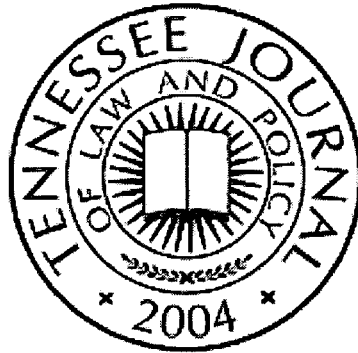


7 Tennessee Journal of Law & Policy (Special Edition) 249



NATIONAL PUBLIC DEFENSE SYMPOSIUM

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“FINDING A SILVER LINING IN THE DARKEST CLOUDS:
HOW TODAY’S ECONOMIC CRISIS CREATES
OPPORTUNITIES FOR REFORM AND COST SAVINGS IN THE
ADMINISTRATION OF THE DEATH PENALTY”**

PANEL FOUR

**FRIDAY, MAY 21, 2010
AFTERNOON SESSION**

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

7 Tennessee Journal of Law & Policy (Special Edition) 250

PANEL FOUR SPEAKERS:

MODERATOR: TONY MAURO
Supreme Court correspondent for National Law Journal,
American Lawyer Media, the Blog of Legal Times, and
law.com

JEAN FARIA,
Louisiana State Public Defender
Baton Rouge, Louisiana

PROFESSOR JON B. GOULD,
Director, Center for Justice, Law & Society
George Mason University
Fairfax, Virginia

ELIZABETH (LIBBY) SYKES,
Director, Administrative Office of the Courts
Nashville, Tennessee

RESPONSE TO PRESENTATIONS:

MALCOLM R. HUNTER,
Executive Director, Center for Death Penalty Litigation
Durham, North Carolina

7 Tennessee Journal of Law & Policy (Special Edition) 251

PENNY WHITE: I'm going to turn it over to our distinguished guest, Tony Mauro, who will be the moderator of this panel. I'll leave the rest to him.

TONY MAURO: My name is Tony Mauro, and I cover the Supreme Court—or I'm a reporter who covers the Supreme Court for the National Law Journal and American Lawyer Media—and it's an honor to be in your midst. I've learned so much in the last day from the excellent panels. It's been tremendous. And, I think I now realize why Robin Maher recruited me to fill in for her. She was supposed to be the moderator, but she had a schedule conflict. And she called me and asked if I would do it. I think I see why she wanted me to. She knows that I cover the Supreme Court, and I've covered it for 30 years. I write about all the decisions they've handed down on the many areas of the law, including EDPA and the effective assistance of counsel. She knows that from that work I get to see the Court's decisions at the level of abstraction that is so far removed from what is happening on the ground, and I've learned that again today. I think that's what Robin was hoping I would learn.

It is amazing to see what the Court does. Of course the Court isn't the only reason for this situation we've been talking about for the last day, but I see now with this sort of steaming costly mess that is indigent defense and how the Court's *Strickland*¹ rulings and others have watered down or betrayed the promise of *Gideon*.² It's been sobering and educational for me. But, it's not about me. It's all about you, and I just wanted to say I'm so glad to be here. What we're going to talk about is the economic part of the equation, the entrance of the economic debate, the economic crisis, and the impact it has had on budgets as

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7 *Tennessee Journal of Law & Policy* (Special Edition) 252

part of the debate over the death penalty.

As you all know, the economy and the cost of the death penalty have become a debating point in many states from California to New Mexico to Kansas. I have heard a number of stories. For example, in California it's estimated that eliminating the death penalty and going to life without parole would save as much eleven million dollars, but I've also seen articles that say that it's really 110-111 million dollars a year that could be saved. These numbers range all over the place, and I think one of the things we're going to talk about is how do we effectively or accurately assess the cost of the death penalty.

What we are doing to do is find out how this new element of the debate—the economy and the economic cost—is entering into the debate over the death penalty. It's really been quite remarkable to see that legislators, at least in some cases, seem to be more comfortable talking about the death penalty as an economic “dollars and cents” issue rather than a moral issue. And, I hope we can talk about that seeming paradox. Maybe it's just that people are more comfortable with that kind of decision.

Dick Dieter, from the Death Penalty Information Center, was quoted recently and said, that “it is easier for some people to talk about the death penalty in economic terms.” He said, “If it's just on gut and my morality versus your morality the debate gets stuck and it's at a stalemate, but as a pragmatic issue this is a new way of looking at it.”

We have a very good panel to discuss the economic issue from all angles. First up, we have Libby Sykes, who is director of the Administrative Office of the Courts in Tennessee. She's been in that position for five years and in the office for many more years before that. Next, we'll hear from Jean Faria who's been the State Public Defender of Louisiana since June of 2008—and before that she was an Assistant Federal Defender for the Middle and Western Districts of Louisiana. Then we'll hear from Jon Gould,

7 Tennessee Journal of Law & Policy (Special Edition) 253

who is the Director of the Center for Justice, Law & Society at George Mason University in Virginia. He has done extensive research in this area. Then last but not least, we'll have Malcolm Ty Hunter who will be commenting on the remarks of the three panelists. Ty is the Executive Director of the Center for Death Penalty Litigation, a private nonprofit law firm specializing in the representation of persons accused or convicted of capital crimes. Before that he served as the First Executive Director of the North Carolina Office of Indigent Defense Services.

Before we start, I'll just mention that Libby Sykes, who will speak first, has an important event in a couple hours back near Nashville—a high school graduation that is—she cannot miss and doesn't want to miss, and so I think we'll all forgive her if she has to leave early. She will start first.

ELIZABETH SYKES: I would like to thank my fellow panelists very much for allowing me to go early. Tonight is my great-niece and -nephew's, twins, high school graduation. And, my niece is the valedictorian. She has worked on her speech for weeks, and I sure don't want to miss that tonight. So, again, I do thank you very much for allowing me to go first. Also, I think I've been mentioned here several times since I have gotten here this morning. That way, when I leave, you can talk about me. But anyway, it is my pleasure to be here, and I thank the organizers for inviting us.

As we said earlier, our office, the Administrative Office of the Courts, administers the Indigent Defense Fund. And, of course, our fund and our budget for the fund is in addition to the funds that the public defender's office receives or those county funds. Payments are made pursuant to Supreme Court Rule 13.³ As Professor Black

³ TENN. S. CT. R. 13 (2010).

7 *Tennessee Journal of Law & Policy* (Special Edition) 254

said earlier, Supreme Court Rule 13 requires the judge to appoint the district public defender or post-conviction defender, if qualified pursuant to this rule and no conflict of interest exists—unless in the sound discretion the trial judge appointment of private counsel is necessary.

Rule 13 does establish the rates of compensation for attorneys, investigators and experts. Also, as Professor Black said earlier, noncapital rates are set at forty and fifty dollars an hour. Those have been the rates since 1994. We'll talk a little bit later—as I go into my program—what it would cost even to equalize that \$40 to \$50.

Allow me to discuss a little bit about the history of our fund. Here, I sort out some of the claims that we process. You can tell, from looking at this, how we have seen an increase in the number of claims that we pay. During the 2000-2001 fiscal year—which again is twelve months, July to June—we processed 54,000 claims. During fiscal year 2006-2007 we processed 94,000 claims. During fiscal year 2007-2008 we processed 105,221 and during the 2008-2009 fiscal year we processed 115,000 claims.

Here is a little bit about our budget. As I talk about our budget today, we are in the final—probably—week to two weeks of our legislative session. The Indigent Defense Fund is still at risk. I would like to encourage all of you—you don't have to put all this down—that if you're an attorney here, licensed to practice in Tennessee to call your legislator before Monday and Tuesday to talk to them. I truly would. I stood in front and had an opportunity to talk with the House Budget Subcommittee.

One day this week I walked in to see Burney Durham, who happens to be a law school friend of mine from thirty years ago. He is the Chief of Staff for the House, and also the Chief Clerk. I walked in and I said, “Burney, I need your help. They're going to take another million dollars of our Indigent Defense Fund.” He said,

7 Tennessee Journal of Law & Policy (Special Edition) 255

“Sit there, Libby, and I'll get you in to talk to this group.” I had the opportunity to go in and talk to thirty leaders of our House General Assembly about what that million dollar reduction would mean to us and to the attorneys that we pay. If you haven't made that call, I invite you to do it before we do it next week, because our discussion is not over with yet.

Fiscal year 2000-2001 illustrates that we spent \$12 million, almost \$13 million. As we've gone into fiscal year 2008-2009, you can see the amount increased to almost \$29 million. We do not have recurring money of twenty-nine million dollars. We have probably recurring money of probably \$24-25 million. Over the last several years—since our economy started to plummet—we have supported this fund by the use of recurring supplemental money at the end of the year and nonrecurring money to sort of begin the year.

I must say that the Bredesen Administration has been very, very supportive of our fund. We were running out of money at the end of the year, and they helped us in requesting supplemental money and also some nonrecurring money. But, as I say, it gets harder and harder.

Last year there was an attempt to remove, I think, about \$5 million from the fund. Again, that was unsuccessful. This year, that same legislator filed a bill that would move the services of the Post-Conviction Defenders Office to the Administrative Office of the Courts. I thought that was a wee bit unusual, and I think Mr. McLain would probably agree with us. In the last few days there was another attempt to take about 4 percent, roughly \$978,000, from our office. Although they considered \$978,000 a small amount, to us that is a significant amount of the claims that can be paid.

