Resource Parity for Defense Counsel and the Struggle Between Public Choice and Public Ideals

by Ronald F. Wright[*]

INTRODUCTION – THE CURRENT MESS, AND A WAY OUT

Lawyers hate to admit it, but criminal defendants do get what they pay for; or more precisely for most defendants, they get what the government pays for. Buyers of legal services who pay more will, on average and in the long run, receive more than those who pay less. Although there are genuine debates about the most efficient ways to organize criminal defense work,[1] money can improve any chosen method of delivering defense services. The laws of supply and demand are not suspended within the walls of the criminal courthouse.

Money not only matters; it now overshadows constitutional doctrine when it comes to improving the quality of criminal defense. Forty years ago, *Gideon v. Wainwright*[2] put defense counsel into more cases, holding that the state was obliged to provide counsel for all indigent felony defendants. Twenty years ago, *Strickland v. Washington*[3] declared that the constitution ensures some minimum level of quality in defense work, establishing the

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[1] *See* Bob Sablatura, *Study Confirms Money Counts in County's Courts: Those Using Appointed Lawyers Are Twice as Likely to Serve Time*, HOUS. CHRON, Oct. 17, 1999, at 1 (privately retained attorneys obtain lower conviction rates and lower sentences that publicly-funded attorneys representing clients facing comparable charges); *but cf.* ROGER A. HANSON, et al., INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL (1992) (publicly funded attorneys in nine jurisdictions process cases as quickly as private attorneys and obtain comparable sentences). There are certainly settings when a state spending less can nevertheless obtain defense work of equal quality to a state spending more, because of more efficient organization. For instance, there are some economies of scale in moving from an appointed counsel to a public defender model. *See* Matthew Dolan, *New Study Makes Case for Public Defenders*, VIRGINIAN-PILOT, Dec. 19, 2001.

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

[3] Strickland v. Washington, 466 U.S. 668 (1984).

legal standard for determining when counsel has provided constitutionally ineffective assistance that invalidates a conviction. But those basic constitutional guarantees have produced little improvement in defense lawyering in the average case. Year after year, in study after study, observers find remarkably poor defense lawyering that remains unchanged by this constitutional doctrine, and point to lack of funding as the major obstacle to quality defense lawyering.[4] The power of money, rather than constitutional standards of quality, will drive any large-scale changes for indigent defense in the future.

For anyone who sees how legislatures fund defense counsel for the indigent, this is a dispiriting claim. Indigent defense remains on a starvation diet in most jurisdictions in the United States. Although state and local governments periodically revisit the question and reluctantly decide to increase funding, it is more common for them to search for methods to "control the costs" of indigent defense. In normal economic conditions of modest inflation, and with normal (for our generation) annual increases in arrests, charges, and convictions, a frozen budget for indigent defense begins to run short after only a few years. Thus, those who seek adequate funding for indigent defense must return to the legislature year after year, and they hear No far more often than they hear Yes.

One way out of this predicament would make some of the choices on funding for defense counsel automatic, so the increases necessary to stay at current support levels in real dollars would happen without any special legislative attention, along the lines of "cost of living" adjustments for Social Security benefits. This article explores one such automatic device, the idea of "parity" between funding for defense counsel and the prosecution. If legislators were obliged to give roughly equal resources to the prosecution and the defense, then every salary increase or new personnel funding for the more popular prosecutors would lead mechanically to some comparable increase in defense funding.

Parity of resources is not the current reality in criminal justice funding. Prosecutors tend to draw larger salaries than publicly-funded defense attorneys. They have lower individual caseloads than full-time public

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[4] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994) (noting lack of funds to "employ lawyers at wages and benefits equal to what is spent on the prosecution"); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) (describing how poor funding weakens Sixth Amendment guarantee of effective assistance).

defenders and greater access to staff investigators, expert witnesses, and other resources. What could shift our current practice in the direction of resource parity?

The parity concept could become the centerpiece of constitutional standards announced and enforced by judges interpreting the Sixth Amendment right to counsel.[5] Professor Donald Dripps has argued that the ex post standards for measuring performance of defense counsel under *Strickland* should be supplemented by ex ante standards, allowing the criminal defendant to file a pretrial motion to block the proceedings if the defense does not have rough parity with the prosecutor in terms of credentials, compensation, and caseload. Resource parity for the defense is not currently required under the federal or state constitutions,[6] but glimmers of the parity concept have appeared in a few judicial opinions.[7]

To depend on judges alone to spread this idea, however, is folly. Judicial rulings can play some role, but their reach will remain tentative and their staying power weak. In the long run, legislatures themselves must embrace parity if it is to become a meaningful part of their funding habits. Why not champion the parity concept directly to the legislature rather than relying entirely on the clumsy and remote means of judicial rulings to deliver the message?

The short answer to the question lies in public choice theory. According to this application of microeconomic principles to government actors, legislators act rationally to maximize their personal utility – that is, they vote in ways that will assure their own re-election.[8] When it comes to legislation that could help criminal defendants, there is not much utility to maximize, because government efforts to prevent wrongful convictions and unduly harsh penalties appeal to a politically weak constituency – young

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[5] *See* DONALD DRIPPS, ABOUT GUILT AND INNOCENCE 179 (2003); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case For An Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997); *see also* William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 70 (1997).

[6] For instance, cases such as United States v. Cronic, 466 U.S. 648 (1984) (rejecting presumption of ineffectiveness when inexperienced attorney was appointed shortly before complex criminal case), make it clear that constitutionally "adequacy" can fall short of providing an ideal challenge to the prosecution.

[7] *See, e.g.*, State v. Lynch, 796 P.2d 1150 (Okla. 1990) (setting appointed attorney compensation in light of salary paid to prosecutors with comparable experience).

[8] *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

black males living in poverty, for the most part.[9] Public choice theory, then, suggests that there is no hope for legislation to establish ongoing and automatic parity between prosecution and defense resources.

But this pessimistic account from public choice theory, although it casts some useful light on legislative behavior, is too crude a tool to explain all criminal justice legislation.[10] Every so often, legislatures vote for measures that incidentally benefit criminal defendants. They do so when the debate becomes framed in terms of competitive balance or integrity of an entire system. When a proposed law taps into public ideals of fair treatment for public employees or reliability of the court system, legislators might vote for it despite the fact that the law happens to help criminal defendants. All is not lost for the parity principle in the legislature, after all.

In this article, I explore the viability of resource parity for indigent defense as a legislative concept. I conclude that resource parity, under the right conditions, could take hold as a funding principle in the legislative branch. This conclusion grows out of a theoretical exercise, an effort to specify the conditions that can allow a legislature to enact laws that benefit criminal defendants, even though such statutes are counterintuitive under public choice theory. But the conclusion also grows out of experience – there are state and local jurisdictions in the United States that have already embraced some version of resource parity.

