

April 2020

## Indigent Defense in West Virginia: A Historical Look at Public Defender Services

Ralph E. McKinney Jr.

*Lewis College of Business, Marshall University*

Casey W. Baker J.D.

*Lewis College of Business, Marshall University*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Ralph E. McKinney Jr. & Casey W. Baker J.D., *Indigent Defense in West Virginia: A Historical Look at Public Defender Services*, 122 W. Va. L. Rev. (2020).

Available at: <https://researchrepository.wvu.edu/wvlr/vol122/iss3/8>

This Home Rule Symposium is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## INDIGENT DEFENSE IN WEST VIRGINIA: A HISTORICAL LOOK AT PUBLIC DEFENDER SERVICES

*Ralph E. McKinney, Jr. and Casey W. Baker, J.D.\**

I.	INTRODUCTION.....	842
II.	HISTORICAL OVERVIEW OF THE RIGHT TO COUNSEL.....	843
III.	AMERICAN BAR ASSOCIATION’S TEN PRINCIPLES .....	846
IV.	THE WEST VIRGINIA INDIGENT DEFENSE SYSTEM.....	850
	<i>A. The Organizational Structure and Function of PDS .....</i>	<i>852</i>
	<i>B. Appointed Counsel and Public Defender Corporations: The Front-Line Troops of Indigent Defense in West Virginia .....</i>	<i>855</i>
	1. Appointed Counsel System.....	856
	2. Public Defender Corporations.....	858
	<i>C. Financing Indigent Defense Programs.....</i>	<i>862</i>
	<i>D. The Restructuring of 2008–2010 .....</i>	<i>869</i>
V.	TENSIONS ARISING IN A MIXED SYSTEM: GIDEON’S (UN)BROKEN PROMISE?.....	873
VI.	CONCLUDING REMARKS .....	877

---

\* Ralph E. McKinney, Jr. is an Assistant Professor of Management at the Brad D. Smith Schools of Business at the Lewis College of Business at Marshall University. Dr. McKinney has authored a number of publications concerning cryptocurrency, economics, forensic business practices, human resource management, indigent criminal defense, and poverty. In 2010, McKinney was recognized as one of 11 instructors for the *Pearson NEIS Economics Insider Contest Instructor Award*. He holds degrees from Aston Business School at Aston University in Birmingham, England (DBA), Marshall University (MBA) and West Virginia State University (RBA). Additionally, he is a licensed Private Investigator. Dr. McKinney’s previous experience includes serving in various capacities at Public Defender Services (2001–2014) including the Director of Operations. Dr. McKinney can be contacted at [mckinney23@marshall.edu](mailto:mckinney23@marshall.edu).

Casey W. Baker, J.D., is an Assistant Professor of Legal Environment at the Brad D. Smith Schools of Business at the Lewis College of Business at Marshall University. Professor Baker’s scholarship touches on a broad base of knowledge, including ethics and professional conduct, debtor-creditor rights, marijuana regulation, and taxation. He is a 2008 graduate of The Ohio State University’s Moritz College of Law and maintains an active law practice in Ohio and West Virginia. Professor Baker can be contacted at [bakerc@marshall.edu](mailto:bakerc@marshall.edu).

The Authors would like to thank Jack Rogers, Bob Wilkinson, and Russ Cook for reviewing this article. Finally, this paper does not constitute an official publication of PDS.

## I. INTRODUCTION

[I]f liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government to the utmost.<sup>1</sup>

In life, as in the legal system, equality is a concept that is more readily articulated than attained. *Equality*, “the quality or state of having the same rights, social status, etc.,”<sup>2</sup> if held by *all* members of society may likely cause the extinction of conflict.<sup>3</sup> As such, diversity, social identity, cultural identity, classism, and generally any grouping of differences would cease in principal.<sup>4</sup> Thus, society seeks to ensure that the concept of *fairness*—“treating people in a way that does not favor some over others”<sup>5</sup>—is sought through practice and attained whenever possible, be it through happenstance, circumstance, or perseverance. As John F. Kennedy stated, “[i]n the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility—I welcome it.”<sup>6</sup>

*Gideon v. Wainwright*<sup>7</sup> held that the accused have a right to counsel under the Fourteenth Amendment and that states, while sovereign, must provide counsel to indigents. The Supreme Court mandated what various jurisdictions already practiced: providing counsel to the accused, regardless of indigency.<sup>8</sup> In theory, this is a simple idea. In reality, providing legal counsel consumes resources (i.e., money and time) that can be directed at other government programs such as education, health care, and transportation.<sup>9</sup> However, many

<sup>1</sup> ARISTOTLE, *POLITICS* bk. IV, at 156 (Benjamin Jowett trans., Oxford Press ed., 1908).

<sup>2</sup> *Equality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/equality> (last visited Mar. 25, 2020).

<sup>3</sup> Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 636–65 (Thomas Gilovich et al. eds., 2002).

<sup>4</sup> See Keith Hart, *Money Is Always Personal and Impersonal*, 23 *ANTHROPOLOGY TODAY* 12, 13 (2007); Lawrence P. Shao et al., *Purchasing Power of Credit, Social Mobility, and Economic Mobility*, 12 *EUR. J. BUS. RES.* 73 (2012); Min Zhan, *Economic Mobility of Single Mothers: The Role of Assets and Human Capital Development*, 33 *J. SOC. & SOC. WELFARE* 127 (2006).

<sup>5</sup> *Fair*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fair> (last visited Mar. 25, 2020).

<sup>6</sup> John F. Kennedy, Inaugural Address of President John F. Kennedy (Jan. 20, 1961).

<sup>7</sup> 372 U.S. 335, 342 (1963).

<sup>8</sup> Ralph E. McKinney, Jr. & Lawrence P. Shao, *Indigent Criminal Defense: Qualitative Review on Economic Value*, 8 *EUR. J. MGMT.* 146, 148 (2008).

<sup>9</sup> *Id.* at 147.

“societies want to protect legitimate society members’, within the respective society’s jurisdiction, fundamental property rights concerning criminal prosecution.”<sup>10</sup>

This Article provides a historical overview of Public Defender Services as the State agency primarily charged with advocating West Virginia indigent defense programs—and aims to fulfill *Gideon*’s promise. This Article also provides an insider’s account of the Agency’s operations, obstacles, pitfalls, and successes that arose while delivering constitutionally required legal representation to the accused in West Virginia.

This Article proceeds by discussing the right to counsel that existed before *Gideon*.<sup>11</sup> The Article then turns to the American Bar Association’s guiding principles for indigent defense programs and addresses issues raised by previous scholarship.<sup>12</sup> Next, the Article examines the role of Public Defender Services and its mission of providing legal representation in West Virginia.<sup>13</sup>

Additionally, as advocacy requires resources, this Article discusses the financial and economic components of public defense programs and how they have resulted in West Virginia’s mixed method of delivering legal services.<sup>14</sup> Finally, this Article concludes with suggestions for improving the delivery of legal services.<sup>15</sup>

## II. HISTORICAL OVERVIEW OF THE RIGHT TO COUNSEL

The Constitution includes several protections for people suspected or accused of crimes. This table highlights and summarizes relevant amendments.<sup>16</sup>

---

<sup>10</sup> *Id.* at 150.

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See infra* Part III.

<sup>13</sup> *See infra* Part IV.

<sup>14</sup> *See infra* Part V.

<sup>15</sup> *See infra* Part VI.

<sup>16</sup> Because this Article aims to provide an in-depth account of the Public Defender Services, discussion of these amendments will be limited to brief analysis.

Amendment	Right
<b>4th Amendment</b>	Protects against arrests, searches, and seizures of property without probable cause
<b>5th Amendment</b>	Primary due process clause, which protects against self-incrimination; Prohibits double jeopardy; Major crimes require indictment
<b>6th Amendment</b>	Right to counsel; Right to speedy public trial
<b>8th Amendment</b>	Forbids excessive bail and fines and cruel and unusual punishment
<b>14th Amendment</b>	Due process clause applying federal rights to the states

One of the Constitution's framers, John Adams, so fervently believed in legal representation for the accused that as a Boston lawyer he defended the eight British soldiers involved in the Boston Massacre on March 5, 1770.<sup>17</sup> It is likely that this experience provided Adams (future 2nd President of the United States) with critical insight into the flaws of the English legal system and influenced his input into the Constitution.<sup>18</sup>

"[I]t is just as important for the state to defend the accused as to prosecute him . . . ."<sup>19</sup> We must "attempt to confirm the claims of those who are charged with crime that they are innocent; as to confirm the charges of their guilt."<sup>20</sup>

<sup>17</sup> Mitch Kachun, *From Forgotten Founder to Indispensable Icon: Crispus Attucks, Black Citizenship, and Collective Memory, 1770–1865*, 29 J. EARLY REPUBLIC 249, 251 (2009). Since the Boston Massacre stoked tensions between the colonies and the British Crown, Adams's defense of these soldiers was very unpopular—especially since several prominent individuals were actively encouraging this sentiment (e.g., Paul Revere and "The Bloody Massacre" engraving). *Id.* at 252. Another commentator contends that John Adams and Josiah Quincy had to consider the innate biases of the Town of Boston against the King and Parliament; and as the soldiers were employed by the King, they too were subject to the same biases as the King and therefore would not readily receive a fair trial. Hiller B. Zobel, *Newer Light on the Boston Massacre*, 78 PROC. AM. ANTIQUARIAN SOC'Y 119, 127 (1969).

<sup>18</sup> John Phillip Reid, *A Lawyer Acquitted: John Adams and the Boston Massacre Trials*, 18 AM. J. LEGAL HIST. 189 (1974). There was no shortage of people accusing John Adams of using the trial as a political referendum (e.g., Thomas Hutchinson, cousin of Samuel Adams). *Id.* at 206.

<sup>19</sup> Abram E. Adelman, *In Defense of the Public Defender*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 494, 494 (1914).

<sup>20</sup> *Id.* These words preceded *Gideon v. Wainwright* by approximately 49 years. Compare *id.* (recognizing the need for public defenders in 1914), with *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Indeed, several published sources (between 1911 and 1922) debated the merits of having programs supporting legal representation for indigents. See McKinney & Shao, *supra* note 8, at 146–47. The most spirited discussions centered on the administration, funding, and appropriate staffing of such programs. For example: *What would the government's role and responsibilities encompass? Would public funds be available for legal representation? Other than legal representation, should other services be available?* In the case of the last question, the question focuses not only on investigators and experts but also social services that consider the causation (i.e., lack of resources, education, and lack of understanding society) of criminal activity.

Therefore, the judiciary must decide the standards of evidence in all cases both civil and criminal.<sup>21</sup> From here begins the germination of the idea for using public and taxpayer funds to further facilitate the organization of legal services to even the lowest acceptable standards as guaranteed by the U.S. Constitution.<sup>22</sup> Supporting legislative reforms that support public funding for indigent criminal defense programs, the *California Law Review* in 1915 wrote that “a defendant without money has very little chance to maintain his defense.”<sup>23</sup>

In 1916, more than 100 Public Defender Offices operated within the United States, from California<sup>24</sup> to New York.<sup>25</sup> This was certainly a progressive change from previous indigent defense programs that relied upon a donation of time by attorneys and various charitable organizations, which only provided limited assistance to the public.<sup>26</sup> Arthur Warner, in 1926, emphatically expressed the need for adequate legal representation that could not be influenced from politics, police, and investigators.<sup>27</sup> Hence came the realization that, in the

---

This echoes the holistic offices that focus on the entire person and not just the immediate need for legal representation.

<sup>21</sup> See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 103 (1911) (citing JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 1–4, 180, 264–66 (Boston, Little, Brown & Co. 1898)).

<sup>22</sup> Adelman, *supra* note 19, at 494; see also Editorial Note, *The Public Defender*, 3 CAL. L. REV. 314, 315 (1915).

<sup>23</sup> Editorial Note, *supra* note 22, at 315. In addition to arguing that every individual has a right to legal representation, the author contends that public defenders are more efficient and effective than volunteer counsel. *Id.*

<sup>24</sup> Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173 (2010). Benner states that “[t]he County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914.” *Id.* at 174. The establishment of the public defender office is largely attributed to Clara Shortridge Foltz, *id.* at 174, and her 1893 Chicago World’s Fair speech advocating for an elected public defender system, *id.* at 175. Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545 (1976). Schwartz presents an overview of the 1870s struggle for Foltz to gain admission to law school and the bar in California. *See id.*

<sup>25</sup> McKinney & Shao, *supra* note 8, at 148; James B. Reynolds, *The Public Defender*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 476 (1922); Douglas Snyder, *Legal Aid in the United States* (Aug. 16, 2003) (unpublished manuscript), [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/0/6/8/3/pages106837/p106837-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/0/6/8/3/pages106837/p106837-1.php) [<https://perma.cc/E68E-LALC>].

<sup>26</sup> See Adelman, *supra* note 19, at 495; Reynolds, *supra* note 25, at 477; Snyder, *supra* note 25, at 22.

