the time the lawyer was able to devote to preparing the case both in court and out: motions prepared, bail applications filed, hearings conducted, research done, time needed to consult with the defendant and his or her family, investigations conducted, and witnesses interviewed. Careful records could be kept of budget requests and denials, and techniques could be developed for projecting estimated caseloads, including details such as expected duration and work required for each type of offense charged.

Defenders could get support for their litigation from chapter five of the ABA's *Standards Relating to the Administration of Criminal Justice*, entitled "Providing Defense Services."³⁷⁶ The standards advise defender organizations not to accept workloads that "by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."³⁷⁷ The standards instruct defenders that if accepting any new cases or continuing representation on all pending cases would lead to ineffective representation, the defender "*must* take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments."³⁷⁸

STANDARDS FOR CRIMINAL JUSTICE Standard 5.4 (A.B.A. 1990). The discussion supporting the ABA Section on Criminal Justice's recommendation to the ABA House of Delegates to adopt this Standard, stated that "it was felt that the standards should explicitly address this issue [impact litigation], given the political pressures which may come to bear on a program when it undertakes anything more than the defense of individual defendants." A.B.A. Section of Crim. Just., Report to the House of Delegates, Recommendation 17 (Aug. 1990).

376. STANDARDS FOR CRIMINAL JUSTICE (A.B.A. 1990).

377. *Id.* Standard 5.3; see also STANDARDS FOR PUBLIC DEFENSE SERVICES Standard Three (Wash. Defenders Ass'n 1989) (recommending that defender organizations should not accept workloads which are so excessive as to interfere with quality representation); STANDARDS FOR DEFENDER SERVICES Standard IV-1 (Nat'l Legal Aid and Defender Ass'n).

378. STANDARDS FOR CRIMINAL JUSTICE Standard 5-5.3 (A.B.A. 1990) (emphasis added); see also GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, FINAL REPORT 517 (Nat'l Study Comm'n on Defense Servs. 1976) (stating that when a defender system is faced with an excessive caseload, it should pursue all viable means of alleviating the problem, including initiating legal causes of action).

While the National Advisory Commission on Criminal Justice Standards and Goals³⁷⁹ does not require litigation by the public defender office confronted with excessive caseloads, it does provide the defender with the following instruction:

If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, *he should bring this to the attention of the court*. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.³⁸⁰

One litigation theory that might prove successful in attempting to get state courts to order additional funding for defender offices is that the inadequate representation provided by the defenders impacts negatively upon the proper functioning of the courts themselves. In *Wilson v State*,³⁸¹ when the Mississippi Supreme Court was confronted with a challenge to the legislatively enacted reimbursement schedule for court-appointed lawyers, it adopted this analysis. The court concluded that the \$1,000 maximum permitted per case was so low as to impact on the courts and to potentially emasculate the constitutional mandate for the separation of powers.³⁸² Without ever specifically enumerating the connection between inadequate reimbursement for counsel and its impact on the functioning of the court as a co-equal of the legislature, the court assumed such a relationship.³⁸³ The court concluded:

If the legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act. *It is the absolute duty of a court in such latter circumstances to act, and act promptly.*³⁸⁴

The concerns of chief defenders about repercussions from the county as a result of the office taking actions that might lead to the county being sued, criticized, or mandated to spend more funds are not merely

379. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS (1973) (project of the Law Enforcement Assistance Administration).

380. *Id.* Standard 13.12 ("Workload of Public Defenders") (emphasis added).

381. 574 So. 2d 1338 (Miss. 1990).

382. The court refused to find the reimbursement statute unconstitutional on either grounds that the low fee constituted an unlawful taking of property or that defendants with such low-paid counsel were denied the equal protection of the laws. *Id.* at 1340-41.

383. In a concurring opinion, Justice Robertson commented that: "If an adequate courthouse is essential to the administration of justice, so are competent counsel." *Id.* at 1342 (Robertson, J., concurring).