Part I of this article considers the abstract case for resource parity, and how such a funding principle meshes with the history and rhetoric of the adversarial criminal justice system in the United States. Part II moves from rhetoric to practice, by describing recent experience with various forms of resource parity. In a handful of jurisdictions scattered around the country, state legislatures and local governments have committed themselves to *salary* parity: attorneys who work for district attorneys and for public defenders are paid on the same salary scale. And in at least a few jurisdictions, legislatures have begun to think in terms of broader resource parity, passing statutes and budgets that link overall resources for indigent defense to the resources for prosecution. These laws tackle the more difficult job of measuring the parity of *caseloads* between prosecution and

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[9] *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give A Damn About the Rights of the Accused?* 44 SYRACUSE L. REV. 1079 (1993).

[10] *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); *cf.* Dan Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002).

defense, and the parity of *support services* such as access to investigators and expert witnesses.

Part III reviews recent litigation intended to improve the funding for indigent defense. The litigation has not yet transformed the face of criminal defense funding around the country, but it is starting to create a pressure point. Unfortunately, the litigation has concentrated on parity among defense lawyers in different jurisdictions rather than parity between defenders and prosecutors. This posture makes it difficult for judges to change funding practices in more than a few extremely under-funded jurisdictions. Further, most of the gains in litigation could disappear in only a few years if not reinforced with changes in legislative habits.

Part IV contrasts the first steps toward parity in the legislative branch with the less promising signs from the judicial branch. It explores the conditions, theoretically speaking, that might lead a legislative body to adopt a principle of parity to guide its funding choices for indigent defense. And in Part V, I discuss how interaction between the judicial and legislative efforts can favor the parity principle, with the limited judicial successes becoming a leverage point for legislative successes. This dynamic works remarkably well in other contexts such as prison funding, and might also work here.

I. PARITY AND THE ORIGINS OF ADVERSARIAL PROCESS

Resource parity builds on a venerable idea: the defense function is just as important to society as the prosecutorial function. This proposition has deep roots in both the historical practices and the rhetoric of Anglo-American criminal justice.

Criminal justice in England and the United States was not always adversarial, and lawyers did not always dominate the proceedings. But as professional public prosecutors became involved in wider categories of cases over time, defense attorneys followed in their wake. Wherever government attorneys controlled the charging and prosecution of crime, criminal defense lawyers became available to a wider range of defendants.

Before the end of the seventeenth century, English law did not allow felony defendants to rely on counsel at trial.[11] Defendants presented their own evidence and cross-examined any accusing witnesses themselves.[12] Technically, the government could employ a prosecuting attorney at this time, even though the defendant could not use an attorney at trial. In ordinary criminal cases, however, the Crown did not actually employ prosecuting attorneys. The victim of the alleged crime presented the facts of the case, and in a few cases the victim retained a private attorney to make any necessary legal arguments. But by and large, the accuser and the defendant developed the facts, with active involvement from the judge and with no lawyers on the scene at all.[13]

The legal bar on defense counsel participation at trial began to break down precisely in those settings where professional prosecutors appeared more often.[14] According to John Langbein, a "steady trickle" of prosecuting attorneys began to appear for the Crown in ordinary criminal cases by the 1730s, and at that same point judges allowed defense counsel to participate in some cases, probably in an effort to equalize the prosecution and defense.[15] By the 1780s, prosecuting attorneys became the norm in serious

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[11] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 355 (1765-1769); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 39, § 2, at 400 (1721). Defense lawyers were allowed earlier in misdemeanor cases, where the distinction between civil and criminal proceedings was less clear (for instance, in trespass or nuisance cases).

[12] Indeed, defendants were even discouraged from consulting attorneys before the trial. *See* Fitzharris, 8 ST. TR. 243, 332 (1681) (accused ordered to give notes of his conversation with attorney to his wife); College, 8 ST. TR. 549, 585 (1681) (notes given to King's counsel).

[13] See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 307-314 (1978); David Philips, *Good to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860*, in POLICING AND PROSECUTION IN BRITAIN 1750-1850 at 113 (Douglas Hay & Francis Snyder eds., 1989).

[14] During the Civil War era of the late seventeenth century, the Crown used prosecuting attorneys in many treason trials; thus, the Treason Act of 1696 made these trials the first where a defendant could present his case through an attorney. The statute declared that treason defendants should be allowed "just *and equal* means for defense of their innocencies…." 7 & 8 Wil. 3, c. 3, § 1 (1696) (emphasis added); HAWKINS, *supra* note 11, at 402 (defense counsel justified in treason cases because they "are generally managed for the Crown with greater Skill and Zeal than ordinary prosecutions").

[15] John H. Langbein, *The Historical Origins of the Privilege Against Self-incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123-134 (1983); *see also* JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 359 (1986). Defense counsel in English courts at this time either advised the defendant and the court on questions of law, or (a bit later) participated along with the defendant in examining or cross-examining witnesses. Only in 1836 did legislation eliminate the last of

criminal cases in England, and a substantial number of defense lawyers also appeared in felony cases.[16]

Reliance on defense counsel in the United States followed a similar path: defense attorneys became a routine fixture in criminal proceedings in tandem with the expanded use of attorneys to prosecute crimes. Early state constitutions and statutes guaranteed the right to counsel, thus repudiating the legal bar on defense counsel in felony cases that still existed in a weakened form in England.[17] But in the daily practice of criminal law in state courts in the early national period, defense lawyers were not often present.[18] The same could be said of professional prosecutors, and even professional judges (the most expensive legal resources available in American states with relatively few lawyers). State and local governments did appoint public prosecutors,[19] but used them sparingly, for only the most serious criminal matters. Victims and complaining witnesses, occasionally represented by private attorneys, prosecuted the case in "summary" criminal proceedings; the defendant personally cross-examined the witnesses and presented evidence; and a justice of the peace or magistrate (typically without legal training) presided.[20]

During the early nineteenth century, prosecutors became more influential as they transformed from court functionaries into elected officials with their own local constituencies. As prosecutors gained influence, the range of criminal cases they handled expanded and most criminal proceedings became affairs run by professionals.[21] Where the prosecutor

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the restrictions on the participation of counsel, and allow the attorney to address the jury in summary arguments. 6 & 7 Geo. 4, c. 114 (1836).

[16] *See* John M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 226-230 (1991).

[17] *See, e.g.*, DEL. DECLARATION OF RIGHTS, § 14 (1776) ("in all prosecutions for criminal offences, every man hath a right … to be allowed counsel"); PA. CHARTER, art. 5 (1701) ("all Criminals shall have *the same* Privileges of Witnesses and Council as their Prosecutors") (emphasis added); N.J. CONST., art. 16 (1776) (same); Powell v. Alabama, 287 U.S. 45, 61-65 (1932) (collecting sources). *See generally* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 9-21 (2002).

[18] *See* JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664-1776 at xxv (1944).

[19] *See* NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 7 (1931) (Wickersham Commission, Report No. 4); PAUL M. MCCAIN, THE COUNTY COURT IN NORTH CAROLINA BEFORE 1750, at 18, 33 (1954).

[20] *See* ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 48-49 (1930); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1105-11 (1994).