Also, we have heard some discussions this year about a system that would potentially pay us in quarters.

7 Tennessee Journal of Law & Policy (Special Edition) 256

Okay. What does that mean? That means that they would give us an allotment for a quarter rather than a full year. We would accumulate our 30,000 claims that we receive during that quarter until the last week or so of that quarter, and then we would determine if the claims exceed the allotment. For example, you are allotted \$5 million. Then, you determine how many claims you have. If they are in excess of that \$5 million, then you cut the claims accordingly to the point that they are equal. So, again, I encourage you to call your legislator before next week.

Capital case expenditures are interesting. You'll see that in 2000-2001 we spent \$2.7 million. This last fiscal year, 2008-2009, that amount was \$1.7 million. For the past several years expenditures have actually looked pretty much flat. I asked some of the staff to look at that in the last few days to see if they could tell us what is happening. And, what they said to me was that between the years 2002 and 2003 we paid 715 claims out of our \$100,000 plus that was considered capital. In the fiscal year 2008-2009, the claims dropped to 428. So, that is a 40 percent reduction in the number of claims that had come into our office that are capital. I assume that is because of the reduction in the number capital cases pending.

I divided the capital case expenditures for 2008-2009 into investigators, attorney fees, and experts. You can see that \$294,000 was paid for investigators, \$883,000 for attorney fees, and another \$554,000 in expert services.

I'm not going to go through all of this, but a little bit of a capital case is defined by Rule 13 as a case in which a defendant has been charged with first degree murder, a notice of intent to seek the death penalty has been filed, and no order withdrawing the notice has been filed. Again, as Professor Black stated earlier, the Rule 13 does require the appointment of two attorneys.

Section 3 of the Rule, establishes the minimum qualifications and compensation of counsel in capital

7 Tennessee Journal of Law & Policy (Special Edition) 257

cases.⁴ And, Section 5 of Supreme Court Rule 13 establishes the procedures for the approval of investigative and expert services and establishes the maximum hourly rates for compensation.⁵

In your materials you should have a copy of all the rules, so I'm not going to go through all of the requirements for lead counsel. But voter, I must say again, that these are our current rates of compensation in capital cases—a little better, Professor Black, than the \$40 and \$50 an hour. The lead counsel when out of court, is paid \$75 and lead counsel when in court is paid \$100. Co-counsel when out of court is paid \$60, and is paid \$80 when in court. Post-conviction counsel is paid \$60 when out of court and \$80 when in court. Rule 13 does not establish a maximum limit for capital cases.

As I said earlier, Rule 13 also establishes an expert and the maximum hourly rates of compensation for our experts and investigators. I'm well aware that most of these experts make a higher hourly rate than the attorneys do. I'm not going to read all of those to you.

What I did on the next one is look at some of the cases that are really at different levels over the last few years as to what we've spent. Some of the trials are still going on, and some of them haven't been tried. I did this by sort of looking at some of those earlier cases in 1994, and the expenses from our fund. The person may have been represented by the public defender's office, but that year we paid for his representation. We had spent \$6,142, and that was the date I believe he was tried. Up to the times of Mr. Cobbins,—listed at the top of the document, as we have spent so far, out of our funds—and he was tried in 2009 for \$346,139. So I think you can look at the document as it clearly shows we are spending much more out of this fund now for capital representation than clearly we did many

⁴ TENN. S. CT. R. 13 (2010).

⁵ *Id.*

7 Tennessee Journal of Law & Policy (Special Edition) 258

years ago.

What if the capital rates were increased by \$25 per hour? What would it cost? At the time I figured this, a year or so ago, it was an additional \$323,000. If the capital rates are increased by \$50 an hour, it would be an additional \$646,000 a year. The one thing that I've really really wanted to do—just a tiny little thing—is to increase the rates—do away with that \$40 and \$50 an hour and to equalize. We would pay a minimum of \$50 an hour, and the cost of that is \$2.5 million. If the noncapital rates are increased to \$75 an hour, that would be an additional \$9.5 million a year.

ADELE BERNHARD: Seems reasonable.

ELIZABETH SYKES: Seems reasonable. You know, no comment on this one. I'd be happy to answer any questions. I won't be here at the end when you take questions, and I would be happy again to take any and answer any questions that you might have. Yes?

MARK STEPHENS: The State's budget is about \$28 million; is that right?

ELIZABETH SYKES: Right.

MARK STEPHENS: And—

ELIZABETH SYKES: Oh, I'd like to say it's probably not \$28 million. We do not have recurring dollars of that amount. We have been success—

MARK STEPHENS: I mean the total State budget?

ELIZABETH SYKES: State budget, you mean billions?

7 Tennessee Journal of Law & Policy (Special Edition) 259

MARK STEPHENS: Yeah.

ELIZABETH SYKES: Okay. You tell me.

MARK STEPHENS: \$28 billion for a state budget, roughly, \$40 million for the public defender's budget, and roughly \$28 million for the Indigent Defense Fund. That's about \$68 million. I don't know what the post-conviction defender budget is. Do you know?

ELIZABETH SYKES: No. Maybe

MARK STEPHENS: But, we're spending \$70-80 million on indigent defense on a \$28 billion budget. We're spending less than 1 percent of the State money on indigent defense. Contextually is that about right?

ELIZABETH SYKES: If you say so. Our budget overall, the judiciary's budget overall, this \$28 million now represents over a quarter of our budget. In the last two years we have lost 21 percent of our budget discretionary funds. Twenty-one percent. Although, we have made every effort to protect the indigent defense funds that we have. I am not at all defensive about this either. I really don't consider myself or our office sort of the enemy in any of this. I really don't. I mean, some of you may. I really don't. I think we all do very much consider ourselves partners. We have, over the years, as we took a 15 percent cut last year in our office and, again, another 6 percent cut, which has required tremendous lack of—we've closed every law library we have. I've laid off fifty people, but we have protected the Indigent Defense Fund and have made every effort we could to increase that rather than decrease it.

UNIDENTIFIED SPEAKER: Why did the AOC take the

7 Tennessee Journal of Law & Policy (Special Edition) 260

position—other than practical reasons—that you don't have the money to pay for private attorneys if they've got more appointments than the public defender's office? Why does the AOC become an adverse party in caseload litigation for public defender offices if we're partners? If we're on the same page? That doesn't make any sense to me.

ELIZABETH SYKES: I'm sure in the earlier session you did talk about the ongoing litigation here in Knox County. We took our position because of the impact that it will have on the Indigent Defense Fund. If I am giving \$20-25 million—or whatever it is that we have in any given year—and we run out of money in December, we sit and we'll have to wait six months before we can get any supplemental or additional funds to pay claims. If we do that, it will impact on every court in this state where attorneys are not being paid. My position is you will have fewer and fewer attorneys that will even take the \$40 and \$50 an hour if they know that they're going to have to wait months to get paid. Our fear is what the impact of that would be on the rest of the state.

UNIDENTIFIED SPEAKER: Do you see an answer? This whole symposium is trying to figure out a way to improve the quality of representation as a whole for indigent defendants, whether it be through a public defender's office or through private attorneys. I mean, the ultimate goal for everybody is to fulfill *Gideon's* promise. I understand your office is hamstrung to these as that your budget is as pathetic as the state's budget is. But, if it takes rocking the boat throughout the whole system is that a bad thing? What would the AOC's position be?

ELIZABETH SYKES: I'll leave that up to you on how you might want to rock the boat. What I have noticed in the last several years—and at the General Assembly—is that you

7 Tennessee Journal of Law & Policy (Special Edition) 261

have fewer and fewer attorneys there. You have fewer people that understand. You have fewer and fewer people that understand why we have to spend \$264,000 and \$832,000 to represent Tony Carruthers. I think that educating them and educating especially the leadership is very important. I also think the process that you have to work with is not only in litigation but also with the people who do the funding, and that's the General Assembly. We have to have the funding, and they have to understand the importance of why this fund has to be appropriately funded. For example, the idea of paying us by quarters—feeling like that their criticism of our office is that we have no control, and we have let this budget get out of control. I don't believe that I have allowed—I've been at this office for much longer than this. I've been the director for the last several years, and I don't believe at all that we've allowed this budget to get out of control. We have paid all of our claims in accordance with Supreme Court Rule 13; it just costs more. There are more people out there that need your services. There are people that could have afforded your services a couple of years ago that can't now. The economy is bringing more and more cases to the courts that need the representation. So, I agree that we all have to be partners, but I believe that much of it. Again, I would invite you to become involved in the legislative process. Ms. Green?

MARY ANN GREEN: Libby, do you have any suggestions for educating the legislature?

ELIZABETH SYKES: Well, you could probably have done a better job than I did. You know, I stood there when I had ten minutes to address that House Budget Subcommittee today. One day this week, I tried to talk about some of the cases that are here in Knox County, and that if we are given a certain amount of money a year the issues that would arise if we have to live within that

7 Tennessee Journal of Law & Policy (Special Edition) 262

amount. What am I going to tell Judge Baumgartner? He can only try one of those this year and the next one? Say okay we're done for the year, we've spent all our money, but next year we can do the next one and the next one and the next one? I think the legislators understood that. And, I think that they also understand that \$40 and \$50 dollars an hour is surely, surely, surely not enough money, but, I don't know.

UNIDENTIFIED SPEAKER: My take on that is that it sounds an awful lot like what prison administrators used to say until the federal government came in and shut them down and said you have to say no, you just can't keep stockpiling. The prison warden said we have no right to say no. How is it any different? I mean it's unconstitutional.

