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# Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants

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**RETHINKING INDIGENT DEFENSE: PROMOTING  
EFFECTIVE REPRESENTATION THROUGH CONSUMER  
SOVEREIGNTY AND FREEDOM OF CHOICE FOR ALL  
CRIMINAL DEFENDANTS**

by Stephen J. Schulhofer\* and David D. Friedman\*\*

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Most citizens would consider it shockingly unethical for an attorney representing one side in a lawsuit to be selected or paid, even indirectly, by the opposing party.<sup>1</sup> Yet such principles are violated routinely in this country on a massive scale. In criminal cases, the great majority of defense attorneys are paid directly or indirectly by the prosecuting party, the state.

The reason that financial conflicts of interest are problematic for the client is obvious; the decisions of the attorney are bound to be affected by the desires of his actual employer. That is true for public defenders and assigned counsel in criminal cases, just as it is for private attorneys in civil cases. While the lawyers, and those who assign them to cases—judges, other government officials, or private firms contracting with government—are no doubt interested in preventing conviction of the innocent, they are less strongly committed to that objective than innocent defendants are. And various officials are likely to have other objectives, such as reducing court backlog, that conflict with the goal of acquitting the innocent. They also may have little commitment to one of the criminal defendant's most important goals—minimizing punishment once guilt has been ascertained.

One reason that conflicts of interest persist in indigent defense is also obvious; if attorneys for the indigent are to be paid at all, they must be paid by someone other than their clients. The resulting division of loyalties is clearly undesirable, but what is the alternative? In this Article we suggest that realistic alternatives exist and explore ways in which they might be implemented.

Our proposals for restructuring indigent defense are not intended simply as a theoretical response to a theoretical problem. Criminal defense systems seem to be in a state of perpetual crisis.<sup>2</sup> The grave inadequacy of existing systems for serving the indigent is widely acknowledged and widely discussed.<sup>3</sup> We offer far-reaching suggestions for change, not just because they are analytically interesting, but because the results of existing indigent

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1. Yet such a situation does not necessarily violate the relevant rules of professional ethics. Rule 1.8(f) of the Model Rules of Professional Conduct (1992) provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Similarly, Rule 1.7(b) provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless . . . the lawyer reasonably believes the representation will not be adversely affected . . ." The comment to Rule 1.7(b) states that "[a] lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." This approach simply ducks the question of when being paid by someone else compromises the duty of loyalty.

2. See *infra* notes 33-34 and accompanying text (discussing crisis in indigent defense).

3. See *infra* text accompanying notes 24-72 (discussing inadequacy of existing indigent defense systems).

defense methods are often abysmal and because the need for effective reform is acute.

In focusing on conflicts of interest as a critical source of present difficulties, our diagnosis and our proposed solutions differ in three fundamental respects from those which are common to the existing literature on reform of indigent defense. First, though we are aware of the importance of resource levels,<sup>4</sup> and will comment on their relationship to our analysis, our approach largely takes as given the resources allocated by prior political decision to indigent defense. We seek to show that at *any* level of resources, reorganization of an indigent defense system can produce gains for both the criminal defendant and society as a whole. Second, we place little store in reliance on case-by-case litigation of ineffective assistance claims or in efforts to strengthen doctrinal formulations of the Sixth Amendment standard. Though doctrinal change could probably improve the quality of indigent defense services to some extent,<sup>5</sup> claims of ineffective assistance on the record of a particular case can have little influence on the overall operations of an indigent defense system. And many areas of indigent defense practice will remain impervious to any conceivable modifications of the constitutional test for effective assistance.<sup>6</sup>

A third difference is the most basic. Contrary to the prevalent approach in the literature, we do not take as our paradigm a large defender organization providing the lion's share of indigent defense services for a city or county,<sup>7</sup> and we do not focus on efforts (desirable though they may be) to write charters that attempt to guarantee such organizations legal independence from the government that funds them.<sup>8</sup> Efforts to promote formal, legal independence for defenders have recently become the subject of acute controversy in the federal courts. An ad hoc committee, appointed by the

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4. See, e.g., Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 55 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*] (discussing low compensation ceilings); Stephen J. Schulhofer, *Access to Justice for the American Underclass*, World & I, June 1991, at 463, 470-73 (discussing systems that provide little or no compensation to defense attorneys).

5. See, e.g., David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) (discussing inadequacy of Sixth Amendment Standard); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986) [hereinafter Goodpaster, *Adversary System*] (discussing implications of new constitutional effective assistance of counsel standard).

6. See Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE, 137 (1986) (practical constraints will govern defense attorney performance, regardless of applicable legal tests for ineffective assistance).

7. See, e.g., ROBERT L. SPANGENBERG & PATRICIA A. SMITH, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 11 (American Bar Ass'n, 1986) [hereinafter SPANGENBERG & SMITH] (referring to view that full-time defender organization is "the preferred method of supplying legal services").

8. See, e.g., AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, §§ 1.3, 3.1 (2d ed. 1980) (noting indigent defense plans should be governed by independent boards of trustees to keep them free from political influence and excessive judicial supervision).

Chief Justice to review federal defenders services,<sup>9</sup> has recommended creation of a Center for Defender Services independent of the federal judiciary.<sup>10</sup> However, the Judicial Conference of the United States and most federal defenders oppose that concept on the ground that it would leave defender budgets even more vulnerable than when, as now, they remain under the administrative aegis of the Judicial Branch.<sup>11</sup> We differ from both sides in this debate because we see budgetary vulnerability and implicit conflicts of interest as inherent in the large defender model, whatever its legal and administrative status. Our alternative paradigm is that of a free market for defense services, one that would, so far as possible, function in the same way that the existing market functions for affluent defendants able to retain their own counsel. Rather than stressing efforts to strengthen the formal independence—and monopoly position—of established Public Defender agencies, we seek, in a word, to “privatize” the delivery of indigent defense services.

Compared to other public functions such as education or the military, indigent defense remains a tiny sector of the economy.<sup>12</sup> Yet few would consider it unimportant. The significance of effective criminal defense for safeguarding basic liberties and protecting the innocent needs no elaboration.<sup>13</sup> We will not speculate here about why conservatives and libertarians who have actively promoted deregulation and privatization as means to restrain government power and enhance consumer welfare in other sectors of the economy have not heretofore sought similar reforms for the indigent defendant. Nor will we suggest that those who oppose privatization in other areas, such as education, logically must adopt the same position with respect to indigent defense. The difficulties of privatization in each area are distinct,

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9. The Judicial Improvements Act of 1990, 104 Stat. 5089, § 318, required the Judicial Conference of the United States to conduct a comprehensive review of the federal defender program. In August 1991, Chief Justice Rehnquist appointed an ad hoc Committee to Review the Criminal Justice Act, to undertake the study required by Congress. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, INTERIM REPORT (July 28, 1992), *reprinted in* 51 CRIM. L. REP. 2335, 2337 (Aug. 19, 1992) [hereinafter INTERIM REPORT].

10. REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (Jan. 29, 1993), *reprinted in* 52 CRIM. L. REP. 2265, 2304 (Mar. 10, 1993).

11. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE FEDERAL DEFENDER PROGRAM, March 1993, *reprinted in* 53 CRIM. L. REP. 2003, 2010 (Apr. 14, 1993).

12. Public expenditures for defense of the indigent totalled only \$991 million in 1986. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL DEFENSE SYSTEMS, A NATIONAL SURVEY 4 (Aug. 1984) [hereinafter CRIMINAL DEFENSE SYSTEMS].

13. For discussion, see Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1105 (1984) [hereinafter Schulhofer, *Plea Bargaining*] (discussing the importance of a vigorous criminal defense to the American scheme of limited government); U.S. ATTORNEY GENERAL'S COMM., POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 11 (1963) (“[T]he loss in vitality of the adversary system. . . significantly endangers the basic interests of a free community.”); see also *infra* text accompanying notes 138-40 (discussing importance of vigorous adversary system).

and potential gains are not always comparable. We propose to address on their own terms the organizational problems of indigent defense and to suggest a fresh approach to understanding and correcting them.

Part I of the Article analyzes the structure of the attorney-client relationship and identifies the problems that contractual or institutional arrangements must seek to minimize. Part II describes existing methods for the delivery of indigent defense services and assesses their ability to address these problems. Part III develops alternatives to existing arrangements. We consider three groups of approaches: insurance models, deregulation models and voucher models. We conclude that insurance models, though theoretically revealing, are impractical. Deregulation models offer an immediate, easily implemented but partial solution. The more ambitious voucher models, adapted to local conditions in various jurisdictions, provide a practical and effective cure for many of the major ills of indigent defense organization, to the ultimate benefit of both defendants and the public at large.

#### I. GOALS AND PROBLEMS IN THE ATTORNEY-CLIENT RELATIONSHIP

Criminal defendants, we may assume, are ordinarily interested in winning acquittal or, if that fails, the lowest possible sentence. If they must support their own defenses, they will also prefer to achieve these goals at the lowest possible cost. Defendants facing substantial prison terms will spend large sums to produce even small increases in the chance of acquittal, but at some point diminishing returns presumably prompt most defendants to economize on the expenditure of their own or their family's resources. Conversely, defendants of moderate means may run out of funds while a potentially productive defense effort remains unfinished; they may regret the inadequacy of their available savings.

Criminal lawyers, whether assigned to indigent defendants or retained by affluent ones, must make hard choices—including decisions about how much work to do (whether to investigate factual leads, research legal issues and file particular motions) and about what advice to render in matters of judgment (whether to recommend accepting a proposed settlement, holding out for a better offer, or going to trial in hopes of an acquittal). For all of these decisions, the lawyer's personal interest may diverge from that of her client.<sup>14</sup> Thus, under the best of circumstances, the relationship between defendant and counsel involves serious agency problems. In the case of retained counsel, these problems are mitigated by the fact that the lawyer

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14. See Schulhofer, *Criminal Justice Discretion*, *supra* note 4, at 53-60 (discussing how compensation arrangements for lawyers can lead to conflict with clients); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179 (1975) (asserting that criminal justice system's reliance on guilty-plea puts defense lawyers in conflict with their clients).

must attract and keep clients, and will do so by creating and maintaining a reputation for serving the clients' interests even when they conflict with his own. The indigent defendant has no such protection. His counsel is chosen not by him but by the judge, the public defender's office, or some private organization which contracts with the government to provide attorneys for the indigent. If the attorney wishes future cases, she must indeed maintain her reputation, but only with those who provide her with business, not with potential defendants themselves.

The attorney-client relationship thus poses three sorts of problems—those involving incentives for the attorney to act in her client's interest (incentive problems), the need for information about the quality and loyalty of alternative providers of defense services (information problems), and protection against the risk of unanticipated need for criminal defense services (insurance problems).

#### *A. Incentive Problems*

Incentive problems are two-sided. If the lawyer's fee is based on an hourly rate set at a figure that is low, relative to the lawyer's other opportunities, or if total resources available for the case are too meager, attorneys may forego useful investigations and may avoid trial even when there are good chances for acquittal. If hourly fees are too generous and if available resources are unlimited, attorneys may pursue unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client's interest.<sup>15</sup>

The first problem is not confined exclusively to the indigent. Middle-class or even affluent clients often lack resources sufficient to assure their attorneys a compensatory fee if a fully litigated trial turns out to be the defendant's best option. Conversely, the second problem is not experienced exclusively by the wealthy. Attorneys for the indigent also may do unnecessary work and run up unjustifiably high fees if their opportunity costs are low and if state support is not effectively restricted.<sup>16</sup> Here, optimal behavior is distorted by a conflict of interest between the defendant and his lawyer on the one hand,

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15. Improper action in such situations, whether by prosecutors or defense counsel, need not be the result of conscious misfeasance. Strong financial rewards or penalties may subconsciously color the attorney's judgment on debatable questions of trial tactics or negotiating strategy.

16. See Mark Hansen, *Indigent Defense Fee Abuses Found*, A.B.A. J., Aug. 1992, at 29 (attributing abuses in Miami's court-appointed indigent defense system to the absence of incentives for lawyers to limit their fees). The parallel problem on the prosecution side is normally constrained, at least in most cases, by the caseload pressure in the office. However, special prosecutors appointed to pursue a single investigation may pose a comparable problem of inadequate incentives to contain costs. Cf. *Morrison v. Olsen*, 487 U.S. 654, 731-33 (1988) (Scalia, J., dissenting) (suggesting that the great discretion given to an independent counsel makes him more likely to abuse his position in a politically partisan manner).

and the taxpayers who pay the bill on the other. As in any situation in which the choices of a buyer and seller are supported by a third-party payor with imperfect monitoring capabilities, expenditure is likely to skyrocket. Health care is the classic case in point.

A further complexity, in the case of indigent defense, is that high fees and imperfect third-party monitoring generate simultaneous conflicts in three directions. When the attorney must decide whether to pursue a marginal or worthless investigative effort, the client is largely unaffected, and the conflict of interest is between the attorney and the state. But when the decision concerns whether to recommend rejection of a plea offer, the attorney's personal interest in gaining lucrative fees by going to trial may clash with those of his client, who wants to avoid a harsh post-trial sentence. At the same time, the client's interests in minimizing the expected sentence also diverge from those of the state, which may want to minimize the expense of the representation, subject only to the constraints of not deliberately convicting the innocent or affording constitutionally ineffective assistance.

Contractual and institutional arrangements are necessary to deal with these problems of distorted incentives and conflicting interests.

### *B. Information Problems*

In order for anyone—judge, state government, or defendant—to choose the best provider of defense services, he must have information on what will be provided. This is a particularly serious problem for the defendant, since he may have had little previous experience with the criminal justice system. The poor may be especially disadvantaged in this regard, since they generally have less access to lawyers and other sources of information about professional competence. Yet the indigent defendant is more likely than a middle class defendant to have faced charges before or to know someone who has.<sup>17</sup> And the professionals with whom a middle class defendant has contact may have little accurate information about the criminal defense bar. Indigent defendants and the more affluent face different but perhaps equally serious barriers to informed choice.

The information problem is less serious if the attorney is chosen by a judge, by a public defender allocating cases to lawyers under him or by a state agency contracting with an independent provider of defense services. In each of these cases the decision is made by someone who has close contact with the criminal justice system and an opportunity to observe the quality of service rendered by alternative providers. Yet the incentive and information prob-

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17. Though indigents probably represent no more than 10-20% of the population, they account for 80% of those charged in felony cases. See Andy Court, *Is There a Crisis?*, AM. LAW., Jan./Feb. 1993, 46.



lems are in tension. The defendant has the incentive to choose a vigorous, effective advocate but may lack the information to do so. A public official who chooses for the defendant is likely to have better information but a weaker incentive to make the best choice. Indeed, as we have seen, the official, appraising an attorney's ability from the standpoint of the court system, has incentives to value cooperativeness, disinclination to work long hours, and other qualities that might not win favor with defendants themselves. Providers may end up being selected according to how well they serve the court, not how well they serve defendants.