[21] *See* JOAN JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 19-36 (1982).

appeared, the defense attorney also became a familiar figure. Defendants more commonly invoked their constitutional and statutory rights to rely on counsel in criminal prosecutions.[22]

The linkage between prosecution and defense functions so evident in the origins of the adversarial system remained present as the current system of indigent defense in this country took shape in the middle decades of the twentieth century. Rulings of the U.S. Supreme Court during this period set the contours of the current system of publicly-financed criminal defense. In most of its pivotal rulings interpreting the Sixth Amendment right to counsel, the Court explicitly invoked the need for a defendant to match the skill of a professional prosecuting attorney. For instance, in *Johnson v. Zerbst*,[23] holding that the federal government had to appoint counsel for any indigent felony defendant in the federal system, Justice Black made this comparison between prosecution and defense: "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[24]

In *Gideon v. Wainwright*, the Court said that "reason and reflection" led to this obvious truth about practical need for defense counsel:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. … That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[25]

As a result of rulings such as *Gideon*, legislation expanding the availability of defense counsel, and an upsurge of arrests and prosecutions in the late 1960s, the judiciary and legal profession found it necessary to reshape the entire system for providing defense lawyers to indigent

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[22] *See* James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials 1681-1837*, 45 AM. J. LEG. HISTORY 455, 457 (1996) (table showing increase in proportion of represented felony defendants from 27.5% in 1767 to 92.1% in 1825); Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891.

[23] 304 U.S. 458 (1938).

[24] 304 U.S. at 462-63.

[25] 372 U.S. 335, 344 (1963).

defendants. The system shifted from discretionary appointments of practicing lawyers to more regularized institutions such as public defender offices, contract attorneys, and lists of appointed attorneys. During this conversion to a more reliable (and more expensive) system meant to handle a larger volume of cases, attorneys explicitly drew parallels between public funding of defense attorneys and the public funding of prosecutors and other components of criminal justice. For instance, Whitney North Seymour, head of the American Bar Association special committee on counsel for the indigent, said in a 1963 speech that the obligation to provide counsel for the indigent accused is "as much a part of the public obligation to support [the criminal justice system] as the provision of courthouses, judges, attendants, and prosecutors."[26]

The 1963 report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (the "Allen Report"), which formed the basis for reorganization of the defense function in the federal system and in several states, also takes up these themes. Proper funding of indigent defense is unlike any other "charitable" spending on behalf of the poor, in part because the government itself initiates the criminal process. The public has equivalent obligations to fund the defense along with the other components of the justice system:

> The proper performance of the defense function is … as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements and by the large, but indeterminate, numbers of persons able to pay some part of the costs of defense, but unable to finance a full and proper defense.[27]

The history and rhetoric of the adversarial system point to a general principle: when the public funds a skilled professional on the prosecution side, it should also fund a skilled professional on the defense side. Such a principle might not resonate with those working in a civil law inquisitorial system, but it speaks clearly to the adversarial tradition of Anglo-American criminal justice.

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[26] The speech is quoted in ANTHONY LEWIS, GIDEON'S TRUMPET 198 (1964).

[27] REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, 10-11 (1963) (Allen Committee).

The history and rhetoric do not resolve neatly into a requirement of precisely equal funding for prosecution and defense. Perhaps, following Blackstone's libertarian principle that it is better to acquit ten guilty men than to convict one innocent man,[28] it might be wise to fund the defense function more generously than the prosecution. At the same time, a jurisdiction might spend more for prosecution than for defense, and still honor the principle that both functions are equally important. A government purchasing these legal services might get comparable levels of prosecution and defense for different prices. After all, prosecutors do not perform exactly the same functions as defense attorneys. We turn now to the challenges of matching the work of prosecutors with comparable functions of the defense attorney, with the aim of producing equally reliable and useful services on the prosecution and defense sides.

II. RESOURCE PARITY IN CURRENT PRACTICE

The equal importance to society of prosecution and defense may get recognition in judicial opinions and in historical accounts of the adversarial process, but the idea gets neglected in today's legislatures. Legislative debates usually create no rhetorical linkage between defense funding and prosecution funding. When legislatures consider possible changes to the organization or funding of criminal defense, they normally talk about ways to bring spending down, rather than asking how it compares to prosecution spending. It is common to hear legislators ask for ways to "contain the costs" of criminal defense alone, rather than criminal justice as a whole.[29]

When we move from rhetoric to results, it becomes even more clear that parity between prosecution and defense is not the operating principle for

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[28] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769) ("the law holds, that it is better that ten guilty persons escape, than that one innocent suffer").

[29] *See* Ala. Code § 15-12-21 (1999) (codifying Ala. Acts 99-427, raising attorney compensation in all categories); John Caher, *Court of Appeals Reviews Staffing in Capital Cases; Fees for Additional Attorneys and Paralegals Challenges*, N.Y. LAW JOURNAL, Mar. 11, 2002 (speculating that governor's threat to withhold payments from defense attorneys was intended to control costs).

Even when actual funding *increases* become realistic, legislators usually discuss the step as necessary to avoid a "crisis." *See, e.g.*, Jonathan Lippman & Juanita Bing Newton, *Assigned Counsel Compensation Plan in New York: A Growing Crisis* (Jan. 2000); Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, at http://uta.edu/pols/moore/indigent/last.doc.

funding in the legislature. By and large, entry-level prosecutors earn higher salaries than entry-level public defenders. The salary difference persists at every level of experience; prosecutors earn more from bottom to top of the seniority scale.[30] While there are many talented and even heroic lawyers who accept the lower salary to become a defender, in the long run defender organizations find it more difficult than prosecutors to retain experienced attorneys at a lower salary.

Sometimes, prosecutors also fare better than full-time state-funded defense attorneys when it comes to workload.[31] Thus, even if defense attorney positions paid the same salary as prosecutor positions (and therefore attracted comparable legal talent over the long haul), the difference in caseload in some jurisdictions would still mean that there is no parity of funding, on average, for each case.

Finally, prosecutors have greater access to investigators and experts than the typical publicly-funded defense attorney. Putting aside the police resources necessary to build a case file to present to the prosecution, the government often devotes further resources to a follow-up investigation to strengthen the case in ways identified by the prosecutor's reading of the file. And prosecutors turn to expert assistance and testimony relating to scientific evidence and claims of insanity or mental disability much more often than the defense.[32] Each of these components – salary, workload, and support services – combine to produce an overall gap in spending between the prosecution and defense functions.[33]

A. Salary Parity

The easiest form of resource parity to defend is salary parity. It is also the form of parity that has made the greatest impact on current practice, and offers the best hope that a parity standard can take root and survive.