384. *Id.* at 1340 (emphasis added).

imaginary The Los Angeles County Public Defender Office commenced three suits: (1) an action to prohibit the Los Angeles County Sheriff Department from reading mail between inmates and their attorneys, (2) a class action suit in federal district court challenging a system of jury selection, and (3) litigation to prevent pre-trial detention of juveniles in state reformatories or correctional institutions.³⁸⁵ Board members of the Los Angeles County Board of Superiors publicly criticized the defender office for instituting the litigation without consulting the Board. The Board proceeded to conduct an audit-management study of the defender office, which resulted in strong criticism of the office's management policies and recommendations that the office desist from filing injunctions or class actions. After the Board withheld approval of any salary increase, the chief public defender resigned.³⁸⁶ The staff defenders were in agreement that the Board had prompted the resignation in direct retaliation for the litigation.³⁸⁷

To some extent, the more effectively public defenders accomplish their proper functions, the more antagonism they may engender, and efforts to limit their work and goals may increase. The agencies the defender may be opposing—the police, prosecution, probation, parole, or corrections department—all have the support of the politicians and the public who want, above all, more effective crime control.

One suit that sought relief similar to that obtained in *Wallace v Kern*³⁸⁸ was initiated by the Colorado State Public Defender. The defender was the beneficiary of a unique situation because the Colorado Commission on Criminal Justice Standards and Goals had empowered the State Public Defender to determine and establish the maximum workload for the attorneys in his office.³⁸⁹ The workload standard adopted was the nationally accepted one of 150 felonies per attorney per year,³⁹⁰ but the

385. See Brenda H. Bohne, *The Public Defender as Policy-Maker*, 62 JUDICATURE 176, 178-79 (1978).

386. *Id.* at 180.

387. *Id.* at 181. The Los Angeles County Bar Association formed a committee to study the matter and concluded that: (a) litigation by the office ought not to be restricted, (b) there might well be a duty of the defender to file lawsuits on behalf of his clients, and (c) the defender office ought not be compromised because it was a public agency. *Id.*

388. 371 F. Supp. 1384 (E.D.N.Y. 1974), *rev'd*, 499 F.2d 1345 (2d Cir. 1974), *cert. denied*, 414 U.S. 1135 (1974), *cert. denied*, 420 U.S. 947 (1975). For a discussion of the case, see *supra* notes 310-26 and accompanying text.

389. Since the complaint terminated with a Stipulation of Dismissal, the case has not been officially reported. A copy of the complaint, supporting memoranda, and exhibits can be found in NANCY ALBERT-GOLDBERG, PERSPECTIVES RELATING TO CASE OVERLOAD IN DEFENDER OFFICES app. B (1981).

390. *Id.*

average caseload in the office far exceeded that number. Because the caseload of attorneys in the defender office exceeded the permissible maximum, the defender proceeded to file a complaint seeking an injunction against the district and county judges which would prohibit the judges from appointing the defender office as counsel for any additional individuals.³⁹¹

The Colorado State Public Defender had previously sought to alleviate the caseload problems by obtaining an increase in funds from the legislature, but the funding which was finally allocated for the next year would have resulted in the actual elimination of three lawyers from the office.³⁹² The complaint alleged that the excessive caseload prohibited the office from providing effective assistance of counsel and, therefore, the attorneys in the office were in jeopardy of violating the *Code of Professional Responsibility*. One deputy defender had been cited for contempt of court for refusing to accept a new appointment, and the complaint stated that other deputies "must and will move to withdraw from certain cases, and they must and will decline new appointments, both at the trial level and on appeal."³⁹³