### C. *Insurance Problems*

Potential criminal defendants—which is to say, all of us—face the risk of having to incur the very high cost of an effective criminal defense. Being accused of crime is not wholly dissimilar to catching a potentially incapacitating or fatal disease. Attempts to combat the problem can be enormously expensive and, in the end, may or may not prove successful. A large share of personal and family resources may be consumed in the effort. Not surprisingly, health insurance to spread the financial risks of catastrophic disease is widely available through the market. Yet insurance against the financial risks of becoming a criminal defendant is not.<sup>18</sup> One function of a public defender system is to provide a substitute for the nonexistent insurance. Public funds are available only to the “indigent.” But middle class or even wealthy individuals can easily be rendered indigent by the costs of defending against a serious criminal charge. When the affluent defendant runs out of funds, he can qualify for appointed counsel, either to complete pretrial and trial efforts or to pursue an appeal. The economic effect is comparable to that of an insurance policy with a very high deductible.

In considering how different institutions perform the insurance function, we must distinguish between two sorts of uncertainty:

1. Uncertainty as to whether someone will be arrested and on what charge.
2. Uncertainty as to how complex the case will be.

The second sort of uncertainty requires further explanation. By a complex case, we mean a case in which additional expenditures on defense continue to provide substantial benefits to the defendant up to a high level of expenditure. A simple case is one in which additional expenditures above a fairly low level produce at most small benefits for the defendant. Simple cases include

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18. The principal exception of which we are aware is the availability of limited reimbursement for the cost of defense against criminal traffic offenses, as part of the benefits of American Automobile Association membership. *See infra* note 86.

both those in which the prosecution's case is so weak that defense expenditures are almost unnecessary,<sup>19</sup> and those in which it is so strong that defense expenditures are almost useless.

We find it useful to distinguish between two sorts of uncertainty regarding the complexity of the case. They are:

- 2a. Uncertainty that can be resolved before the attorney is chosen.
- 2b. Uncertainty that can be resolved only after the attorney is chosen.

The various kinds of uncertainty affect the relative advantages and incentive problems of different kinds of pay-outs that an insurance program might afford. Three basic pay-out methods may be distinguished: lump-sum payments, variable (fee-for-service) payments and in-kind payments.

In the lump-sum payment approach, the insurance policy pays a fixed amount or, more commonly, one of several fixed pay-outs, depending on which of several risks materializes. Lump-sum payments are common in disability insurance and certain kinds of supplemental health insurance (coverage for school children, for example). The lump-sum system is also common in indigent defense; as we shall see,<sup>20</sup> many jurisdictions pay appointed counsel a flat fee per case, with different amounts often specified for misdemeanor, felony and capital cases.

Variable (fee-for-service) payouts are probably the most common form of health-insurance coverage, and this system is also used in indigent defense; some jurisdictions compensate appointed counsel on an hourly basis for all reasonable effort both in and out of court. Fee-for-service pay-outs also exist in some commercial policies for reimbursing reasonably necessary counsel fees incurred in defending against civil claims. This form of coverage appears to be uncommon in civil liability coverage, however.

In-kind pay-outs are the predominant form of coverage in health insurance provided by the Veteran's Administration and Health Maintenance Organizations (HMO's) and in pre-paid legal service plans available through unions or employers.<sup>21</sup> In commercial insurance against civil liability, the insurer typically undertakes to defend against any covered claim, using its in-house legal staff or selecting outside counsel at its sole expense. In some areas of

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19. See Schulhofer, *Plea Bargaining*, *supra* note 13, at 1080 (noting that in a sample of felony bench trials, defendants won acquittal in 33% of cases in which defense counsel made no effort to cross-examine prosecution witnesses and offered no witnesses in defense).

20. See *infra* text accompanying notes 62-63, 67-69 (discussing lump-sum reimbursement systems).

21. Some prepaid legal services programs use an "open panel" plan, in which members select their own attorneys and obtain reimbursement on a fee-for-service basis, often subject to some cap on hourly rates, hours expended or both. Far more common, however, is the "closed panel" plan, in which members must use attorneys who have been retained or employed in advance by the plan. Thomas J. Hall, Comment, *Prepaid Legal Services: Obstacles Hampering Its Growth and Development*, 47 *FORDHAM L. REV.* 841, 851-57 (1979).

malpractice or products liability insurance, the value of defense services provided in-kind is often greater than any indemnification for damages. The in-kind payment system is also the dominant form of criminal defense "insurance" in jurisdictions that rely on a public defender.

Variable (fee-for-service) pay-outs afford the most complete coverage for the insured, but present large incentive problems. The insured and the service provider have only weak inducements to control costs, and monitoring by the insurer may not be fully effective, as escalating health-care costs have made clear. Lump-sum payments avoid the monitoring problem for the insurer (at the cost of possible overpayment on some claims) but leave the beneficiary self-insured for the risk that providers will be unwilling to take on his case because they readily identify it as an exceptionally complex one that cannot be treated for the lump-sum fee. The problem is different when a complex case cannot be identified as such before a service provider accepts it. In that instance the lump-sum may be adequate to induce a doctor or lawyer to commit to providing the necessary services. The risk of unforeseen complexity then shifts to the service provider, but because the lump-sum fee affects his incentives, the monitoring problem is transformed. Surveillance, directly or through reputation, is no longer necessary to prevent excessive provider services but is now required to assure that services are sufficient, and the responsibility for monitoring shifts from the insurer to the insured.

In-kind pay-outs also solve the monitoring problem for the insurer and, unlike lump-sum payments, they protect the insured against the risk of complexity that a service provider could detect at the outset. Their disadvantage is the same as that which the insured faces under a lump-sum payment when complexity is initially disguised. The service provider bears the risk of exceptional complexity, but monitoring by the insured is essential to assure that adequate service is provided.

In-kind payout of defense services in civil liability insurance presents a significant variation. As long as the insurer must cover the full amount of any damage award, the insured escapes the need to monitor the adequacy of defense services. But if insurance coverage is less than the potential damage exposure, the insurer has only limited incentives to render adequate service, especially on litigation effort that serves only to reduce the damage award. In settlement decisions, conversely, the insurer with limited damage exposure may have an incentive to choose "excessive" service. Assume that the plaintiff has a 50% chance of establishing liability, in which case he will recover one million dollars at trial. If policy coverage is limited to \$500,000 and the plaintiff offers to settle for that amount, the settlement is likely to be in the joint interest of the insurer and the insured defendant, and is certainly in the private interest of the defendant, who has nothing to gain and \$500,000 to lose by going to trial. Yet the insurer, who ordinarily has legal control over the decision to settle, can expect to *gain* by going to trial, provided that

litigation expense will be less than \$250,000. Here monitoring by the insured, though essential, may be impeded by the difficulty of extracting sufficient information bearing on the decision whether to risk trial. Perhaps reflecting courts' concerns with the weakness of reputation and other monitoring mechanisms here, cases increasingly have permitted after-the-fact suits by the insured against the insurer for wrongful refusal to settle.<sup>22</sup>

The different mix of advantages and drawbacks in each pay-out method helps explain why all three approaches are found in most forms of insurance for legal and medical services. Lump sum, variable and in-kind pay-out packages co-exist in the market, and the insured can select the pay-out system that best suits his own situation. In one respect, however, indigent criminal defense is an exception. As we shall see in the next Section, lump-sum, variable and in-kind approaches are all important forms of indigent defense "insurance," but jurisdictions tend to choose one or the other, or to use them in a specified combination. Nowhere is the insured, the indigent accused, permitted to select the package that best meets his own needs.

## II. THE PRESENT SYSTEM

A series of Supreme Court decisions mandates publicly-funded defense for indigent criminal defendants,<sup>23</sup> but not the institutional form of that defense. Existing methods are of three basic types: public defender programs, contract defense programs and assigned counsel programs. In this section we describe these approaches and consider the extent to which they successfully address the problems of incentives, information and insurance.

### A. Public Defender Programs

In a public defender program, an organization staffed by full-time or part-time attorneys represents nearly all indigent defendants in the jurisdiction.<sup>24</sup>

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22. See e.g., *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Consolidated Am. Ins. Co. v. Mike Soper Marine Services*, 951 F.2d 186 (9th Cir. 1991). For a general discussion of refusal-to-settle litigation, see WILLIAM SHERNOFF ET AL., *INSURANCE BAD FAITH LITIGATION* (1984); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS 904-10* (5th ed. 1990); Annotation, *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R.2d 168, 178-90 (1955).

23. See *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring State courts to appoint counsel for poor defendants in capital cases); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing the right of indigent defendants to appointed counsel in all criminal proceedings in Federal Courts); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending the right to appointed counsel in State courts to all indigent defendants charged with a felony); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to all criminal prosecutions involving a sentence of imprisonment); *In Re Gault*, 387 U.S. 1 (1967) (accordng juveniles charged with delinquent acts the right to appointed counsel).

24. Conflicts of interest occasionally preclude appointment of the public defender. The most common conflict situations are those in which the defender already represents a co-defendant and those in which one of its staff was a victim of the alleged offense.

In most jurisdictions the defender organization is an agency of the executive branch of state or county government, and in more than half the others, the public defender is an agency of the judiciary.<sup>25</sup> A minority, roughly 10-15% of the defender offices, are organized by private non-profit corporations, which perform the defender function under contract with the city or county.<sup>26</sup>

Contrary to the prevailing popular conception, most defender offices are small. Some 75% employ three or fewer full-time attorneys, and at the time of a 1984 study only sixteen employed more than fifty full-time attorneys.<sup>27</sup> But the public defenders in Los Angeles and in Cook County (Chicago) each employ more than 400 attorneys. Even the small defender offices usually employ investigators, and the larger offices tend to have substantial support staffs, including social workers and paralegals.

Though all defender systems are funded directly or indirectly by the government, there are significant differences in the government's formal control over the Chief Defender. Usually county officials appoint the Chief Defender, but in some places he is appointed by a bar association committee, by judges (especially when the defender office is an agency of the judicial branch) or, in the case of a Community Defender, by the board of the non-profit corporation. Public Defenders are elected in Florida and in parts of California, Nebraska and Tennessee.<sup>28</sup> Election of the Defender guarantees his independence from county government and the court, but at the cost of accountability to voters who may not regard acquittal or early release of criminal defendants as a top priority.<sup>29</sup> In Florida, some Defenders apparently have won election by pledging to cut the office's staff and expenses.

The various selection methods do not necessarily preclude appointment of Chief Defenders who will guard the independence and resource needs of their offices. Nearly all Defenders are philosophically committed to protecting the indigent. Some have aggressively challenged defective arrangements, by declining to accept new cases or suing the court system for inadequate financial support.<sup>30</sup> Defender staffs have sometimes gone on strike to protest excessive caseloads, which the defenders felt were forcing them to render

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25. CRIMINAL DEFENSE SYSTEMS, *supra* note 12, at 3.

26. *Id.* These offices are sometimes called "Community Defenders" rather than "Public Defenders." See 18 U.S.C.A. § 3006A(g)(2) (West Supp. 1993) (distinguishing between "Federal Public Defender Organization" and "Community Defender Organization").

27. See SPANGENBERG & SMITH, *supra* note 7, at 11.

28. *Id.* at 17.

29. *Id.* at 216-218.

30. See, e.g., *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980) (public defender won right to withdraw from case on grounds of excessive caseload, even though Florida statutes imposed duty to represent all indigents); John B. Arango, *Tennessee Indigent Defense Systems in Crisis*, CRIM. JUST., Spring 1992, at 42 (Tennessee Public Defender successfully asked to be relieved from accepting new misdemeanor cases, and thus forced state to assign private counsel).

inadequate service.<sup>31</sup> Still, most Chief Defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs.<sup>32</sup> Thus, for most Defenders, most of the time, accommodation to the case management and budgetary priorities of the court and county government is a fact of life.<sup>33</sup> And as a result, the great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider necessary for a minimally tolerable defense.<sup>34</sup>

Public defender programs tend to be concentrated in urban jurisdictions. Nationally, only about 33% of all counties have a public defender, but 80% of the fifty largest counties do, and 65% of the population lives in counties with a public defender program.<sup>35</sup> Public officials generally view a defender as the most cost-effective approach when case volume is high.<sup>36</sup> Other advantages claimed for a defender system are that its full-time attorneys can become

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31. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 586-90 (1986-87).

32. See, e.g., Alison Frankel, *Too Independent*, AM. LAW., Jan./Feb. 1993, 67-70. The U.S. Court of Appeals for the Fourth Circuit refused to rehire Maryland Federal Defender Fred Bennett. Circuit Judge Paul Niemeyer reportedly argued that Bennett's aggressiveness might make him ineffective. In the words of a Baltimore assistant defender, "[The system] creates an awkward situation for clients. We're representing them, but we're controlled by the court. When the head of our office is essentially terminated by the court [for being too aggressive], it's hard to explain." *Id.* at 70.

33. An internal study commissioned by the Legal Aid Society of New York in the late 1970's provides one telling illustration. It found:

Reacting to increased workload and proportionately diminished staff, the management and staff agreed to place greater emphasis on disposing cases through guilty pleas, clearing court calendars, and reducing backlog . . . [T]he Society's institutional concerns with meeting its contractual obligations triumphed over the need for systemic reform. The Society . . . subordinated vigorous advocacy—"diligent," "vigorous," and "individualized" defense—to the need for productivity and efficiency.

McConville & Mirsky, *supra* note 31, at 687-88 (footnotes omitted).

34. Few knowledgeable observers would question the proposition in text, but several cases have illustrated the depth of the problem. See, e.g., Mark Hansen, *P.D. Funding Struck Down*, A.B.A. J., May 1992, at 18 (New Orleans trial judge held the city's entire indigent defense program unconstitutional because it required public defenders to handle upwards of 300 cases at once); AMERICAN BAR ASSOCIATION, INDIGENT DEFENSE INFORMATION, Spring 1990, at 3 (caseloads in some Florida cities recently stood at 1200 misdemeanors per attorney per year and annual felony caseloads ranged from 371 to 539 per attorney per year, even though national standards suggest caseloads of no more than 400 misdemeanors or 150 felonies per attorney per year); Rodger Citron, Note, (*Un*)Lucky v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 490 (1991) (citing 1990 Fulton County (Atlanta), Georgia report which found that some defenders were handling more than 500 felony cases per year). For a dissenting view, see Roger Hanson, *Indigent Defenders Get the Job Done and Done Well*, National Center for State Courts, May 1992, cited in Court, *supra* note 17, at 46 (arguing that people represented by privately retained counsel on the whole obtain the same results as those represented by publicly financed defenders).