<sup>27</sup> Arthur Warner, *Paving the Way*, 123 NATION 266 (1926). This is in response to a case in Massachusetts, *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926), where Warner asserts that there was indeed a significant judicial issue as “[w]ith any one man there may be a single miscarriage of justice, but there can hardly be two.” Warner, *supra*, at 266. This reference was made in concerning the methods used to prosecute the case, the (in)actions of the defense attorney, and the verdict. *Id.* at 266–67. Vanzetti was found guilty of two separate crimes: murder at South Braintree and attempted robbery at Bridgewater. *Id.* at 266. Warner offers this answer:

U.S. legal system, a conflict of interest prevented a prosecutor from also acting as a defense attorney.<sup>28</sup> It became imperative that prosecutors not have “double roles” and the addition of taxpayer funded full-time Public Defenders were necessary to ensure adequate representation in criminal judicial proceedings.<sup>29</sup> Furthermore, the legal representation of indigent persons should not be substandard but beyond a minimum level of quality guaranteed by law.<sup>30</sup>

“We have a wealth-based system of justice . . . . For the wealthy, it’s gold-plated. For the average poor person, it’s like being herded to the slaughterhouse.”<sup>31</sup>

### III. AMERICAN BAR ASSOCIATION’S TEN PRINCIPLES

More recently, in February 2002, the American Bar Association (“ABA”) approved a set of ten guiding principles (the “Principles”), described

No, a miscarriage of justice is not likely to happen twice to the same man if it be in different parts of the country, on different charges, and at different times. But it is more than likely to happen in any one neighborhood and at a given time, especially when that time is one of hysteria and there is a widespread community desire to get rid of a particular man or group of men.

*Id.* In fact, Warner notes that a lack of advocacy on the defense, the failure to fail timely objections, the lack of real evidence against the defendant, and the failure of the system to reconcile that despite Vanzettit’s alibi and number of witnesses testifying for him, he was still convicted. *Id.* at 266–67.

<sup>28</sup> Mayer C. Goldman, *The Need for a Public Defender*, 128 NATION 131, 131 (1929) [<https://perma.cc/UQG5-F3D6>]. Goldman presents the case of Charles F. Stielow convicted of murder in New York and subsequently pardoned by Governor Whitman. *Id.* at 131. By Goldman’s account, Stielow was convicted from “a ‘third-degree’ confession,” which seems to mean hearsay evidence. *Id.*

<sup>29</sup> *Id.* at 132. Goldman also notes that Alfred Schwitofsky received a commuted sentence from Governor Whitman based on the issues associated with the judicial process in which Schwitofsky received “twenty-years for burglary and felonious assault.” *Id.*

<sup>30</sup> Kenneth Scott Schlesinger, Comment, *Polk County v. Dodson: Liability Under Section 1983 for a Public Defender’s Failure to Provide Adequate Counsel*, 70 CALIF. L. REV. 1291 (1982). Schlesinger notes that the question of liability may arise when an individual (e.g., public defender, appointed counsel, pro bono counsel, or other such representative) is engaged in providing legal services to indigents. *Id.* at 1291. Considering 42 U.S.C. § 1983, various arguments concerning its application to public defenders have been made. *Id.* at 1291–95 (collecting cases concerning individuals who acted “under color of state law” in violation of the Constitution and the United States Code (citing *Polk Cty. v. Dodson*, 454 U.S. 312 (1981); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941))).

In West Virginia, section 29-21-20 provides general immunity from suits arising from representing indigents. See W. VA. CODE ANN. § 29-21-20 (West 2020). This statute can also apply to immunity in Federal appointments under *Mooney v. Frazier*, 693 S.E.2d 333 (W. Va. 2010).

For a historical review of significant events impacting indigent legal representation, see John C. Kilwein, *Indigent Access to Justice in West Virginia*, 20 W. VA. PUB. AFF. REP. 2, 2–9 (2003).

<sup>31</sup> Editorial, *Too Poor to Be Defended*, ECONOMIST (Apr. 11, 1998), <https://www.economist.com/united-states/1998/04/09/too-poor-to-be-defended>. This quote is from Stephen Bright, Director of the Southern Center for Human Rights in Atlanta. *Id.*

as “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”<sup>32</sup> The ten Principles are:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel’s workload is controlled to permit the rendering of quality representation.
6. Defense counsel’s ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.<sup>33</sup>

Former Attorney General Eric Holder cited the Principles as “the building blocks of a well-functioning public defender system.”<sup>34</sup>

---

<sup>32</sup> AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, at intro. (2002), [https://www.ils.ny.gov/files/ABA\\_Ten\\_Principles.pdf](https://www.ils.ny.gov/files/ABA_Ten_Principles.pdf).

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

<sup>34</sup> Eric Holder, U.S. Att’y Gen., Address at Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent>.



The ABA recommended “that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.”<sup>35</sup> At least three states have directly cited to the Principles when developing, interpreting, and enforcing their indigent defense rules.<sup>36</sup> Even the United Nations has embraced the Principles in its declarations regarding the fundamental human right of access to justice.<sup>37</sup>

And yet, previous scholarship notes practitioners’ relative ignorance of—or noncompliance with—the Principles.<sup>38</sup> Reporting on the results of a nationwide survey, Professor Caroline S. Cooper notes that the only principle to which a significant portion of survey respondents report adherence was the first, regarding independence of counsel.<sup>39</sup> Less than half of respondent attorneys reported “completely” or “mostly” adhering to the other nine principles.<sup>40</sup> The same study notes that the survey respondents actually *over-estimated* their achievement, relative to performance benchmarks.<sup>41</sup>

According to Professor Cooper, survey comments suggest that public defense providers’ performance is significantly impacted by a lack of funding, understaffing, caseload, and management infrastructure.<sup>42</sup> Professor Cooper notes that these are systemic challenges, rather than issues within the control of individual public defenders.<sup>43</sup> Cooper thus calls for collaboration between public defense providers and “policy makers at all levels” to address the systemic shortcomings.<sup>44</sup>

Other researchers note that policy makers will struggle to address issues, given the lack of consistent quality data, or even consensus on what metrics to consider in making policy.<sup>45</sup> As Professor Jennifer E. Laurin observes:

<sup>35</sup> AM. BAR ASS’N, *supra* note 32.

<sup>36</sup> *State v. Lee*, 879 So.2d 173, 176 n.2 (La. Ct. App. 2004); *In re Regulations Governing a Sys. for Appointment of Counsel*, No. 2015-27, 2016 Mich. LEXIS 1072, at \*4 (Mich. June 1, 2016); *Kerr v. Parsons*, 378 P.3d 1, 12–13 (N.M. 2016).

<sup>37</sup> See Norman Lefstein, *Time to Update the ‘ABA Ten Principles’ for the 21st Century*, 40 CHAMPION 42, 42 (2016) (citing David Carroll, *The United Nations Takes the Ten Principles International*, SIXTH AMEND. CTR. (Jan. 11, 2013), <https://sixthamendment.org/the-united-nations-takes-the-ten-principles-international/>).

<sup>38</sup> See Caroline S. Cooper, *The ABA “Ten Principles of a Public Defense Delivery System”: How Close Are We to Being Able to Put Them into Practice?*, 78 ALB. L. REV. 1193, 1202 tbl.3 (2015).

<sup>39</sup> *Id.* at 1202.

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

<sup>41</sup> *Id.* at 1203.

<sup>42</sup> *Id.* at 1204.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1206.

<sup>45</sup> See, e.g., Janet Moore & Andrew L.B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345, 348–50 (2017); Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 332–33 (2015).

[W]hile the provision of defense services is guided by an array of influential professional standards for practice, little of that guidance could accurately be called evidence-based as opposed to the product of collective experience and observation. And while indigent defense is universally viewed as underfunded, the truth is the field lacks an objective means of quantifying how much money its services do or should cost, or what a reduction in the ability to provide particular services means from the standpoint of quality.<sup>46</sup>

Nadine Frederique, Patricia Joseph, and R. Christopher C. Hild note that it is difficult to draw general conclusions from most studies of indigent defense systems because of the specificity of each study.<sup>47</sup> Alissa Worden, Andrew Davies, and Elizabeth Brown also identify the patchwork-nature of indigent defense:

[S]tates are not only permitted broad discretion in key policy decisions, such as how much they pay for defender services, but they may also choose to devolve responsibility for such decisions—and, indeed, for the provision of defender services themselves—to the local and county level. In other words, states not only vary among themselves; they may also, at their discretion, permit further variation within themselves.<sup>48</sup>

Thus, it is common to see research focus on jurisdiction-specific data and outcomes, with an eye on jurisdiction-specific policy.<sup>49</sup>

It is with this context that the Authors discuss West Virginia's public defense system, which is virtually non-existent in the existing literature. The Authors hope that researchers and policy makers find the information and insight discussed herein—much of which is based on Author McKinney's personal first-hand experiences as Director of Operations of the West Virginia Public Defender

---

<sup>46</sup> Laurin, *supra* note 45, at 336 (internal citations omitted).

<sup>47</sup> Nadine Frederique et al., *What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317, 1329 (2015).

<sup>48</sup> Alissa Pollitz Worden et al., *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1428 (2011).

<sup>49</sup> See, e.g., Kelly G. Carmena, *The New Face of Louisiana's Public Defender Board: Indigent Defense and the 2016 Reform*, 44 S.U. L. REV. 75 (2016); Bonnie C. Groller, *Cosmetic Repair to a Crumbling Foundation: A Critical Examination of Idaho's Most Recent Indigent Defense Legislation*, 52 IDAHO L. REV. 669 (2016); Laurin, *supra* note 45 (examining Texas, North Carolina, and New York); Zachary Phillips, *Why Does Florida Have Public Defender Elections?*, 26 ST. THOMAS L. REV. 322 (2014); Susan L. Wynne & Michael S. Vaughn, *Eligibility for Court-Appointed Counsel in Federal Cases: A Review of Legislation and Case Law*, 80 ALB. L. REV. 899 (2017) (discussing public defender programs at the federal level); see also Frederique et al., *supra* note 47, at 1328–30 (discussing a number of such studies).

Services (“PDS”)—relevant to the nationwide conversation regarding indigent defense funding, structure, and metrics for performance measurement.

#### IV. THE WEST VIRGINIA INDIGENT DEFENSE SYSTEM

In West Virginia,

[t]rials of crimes, and of misdemeanors . . . shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and *shall have the assistance of counsel*, and a reasonable time to prepare for his defence; and there shall be awarded to him compulsory process for obtaining witnesses in his favor.<sup>50</sup>

Even though West Virginia has expressed a commitment to the concept of indigent defense, this commitment cannot be accomplished without some method of actually delivering legal representation to those individuals to whom this commitment was made. To fulfill its Constitutional obligations,<sup>51</sup> the West Virginia Legislature has charged PDS with the responsibility of indigent representation.<sup>52</sup>

But before PDS was established, an Agency known as the Public Legal Services Council served that function.<sup>53</sup>

The legislature finds and declares that in certain proceedings the state is required to provide high quality legal assistance to indigent persons who would be otherwise unable to afford legal counsel; that providing legal representation to those who face an economic barrier to adequate legal counsel will serve the ends

---

<sup>50</sup> W. VA. CONST. art. III, § 14 (emphasis added). Prior to 1981, Public Defender Corporations did not exist, and the appointed counsel made claims to the Supreme Court of Appeals of West Virginia.

<sup>51</sup> *Id.*

<sup>52</sup> For a historical overview, see Kilwein, *supra* note 30.

<sup>53</sup> The Public Legal Services Council was a direct result of *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976):

We are confident that the Legislature, given the full opportunity to carefully scrutinize all of the probative aspects of the need for a revised delivery system for legal counsel for indigent defendants, will wisely exercise its prerogative to assure the continuing administration of the system of criminal justice in West Virginia.

*Id.* at 323. The primary question presented to the court focused on the clarification of indigence and secondly how to determine and confirm indigence. *Id.* Prior to *Partain*, appointed counsel received up to \$100 per misdemeanor and \$200 per felony. *Id.* at 318.

of justice in accordance with rights and privileges guaranteed to all citizens by the Constitution of the United States of America and the constitution of the state of West Virginia; that the availability of quality legal assistance reaffirms the faith of our citizens in our government of laws; that the present system which utilizes appointed counsel is not operating satisfactory in some areas of this state and the legislature is presently unable to determine what system or systems will provide the most efficient means for providing legal representation; that there is a need to explore alternative methods of delivering legal assistance including the use of salaried public defenders complemented by private panel attorneys; that innovative programs and pilot projects as well as a continuation of the present appointed counsel system are necessary in separate areas of the state to provide information and experience upon which to base future legislative actions.<sup>54</sup>

The Public Legal Services Council was “reorganized as a result of Chapter 169, Acts, Regular Session, 1989, amended by Chapter 154, Acts, Regular Session 1990; and Chapter 209, Acts, Regular Session, 1996” as the Public Defender Services.<sup>55</sup> The West Virginia Public Defender Services (“PDS”) was established July 1, 1981,<sup>56</sup> as the state agency responsible for administering legal representation<sup>57</sup> for eligible proceedings.<sup>58</sup> The programs targeted indigent persons accused of crimes (State & Municipal Courts); persons before Mental Hygiene Commissioners; all juveniles in any judicial proceeding; all parties involved in abuse & neglect proceedings (both parents and children); and in miscellaneous proceedings—probation/parole revocation, contempts of court, extradition, and proceedings “ancillary” to eligible proceedings (appeals/habeas corpus, forfeiture, and expungement proceedings).<sup>59</sup>

The organization of PDS is discussed below.

---

<sup>54</sup> W. VA. CODE ANN. § 29-21-1 (West 2020).

<sup>55</sup> In 1989, West Virginia enacted legislation that created Public Defender Services. W. VA. CODE ANN. § 29-21-3 (West 2020) (“There is hereby created an executive agency known as public defender services.”).

<sup>56</sup> *Id.* § 29-21-1.

<sup>57</sup> *Id.* § 29-21-14.