The matter terminated in a stipulation of dismissal, granting to a significant extent what had been sought by the public defender office. The defendant-judges ceased to appoint the defender office in a number of cases, and permitted withdrawal in others. The stipulation stated: "The effect of this action has been to reduce the caseloads of the Plaintiffs herein to the maximum caseload standards sought by Plaintiffs."³⁹⁴ While the defenders were paid by the state, the counties exclusively bore the expense of appointed counsel who were taking the place of the public defenders. The counties then proceeded to successfully pressure the legislature to fund additional positions for the state defender system.³⁹⁵

The Colorado court's support for the public defender does have reinforcement from the ABA's *Standards for Criminal Justice*.³⁹⁶ In 1990, the ABA House of Delegates approved a one-sentence addition to the "Workload" Standard of chapter five. The new standard instructs:

391. *Id.*

392. *Id.* at Exhibit A. If court appointments of the defender's office continued at the then-current rate, the effect of the decrease in staff would have been to increase caseloads to approximately 215 cases per attorney in the next fiscal year. *Id.* at app. B(4)(2).

393. *Id.* at app. B(1)(4) (Complaint for Declaration Judgment and Injunctive Relief).

394. *Id.* at app. B(5) (Stipulation of Dismissal). Furthermore, there was an acknowledgment by the defendants that the 150 felony standard for each attorney was appropriate and reasonable.

395. *Id.* at 28.

396. STANDARDS FOR CRIMINAL JUSTICE (A.B.A. 1990).

"Courts should not require individuals or programs to accept workloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."³⁹⁷

In Florida, two circuit public defender offices confronted with excessive caseloads filed motions to withdraw from certain assignments, claiming inability to provide effective assistance of counsel. In one of the cases, *State ex rel. Escambia County v. Behr*,³⁹⁸ the Florida District Court of Appeals for the First Circuit approved the trial court's decision granting the motion to withdraw.³⁹⁹ In *Dade County v. Baker*,⁴⁰⁰ the Third District Court of Appeals noted that the First District's *Behr* decision was "on point,"⁴⁰¹ but declined to adhere to that ruling and held that the defender office could not withdraw.⁴⁰² With the two appellate districts in conflict, the Florida Supreme Court upheld the *Behr* decision permitting withdrawal by the defender.⁴⁰³ The independent action taken by the Florida defenders, antagonizing the county officials who must appropriate

397. *Id.* Standard 5-5.3. The Discussion section supporting this addition to the *Standards* was presented to the House of Delegates in its August, 1990, meeting. It stated that "[i]t was felt that the addition was necessary to point out that the problem of excessive caseload is as frequently an issue of pressure from the courts as it is a reluctant willingness by public defenders to accept them." A.B.A. Section of Criminal Justice, Report to the House of Delegates, Recommendation 16 (Aug. 1990).

398. 354 So. 2d 974 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 147 (Fla. 1980).

399. The county sought a writ of mandamus to *compel* the public defender to represent the defendants on the cases from which he was seeking to withdraw. *Behr*, 354 So. 2d at 975. The court held that it would be improper "to mandate the appointment of the public defender if so doing would compromise the effectiveness of his representation. 'Both ethical considerations and professional standards dictate otherwise.'" *Id.* at 976.

400. 362 So. 2d 151 (Fla. Dist. Ct. App. 1978).

401. *Id.* at 152. The court added: "[W]e decline to follow the holding of our sister court in its broad application of the law." *Id.* at 154.

402. The public defender office had sought to withdraw from all noncapital felony appeals "as a temporary stop gap measure to avoid further delays and dismissals of appeals which must presently be prosecuted." *Id.* When the filings of appeals are being delayed, it may be that defendants remain incarcerated merely because of the limited resources available to the counsel responsible for conducting the appeal.

403. *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980). The Oregon Supreme Court took a similar approach. *Acocella v. Allen*, 604 P.2d 391 (Or. 1979) (filing of petitions by public defender office and nine indigent defendants to have appellate counsel other than the public defender office assigned because there was insufficient staff to adequately represent all the appeals). The circuit court judge refused to allow the defender office to decline appointment, but the Oregon Supreme Court, in a decision criticizing the circuit judge for caring only about saving taxpayers' funds, ordered a writ commanding the presiding circuit judge to appoint counsel other than the public defender office.