The "standards" that professional groups have developed to identify the best practices in structuring and running indigent defense programs

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[30] *See* John B. Arango, *Defense Services for the Poor*, 10 SUM. CRIM. JUST. 37 (1995).
[31] *See* Spangenberg Group, *Tennessee Public Defender Case-Weighting Study: Final Draft Report* (April 1999) (under contract with the National Center for State Courts).
[32] *See* Ake v. Oklahoma, 470 U.S. 68 (1985); Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO STATE L.J. 801, 828-31 (2000).
[33] *See* Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEGAL ETHICS 199, 202-203 (1999).

explicitly call for parity of salary between prosecutors and defenders. For instance, the ABA Standards on Providing Defense Services say that attorneys and staff in defender offices should be paid at a rate "comparable to that provided for their counterparts in prosecutorial offices."[34] On a rhetorical level, parity between prosecution and defense funding does get mentioned in some legislative debates.[35]

More striking than the rhetoric, however, is legislation passed in some jurisdictions that embodies some form of salary parity. A Connecticut statute, passed in 1974, provides that "The salaries paid to public defenders, assistant public defenders and deputy assistant public defenders in the superior court shall be comparable to those paid to state's attorneys, assistant state's attorneys and deputy assistant state's attorneys in the various judicial districts in the court."[36]

Although statutes that explicitly require parity of salary are unusual, as a matter of practice there are examples scattered around the country. The most visible example comes from the federal system, where federal public defenders are paid on the same scale as Assistant United States Attorneys.[37] Parity of salary is also the practice in Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming. Some local jurisdictions also offer salary parity, such as Orange County, California and Maricopa County,

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[34] AMERICAN BAR ASSOCIATION, STANDARDS ON CRIMINAL JUSTICE, 5-4.1 (1993); *see also* NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.2 (1974) (salaries for all staff should "in no event be less than" salaries for comparable positions in prosecutor's office); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (compensation for assigned counsel should be paid commensurate with other contracted work, such as work contracted by Attorney General); *cf.* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, Standard 13.7, 13.11 (1973) (chief public defender to be paid at rate comparable to presiding judge of trial court; assistant defenders in first five years of service to be paid comparably to associates in local law firm).

[35] *See* Spangenberg Group, *Illinois Task Force Proposes Increased State Funding for Indigent Defense*, 6 SPANGENBERG REPORT, Issue 3 at 5 (Feb. 2001) (proposes that state fund two thirds of full-time chief defender's salary if local government sets salary at 90% or more of local prosecutor's salary); Margaret Graham Tebo, *Promise Still Unfulfilled*, 89 ABA JOURNAL 68 (April 2003) (ABA Standing Committee on Legal Aid and Indigent Defendants, chair Jonathan Ross says that hearings will "shed light on the lack of parity between the resources available to the state versus those available to the defense").

[36] CONN. GEN. STAT. § 51-293(h). The original statute applied as well to defenders in the court of common pleas, but was amended in 1976 to cover only defenders in superior court.

[37] *See* Scott Wallace, *Parity: The Failsafe Standard*, in 1 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS 16 (Dec. 2000).

Arizona.[38] Nationwide, recent surveys indicate that salary parity is the norm rather than the exception for larger public defender offices.[39]

Salary parity is easier to achieve than other forms of resource parity. Salaries are relatively easy to equalize because they present no measurement problems: salaries for all government attorneys depend heavily on years of experience, so it is easy to identify the relevant comparison points for prosecutors and defenders. An attorney with three years' experience in the district attorney's office compares naturally to an attorney with three years' experience in a public defender's office.[40]

In reality, attorneys with comparable years logged in the two types of offices might develop different skills, and their organizations might value them differently. For instance, if the public defender's office experiences a higher turnover rate among attorneys than the local prosecutor's office, one might argue for increasing the pay scale more quickly in the PD's office. But years of experience, although an imperfect measure of value, remains a valuable estimate of the salary that government agencies pay their attorneys.

If a government endorses the equal social value of the prosecution and defense functions, it is difficult not to embrace a form of salary parity. It is not so clear, however, which institution of government will adopt the principle. Court system administrators (typically employees of the judicial branch) often adopt these salary parity policies, but the state legislatures provide the funding and the general authorizing legislation.[41] The government can also address the question indirectly when attorneys for the

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[38] Spangenberg Group, *Kentucky's Department of Public Advocacy Continues to Meet Program Improvement Goals*, 6 SPANGENBERG REPORT, Issue 3, at 13 (Feb. 2001) (Connecticut; Massachusetts; North Carolina; Orange County, California; Los Angeles County, California; Maricopa County, Arizona; Wyoming); Spangenberg Group, *1999 State Legislative Scorecard: Developments Affecting Indigent Defense*, 5 SPANGENBERG REPORT, Issue 3, at 1,5 (Oct. 1999) (Kansas); Spangenberg Group, *Comparable Pay for Comparable Work: Making the Case for Salary Parity Between Public Defenders and Prosecutors*, 5 SPANGENBERG REPORT, Issue 1, at 6-8 (Mar. 1999) (New Mexico, Oklahoma, Kansas, Connecticut, California, Wyoming, Arizona, Tennessee, federal system); *cf.* Ariz. Stat. §11-582 (public defenders to earn at least 70% of salary of prosecutors).

[39] *See* Wallace, *supra* note 37, at 16 (discusses NLADA survey).

[40] Setting the proper compensation rate for appointed counsel is more difficult; it requires some method of converting a prosecutor's annual salary into either an hourly rate or a per-case fee. The rate for appointed counsel would also have to include some estimate of the "overhead" costs that prosecutors devote to cases in the relevant category.

[41] BUREAU OF JUSTICE ASSISTANCE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE (2000) (discussing parity in New Mexico and Connecticut).

prosecution and the defense belong to the same association or union and negotiate their salaries in a single contract.[42] In this setting, the legislature funds salary parity as a question of labor relations rather than a direct statement about the relative value of the prosecution and defense functions.

B. Caseload and Support Services Parity

The next steps toward resource parity go beyond parity of salary; these next steps, while more difficult politically and technically, are necessary if the functional equality of prosecution and defense is to become reality. If each attorney in a defender's office earns a salary comparable to that of a prosecuting attorney, but each defender carries a dramatically heavier caseload, the equality of salary among the attorneys will mean little to the criminal defendant. The defender will still have less time to spend on the case and the prosecution will enjoy a systematic advantage. Similarly, if the prosecutor can rely on investigators and other experts to strengthen the case while the well-paid public defender has no access to support services, there is no meaningful parity.

Those who work for improved quality in criminal defense work recognize the need for this broader form of equality between prosecution and defense. Aspirational standards such as the ABA Standards call for equal access to support services[43] and rough comparability of workload.[44]

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[42] *See* Wallace, *supra* note 37.

[43] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 5-6.1 (1993) (discussing "supporting services necessary to an adequate defense"); Allen Report, *supra* note 27, at 39-40 (discussing need for pretrial investigation and expert witnesses).

[44] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-1.3(e) at 126 (1993) (defense counsel "should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations"); *id.* at Standard 5-5.3, at 67; NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES §§5.1, 5.3, at 411, 413 (1976) ("every defender system should establish maximum caseloads for individual attorneys in the system" and caseloads should reflect national standards and consider objective statistical data); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON COURTS 186 (1973) (caseload should not exceed 150 felonies per year; 400 misdemeanors; 200 juvenile cases; 200 Mental Health Act cases; or 25 appeals).