<sup>58</sup> *Id.* § 29-21-2(2) (defining the term “[e]ligible proceeding”).

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

A. *The Organizational Structure and Function of PDS*

PDS is an executive agency within the Department of Administration.<sup>60</sup> While one might envision an organizational schematic showing legal services being delivered by staff attorneys leading directly to the office of the Executive Director, who manages the agency, this is far from the reality of PDS.

PDS is managed by an Executive Director<sup>61</sup> appointed by the Governor and confirmed by the Senate.<sup>62</sup> To be considered for the position of Executive Director, an individual “shall be a qualified administrator as determined by the governor, and shall be a member of the bar of the supreme court of appeals.”<sup>63</sup>

Although the qualifications seem specific, they are ambiguous. First, the administrator’s qualifications are determined by the governor,<sup>64</sup> with the implication that it is solely the governor’s prerogative to determine the personnel specifications and criteria that may be used in selecting the Executive Director. Second, while the statute requires the Executive Director to be a member of the Bar of the Supreme Court of Appeals, it does not stipulate whether the individual must be a member *in good standing*, nor does it specify to which classification of membership that the individual must hold.<sup>65</sup> Furthermore, the Code does not specify that the individual must be able to practice law.<sup>66</sup> Finally, this section specifies the conditions for becoming Executive Director, but it is not clear whether a person serving temporarily as “Acting Executive Director” must meet the same qualifications.<sup>67</sup>

PDS has three distinct units: the Criminal Law Research Center,<sup>68</sup> the Accounting and Auditing Division,<sup>69</sup> and the Appellate Advocacy Division.<sup>70</sup>

<sup>60</sup> *Id.* § 5F-2-1(a)(7) (incorporating Public Defender Services as part of the Department of Administration).

<sup>61</sup> *Id.* § 29-21-5. At the writing of this paper, there have been four Executive Directors—Michael Frasher (1981–1989), John “Jack” A. Rogers (December 1989–December 2010), Russell S. Cook (January 2011–April 2013), and Dana F. Eddy (July 2013–present). Cook was appointed as Acting Executive Director during his tenure. After Cook stepped down as Executive Director, the Deputy Cabinet Secretary of Administration Cedric Greene oversaw the Agency until the appointment of Eddy. As such, the Fiscal Year 2014 contracts with Public Defender Corporations were jointly signed by Cedric Greene of the Department of Administration and Ralph E. McKinney of PDS.

<sup>62</sup> *Id.* § 29-21-5(a).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* §§ 29-21-6(c), 29-21-7. It should be noted that both sections contain similar functions except the latter has greater specificity as to those functions.

<sup>69</sup> *Id.* § 29-21-6(d).

<sup>70</sup> *Id.* § 29-21-6(e).

The Criminal Law Research Center (“CLRC”) is charged<sup>71</sup> with providing legal research materials, the production of publications, and low cost continuing legal education. The purpose of the CLRC was to act as a facilitator of knowledge through a coordinated effort of researching, analyzing, and distributing materials in written form and through training programs.<sup>72</sup> Moreover, CLRC is tasked with offering this knowledge at low rates to foster participant (i.e., employees and non-employees) knowledge and program improvements.<sup>73</sup> In an effort to present continuing legal education, the CLRC hosts an Annual Public Defender Conference in West Virginia.<sup>74</sup>

The Accounting and Auditing Division is responsible for financial oversight which includes both the Public Defender Corporations and other parties receiving funds from the PDS.<sup>75</sup> Additionally, this unit is responsible for the preparation of the Agency’s Annual Report and recordkeeping.<sup>76</sup> Due to the growth and complexity of the Agency, this unit was split administratively into Operations and Public Defender Corporations and Accounting and Voucher Processing divisions.<sup>77</sup>

---

<sup>71</sup> *Id.* § 29-21-7. CLRC is the only unit within PDS having a *re-appropriated special revenue* account—that is, an unexpiring account that may collect fees for materials and services and to expend such funds in carrying out the functions of CLRC. The CLRC Directors were Elizabeth Zuccari Murphy, John “Jack” A. Rogers, Russell S. Cook, and Donald L. Stennett.

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

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

<sup>74</sup> Author McKinney attended the 2010 Annual Public Defender Conference in Charleston, West Virginia. *See* W. VA. PUB. DEF. SERVS., 2010 ANNUAL REPORT 9 (2010), [http://www.wvlegislature.gov/legisdocs/reports/agency/P07\\_FY\\_2010\\_1031.pdf](http://www.wvlegislature.gov/legisdocs/reports/agency/P07_FY_2010_1031.pdf) [hereinafter PDS, 2010 REPORT]. That year, the participants were greeted on their first day by various law enforcement personnel. A series of actions had led the police and other law enforcement personnel to the conference area. Unbeknownst to the conference attendees, the United National Bank (just a few blocks away) had just been allegedly robbed. While fleeing, the alleged suspect entered the Embassy Suite’s premise via side kitchen door, then passed through the main conference area where many criminal defense attorneys and various Circuit Court judges and at least one Supreme Court Justice were gathered for a continental breakfast, before being apprehended. Ironically, the suspect created what is believed to be the largest conflict of interest issue in West Virginia history, as the over 200 criminal defense attorneys and judges attending were all potential witnesses to the criminal activity. W. VA. RULES OF PROF’L CONDUCT r. 3.7 (2018).

<sup>75</sup> W. VA. CODE ANN. § 29-21-6(d).

<sup>76</sup> The Annual Report focuses on compliance with the state’s statutory reporting requirements. *See id.* § 5-1-20 (West 2020) (listing these requirements).

<sup>77</sup> The Accounting and Auditing Division was operated as a single unit at first. However, with the activations and subsequent operations of additional Public Defender Corporations, increased number of attorneys participating as appointed counsel, more service providers acting as experts and rendering services to the legal program, and finally the increases in funding appropriations from the Legislature, as Executive Director, Jack Rogers separated the responsibilities into two functional and distinct areas: (1) Agency Operations including monitoring Public Defender Corporations and (2) Accounting & Voucher Processing for Appointed Counsel and service

The Appellate Advocacy Division focuses on providing legal representation to eligible clients in the Supreme Court of Appeals.<sup>78</sup> The types and number of cases is determined at the discretion of the Executive Director. Traditionally, this division focuses on appealing criminal convictions to the Supreme Court and in some instances Circuit Courts, advocating the enforcement of federal Habeas Corpus rights, and providing advice and litigation support to other practitioners (both in Public Defender Corporations and appoint counsel) concerning cases.

---

providers. The decision was based on the ability to manage operations while providing customer service to the respective parties.

*Operations and Public Defender Corporations* – General operations including *fiscal management* (managing accounts payable, procurement under § 148 CSR Series 1, and maintaining property schedules such as fixed assets); *Human Resource Management* such as maintaining personnel and leave records, assisting with selection processes, and acting as agency liaison for personnel matters; *Records Management*; *Technology Management*; and so forth. Other operational issues include supporting the Indigent Defense Commission; acting as editor for Agency Annual Report; producing research and reports as required and desired; and assisting with audits and investigations of appointed counsel claims.

This unit was also responsible for financial oversight of 17 Public Defender Corporations (22 sites) serving 18 of 31 Judicial Circuits (29 of 55 counties) within West Virginia. This includes the contracts, budgeting, and funding for corporations; resolving some global technology issues for corporations; maintaining databases (using TimeMatters programs) for compiling statutory statistical reports; providing training and education to staff and interested parties; and providing general support and strategies to corporations.

There have been two Directors of operations: Kellie J. Carper and Ralph E. McKinney, Jr.

*Accounting & Voucher Processing* – Functions include overseeing the appropriation and expenditures requests and schedules; processing claims from appointed counsel and service providers; preparing reports according to statutory requirements using *Appointed Counsel Claims Tracking System* (“ACCTS”); facilitate the use of the *Online Voucher Submission System* (“OVS”) effective April 2, 2012, in processing claims; and the processing of IRS Form 1099s for appointed counsel and service providers.

The Directors were Dana Smith and Kitty Wilson.

Around October 2014, both units within the Accounting & Auditing Division were reintegrated under Executive Director Dana Eddy with Director Kitty Wilson managing some operations. Moreover, some tasks (e.g., human resource functions) were placed within CLRC, other functions (e.g., conducting research and compiling reports) were placed in a new unit known as *Special Projects*, and other functions (i.e., helping maintain a strong relationship with the Public Defender Corporations) simply ceased.

<sup>78</sup> W. VA. CODE ANN. § 29-21-6(e) (West 2020). Although PDS has operated the Appellate Advocacy Division, it was not until July 1, 2014, that PDS hired additional positions (i.e., four attorneys and two staff). Prior to July 1, 2014, the primary entity serving as in this capacity in the matters for Statewide Appellate Advocacy was the *Public Defender Corporation for the 13th Judicial Circuit* or commonly referred to as the Kanawha County Public Defender Office. An important distinction to make is that Public Defender Corporations are autonomous entities from PDS. Public Defender Corporations are discussed further in Part V.

The Appellate Advocacy Division Directors were Frank W. Helvey, Jr., Jack Hickok, Richard Lorensen, and Duane C. Rosenlieb, Jr.

To advise PDS, the West Virginia Legislature established the Indigent Defense Commission.<sup>79</sup> This Commission is composed of nine members, including the Executive Director of PDS whom serves as the Commission Chair.<sup>80</sup> The primary purpose of the Commission is reviewing agency operations and the delivery systems (i.e., Public Defender Corporations and appointed counsel) for legal representation.<sup>81</sup> The Commission was to review a number of issues and to report their findings on or before January 15, 2009.<sup>82</sup>

PDS, as a State Agency, provides overall direction for the agency and the representation of indigents in eligible proceedings by non-state personnel or panel counsel and agencies. In the next Part, discussions focus on the mixed system of these non-state stakeholders.

*B. Appointed Counsel and Public Defender Corporations: The Front-Line Troops of Indigent Defense in West Virginia*

Indigent defense programs make “use of salaried public defenders complimented by private panel attorneys.”<sup>83</sup> Thus, in West Virginia a mixed system composed of appointed counsel (private panel attorneys) and Public Defender Corporations (governmentally established non-profit organizations) work in conjunction to deliver legal representation to eligible indigents. In some instances, a conflict of interest may create a need to have separate legal representation, usually by panel attorneys.<sup>84</sup>

---

<sup>79</sup> *Id.* § 29-21-3b. The Indigent Defense Commission was established July 1, 2008. *Id.* § 29-21-3b(a) (West 2020) (establishing “the Indigent Defense Commission to provide assistance to Public Defender Services with regard to the general policies and procedures of the agency”).

<sup>80</sup> *Id.* § 29-21-3b(b). Membership is composed of eight individuals appointed by the governor and the Executive Director of PDS whom serves as the Chair of the Indigent Defense Commission. On July 1, 2008, the Indigent Defense Commission consisted of John “Jack” A. Rogers, Esq., Executive Director of PDS serving as Chair (*ex officio*); The Honorable Andrew A. MacQueen, Esq., Retired Circuit Judge (term ending June 30, 2013); William B. Richardson, Esq., Attorney, 1st Congressional District (term ending June 30, 2013); Joseph M. Ward, Esq., Attorney, 2nd Congressional District (term ending June 30, 2014); Robert E. Richardson, Esq., Attorney, 3rd Congressional District (term ending June 30, 2014); Adrienne Worthy, Non-Lawyer (term ending 06/30/2011); James Strawn, Mental Illness Advocate (term ending June 30, 2011); Cathryn S. Nogay, Esq., Abuse and Neglect Attorney (term ending June 30, 2012); and Deborah A. Lawson, Esq., Chief Defender (term ending June 30, 2012). As a law clerk, Judge MacQueen helped draft the *Partain* decision that eventually established PDS. PDS, 2010 REPORT, *supra* note 74, at 5.

<sup>81</sup> *Id.* § 29-21-3b(a).

<sup>82</sup> *Id.* § 29-21-3b(g).

<sup>83</sup> *Id.* § 29-21-1.

<sup>84</sup> For example, three individuals are arrested for drug possession and subsequently found eligible as indigent for legal representation. Assuming a Public Defender Corporation is located within that circuit, one individual should be represented by that Public Defender Corporation. For the other two individuals, appointments should be made from the list of private panel attorneys. Even though a Public Defender Corporation is located within a judicial circuit, that office cannot



In this system the court determines eligibility for services;<sup>85</sup> the judiciary then makes the appointment for legal representation in accordance with the statute.<sup>86</sup> Indigent guidelines help establish uniform standards for determining indigence for both Public Defender and appointed counsel.<sup>87</sup> Appointed Counsel and Public Defender systems are described separately below.

### 1. Appointed Counsel System

The appointed counsel system is a program composed of attorneys that are willing to serve as legal representatives to individuals in cases where

---

represent all eligible individuals without jeopardizing the quality of legal representation created from a conflict of interest. A Public Defender Corporation *cannot* eliminate the need for private panel attorneys.

<sup>85</sup> *Id.* § 29-21-16. Eligibility determination considers income, assets, and circumstances when making a decision in appointing legal representation. At the discretion of the judge, the individual may be appointed legal representation even if his/her financial circumstances exceed eligibility guidelines set by PDS. Alternatively, an individual may be found indigent for legal expenditures and not legal fees under *Rojas v. Wilkes*, 455 S.E.2d 575 (W. Va. 1995). These claims are processed as direct bills and are referred to as “*Rojas* vouchers.” *See id.*

<sup>86</sup> *Id.* § 29-21-9(b). The following is the preferential method to appoint legal representation. A public defender office within the circuit; a panel attorney within the circuit; a panel attorney located within the region; a public defender office in an adjoining circuit; a panel attorney from an adjoining circuit; and an attorney in any circuit.