The New York City Legal Aid Society also found itself with more appeals than it could handle, and the Legal Aid Society's executive director petitioned the city's two appellate divisions for an 18-month moratorium on the assignment of new appeals to Legal Aid. The Legal Aid Society had 1,800 cases pending at the time. The appellate division judges agreed to send letters to bar associations and law firms requesting volunteers to assist with the backlog. Martin Fox, *Ruling Emphasizes Backlog of Appeals by Legal Aid*, N.Y. L.J., Feb. 23, 1984, at 1.

the extra cost of appointed private counsel to replace the public defenders,⁴⁰⁴ was possible in part because public defenders in Florida are elected⁴⁰⁵ and therefore not dependent on county officials for the retention of their positions.⁴⁰⁶

In any such litigation conducted by a defender office, it is most helpful if the statutory scheme which provides for the delivery of defense services for indigents includes provisions for the appointment of private counsel as well as public defenders. A court judging the effectiveness of an overburdened defender agency must have available to it the option of court-appointed counsel to represent those defendants who would normally be clients of the defenders but who, if assigned to a public defender, would just exacerbate the problems currently confronting the already overloaded defender system.⁴⁰⁷ Virtually all defense services systems, whether providing for representation in state⁴⁰⁸ or federal⁴⁰⁹ courts, have such provisions.⁴¹⁰

One very real obstacle to successful litigation is the resistance of courts to become involved, compounded by insensitivity to the severity of the problem. The New Jersey Supreme Court's 1992 decision in *Madden v. Township of Delran*⁴¹¹ exemplifies judicial obstinacy and indifference. The issue presented in *Madden* was whether the failure of municipalities throughout the state to compensate counsel who were appointed to represent indigent defendants was permissible. The court admitted that the

404. In both of these Florida cases, it was the county that appealed the initial trial court decision permitting defender withdrawal.

405. FLA. CONST. art. V, § 18; FLA. STAT. ANN. § 27.50 (West 1988).

406. By 1990, overwhelming caseloads had once again created a crisis. The Dade County Public Defender stated that staff defenders simply could not handle their caseloads in a "timely and professional manner." Caseloads per year in Miami and Tallahassee have approached 1,200 per attorney. *Florida Public Defenders Call for Restructuring of Indigent Defense Funding*, *supra* note 244, at 3.

407. The court then could give the county the clear choice of increasing funding for the defender office or expending funds for court-appointed counsel. *See Ligda v. Superior Court*, 5 Cal. App. 3d 811, 827-28 (1970) (stating that a defender confronted with a staggering workload should inform the court which can then order private counsel to be appointed).

408. *See, e.g.*, ILL. ANN. STAT. Ch. 38, ¶ 208-10(c)(1) (1973) (stating that the state appellate defender may maintain a list of lawyers to be called upon on a case-by-case basis); D.C. CODE ANN. § 1-2702 (1992) (stating that at least 40% of all indigent defendants must receive court-appointed, not public defender, counsel).

409. 18 U.S.C. § 3006A(a) (1988) (stating that localities providing for representation of indigent defendants in federal cases must provide for private counsel to be appointed in a "substantial portion of cases").