35. SPANGENBERG & SMITH, *supra* note 7, at 15.

36. *Id.* at 11; see McConville & Mirsky, *supra* note 31, at 689 (citing study that found costs per case in assigned counsel programs were triple those of defender systems).

experts in criminal trial practice, and that their salaried position affords them greater independence from judicial pressure. Critics of the defender approach argue, however, that defender offices tend to become overwhelmed with cases, that a defender system excludes the private bar from involvement with criminal law issues, and that the program "will grow to become a large, bloated bureaucracy."<sup>37</sup> Critics also object that defenders "file too many motions and clog the docket because they are on salary and do not have to account for their time."<sup>38</sup> This last objection simply restates in negative terms the very qualities that proponents of the defender consider its advantage; what some see as independence is for others irresponsibility.

As a solution to the problems of incentives, information and insurance considered above, the defender approach is plausible but imperfect. The information effects are straightforward. Subject to his budget constraints, the Chief Defender can hire the best attorneys possible, and can know their abilities first hand before assigning them to cases. He is probably more able than the defendant to select the best attorney for the case, at least if the meaning of "best" is unambiguous. But if the Chief Defender values attorneys for their ability to move cases quickly and to persuade reluctant defendants to plead guilty, the accused might be better off making his own, poorly informed, choice. This problem is not lost on the supposedly unsophisticated defendants whom the public defender ostensibly protects from exploitation in the market. Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing" and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public defender."<sup>39</sup>

The twin incentive problems are to assure that defenders do not slight the client's interest in adequate service or the taxpayer's interest in controlling costs. The latter concern is met directly by government power to fix the defender budget and its control or influence over the choice of the Chief Defender. The Chief Defender, in turn, may lobby for more resources (just as the District Attorney might), but once the appropriation is determined, he will be forced to insist that his staff allocate time and resources carefully to provide the best possible service to the clientele as a whole, within the limits of budget constraints.

The other incentive concern (not slighting the client's interest) is more

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37. SPANGENBERG & SMITH, *supra* note 7, at 12.

38. *Id.*

39. Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971).

problematic. One might ask why the Defender or his staff would bother to do *anything* for their clients, beyond the minimal effort required to avoid professional discipline or suit for ineffective assistance. One answer is personal pride and a commitment to professional values. Many defender offices develop an *esprit de corps*, in which they view acquittals as victories and severe sentences as defeats in a continuing competition with the prosecutor's office. The agency might be staffed and run by idealistic lawyers, trying to do their best for the poor and unfortunate.

To the extent that idealistic motivations are operative, the defender approach provides a distinctive way to reconcile the twin incentive problems. When government controls compensation case-by-case, as in the assigned counsel systems considered below, its need to prevent excessive service is at every step in direct tension with the defendant's need to assure adequate service. In the defender approach, the state exercises its cost control function wholesale, leaving the monitoring function at the "retail" level to the Chief Defender and other supervisors in his office. Their annual budget leaves them (like prosecutors) the flexibility to invest enormous resources in a particular case if their sense of justice requires, free of the chilling effect of case-by-case external review. But even when mediated in this way, the cost control function constrains the management of nearly all cases nearly all of the time. The annual bottom line may even create a more powerful and pervasive cost-control ethos than would exist for a private attorney who had to justify a single claim for fees in an individual case.

Considerations of narrower self-interest may join with idealism in providing incentives for adequate service. To win the esteem of colleagues, adversaries and judges, and to pave the way for subsequent career moves, the staff attorney needs a reputation for vigor and effectiveness.<sup>40</sup> The reputation effect can operate powerfully at trial but is unlikely to constrain an attorney's low-visibility decision to recommend a time-saving plea.<sup>41</sup> The reputation effect may even distort his advice by inducing him to recommend trial in a case that would be a "good vehicle" or to plead out some defendants in order to permit better preparation in high-visibility cases. In any event, self-interested reasons for effective performance, as reinforced by idealism and office *esprit de corps*, must compete with office attitudes that run in the opposite direction—that of restraining costs and cooperating in the court's desire to move cases. The adversarial attorney thus may *lose* collegial esteem or the Chief Defender's approval as a result of vigorous efforts. In one recently publicized case, the Atlanta Public Defender demoted a staff

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40. See Schulhofer, *Plea Bargaining*, *supra* note 13, at 1099-1100 (discussing need for assertiveness to achieve success within the public defender's office and to move into private practice).

41. Schulhofer, *Criminal Justice Discretion*, *supra* note 4, at 53-60.



attorney because she had filed a motion asking the local judges to appoint her to no more than six cases per day.<sup>42</sup>

The insurance problems are a function of the incentive issues just canvassed. Like any insurer which provides an in-kind pay-out, the defender has in-house control to prevent excessive effort, but it bears the risk of unforeseen complexity, and the insured (the accused) must monitor performance to prevent short-cuts and inadequate service. In one respect the criminal defendant is better placed to control counsel's effort because the decision whether to settle is legally his alone to make; the insured defendant in civil litigation often has no such protection. On the other hand, the criminal defendant has less capacity to assess litigation risks than many civil defendants, usually hospitals or manufacturers with their own legal staffs.

An alternative possibility for monitoring is the after-the-fact suit for malpractice or constitutionally ineffective assistance, roughly analogous to the civil defendant's suit for an insurer's wrongful refusal to settle.<sup>43</sup> But the malpractice suit is virtually a non-existent remedy for the criminal defendant.<sup>44</sup> An ineffective assistance claim is almost equally improbable as a monitoring device. First, many departures from fully adequate service do not rise to the level of constitutionally ineffective assistance. The constitutional standard is low, and what the defendant wants to assure is not just a minimally adequate effort but the effort that an attorney with the right incentives would provide. In addition, the severe penalties that can follow conviction at trial mean that an attorney's recommendation to plead guilty can almost never be proved unreasonable, however much it may be influenced, consciously or subconsciously, by resource constraints.<sup>45</sup> Finally, ineffective assistance claims often can be brought only in post-conviction proceedings and such claims *must* be brought in a post-conviction proceeding when conviction is on a guilty plea; thus the defendant's only tool for

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42. *Reports and Proposals*, 51 Crim. L. Rep. (BNA) 1285 (June 24, 1992). At the time of her motion, the attorney had been assigned to handle 45 cases at a single arraignment session, leaving her only 10 minutes for each felony client.

43. See *supra* text accompanying note 22 (discussing suits for wrongful refusal to settle).

44. See, e.g., *Shaw v. Alaska Dep't of Admin.*, 816 P.2d 1358 (Alaska 1991) (obtaining post-conviction relief is prerequisite for filing action against original defense lawyer for malpractice); *Stevens v. Bisham*, 53 Crim. L. Rep. (BNA) 1239 (Or. May 13, 1993) (same); Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 *FORDHAM L. REV.* 719 (1991) (same); see also Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 *A.B.A. SEC. LITIG.* 13 (1989) ("Criminal cases present two barriers that make victory in a later legal malpractice suit almost impossible.").

45. See Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 *N.Y.U. REV. L. & SOC. CHANGE* 137, 140-43 (1986) (discussing when public defenders recommend guilty pleas for their clients and why); see also Goodpaster, *The Adversary System supra* note 5, at 80-83 (discussing the difficulty of evaluating whether counsel was effective where the public defender entered a guilty plea on behalf of his or her client).

monitoring is one he must invoke without a constitutional right to professional help.<sup>46</sup>

The weakness of available incentives to assure adequate services and the absence of effective after-the-fact monitoring leave the Public Defender as a highly flawed solution to the incentive, information and insurance problems. Although idealism undoubtedly motivates many defenders to seek the best outcome for their clients, the system as a whole is driven by political goals which often conflict with that objective. A court system troubled by full dockets and high crime rates may well decide that lawyers with an idealistic commitment to getting their clients acquitted, a strong aversion to guilty pleas, or a determination to assure the lowest possible sentences are not the lawyers it wishes to put in charge of indigent defense.

### *B. Contract Defense Programs*

In a contract defense program, individual attorneys, bar associations or private law firms agree to handle a specified volume of indigent defense cases for a specified fee.<sup>47</sup> Although a contract defender could in theory devote all his time to indigent defense work, contract defenders almost invariably maintain a substantial private practice. Unlike the public defender, a contract defender normally handles only a part of the jurisdiction's indigent defense caseload, and counties that use this approach may have several independent attorneys or firms under contract. Contract defender programs are becoming more popular, but nationally only about 10% of all counties use this type of program as their primary system for delivering indigent defense services.<sup>48</sup> Many others, however, use the contract method as their back-up system for cases that the public defender cannot accept.

Two types of contracts are common. In the *global fee* approach, the contract defender agrees to accept all cases of a certain type—for example, all felonies or all juvenile cases—for a single annual retainer. Many county officials prefer this approach because it keeps the indigent defense budget predictable and puts a cap on total expenses. That leaves the contract defender with the risk of unforeseen increases in caseload. In effect he is selling the county not only legal services but insurance. The contract defender has much less ability to control the court's caseload, which is largely a

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46. See *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding indigent death row inmate has no constitutional right to appointed counsel to pursue constitutional claim in post-conviction litigation).

47. Almost three-quarters of the contract programs rely on individual practitioners. SPANGENBERG & SMITH, *supra* note 7, at 14.

48. Lawrence D. Spears, *Contract Counsel: A Different Way to Defend the Poor*, CRIM. JUST., Spring 1991, at 30.

function of the District Attorney's charging discretion, than county government does. Yet, about a third of all contract programs take this form.<sup>49</sup>

The other common approach is the *individual fee* contract, in which the attorney or firm agrees to handle a specified number of cases for a flat fee per case. These contracts protect the attorney from the risk of unforeseen increases in case volume, but he still bears nearly all the risk of unforeseen complexity.<sup>50</sup> More than half the contract defender agreements use the individual fee approach.<sup>51</sup>

The contract method is attractive for jurisdictions that are too small to support a full-time public defender. It has become the predominant system in some sparsely populated areas, such as North Dakota.<sup>52</sup> Costs tend to be lower than in assigned counsel programs, and the quality of service may be superior; as compared to assigned counsel, contract counsel have more opportunity to specialize in criminal practice. Critics of contract programs fear that counties will award contracts to the lowest bidder, without regard to attorney qualifications or the proposed level of service. Apparently this has not happened in any blatant way to date; competitive bidding is widely used but in nearly all cases surveyed, the cost per case was set in advance, and bidders were selected on the basis of quality.<sup>53</sup> Critics also charge that global fee and individual fee contracts have induced attorneys to stint on their time and on the back up services of investigators and experts.<sup>54</sup>

Information, incentive, and insurance problems arising in contract defense programs largely parallel those in the public defender service, but with several important variations. The indigent is insured against exceptional complexity but, as in a public defender program, the accused bears the burden of monitoring. Effective tools for carrying out this function are largely absent.

The information problem in a contract system presents itself in two stages: officials must award contracts to attorneys and then assign individual cases to one of the previously designated contract recipients. Often the first decision is made by county government and the second by a court administrator or by the judge responsible for the case. At both stages, officials are in a good position to evaluate attorney competence. Indeed, competitive bidding focused on quality of service offers a powerful vehicle for ascertaining what qualifications and support services are available through competing provid-

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49. SPANGENBERG & SMITH, *supra* note 7, at 13.

50. Some contracts permit supplemental payments in certain circumstances. *Id.*

51. *Id.*

52. Spears, *supra* note 48.

53. SPANGENBERG & SMITH, *supra* note 7, at 13-14.

54. See RICHARD J. WILSON, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, CONTRACT BID PROGRAM: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES 20 (1982).

ers.<sup>55</sup> And compared to some assigned counsel programs discussed below, there is more prospect that officials will use their superior knowledge in the right way, because the county's defense costs are not affected by the choices made either at the case-assignment stage or at the initial contracting stage—at least when the contract price is fixed in advance and excluded from negotiation or competitive bidding. For whatever it chooses to spend, the county should be in a position to choose the best available defenders. There is one qualification, however. Although defense costs are independent of which attorneys are selected, total court costs are not. Thus, officials might hesitate to choose attorneys known for filing many motions, driving hard bargains or insisting on trials, even if the lawyers offered to provide these services at no extra charge.

Contract programs, like public defender programs, address only one side of the incentive problem. Because fees are fixed, either per case or per annum, attorneys have a powerful incentive to avoid *unnecessary* service, but there are few direct incentives for *adequate* service. Indeed, global fee and individual fee contracts give the attorney a powerful disincentive to invest time and resources in his indigent cases. In this respect the contract attorney poses a much larger problem than a public defender does. Public defenders have few direct economic incentives for adequate service, but apart from any taste for pure leisure, they have no concrete *disincentive* to work on their cases. Public defenders may cut costs on some cases to free up resources for others, but they cannot take home unspent cash at the end of the year. The contract defender, in contrast, is in business for a profit. Money saved on defending one case need not be spent on another; it may simply enlarge the Christmas bonus. Perhaps worse, time saved in handling indigent cases is freed up for more lucrative business, and an overly busy attorney is unlikely to turn away paying clients when he has the alternative of cutting low-visibility corners in his indigent case commitments. These dangers are intrinsic to all contract defender programs and have produced seriously deficient service in many.<sup>56</sup>

A countervailing incentive for adequate service in contract programs is professional pride and ideological commitment. But we would speculate that the latter factor, though important for public defenders, operates less strongly among contract attorneys, who may see their arrangements primarily as ways of attracting business to a profit-oriented practice. Another factor that may encourage adequate service is the opportunity to renegotiate contracts annually. Proponents of the contract system argue that the con-

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55. On the other hand, it is harder for third parties to compare quality bids than price bids, and thus harder to judge whether the contract is really being awarded to the best bid.

56. See ABA STANDARDS FOR CRIMINAL JUSTICE § 5-3.1 at 46 (3d ed. 1992) (discussing “uniformly dismal” results in early contract programs).

tinual prospect of service providers leaving the market puts pressure on counties to keep contract prices at a compensatory level; an institutionalized public defender has less capacity to resist steady increases in its caseload-staff ratio.<sup>57</sup> A public defender's leverage would be powerful if its staff chose to strike, but defender strikes have proved problematic, legally and politically.<sup>58</sup>

A final inducement to providing adequate service may be the attorney's desire to win renewal of the contract. But contract renewal requires pleasing the county, not the client, and the county's priorities are, as always, ambivalent. Over the long run, the lawyer may attract more business and generate more profit per case by keeping costs, and hence next year's fees, lower than those of potential competitors. Cost-cutting is not undesirable per se, but it is problematic in indigent defense programs because the client who suffers from reductions in the quality of service has no control over the flow of business to the attorney who benefits from the decision to cut costs.

Though the contract system resolves some incentive, information and insurance problems better than a public defender does, overall its structure is seriously flawed. The existence of competing service providers in the contract system should be advantageous, but the potential benefits are lost because court officials rather than clients control the flow of cases to the attorneys.<sup>59</sup>

### C. Assigned Counsel Programs

In an assigned-counsel program, a member of the private bar is appointed on a case-by-case basis for each criminal defendant. About 60% of American counties use assigned counsel as their primary method of assuring indigent defense, and nearly all the others rely on assigned counsel for cases in which public and contract defenders are disqualified or unavailable.<sup>60</sup>

The judge responsible for the case or another court official usually makes the assignment decision. Sometimes the selection system is entirely informal, and appointments are distributed ad hoc to attorneys the judge knows or to those who happen to be present in court. More typically, the assigned

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57. See Spears, *supra* note 48, at 27, 29 (describing how contract counsel programs self-adjust to case load volumes and social conditions due to open-bidding).