<sup>87</sup> PDS is responsible for establishing and reviewing financial guidelines for determining indigence. *Id.* § 29-21-16(a). These guidelines follow the Federal Poverty Level (“FPL”) guidelines as issued by the U.S. Department of Health and Human Services for other such federal programs aimed at assisting the indigent. As a practical matter, PDS set guidelines at the 1994 150% FPL. Although it would be easy to argue for increasing these guidelines to reflect a more current representation of indigence, the practical matter of acquiring increased funding as a result of making more individuals eligible for the program was not economically feasible to many political stakeholders. As in politics, energies are channeled into what is valuable and what can be acquired. Furthermore, judges already had the authority to make findings of indigence in individual cases; and therefore, the political strategy that was more acceptable was to allow the judiciary to become the gatekeepers for determining indigence. PDS did raise the FPL on October 1, 2013. As a result, the 2013 125% FPL guidelines replaced the previous 1994 guidelines. Although the new guidelines were set 25% lower than the 1994 guidelines, the increases made minimum impact on the number of accused eligible for legal counsel.

indigence is determined.<sup>88</sup> Appointed counsel<sup>89</sup> are compensated for time<sup>90</sup> and expenditures<sup>91</sup> by PDS<sup>92</sup> up to the statutory payment limits.<sup>93</sup> To receive compensation, the appointed counsel submits a claim by voucher to the local Circuit Court.<sup>94</sup> The appointed counsel system was not designed to provide a revenue source for attorneys but to provide a reasonable compensation for accepting indigent cases.<sup>95</sup> The hourly compensation rates established over 25 years ago include overhead expenditures.

---

<sup>88</sup> *Id.* § 29-21-9. COMM'N ON THE FUTURE OF THE W. VA. JUDICIAL SYS., FINAL REPORT 64 (1998), <http://www.courtswv.gov/court-administration/ReportAll.pdf> [hereinafter FINAL REPORT]. Within the appointed counsel system, there are over 800 lawyers and service providers. *Id.*

<sup>89</sup> Attorneys acting as appointed counsel for indigents have no employment relationship with PDS. Additionally, there is no contractual relationship (i.e., vendor and customer) with PDS. Furthermore, those individuals (i.e., experts, investigators, and paralegals) contracted with the attorney for services still must work with that attorney to either be compensated directly by that attorney or file a direct claim with PDS.

<sup>90</sup> W. VA. CODE ANN. § 29-21-13a. An attorney's time is compensated at a rate of \$60 per hour for out of court time, *see id.* § 29-21-13a(j)(1), and \$80 per hour for in court time, *see id.* § 29-21-13a(j)(2). The attorney's time is considered "fees."

<sup>91</sup> *Id.* § 29-21-13a(e). Although examples of expenditures are given within the statute, the amounts may be determined by PDS, the Travel Management Office of the Department of Administration, the State Auditor, or some other party. In either event, it is always a wise choice to contact PDS to understand what an expense entails and what records must be submitted.

<sup>92</sup> PDS processes most claims using the first-in and first-out system where a received date stamped by PDS is imprinted on the claim. Priority is given to abuse and neglect claims. *See id.* § 29-21-13a(i).

<sup>93</sup> *Id.* § 29-21-13a(j)(4). The limit is set at \$3,000 in fees for anything that is not a felony "for which a penalty of life imprisonment may be imposed." *Id.* For such felonies, it is at the discretion of the court. *Id.* Additionally, it is also at the discretion of the court to make exceptions to the maximum limit on a per case basis. *Id.* For expenditures, the limit is \$1,500.00 unless the Court agrees to exceed that limit. *Id.* § 29-21-13a(k).

<sup>94</sup> Each Circuit operates differently with respect to claims to PDS. In some instances, those claims are forwarded by the Circuit Clerk directly to PDS. In other instances, these claims are returned to the attorney and it is the attorney's responsibility to submit to PDS. The problem with attorney submissions is sometimes they are lost, untimely, never submitted, or altered. Altered documents are beyond the scope of this work; although the authors contemplate further exploration of the issue in subsequent scholarship.

The vouchers submitted to PDS constitute a public record that are subject to FOIA. *See Darrell V. McGraw, Jr., The West Virginia Freedom of Information Act*, OFFICE OF THE ATT'Y GEN. (2004). "Completed vouchers for legal fees and expenses submitted by an attorney to Public Legal Services for reimbursement, and the agency's audit of those vouchers, are 'public records' and thus accessible to the public under the WV-FOIA." *Id.* at 12 (citing 61 Op. Att'y Gen. 112 (Apr. 11, 1986)).

<sup>95</sup> *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989). After *Jewell*, "no lawyer in West Virginia may be involuntarily appointed to a case unless the hourly rate of pay is at least \$45 per hour for out-of-court work and \$65 per hour for in-court work." *Id.* at 546–47. Recent legislation increased these rates to \$60 for out-of-court work and \$80 for in-court work. W. VA. CODE ANN. § 29-21-13a(j)(1)–(2) (West 2020). Nevertheless, these rates are still below the recommendations of the

## 2. Public Defender Corporations

“In each judicial circuit of the state; there is hereby created a public defender corporation of the circuit . . . .”<sup>96</sup>

Currently, there are 17 Public Defender Corporations,<sup>97</sup> which are considered non-state agencies.<sup>98</sup> Public Defender Corporations are managed by a board of directors composed of not less than five individuals.<sup>99</sup> The Chair is appointed by the Governor with the remaining members appointed by the County

Indigent Defense Commission. *See* Letter from John A. Rogers, Chair, W. Va. Indigent Defense Commission, to Hon. Robin Davis, Chief Justice, Supreme Court of Appeals of West Virginia (May 24, 2010) (on file with authors).

<sup>96</sup> § 29-21-8(a)(1). Thus, by code, the legislature chartered a Public Defender Corporation in each of West Virginia’s 31 judicial circuits. Those Public Defender Corporations are dormant until *activated* by several triggering events. First, both the Indigent Defense Commission and the Executive Director of PDS must approve the creation of a Public Defender Corporation. Second, the legislature must receive a report from the Indigent Defense Commission concerning the approval of the Public Defender Corporation. Third, the judge or chief judge must be consulted and issue recommendations for the Indigent Defense Commission to consider. *See id.* § 29-21-8(b).

Prior to the reforms of 2008, the Indigent Defense Commission did not exist and the process of activating a Public Defender Corporation was significantly less challenging.

As a “public body” under section 29B-1-2(3), a Public Defender Corporation is subject to the Freedom of Information Act. *See* Queen v. W. Va. Univ. Hosps., Inc., 365 S.E.2d 375 (W. Va. 1987). However, there are exceptions to FOIA requests. § 29B-1-4; McGraw, *supra* note 94.

<sup>97</sup> Currently, Public Defender Corporations operate within 19 of the state’s judicial circuits. *PD Corporation Directory*, PUB. DEF. SERVS., <https://pds.wv.gov/Public-Defender-Corporations/pdcorpdirectory/Pages/default.aspx>.

<sup>98</sup> The term “[n]on-state agency” denotes an autonomous organization that supports a state agency’s mission. Often, the term “quasi-governmental organization” is used interchangeably. Regardless of terminology, the concept is that these entities are clearly constructed organizational instruments used in carrying out state objectives and missions.

Nevertheless, the term “non-state agency” can apply to any organization that is not directly under the Legislature, Judiciary, Executive branches of the State. A non-state agency can be a county or municipal government and selected non-profit entities created for the purpose of assisting in the delivery of government services and programs. In contrast, the term “quasi-governmental” is a hybrid of public and private entity. That is, it is a joint venture where the government contributes more than resources, but also contributes leadership in this entity. In some cases, as in the Public Defender Corporations, the governing board is composed of members that are politically appointed. Therefore, while all quasi-governmental organizations are also non-state agencies, not all non-state agencies are quasi-governmental organizations.

Whichever term is used to identify these Public Defender Corporations, they are considered component units of PDS. As a result of Public Defender Corporations being component units, each is required to be included in the State’s *Consolidated Annual Financial Report* (CAFR). The CAFR is a critical financial document that determines the State’s financial health and well-being as far as decisions on bond ratings and interest rates rely on the audited information contained within these Financial Statements. The CAFR is compiled by the *Financial Accounting and Reporting Section* (FARS) of the Department of Administration.

<sup>99</sup> W. VA. CODE ANN. § 29-21-15.

Commission and the local County Bar Association (or by Circuit Court if no County Bar Association exists) in equal numbers.<sup>100</sup> It is expected that board members establish macro-policies and the strategies for operations<sup>101</sup> and comply with the nonprofit statuses.<sup>102</sup> Additionally, the Board is ultimately responsible for personnel matters but not representation in individual cases.<sup>103</sup>

---

<sup>100</sup> *Id.* § 29-21-15(a)(1). Appointments of board members directly corresponds to the number of counties in which the Public Defender Corporations shall serve.

<sup>101</sup> *Id.* § 29-21-15(c). The code specifically notes that the board “shall not interfere with any attorney’s professional responsibilities to clients.”

<sup>102</sup> *Id.* § 29-21-15(d). In practice, each Public Defender Corporation files with the Internal Revenue Service as a non-profit entity under I.R.C. § 501(c)3. Additionally, the IRS has determined that Public Defender Corporations also are § 509(a)(1) entities—an organization that receives all or a majority of funding from a governing body, in this case, West Virginia. Filing with the IRS has been difficult as the filing requirement includes the submission of the Articles of Incorporation and State Charter. As noted earlier, West Virginia Code section 29-21-8 incorporates Public Defender Corporations by statute. Even with submitting copies of the statute, letters, and explanations, the concept of the quasi-government entity was still new to the I.R.S.

<sup>103</sup> *Id.* § 29-21-15(c)(1)–(3). In addition to hiring and firing authority, the board also has responsibility for “fixing of professional and clerical salaries.” Contrary to popular belief, the Executive Director of PDS has limited authority concerning the individual salaries of employees of Public Defender Corporations.

In the opinion of author McKinney, based on his first-hand experiences as Director of Operations for PDS, the greatest power that the Executive Director has is the *power of the purse* and the ability to contract with Public Defender Corporations. To help illustrate this concept, the attaching of budgets and salary schedules to the contract became a routine practice under the Executive Director Jack Rogers and Director of Operations Kellie Carper, due to the potential for reduced state appropriations. Legal services provided by Public Defender Corporations could drastically be reduced by a reduction in funding. By the very nature of the organization being a service provider and the need to employ qualified professional staff, reductions would most likely impact personnel. Additionally, it was essential for Public Defender Corporations to look beyond the *annual budget* and create more strategic long-term plans of operations. Moreover, some offices did not fully comprehend personnel decisions. As such, PDS responded by establishing internal compensation studies, standardizing non-state benefits, and further developing and facilitating good personnel practices.

In the subsequent figure,<sup>104</sup> the last Public Defender Corporation was established in Fiscal Year 2001.<sup>105</sup> The largest spike in new offices occurred between 1986 and 1990, when five Public Defender Corporations were activated.

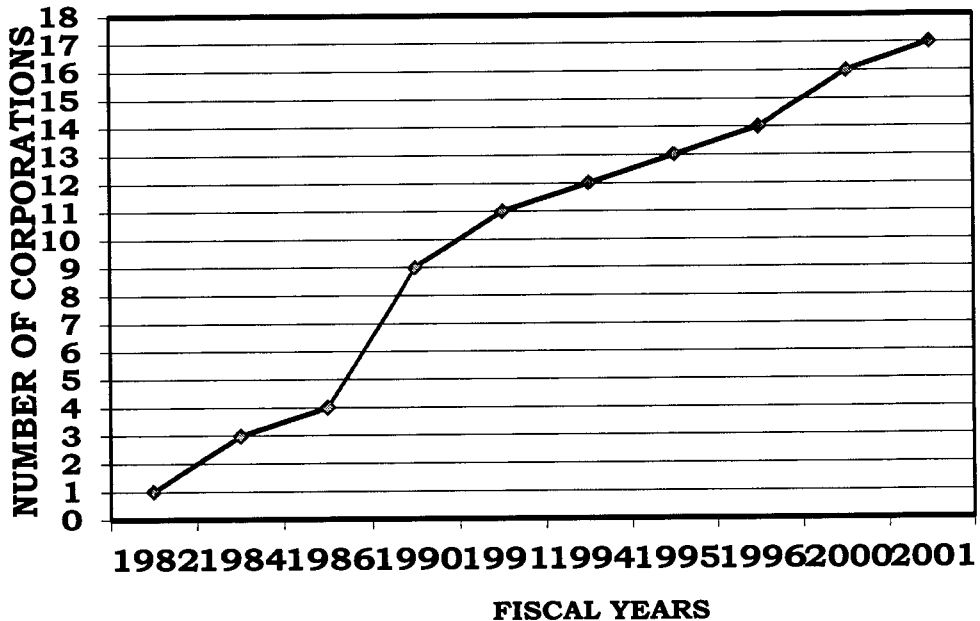


Figure 1: PDS Growth by Fiscal Year

With respect to personnel, the complement of employees of Public Defender Corporations range from Public Defenders,<sup>106</sup> Assistant Public Defenders,<sup>107</sup> investigators, social workers, paralegals, sentencing advocates,

<sup>104</sup> W. VA. PUB. DEF. SERVS., ANNUAL REPORT: FISCAL YEAR 2012–2013, at 13 (2013), <https://pds.wv.gov/Documents/2013%20ANNUAL%20REPORT.pdf> [hereinafter MCKINNEY, ANNUAL REPORT].