410. *See* STANDARDS FOR CRIMINAL JUSTICE Standard 5-1.2 (A.B.A. 1990). Standard 5-1.2 suggests that a plan for representation of indigent defendants should be based on the services of both a full-time public defender and an assigned counsel system involving the private bar. *Id.*

411. 601 A.2d 211 (N.J. 1992).

low quality of advocacy provided by conscripted attorneys having no desire to represent indigent clients, especially when no fee was provided, was "unfair to indigent defendants who suffer with unequal justice."⁴¹²

The *Madden* court found the system which so short changed the indigent-accused to be "most unsatisfactory," yet one which did not call for "statewide action by this Court."⁴¹³ Although the court realized it "cannot forever accept a system so clearly inefficient, historically unfair, and potentially unconstitutional,"⁴¹⁴ it could accept the system for now. The court seemed blind to the financial realities confronting the economically troubled, recession-impacted state when it held, "[w]e stay our hand only because we believe other branches of government, state, county and local, are equally able to address the problem, equally committed to meeting the constitutional obligation, and equally concerned with the unfairness that inevitability affects the present system."⁴¹⁵

That this court had such faith in the New Jersey local and state governments was all the more mind boggling in light of the action taken by a major New Jersey locality just prior to this court's decision. Since 1973, Jersey City had had a public defender system, yet the city decided to eliminate the program⁴¹⁶ and act in just the way that the state supreme court was to find constitutional in *Madden*. After all, why pay for defenders when the city could just assign lawyers to provide that representation at no cost to the city? The court, instead of focusing on the devastating impact likely to result from destroying the public defender program, found that, "for Jersey City, the financial gain may be needed."⁴¹⁷ Lip service, however, was given to Sixth Amendment concerns when the court acknowledged that "[e]limination of [the public defender] office will severely damage the efficiency of its municipal court

412. *Id.* at 213.

413. *Id.* The court reasoned, in part, that if the court did order municipalities to compensate counsel, there would be undesirable and "inevitable confrontation" between the two branches of government. *Id.* at 212.

414. *Id.* at 213.

415. *Id.* The court did require that the assignment of counsel without compensation be fairly distributed among all attorneys and that the assignment of counsel proceed alphabetically from a list that includes every attorney licensed in the state whose primary office is in that locality. *Id.* at 218. While the court did realize that some attorneys with no criminal law experience at all would now be assigned cases, it found that to be of no great concern, even while acknowledging that "[w]e have lived with that system in many counties for some time. [W]e have no doubt that on occasion their inexperience has affected their representation." *Id.* at 219 (emphasis added).

416. *Id.*

417. *Id.* at 220. The court realized that representation provided by public defenders or paid counsel was "far superior to that which appointed counsel may offer, but such a conclusion does not equate with a constitutional denial of counsel." *Id.* at 215.

and impair the constitutional rights of its indigent defendants."⁴¹⁸ The New Jersey Supreme Court decided to tolerate impairment of constitutional rights in the name of saving money

In early 1992, a very interesting example of court initiative occurred in Tennessee. The Tennessee District Public Defenders Conference determined that the average public defender in Tennessee carried 430 cases.⁴¹⁹ The judges in the Knoxville General Sessions Court reacted to what they deemed a "crisis," and issued a decree mandating *all* of the state-licensed lawyers who reside in Knoxville to be ready to accept appointment to represent indigent defendants. The judges' order stated: "No lawyer will be excused for any of the following reasons: a) does not accept appointed cases; b) does not practice criminal law; c) is too busy"⁴²⁰

Another extraordinary example of court intervention and concern is demonstrated by the Arizona Supreme Court's action in *State v Smith*.⁴²¹ Defendant Smith appealed his burglary and assault convictions, claiming, in part, that he was denied effective assistance of counsel because of his attorney's "shocking, staggering and unworkable" caseload.⁴²² The Arizona court concluded that, in order to fully determine the issue of competency of counsel, it would be necessary to expand the record. Therefore, the court invited the filing of amici briefs relating to the issue of whether the system of providing counsel to indigents in Mohave County⁴²³ resulted in counsel being so overworked as to endanger the defendants' Fifth and Sixth Amendment rights.⁴²⁴

418. *Id.* at 220.