ELIZABETH SYKES: Yes?

UNIDENTIFIED SPEAKER: I'm from Washington State so I don't know what you do here, but are there qualifications for the appointed counsel that you pay? Is there any review of their qualifications or their work?

ELIZABETH SYKES: No.

UNIDENTIFIED SPEAKER: No?

ELIZABETH SYKES: No, not by our office.

UNIDENTIFIED SPEAKER: Do you have any idea how many cases lawyers have when they submit bills to you?

ELIZABETH SYKES: I don't know that. I could probably tell you. I mean our system has the ability to tell. We key every line an attorney sends us as far as what work they do.

7 Tennessee Journal of Law & Policy (Special Edition) 263

We know daily how many hours they're billing us for. What we don't know is what other cases they might have. But, I can tell on a given year how many claims that have been submitted by an attorney.

UNIDENTIFIED SPEAKER: Do you know what the most would be?

ELIZABETH SYKES: I don't have any idea.

UNIDENTIFIED SPEAKER: I mean one idea I have in terms of following up on the other question—I know in litigation your office might take the position that it's going to cost a lot of money, but we also know that it should cost more than it does. It might help to alleviate the pressure on the legislature to have a court order that says the caseload has to come down. That would allow you to go to the legislature and say, "Courts have ordered this. You can blame it on them, but we have to have more money to do that." It could be that if your office did have qualification requirements, for example, like Massachusetts has for appointed counsel, then there would be pressure to get the payment up because you're not going to be able to find qualified people to do it at the prices that you're paying. Also, if you collected data on the number of cases each lawyer is doing and billing you for, then that would also demonstrate the humongous caseloads that people are carrying in order to make a living at the payments that you're making, and that would help support the position of in the legislature. And finally, I have a question. Would be of any benefit to you, your colleagues, everybody here, and on the legislature, for some of us who are from out of town to write an op-ed for local papers based on our being here. I don't know if that would help or hurt. But if it would help, I'll do it.

7 Tennessee Journal of Law & Policy (Special Edition) 264

ELIZABETH SYKES: I'll let you all decide that after I leave when you talk about me. Yes, sir?

KENT BOOHER: I'm Kent Booher from Loudon County. The problem that you've got—those of us who are accepting appointed cases also have clients who are paying us. The payments that we're receiving on the appointed cases, quite frankly, our other clients are subsidizing them. So, to somehow try and figure out how many cases I have that I'm using to support my firm is really not going to be an accurate number. Because at any given time I may have twenty or thirty appointed cases, but I may also have thirty to forty, or maybe even as high as fifty cases where I have clients who have actually come in to pay me. And we're doing the work for them. The real problem that I have is that my clients who pay me are being indirectly taxed to support the Indigent Defense Fund. Frankly, that's not fair. At some point in time somebody is going to figure that out and who knows, maybe there will be some sort of equal protection lawsuit brought to force that indirect unrepresented taxation on folks who can afford to pay me who are supporting those who can't.

ELIZABETH SYKES: Yes.

ADELE BERNHARD: I'm just wondering, is there an opportunity for you to sit down at some kind of criminal justice roundtable where you can speak with police, and the prosecutor and defenders and say, "Hey, let's take a look at what this is all costing every time you decide, Mr. Police Officer, to do a sweep of the downtown part of town and make another fifty arrests for X, Y and Z as response to citizens complaints." That's going to end up costing us. Then you'll be able to tell them how many millions of dollars are spent. We as a community could decide whether that's the kind of action we actually want to take,

7 Tennessee Journal of Law & Policy (Special Edition) 265

and whether the results in terms of drug use prevention are worth it in terms of what we're all paying for that—because no one really thinks about it. They see these two separate things as separate pockets. Over here there's safety and then over here there's defense. We don't understand that they're all completely connected to one another. Maybe as citizens we'd rather walk around and talk to the kids than end up paying more tax dollars for this whole system that lurches into place. Is there any opportunity for you to do something like that?

ELIZABETH SYKES: I would love to participate in that, and I think that we could provide some statistics on what those type of things—what they do—cost.

ADELE BERNHARD: Yeah, people don't see it.

ELIZABETH SYKES: People have asked me before whether the whole misdemeanor sentencing is effective. If you'd look to see what we spend for the representation of appointment of misdemeanors, it's many many millions of dollars.

ADELE BERNHARD: Millions.

ELIZABETH SYKES: But, could you just decriminalize that? You know, I'm not here to say I'm in favor of that even though I am a bleeding heart liberal. But, this year there was an opportunity at the General Assembly. There is a bill—and I think it's still moving along, those of you who follow it a little bit closer than I am—that we have this class—it's for aggravated robbery. There are some members of the General Assembly that want to increase that parole eligibility after you serve 85 percent rather than 20 or 30 or whatever, and they're talking about doing away with the initial prison time for 19 D and E felonies to make

7 *Tennessee Journal of Law & Policy* (Special Edition) 266

up for that. So at one time I thought, well, that sounds like an opportunity to be able to save a little money and to increase what we pay. Then they went back and they said, well, sometime down the road there is still that possibility, and so you couldn't say that counsel was affected either way. But we would welcome whatever opportunity.

TONY MAURO: Thank you, Libby, and have a good—

ELIZABETH SYKES: Thank you.

TONY MAURO: —celebration.

ELIZABETH SYKES: Again, thank you very much.

JEAN FARIA: Good afternoon, I'm Jean Faria. I'm the State Public Defender from Louisiana, and as my friends at home said to me when I took this job two years ago with worsening economy and having just come off of Rita and Katrina, don't move your head too fast or the rest of your marbles will fall out. It's sort of been like that all along the way. The first summer that I had the job we had Hurricane Gustav, and the Supreme Court Justice Chief called because she couldn't find any public defenders as we hadn't been there long enough to have coups made and put into place or make continuity of operations plans. She called me in and she said, "I can't find any public defenders anywhere. Will you go to the prison and do all the Riverside hearings?" "Sure, chief." "Be glad to do it," I said and often went. It's been that way in terms of funding. Now, of course, we are in real serious problems with what has happened in the Gulf, and what is happening to a one billion dollar industry. We just recently heard on Monday that the \$6.6 million increase that I was given in the Governor's budget may be at risk, so we have a number of strategies, many of which have been talked about today and

7 Tennessee Journal of Law & Policy (Special Edition) 267

yesterday in this room. That goes to sort of the theme of when I talk about capital work. You have to have a plan.

When I took the position it was in the context of a brand-new state agency being created, which was created because of the crisis in indigent defense and the delivery of services in that state. At the same time that that was going on, we grandfathered in all of the people who had been there for a year before the change in the law. So that created and continues to create some challenges for us. Overall, my budget last year was \$28.9 million when you add in the locally-generated revenue. As many of you may know, most of our financing of our public defender system was historically from a \$35 fee on traffic tickets. So, if you happened to be lucky enough to have an interstate going through your land and your jurisdiction, then you had money. But, if you didn't have an interstate, you didn't have money. Those of you who've traveled through Louisiana know that there are three major interstates. If you're on it, you're rich, and if you're not, then you don't have money. And, if you are in a place like New Orleans, which is still recovering from Katrina and the loss of funding there, that base is also gone.

The other thing that has affected the local revenues has been the use of traffic tickets or traffic cameras at the intersections that catch speeding and running of lights. Well, all the major metropolitan areas have implemented those and guess who wasn't at the table when that little piece of pie was being divided up—which is a critical piece of local funding? The DAs, the sheriffs, and the City and, of course, the company itself were left out. They're the recipients of the money in Louisiana. So, locally-generated revenues are falling.

In calendar year 2009, \$46 million was the total sum of funding to spend on indigent defense, and for the district attorneys there was \$116 million. Of the stimulus money that came into the state, \$20,750,000 went to law

7 Tennessee Journal of Law & Policy (Special Edition) 268

enforcement and the district attorneys and \$250,000 went to the Supreme Court for a mental pilot program. For the first time ever, \$50,000 went to the public defender, the State Public Defender, to study data systems and the one that we would select. I frequently characterize myself as the little Charles Dickens person with the bowl and cane saying, “May I have some more please, sir”, in the OLIVER TWIST version. So, there are a lot of disparities, and that's not going anywhere.

I am here to say that given all that we have seen—particularly in the capital area, and we'll talk with you just briefly about that in a minute—you can't give up hope and you can't not do anything. When we came in we started to make the changes that we felt were appropriate—we being my fifteen member board who is headed by a very conservative republican who has turned out to be a total champion. I mean the best. We sat down and said, “Okay, what do we think we ought to do. Well, I think we need a media strategy. I think we need to meet two-thirds of the legislators, all of whom are new, and very few of whom are lawyers. We need to have editorial boards. We need to meet the local legislators whenever we travel.” So, we did a road show. We went to the *Times Picayune*. We went to New Orleans. We went to every single little podunk place that had a newspaper, and we sat down and talked about what we're going to and how we're different. Even though all the faces look the same, it really is going to be different. We will be coming to you and talking to you during the legislative session to talk with you about funding issues. Then we started meeting with district attorneys in the hot spots. We don't have the greatest database. We have roughly, on average, 110 open capital cases at any given time. The problem that we have in New Orleans is that we have a new district attorney who is fighting a \$14 million judgment against him, or his office, for a wrongful conviction of a gentleman named John Thompson who is

7 Tennessee Journal of Law & Policy (Special Edition) 269

one of the seven exonerees off of death row in Louisiana. John Thompson was able to get this and keep this judgment. It went up to the 5th Circuit Court of Appeals.⁶ The United States 5th Circuit Court of Appeals said, yeah, you get to keep that judgment and writs have been granted by the Supreme Court. So, that is a very interesting topic for them to be pursuing.