<sup>105</sup> Although the Public Defender Corporation for the 4th Judicial Circuit has appointed a board of directors and has selected a Chief Defender, it has not been included in this figure since it is still being formed.

<sup>106</sup> W. VA. CODE ANN. § 29-21-2(5) (West 2020) (defining “[p]ublic defender” as a “staff attorney employed on a full-time basis by a public defender corporation who, in addition to providing direct representation to eligible clients, has administrative responsibility for the operation of the public defender corporation”).

<sup>107</sup> *Id.* § 29-21-2(6) (“A staff attorney providing direct representation to eligible clients whose salary and status as a full-time or part-time employee are fixed by the board of directors of the public defender corporation.”).

accountants, bookkeepers, administrators, office managers, and secretaries.<sup>108</sup> These positions are considered employees of the Public Defender Corporations and not of Public Defender Services nor West Virginia.<sup>109</sup> Furthermore, West Virginia Code section 29-21-17 specifically forbids full-time attorneys employed by Public Defender Corporations to engage in the practice of law for personal financial gain.<sup>110</sup>

Public Defender Corporations are funded through Legislative general appropriations to PDS and subsequently through grants to Public Defender Corporations.<sup>111</sup> Grants to Public Defender Corporations are disbursed<sup>112</sup> after the approval of a funding application and proposed budget.

In the next section, discussion focuses on funding these indigent defense programs.

---

<sup>108</sup> The classification of public defender personnel has been of particular concern to PDS management. On contracts, the number of authorized positions was simply broken into attorneys and secretaries. It was PDS management's belief that more information was needed concerning the duties and responsibilities of the secretaries. After surveying the Public Defender Corporations, it was decided that a basic classification system was necessary. Therefore, the various job titles as noted were created to reflect what was in practice. This was also a strategic move as PDS could more readily identify to the Legislature the types of specialized positions and functions each Public Defender Corporation was using. It became easier to justify additional salaries paid to an investigator or social worker than a secretary or receptionist. Furthermore, PDS does not fund outside investigators if Public Defender Corporations have investigators on staff.

<sup>109</sup> The employment relationship is a common misconception with external stakeholders having the belief that PDS made personnel decisions and employed public defenders. In fact, PDS was sued for the release of a Public Defender Corporation employee's personnel file, to which PDS replied, "This person was never employed by this Agency." Additionally, PDS was the recipient of several tax levies, garnishments, and informational requests concerning individuals that were never employed by PDS. Moreover, the only common link among these individuals is that they were attorneys; and somehow, PDS could magically help the requestor.

<sup>110</sup> Although there are narrow exceptions to this (e.g., pro bono work, remit fees to Public Defender Corporation, and the closing and disposing of cases within 90 days by newly hired attorneys), it is only the board of directors that have the authority to make these exceptions. Similarly, the prohibition of engaging in the private practice of law has also be applied to employees of PDS.

<sup>111</sup> W. VA. CODE ANN. § 29-21-13.

<sup>112</sup> Public Defender Corporations normally received grant disbursements on a monthly basis. However, it was necessary to issue additional supplemental disbursements based on unusual caseloads and circumstances. Likewise, grants were also reduced when the need for resources was anticipated to be less. Essentially, it was important that PDS and the Public Defender Corporations have a good working relationship that allows for shared management and efficient use of resources. Furthermore, it should be noted that any funds disbursed were used to meet the maximum spending plan (also known as the *budget*). As noted, the adjustments of disbursements allowed PDS to shift funds to other areas of operations. This philosophy discouraged the "spend it or lose it" mentality associated with publicly funded programs.

### C. Financing Indigent Defense Programs

Funding indigent defense programs in West Virginia is done through Legislative Appropriations from General Revenues. The table below illustrates the general appropriation history of PDS.<sup>113</sup> While appropriations have increased over time, there have been instances of legislative reductions (FY 2000–2003) and static budgets (FY 1995–1997 and FY 2008–2011). Furthermore, this table does not account for executive orders that reduce expenditures from legislative appropriations.

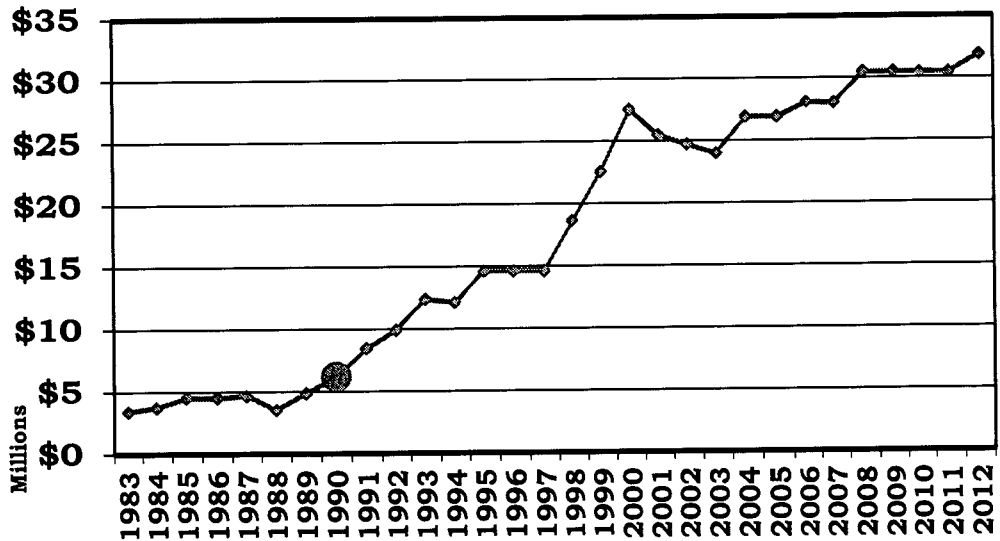


Figure 2: PDS Appropriation History

Each year, PDS must fund both the court-appointed counsel and Public Defender Corporations from funds allocated by the State Legislature.<sup>114</sup>

<sup>113</sup> MCKINNEY, ANNUAL REPORT, *supra* note 104, at 17. This figure does not include supplemental appropriations. In 1990, *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989), caused the rates to increase and the need for increases in funding; and as such, this is represented as the larger red dot. In most instances, supplemental appropriations to PDS came from special revenue sources the most common being lottery funds. In Fiscal Year 2013, PDS had received allocations totaling \$49,748,279.31 included a supplemental appropriation of \$11,500,000 on March 28, 2013. MCKINNEY, ANNUAL REPORT, *supra* note 104, at 19. The largest supplemental appropriation to the Agency was \$21,000,000. H.B. 114, 79th Leg., Reg. Sess. (W. Va. 2009); S.B. 1015, 79th Leg., 1st Special Sess. (W. Va. 2009). In 2010, H.B. 118, 79th Leg., 1st Special Sess. (W. Va. 2010) and S.B. 1018, 79th Leg., 1st Special Sess. (W. Va. 2010) made an \$11,000,000 appropriation from the same funds: “Appropriations from State Excess Lottery Revenue Fund.”

<sup>114</sup> This has created a sense of competition of funding between the appointed counsel and Public Defender Corporations to the point that in 2010, the Legislature approved a budget bill where appropriations were allocated in separate line-items. *See* PDS, 2010 REPORT, *supra* note 74, at 13. Consequently, the need for supplemental funding for appointed counsel was still an issue. This was not the first instance of separating legislative allocations as it had been done as early as 1995.

Typically, questions arise concerning which system (appointed counsel or Public Defender Corporations) is more efficient in using funding.<sup>115</sup> Figure 3 compares the appointed counsels' cost per claim<sup>116</sup> against the Public Defender Corporations' cost per closed case.<sup>117</sup>

The figure illustrates that from 1993 to 2011, the Public Defender Corporation system was more cost effective than the appointed counsel system in delivering legal representation to indigents. For example, the average cost per closed case for Public Defender Corporations in 1993 was \$190.25 compared to \$396.25 for appointed counsel. In 2011, the average costs were \$299.32 and \$769.49 respectfully. This represents a per-case increase of \$108.88 for Public Defender cases and \$373.24 for appointed counsel. Another way to consider this is that the gap between appointed counsel and Public Defender Corporations was \$205.81 per case in 1993, but grew to \$470.17 by 2011, with Public Defender Corporation attorneys remaining more cost effective.<sup>118</sup> The increase is despite the fact that appointed counsel rates did not change between 1990 and 2011.

---

<sup>115</sup> This further meant that each system had to justify its existence which meant that sometimes negative information was provided by stakeholders to increase their claims in a particular system.

<sup>116</sup> PDS attempts to measure this cost per claim by identifying unique claims in ACCTS. *See generally supra* note 77. ACCTS is an electronic databased in which all claims are entered, tracked, and validated for payment. Consequently, this does not always work because related claims are not always flagged as related especially with the submissions of supplemental and direct claims. For example, misspellings, misinformation, and erroneous charges are dissimilar enough for ACCTS to ignore those. Also, staff may not check every claim against system information (known as conducting *duplicate searches*) due to system limitations and inefficiencies, specifically the time it takes to conduct the search. Thus, appointed counsel claims are most likely reported higher and as a result the analysis will be skewed in favor of a lower cost per claim.

<sup>117</sup> In many of the annual reports produced by PDS, Public Defender Corporation cost per claim have been reported under three methods: open, represented, and closed. Under each method, the total cost remains the same and only the denominator changes. First, *open cases* considers only the number of new cases that are opened in the fiscal year being reported. Second, *cases represented* counts all cases in which the Public Defender Corporation had time reported within the that fiscal year of comparison. This means that cases opened and cases closed and working cases were counted. Third, *cases closed* focus on only those cases in which the final disposition occurred during the year of comparison. It is the authors' opinion that the comparison between appointed counsel claims and Public Defender Corporations should be cases closed as these have more similar characteristics to make analysis and assumptions.

In 2013, statistical reporting on Public Defender Corporations focused on cases closed and removal of administrative time. MCKINNEY, ANNUAL REPORT, *supra* note 104. A six-year comparison from FY 2008 to FY 2013 was presented to illustrate the differences between appointed counsel and Public Defender Corporations. *Id.* at 130. Over the six years, Public Defender Corporations spend more time (approximately 40% more (16% appointed counsel and 27% Public Defender Corporation)) in court than appointed counsel. *Id.* Based on the review of data, the efficiency of Public Defender Corporations is the ability to streamline processes and spend less out-of-court time and more time advocating for clients in court.

<sup>118</sup> These figures are not adjusted for inflation, and merely represent the first level of analysis when considering a system concerning financial effectiveness. In fact, there are so many other variables (e.g., the processing of vouchers by PDS and the judiciary, the audit costs of vouchers)



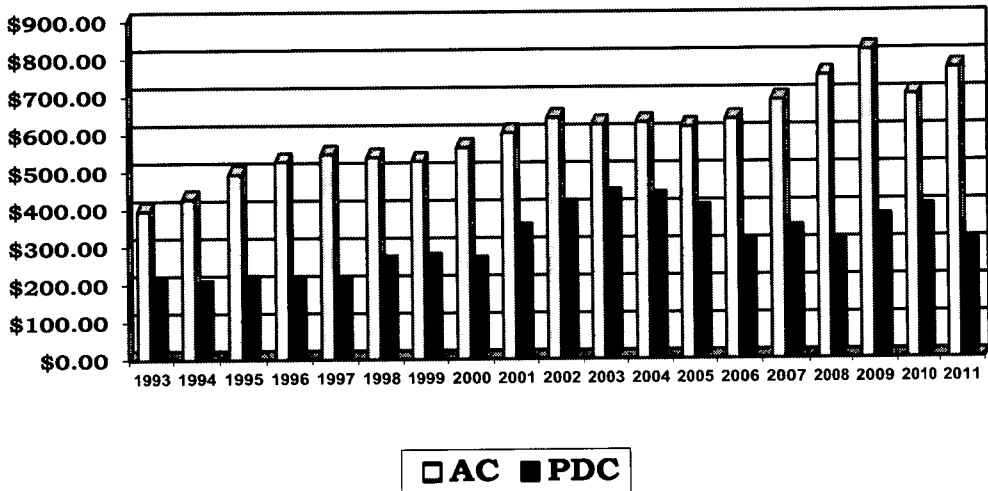


Figure 3: Comparison of AC/PD Cost per Claim/Closed Case

To ensure that public funds are expended according to the mandates of the West Virginia Legislature, the Legislative Auditor's Office periodically reviews government agencies and recipients of government funds. Reviews not only assist with ensuring compliance but also with identifying ways to improve programs. In a 1999 report, two main issues were identified for improving the indigent defense programs in West Virginia: "Maximum Use of Public Defender Corporations Needed to Control Costs" and "Inadequate Monitoring of Improvement Needs, Compliance, and Quality of Legal Services."<sup>119</sup> Each point is discussed in turn.

"According to calculations by the Legislative Auditor the expansion of Public Defender Services [by activating more Public Defender Corporations] could realize a savings from \$2,205,706 to \$7,468,789."<sup>120</sup> As noted in *Figure 3*, the Legislative Auditor also noted that appointed counsel costs well exceed that

---

that these figures do not reflect the true difference, but do reflect minimum differences between the systems. Further value may be established in considering the quality of legal representation. The difference seems to be about \$250. *See* FINAL REPORT, *supra* note 88, at 65.