58. See McConville & Mirsky, *supra* note 31, at 688-90 (1982 strike of staff attorneys at New York Legal Aid Society generated political resentment and led city to insist on including a no-strike clause in collective bargaining agreement).

59. Court officials could ask clients after the case closed whether they were satisfied with the performance of their attorneys and then give future business to attorneys with satisfied clients. It is not clear, however, that court officials would actually follow this course of action. Moreover, the client can be expected to take less care in judging his attorney after the fact, when he knows his decision will have no effect on his case, than he would take before the fact, in a system in which he was choosing his own attorney.

60. SPANGENBERG & SMITH, *supra* note 7, at 15.

attorney is chosen from a list established in advance by either the court, the local bar association or each judge for his own cases. The judge may use a formal, predetermined rotation plan to select an attorney for each case, or he may make a selection from the list less systematically. All members of the bar may be eligible for the list, or there may be a few simple prerequisites, such as a certain number of years of experience. About a quarter of the assigned counsel jurisdictions have more elaborate eligibility requirements, a system to screen applicants for inclusion on the list, provisions for monitoring and ancillary support services.<sup>61</sup>

Desire to serve is not necessarily a condition of eligibility. Nearly all courts have authority to appoint an unwilling attorney, and such a power is probably an essential backup for cases that involve extensive conflicts of interest or an extraordinarily unpopular defendant. But in many jurisdictions, conscription of unwilling attorneys is a routine feature of the assignment system; *all* eligible attorneys are included on the list, and they are obligated to serve when called.<sup>62</sup>

A variety of compensation systems are used in assigned counsel programs. In some, attorneys receive a flat fee per case or per appearance, usually with different amounts specified for juvenile cases, misdemeanors and felonies. Other jurisdictions pay on an hourly basis, often with one rate for time spent in court and a somewhat lower rate for time spent in preparation.

Hourly rates vary from low in some jurisdictions to derisory in others. A March 1992 survey found many jurisdictions still paying only \$10 or \$20 per hour,<sup>63</sup> rates that are inadequate even to meet the attorney's office over-

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61. *Id.* at 9.

62. *See, e.g.,* State v. Rush, 217 A.2d 441 (N.J. 1966) (upholding the constitutionality of uncompensated, involuntary assignment of counsel to indigents). That court recently reaffirmed *Rush* and upheld the practice in many New Jersey municipalities of conscripting attorneys to serve without compensation in misdemeanor cases. *Madden v. Township of Delran*, 601 A.2d 211 (N.J. 1992). The court said, "[w]e cannot forever accept a system so clearly inefficient, historically unfair, and potentially unconstitutional. We stay our hand only because we believe other branches of government, state, county, and local, are equally able to address the problem . . ." *Id.* at 213. *See also* *People v. Otano*, 548 N.Y.S.2d 401 (Just. Ct. 1989) (upholding conscription of unwilling member of the Legal Aid Society); David Margolick, *Volunteers or Not, Tennessee Lawyers Help Poor*, N.Y. TIMES, Jan. 17, 1992, at B16 (conscription without pay); *Tennessee Lawyers Balk at Defending the Poor for Free*, ATLANTA J. & CONST., Jan. 8, 1992, at 3 (same). *Cf.* State v. Lynch, 796 P.2d 1150, 1158 (Okla. 1990) (upholding system of conscripting defense attorneys in capital cases, but mandating "adequate, speedy, and certain compensation"). In an interesting variation, one New Jersey county permits conscripts to escape their obligation by paying another lawyer \$300 to \$750 to substitute for them. But most New Jersey counties do not permit conscripted attorneys to buy out of involuntary service. Suzanne Riss, *Buying Out of Pro Bono: Somerset Plan is Envied*, N.J.L.J., March 15, 1990, at 4. For an account of the problems faced by conscripted lawyers, see Audrey Duff, *Slaves of St. Louis*, AM. LAW., Jan./Feb. 1993, at 85.

63. SPANGENBERG GROUP, SURVEY OF INDIGENT DEFENSE PROVISIONS BY STATE (1992); *see also* *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (appointed attorney in Texas capital case was paid \$11.84 per hour).

head.<sup>64</sup> Low rates are not exclusive to Southern or mainly rural states. Hourly rates for out-of-court time stand at \$25 for New York, \$20 for Connecticut and \$15 for New Jersey.<sup>65</sup>

When compensation is on an hourly basis, judges or court administrators always review fee claims, and they often reduce fees, sometimes in a way that the attorneys consider arbitrary. In any event, there is usually a cap on total compensation payable. In the federal courts, the cap, now \$3500 for felonies, may be waived, though only by the chief judge of the circuit court of appeals.<sup>66</sup> In many states the cap may not be waived, and as caps are low, compensation systems that are ostensibly based on an hourly rate become flat-fee systems in practice.

The low caps reported in several surveys in the 1980's<sup>67</sup> have been raised to some extent.<sup>68</sup> But as of March 1992, the *maximum* fee for a non-capital felony was still only \$1250 in Illinois, \$1200 in New York, \$500 in Oklahoma, South Carolina and New Hampshire, \$400 in New Mexico and \$350 in Arkansas.<sup>69</sup> In Kansas, one of the few states to set different caps for plea and trial cases, \$1000 is allowed for felonies that go to trial; the maximum for a guilty plea case is \$400 for the most serious cases and \$250 for less serious felonies. In Virginia, compensation may not exceed \$265 for felonies carrying a potential sentence up to twenty years; the maximum for felonies punishable by sentences over twenty years is a mere \$575—enough to fund less than three days' work at the modest authorized rate of thirty dollars per hour. Finally, some jurisdictions regard indigent defense as a "pro bono" obligation, and appointed counsel, usually conscripts rather than volunteers, receive no compensation at all.<sup>70</sup> Although the no-compensation approach is exceptional, flat fees or fee caps are so low in many jurisdictions that hourly compensation in cases that go to trial is virtually nil.

Assigned counsel programs are often defended on the ground that they provide good training for new attorneys, that private counsel are more independent than public defenders and that private counsel develop better rapport with their clients, who often mistrust the public defender. Such programs can also be less expensive than a defender system, at least when fee caps are low and attorneys are expressly or indirectly conscripted to partici-

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64. One court estimated that an attorney needs a fee of \$27-\$35 per hour just to cover overhead expenses for rent, library and secretarial services. *State ex rel. Stephan v. Smith*, 747 P.2d 816, 837 (Kan. 1987).

65. SPANGENBERG GROUP, *supra* note 63, at 1, 4.

66. 18 U.S.C. § 3006A(d) (1988).

67. *See* CRIMINAL DEFENSE SYSTEMS, *supra* note 12, at 5 (noting that compensation ceilings of \$500-\$1000 were common for non-capital felonies, and in some counties ceilings were as low as \$200).

68. Maximums are now set at \$3500 for the District of Columbia, \$3000 for West Virginia and Hawaii, and \$2500 in Florida, Nevada and Iowa. SPANGENBERG GROUP, *supra* note 63, at 1-3, 5.

69. *Id.* at 1-5.

70. *See supra*, note 62 (discussing conscription without compensation).

pate. Others see the same points as disadvantages. Low rates draw mainly inexperienced or less effective lawyers and discourage preparation; yet when compensation is anywhere near market rates, costs become unpredictable and much higher than those of a public defender.

In terms of the information, incentive and insurance problems we have canvassed, assigned counsel programs pose numerous obvious problems. Judges and court officials who select counsel have the ability to acquire good information about attorney effectiveness, but they have little incentive to acquire such information and even less reason to act upon it. Their own interests are best served by assigning an attorney known to be cooperative rather than aggressively adversarial.<sup>71</sup>

With respect to the attorney himself, the incentive problem is to provide inducements for sufficient but not excessive effort. Low hourly rates, low fee caps and mandatory service *pro bono* nicely solve the latter half of the problem but leave the assigned attorney with powerful reasons to minimize the time and effort devoted to the case. The more generous states, a small minority, face different problems. Hourly rates close to market levels and an absence of fee caps give the right incentives for adequate service but they risk unnecessary attorney effort and excessive cost. Most of these more generous jurisdictions rely on reputation effects, along with case-by-case review of attorney fee submissions, to provide the right cost-control incentives, but monitoring of this sort is expensive and not always successful.<sup>72</sup> And even if not abused, a program of compensation at near-market rates puts unpredictable budget demands on the county and tends to cost more than specialized contract defenders or a public defender system.

In terms of insurance problems, the compensation structure is crucial. If fees are paid at near-market levels, the county is in effect self-insured for both the risk of unusual case complexity and the risk of unforeseen increases in case volume. Except in the smallest rural counties, the former risk is spread over a universe of cases large enough to make self-insurance viable.

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71. A recent article describing the Detroit Recorder's Court reports:

Since court-appointed counsel depend upon the 29 Recorder's Court judges for their assignments, the system may discourage the lawyers from doing anything that might alienate the judge by impeding his or her efforts to move the docket.

In testimony given two years ago before a special master appointed by the Michigan Supreme Court in the dispute over the flat fees paid to indigent defenders, Recorder's Court judge David Kerwin spoke of "lawyers who just don't seem to really be interested in recognizing that it's an adversary process . . . that are more interested in presenting to you a situation that accommodates the moving of the docket, as though that's going to endear them to you and cause you, when you are on assignment [duty], to give them more cases."

Andy Court, *Rush to Justice*, AM. LAW., Jan./Feb. 1993, at 58. See *supra* notes 32-33 and *infra* note 127 (discussing actions by judges and court officials to select attorneys perceived as less adversarial).

72. See Hansen, *supra* note 16, at 29 (describing abuses resulting from inadequate monitoring of attorney fee submissions).



The defendant escapes most of the need to monitor the adequacy of service, at least if he can assume that the assigned attorney has no hidden motivation to cut costs. But the county has an intense need for monitoring to prevent excessive costs. And since the county may meet that need by assigning attorneys predisposed to be cooperative, or not reappointing those who seem too diligent, the defendant still needs—but largely lacks—some vehicle for effective monitoring of the adequacy of service. In fixed-fee and low-cap systems, the county still bears the risk of unexpected increases in case volume, but the assigned attorney now bears the risk of unusual case complexity, and the burden of monitoring now falls entirely on the party least able effectively to protect his interests—the indigent accused.

### III. ALTERNATIVE APPROACHES

In the present section we consider alternative approaches for solving the organizational problems of indigent defense. As we have seen, existing systems resolve, with varying degrees of success, the incentive, information and insurance problems presented *for the state*, but the indigent's problems in these areas are left largely unaddressed.<sup>73</sup> There are few reliable mechanisms to insure that attorneys for the indigent vigorously protect the interests of their clients when these clash with the interests of the court system or the government that pays their fees. Before describing specific institutional alternatives, we can help focus the issues by describing three general tools for solving the client loyalty problem, which is the central difficulty each approach must address.

One such tool is to rely on incentives other than individual or institutional self-interest, in particular the attorney's personal pride, professional ethics and idealistic commitment to helping the poor.<sup>74</sup> This is the solution implicit in all existing institutions. Its power is not negligible, but for reasons already discussed, we believe it is by itself an inadequate counterweight to strong organizational and financial pressures that push in other directions.<sup>75</sup>

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73. See *supra* notes 24-72 and accompanying text (discussing existing systems for providing defense services to the indigent).

74. In the course of an opinion upholding conscription without pay, the New Jersey Supreme Court stated, "[a] lawyer needs no motivation beyond his sense of duty and his pride." *State v. Rush*, 217 A.2d 441, 444 (N.J. 1966).

75. See *supra* notes 25-69 and accompanying text (discussing the financial and organizational pressures in the present system); see also *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989):

We have a high opinion of the dedication, generosity, and selflessness of this State's lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.

While one wants to be sure that institutional reforms do not impair the valuable role of personal and professional ideals, there is a need to supplement idealism with concrete inducements and to diminish the power of countervailing pressures.

A second solution is to use direct incentives to align the interests of defense counsel more closely with those of the defendants. This could be done, within a system in which the state appoints defense counsel, by making reimbursement in part conditional on the outcome of the case, with outcomes more favorable to the defense resulting in more compensation for counsel. But there are at least two problems with this solution--the incentives and the knowledge of those running the program.<sup>76</sup> We want direct incentives because we suspect that the government's interest is in conflict with the interest of the defendant. Yet there is no simple, objective way to convert successful outcomes into automatically quantifiable bonuses. Setting up a system of discretionary rewards controlled by the state would have a certain air of hiring the fox to guard the chicken coop. If such a reform were introduced, those in charge of administering it could defeat its purpose by paying bonuses to the most cooperative lawyers rather than to the most effective ones.

The second problem is that, even if the system is designed and run with the intention of serving poor defendants as well as possible, those in charge may not have the information necessary to do so. This is a common problem in institutions designed to substitute administrative rules for market incentives. How a defendant would wish his counsel to trade off the costs and benefits of different strategies is a complicated issue, especially in deciding whether to accept a particular plea offer. Any administrative rule setting the reward as a function of the outcome will represent only a crude approximation of the correct incentives.

A third solution is to transfer the power to select the attorney from the court system to the defendant, introducing consumer sovereignty into the institution of indigent defense. So far as his own interests are concerned, the defendant has precisely the correct incentives. If available information is good enough to allow a defendant to appraise alternative providers of defense services, such a system solves the client's problem. Even if the defendant cannot judge perfectly among alternative counsel, at least the decision will be made by someone with an interest in making it correctly. Consumer sovereignty is, despite imperfect information, the mechanism that most of us use most of the time to control the quality of the goods and services we buy.

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76. For a discussion of the same problems in the context of regulating a natural monopoly, see DAVID D. FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* 466-77 (2d ed. 1990).

In this section we explore ways to correct systemic malfunctions and enhance the welfare of the indigent by introducing elements of consumer sovereignty into indigent defense programs. Our objective is, so far as possible, to create a system in which defense attorneys do not find it in their interest to sacrifice the welfare of either defendants or taxpayers to their own, nor to sacrifice the interests of defendants to those of the state. Defense attorneys are not the only ones whose incentives will be affected by different institutions for providing criminal defense services. As we will see below, some of the institutions we consider will also affect the incentives of the prosecution. We consider three approaches: insurance models, deregulation models and voucher models.

### *A. Insurance Models*

Probably the ideal way to maximize choice and minimize the risk and incentive problems for all concerned would be to establish a system of private insurance through commercial carriers. The practical obstacles to implementing such a system are formidable; we will consider them in a moment. But it will help clarify the issues if we begin by imagining how a system of private insurance might function.