However, we have a lot of mistakes. We have this *Kyles v. Whitley*⁷ problem that was a New Orleans case. We just have a history of not having prosecutors who really understand *Brady*⁸ and *Giglio*.⁹ If that continues on—now with the *Anderson* case wherein there was a taped statement of a witness who said she had slept through the entire event, and she didn't see anything. One of the two prosecutors who did the videotaped statement was one of the prosecutors at trial and didn't say anything when the witness said, "I will never forget that face when I saw him come out underneath that streetlight." As part of our contractual relations with the Louisiana Crisis Assistance Center, they did the motion for new trial which the prosecutors fought tooth and nail saying that, "Hey, the jury heard both sides of the story, even though the impeachment evidence wasn't available to the defendant, but they didn't believe the defendant's witnesses so what's—no harm, no foul." It was reversed and LCAC is now going to represent that gentlemen.

We spend about \$8 million a year on capital cases, that's 110 cases out of approximately 280,000 cases a year. So you can see that it eats a great deal of our budget. And, we are not allowed by state law to have defenders as state employees. They are not parish employees. They are not state employees. They are something else, which is yet to

⁶ *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009).

⁷ *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁸ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹ *Giglio v. United States*, 405 U.S. 150 (1972).

7 *Tennessee Journal of Law & Policy* (Special Edition) 270

be defined. That's another one of my tasks on my list of things to do. The House of Governmental Affairs wants to know who I'm going to contract with and what that contract is going to say. We represent at the trial court, capital appeals, and capital post-conviction level, and that \$8 million represents all stages of the representation. We have post-conviction representation by statute. There is a right to counsel in the capital cases. So, you know that is the area of the greatest concern for the district attorneys. The only thing that they have come to the table to fight me on was the capital guidelines—not the performance standards, not the guidelines we were talking about today, but actually the structure of how we look at and monitor capital cases.

Right now we have panels that are contracted regionally, which is not working very well because the acceptance rate for the Orleans District Attorney is 100 percent. So, 100 percent of the capital cases that come in as first-degree murders move forward as first-degree murders, and that is basically bankrupting us. When we were doing our media strategy, the second component of “have a plan” is, go to the hot spots, when you discover where they are by doing the data research, and meet the District Attorney. So, we did that.

Frank Neuner—my board chair, Mr. Republican—everybody likes to talk to him because he's the stable guy. We go in, and I sort of sit there kind of quietly in the beginning. Frank begins this dialog about we're a reactionary and responsive agency. That's what we are here to do. He said that we have very limited funding and goes through this whole financial discussion. By the end, invariably, you've got this guy across the table going, “yeah, okay.” Yeah, I get that, and it's like I could have said the same thing, but it's not the same coming from a line defender. So it has been very effective. In the really large jurisdictions like Jefferson Parish where we had twenty to thirty cases at any given time, they've taken the

7 Tennessee Journal of Law & Policy (Special Edition) 271

position that it's too expensive. We can't afford it, and we're not going to do anymore. We will only do it in those cases where we politically cannot survive. You have these conversations that are not ones that you just go in and have one conversation. You have to keep that conversation going.

Every opportunity that we get to go into a district—whether it is to have a district-wide criminal justice discussion by bringing in all the judges, the DA, the parish, the municipal, and the police juries to bring in everybody to the table and talk about them wanting to do all of these capital cases Leon Cannizzaro, Mr. DA of New Orleans, that's what you want to do. Well, there's got to be a trade-off. We can't do 37,000 municipal court misdemeanors. If we're going to be giving over 50 percent of our capital resources and 25 percent of all of our regular resources to this jurisdiction, something has got to give. So, what they decided to do in municipal court was they moved all the first offense marijuana cases, and they moved all the misdemeanors to municipal court. They have reached an agreement that they will not allow any of those to be enhanceable and none of those areailable offenses. So, that was the trade-off that we got in order to be able to do more capital cases.

I mean, you find yourself in these crazy political positions but constantly pushing on the media, pushing on the local legislators, pushing on the DAs that are bringing these cases, and going to the state bar association, passing resolutions to agree to reclassify misdemeanors, to backing legislation for reclassification. It's a constant moving target. It's like three-dimensional chess, but it has to be done over and over and over again. The hard part is keeping the day-to-day hope that we will be able to properly fund the Sixth Amendment right to counsel,¹⁰ whether or not it is a capital case—which where I'm living

¹⁰ U.S. CONST. amend. VI.

7 *Tennessee Journal of Law & Policy* (Special Edition) 272

we're not getting rid of capital cases. That discussion has not happened on a legislative level.

Right now, as we speak, there is a bill going through our house, our legislature, to allow for and speeding up voluntary executions; to help volunteers get there faster. The conversation on a legislative level, within that body, is not happening. That's why becomes imperative that there be smaller conversations with many stakeholders present to discuss the impact.

We have litigation pending in one of our jurisdictions, and one of the reasons they have historically have been in trouble is because the high number of capital cases that they've had. Really excellent representation from LCAC—there are a couple of people here who are affiliated with LCAC. The quality of their representation, the motion for new trial project that we have entered into a contractual agreement with them to do for us, and the advocacy of those panels has made a difference with the funding problem.

Every single courthouse, every single DA is screaming and yelling that they don't have enough money. So, the first thing that we say to them is that these are real expensive cases. It's going to take X amount of dollars, it's going to take X amount of time, and we're going to need X amount of witnesses. We bring that data in that we are now collecting, and we'll be more selective. Okay. Whatever. If that's what I'm going to get is we'll be more selective—and in Jefferson Parish more selective means one case as opposed to continually twenty-four cases. It hasn't made that impact yet in New Orleans. But New Orleans, like everything else in Louisiana, is different because in New Orleans although there is no right to a preliminary examination. The judges and the practice there is for the defenders to have PEs. So, by very aggressive preliminary examination practice they're able to knock a lot of those cases down to seconds and to manslaughters and to put

7 Tennessee Journal of Law & Policy (Special Edition) 273

them back into the public defender system.

The idea from our perspective is you have to have a strategy, and you have to have a plan. You don't get to sit in your office and just take a look at numbers and crunch numbers and decide, "Well, we're going to put a certain amount of money over here and a certain amount of money over there." It absolutely required my board chair and me to go to every district to see what the practices were in every district. It's very similar to what Dennis Keefe said yesterday when he said, "You know, I don't know if you can really compare jurisdictions across a state. I'm here to tell you, at least in Louisiana, you can't because New Orleans ain't nothing like Shreveport. I mean, it's just not. And, Washataw Parish is not anything like Alexandria. They're very, very different. They're grandfathered in. Those, not just the people but the practices, are grandfathered in." So, you have to look at that.

The reality for us was not only did we have to look at that, but people saw our visits and repeated visits as sort of acknowledgement of those differences and acknowledgement of who they were and a connection that has served us very well. As we've continued these conversations and continued this media strategy, the repeated discussions with the media, and the repeated discussions with the district attorneys—I can't tell you how invaluable standards, all the things I've heard in this room in the last two days, standards are. Understanding what those standards mean, making sure that people perform to those standards, supervision, and adequate funding is essential. All of the things that have been said in here, those things are going to have to be stressed to legislators who are not lawyers and to prosecutors who have never defended. They don't see what we do. That was said earlier today. I couldn't agree with that more. They have no sense of what it is that we do. That our world is not having a case handed to us and what it is that we have to

7 Tennessee Journal of Law & Policy (Special Edition) 274

do.

The people who tell the story the best, from my perspective, are exonerees off of death row. Those people are the people who, every time that their grace—what people hear when they tell their story, about the years that they spent on death row and how close they came to being executed. How, no, they're really not bitter about any of that. They're just really happy to be free, but they wished that they had had better representation. They wished that they hadn't had to spend those 400 combined years that they were sentenced years to. If they live—I'm sorry—with my noncapital, I have thirty of those. But, these capital people don't resent anybody. It's just astonishing. It's just astonishing. So, yes, you need a strategy, and yes, you need to think about the budget, and yes, you need to think about the media. Yes, you need to think about talking to and convincing DAs that it costs too much money, and it's too much trouble. But you also have to be able to fund the cases that are tried properly, so that they are not too much trouble as they go forward. That's the Louisiana experience. Thank you.

TONY MAURO: Before you turn it over Jon, just one more question. You mentioned, and Libby did too, this trend of fewer and fewer legislators are lawyers now. So how do you have this—I mean, you said—is it some more of these exonerees that make the case or is it the money, it's too expensive, or can you mention *Gideon*?¹¹

JEAN FARIA: Well, from my perspective, the exonerees are the best example because what happens if there's inadequate funding, and a person actually is convicted of something that they didn't do. That is the piece that people are willing to listen to.

The piece in Louisiana about—we have a post-

¹¹ *Gideon*, 372 U.S. at 335.