<sup>119</sup> ANTONIO JONES, OFFICE OF LEGISLATIVE AUDITOR, PRELIMINARY PERFORMANCE REVIEW OF PUBLIC DEFENDER SERVICES 1 (1999), <https://pds.wv.gov/about/Reports/Documents/1999%20PDS%20Performance%20Evaluation.pdf>.

<sup>120</sup> *Id.* at 7. The term savings is not a true realizable concept as my preference is *cost avoidance*, as no funds would be reallocated or otherwise available for use. Furthermore, the "savings" measured only represent direct variables and do not consider any costs associated with other variables such as processing of vouchers by PDS and the judiciary and the time to appoint legal representation from the private panel.

of Public Defender Corporations.<sup>121</sup> Moreover, the need for supplemental appropriations and funding is necessary to cover the services already rendered by appointed counsel.<sup>122</sup>

The second point focuses entirely on issues associated with *monitoring*, *compliance*, and *quality*.<sup>123</sup> Most of this point is directed at the appointed counsel system and the fiduciary responsibility of PDS to ensure that abuses are minimized.<sup>124</sup> Part of this fiduciary responsibility requires metrics to ensure a minimum standard of quality for legal representation,<sup>125</sup> that the statutory methods of appointment are followed,<sup>126</sup> and comparisons between Public Defender Corporations and appointed counsel.<sup>127</sup>

In 2004, the Legislative Auditor recommended that “[t]he Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System.”<sup>128</sup> Furthermore, “the Legislative Auditor also recommends that the Legislature implement a public defender application fee.”<sup>129</sup> The Auditor claimed that if the recommendations were implemented, an estimated \$5 million would be collected from indigents and re-appropriated for their defense.<sup>130</sup> However, it appears that seeking additional revenue streams as a condition of legal representation is

<sup>121</sup> *Id.* at 24 (“[I]t is more expensive to provide legal representation to indigent clients using appointed counsels as opposed to using state employed public defenders.”).

<sup>122</sup> *Id.* at 12. Ultimately, the continued need to ask the Legislature for supplemental funding continues primarily as a result of a desire to not significantly increase the initial (or base) appropriations in an effort to control costs. Consequently, additional strategies implemented during the restructuring helped motivate and facilitate the approval of Legislative appropriations.

<sup>123</sup> *Id.* at 31.

<sup>124</sup> *Id.* The OLA noted that the circuit judges review and sign appointed counsel claims with the burden of PDS “to require and monitor compliance” within program specifications. *Id.* at 32. Although section 29-21-13a(g) provides PDS the authority, it does not provide the authority to refuse to obey a court order; and as vouchers are codified by court order, PDS would be in contempt of such order to pay a claim if PDS refused. With enhanced computer capability, PDS did develop methods to identify some of these abuses.

<sup>125</sup> *Id.* at 34.

<sup>126</sup> *Id.* at 35. This is still an issue as many judicial circuits have inadequate methods and technology for tracking cases.

<sup>127</sup> *Id.* at 36. Subsequent to the OLA 1999 report, PDS has made comparisons part of their Annual Report to the Governor and Legislature.

<sup>128</sup> JOHN SYLVIA, OFFICE OF LEGISLATIVE AUDITOR, PUBLIC DEFENDER SERVICES 5 (2004), <https://pds.wv.gov/about/Reports/Documents/2004%20PDS%20Performance%20Evaluation.pdf>.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> *Id.* at 10, 20. This assumes that most fees will be collected.

inappropriate as “the right to counsel cannot be denied” based upon the inability for the accused to pay.<sup>131</sup>

Asking indigents to pay application fees for legal representation goes against the basic philosophy of protecting the due process rights of individuals.<sup>132</sup> In fact, early 1890s discussions debated whether defendants should be deprived of any resources when charged with crimes as well as the minimum standards for legal representation.<sup>133</sup> “Even though the right to counsel still exists doctrinally, the inadequate funding of indigent defense threatens what remains of the right.”<sup>134</sup> Pro bono or panel counsel must necessarily ration their time between indigent and private pay clients<sup>135</sup>—and with practice expenses and overhead constantly looming, one is forced to question whether such attorneys will spend most of their efforts focused on the paying clients. Therefore, ensuring that enough resources are available for indigent defense has always been an issue in West Virginia as well as most other states.

Consequently, the burden should not be upon the poor to raise revenues for their own defense as “poor people are a hard constituency to organize.”<sup>136</sup> Moreover, inefficiencies within the system must be identified and corrected to improve the use of resources. In some cases, this means evaluating processes to reduce waste and errors in the systems.<sup>137</sup>

---

<sup>131</sup> *Id.* at 29. Jack Rogers, Executive Director of PDS, addressed the problems associated with lawyers refusing a court order of representation for the failure of the client to pay and lawyers becoming financial collection agents of West Virginia. *Id.* at 29–30. He also expressed concern that the incentive to collect funds may jeopardize legal representation, as the incentive may be greater to enter a plea bargain than to go to trial.

For a period of time after this report, PDS had to argue against the idea of application fees being a condition of legal representation. Similarly, the same arguments could be applied to recipients of other government benefits such as Medicaid, Food Stamps (now SNAP), and student loans. The argument being that if an individual cannot afford an attorney, then how can that same individual afford the application fee?

<sup>132</sup> See McKinney & Shao, *supra* note 8; see also Ralph E. McKinney & Lawrence P. Shao, *Quantitative Evaluation on Indigent Criminal Defense Funding*, 9 EUR. J. MGMT. 119, 120 (2009).

<sup>133</sup> Benner, *supra* note 24, at 175. Clara Foltz advocated for much of this discussion. *Id.*

<sup>134</sup> Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005).

<sup>135</sup> See Joe Margulies, *Resources Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 678–79 (1989).

<sup>136</sup> Snyder, *supra* note 25.

<sup>137</sup> According to the Commission on the Future of the West Virginia Judiciary, emphasis should be placed on the Public Defender Corporation system and cost containment methods for both systems but with emphasis on the appointed counsel system. FINAL REPORT, *supra* note 88, at 65. Also, a significant reduction of expenditures could occur if the judiciary would fully enact measures to reduce waiting in-court. Development of methods to ensure that recipients of legal representation were indigent is necessary. It was recommended to identify and reduce legal counsel to only those proceedings where it is constitutionally required with the exception of child abuse and neglect and mental hygiene. Finally, the requirement that the judges mandate indigents pay for

Interestingly, though, West Virginia compares relatively well to other communities with regard to the funding of indigent defense. Indeed, while the “right to counsel” is a global concept<sup>138</sup> that can significantly vary among societies,<sup>139</sup> funding comparisons are nevertheless relevant to the discussion of best practices. To illustrate this concept, the table below provides a comparison among selected societies compiled from U.S. States and foreign nations.<sup>140</sup> As illustrated, West Virginia was at the top of the list with Texas coming near the end. Moreover, South Africa and Venezuela expend more resources for their programs than Texas by comparison. Thus, the use of GDP-PPP provides a common unit for measuring how these values rank among jurisdictions.

---

services. is problematic as this may well exhaust, or at least diminish, the resources of those needing legal representation. *Id.* at 65–66. In essence, even if the legal proceedings for the accused end favorably, the mandated repayments create a relationship of indentured servitude between the indigent and the State. See Shao et al., *Purchasing Power of Credit, Social Mobility, and Economic Mobility*, *supra* note 4, at 73.

<sup>138</sup> The ABA’s Principles have been embraced by the United Nations. See Lefstein, *supra* note 37, at 42.

<sup>139</sup> McKinney & Shao, *supra* note 132, at 119–20. In this paper, the authors presented a mathematic method for comparing indigent defense programs. Unlike traditional methods of economic analysis where trade (i.e., import and export) variables, negative externalities, and other such factors must be considered, these may be mostly discarded when considering legal work based on a few assumptions. First, indigent programs are intangible and knowledge-based and require specialized skill sets that are usually regulated by an entity (e.g., The West Virginia Bar). Second, indigent defense programs are contained within a jurisdiction, that is, these programs and neither exported nor imported. Although an argument may be made that sometimes it is necessary to make a change in venue, the granting of such change is infrequent; and, if granted, the end result is still under the same jurisdiction. Third, the value of the work product is insignificant to all but related parties – the defendant, the plaintiff, the counselors, and the judges. Simply put, it cannot be sold. Moreover, most of the consumption (i.e., the program expenditure) is limited to a geographical (or jurisdictional) area. Fourth, the accounting for taxes and trade fees associated with the importation and exportation of products and services is unnecessary as these programs have no interest in trade. *Id.* at 120. Finally, whatever resources are expended in such program are not necessarily recouped but function as a means of protecting individual property rights. Considering that a similar argument of funding recoupment can be made concerning national defense (as well as police services, fire services, and insurance policies), very few people argue for the complete dismantlement of the military. Consequently, societies value indigent defense differently. *Id.* at 125.

This brings the concept of *Gross Domestic Product Indexed Purchasing Power of Parity* (“GDP-PPP”) to help determine the value that society places upon indigent programs. (The prices of goods and services, as well as currency conversion, can be drastically different. Traditionally per capita formulas have been used for comparison among programs which, without adjusting for purchasing power, can skew results and interpretations of data. Thus, it is necessary for the conversion of data into common units prior to making interpretations and judgements about programs. The calculation for GDP-PPP is Total Indigent Criminal Defense Budget divided by Gross Domestic Product times 10,000 or ICD/GDP \* 10,000. *Id.* at 120–22.

<sup>140</sup> McKinney & Shao, *supra* note 132, at 124. Selection of Societies from Table 5: *Societies Ranked by GDP-PPP Expressed in Local Currencies*. In the original table, 41 societies were represented with Ohio being the median or statistical central point.

<b>Societies Ranked by GDP-PPP Expressed in Local Currencies</b>		
<b>Society</b>	<b>GDP-PPP</b>	<b>USD-Ohio</b>
<b>England &amp; Wales</b>	11.9726	\$42.74
<b>Netherlands</b>	6.3836	\$22.79
<b>West Virginia</b>	5.9385	\$21.20
<b>Honduras</b>	4.4241	\$15.79
<b>California</b>	3.9500	\$14.10
<b>Columbia</b>	3.3216	\$11.86
<b>South Africa</b>	2.8440	\$10.15
<b>Ohio</b>	2.4287	\$8.67
<b>Kentucky</b>	2.2736	\$8.12
<b>France</b>	1.6751	\$5.98
<b>Venezuela</b>	1.4384	\$5.13
<b>Texas</b>	1.4320	\$5.11
<b>Greece</b>	0.0794	\$0.28
<b>Bolivia</b>	0.0024	\$0.01

Bear in mind that the differences in valuations among societies in the above table are a direct result of their general concept of indigent defense.<sup>141</sup> Some societies use a holistic approach,<sup>142</sup> where both criminal and civil procedures are delivered to indigents, and thus program expenditures are higher. Additionally, capital offenses, such as death penalty cases, drive the need for additional expenditures. Furthermore, the number, type, and seriousness of crimes (i.e., felonies versus misdemeanors) facilitate the necessity for increased resources being *allocated* and *available* for indigent programs.<sup>143</sup> Although more than these variables assist

<sup>141</sup> Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 416 (2004). In many international debates concerning indigent defense, the United States is normally excluded due to its high imprisonment rate. Compared to most nations, the U.S. incarcerates five times as many individuals. Thus, the U.S. is on the extreme spectrum of any comparison.

<sup>142</sup> McKinney & Shao, *supra* note 8, at 146. Holistic programs (e.g., England, Wales, Canada, and the Netherlands) for indigent defense not only focus on providing legal representation for the accused, but also consider that it is important to treat the catalysts for criminal activities – lack of resources, education, and social morality. The premise is that by eliminating or reducing these risk factors, the rates of recidivism are also reduced and thereby the society invests in mitigating against future undesirable actions.

<sup>143</sup> The terms *allocated* and *available* hold considerable significance in indigent programs. A governing body, such as a legislature, can allocate as much funds to a program as desired. However, if funds are *not available* (e.g., an Executive Order reducing appropriations), then the allocation is restricted. And, when funds are restricted, program modifications must be made. In essence, the *allocation* serves as a budget setting the *maximum spending* plan whereas the *available* functions

in shaping the final organizational structure of the indigent defense program, those variables are considered micro-macro issues that must be addressed separately within their respective societies.<sup>144</sup> However, despite their differing roles of commitment, the goal of indigent defense programs is the same—to render legal services to individuals that are accused of undesirable actions that also lack adequate resources to afford such services.<sup>145</sup>

#### D. *The Restructuring of 2008–2010*

From 2008 to 2010, a great restructuring occurred with legal representation programs that PDS administered in West Virginia. On July 1, 2008, the Indigent Defense Commission was established, abuse and neglect claims were given priority,<sup>146</sup> and “[r]eimbursements after ninety days shall bear interest from the ninety-first day at the legal rate in effect for the calendar year in which payment is due.”<sup>147</sup>

As required by West Virginia Code section 29-21-3b-g, the Commission submitted their findings in its first report to the Legislature on January 15, 2009.<sup>148</sup> In this report, five recommendations were made and are summarized below:<sup>149</sup>

---

to control the funding through the issuance and making available the necessary resources (i.e., cash, contractual and cooperative services, and knowledge) to conduct and satisfy the program objectives, goals, and mission. To further clarify, in West Virginia, both governing bodies (i.e., Legislative and Executive) must work in tandem to achieve society’s expectations based upon the aggregate resources available to *all* programs. Thus, it is sometimes necessary to reduce available to one program while making access to resources in another program greater.