As we have seen, financial protection against the costs of medical and legal misfortune can be provided in the form of lump-sum, variable or in-kind pay-outs.<sup>77</sup> Companies providing insurance against the cost of criminal defense could offer different policies with a choice among these forms of protection. The customer, in choosing a company and a policy, will wish to insure himself optimally against the expenses of criminal defense. Of course, commercial insurance, even if available, would not entirely solve the problem for the indigent; many of those too poor to finance a defense once accused would also be too poor to buy insurance. The first step, therefore, would be for the state to provide all indigents a voucher to be used for the purchase of insurance.<sup>78</sup>

Each indigent citizen would then select the policy that best met his own needs. Suppose, for simplicity, that he is considering only contracts that offer

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77. See *supra* text accompanying notes 19-21.

78. Like any voucher system, this one raises the question of what public interest justifies us in requiring the recipient to spend the voucher on buying a particular sort of good, instead of using it to buy whatever he most values. One answer is that there is a public interest in not convicting innocent defendants. In addition to the cost of being punished that a false conviction imposes on the defendant (which is included in the defendant's calculation of how to spend the money), a false conviction resulting in imprisonment imposes on the criminal justice system the cost of punishing him. False convictions also weaken deterrence by reducing the probability that the real perpetrator will be caught. Finally, the knowledge that innocent people are being punished may be a real cost to others in the society, and one they are willing to pay to reduce. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1985-86 (1992).

a fixed sum to pay for defense against each possible charge. He will want a schedule of payoffs such that the benefit to him of an additional dollar is the same in each situation.<sup>79</sup> As long as that is not the case, the contract can be improved by transferring benefit payments across outcomes, from one where the marginal benefit is low to one where it is high. So the consumer will want a contract that pays large amounts for charges where it is likely that additional defense expenditures will continue to produce large reductions in the probability of conviction up through high levels of expenditure (“complex” cases), and pays small amounts for charges where it is likely that the payoff from defense expenditure drops off at a low level of expenditure (“simple” cases).

The same argument applies to contracts providing a more complicated structure of payments. Insofar as it is possible to distinguish between complex and simple cases involving the same charge, the customer will prefer a contract that provides more money for the complex cases, up to the point at which the marginal payoff is the same in all situations. But sorting of this kind is difficult, and with indigent customers, the insurer could not rely on the common solution of coinsurance, in which the insurer would agree to bear, for example, 80% of the lawyer’s fee and the insured would decide how many hours of legal services he wants. For both variable and in-kind pay-outs, the most likely device for regulating the level of service would be reputation. As in policies of insurance for the costs of defending against civil claims, the customer would decide whether he prefers a firm that guarantees a specific level of service or one that makes no enforceable guarantees but has a reputation of keeping costs down on simple cases and spending whatever is necessary for complex ones.

The argument applies to incentive problems as well. The customer will not only weigh the reputation of the firm but will consider how the payment scheme of a particular contract affects the incentives of the lawyer who will work on his case. The better the contract aligns the interest of lawyer and client, the more attractive the contract.<sup>80</sup>

The insurance approach also would protect the state against the risks of excessive service, unexpected case complexity and unexpected increases in the volume of cases. Each year the state would determine its budget for

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79. FRIEDMAN, *supra* note 76, at 50, 95-97.

80. Note that the client will want an efficient contract, not a contract that forces the lawyer to act in the client’s interest whatever the cost. A contract term that forces the lawyer to bear a \$10 cost in order to provide the client with a \$1 benefit will not be in the client’s interest, since it will cost the client more (in the initial price of the insurance) than it is worth—*ex ante*, the lawyer must cover her costs. But in calculating efficiency, the client will only be interested in costs and benefits to himself and the lawyer; he will ignore costs to the court system (e.g., the cost of spending more to convict a guilty defendant with a good lawyer) or society (e.g., the cost of having guilty defendants with good lawyers acquitted). He will also ignore benefits to the court system and the state—such as the benefits that come from not convicting innocent defendants.

indigent defense, divide it by the number of indigents in the jurisdiction,<sup>81</sup> and distribute the resulting amount to each indigent as a voucher for purchasing insurance. Insurance providers would control for excessive service and spread the other risks—unforeseen changes in volume and complexity—through re-insurance or their own multi-state operations.

Unfortunately, private insurance against the costs of criminal defense is probably not a practical option. One problem is adverse selection. Some people—mostly those who intend to commit criminal acts—know that they have a higher than average probability of being arrested. To them, an insurance policy covering the legal costs of their defense is very valuable. Other people know that they have a low probability of being arrested. They might still want insurance, but only at a lower price—one reflecting their low chance of collecting. As long as the customers know which group they are in and the insurance companies do not, adverse selection will tend to drive the low risk customers out of the market.<sup>82</sup> The result will be that innocent defendants—the group who, on both moral and economic grounds, we would most like to protect<sup>83</sup>—will be uninsured.

A further problem with criminal defense insurance is informational. Most of us face only a small risk of being charged with a crime. As a result, even if such insurance were available, it would be worth bearing only very small costs in evaluating the contracts offered by competing firms, in order to decide which provided the best package of benefits. Since good information about the quality of such a complicated product is expensive, firms would face only weak pressure to construct well-designed programs.

These theoretical arguments fit the observed facts. Insurance against the legal costs of defending civil cases is a standard feature of liability insurance policies,<sup>84</sup> and of what are usually referred to as prepaid legal service plans.<sup>85</sup>

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81. A supplementary system would be required to provide representation to nonresident indigents prosecuted in the jurisdiction.

82. For a classic discussion of this sort of problem see George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 336 Q.J. ECON. 488 (1970); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 650-52 (1985).

83. Insurance is most valuable when there is a low probability of a high loss. Professional criminals may be arrested frequently enough so that the variance of their cost is low, and they can self insure. In purely economic terms, the category of those who would benefit most from insurance would include not only innocent defendants but also guilty defendants who commit infrequent, hard to detect crimes. The gain from insuring members of both groups will typically be larger than that from insuring professional criminals.

84. See SPENCER L. KIMBALL, *CASES AND MATERIALS ON INSURANCE LAW* 247-57 (1992) (noting that typical policy obliges insurance company to defend its insured and to indemnify it in case of judgment against insured).

85. See Thomas J. Hall, Comment, *Prepaid Legal Services: Obstacles Hampering Its Growth and Development*, 47 FORDHAM L. REV. 841, 851-57 (1979) (types of prepaid legal plans include open plan in which insured picks own attorney and closed plan in which insurance company has retained attorneys in advance); see generally ROGER D. BILLINGS, JR., *PREPAID LEGAL SERVICES* (1981)

Insurance against the legal costs of serious criminal accusations (other than motor vehicle prosecutions)<sup>86</sup> seems to be nonexistent. Since a viable market for such insurance has not emerged even for non-indigents, there is no strong reason to suppose that providing voucher payments to all indigents would create such a market to serve them. The problem then is to determine to what extent alternative arrangements can provide the desirable features of an “ideal” insurance system.

### *B. Deregulation Models*

A less complicated way to address the organizational problems of indigent defense would be to leave existing delivery systems, including compensation levels and methods of payment, in place but reduce government control over selection of the attorneys who serve. At present, the assignment systems are highly regulated. Public officials normally designate the Public Defender and select contract defenders; a judge or court official determines the necessary qualifications for appointed counsel and screens the bar to select applicants or place conscripts on the list. A public official also assigns one of the eligible attorneys to each case, unless this is done by rotation or at random. The large public role serves both informational and incentive needs. As we have seen,<sup>87</sup> public control can help insure that attorneys are capable and that they do not run up excessive costs. But both effects have mixed consequences. Cost control may occur at the expense of the defendant’s interest in vigorous representation. Quality control may favor cooperative attorneys rather than aggressive ones.

A straightforward solution to these problems is to deregulate the system by reducing government control over attorney eligibility and over the assignment of counsel to particular cases. In a deregulation program of modest ambitions, the government would continue to designate the Public Defender and contract defenders.<sup>88</sup> But screening and eligibility standards for appointed counsel would be eased, and each defendant would select his own attorney from among those eligible. In this section we will first describe how a deregulated system could work and then address the arguments that have been advanced against recognition of defendants’ choices.

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86. The benefits afforded to members of the American Automobile Association include reimbursement for the legal costs of defending against charges of manslaughter, reckless driving and other vehicle offenses, up to a maximum of \$500 for trial and \$500 for appeal. Prosecutions for drunk driving are expressly excluded. CHICAGO MOTOR CLUB, MEMBERS HANDBOOK 11-12 (n.d.). Both Hyatt Legal Services and the legal services plan of the United Auto Workers afford partial coverage for defending against traffic charges and some other misdemeanors.

87. See *supra* text accompanying notes 15-16, 25-72 (discussing advantages of public control).

88. We consider reforms that would change this feature in the next section. See *infra* text accompanying notes 128-35 (discussing voucher models).

### 1. *Implementing Deregulation*

The first area for deregulation is the matter of determining which attorneys will be permitted to represent the indigent. We approach this topic cautiously because many observers feel, with good reason, that eligibility standards are already too lax, especially for serious matters such as capital cases.<sup>89</sup> Yet the nonindigent defendant has a constitutionally protected right to select any attorney who is admitted to the local bar and free of conflict of interest.<sup>90</sup>

Information problems in the selection of competent defense attorneys are undoubtedly serious. These problems may warrant requiring defense attorneys to be certified for criminal practice as a specialty or to meet stiff standards for serving in the most serious cases.<sup>91</sup> Information problems might also justify steps to make details about the qualifications and experience of criminal defense practitioners more readily available. We will not discuss such reforms here, except to note that any justified restrictions on eligibility and any worthwhile efforts to disseminate information should affect rich and poor defendants alike. Court officials might continue to screen attorneys for an indigent defense panel, but inclusion on such a roster should mean only that the attorney is a recommended choice, not a required one. Once general eligibility standards for criminal practice are set, there is no reason for legal regulation to confine the indigent to a smaller pool of providers.<sup>92</sup>

The second area in which government regulation should be relaxed is the matter of selecting the attorney who will represent a particular indigent defendant. So far as we are aware, no American jurisdiction presently permits indigents to select their counsel from among those eligible; many jurisdictions expressly forbid them from doing so.<sup>93</sup> Though such restrictions have occasionally been challenged, virtually every American court considering the issue has held that refusal to accept the indigent's choice of counsel is

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89. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983) (proposing new state standards for assessing effectiveness of counsel in penalty phase of capital crimes); Marcia Coyle, et. al., *Fatal Defense*, NAT'L L. J., June 11, 1990, at 30-44 (discussing low level of skill and learning of capital defense attorneys in the South).

90. See *Wheat v. United States*, 486 U.S. 153, 159 (1983) (discussing criminal defendant's right to his chosen attorney), *reh'g denied*, 487 U.S. 1243 (1988).

91. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) (proposing special certification for trial advocates).

92. On balance, nonindigents may have no better access to information about attorney competence than indigents do. See *supra* text accompanying note 17 (discussing information problems confronting indigents and nonindigents).

93. A number of plans adopted by federal courts pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, specifically preclude the indigent defendant from choosing his counsel. See *United States v. Davis*, 604 F.2d 474, 478-79 (7th Cir. 1979) (approving district judge's refusal to allow indigent defendant to choose his own counsel).

permissible and constitutional, even when a defendant's preferred attorney is a member of the indigent defense roster, has previously been appointed to represent the defendant in other matters and makes clear his willingness to serve.<sup>94</sup>

Efforts to empower the defendant and honor his choices could take several forms. Total deregulation would imply leaving the selection decision entirely to the accused. The attorney selected would have to be willing and able to serve, as in any contractual arrangement, but court officials would play no role in bringing him and the defendant together. At most, the defendant might receive a list of attorneys admitted to the bar or a phone number for the bar association referral service. But approaches with such minimal government involvement seem unlikely to further well-informed choices. In addition, they are almost sure to prove logistically infeasible. Speedy trial concerns of both the state and the accused require that the attorney-client relationship be sealed promptly. Moreover, indigent defendants are often jailed prior to trial. They can be permitted to seek counsel by telephone, their families may help, and their cellmates can provide a large pool of current information. Still, many incarcerated indigents will be unable to pursue a quick and successful search for counsel.

These considerations suggest the need for continued official participation in the choice of counsel. Government involvement need not cloud the incentive structure we want to create, provided that the defendant retains effective control over the ultimate selection decision. In one variation, the defendant could be provided several recommendations, or the name of a single attorney likely to accept appointment. An even more cautious model would continue the practice of having the court appoint counsel, but would advise defendants that they can choose a substitute if they prefer. The right to choose a substitute not only would apply among appointed private counsel but would extend to replacement of appointed private counsel by the public defender and vice versa.

In any of these approaches, the attorney could refuse an undesired appointment; even the public defender could decline on grounds of overloaded staff or conflict of interest. The defendant would also have to exercise his option promptly to avoid inflicting duplicative work and disruptive

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94. See, e.g., *United States v. Ely*, 719 F.2d 902 (7th Cir. 1983) (denying defendant's requested counsel even though she had previously represented defendant, was willing to accept appointment, and had represented indigent defendants before), *cert. denied*, 465 U.S. 1037 (1984); *United States v. Davis*, 604 F.2d 472 (7th Cir. 1979) (same); *Drumgo v. Superior Court*, 506 P.2d 1007 (Cal. 1973) (same), *cert. denied*, 414 U.S. 979 (1973). *But see* *Harris v. Superior Court*, 567 P.2d 750 (Cal. 1977) (one of the only decisions holding that extraordinary circumstances may require court to appoint counsel of defendant's choice). See generally WAYNE R. LA FAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 11.4(a), 546-47 (2d ed. 1992); Ronald A. Case, Annotation, *Indigent Accused's Right to Choose Particular Counsel Appointed to Assist Him*, 66 A.L.R.3d 996 (1975).



continuances.<sup>95</sup> But under no circumstances would court officials be permitted, as they are now, to deny a defendant's timely request for appointment of a qualified attorney who is willing to serve.

In models involving continued official participation, the "bottom line" might appear unchanged—most defendants would probably end up with the attorney that the court initially appointed or recommended. But some defendants would make a personal choice, and even those that did not would benefit. The mere existence of a right to choose would dissipate some of the distrust that now infects many involuntary attorney-client relationships and would *for the first time* give the appointed attorney a self-interested reason to value the satisfaction of his client as well as that of the court.

The effect on the incentives of the public defender is more complex. Since defender organizations do not seek a profit, they have no direct economic incentive to try to retain clients; a defender office might even hope that clients would flock to appointed counsel and thus ease its heavy caseload.<sup>96</sup> In the short run, therefore, the defender's incentives, other than idealism and professional pride, might point toward trying to *displease* clients. The crucial countervailing factor here is that representation by appointed private counsel entails much higher costs per case than does representation by the public defender.<sup>97</sup> If substantial numbers of clients opted out of defender programs, indigent defense costs would skyrocket. In a choice system, therefore, county officials would have strong pocketbook reasons for insisting that the public defender maintain client satisfaction in order to continue attracting cases.<sup>98</sup> Freedom of choice provides a mechanism that would, again *for the first time*, give defender organizations an economic incentive to serve the interests of their clients rather than those of the court.