7 Tennessee Journal of Law & Policy (Special Edition) 275

conviction task force that's going on right now. It's doing capital work and noncapital work. The Supreme Court brought in—on one day—the Supreme Court Task Force. On one of the days of the task force the first two people who came in were mothers of two young women who were killed by a serial killer in Baton Rouge. I don't know why, but we always seem to have at least one serial killer. So, that was really very difficult and the level of anger is really very problematic. It's one of my huge complaints about prosecutors, and how they utilize victims. You know, in my capital cases that I have done, they roll them out when they need them for something, and they don't deal with them as people. So these two women were just very raw and very, very angry and hurt. That was what they talked about. The DAs that were on the Post-conviction Task Force were just all, you know, "Yeah, go for it." The exonerees came in later, in the afternoon. They told the court, and most everybody on there—almost everyone is not a public defender so they didn't know this—that all of the people who get on go forward—of 50 percent of the people in Louisiana who are ever released, are released from parish prisons. They never get to a place where there is a law library and inmate counsel substitute. They're time barred before they ever get to a facility. So, they couldn't ever get post-conviction.

So you can't really go into all of that detail with folks because they look at you and their eyes glaze over. So, they say this is what happens. We've had thirty people we've been able to actually identify who are actually innocent. This is what happens when you have four minutes for every client, and that's what we're trying to do is quantify it. That's what they data is all about. Right? This is the only reason you want people to keep time sheets and do all this stuff. It's not because you don't like them, and you're their boss. It's because you need that to go to the legislature to say here are the thirty people who went to

7 *Tennessee Journal of Law & Policy* (Special Edition) 276

prison for something they didn't do, and this is how much time they got from their lawyer. And this is the amount of resources that were available to them, and this is what happens. When you say people don't have respect for the law—all of these criminals and thugs around here—if you have a law and you don't honor it—like the Sixth Amendment right to counsel¹²—you don't adequately fund it. You don't adequately resource it. This is what happens. So that's the level, and it's visceral. It's not really—without the lawyers in the legislature, it's become very difficult.

JON GOULD: In my years of giving these presentations I've learned two things. Number one, try not to be one of the last guys on Friday afternoon keeping the audience from departing and, number two, don't follow Jean Faria. So, you can see how well I've succeeded already. Jean and I were talking before this panel. We were joking that usually I'm the one who's on the optimistic side, and Jean's kind of slapping me around, saying, “Come on, you're being Pollyannish about this.” But, I actually think today we are switching roles because even though you hear Jean—I don't know whether she thinks of herself as being half-full or half-empty on this—I very much think that the glass is half-empty when it comes to the question of whether the current economic situation gives us an opportunity for reform or cost savings when it comes to the death penalty.

I recognize that the reduced revenue for states and the federal government has given reformers an opportunity to argue that the administration of the death penalty is too expensive, but actually my research on the cost issue suggests just the opposite. What's happening here is that we are not spending enough money on capital defense—with really tragic consequences. The other problem here is the situation is actually much worse for noncapital cases. I

¹² U.S. CONST. amend. VI.

7 Tennessee Journal of Law & Policy (Special Edition) 277

say at the beginning that this is apart from questions of the purpose, if you will, of the death penalty.

If we accept for the moment the public thinks that the death penalty is legitimate, the death penalty as administered isn't very effective. Nationally, just 25 percent of capital defendants who are brought to trial end up being sentenced to death. We know that of the other 75 percent—most of them, the vast majority of them—are not walking out of court that day. So if the question is, "Is the death penalty cost-effective," I think the answer is no. But that's a different question than the one that I want to focus on today, which is the issue of cost of capital defense.

Here's my concern. You all, I'm sure, are either part of or have read the statements of reformers who are trying to get rid of the death penalty—who talk about how it's too expensive. The death penalty is way too expensive. But, my fear here is that if we are saying that in the context of indigent defense, then the natural implication for policy makers and the public is to think that the cost of noncapital representation is both acceptable and cost-effective. I think all of us in this room know that that is simply not the case, and we can neither glorify or institutionalize that position.

I come at this question from a little bit of different background than most of you. I am what I would like to call a recovering lawyer. I was trained as a lawyer and did practice law for a while. But I'm actually a social scientist, and I head a research institute at George Mason University just outside of Washington, D.C. George Mason University has a number of different people, and our research center brings together people from a several disciplines to do social science research on questions of legal importance. We have the Spangenberg Project¹³ now with us at George Mason University. So when I talk about the issue of cost here, this is based on studies that I have done or been part of, both looking at federal capital defense

¹³ The Spangenberg Project, <http://tsp.gmu.edu/>.

7 *Tennessee Journal of Law & Policy* (Special Edition) 278

as well as capital defense in this state—and Texas as well.

I have made the mistake of choosing to throw a bunch of numbers at you today without a PowerPoint, and we're going to see whether I can keep your interest and whether I can explain it. But to simplify things, there are four points to walk away with when I'm done here today.

First of all, I'd like us to have a little bit of understanding of what has been done to estimate the cost of the death penalty. Then I'll talk a little bit about why capital cases are more expensive than noncapital cases to litigate. My third point is really this argument that capital defense is not expensive enough. I know that doesn't play politically, but for the moment let's just put politics aside. Capital defense does not offer enough resources, and it comes with tremendous tragic consequences for those involved. Finally, I'm going to finish with an argument for why it's ill-advised for us to keep pushing the cost argument for reform of indigent defense.

For those of you who have done any reading on this, you probably know there have been a number of studies on the cost of the death penalty. Part of the difficulty in trying to understand the cost of the death penalty is that people have used various definitions of what cost means. So, for example, some people have focused on adjudication costs—or I should say litigation costs—but they haven't distinguished between defense or prosecution costs. Others have lumped together all litigation costs—meaning trial, direct appeal, and collateral appeal. Other studies try to throw in the cost of incarceration. And then some of the most—to my mind—interesting and difficult studies are those that look at what they call the opportunity cost of the death penalty. By that, what they're looking at is the social cost of additional crime that is not being prevented or dealt with because money is being spent—as they say—unnecessarily on administration of the death penalty.

7 Tennessee Journal of Law & Policy (Special Edition) 279

My point here is not that any one of these studies is illegitimate or indeed that any one is better than the other. I think what's important to recognize here is that they're defining costs differently. But even with all of those differences they arrive at a similar conclusion,—which is not going to surprise anyone in this room—which is the cost of litigation and punishment is more expensive for capital matters than noncapital matters. And you're going to look at me and say “Duh. I knew that. What's the value of any of these studies?” And what I will respond back to you—and I know some of you have heard me make this argument before—is that the value of the research here is to quantify what we think we understand to make sure that we truly understand it. Now, some of you will say, “Well you're just quantifying the obvious,” and I will say, “It may be it obvious to you, but it may not be to others.” And more importantly, we may be wrong in what anecdotally we think is going on in the criminal justice system, and that's why these studies are done.

My own research looks at more than the cost of the death penalty. On the indigent defense side, it looks not just at cost but the quality and availability of counsel. And I really would caution us to get away from simply discussing cost, because cost has us forgetting the fact that what we're ultimately after here is quality defense. Because without quality defense, we are not getting the Sixth Amendment standard¹⁴. I will argue a little bit later that to some extent cost is synonymous with quality in particular situations. But this attachment to cost in this period of declining revenue, while understandable, has us digging a hole that is problematic. The research that I'm going to talk about is true of both pleas and trials and about state and federal court. And my findings are consistent with what other studies have shown, which is that capital defense is more expensive than noncapital defense. And by

¹⁴ U.S. CONST. amend. VI.

7 *Tennessee Journal of Law & Policy* (Special Edition) 280

noncapital defense, we've got to be careful here. It means capital-eligible unauthorized cases. And as we know—or as I should say we might expect—the capital cases are more expensive. This is true, irrespective of jurisdiction and irrespective of whether it's the federal system or the state system.

So the question is, “Why is that so? Why are capital cases more expensive than noncapital cases? My guess is if I asked you for a show of hands, most of you would have the answers immediately. We know that, first of all, structurally the defense of capital cases is different. You generally get more attorneys, you get a higher hourly rate, the courts generally aren't putting caps on your time, and the courts are generally granting you greater deference to bring in experts and other expenses that you might not get elsewhere. But capital cases are also being litigated differently. And they take longer. So let me start off with a few numbers.

In the federal system, if we look at the median length of time that a case takes—so this is from the appointment of counsel to resolution in the trial court, either an acquittal or a sentence being handed down—for capital cases it's 727 days, for capital-eligible unauthorized cases 96 days. 727 to 96. This has been replicated at the state level too. In Kansas, for example, the average number of days that a capital trial takes is 34 days. Compare this to a noncapital murder trial, which takes nine days there. 34 to 9. These things take longer. Why do they take longer? The authorization process takes longer. Jury selection takes longer to get a capital-eligible jury. We have the two stages of trials, and some courts are using three stages. But, also the research suggests—because the stakes are so much higher—that the litigation is more zealous. And we may not want to admit that, but the research is showing that the attorneys are putting in more time. And the investigators are putting in more time. Research shows, for

7 Tennessee Journal of Law & Policy (Special Edition) 281

example, that both sides are filing more motions in capital cases than they would otherwise.

Another thing to keep in mind is that capital cases are often more complex. They have more defendants and more victims. These things take longer. But even though capital cases cost more, they have shockingly low amounts of time and resources spent on them in a number of jurisdictions—in a number of cases. Indeed I will argue—and you will get tired of me saying this but—I don't think that the problem is that the death penalty is too expensive. Although, of course, I understand that the objection is a worthy one for arguing for the elimination of the death penalty. That's not the problem. The problem is that too many defendants who are facing the prospect of death at the hands of the state are not getting sufficient resources to be able to defend themselves. Let me give you a couple of examples from the research.