The gloomy reports that assess indigent defense periodically mention equalized caseloads and support services as part of the solution.[45]

But an agreement in principle that individual prosecutors and full-time defenders deserve equivalent caseloads and support services leaves many difficult questions unresolved. A legislature cannot simply mandate that prosecutors and public defender offices employ the same number of attorneys, because prosecutors and defenders do not work on precisely the same cases, and do not perform comparable work on each case. Prosecutors handle many less serious cases where defendants represent themselves. They also devote time to some cases that they decline to charge, or cases that they divert from criminal justice before a defense lawyer is assigned to the case. Prosecutors also staff cases that are defended by private attorneys or counsel appointed to a case in response to a conflict of interest within the public defender's office. Conversely, some public defender offices handle certain juvenile matters or lesser crimes prosecuted by government attorneys other than those assigned to the district attorney.[46]

Even for those cases that assign a full-time government attorney for both the prosecution and the defense, it is not clear that the two attorneys should invest equal hours in the case. For some categories of cases, it might require more hours to assemble witnesses and other evidence to carry the government's burden of proof, or the legal research and writing necessary to respond to defense challenges to the evidence. In other categories of cases, it may require more hours for the defense attorney to investigate the case and assemble the legal and factual challenges to the government's evidence.

Support services are also difficult to equalize. The largest question is how to account for the work of police officers on a case. Should the police count as support for the prosecution, whose efforts must be matched by investigators or other support services for the defense? At the very least, defense attorneys will insist that they need to match the hours of investigation that the prosecution performs after the police deliver the case file. Prosecutors often supplement the investigative file that the police refer to them, sometimes by directing further efforts by police officers and at

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[45] *See* NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR F-1 to F-68 (1982) ; SPECIAL COMM. ON CRIM. JUST., CRIMINAL JUSTICE IN CRISIS (1988).

[46] When it comes to staff support parity, it would be cumbersome to match each category of support for prosecution to some comparable position for the defense. Defender organizations may require a different blend of support services than prosecutors, and need the flexibility to change the type of support over time. Establishing a very general "staff to attorney ratio" for the prosecution, and matching that ratio for the defense, might provide rough parity on this question without delving into too much administrative detail.

other times through the work of investigators formally assigned to the prosecutor's office.[47]

There might be no clear conceptual solution all these nettlesome questions. But managers of large prosecution and defender offices are now developing workable methods of measuring attorney caseloads and support services, measurements that allow some rough comparisons between prosecution and defense. Tennessee offers one interesting example of an effort to measure, compare, and equalize caseloads between prosecution and defense. Legislators in the state have begun linking growth rates for prosecution and defense resources.[48]

Before a 1989 law created a statewide District Public Defenders Conference, all but two counties in Tennessee depended on appointed counsel. The legislature set funding levels for the new organization according to a general formula: public defenders would receive half the amount of funds devoted to prosecutors.[49] Within their first two years of operation, the new public defender offices demonstrated that funding at this level was not adequate, so in 1992 the legislature reset the figure, this time at 75 percent.[50] Prosecutors, whose own requests for additional funding were being ignored while the state money flowed to the new defense offices, struck back. In 1994, they convinced the legislature to remove the linkage at the state level between prosecution and defense funds. The amended statute retained the 75 percent ratio, but applied it only to *local* government

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[47] Expert witnesses such as psychiatrists in cases involving an insanity defense, or forensic laboratory personnel in cases that turn on physical evidence, are more likely to trigger a clear one-to-one match between prosecution and defense.

[48] Sometimes resources will come from sources other than state or local government, such as private foundation grants. The federal government occasionally funds prosecution but not defense. *See* Crime Identification Technology Act of 1998, Pub. L. 105-251, 112 Stat. 1871, Title I (Oct. 9, 1998) (provides 1.25 billion to fund technology for state and local agencies, including judiciary and prosecution but not defense). While state legislatures might on an ad hoc basis match some of these prosecution resources through additional appropriations for the defense, it is more likely that defender organizations will find it necessary to match these external prosecution funds with their own external fundraising efforts.

[49] The amount was based on an estimate of the proportion of cases in the state defended by public defenders, as opposed to privately retained counsel and appointed counsel. Public defender offices were expected to handle about half the total cases. Telephone Interview with Wally Kirby, Executive Director, Tennessee District Attorneys Association (May 5, 2003).

[50] In November 1991, the Knox County Public Defender filed a motion asking the General Sessions court judges to suspend further case appointments because its staff was overextended. The court responded by notifying the members of the bar that each member would be expected to take an appointment in a criminal case to reduce the backlog. *See* Spangenberg Group, *Tennessee Public Defender Case-Weighting Study* 2 (1999).

funding.[51] Since virtually all funds for prosecution in Tennessee derives from the state government rather than local governments, the remaining statute had limited meaning.

For the next four years, both the prosecutors and public defenders took their own funding proposals to the legislature; not to be outdone, the judiciary in Tennessee also made regular requests for more staffing. The lawmakers turned aside virtually all of these funding requests, and became convinced that these nominally unconnected funding requests were actually closely related.[52] In 1998, the legislature instructed the prosecutors, the public defenders, and the judges to conduct three separate "weighted caseload" studies and to make any requests for new funding in light of the caseload information.[53]

The three studies were prepared by contractors under the auspices of the State comptroller's office.[54] The study of prosecutor caseloads, completed by the American Prosecutors Research Institute, a research group affiliated with the National District Attorneys' Association. The defender study was performed by the Spangenberg Group, a national consulting firm dealing with advocates for indigent defense funding, while the National Center for State Courts completed the study of judicial caseload. For all three studies, the agency in question collected time sheets and other data on the typical hours devoted to various common tasks in criminal adjudication, creating an estimate of the total number of hours (and thus the number of attorney or judge positions) necessary to complete the cases coming into the system. The three studies shared common assumptions in tabulating the number and type of criminal cases that each of the offices would normally handle.

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[51] Section 16-2-518 now provides: "From and after July 1, 1992, any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense." The 75 percent figure remains a de facto funding ratio at the state level; budget discussions treat this ratio as the presumptive outcome, even though it has no statutory basis. *See* Telephone Interview with Kirby, *supra* note 49.

[52] *See* OFFICE OF JUSTICE PROGRAMS, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS 30 (2000) (NCJ 181344) [hereinafter, Symposium Report].

[53] *See* TENN. CODE ANN. § 16-2-513 (1998); Comptroller of Tennessee, *FY 2001-2002 Tennessee Weighted Caseload Study Update* (2003), available at http://www.comptroller.state.tn.us/orea/reports/wclsupdate.pdf.

[54] *See* Spangenberg Group, *supra* note 50.

When the studies were complete, the prosecutors requested an additional 126 positions, an increase of 34 percent from the 375 funded positions at the time. The defenders requested an extra 56 position, a 22 percent increase above their 250 funded positions. Finally, the judicial study indicated that the state already employed 11 too many judges.

Thus far, the Tennessee legislature has not funded either of the requests for new attorney staffing.[55] Other state spending has taken a priority over criminal adjudication, particularly in a weak economy. It is clear, however, that the legislators will not address the budget shortfall by funding new prosecutor positions without adding comparable positions for the defense.