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95. Courts could justifiably restrict requests for substitution of counsel that come too late or are made for dilatory purposes. *See, e.g., Ungar v. Sarafite*, 376 U.S. 575 (1964) (denying defendant's third request for continuance to find another attorney when attorney he selected needed additional time for preparation); *McKee v. Harris*, 649 F.2d 927 (2d Cir. 1981) (denying request for substitute of counsel where request was made on second day of jury selection).

96. "Shedding" of cases to appointed defense counsel was at one time a persistent practice at the New York Legal Aid Society. *McConville & Mirsky*, *supra* note 31, at 652-58.

97. *See SPANENBERG & SMITH supra* note 7, at 11-12 (discussing arguments supporting public defender programs).

98. The need to attract clients on a voluntary basis would probably cause the defender's costs per case to rise, and those costs could begin to approach the per-case costs of representation by appointed counsel. But economies of scale are such that even defenders who are not overloaded operate with lower costs per case than do appointed counsel programs in which attorneys provide careful representation. *Cf. McConville & Mirsky, supra* note 31, at 744-45, 773-74, 874 (In New York City, most appointed panel attorneys were ignorant of the facts of their client's cases and had little knowledge of the state's case; nearly 40% of their fee requests claimed no out-of-court activity whatsoever; under these conditions, per-case costs for panel attorneys were only half those of the defender).

## 2. *Arguments Against Freedom of Choice*

Courts and commentators have given several reasons for denying the indigent defendant a say in the selection of his lawyer. In *Drumgo v. Superior Court*,<sup>99</sup> the California Supreme Court made essentially three points: first, that judges who know the abilities of local counsel can choose a more able attorney than the defendant can;<sup>100</sup> second, that granting a choice to defendants in an appointed counsel program would be inequitable because defendants assigned to the public defender cannot decide which lawyer will represent them;<sup>101</sup> and third, that constitutional requirements are met by a satisfactory minimum level of competence, even if the defendant's preferred lawyer would be better.<sup>102</sup>

*United States v. Davis*<sup>103</sup> held that denial of choice was not merely constitutional but desirable and even, in the court's view, essential. In that case, a federal defendant sought the appointment of an approved panel attorney who was already representing him in another matter. The trial court's local criminal justice plan did not expressly prohibit such an appointment, but the magistrate refused to make it, indicating that to honor a defendant's choice was "not the policy of this district."<sup>104</sup> The defendant challenged the refusal not as unconstitutional but simply as an abuse of discretion. The U.S. Court of Appeals for the Seventh Circuit rejected the argument. Relying on the 1968 version of the ABA Standards on Criminal Justice,<sup>105</sup> the court mentioned several reasons for considering freedom of choice undesirable as a matter of policy: freedom of choice would "disrupt . . . the even-handed distribution of assignments";<sup>106</sup> habitual offenders, better informed about the abilities of counsel, would have an unfair advantage; the more experienced lawyers, in heavy demand by repeat offenders, might be unavailable to other defendants; and choice, if recognized, might lead to undue impositions on particular lawyers. For these reasons, the court concluded, refusal to honor a defendant's preference was not only permissible but "a necessary element of any system to rationally allocate assignments . . ."<sup>107</sup> While treating judicial administration concerns as compelling, the court dismissed the countervailing defense interests as insubstantial: "The defendant has

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99. 506 P.2d 1007 (Cal. 1973).

100. *Id.* at 1009.

101. *Id.*

102. *Id.* at 1010.

103. 604 F.2d 474 (7th Cir. 1979).

104. *Id.* at 479 n.4.

105. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, § 2.3, comment b (Approved Draft 1968) [hereinafter ABA 1968 Standards].

106. *Davis*, 604 F.2d at 478 (quoting ABA 1968 standards, *supra* note 105).

107. *Id.* at 479 (emphasis added).

suggested little more than personality conflicts and disagreements over trial strategy. . . ."<sup>108</sup>

*United States v. Ely*<sup>109</sup> reaffirmed *Davis* and enlarged upon its reasoning. *Ely*, like *Davis*, involved a federal defendant who made a timely request for appointment of a competent and willing local attorney. The court again held that the refusal to do so was not only constitutional but desirable.<sup>110</sup> Its opinion upholding the refusal to honor a defendant's choice carries particular weight because it was written by a person who is ordinarily a staunch supporter of contractual freedom, Judge Richard Posner. Judge Posner began by noting that the compensation paid to appointed counsel is not generous.<sup>111</sup> He then explained:

The best criminal lawyers who accept appointments therefore limit the amount of time they are willing to devote to this relatively unremunerative type of work; some criminal lawyers, indeed, only reluctantly agree to serve as appointed counsel, under pressure by district judges to whom they feel a sense of professional obligation. The services of the criminal defense bar cannot be auctioned to the highest bidder among the indigent accused—by definition, indigents are not bidders. But these services must be allocated somehow; indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer. The district judge in this case could not, realistically, be required to arbitrate a dispute between *Ely* and another indigent criminal defendant who wanted to be represented by [the same lawyer].<sup>112</sup>

The reasons given for refusing to honor defendants' choices are in our view insufficient. The constitutional issue is largely beside the point. Admittedly, the Sixth Amendment does not guarantee a defendant the best possible lawyer. But the reasons this must be so are primarily economic and logistical; the best possible lawyer will frequently be too expensive or too busy to serve. It is far from obvious that the Sixth Amendment should be deemed satisfied by appointment of a merely competent attorney when a lawyer the defendant prefers is ready and willing to serve at no additional cost.<sup>113</sup> But even if

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108. *Id.*

109. 719 F.2d 902 (7th Cir. 1983).

110. *Ely's* claim was cast solely in constitutional terms, and the court rejected it: "[T]he government's constitutional obligation is exhausted 'when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense.' . . . *Ely* does not argue that [appointed counsel] was incompetent or had a conflict of interest. . . . It was not that [appointed counsel] was not good but that [another attorney] was, in *Ely's* opinion, better." *Id.* at 904 (quoting *Davis*, 604 F.2d at 479). But the court's opinion went on to address the policy issues and to endorse the view that "[t]here are practical reasons for not giving indigent criminal defendants their choice of counsel." *Id.* at 905.

111. *Id.* at 905.

112. *Id.*

113. See Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 99

refusal of choice is constitutional, why should this policy be considered a necessary or desirable feature of a sensible indigent defense system?

There is little to the claim that the appointing judge can choose more able counsel than can the defendant himself. The importance of rapport and trust for an effective attorney-client relationship is one reason for doubting the proposition. More decisive is the incentive problem. Even if the judge has better information, he has much less reason to make the best possible choice; indeed the judge has an incentive to use his information perversely by preferring cooperative attorneys to vigorous ones.<sup>114</sup> If the claim about judges' superior knowledge were advanced as a reason for denying choice to defendants of means, we would not give it a moment's credence. It deserves no more weight with respect to defendants who are indigent.

Several arguments suggest that defendant choice would produce unfairness among attorneys. In the "even-handed distribution" argument,<sup>115</sup> appointment may be seen as a plum that particular attorneys should not be permitted to horde. But remuneration is seldom too generous, and if it is, inequitable distribution is far more likely when judges or other court officials control the largess than when its distribution results from choices by individual defendants pursuing their own self interest.<sup>116</sup> Indeed, defendant

(1974) ("The importance to the indigent of choosing his attorney is clear: improvement in the attorney-client relationship, representation by an able attorney who will fight aggressively for him, and the likelihood of greater participation in structuring his defense.").

114. McConville & Mirsky, *supra* note 31.

115. *Davis*, 604 F.2d at 478.

116. Where appointment is seen as desirable, judges may use their control over appointment to benefit themselves at the cost of indigent defendants. A recent article describes the situation in the felony trial courts of Marion County, Indiana (which includes the city of Indianapolis):

[T]he city's six superior court judges each hire defense lawyers to represent indigents. These public defenders work exclusively in the courtroom of the judge who hires them—and who can fire them. . . . No lawyer interviewed could remember an instance where a judge hired a public defender who didn't belong to the judge's political party. Nor is the political tie severed after the public defender begins work. Four current and former public defenders acknowledge contributing to their judge's campaign. "I donated, and I use 'donated' in quotes," says former defender Hammerle, who worked for three different judges at different times. "You gave—let's put it that way."

And if the trial-level public defender system is tinged with political influence, the indigent appeals system in Marion County has historically been marked by naked political patronage. In some cases appellate lawyers have even served as campaign chairs to the judge's campaign. That can result in appellate lawyers more skilled in fund-raising than law, says Hammerle, who notes that when he was first building his practice some of these lawyers would pay him a \$500 fee to ghostwrite appellate briefs.

Nicholas Varchaver, *Sentenced Before Trial*, AM. LAW., Jan./Feb. 1993, at 50, 54.

According to another article, describing the situation in Wayne County, which includes Detroit:

Judges run for reelection every six years in Wayne County, and one local lawyer says it is more than coincidental that judges tend to come up for assignment duty around fund-raising time. When the wife of one Recorder's Court judge was running for

choice would tend to force attorneys to compete away excess profits by offering better services to attract clients. The situation most likely to involve excess compensation is that of the inexperienced or ineffective attorney with few other opportunities, and these are just the attorneys that defendants would try to avoid. Defendant choice would tend to skew the distribution of appointments toward attorneys for whom representing the indigent would not be a financial boon.

This leaves the “undue imposition” argument—that good attorneys would be unfairly burdened with the task of serving the indigent—<sup>117</sup>and the related idea, emphasized in *Ely*, that “indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer.”<sup>118</sup> But since busy attorneys can refuse additional appointments, no attorney would ever have to carry more cases than he himself considered fair. There is at most the potential inconvenience of an attorney’s having to turn away the requests, but successful attorneys always face this problem when their fees are not raised to the fullest or are not known to potential clients. In any event, court officials can easily avoid the logistical problem by advising defendants about which attorneys are currently accepting indigent cases.<sup>119</sup>

Claims that freedom of choice would cause unfairness between defendants seem strained. One argument is that choice should be denied in assigned counsel programs because it is denied to defendants represented by the public defender. But representation by a public defender provides a mix of advantages and disadvantages compared to the services of appointed private counsel; the absence of one feature in a defender system is no argument against making an otherwise feasible improvement in the operation of the assigned counsel program. And a policy denying defendants their choice of counsel within a public defender office is itself open to question. Offices organized to afford each defendant continuous representation by the same

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reelection to the state supreme court, “you handed in your hundred dollars [for the wife’s campaign] and then you got your assignment,” says the lawyer, who speaks from direct experience.

The only Recorder’s Court judge with a wife on the state supreme court, Terrance Boyle, says the charge is “absolutely untrue.” He acknowledges that a number of Recorder’s Court lawyers think there is a direct connection between the money they contribute and the assignments they get, but he says that has nothing to do with the decisions he makes.

But the mere perception that contributions are mandatory makes it easy for judges to fundraise at election time. “You know how much money I’ve spent this year [on donations to judges’ campaigns]?” says the local lawyer. “More than five thousand dollars.”

Court, *Rush to Justice*, *supra* note 71, at 58.

117. *Davis*, 604 F.2d at 479.

118. 719 F.2d at 905.

119. In the deregulation models considered *supra* text accompanying notes 87-98, court officials would make recommendations or initial appointments in light of attorney availability.

defender probably could permit clients a considerable degree of choice in most kinds of cases. Offices committed to the so-called “zone defense,” which assigns a different defender to each stage of a case, normally would not be able to permit choice of counsel, but such offices would afford other advantages that some clients might consider preferable, such as the assurance that a highly experienced attorney will handle the trial phase of the case. The important point, for purposes of assuring effective choice, is that defendants displeased with the package of services provided by a defender office—including one that did not permit its clients to select a particular defender—should have the option of switching to appointed private counsel, or even to a competing firm of defenders, just as students choose among colleges without expecting to have complete freedom to choose all of their professors.

Other arguments against choice focus on fairness among defendants assigned to private counsel. The best lawyers are a scarce resource, and they must be allocated by some system other than the price mechanism. *Ely* conceives a defendant’s request as an attempt to deny the preferred lawyer’s services to another defendant who also wants them. Even if this were true, it would mean only a first-come-first-served principle of distribution, not a bad alternative to discretionary government control. But the conflict is largely hypothetical, assuming a unidimensional ranking of lawyer quality and an unambiguous definition of what makes an attorney the “best.” In practice different defendants, will face different tactical problems, and they may therefore prefer attorneys known for different styles and skills. And a crucial determinant of lawyer quality is trust, often based on a prior relationship. Lawyer A is appointed for defendant X, but X prefers lawyer B whom he already knows. *Ely* forces X to remain with A, on the assumption that a hypothetical defendant Y also wants B’s services. Yet for all we know, Y was previously represented by A and prefers the lawyer that X is trying to get rid of. *Ely* binds X to A and Y to B, even though each defendant may prefer a swap. As is the case in most other areas of economic activity, allocation by official decision prevents mutually beneficial gains from the exercise of free choice.

A final concern is that in a system of free choice, defendants with poor information would get good lawyers less often than they do now, while well-informed defendants, a group that may include a disproportionate share of repeat offenders, would benefit. But if this is a “problem,” it is also one ubiquitous in economic transactions. Less informed and less careful consumers often do worse than others, but our society does not consider this difference in outcomes inequitable, even for such vital services as health care and criminal defense; hence our commitment to protecting free choice for the nonindigent defendant even though this policy gives the nonindigent

recidivist an advantage over the nonindigent first offender. Should we randomly assign medicare patients to doctors in order to be sure that those who are less informed have an equal chance to get the best care? The advantages of choice for maximizing consumer welfare far outstrip any costs to those who do not vigorously protect their interests.

Moreover, less informed defendants are not necessarily worse off in a system that honors the knowledgeable recidivist's choice. Even when the defendant's interests are of the sort that the court in *Davis* sought to trivialize as "little more than personality conflicts and disagreements over trial strategy,"<sup>120</sup> the importance of choice should be apparent. Though a no-choice regime seems to give the inexperienced defendant an equal chance for the "best" lawyer, this is true only over a short run in which the quality of the attorneys remains fixed. In a system of choice, selection by knowledgeable consumers will tend to attract better attorneys and drive out the ineffective ones. Over the long run, even the poorly informed defendant is therefore likely to do better than he will in a regime that contains no systemic incentive for attorneys to value the satisfaction of their clients, just as all shoppers benefit from the efforts of those who take the time to compare prices and quality across stores. And if Judge Posner is correct, as we believe he is, to note the impact of low fees on the good lawyers, who "limit the amount of time they are willing to devote to this relatively unremunerative type of work,"<sup>121</sup> countervailing incentives to respect the client's interest become all the more necessary.<sup>122</sup>

Though we find the arguments against choice thoroughly unconvincing, the virtual non-existence of this system anywhere in the United States suggests that powerful reasons of some sort sustain the status quo. One possibility is that logistical impediments to honoring choice are not as trivial as our own analysis suggests. Yet indigents have long been permitted to select their own counsel in England and Wales,<sup>123</sup> and more recently in Ontario,<sup>124</sup> so there

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120. *Davis*, 604 F.2d at 479.