If you compare the amount of money that is spent on capital defense in the federal system versus in most state systems, in the federal system defendants are getting roughly ten times more money per representation than they are in the state system. Libby showed you earlier that in the most expensive death case in Tennessee the defense got \$346,000. That is a hundred thousand dollars less than the average death case in the federal system. Indeed, the most expensive death case in the federal system is \$1.4 million more than the most expensive case here in Tennessee. And that's per defendant. One of the most expensive death case in the federal system comes out of the District of Columbia. Three defendants, all getting about \$1.7 million in defense expenses.

Some of the difference in cost is because the hourly rate for federal defense attorneys in capital cases is significantly higher, about a \$175 an hour at present. Many people in other states would very much want that kind of hourly rate. But that's not what's driving a ten times

7 Tennessee Journal of Law & Policy (Special Edition) 282

difference. There are other things going on in terms of the quality of the attorneys and the effort that is going into the state capital cases. Moreover, there are problems even in the federal system. Over the last couple of days we've heard the admonition—"Go to your federal court. If there's a problem, you need to file suit. You need relief. Go to the federal courts, you'll find the solution there." But, that's not necessarily the case.

If you look at federal capital trials, there is a cut point in defense resources that divides capital defendants in general from those receiving the lowest one-third in attorney time and expert expenses. That one-third of capital defendants has twice the chance of a death sentence at trial than the upper two-thirds. I will give you the cut point, and many of you will say, "Oh, I wish I had that kind of money to defend in state court." It's \$320,000. That's the one-third mark. But if you are receiving less than \$320,000 in defense services at a capital trial in the federal system you have twice the risk of a death sentence than if you are receiving anything over the \$320,000 mark.

Research suggests that there is a link between the cost of capital cases and the quality of the representation being provided, so to me that division between the low cost cases and other capital trials represents a potential Sixth Amendment violation¹⁵. But I'm also concerned about how this translates to noncapital cases.¹⁶ When people say that money would be saved if the death penalty were eliminated, I'm worried that we're implicitly saying that the resources and quality of litigation in noncapital cases is acceptable. That's what we're going to be to be living with

¹⁵ U.S. CONST. amend. VI.

¹⁶ A small portion of Professor Gould's remarks delivered at the symposium were excised since they were based on a forthcoming report on which the speaker was working on behalf of the federal courts. Although not yet released, the report is expected to be made public in 2011.

7 Tennessee Journal of Law & Policy (Special Edition) 283

if the death penalty is ever eliminated, and yet the quality of representation at these dollar levels simply isn't acceptable.

There's been a lot of advocacy lately that capital cases cost sixteen times more than noncapital prosecutions, but that difference is surely not because of the structural differences between death cases and noncapital cases. It's not solely because of the number of attorneys or because you need a death-qualified jury, or because there are the two stages of a trial. More troubling, it's also because the noncapital cases are being litigated even worse than the capital cases. And in this climate where we are trying to get every dollar out of the criminal justice system, what we are really setting ourselves up for is a public that will be satisfied with even a more substandard criminal justice system.

I know I'm out of time, but I cannot close on an absolute downer because it goes against my nature. There potentially is a sign on the horizon that may be a positive—and this would be both for cost and for what happens in capital cases. We are seeing nationwide, and particularly at the federal level, prosecutors bringing fewer capital cases. If you look at the burgeoning data from the Obama Justice Department, and you compare it to what we saw in the Bush II Administration—and in fact in the Clinton Administration—the Obama Administration already is on pace for a record low number of capital authorizations. We are also seeing that in some states. In fact—our lunch speaker who couldn't make it here today—David Dow, was quoted in a newspaper, I think it was in Texas today, talking about how capital authorizations in Texas are down by a large percentage over previous years. While I think this cost argument is dangerous when it comes to the context of indigent defense, what we may see is a twin potential victory in the making as prosecutors bring fewer capital cases. We will be litigating fewer of them and

7 Tennessee Journal of Law & Policy (Special Edition) 284

saving money in the interim. With that, thank you very much.

TONY MAURO: Actual question. I thought that the total universe of federal and capital cases is still to a low number. Is it? Is it not? Is it? What is it? How many federal capital cases are there?

JON GOULD: Total?

TONY MAURO: Yeah.

JON GOULD: You mean from the beginning of time?

TONY MAURO: No.

JON GOULD: It was—from the reinstatement of the federal death penalty—we're still under 500 cases. This isn't that many, but as we've all talked about the last couple of days, the federal example, to some extent, sets the standard elsewhere. So what's happening at the federal level does have consequences for what's happening at the state level.

MALCOLM HUNTER: A very interesting panel. What was the title? What was supposed to be the title?

VARIOUS AUDIENCE SPEAKERS: Silver lining.

MALCOLM HUNTER: I'm going to provide all the silver, I think, for the panel. I would like to start commenting, just briefly, on my reaction to each of the panelists, which all of them were very different, but very interesting and very illustrative in some ways. And I thought Libby Sykes—God bless her—on her way to her grand-niece's graduation, is the perfect picture of the beleaguered court official who is saddled with a program that is not really their program.

7 Tennessee Journal of Law & Policy (Special Edition) 285

And they're doing the best they can to explain a program that's not really something they do, or that they understand and to try to and sell that to a legislature. And it's no surprise that that's a very tough job. In North Carolina, ten years ago, we cut loose from the Administrative Office of the Courts. And one of the big worries lots of lawyers had was, "Well, they're the only ones who are protecting us. We'll get nothing if it's not the judges coming in there. You know, we're better off getting the crumbs that fall off the judge's table than in fending for ourselves." And we didn't know the answer to that; we were predicting the answer to that.

But I think the answer was if you've got someone who goes in there who can talk about advocacy, and talk about how important it is, and what the terrible consequences are for poor advocacy, even though they don't have a robe, even though they may be disposed not to necessarily trust that . person, you do better. You do better with the public. You do better with the legislature. And you do better with everybody. And so I felt a lot of sympathy for Ms. Sykes, and it did remind me of where we were before we cut loose.

We're more partners with the AOC now than we were before; well we weren't partners when we were under the AOC. We were the—as one of my friends used to like to say—we were always the red-headed step-child in the family. And now we are more partners. And in fact, we're a competition. We're in this. They're looking for money to line their robes with ermine, and we're looking for money to pay our lawyers. And so we go in there, and we have a discussion about what we're going to do. But I'll just say we cut loose in North Carolina, and we've never regretted it.

My takeaway points from that—and I think Jean's exactly right—is we people need to get the message that we are a completely reactive agency. Our costs are directly a

7 *Tennessee Journal of Law & Policy* (Special Edition) 286

result of what these prosecutors decide to do, and nobody is looking at what these prosecutors are doing. And we have had a little fun in North Carolina talking about that. When we first started out in the early 2000's, we were spending about \$10 or \$12 million a year on trial-level capital cases. Then by 2007 we were spending about \$17 million on trial-level capital cases. By Tennessee standards, that means that we're swirling completely out of control on our spending, and so we were getting a little pushback from other people about why we were spinning. So we decided we were going to do a study.

We, right from the beginning, tried to keep very good data. And so we looked at that. And one of the things that we figured out is the reason our spinning had gone up from \$10 million to \$17 million is every year these prosecutors are bringing out more so-called capital cases than they're closing. In fact, the number of capital cases we were carrying was almost 50 percent higher in 2007 than it was in 2002. They obviously had no idea, or they would have never brought up the subject in the first place. But then we didn't stop there, and we started talking about, "Well, what are the things that are driving our expenses?" And I'll just read you a couple of the bullets we had in this report we gave to this legislature. We said, "The two primary factors that drive IDS expenditures in potentially capital cases at the trial level are whether the district attorney decides to prosecute the case as capital or noncapital. And the practice in North Carolina of charging almost every intentional homicide as first-degree murder."

And I don't know if this is true—it's probably true in most places—but in North Carolina if there's anything that can be argued that is an intentional murder, it's first-degree murder. Nobody gets charged with a second-degree, much less voluntarily manslaughter, unless you have a uniform. So we talked about that. We talked about the fact that in North Carolina. We have a very broad first-

7 Tennessee Journal of Law & Policy (Special Edition) 287

degree murder statute, and we have a very broad capital statute, which means we have 500 new, potential capital cases every year that we have got to figure out lawyers for—spend this extra money on. And so what happens to those cases?

Well, they're charging 85 percent of these cases as first-degree murder. Well what happens to these first-degree murder cases? About 15 percent of them end up as first-degree murder convictions. About another 35 percent of them end up as second-degree murder convictions. Half of them end up either dismissed or voluntary manslaughter or involuntary manslaughter or following too closely or something. But these cases completely wash out. Yet we're spending hundreds of thousands, millions of dollars on getting these cases resolved—which sort of brings me indirectly to Jon's comments, which I really like. It was very stimulating. I thought your take on this whole thing. I tried to think, "Okay, well what do I think about that?" And I said, "I think something cannot cost enough to be good quality and still be a waste of money."