The moral of this story is not entirely clear. The Tennessee experience perhaps suggests that parity of resources will not take hold right away; the results thus far suggest a stalemate rather than routine equal funding of prosecution and defense. Yet the Tennessee legislature, despite its various changes in course, did hold to an overarching insight about parity. It remained convinced over time that there was a connection between prosecution, defense, and judicial resources for criminal justice, for the sake of fairness and efficient use of public funds. That insight alone places criminal defense in a better funding position than when public defense must convince the legislature that a crisis of constitutional proportions has arrived.

Defense caseloads and funding might track the overall levels of prosecution caseloads and funding in places other than Tennessee; indeed, other states have also begun to explore this territory beyond salary parity. In Connecticut, the state funding targets for public defense are set at about two-thirds the level of funding for the prosecution.[56] A New Mexico law links new public defender staffing to new judicial staffing.[57] More generally, legislatures in many subject areas grow accustomed to hearing the funding requests of complementary players in a single system, and sometimes require a coordinated budget request from them.[58]

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[55] *See* Telephone Interview with Kirby, *supra* note 49. Indeed, budget shortfalls have required state agencies to cut their budgets in recent years, although the cuts have been limited so far to support services rather than attorney positions.

[56] *See* Symposium Report, *supra* note 52, at 16.

[57] *See* Symposium Report, *supra* note 52, at 16 (Balanced Justice Act); Spangenberg Group, *Vermont*, 6 SPANGENBERG REPORT, Issue 3 at 6-7 (Feb. 2000) (Vermont Task Force proposes reduction in defender workload by requiring corresponding defense budget increases for all new legislative enactments impacting defender workloads).

[58] This is true, for example, when Congress constructs the defense budget for new weapons systems.

The fairly widespread acceptance of salary parity, together with the more tentative experiments with broader resource parity based on caseload information and coordinated funding requests, suggest that some benefits for the defense can emerge from the legislature. Yet the various forms of parity remain the exception rather than the rule; the concept remains more important in aspirational statements than it is in budgetary practice. Which institutions and arguments might bring resource parity more into the mainstream of practices for funding indigent defense? The next part of this article explores the prospects for achieving resource parity through litigation in the courts.

III. RESOURCE PARITY IN THE COURTS

Every year, courts respond to a torrent of traditional ineffective assistance of counsel claims, detailing in case after case the failings of individual lawyers. This litigation is especially fertile in the capital context.[59] But these "ineffective assistance" constitutional claims offer no relief for most defendants, since only the most unthinkable gaffes by defense attorneys lead to any relief.[60] Part of the problem lies in the nature of the test chosen in *Strickland v. Washington*[61] for measuring ineffective assistance of counsel, and commentators have diagnosed many different problems with this standard. The "performance" prong of the test is phrased generally, without reference to any specific tasks to be performed by minimally competent lawyers;[62] courts have enthusiastically applied the presumption of competence that the Supreme Court created;[63] the prejudice

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[59] *See* VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45 (1994) (showing ineffective assistance of counsel as most common basis for habeas claims by state prisoners).

[60] *See, e.g.*, People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (finding lawyer was not ineffective even though he consumed large amounts of alcohol on trial days and was arrested for drunk driving en route to courthouse); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999).

[61] 466 U.S. 668 (1984).

[62] *See* Kim Taylor-Thompson, *Tuning Up* Gideon*'s Trumpet*, 71 FORDHAM L. REV. 1461 (2003).

[63] *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995) (calculating that less than five percent of ineffectiveness claims have been successful at the circuit court level).

prong saves many cases despite substandard defense lawyering.[64] Indeed, the very attorney responsible for the poor performance is also responsible for creating the record on appeal that could demonstrate prejudice.[65]

The problem goes deeper than the particular formulation of a standard that the *Strickland* court chose. Even a prejudice test phrased with a standard of proof easier for defendants to meet, or a standard without any formally announced presumption of adequate representation, would still lead to an overwhelming number of convictions affirmed on appeal. So long as the constitutional standard requires appellate courts to judge individual cases retrospectively, these claims will fail overwhelmingly. Any other pattern of outcomes would conflict with deep-seated traditional beliefs about the modesty of the judicial role.[66]

For judges who are convinced that they must declare defense counsel ineffective only in exceptional cases, the funding available for indigent defense constrains the standards used to evaluate their work. That is, the amount of money that legislatures devote to criminal defense will influence the judicial definition and interpretation of the quality standards. Judges might be willing to stop the aberrations, to cull the very weakest efforts at criminal defense. But the judges will also allow the legislature, through funding choices, to set the average for criminal defense. Judges responding to claims of ineffective assistance of counsel then apply the minimum standards in light of that average.

Granted, the causation might on occasion run from the judiciary to the legislature: constitutional standards could affect the amount that governments spend on criminal defense. If courts declare that a certain quality of representation is necessary to obtain a valid criminal conviction, legislative bodies will spend enough to meet the standard. But our experience with retrospective standards over many decades, together with our tradition of a limited judicial role, suggest that causation will ordinarily run from the legislative funding choices to the judicial interpretation of quality standards.

The retrospective ineffective assistance of counsel cases, however, do not exhaust the possible judicial contributions to the quality of defense attorneys. This Part surveys cases that pursue an alternative strategy,

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[64] *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, __ BRANDEIS L. REV. ___ (forthcoming 2004) (any retrospective standard underestimates prejudice due to inevitability cognitive bias).
[65] *See* Dripps, *supra* note 5, at 245.
[66] *See* Marc Miller, *Wise Masters*, 51 STAN. L. REV. 1751 (1999).

directly addressing the funding for defense counsel. It then analyzes the current limits of this litigation and suggests how the strategy must evolve before it can prompt widespread changes in the quality of criminal defense lawyering.

A. Litigation to Increase Defense Funding

Increasingly over the last twenty years, litigants have questioned the adequacy of the overall system for compensating the attorneys of indigent defendants. These challenges take several different forms, generating challenges to the funding systems both for appointed counsel and public defenders. With very few exceptions, however, the claims succeed only when they are confined to the compensation for attorneys in an individual case. Until recently, courts rejected challenges that extended beyond a particular case to the systemic funding arrangements for all criminal cases.

Attorneys themselves raised some of the earliest challenges to the funding arrangements for appointed counsel, arguing that statutory caps on compensation amounted to an unconstitutional "taking" of the attorney's property in a particular case. At first, these claims failed because the courts reasoned that attorneys carried a professional obligation to represent indigent defendants without compensation.[67] Over time, however, more courts bowed to the reality that criminal defense work requires specialized skills, and that the increasing number of defendants requiring appointed counsel could swamp the qualified attorneys.[68] In the cases framing the

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[67] *See* Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982) (requiring an attorney to represent an indigent without compensation is not a taking of property without just compensation); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965); State v. Ruiz, 602 S.W. 2d 625 (Ark. 1980) (each attorney has taken an oath requiring the performance of services without compensation if necessary); Sheppard & White v. Jacksonville, 827 So.2d 925 (Fla.2002) (rejects challenge to hourly rate set for appointed counsel in capital cases; inability to make profit or cover expenses is not sufficient basis for overturning conviction on constitutional grounds); In re Attorney Fees, 196 N.W.2d 144 (Mich. 1971) (not unconstitutional, will continue to work towards increased compensation but not ready to thrust that burden on the counties yet); Huskey v. State, 743 S.W. 2d 609 (Tenn. 1988).