121. *Ely*, 719 F.2d at 905.

122. Good lawyers who lose money on indigent cases might not regret the loss of indigent business if dissatisfied clients tried to avoid them. But this possibility raises the question of why such lawyers are accepting indigent cases in the first place. If, as Judge Posner assumes, they do so under pressure by district judges, then their inability to attract indigent clients would leave them unable to meet the court's demand for their public service contribution. As in the case of a public defender, good private attorneys would have to maintain client satisfaction in order to respond to political pressures on them to bear a certain share of the indigent defense caseload. Such attorneys presumably would still "limit the amount of time they are willing to devote," *Id.* at 905, but the crucial difference is that a system of choice would create incentives for such attorneys to limit their time by taking fewer cases, rather than by stinting on the time they devote to the cases they accept.

123. See INTERIM REPORT *supra* note 9, at 2335, 2345 n.14 (indigents given freedom to choose counsel paid with government funds).

124. See William W. Horne, *Canada's Cadillac*, AM. LAW., Jan./Feb. 1993, at 62-66 (discussing 1967 plan that allows qualified applicants to choose from 5,500 lawyers serving on legal aid panels).

seems little basis for belief that such a system cannot be workable. Moreover, the American Bar Association's opposition to choice, reflected in the 1968 standards on which the *Davis* court relied, was largely reversed only a year after *Davis* in the ABA's 1980 revised standards.<sup>125</sup> More recently, the Judicial Conference of the United States has recommended "an experimental program . . . in volunteer pilot districts in which certain CJA-eligible defendants would get a limited choice of counsel."<sup>126</sup> We consider this a sensible approach, though the cautious qualifications are probably unnecessary.

The near unanimity of the judicial decisions rejecting freedom of choice might give us pause, were it not for the courts' obvious stake in preserving the existing rule. The no-choice regime is easy for judges to manage, requires no new administrative procedures, and above all gives courts a direct means of steering appointments to political supporters or to attorneys who do not make excessive demands on the indigent defense budget and on the courts' time.<sup>127</sup> The steering factor is probably the biggest advantage of judicial control and at the same time its biggest vice, for a judge's conception of excessive cost may be a defendant's conception of vigorous effort. An attorney's tendency to make heavy demands on court time cannot be a proper basis for disqualification, and courts must monitor attorney fee statements in any event. Judicial control over the appointment process may make monitoring easier, but we assume that this advantage would be a manifestly insufficient basis for disqualifying a vigorous attorney who sought to be included on

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125. The revised standard withdraws the reasons that had been given for opposition to choice and states instead:

Neither statutes nor court decisions recognize the right of an eligible defendant to select the private lawyer of his or her choice. . . . In contrast, the defendant with sufficient funds can retain the lawyer of his or her choice and discharge an attorney when confidence in the lawyer diminishes. There is much to be said for allowing the eligible defendant, when administratively feasible, the same freedom of action available to the defendant of means. Where the defendant has personally selected counsel, there is likely to be greater confidence in the attorney and in the justness of the legal system generally. Obviously, if all defendants insisted on the right to choose their own attorneys, the administrative burden would surely undermine the effectiveness of the assigned-counsel system. But where the requests are few and do not pose serious administrative inconvenience, selection of counsel by defendants should be encouraged.

A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, standard 5-2.3, commentary at 5.29-5.30 (2d ed. 1980) (footnotes omitted). See also A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, standard 5-2.3 (3d ed. 1992).

126. INTERIM REPORT, *supra* note 9, at 2017.

127. See *supra* notes 32-33 (discussing steering of appointments to more cooperative attorneys). For a particularly vivid example in which the federal court of appeals found that the defendant was deprived of his constitutional right to assistance of counsel because the trial judge had explicitly threatened to withhold fees and future appointments from defendant's counsel as punishment for counsel's adversarial behavior, see *Walberg v. Israel*, 766 F.2d 1071 (7th Cir. 1985).



an indigent defense panel; indeed defenders of the no-choice regime have never sought to justify the system on that basis.

We conclude that deregulation, in order to permit freedom of choice in the context of existing public defender and assigned counsel programs, is an easily implemented and important step toward improving incentives and curing malfunctions in the representation of indigent defendants. The next section considers more ambitious reforms that would go beyond free choice for defendants to change the structure of public defender systems and provide greater freedom of organization for the providers of indigent defense services.

### *C. Voucher Models*

The approaches we consider in this section carry deregulation one further step. They not only permit defendants to choose among authorized providers, but they reduce the extent of governmental control over the providers themselves. We intend no sharp conceptual split between the partial deregulation models just considered and the more ambitious voucher models. With the freedom of choice provided by the former systems, clients might begin to request the services of private firms rather than just the lawyers on an indigent defense panel, and lawyers might organize to attract such business. If so, the more extensive changes we now want to consider could quickly evolve from initially cautious forms of partial deregulation. For convenience, we will designate as a “voucher” model any system in which lawyers who serve the poor have freedom to organize their practice as individuals or firms, with or without specialization, and to compete for the business of indigent clients. The voucher would be the guarantee of state payment that the accused can take with him to any individual or group provider of criminal defense services.

Because government would not control the organizational form employed by indigent defense providers, a number of different approaches would be likely to materialize. We would expect them to include solo lawyers, small groups of practitioners and larger firms. Providers would vary not only by size but by kind of practice, just as they currently do in most areas of legal work. Some practitioners might be generalists who occasionally take a criminal case. Most would probably be specialists—in litigation, in criminal practice or even in a particular kind of criminal practice, such as juvenile cases, traffic offenses, or major felonies. These variations already exist among those who represent nonindigent defendants and the increase in the client pool made possible by a voucher system would permit further specialization. We expect that most criminal defense specialists, whether individuals or firms, would serve both poor and affluent clients, though some might specialize in serving

the indigent.<sup>128</sup> Finally, we would not exclude the possibility of a government-run staff of salaried public defenders, financed by vouchers collected from clients. A public defender of this sort would not compromise the value of a voucher system, so long as alternate private service providers were also available and defendants remained free to choose among the various public and private sources of representation.

We hypothesize that this proliferation of possibilities for the indigent defendant would provide a much needed spur for innovation, effectiveness and loyalty to client interests in delivery of criminal defense services. The principal risk of such an approach is two-edged. Would it successfully protect the state's legitimate interest in avoiding excessive costs, and if so would it still successfully elicit quality defense services for the poor? To explore the question whether a voucher system can avoid these twin pitfalls, we need to examine in detail the form of reimbursement that the voucher would guarantee. We consider two possibilities: lump-sum payments and variable payments based on services actually rendered.

### *1. Lump-sum payments*

With a lump-sum voucher, the state would grant a fixed amount to cover the cost of defense but leave to the defendant the decision of what services to buy with the money provided. The transition to lump-sum vouchers would be easiest in counties that currently compensate appointed counsel or contract counsel on a lump-sum basis. As at present, the amount of the voucher would depend on the nature of the charge, with different rates for capital cases, other felonies and misdemeanors, but unlike the present system the voucher could be cashed by any provider chosen by the defendant who was legally eligible to provide the service—that is, to practice before the relevant court.

When first implemented, a voucher system of this sort would cost no more than the prior system of representation; in principle, each voucher would be worth exactly what the county had previously been paying per case for indigent defense services. We would expect that plan administrators would find it cost-effective to make the schedule of voucher payments more discriminating—for example, linking lump-sum amounts to the particular offense charged and perhaps to other observable features of the case, such as whether it is resolved by guilty plea or by trial. But initially at least, average payments per case would be no higher than before.

Over time, the voluntary choice features of a voucher system for both attorney and client would exert some upward pressure on the indigent

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128. The prospect of the legal equivalent of health care's "Medicaid mills" comes to mind as a cautionary note here, though we doubt that firms freely chosen could be any worse in this regard than many existing public defender systems.

defense budget. If the payments offered were insufficient to attract sufficient numbers of qualified attorneys, a county that had previously relied upon conscription would have to raise the amount of its vouchers. The resulting addition to the county's budget would not, of course, represent an increase in real economic cost, but only a transfer to the public of costs that had been borne by attorneys previously conscripted at below-market rates.<sup>129</sup>

In such a system, the principal constraint on providers is market pressure, working through reputation. Just as in the market for ordinary legal services, defense firms will wish to establish a reputation for effectiveness, in order to attract more clients. A lawyer might be tempted to pocket the lump-sum fee and then stint on the time he devotes to the case, but this danger already exists in the fixed-fee appointment systems that a lump-sum voucher would replace. The difference under a voucher plan is that, as in any market transaction for service at a fixed price, stinting on service risks client dissatisfaction and, through reputation, a loss of future business.<sup>130</sup> There is no such prospect for preventing meager service when the flow of future clients is controlled by the county or the court.

How well reputation will work depends in part on how well informed potential clients are about the performance of firms. While the state's primary role in such a system is providing the voucher, there is no reason why it cannot also provide information. The court or county government could inform indigent defendants as to which firms it believes do a good job. Defendants would be free to discount the recommendation if they suspected that the state was more concerned with its interests than with theirs. Such an arrangement allows defendants to have both the informational advantage of state choice of provider and the incentive advantage of defendant choice.

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129. A voucher plan could also raise taxpayer costs in cases that currently receive a mix of retained and appointed representation. Some defendants start through the courts as indigents, but then switch to retained counsel, usually with funds obtained from family or friends. See Janet A. Gilboy and John R. Schmidt, *Replacing Lawyers: A Case Study of Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, 8-9 (1979). The ability to choose counsel under a voucher plan would lessen the pressure to opt out of the indigent defense program, and the indigent defense caseload might therefore rise somewhat. But the associated increase in taxpayer costs would be counterbalanced by gains that both the defendant and the court system would realize from a less disrupted attorney-client relationship. See *id.* at 19-21; Janet A. Gilboy, *The Social Organization of Services to Indigent Defendants*, 1981 AM. B. FOUND. RES. J. 1023, 1044-47. In addition, a voucher plan would tend to reduce the frequency of disruptive changes in representation that occur when indigency forces defendants to switch from retained to appointed counsel and when judicial appointment prerogatives force defendants to switch from one appointed attorney to another at different stages of the case. *Id.* In these instances, a voucher plan would further continuity and courtroom efficiency without adding to taxpayer outlays for indigent defense appointments.

130. An article on Ontario's voucher system reports: "...10-15 percent of the criminal certificate bar are 'constant pleader' types who rarely go to trial—and . . . clients know it. Layton Elijah, who has been represented on certificates several times since 1971, agrees that defendants know which lawyers will merely try to plead them out. 'You hear about it in jail about guys who just take the deal, lawyers who lead you astray,' he says." Horne, *supra* note 124, at 51.

So long as a lump-sum voucher is set at a level sufficient to make it attractive to criminal defense practitioners, this approach provides one way to solve the incentive problem. Not only does it use consumer sovereignty to constrain the lawyer to act in the interest of his client, it also fixes the payment obligations of the state, and thus eliminates any potential for the lawyer to increase his income at taxpayers' expense.

The lump-sum voucher has another interesting incentive characteristic. Since the amount provided will normally increase with the seriousness of the charge, the voucher model would tend to deter prosecutors from inflating the charge. A prosecutor who follows such a strategy, to bluff the defendant into pleading guilty to a lesser count, increases the resources available to the defense and thus makes conviction more difficult.

A lump-sum voucher provides the defendant insurance against type 1 risk, uncertainty about whether a particular person will be indicted and if so, for what offense.<sup>131</sup> Such a voucher also insures the defendant against type 2b risk, the risk that his case will turn out to be complex after an attorney has accepted it. Such insurance is implicit in the agreement made by a provider when he accepts the case. Defendants choose providers in terms of the total package they offer, including service for both complex and simple cases. As long as the cases cannot be distinguished in advance, a provider has an incentive to offer good service on complex cases as part of a package intended to attract clients because this is the only way to get simple cases.

The most serious disadvantage of the lump-sum voucher is that it provides no insurance against type 2a uncertainty, no protection for the defendant who has a complex case identifiable as such before the lawyer accepts it. Because the provider gets a fixed payment, he will prefer, so far as possible, either to take only simple cases or to take complex cases only on the understanding that he will not try very hard to win them. One cannot solve this problem by merely requiring providers to agree, like common carriers, to accept all comers. All a firm need do to protect itself against complex cases is do an inadequate job of defending them, thus saving money and developing a reputation that will keep away future clients with complex cases.<sup>132</sup> This

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131. The form of the insurance is decided by the state agency that sets the pattern of vouchers, not by the market, so a voucher system is in this respect neither better nor worse than the other alternatives discussed.

132. This point applies only to type 2a hard cases. The firm wants a reputation for doing a good job with type 2b hard cases, since that is the only way of getting type 2b easy cases—the two being, by definition, indistinguishable at the point when the defendant chooses a firm.

One possible solution (at least in theory) for the problem of hard cases identifiable in advance is the option of coinsurance. The state could allow the defendant to pay the provider for services beyond those covered by the voucher—for example, extra hours on an obviously difficult case—and could then reimburse the defendant for some fraction of that expenditure. This option is relevant only if the defendant has access to some resources, but even those judged indigent may have some money, or source of loans, or friends willing to contribute to their defense. A further modification would be to

might be a serious argument against a voucher if the current system of indigent defense provided substantial insurance against the complex-case risk. But it does not. As we have pointed out, many counties currently provide only a lump sum for indigent defense, and thus replicate the disadvantage of a voucher without its advantages. Many more jurisdictions provide a variable amount but with a low ceiling, thus in effect offering either a lump sum or only minimal insurance. For jurisdictions that currently compensate counsel by a lump-sum payment or an hourly rate with a low cap, a voucher structured in the same way would cost taxpayers no more and would leave defendants unequivocally better off.

Nonetheless, the problem of type 2b uncertainty suggests that the lump-sum voucher is far from ideal. It is therefore important to explore possible improvements upon the lump-sum voucher approach. The next section analyzes several more complicated forms of voucher payment.

## 2. *Hourly-rate Vouchers and Other Variations*

One alternative would be for the voucher to authorize payment at a predetermined rate per hour, with a firm or presumptive cap and some possibility for a court administrator to review whether the time spent on the case was reasonable. The Canadian province of Ontario has used such a model for some time, apparently with considerable success.<sup>133</sup> This approach is a compromise between the lump-sum voucher (which completely disengages the state from control over an individual provider's compensation) and the more heavily regulated approaches discussed earlier.

The hourly-rate voucher improves the system as insurance, but brings back

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make the terms of the coinsurance conditional on case outcome. One might, for example, reimburse all reasonable defense expenses if the accused is acquitted. For the client, such an arrangement would amount to the reverse of the ordinary contingent fee—the client would pay only in the event of an unsuccessful result. For exploration of the complexities of determining the appropriate measure of full or partial success in criminal cases, see Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595 (1993).