419. Margolick, *supra* note 170, at B16.

420. *Id.* The order provided only three valid excuses: illness, retirement, or death. Even the Knoxville mayor, who had not practiced law for years and had never handled a criminal case, was not exempt from the decree and was assigned the case of a defendant charged with trespass. *Id.*

421. 681 P.2d 1374 (Ariz. 1984) (en banc). One extraordinary aspect of the case involved the court's sua sponte consideration of appropriate prospective relief for future defendants. Nothing in the record indicates that defendant Smith had ever raised this issue.

422. *Id.* at 1378-79.

423. The defense delivery system in the county was one best characterized as the low-bid-wins-the-contract-to-represent-the-indigent-defendants system. The court described the procedures as follows:

In May of each year a bid letter goes out from the presiding judge of Mohave County to all attorneys in the county. It calls for sealed bids. No limitation is suggested on caseload or hours, nor is there any criteria for evaluating ability or experience of potential applicants. The successful bidders are assigned all indigent criminal cases in the superior courts, all appeals in Mohave County, and all mental evaluations. No suggestion is made that counsel may expect assistance in any way for support personnel. Any investigator, paralegal, secretary, or similar personnel must be provided by the individual bidder who must also provide his own office space, equipment and supplies.

Id. at 1379.

424. *Id.* at 1376.

The National Legal Aid and Defender Association, the State Bar of Arizona, and several county public defender offices submitted amici briefs. The court's decision was most interesting and significant. Although finding that in this specific case the counsel's representation was not shown to be ineffective, the court did deem the attorney's caseload "excessive, if not crushing"⁴²⁵ and found that the system for providing counsel for indigents "militates against adequate assistance."⁴²⁶ Smith's counsel had, in addition to 160 misdemeanor clients, 21 juvenile cases and 149 felony clients.⁴²⁷ The court stated:

The fact that one felony defendant out of 149 felony defendants was given minimum adequate representation does not mean that others were properly represented. The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads.⁴²⁸

The court concluded that the county's procedures violated defendants' rights to counsel and to due process found in the United States and Arizona Constitutions.⁴²⁹ The decision relied on the finding that attorneys so overburdened cannot be reasonably effective nor can they adequately and properly represent all clients.⁴³⁰ The remedy offered, however, was not as sweeping as might have been hoped for or expected. The court merely ruled that as long as the county's procedures continued, a rebuttable presumption of ineffectiveness would exist for all subsequent appeals claiming ineffective assistance of counsel.⁴³¹

Defenders, nevertheless, ought to be heartened by the *Smith* decision and realize that routine appeals on ineffective assistance of counsel grounds may offer opportunities for showing that inadequate funding is constitutionally impermissible. As *Smith* demonstrated, support from state and local bar associations is helpful and may insulate defender offices from retaliation by funding sources.⁴³²

In 1991, the Kentucky Court of Appeals in *Lavit v Brady*⁴³³ took the unsolicited initiative to express concerns that were somewhat similar to

425. *Id.* at 1380.

426. *Id.* at 1381.

427. *Id.* at 1380.

428. *Id.* at 1381.

429. *Id.*

430. *Id.*

431. *Id.* at 1384.

432. See *supra* notes 314-16 and accompanying text.

433. Nos. 89-CA-2360-MR, 90-CA-1302-MR, 1991 WL 228037 (Ky. App. Nov. 8, 1991).

those of the *Smith* court. However, the court offered no remedy or plan of action. In the Kentucky case, the only issue presented to the court was whether counsel in a death penalty case were entitled to be paid for *all* hours worked even though the amount due would exceed by 350% the statutory maximum of \$1,250.⁴³⁴ The applicable Kentucky statute provided for \$35 per hour for in-court work and \$25 per hour for out-of-court work. The court of appeals commented: "While the statutory hourly rates are not in question on appeal, it behooves us to comment that the sums are not commensurate with professional services of the kind demanded by the nature of a capital murder case."⁴³⁵ The court went on to comment that the state may not be fulfilling its constitutional obligations due, among other problems, to the lack of adequate funding for indigent defense services.⁴³⁶