I think what we have to look at is what are we getting, whatever we're spending. Maybe we're not spending enough to do it right. And you know what? I agree with you 100 percent. We're not spending enough to do it right, but it can still be a waste of money. Because what are we getting for it? And part of that is, are you getting capital convictions? And in North Carolina—and I think this is true in a lot of places around the country—the number of capital prosecutions has dipped. You would think that if the prosecutors were being choosier, then their win rate would go up. But it's been just the opposite. In the 1990's in North Carolina we routinely would have fifty or sixty capital trials a year, and about half of those people would get the death penalty. Last year we had eight capital trials in the state. Two people got the death penalty; they were both offered pleas. So nobody is on death row last

7 *Tennessee Journal of Law & Policy* (Special Edition) 288

year in North Carolina who the state thought really needed to be on death row. The year before that, there were twelve capital trials. One person got the death penalty. So far this year, there have been five capital trials, and nobody has gotten the death penalty.

So when you're talking about how much you're spending on this—even for people who, quote, “believe in the death penalty,” —at some point you'll have to say, “well the public doesn't believe it anymore.” The public says they support the death penalty if you ask them. But North Carolinians—when you put them in the jury, and they all have to be qualified as people who could give the death penalty in a case—they are saying no. When they hear the whole story—even with imperfect lawyers, and they certainly are, and even in the context of a capital trial, which is not the best way to tell your story necessarily—juries are saying no. And in North Carolina it only takes one juror to cause a case to go to life. And so we went back to look and say, “Well, how many are we having like that?” Almost all of our juries in the last three years have been unanimous. They've almost all been unanimous for life. So there has been a sea change in North Carolina, which doesn't have to do politics, but I think it has to do a lot with exonerations. We've also had a number of very high-profile exonerations. And I think the public has learned that even though some nice-looking young man or young woman from the prosecutor's office comes in and acts like they're entirely convinced this person is a horrible killer, that doesn't make it true. I think for a lot of people that was a shock. And I think the press has been extremely, extremely helpful in that—at least in North Carolina. We've gotten big exoneration stories out of all of our major news networks.

I wanted to tell you one other fun study that we did at IDS. It's not directly related to capital litigation, but has to do with waiting in court. You know how when we have

7 Tennessee Journal of Law & Policy (Special Edition) 289

a lot of appointed lawyers, they go to court and a lot of their time is spent not litigating, but waiting their turn. While the most important person in the courtroom, the judge, or the prosecutor,—who's the second most important person in the courtroom—are deciding when we're going to hear your little matter. Then you do your little bit of business, and then you get to go home. And what I have been arguing at the legislature and everyone else is, "Yes, the judge is the most important person, and let's just assume that the prosecutor is the second most important person. I don't even want to argue about it, but the most expensive part of that courtroom is indigent defense." Even if they're getting a lousy \$50 an hour, there's twenty of them out there. We're spending more on indigent defense, and yet we organize this whole courtroom around the convenience of less expensive elements of it.

So just from a matter of spending the state's money, we ought to be disposing of these cases in a way that is more efficient. So we did a waiting in court study for misdemeanors, and we found out that we were spending \$10 million a year in North Carolina on lawyers waiting in court. And the study is at [ncids.org](http://www.ncids.org),¹⁷ but we have had just a tremendous amount of fun. And then the issue isn't an issue of power, it's an issue of how are we spending the state's money? Why are we organizing things in a way that we're having people lounge around and wait for their turn to get into court? So, it's not about power, it's about efficient spending for the state. I like costs as a different lens to look through. And again, Jon, I'm not disagreeing with anything you said. I thought your remarks were very interesting and stimulating, but I have found that the economic downturn has given us opportunities for reform.

¹⁷ N.C. OFFICE OF INDIGENT SERVICES, FY05 PRIVATE APPOINTED COUNSEL WAITING-IN-COURT STUDY (Aug. 2005), *available at* <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/fy05%20pac%20wait%20time%20study%20report%20final.pdf>.

7 *Tennessee Journal of Law & Policy* (Special Edition) 290

I think when we have economic downturns, the government and the legislatures and courts look for what do they look for when they don't have as much money as they want to spend. They look for government programs, which cost a lot but don't deliver much value. And I would say capital punishment everywhere we have it, in almost all cases, is conducted in a wasteful way even though it's not done well. It's done in a wasteful way and therefore ripe for reform.

And again, I loved what Jean was talking in going to these prosecutors. We have to back the camera up and not just look at what defense lawyers are spending and not just having an argument over whether a defense lawyer is entitled to an investigator or a defense lawyer is entitled to a DNA expert. But back the camera up and look at the way the whole system works and what system reforms we can do because, again, there's nothing we're doing that we're not just trying to respond to the other side.

Another point that somebody made earlier—and I think we have to understand, and I've certainly seen that in my time—is that reform is implied criticism of the status quo. And so when we go in and say, “Boy, the representation is terrible here,” people understand that you're talking about what they've done. And that's hard for people to hear. And judges understand that they're responsible for that court, and they don't want to hear that the justice that's being dispensed in that court is not good. And so there is always going to be pushback and will be pushback. I think it's just human nature. I do think the litigation we're having is helpful and encouraging, even though right now it doesn't seem to have gone very far. But I think we're building toward a tipping point, and I hope it'll be a tipping point where I still have enough of my faculties to appreciate and celebrate when it happens. But I think there are more and more stories coming out. There was a

7 Tennessee Journal of Law & Policy (Special Edition) 291

great story in *The New Yorker*¹⁸ just several weeks ago about a murder trial in Manhattan of—I don't know if they were from Lithuania—but they were immigrants who came over and got involved in a murder. Janet Malcolm of all people, great writer, wrote a story. Did anybody read that story in *The New Yorker* about the murder trial? Well, I'm in bed with my bride of, it will be thirty-nine years next week, and she's reading the *New Yorker* as is often the case. And then she finishes this story, and she looks at me and she says, "You know, I really admire you for putting up with what you've put up with for all these years—you know, doing criminal defense." I said, "Boy, thank you very much." And she had just read this article in *The New Yorker*. She'd never told me that in thirty-eight years.

And so these stories are powerfully important, I think, and are very helpful. So I think that is important. I think stories are important. I think we have to push, and we have to tell the truth. One thing that's only been touched on, but I think is true is our indigent defense problems—and I said this in North Carolina where I think our funding situation is a little bit better than certainly some other places in the South—our big problem is not money. Our big problem is accountability. I think that private lawyers have such a big advantage over public defenders in dealing with their clients. Because one thing a private lawyer has to learn how to do—as a private lawyer they have a completely different relationship with their client. They really understand what a client is. Because with a private lawyer, someone comes into your office, and they're deciding whether they're going to put their hand in their pocket and give you a big stack of money or not. And you have to convince them as a private lawyer "I'm the person

¹⁸ Janet Malcolm, *Iphigenia in Forrest Hills*, THE NEW YORKER, May 3, 2010, at 34, available at http://www.newyorker.com/reporting/2010/05/03/100503fa_fact_malcolm.

7 Tennessee Journal of Law & Policy (Special Edition) 292

for you, I'm going to give you the best job that I can possibly give you. You're going to be in good hands." And if the person is convinced, they give you the money. And they think they've done a good thing, and you think they have confidence in me. And you're off to the races.

Well, needless to say with public defenders or appointed counsel, it's completely different. I mean, for most public defenders you get a new case, you say, "Oh, my God, that's the last thing I need." You're not getting any bag of money with that case. You're just getting another case. You've got to worry about and neglect all of your other cases. And the client has not decided the client likes you, or that you're doing a good job, or that he wants you. And so, I think public defenders have a huge problem in client relations that they don't even understand and that private lawyers don't even have to deal with. Not to say that private lawyers don't have some problems with clients from time to time. They do, but I really think there's something about the way that we assign cases. I would like to have a system where people who are indigent get to pick from a roster who they want to represent them—the way people do that have money get to pick who they want to represent them. I think that would change indigent representation. It wouldn't cost a dime, and I think that would change indigent representation. I'm going to leave some time for comments here, but thank you very much. Thanks to our panelists. And now we'll entertain questions.

TONY MAURO: Well, thank you. We'll all be looking for that *New Yorker* article.

MALCOLM HUNTER: It's not a glowing picture. There was one public defender and one private lawyer.

TONY MAURO: Okay. Before we go to the audience, a couple of comments from—other comments?

7 Tennessee Journal of Law & Policy (Special Edition) 293

JON GOULD: Malcolm, I really like the statement you made about, "Something cannot cost enough to do it right, but still be a waste of money." And I agree with you completely. And in fact, there will be a few studies out in the next few months where I think you will find it surprising what judges are saying about the cost effectiveness of the death penalty. So I don't disagree with you at all about whether this is a waste of money or not.

I think potentially I did not make my second point fairly clearly. And it's this: Maybe the way to do this is to ask for a show of hands. How many of you practice in jurisdictions that have the death penalty? Just by a show of hands, so keep them up for second. How many of you believe that if the death penalty were eliminated in your state that your agency or the amount of money you had that's currently spent on indigent defense would remain the same. You would be able to keep it all that you currently you have if the death penalty were taken off the table? Okay. So we have some either optimists or Pollyannish folks, but I think for the most part you've all just proven my second point, which is that if we get rid of the death penalty what we have then is a level of indigent defense as is probably practiced right now—or pretty close to it—without a lot of additional resources being brought to bear. And all the research that I have done and read suggests that the level of defense is better in capital cases than it is in noncapital murder cases. And I want to put the question to you all. Are we then going to be looking at a system where, on average, defendants are getting worse quality representation if we don't have capital representation? That's more of the provocative question I was trying to ask.