[68] *See* David Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 5 (1980). Some attorneys also framed the challenge as an equal protection claim, pointing out that the burden of unpaid or underpaid representation falls on some members of the bar but not others, particularly in states where some local governments rely on appointed counsel and others use public defenders. *See* Delisio v. State, 740 P.2d 437 (Alaska 1987); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan.

problem as a threat to attorney property rights, the court offered relief for a few extreme outlier cases (say, a capital case in which the attorney spent far more than the caps envisioned for a typical case).[69]

But when the litigation theory shifted from the rights of appointed attorneys to the rights of clients to an adequately funded defense, the results were less happy for defendants. As the emphasis moved toward the rights of clients, the courts encountered theories that could apply across the board to many defendants – for instance, the theory that low compensation rates created a conflict of interest between the attorney and the client.[70] Thus, the courts faced the prospect of raising the funding and quality of appointed defense counsel generally, rather than correcting a few injustices on the fringes. Many courts concluded that such a job was overwhelming and not fit for judges to decide.[71]

Most often, courts still dispose of defendants' claims based on inadequate funding by applying the *Strickland* standard. They conclude that the particular defendant could not show "unreasonable" (that is, aberrational) performance or prejudice, simply because an attorney is

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1987); State v. Lynch, 796 P.2d 1150 (Okla. Crim. App. 1990). Attorneys have also claimed, unsuccessfully, that unpaid representation amounts to a violation of the Thirteenth Amendment's ban on slavery.

[69] *See* United States v. Cheely, 790 F. Supp 901 (D. Alaska, 1992); United States v. Cooper, 746 F. Supp. 1352 (N.D. Ill. 1990); Delisio v. State, 740 P.2d 437 (Alaska 1987) (taking of property under Fifth and Fourteenth Amendments); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991) (appointment system violates attorney rights); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986) (fee caps unconstitutional as applied); White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989) (fee caps unconstitutional as applied in capital case); State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987) (striking down appointed system, reviewing cases from other states); State v. Robinson, 465 A.2d 1214 (N.H. 1983) (striking down $500 cap on fees); State v. Rush, 217 A.2d 441 (N.J. 1966) (conscription of attorneys an unconstitutional taking of property); State v. Lynch, 796 P.2d 1150 (Okla. Crim. App. 1990) (statutory compensation violates due process, amounts to taking of property); Bailey v. State, 424 S.E.2d 503 (S.C. 1992) (court retains discretion to override caps in capital cases); Jewell v. Maynard, 383 S.E.2d 536 (W.Va. 1989); cf. Smith v. State, 394 A.2d 834, 838 (N.H. 1978) (statutory rate caps violate separation of powers, judges must have power to override caps in individual cases).

[70] *See* State v. Taylor, 947 P.2d 681 (Utah 1997) (conflict of interest theory fails); Webb v. Commonwealth, 528 S.E.2d 138 (Va. App. 2000) (conflict of interest theory fails); State v. Bacon, 658 A.2d 54 (Vt. 1995) (conflict of interest theory fails).

[71] *See* Grayson v. State, 479 So. 2d 76 (Ala. 1985) (attorney has an ethical obligation to do a good job regardless of compensation; systemwide challenge to appointed counsel system fails); Lewis v. District Court, 555 N.W.2d 216 (Iowa 1996) (systemwide challenge fails).

underpaid.[72] Lack of funds is too widespread a condition to create a basis for relief, and defense lawyers regularly prove that an adequate defense is possible even without much funding. Something more than funding choices is ordinarily necessary to demonstrate ineffective assistance.

Claims based on inadequate public funding are especially difficult to win in jurisdictions that use contract attorneys or public defender systems.[73] In such systems, the compensation available to the attorney is standardized and does not vary from case to case. Thus, any conclusions about one case necessarily has implications for all others. As a result, most of these claims fail.

A new breeze is blowing in the attorney funding litigation, however. In a few cases, most decided in the last fifteen years, courts have accepted claims by defendants and defense attorneys that go to the heart of the funding systems, claims with implications for entire groups of cases. For instance, the Arizona Supreme Court ruled in 1984 that the anemic funding for criminal defense under a contract system created such huge caseloads that the state was violating the defendants' constitutional right to counsel.[74] A celebrated 1993 decision of the Louisiana Supreme Court in *State v. Peart*[75] held that low funding levels, high caseloads, and inadequate investigative support all combined to create a "rebuttable presumption" in every criminal case thatpublic defenders were providing ineffective

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[72] *See* Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) (relationship between compensation and effectiveness is not certain otherwise pro bono attorneys are per se ineffective); Pickens v. State, 783 S.W.2d 341 (Ark. 1990) (attorney was effective, fees reduced to statutory limit); Coulter v. State, 804 S.W.2d 348, 358 (Ark. 1991) (conflict of interest could be created by fee cap, but Coulter made no showing of deficient performance or prejudice); People v. District Court of El Paso County, 761 P.2d 206 (Colo. 1988) (trial court dismissed charges because attorney claimed fee limit would create ineffective assistance of counsel; finding must be made after trial, not prospectively); Johnson v. State, 693 N.E.2d 941, 952 (Ind. 1998); Lewis v. State, 555 N.W.2d 216 (Iowa 1996) (no showing that indigents are harmed); Hansen v. State, 592 So. 2d 114 (Miss. 1991) (counsel exceeded *Strickland* standard, no ineffective assistance of counsel); State v. Taylor, 947 P.2d 681 (Utah 1997) (ineffective assistance claim denied because attorney never requested more money from state).

[73] For a description of the difference between these systems and an appointed counsel system, see Steven Smith & Carol DeFrances, *Indigent Defense* (1996) (NCJ 158909).

[74] State v. Smith, 681 P.2d 1374 (Ariz. 1984) (Sixth Amendment violation under contract system in Mojave County); Zarabia v. Bradshaw, 912 P.2d 5 (Ariz. 1996) (en banc) (Yuma County appointment and contract systems are potentially unconstitutional; ruling sparks creation of public defender system in state); *cf.* Heath v. State, No. 574 S.E.2d 852 (Ga. App. 2002) (presumption of ineffective assistance for this defendant based on caseload and inactivity of contract attorney).

[75] 621 So. 2d 780 (La. 1993).

assistance of counsel. The Michigan Supreme Court in 1993 struck down a "fixed-fee schedule" that compensated attorneys with a flat fee for each case, regardless of whether the case went to trial; such a system gave the attorney too little compensation for trial work and violated the statutory right to an attorney who receives "reasonable compensation for the services performed." The appellate court ordered the trial court to discontinue the old system of compensation and to develop a new one.[76] And current litigation in New York made news headlines as a trial judge granted a preliminary injunction increasing the compensation rates for appointed counsel in New York City.[77] Do these recent court decisions signal that the day has arrived when litigation can bring parity of resources for the defense into mainstream practice in the United States?