Class action suits on behalf of inmates alleging violations of their constitutional rights might provide a model for a suit on behalf of indigent defendants. Successful suits for prisoners have been brought when the claim involved systematic detention absent any judicial determination of probable cause,⁴³⁷ denial of the constitutional right to a speedy trial,⁴³⁸ and prison conditions allegedly constituting cruel and unusual punishment. Indeed, the language of the federal district court in *Holt v Sarver*,⁴³⁹ considering Arkansas's claim that it had insufficient funds to remedy prison conditions, would seem to apply to a system providing for representation of indigent defendants which does not meet the constitutional requirements of effective assistance:

Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionality does not depend

434. *Id.* at *1.

435. *Id.* at *2.

436. *Id.* at *6. One judge, while concurring in the result, filed a separate opinion stating: "This court should refrain from giving advisory opinions as to constitutional questions not before us and from suggesting legal strategy to be used in a possible future lawsuit." *Id.* (Wilhoit, J., concurring). But even this judge sounded an alarm, warning that the inadequate funding problem "needs prompt attention lest a full-blown crisis develop in criminal prosecution." *Id.* at *7.

437. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (invalidating arrests without a warrant and incarceration absent probable cause on constitutional grounds). The Court in *Gerstein* issued its ruling even though the claims of the named plaintiffs in the suit had become moot. The Court noted, "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. [I]t is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." *Id.* at 110 n.11.

438. *Wallace v. Kern*, 371 F. Supp. 1384, 1385 (E.D.N.Y. 1974) (granting preliminary injunctive relief to plaintiff class), *rev'd*, 499 F.2d 1345 (2d Cir. 1974), *cert. denied*, 414 U.S. 1135 (1974). The federal district court judge found the federal courts to have proper jurisdiction because "[t]he hostility of New York State courts to class actions make it impossible to obtain effective state relief where a large number of prisoners are suffering similar loss of rights." *Id.* at 1390.

439. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.⁴⁴⁰

Litigation concerning the desegregation of schools also illustrates the willingness of courts to intervene when the administration of a governmental function has been found to operate in violation of the constitutional rights of some citizens. The failure of states to properly implement the *Gideon* and *Argersinger* mandates⁴⁴¹ may be analogous to the failure of some states to effectuate the constitutional requirement not to discriminate against public school children on the basis of their race.

The Supreme Court in *Brown v Board of Education*⁴⁴² first mandated that the states eliminate racially separate public schools. The following year, in *Brown v Board of Education* (Brown II),⁴⁴³ the Court noted that, whereas school authorities have the primary responsibility for complying with the mandate, the "courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."⁴⁴⁴ But compliance was not forthcoming, and the Court in *Griffin v School Board*⁴⁴⁵ and *Green v County School Board*⁴⁴⁶ required that the school boards remedy the constitutional violations forthwith.

By 1970, the Court, exasperated by the "failure of local authorities to meet their constitutional obligations,"⁴⁴⁷ granted certiorari in *Swann v Board of Education*⁴⁴⁸ to "review important issues as to the duties of school authorities and the scope of powers of federal courts under this

440. *Id.* at 385; see also *Hutto v. Finney*, 437 U.S. 678 (1978); *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972) (stating that it is the responsibility of the legislature to appropriate sufficient funds to enforce the laws it has enacted). The litigation for a structural injunction to bring about institutional reform in Arkansas prisons lasted for more than ten years. See OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 529-752 (2d. ed. 1984).

441. See *supra* notes 305 & 308 and accompanying text.

442. 347 U.S. 483 (1954).

443. 349 U.S. 294 (1955) (Brown II).

444. *Id.* at 299. Such judicial vigilance and concern in watching over the counties or states charged with meeting constitutional requirements for effective assistance to indigent defendants would be welcome news indeed. In some criminal justice matters, the federal courts have shown awareness of their responsibilities. See, e.g., *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976) (finding it the duty of the court of appeals to exercise a supervisory role over the administration of criminal justice in the circuit).