In systems permitting coinsurance, i.e. private supplements to the public voucher, indigent defendants would no longer self-select. Any defendant, however great his resources, would have an incentive to claim indigency in order to get the voucher, since he could supplement it with as much of his own money as he wanted. The agency handing out the vouchers would have to be more careful than under present arrangements to verify indigency claims.

133. The Ontario Legal Aid Plan (OLAP) differs from a simple hourly-rate voucher in several ways. It combines payment by time with lump sum payments for certain activities. A higher payment is provided to more experienced lawyers. Defendants who are not sufficiently indigent to qualify are in some cases able to get a partial subsidy for their legal expenses. The system provides some coverage for civil cases as well as criminal. OLAP seems to be widely regarded as a success in terms of the quality of service, but it is hard to tell whether that reflects the organizational structure, the level of funding, or features of the legal environment in which it works. Compared to New York City's legal aid plan, the OLAP is less expensive per taxpayer but substantially more expensive per matter handled. Horne, *supra* note 124, at 62-66.

some of the incentive problems that a lump-sum voucher is designed to avoid. If the hourly rate is compensatory, it leaves the attorney with an incentive to spend more time than necessary on the case. Government review of fee claims is therefore essential in an hourly-rate voucher plan, as it is in existing programs that compensate appointed counsel at an hourly rate. Unfortunately, from the taxpayer's perspective government review is a costly and imperfect monitoring device, while from the defendant's perspective supervision by a court administrator or judge reduces his freedom of choice; the court system could punish attorneys who prove too loyal to their clients and chill their willingness to serve future defendants by permitting them only minimal fees.

These drawbacks to the hourly-rate approach would count as serious defects in this sort of voucher, except that each of them is equally present in existing hourly-rate plans for appointed counsel. The voucher approach is no worse in these respects and at least has the advantage of using the defendant's power of choice as a reason for the attorney to take her client's interests into consideration. Once a jurisdiction has opted to compensate appointed counsel on an hourly-rate basis, there are unequivocal welfare gains in offering defendants a "portable" voucher structured in the same way.<sup>134</sup>

Since an hourly rate voucher gives the taxpayer less security than a voucher for lump-sum payment, logic alone cannot dictate the choice between these two methods of structuring compensation within a voucher system. To some extent the relative merits of these alternate approaches will depend on local conditions and on the level at which lump-sum and hourly payments are set. These matters would provide fruitful areas for investigation, as would the possibility of giving defendants a choice between lump-sum and hourly-rate vouchers. Current experience suggests that hourly rates, combined with after-the-fact monitoring, lead to more responsible and effective representation, without uncalled-for demands on the state budget.<sup>135</sup> And whatever the variation in how voucher plans were structured, any of the voucher models we have considered will improve upon partial deregulation plans by permitting greater diversity of organizational form for service providers and wider scope for the operation of free choice on the part of indigent clients. Voucher models offer a package of incentive, insurance and information benefits that is clearly superior to those of either partial deregulation or, a fortiori, preservation of the status quo.

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134. This remains so even though monitoring of attorney fee requests seems likely to be more effective when the state can restrict the pool of attorneys eligible to serve.

135. The comparison between the effectiveness of attorneys compensated on a lump-sum or hourly basis in current, non-choice regimes is clouded, however, by the fact that the level of authorized payments in existing lump-sum systems is typically quite low and the attorneys who serve in such regimes tend to be conscripts with powerful incentives to minimize the time they devote to the case.

### *D. Objections to Voucher-Based Reforms*

#### *1. Will a Voucher Approach Prove Effective in Practice?*

Our primary goal in proposing a voucher approach has been to use the engine of free choice and consumer sovereignty to improve the effectiveness of indigent defense services. But several practical concerns raise questions about whether a voucher approach would really work. We examine both economic and non-economic concerns.

##### *a. Resource levels*

Until now we have put to one side the question of how generously indigent defense services will be funded; we have simply argued that, with whatever resources society allocates to indigent defense, freedom of choice will enhance the quality of the services delivered. Among those committed to the improvement of indigent defense, however, there is an understandable preoccupation with funding levels. There are legitimate concerns that without large increases in the resources devoted to indigent defense, the reforms we propose may make little difference. Conversely, if the necessary funding increases can be achieved, it might seem that the reforms we propose will no longer be necessary. We recognize that funding levels have major impact on the quality of defense services and will continue to do so under the voucher regimes we propose. Nonetheless, as we explain in this section, freedom of choice remains a critical element in a plan for achieving effective defense services, at any level of funding.

If funding levels remain low, the pool of attorneys who serve the indigent will continue to include both able, altruistic lawyers and minimally competent attorneys with few other opportunities. It might appear that our proposal to end conscription, when combined with low resource levels, would reduce the number of able attorneys serving the poor. But the only attorneys lost in this way would be those who try to minimize the time they devote to indigent defendants because they prefer not to serve. The end of conscription would not preclude able attorneys from serving at below-market rates, and in fact would help insure that those who do so are participating out of genuine altruism and concern for client interests.

Nonetheless, if resource levels are low, many minimally competent lawyers will remain in the pool of providers. In such an environment, so common in American cities today, client needs are at risk under the best of circumstances. But client choice becomes especially important when resources are meager, because it affords defendants some reason to trust their attorney, if only by providing an escape from the worst lawyers.

A voucher plan also can have major impact on the question of what the long-run resource level will be. Client choice and a bar on conscription will

tend to render funding inadequacies more visible and bring more effective pressure to correct them.<sup>136</sup>

If resource levels are increased, the predicament of the indigent accused will improve, but client choice will remain a crucially important safeguard. Public defenders and appointed attorneys will no longer find it impossible to devote adequate time to their cases, but apart from altruism, such attorneys will still lack an affirmative incentive to do the best job for their clients. In fact, if indigent appointments become lucrative and public defender salaries are raised, the attorneys involved will have even stronger reasons than at present to curry favor with court officials upon whom their positions depend. So client choice will remain essential, even with ample funding, to assure that attorneys focus on satisfying clients rather than the court.

*b. Non-economic concerns*

A non-economic element also affects prospects for a voucher system. What risks do we run in making the profit motive a more prominent factor in indigent defense practice? At present, idealism attracts many able lawyers to serve the poor, and these attorneys provide one of the few bright spots in the otherwise dismal picture of American indigent defense systems. In a more profit-oriented atmosphere, would fewer lawyers be drawn to this kind of work? Would attorneys in profit-oriented firms lose their idealism? Parallel concerns arise with many other proposals to substitute market arrangements for various forms of public service.

These risks should not be taken lightly, especially in an area where, as in indigent defense, idealism has played a vital role. The structure of a voucher model suggests one answer to the problem. Voluntary arrangements and free choice do not mandate a preoccupation with profit. Bar leaders could still form nonprofit corporations and hire idealistic lawyers on salary, just as happens now in Community Defender Associations. Defenders organized as government agencies could likewise emphasize public service in their recruiting and daily operations. Such organizations should have no difficulty attracting clients (and vouchers) if their performance lives up to their ideals. And if altruism permitted such firms to hire attorneys at below-market rates, they would have a further advantage that should translate into larger staffs, lower caseload ratios and more support services than profit-oriented firms could provide. The market approach we urge in this paper is not inconsistent with preserving what is best in existing systems for indigent defense. Indeed, we

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136. It might be argued that, under present circumstances, the public defender's office provides a powerful organized voice in favor of increased funding. So a reform that replaces the public defender's office with a multitude of private attorneys paid by vouchers might result in less pressure for funding and thus fewer funds. On the other hand, private firms providing goods or services for government can make up a potent lobby in favor of increased funding, as military contractors have often demonstrated.



believe flexibility and client control are essential to insure that the good qualities in current indigent defense practice will be protected and encouraged.

## 2. *Are Improvements in Indigent Defense Socially Desirable?*

In arguing for freedom of choice and a system of vouchers as a way to improve the quality of defense services, we have taken for granted that such improvements would be a good thing. But some scholars and a substantial portion of the general public may disagree. That disagreement, though seldom openly articulated, may play a large behind-the-scenes role in explaining resistance to improving indigent defense. We believe it useful to try to make explicit the reasons for that resistance and our response to them.

One source of skepticism about the value of an effective defense is a widespread view about the way that an effective lawyer can help his client. Do the special skills of the high-priced lawyer typically serve to demonstrate the innocence of someone who was falsely charged, or do they more often enable a guilty person to get off on a "technicality"? Much of the resistance to providing better indigent defense no doubt reflects the latter view. If that view is correct, then an improvement in the quality of defense services may occasionally keep an innocent from being convicted, but its main effect will be to make conviction of the guilty more difficult, thus lowering conviction rates, reducing the deterrent effect of criminal punishment and increasing the amount of crime.

We do not know of any way to establish whether effective lawyers help the guilty more often than they help the innocent. But even if that pessimistic view is empirically correct, it represents an obvious normative mistake. Rules of criminal procedure that permit the guilty to escape on mere "technicalities" may need to be reconsidered on their merits, but there is no justification for undermining those rules covertly by making them hard for one subset of defendants, the indigent, to invoke. So long as such rules remain on the books, they reflect presumptively legitimate goals, whether related to or distinct from protection of the innocent, and counsel should be able to invoke those rules effectively in order to promote the social values they serve.

A related but even broader claim is that virtually all defendants presently convicted by our criminal justice system are in fact guilty, so that improvement in the quality of indigent defense is unimportant. This view rests, again, on an unprovable empirical premise; recurrent news stories about demonstrably innocent men convicted of serious crimes<sup>137</sup> require one to approach this

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137. See, e.g., *Walker v. New York*, 974 F.2d 293 (2d Cir. 1992) (civil rights plaintiff spent 19 years in prison for a crime he did not commit), *cert. denied*, 113 S. Ct. 1387 (1993); Karen F. Donovan, *Lock-Up to Limbo: Court OK's DNA Test*, NAT'L L.J., July 29, 1991, at 8 (innocent man released after serving four years of 335-year sentence for a double rape); Kevin Krajick, *Genetics in the Courtroom*, NEWSWEEK, Jan. 11, 1993, at 64 (defendant exonerated by DNA testing after serving 11 years on a

claim with skepticism. Nonetheless, some scholars have sought to provide theoretical support for the view that nearly all convicted defendants are guilty. Judge Richard Posner, for example, has argued that police and prosecutors, faced with tight budgets and high crime rates, have enough to do convicting the guilty and are therefore unlikely to waste scarce resources trying to convict the innocent.<sup>138</sup>

We find arguments of this sort unconvincing on several grounds. First, even in a society of overworked police and scarce prosecutorial resources, there are several sources of serious risk to the innocent. Even if prosecutors consistently select only their easiest cases, there is no guarantee that ease of conviction will correlate closely with actual guilt—especially for poorly represented defendants. Indeed, high crime rates, scarce resources and a weak system of defense may drive prosecutors to seek an easy conviction of the first suspect at hand, rather than pursuing a more thorough investigation that might exonerate him.

A second problem with the hypothesis of prosecutorial triage is more basic. To posit that prosecutors consistently select only “easy” cases seems to beg an important part of the question. If we assume, with Judge Posner, that police and prosecutors screen out weak cases to maximize the value of scarce resources, we are positing a particular kind of rational behavior and putting aside both irrational behavior such as vindictiveness, and any rational but self-seeking behavior that does not require the socially, optimal use of scarce resources. If those sorts of executive misfeasance seldom or never occur, effective judicial oversight and other checks and balances obviously become superfluous. But such a restricted behavioral model, however useful for some analytic purposes, simply assumes away the very reason why we have courts and defense counsel in the first place.<sup>139</sup>

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rape conviction); *Results of DNA Tests Free “Murderer” After 9 Years*, N.Y. TIMES, June 29, 1993, at A11 (innocent man released after serving nine years on murder-rape conviction); cf. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. (1987) (study alleging 350 cases of people wrongfully convicted of capital and potentially capital crimes).

138. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 216 (1990).

139. The argument against improving criminal defense, if correct, has some interesting implications. There is no obvious reason to think that indigents are less likely to be convicted of crimes they did not commit than non-indigents; if anything one would expect the opposite. So if improvements in indigent defense are a bad thing, if their main effect is to make it harder to convict the guilty, then so are improvements in defense for non-indigents.

Non-indigents improve their defense by spending more money on it. If even costless improvements in indigent defense, such as those that might result from moving to a voucher system, are undesirable, then costly improvements in defense are undesirable a fortiori. If improvements in indigent defense are undesirable even at the present low level of expenditure, it seems to follow that expenditures on non-indigent defense above that same low level are also undesirable. So the argument holding that our reforms are undesirable precisely because they would provide improved defense for indigents also seems to imply that there should be a cap on defense expenditures by ordinary defendants, set at or below the present level of expenditure for indigents.

In addition to making it less likely that innocent defendants will be convicted, an improvement in the quality of defense services has other desirable effects. One is to reduce the injury the legal system does to innocent defendants who are eventually acquitted, but would have been released sooner and at lower cost to themselves if they had been adequately represented.<sup>140</sup> A second effect is to provide more complete information at sentencing and thus to make it more likely that judges will impose socially appropriate punishments on the guilty.

We recognize that improvements in indigent defense, however desirable, cannot be pursued indefinitely, regardless of cost. But since a voucher system can be instituted with whatever resources a state decides to allocate to defense services, the argument against our proposals is in effect an argument that improvements in indigent defense are undesirable even if they entail no additional cost. That argument is simply an argument against the adversary system. It implies that lawyers who try hardest to get their clients acquitted are, on net, an obstacle to justice, even when they are doing their job with very limited resources. This perspective strikes at the heart of our system of criminal justice. It is of interest, in part, because it draws attention to the degree to which our present system may have become, at least for indigent defendants, inquisitorial in substance even if adversarial in form.

#### IV. CONCLUSION

We can see only two grounds, other than inertia, on which a reasonable person might defend existing institutions for defense of the indigent. One is the belief that defense lawyers are so bound by their professional ethics that they will consistently sacrifice their own interest to the interest of clients to whom they are assigned. Another, and less optimistic, belief is that almost all indigent defendants are guilty, if not of the offense charged than of something else, and that the real business of the court system is the administrative task of allocating punishments while maintaining a polite fiction of concern for defendants' rights.

These arguments are both unconvincing and inconsistent with the underlying premises of an adversary system of justice. We conclude that present institutions for providing criminal defense ought to be replaced with a voucher system, in order to provide indigent defendants with freedom of choice and to provide their attorneys with the same incentive to serve their clients that attorneys have always had when they represent clients other than the poor.

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140. See, e.g., Anthony Lewis, *The Soul of Justice*, N.Y. TIMES, Jan. 4, 1993, at A15 (Indianapolis defendant spent 19 months in jail awaiting trial, including four months confined after charge was dismissed; the public defender never told defendant or prison authorities about dismissal).