<sup>144</sup> The term “micro-macro” denotes an issue with attributes of both impacting a general study on a smaller scale but also these variables may impact the subgroups of that study on a larger scale. To use an example in this case, the number of capital cases that must be addressed within South Africa’s indigent defense program will drive up the need for resources significantly in South Africa. However, those South African capital cases have little or no financial impact for West Virginia indigent defense programs. In essence, South African capital cases are a macro-variable for South African society, but a micro-variable when comparing indigent defense programs as a group. *See generally* McKinney & Shao, *supra* note 8.

<sup>145</sup> *See* PUB. INTEREST LAW INITIATIVE ET AL., ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE: A SOURCE BOOK (2003), [https://www.pilnet.org/component/docman/doc\\_download/49-access-to-justice-in-central-and-eastern-europe-source-book.html](https://www.pilnet.org/component/docman/doc_download/49-access-to-justice-in-central-and-eastern-europe-source-book.html).

<sup>146</sup> W. VA. CODE ANN. § 29-21-3b (West 2020).

<sup>147</sup> *Id.* § 29-21-13a(o).

<sup>148</sup> INDIGENT DEF. COMM’N, PUB. DEF. SERS., REPORT TO THE LEGISLATURE (2009) [hereinafter IDC REPORT]. The IDC had roughly six months to review and submit this report.

<sup>149</sup> PDS, *2010 Annual Report*, *supra* note 74, at 5. Many of these recommendations are similar to the issues that the Legislative Auditor presented in multiple reports (see OLA, *Preliminary*).

Activations of Public Defender corporations in the 4th, 16th, 17th, and 26th Judicial Circuits (effective July 1, 2009 or sooner);<sup>150</sup>

Increase the hourly rate<sup>151</sup> of compensation to private appointed counsel (effective July 1, 2009 or sooner);<sup>152</sup>

The WV Supreme Court and State Bar advise the Legislature annually as to needed changes and improvements to the indigent defense system, including recommending hourly rates for private counsel;<sup>153</sup>

<sup>150</sup> IDC REPORT, *supra* note 148, at 3. The 4th being Wood and Wirt Counties with an office in Parkersburg; the 16th covers Marion County with a location in Fairmont; 17th is Monongalia County with an office in Morgantown; and the 26th being Lewis and Upshur Counties with an office in Buckhannon. Additionally, the IDC notes that the activation of Public Defender Corporations was recommended 10 years ago by the Legislative Audit and other individuals. *Id.* at 4. Todd Baucher, *Wood County Public Defender Could be Appointed Soon*, WTAP (Apr. 24, 2015, 6:48 PM) <https://www.wtap.com/home/headlines/Public-Defender-Office-Coming-To-Wood-County-288098921.html>. Blaine Myers is serving as the Chair of the Board for the Public Defender Corporation for the 4th judicial Circuit. *Id.*

<sup>151</sup> IDC REPORT, *supra* note 148, at 2 (recommending “\$75 for out of court and \$105 for in court work” (emphasis added)).

<sup>152</sup> Ralph E. McKinney, Jr., *Reimbursement Rate Calculations of Current Value (from 1990 to 2008)* (2008). This is also Appendix B of the IDC, *Report 2009*. Considering that appointed counsel rates had not changed since 1990 after *Jewell v. Maynard* 383 S.E.2d 536 (W. Va. 1989), the aim of this study that was subsequently integrated into the Indigent Defense Commission Report to the Legislature in 2009 was to provide a conservative estimate of the hourly rates of \$45 out-of-court and \$65 in-court in a more current form. *Id.* at 2. The conservative estimate was \$87.05 and \$126.22 respectfully. *Id.* at 11. The final estimate did not consider case complexity or case type nor did it consider geographic location, it simply considered that the economics of 2008 were different than 1990. *Id.* at 3. As such, three methods of calculating rates were undertaken. First, the annual inflation/deflation estimates of the *Consumer Price Index* were applied to the 1990 rates (*id.* at 4) which equated to \$73.45 and \$106.09. *Id.* at 5. Second, the appointed counsel were “comparable [to other similar] positions as detailed from the WV Division of Personnel” (*id.* at 6 (emphasis added)) which projected that the final average hourly estimate without any overhead was \$29.44 to \$68.47. *Id.* at 9. Third, the salaries of attorneys in prosecutors and legislative positions were examined. *Id.* at 10.

Knowing that members of the appointed counsel earned less than many of their peers and that some members (as noted in the prior section) may be motivated to engage in unethical billing practices and illegal activities, the strategic initiative was to increase the hourly rate and reduce the motivation to claim “phantom” hours. This seems counterintuitive as higher rates would likely increase the motive to engage in unethical practices. The increased rates would effectively reduce the disparity between appointed counsel and their peers which would re-establish the value that society places on their services. In addition to the rate increases, better metrics would be established to deter fraudulent behaviors. So the increase in rates was only part of the strategic initiative for changing the system.

<sup>153</sup> IDC REPORT, *supra* 148, at 8. Requiring the Supreme Court of Appeals of West Virginia and the West Virginia State Bar annually advocate rate changes is a more effective method of achieving changes. Although PDS has the primary mission in overseeing indigent defense programs, the hourly rates continued to stagnate at the 1990 levels. As such, new strategic plans

PDS should devise a system to alert judges to private counsel billings which appear to be consistently higher than average and local panels of attorneys should be defined;<sup>154</sup> and Indigent defense lawyers to be required to complete a minimum number of relevant CLE hours.<sup>155</sup>

“Of these recommendations, PDS has been able to implement the fourth item, i.e., report of private counsel billing. The remaining recommendations require action by the Legislature, the Supreme Court of Appeals, or the West Virginia State Bar.”<sup>156</sup> Not all members of the IDC agreed with the 2009 Report.<sup>157</sup> Bill Richardson properly notes that “the goal should not be to establish the cheapest system but the concern should focus on the quality of representation.”<sup>158</sup> Much of the previous studies and reports focus on the financial effectiveness of systems with limited investigations and examinations of the quality of legal representation being delivered. He further notes that there are differences amongst the judicial circuits that cannot be explained and as such require further investigation.<sup>159</sup>

---

were developed, and it was determined that PDS must seek a greater cooperation with the legal community in order to bring changes to the system and ultimately indigent defense.

<sup>154</sup> *Id.* at 9. It was noted that sometimes judges do not follow the statutory guidelines for appointing legal representation. Moreover, the local panel of attorneys has not been defined by statute and as such the IDC recommends that “persons residing in the county or Circuit” be added to the statutory language. *Id.*

<sup>155</sup> *Id.* at 2. Although this report suggests that “[t]he West Virginia Supreme Court of Appeals and the West Virginia State Bar should recommend the appropriate number of hours” (*id.* at 9), some discussions centered on establishing an additional hourly rate (e.g., \$10 more per hour) on the base rates for those attorneys completing this training. Consequently, the dual rates would likely complicate the processing of vouchers and issuance of payments. Moreover, the dual rates may impact appointment processes not necessarily for the good of the accused. It was these primary reasons, along with the express need to establish a coalition of advocates, in seeking a single rate. Furthermore, it would be difficult for PDS to implement mandatory Continuing Legal Education without the support of the two organizations, so it is essential that both work together in establishing the necessary continuing legal education requirements for indigent defense. *Id.* at 9–10.

<sup>156</sup> MCKINNEY, ANNUAL REPORT, *supra* note 104, at 25. PDS uses its website to produce reports that identify the “top billers” to all interested parties.

<sup>157</sup> IDC REPORT, *supra* note 148, at 338. Bill Richardson presented the Statement of Opposition to Indigent Defense Commission Report to address certain aspects of the 2009 Report which he disagreed. *Id.*

<sup>158</sup> *Id.* at 339.

<sup>159</sup> IDC REPORT, *supra* note 148, at 338. Richardson’s observations focus on the per capita disparities amongst the judicial circuits with respect to cases. *Id.* This is correct, but there are also income disparities and other economic factors not considered in per capita studies. These variables have already been defined. See McKinney & Shao, *supra* note 132. Furthermore, the IDC was in the process of addressing the quality of legal representation and subsequently issued Performance standards on May 12, 2010. Richardson was correct in the fact that limited studies on the quality of legal representation in West Virginia settings have been conducted.



To help focus on the mission of providing high quality legal representation by the West Virginia Public Defender Services, the Indigent Defense Commission established and adopted five core values at its meeting on February 22, 2009 applicable to both Public Defender Corporations and Private Panel Attorneys:

**Justice:** In the broad sense, should include a right resolution to every dispute; a fair result. Clearly includes procedural as well as substantive fairness. Implies at minimum a responsibility for adequate investigation; legal knowledge; funding for support services; and time to prepare so as to allow for constitutionally adequate representation.

**Accountability:** Implies responsibility to do the job right at a reasonable cost without sacrificing adequate representation; includes a duty to the client, to fellow workers, to the legal system and to the taxpayers.

**Quality:** A level of representation that may be difficult to articulate but is objective in some sense. Implies not just the best possible effort under the circumstances but rather a goal of genuinely adequate representation. May be subject to debate about strategy used but implies a level of competence and dedication that is measurable.

**Integrity:** A clear commitment to doing the right thing for the right reasons. Honesty, reliability, consistency, dedication to duty, a passion for doing the job to the best of one's ability. Should infuse the culture of every law office.

**Responsiveness/Efficiency:** A clear-headed sense of priorities and a dedication to reacting quickly with both sureness of purpose and adequacy of work. In dollars and sense, a commitment to providing the very best service for the most reasonable cost.<sup>160</sup>

After these core values were adopted, the Indigent Defense Commission sought to establish performance standards concerning the minimum expectations for legal representation of indigents.<sup>161</sup> It was anticipated that a qualitative

---

<sup>160</sup> IDC REPORT, *supra* note 148. This process took a couple of months to complete. The Commission was presented with numerous research materials, operational plans, and general discussions. To help the Commission, Phyllis H. Subin, Esq. of New Mexico was brought in to facilitate the meetings and assist with keeping the meetings focused on the Legislative objectives.

<sup>161</sup> These standards were largely based upon the American Bar Association, *Standards for Criminal Justice-Prosecution Function and Defense Function Third Edition* (1993). It was the Chief Defenders along with the Indigent Defense Commission and selected PDS staff that were responsible for the adopted West Virginia Performance Standards.

methodology would be developed to measure these standards. At this time, no formal metrics have been devised.

In the next section, a general overview of the evolution to legal representation is presented.

#### V. TENSIONS ARISING IN A MIXED SYSTEM: GIDEON'S (UN)BROKEN PROMISE?

Before *Gideon*, champions for the right to legal counsel were already making great strides in establishing effective delivery systems from California<sup>162</sup> to New York.<sup>163</sup> It was *Gideon's* case that represented so many previous injustices<sup>164</sup> that brought the concept of indigent defense to the front line. Thus, the right to counsel entails that legal representation be provided, but there are still many more issues to address—quality of legal representation being the most difficult to quantify in a simple numeric expression.<sup>165</sup> If one cannot make comparisons, one cannot justify existence.

Consider the evolution of indigent criminal defense programs.<sup>166</sup> During oppressive government regimes, these programs are at best virtually non-existent. When that society becomes dissatisfied with the current political and social environment, the society shifts towards valuing property rights,<sup>167</sup> the ability for individual advancement, and the ability to earn a living—basic property rights as society moves towards a free market economy. This movement triggers discussions and the protection and public funding of basic rights

<sup>162</sup> Benner, *supra* note 24, at 173.

<sup>163</sup> Reynolds, *supra* note 25, at 477.

<sup>164</sup> Nicola Sacco, Bartolomeo Vanzetti (Warner, *supra* note 27, at 266), Charles F. Stielow, and Alfred Schwitofsky (Goldman, *supra* note 28, at 131–132).

<sup>165</sup> It has been author McKinney's experience that leaders of governing bodies want to know how the program is performing in relationship to its mission, allocation of resources, and other similar programs. Rightly so. With taxpayer funds, a fiduciary relationship of trust must be maintained amongst the involved parties. A system of checks and balances to ensure that resources are directed at the programs society needs, expects, and requires. As a result, indigent defense competes for the same resources as Highways, Education, Senior Citizens, Medicaid, and many other desperately needed programs. As such, administrators of indigent defense programs have always struggled to measure a complexity of variables. Most studies have used per capita figures as the best available measurements. As noted earlier, a more common unit known as GDP-PPP can be used in a general macro comparison. See McKinney & Shao, *supra* note 132. Furthermore, a more comprehensive method of analysis is needed to consider the smaller segments (i.e., the 31 Judicial Circuits) of West Virginia. Unfortunately, this methodology is beyond the scope of this paper.

<sup>166</sup> Ralph E. McKinney, Jr., *A Global Perspective on Funding the Right to Counsel: An Overview of Criminal Defense Programmes* 30 (June 21, 2012).