MALCOLM HUNTER: Well, you know, if someone told me you can have all the money you want for noncapital and in return we throw somebody into a volcano once a month,

7 *Tennessee Journal of Law & Policy* (Special Edition) 294

I would say, “Nuh-uh, I’ll do without the money.” I’m not interested in throwing somebody in a volcano. It doesn’t even depend on whom. But, there are lots of people here from states—Michigan is a place that they’ve never had the death penalty. Congratulations. But they have terrible problems, and it’s not because they don’t have the death penalty. Their problems would be worse if they had the death, but their problems wouldn’t be better. And I think it’s easier to deal with it. I think that the death penalty has had a distorting effect on criminal justice everywhere it is. It is true that it’s pumped some money some places. But I think its impact has been almost entirely—not completely, but almost entirely—predominately negative on the law and on the way people act in court. It’s been quite, quite negative.

JEAN FARIA: How many people are on the row in North Carolina?

MALCOLM HUNTER: 140.

JEAN FARIA: We have eighty-four, but we have the highest incarceration rate per capita of anyplace in the world. 37,000 people are incarcerated. And we have a population of about 4 million.

NORMAN LEFSTEIN: Well, you’ve only been a public defender for two years, so—

JEAN FARIA: Well I’m working on it.

MALCOLM HUNTER: Give her another two years.

TONY MAURO: Any questions? Over there.

CARA DRINAN: I’d like to follow up on Jon on your

7 Tennessee Journal of Law & Policy (Special Edition) 295

point, and I think maybe I actually like the cost arguments. Like when I first heard you say that you thought that argument was ill-advised, my ears perked up. And I like it because I think it's an argument—can money talk? It's an argument they (inaudible) jurisdictions where, as Jean was saying a moral discussion abolishing the death penalty is just off the table. But I wonder if a way to harmonize our positions—your concern that it's ill-advised and my thinking, “well, it's a great idea,” —is push the practical money argument—is just to refine the argument, right? So if you're posturing that we take away capital punishment, and we are left with the same amount of money that noncapital cases still have, to me that doesn't have to be a natural consequence, right? If we frame discussion as, “Abolish the death penalty,” in response to funding organizations saying where does the money come from—that's, to me, when the abolition argument comes up. Where does the money come from? It comes from not spending millions on capital cases and funneling those into the noncapital cases. Would you accept that refinement?

JON GOULD: Well, I'm being a little provocative here. We all know that to some extent the cost argument works. I come from the State of Virginia. They're only two arguments that ever work in Virginia: reducing cost to the tax payers and reducing crime. Everything else in terms of the Fourth Amendment,¹⁹ Sixth Amendment²⁰—

MALCOLM HUNTER: Just noise.

JON GOULD: Exactly. We don't care about that. We care about whether it's going to come out of someone's pocketbook, or whether you're going to get hit over the head by somebody else. So, yes, in terms of the death

¹⁹ U.S. CONST. amend. IV.

²⁰ U.S. CONST. amend. VI.

7 *Tennessee Journal of Law & Policy* (Special Edition) 296

penalty, as Malcolm says, right now what works is the cost-effectiveness argument. What I'm saying—what worries me here—is that cost argument has—the natural implication of the cost argument is that we then have a system of defense in murder cases where you all are putting in significantly fewer hours and using significantly fewer experts in a noncapital murder case than a capital murder case. And for those defendants who are not being charged capitally, I'm posturing that they are getting a worse defense than those who are being charged capitally. And that's what concerns me.

MARY ANN GREEN: This is primarily to Jon and to Jean. I'm sorry Libby has gone because on her list of cases and the amounts were spent on them. Conspicuously missing was the one case in Tennessee that has resulted in exoneration. Have there been any studies about the costs of cases that go all the way to an acquittal or exoneration as opposed to those cases that do not?

JON GOULD: To my—do you know the answer to this off the top of your head?

JEAN FARIA: No. To my knowledge, no.

JON GOULD: Yeah, I don't know of any either.

MARY ANN GREEN: You were talking about your exonerees, and I just wondered if that were an argument that could be presented?

JEAN FARIA: Well, one of the things that we are now trying to do—the Innocence Project in New Orleans—we actually give them funding because from my board's perspective. The work of a lot of people leads to these horrible situations, and so we feel duty-bound to assist in

7 Tennessee Journal of Law & Policy (Special Edition) 297

funding the noncapital post-conviction. So it's part of a strategy, a media strategy that we're developing. They just hired a new person for media. I have on my staff of sixteen people for a statewide program—I have a special projects advisor. She's a non-lawyer, and that's one of the media pieces—one of the things that she's doing. And we're going to be looking at that data because it's not been collected—at least in the noncapital post-conviction area. It's not been collected by us. I mean, we could have some estimates, but as is true in most new cases, we have this tremendous reluctance to do time sheets, which we're working on because the culture is—

MARY ANN GREEN: But what I'm thinking of is what is a life worth?

JEAN FARIA: Well, yeah, that's a complicated question. But, yes, I think that is something that needs to be captured. And I think that is going to be very helpful in getting to some idea of the cost of this.

JON GOULD: The other piece is that the vast majority of exonerations so far have not been capital cases. And so there just haven't been that many to work through. Now you can kind of go get the cost by going in from the back end, and it is possible to make these estimates. But I'm not sure. I guess the argument does work. That this is a sum of money the taxpayers had to cover that they should not have had to cover otherwise. And they're not inconsequential amounts of money per case. What you want to do is be able to sum them up to some larger figure either statewide or nationally.

TONY MAURO: Any others? Okay. Before we adjourn, two things. I want to thank the panels for a very good—

7 Tennessee Journal of Law & Policy (Special Edition) 298

(Audience applause).

TONY MAURO: So I'm going to give Norm the final word, as he should have. And are you planning something else?

NORMAN LEFSTEIN: Well, you folks are the real true believers committed to a late hour at four o'clock. I want to make an announcement. I also want to give a chance to Stephanie Baucus from the Department of Justice to say something about a handout that she has available. I want to remind you that if you have evaluation forms and have not handed them in, that you leave them on the table just outside the door. Let me turn it over to Stephanie, just very briefly, and then I want to make one last comment. Stephanie?

STEPHANIE BAUCUS: Yes. Thank you, Norm. I will be brief. You know, this is great to be back here in East Tennessee because this is pretty much where I grew up. But I am now working with the Obama Administration at the US Department of Justice, so I'm really happy to be with you guys. I've met a good number of you but not everyone, so what I'm going to do is stand out in the back. The reason I was very late—and I apologize today—is that I had some copies made—and by made I made myself—and it took a really long time. And in any event, I have enough cards for every single person, and I have enough copies of an indigent defense speech that I wrote for every person. And I have been assigned to be your liaison in several different ways, because I'm the ADA liaison for the leadership at the department. So that's for the attorney general and the deputy associate attorney generals as well—attorneys general. And we work with a variety of different groups. And I'm also the defense liaison, defender liaison, so I'm very interested in these issues for a variety of

7 Tennessee Journal of Law & Policy (Special Edition) 299

reasons—and passionate about this. And I've done a lot of work, as you might see by the desk. I have a bunch of other PowerPoints here on these issues that I work on with state legislators and counties, and I'm very interested in a lot of the things I just heard and some fascinating ideas that people have. I work with Laurie Robinson and her staff and other components at DOJ, and I'm very interested in working with all of you. And I hope that you will take my card and call me and give me your complaints and your ideas. Thanks very much, and turn it over to—

GEORGIA VAGENAS: Stephanie, you mentioned that one of the power—this PowerPoint—the handouts have to do with grants. And you mentioned something about the new grants coming up. I don't know if there were some deadlines that you wanted to mention to people.

STEPHANIE BAUCUS: Yes. Yes, I'm sorry. I had twenty minutes of sleep the night before last and two, three hours last night, so I'm kind of sleep deprived. One of the handouts that I do have is the Program Plan. And some of the excerpts from our—what we call our Program Plan, which is a weird name—for grants that are available right now. If you wanted to consider applying, some of the deadlines are in fact coming up soon. And as I think we all know in this room, there aren't enough grants for public defense. There are more this year than there were last year, and there will be more next year. And another handout that I have that deals with that is next year's budget request. And one thing that's important in that—if you look at it now and you say, “Gosh, you know. I wonder how they're going to write that. I wonder how they're going to actually turn that into a grant solicitation.” Then let's talk about it. Let me hear your concerns. Let's hear what you want to go into that. Let's think about it now, because now is the time to hear your ideas before Congress actually appropriates the

7 Tennessee Journal of Law & Policy (Special Edition) 300

money—those grant solicitations get written. So that's why I brought all of this stuff, because I'm all about being practical. And this is your government, so let's make it accessible to you. So I have presentation copies for you, cards with contact information, and the grant information for both this year and next year. And I'm here to help, so, from the federal government. Thank you.

ADELE BERNHARD: Great.

NORMAN LEFSTEIN: Thanks very much, Stephanie. We appreciate it. Well, lastly, my thanks to our concluding panel. Always enjoyable to hear from all of you, and I especially appreciate Tony Mauro filling in at the last minute as our moderator of this last panel. I want once again to thank the College of Law, Professor Penny White, and her colleagues for serving as our hostess and host for this conference. They've been absolutely splendid to work with. Our goals in planning this conference were to make it enjoyable, to make it educational, stimulating, and we hope we've succeeded in all of those goals. We appreciate all of you being with us and wish you safe travels home. Thanks very much.

7 Tennessee Journal of Law & Policy (Special Edition) 301