445. 377 U.S. 218, 234 (1964).

446. 391 U.S. 430, 439 (1968).

447. *Swann v. Board of Educ.*, 402 U.S. 1, 14 (1970).

448. *Id.*

Court's mandates ⁴⁴⁹ The Court proceeded to clearly support the active intervention of the federal courts when authorities have failed to comply with their affirmative obligations: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."⁴⁵⁰ The Court added that in cases involving the framing of remedies to repair the denial of a constitutional right, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."⁴⁵¹

The failure of states to deliver defense services which actually do provide for the mandated effective assistance of counsel⁴⁵² involves "a right and a violation" requiring equitable remedies.⁴⁵³ Continuing and long-standing governmental failures call for litigation against those entities which refuse to meet their responsibility to ensure to indigents their constitutional right to effective counsel.

CONCLUSION

Problems created by the chronic underfunding of the defense services system impact not only the defendant deprived of his or her Sixth Amendment right to effective counsel, but also court-appointed attorneys and public defenders. Defense counsel for the indigent should no longer

449. *Id.* at 5.

450. *Id.* at 15.

451. *Id.* at 16; *see also* *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (recognizing federal judicial power to mandate local governments to increase taxes in order to fulfill the requirements the Constitution has imposed on them).

452. The Sixth Amendment of the Constitution provides that an accused is entitled "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), held that the Sixth Amendment required the appointment of counsel for an indigent in federal proceedings, and in *Powell v. Alabama*, 287 U.S. 45 (1932), the Court held the Fourteenth Amendment's Due Process Clause obliged the state to appoint counsel for an indigent in a capital case. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court, through the Fourteenth Amendment Due Process Clause, extended the Sixth Amendment right to counsel to defendants charged with serious offenses in state courts. The Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), recognized the Sixth Amendment right to counsel of any accused confronted with the loss of liberty. The Court first specified that the right to counsel meant the right to the effective assistance of counsel in *McMann v. Richardson*, 397 U.S. 759 (1970).

453. Such remedies could take the form of an injunction against the trial judge, prohibiting the assignment of additional cases to the public defender office, or a writ of mandamus ordering the trial court to relieve the defender office by appointing private counsel to a certain number of cases. Any injunction prohibiting the assignment of new cases could be in effect until the public defender represents to the court that the caseload had come within the professionally recognized standards and that the office could effectively assist new clients.

focus exclusively on the rights of their individual clients; the time has come for a heightened emphasis on the collective needs of indigent defendants.

Court officials, administrators of court-appointed counsel plans, and judges have rarely concerned themselves with the *quality* of counsel provided indigent defendants. Absent some completely unforeseeable event, the prognosis for any additional funding for defense services is poor indeed—it is almost inconceivable that elected politicians would call for or provide additional funding to represent indigents accused of crime. The responsibility of defense counsel, who are most aware of the egregious violations which result from inadequate funding, is clear. Neither habeas corpus petitions, nor appeals based on claims of ineffective assistance of counsel, nor attempts by private court-appointed counsel to unite and strike have been successful in bringing about the fundamental changes that are required.

Systematic litigation attacking the constitutionality of the system for delivering defense services, however, offers hope and promise. The failures of states and counties to provide adequate funds to ensure the constitutionally mandated effective assistance of counsel are subject to, and call for, attack.

There are few jobs as vital to our Constitution as that of defense counsel for the indigent. Every day such counsel protect and fight for the basic constitutional rights of citizens who are being prosecuted by the state. Now, those same counsel, or others representing the class of indigent defendants deprived of their Sixth Amendment rights, must initiate litigation against the government for failing in its responsibilities. Public defenders should act as criminal justice policy makers, as litigators actively advocating systemic change. Those who defend accused indigents cannot be compelled to work under circumstances that render it impossible to provide the effective assistance of counsel.