<sup>167</sup> This extends to due process rights including liberty and freedom from unlawful imprisonment and, in some instances, death.

including protection against wrongful imprisonment.<sup>168</sup> These early indigent defense programs start out with volunteers and move towards private and contracted attorneys. As expenses increase, programs are redefined to identify methods of *cost avoidance*<sup>169</sup> and the move towards salaried attorneys specializing in criminal law takes place.<sup>170</sup> In fact, a mixture of salaried and private attorneys, as in West Virginia, can form a comprehensive delivery system that enhance quality.<sup>171</sup>

However, sometimes systems within a society de-evolve, deregulate, or become non-existent.<sup>172</sup> In some cases, a society may shift its values and seek greater rewards and invest in other programs such as education, health care, crime prevention, infrastructure and so forth. With respect to indigent defense, limitations (e.g., eligibility, funding, and quality of legal representation) are introduced to deter use.<sup>173</sup> Consider this:

Funding decisions for the indigent defense system, moreover, have been left in the hands of local officials who, chafing under an unfunded mandated imposed by the federal Constitution, understandably desire to spend only the bare minimum necessary to keep the system functioning. Most defendants plead guilty because of the pressures created by a system of plea bargaining in which no penalty is imposed upon a prosecutor who overcharges to increase the incentive to plead. Thus, only enough funding to the “presumed guilty” is deemed necessary.<sup>174</sup>

One observer, David E. Patton, notes that procedural differences in the Federal criminal system since 1963 have eroded many of the *Gideon*-era

<sup>168</sup> McKinney, *supra* note 166, at 31.

<sup>169</sup> The term cost avoidance is, in author McKinney’s opinion, a better concept than cost savings. Savings implies that after expenditures are taken into account, some resources remain. Any remaining resources may then either be re-appropriated to the program or reallocated for consumption in other programs. With cost avoidance, the expectation and strategy is towards cost minimization through the efficient delivery of programs that do not jeopardize the quality of legal services. With cost avoidance, no resources truly remain for use in other programs. Essentially, cost avoidance considers the opportunity cost in delivering similar services and makes the selection to use the least amount of resources in acquiring the greatest benefit. But unlike basic procurement and contract law, you cannot unilaterally cancel someone’s Constitutional Rights.

<sup>170</sup> McKinney, *supra* note 166, at 31.

<sup>171</sup> *Id.* Author McKinney believes that the existence of the appointed counsel and Public Defender Corporation systems in West Virginia provide additional value to an indigent defense program. Like the United States Senate and House of Representatives, these systems must work in conjunction for changes in organizational structure and procedures to occur.

<sup>172</sup> *Id.* at 32.

<sup>173</sup> *Id.*

<sup>174</sup> Benner, *supra* note 24, at 207.

assumptions—the emphasis now is less on trial advocacy and more on plea bargaining.<sup>175</sup> In Patton’s words,

The daily injustices are staggering, the choices absurd: plead guilty at the first appearance and get out of jail, or contest your guilt and sit in jail for months awaiting trial; post bail or get a lawyer, but not both; take the deal or roll the dice as one of your public defender’s two hundred to three hundred clients.<sup>176</sup>

Simply put, the convergence of administrative delays, large caseloads, and lack of resources<sup>177</sup> have created a system of inefficiency and coercion, with a resultant denial of constitutional rights. As Patterson describes the Federal system, Schlesinger describes similar occurrences within State systems.

[T]he extent of the state’s involvement in the public defender system helps establish state action. The state prescribes their selection and appointments; and determines the attributes of indigency. Through these activities, the State exercises substantial influence over the size of a public defender caseload. Hence, the State controls the amount of time a public defender can devote to any particular case, and thus directly affects the quality of an indigent’s representation. Therefore, the conduct of public defenders constitutes state action because the State has made itself a party to the representation and has elected to place its power, property, and prestige behind the public defender’s action.<sup>178</sup>

According to these accounts, Patton and Schlesinger articulate that both the Federal and State systems have fallen short in achieving Gideon’s promise. “Other professions and industries—from engineering to aviation, medicine, and

<sup>175</sup> David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 *YALE L.J.* 2578, 2581 (2013).

<sup>176</sup> *Id.* at 2602.

<sup>177</sup> John Pollock & Michael S. Greco, *It’s Not Triage If the Patient Bleeds Out*, 161 *U. PA. L. REV. PENNUMBRA* 40 (2012). Simply adding more resources and creating more programs needing resources does not solve the issues at hand with indigent defense funding. *Id.* at 48. Resources must be used in efficient ways that make meaningful contributions to cases. Not every case needs an expert witness or an investigator. In cases of same-crime recidivism, experts and investigators may prove detrimental to the defendant. Furthermore, not all cases need legal representation. *Id.* at 50–51. In West Virginia, only eligible proceedings (e.g., jailable offenses) are provided counsel in certain instances.

<sup>178</sup> Schlesinger, *supra* note 30, at 1300. This is part of Schlesinger’s analysis between *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Polk County v. Dodson*, 454 U.S. 312 (1981). Although this was done some 33 years ago, his statement describes the current West Virginia Public Defender System indigent program. Overall, PDS provides eligibility guidelines for indigence determination. For the Public Defender Corporations, PDS approves an operational guideline which includes the staff numbers and types of positions.

car manufacturing—appear to be far ahead of the legal profession in trying to design systems that do not depend upon the characteristics of the individual professional to reach a reliable outcome.<sup>179</sup>

To improve and enhance indigent representation, it is suggested that efforts be focused in three areas.<sup>180</sup> First, the development and implementation of quality guidelines and checklists can help standardize expectations and practices.<sup>181</sup> Second, enhanced discovery in criminal proceedings.<sup>182</sup> Third, reconfiguring the delivery of legal defense to incorporate more non-lawyer professions (e.g., investigators, paralegals, social workers) while requiring specialization for criminal defense attorneys.<sup>183</sup> While three recommendations have been made, the system in which legal representation is delivered also needs attention.

Anderson and Heaton conducted an extensive study consisting of 2,459 defendants charged with murder in the jurisdiction of Philadelphia, Pennsylvania where a mixed system operated.<sup>184</sup> The study suggests that Public Defender systems are more favorable to defendants than appointed counsel systems.<sup>185</sup> In this study, the evidence suggests that if all defendants were assigned legal

<sup>179</sup> James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 209 (2013). This statement highlights the fact that indigent defense systems rely on the individual attorney being qualified and successful and the need to enact risk minimization against human error. Inasmuch to say that teamwork is a better method to deploy against erroneous judgements. *Id.* at 209. Considering that *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requires that the attorney's effectiveness be brought into question, the lack of progressively modifying the legal system with safeguards to ensure that the accused has adequate processes that improve legal representation is unsettling. *Id.* at 210.

<sup>180</sup> *Id.* at 209.

<sup>181</sup> *Id.* at 210. In fact, the West Virginia Indigent Defense Commission, the Chief Defenders of the 17 Public Defender Corporations, and PDS completed and adopted those standards on May 12, 2010. Unfortunately, since 2013, PDS has done little to further disseminate and support a wider acceptance of those Performance Standards. *Id.*

<sup>182</sup> *Id.* at 211. It is suggested that discovery be similar to civil proceedings where evidence and testimony are examined more extensively in pretrial setting and with less emphasis “on trial skills and cross-examination on the fly.” *Id.* (emphasis added). This would decrease uncertainty in the reliance of information and would likely result in quicker dispositions of cases from plea agreements. *Id.*

<sup>183</sup> *Id.* Essentially shifting the paradigm in which legal representation in criminal proceedings would take a greater team focus. *Id.* Integrating non-lawyers would allow for greater specialization among team members and thus place less emphasis on the “one-man band.” In fact, the Public Defender Corporations in West Virginia do operate more in a team setting. With respect to specialized training, the CLRC is responsible for providing such services to interested parties. Consequently, specialized training is not required in indigent representation although this was the fifth recommendation of the Indigent Defense Commission in their 2009 Report to the Legislature. Movement towards mandated requirements stalled in 2013.

<sup>184</sup> *Id.* at 159.

<sup>185</sup> *Id.* at 212.

representation from a defender association and not appointed counsel, defendants would in the aggregate see “a decrease of 6,400 years” while the State would avoid “prison costs for these crimes by over \$200 million.”<sup>186</sup> Furthermore, “the causes of this disparity are incentive structures created by the appointment system and a resulting failure of appointed counsel to prepare cases as thoroughly as the public defender.”<sup>187</sup>

In effect, resources that could be utilized for fulfilling Gideon’s promise are expended on the inefficiencies in providing legal representation, appeals resulting from the ineffectiveness of counsel,<sup>188</sup> and consistent efforts to justify constitutionally mandated protections.

## VI. CONCLUDING REMARKS

In West Virginia, a delivery system similar to Philadelphia’s exists with the Public Defender Corporations and the appointed counsel. These systems are intended to complement one another, with the Public Defender Corporations being the preference for appointments and the appointed counsel serving where conflict of interests arise and in areas in which no Public Defender Corporation is activated. There have been no shortage of studies and arguments of which system provides better representation and saves the State money. Some of these discussions lack the rigor of methodology, the robustness of evidence, and the epistemology of the subject material. While the discussions concerning indigent legal representation are welcome, the blatant disregard for the accused, the Constitution, and society is not.

With any publicly funded program, concerns arise over scarce resources. Scarce resources mean that the allocation of resources to one program means another program is not funded. Scarcity of resources mandates that we act in a fiducially responsible manner that considers the stakeholders—the public as a whole and not the special interest groups. Sometimes, you just have to *Do The Right Thing*.<sup>189</sup>

There is a simple solution to the funding crisis that seems to occur each year during the West Virginia Legislative session—“how much supplemental

---

<sup>186</sup> *Id.* at 212.

<sup>187</sup> *Id.* at 213.

<sup>188</sup> Emily Rose, Note, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279, 290 (2014). Rose suggests that the Sixth Amendment *right to speedy trial* is a better basis for challenging underfunding in indigent defense. *Id.* at 279. Moreover, the speedy trial can reduce caseloads for attorneys providing indigent defense services and create a greater need for prosecutors to resolve cases. *Id.* at 314. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993). Klein argues for an increased use of asserting Sixth Amendment rights instead of using the ineffective assistance counsel argument. *Id.* at 409. It is not the single attorney but the system itself that needs correcting. *Id.*

<sup>189</sup> DO THE RIGHT THING (Universal Pictures 1989).

funding does PDS need?” With a decentralized system where judicial circuits appoint legal counsel in which the appointed counsel operate autonomously and have limited to no incentive to consistently report their financial needs to PDS, how can PDS reasonably anticipate the claims? At best, appointed counsel can report on an annual basis their accrued receivables.<sup>190</sup>

Public Defender Corporations submit operational plans annually—detailing personnel compensation and anticipated expenditures. Public Defender Corporations also submit monthly reports concerning expenditures and the need for resources. There are no vouchers to process or review by either PDS or the court.<sup>191</sup> Public Defender Corporations can operate under a team approach for the accused. Also, Public Defender Corporations do not necessarily have to consider political retaliation for advocacy in court.<sup>192</sup> Furthermore, the presence of a Public Defender Corporation in a community establishes and reinforces the societal expectation of protecting constitutional rights.<sup>193</sup>

When asked which system (i.e., a Public Defender or appointed counsel) provides better legal representation, efficient use of resources, and ease of management, it is by far a Public Defender system. Further, the authors believe that an appointed counsel system operating alongside a Public Defender system

<sup>190</sup> Each year around June, PDS issues a request for appointed counsel to report their Accrued Liability to the Agency. The response to this request is not great.

<sup>191</sup> Salaried Public Defenders are not compensated for additional hours and as such have no real financial motivation to intentionally report erroneous hours. From my experience, hours reported by attorneys of Public Defenders Corporations are usually underreported since their primary focus is on indigent defense and not split between the clients’ defense and making claims against the State.

<sup>192</sup> See PATRICIA PURITZ & ROBIN WALKER STERLING, NAT’L JUV. DEF. CTR., WEST VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY COURT 5 (2010), [https://njdc.info/wp-content/uploads/2013/11/West\\_Virginia\\_Assessment-FINAL.pdf](https://njdc.info/wp-content/uploads/2013/11/West_Virginia_Assessment-FINAL.pdf) (“In each county visited, there was a clear emphasis on the importance of civility, inside and outside the courtroom, that in practice seemed to translate into less diligent legal advocacy by defense attorneys. In some of the counties that operate on a contract system, other courtroom actors have the power to appoint attorneys to cases; defense counsel in those counties expressed an unwritten rule that they should be careful not to cultivate a reputation as ‘too adversarial or too aggressive,’ and that often providing even minimal or basic legal assistance, such as filing motions or taking cases to trial, was considered adversarial or aggressive.”).

<sup>193</sup> Part of the strategic initiative in protecting constitutional rights is the stability in maintaining and ensuring a perpetual entity such as a Public Defender Corporation. This includes several components. The *longevity of employment* seeks to maintain knowledge and skills of qualified personnel whose skillsets expedite processes efficiently. The *ownership of property* moves the organization from being seen as an *outside stakeholder* to being seen as a *community shareholder* with a vested interest in each client’s case. Furthermore, *moral management*—valuing employees as people—is essential for maintaining good rapport and building strong relationships with interested parties (especially within local communities). Immoral managers, who view employees as nothing more than production units, and amoral managers, who treat employees as well as law requires, can cause damage to any system. If there is a “churn and burn” philosophy, then conflict and issues are sure to follow.

adds significant value by taking conflict of interest cases, overflow cases, and general assistance to the program. With all organizations, sometimes it is necessary to have temporary help and outsource some functions; but it is never necessary to outsource all operations. The basic concept is “justice for all.”<sup>194</sup>

---

<sup>194</sup> METALLICA, ...*And Justice for All*, on ...AND JUSTICE FOR ALL (Elektra Records 1988).