B. Impact of the Litigation

These recent cases are promising developments, and offer an important supplement to the case-by-case claims of ineffective assistance of counsel under *Strickland*. The litigation is spreading, as national organizations such as the NAACP and the National Association of Criminal Defense Lawyers join a conscious strategy to file these claims as a way to improve the funding for criminal defense generally.[78]

The impact is not limited to jurisdictions where courts actually issue final rulings supporting the claims. A small number of rulings like *Peart* can have ripple effects in settlement negotiations all over the country. Litigants who present a credible threat of obtaining a cataclysmic ruling (particular those claimants who survive an initial motion to dismiss) can negotiate favorable settlements with state and local governments, providing in the consent decree for higher levels of funding for criminal defense. This is

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[76] Recorder's Court Bar Ass'n v. Wayne County Court, 503 N.W.2d 885 (Mich. 1993) (set fees for every case, rules struck down). For more recent litigation over the compensation for appointed attorneys in Wayne County, Michigan, see Shawn D. Lewis, *Lawyers Sue Court for Raise*, DETROIT NEWS, Nov. 12, 2002.

[77] N.Y. County Lawyers Ass'n v. New York, 745 N.Y.S.2d 376 (Sup. Ct. 2002) (preliminary injunction granted, defense motion to dismiss denied).

[78] See John Gibeaut, *Defense Warnings*, ABA JOURNAL, Dec. 2001 at 35, 37. One example of such litigation comes from Mississippi. See Van Slyke v. Mississippi, No. 00-0013-GN-D (Miss. Ch. Ct. Forrest County, filed Jan. 12, 2000); Quitman County v. Mississippi, CIV. Action No. 99-0126; Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES 15 April, 2003.

exactly what happened recently in litigation that settled in Connecticut[79] and in Allegheny County, Pennsylvania soon after the claimants survived early motions to dismiss.[80]

Nevertheless, these judicial rulings become available only in jurisdictions where the defense lawyers are extremely under-funded and overworked. The difficulty for litigants in most of these cases is the comparison pool: the caseload for the public defenders in the home jurisdiction is compared to recommended caseloads formulated at the national level, based on mainstream practices.[81] The parties argue about parity among *groups of defenders*, rather than parity between *prosecutors and defenders*.

A judge will not issue an ambitious order that restructures and increases the funding for criminal defense based only on a showing that local practice falls short of national standards, even if the gap is quite large. In some jurisdictions, many public services do not get the funding they need to meet aspirational national standards, ranging from safety inspectors to police and fire protection to public health and hospitals. Indeed, the prosecutors in the same jurisdiction and the judge's own support staff often do not meet national aspirational standards.

When a judge knows of less than ideal funding for so many public services, only the most obvious departures from the recommended caseloads for defense attorneys can catch a judge's attention. Only the defenders at the bottom of the national ladder will appear to merit any relief.[82] The need to point to unusually badly funded systems may explain why so little of this litigation is filed, despite longstanding and universal complaints about overall funding for criminal defense.[83]

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[79] *See* Rivera v. Rowland, No. CV 950545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996); Connecticut Div. of Public Defender Services, 1999 Annual Report at 25 (2000) (settlement adds 54 new positions over 2 years, with 5 million budget increase).

[80] *See* ACLU, Doyle v. Allegheny County Salary Board, No. GD-96 13606 (Pa. Ct. C.P. filed Nov. 21, 1997), settlement described at http://www.aclu.org/news/n051398b.html; *see also* John B. Arango, *Defense Service for the Poor*, 13 CRIM. JUST. 25 (1998).

[81] Symposium Report, *supra* note 52, at 2-3; 1 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (Dec. 2000) (400 misdemeanors or 150 felonies per year).

[82] For examples of cases turning aside systemic challenges to public defender systems, see Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996); Wilson v. State, 574 So. 2d 1338 (Miss. 1990).

[83] *See* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, at n.93 (2000) (estimating the filing of ten systemic challenge cases since 1980).

The judicial rulings, even the most ambitious of them, have another limitation, as well: their help is only temporary. After a judge orders or convinces the state or local government to fund indigent defense at prevailing rates for the time, the world moves on. Inflation immediately starts eroding the salaries of the attorneys; greater numbers of arrests and charges erode the gains in caseload. Over time, the old difficulties for defense attorneys return, though perhaps not quite in the extreme form that provoked the earlier judicial ruling.[84]

One such story of erosion comes from Louisiana. Within the first two years after the enormous litigation victory in 1993, the state legislature did increase the annual funding for criminal defense by $5 million. In 1997, the legislature funded a new statewide oversight board for criminal defense, appropriating $7.5 million.[85] But the additional money was less impressive over the long run. The amount of the statewide appropriation actually devoted to New Orleans was modest, because so many parishes took a share of the state support, meaning that local revenues remained the most important source of funding for criminal defense.[86] The annual appropriation from the state remained the same every year, meaning that it decreased in real terms. Because of increases in arrests, charges, and funding for the prosecution, the funding that litigation brought to indigent defense in New Orleans must stretch further than before. Today, the caseloads for defenders in New Orleans remain remarkably heavy, perhaps even heavier than they were before the *Peart* litigation.[87]

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[84] *See* Rufo v. Inmates of Suffolk County, 502 U.S. 367, 384 (1992) (setting standard for modifying injunctive relief or consent decrees).

[85] *See* 1997 La. Acts No. 1361, 1997 HB1 (Indigent Defender Assistance Board, budget item 20-945), codified at La. R.S. 15:151. For the earlier funding difficulties of the Indigent Defense Board in Orleans Parish, see Susan Finch, *$5 Million OK'd to Defend State's Poor*, NEW ORLEANS TIMES-PICAYUNE, May 24, 1994, at B4; Carl Redman, *House Committee Halves Indigent Board Budget*, BATON ROUGE ADVOCATE, May 2, 1995, at 4A; Jack Wardlaw, *Legal Defense Fund Cut by Panel*, NEW ORLEANS TIMES-PICAYUNE, May 2, 1995, at A3.

[86] The base budget for Indigent Defense in New Orleans is over ten million dollars per year.

[87] Telephone Interview with Steven Singer, Staff Attorney for the Louisiana Crisis Assistance Center (May 12, 2003). Louisiana is not alone; the long-term effect of reform litigation has been disappointing in other locations, as well. For an account of events in Arizona after the Smith decision in 1984, see John A. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, 34 ARIZONA ATTORNEY at 16 (March, 1998); John A. Stookey & Larry A. Hammond, *Rethinking Arizona's System of Indigent Representation*, 33 ARIZONA ATTORNEY 28 (Oct. 1996).

C. Changing the Point of Comparison

Imagine the difference that a parity principle could make for each of these shortcomings in the systemic litigation. Instead of comparing the defense resources available in one jurisdiction to the defense resources available elsewhere, the court would ask how the defenders' resources and caseloads compare to the resources and caseload of the local prosecutors. With this the relevant comparison point, relief might go to a larger group of defenders. When the resource norms are set by prosecutors rather than a larger pool of defenders, a Lake Wobegon effect becomes possible in reverse: *all* defenders can be well below average.[88]

A principle of parity between defense and prosecution can also address the fleeting quality of litigation success. If a judicial order requires new resources for the defense every time the prosecution receives new funding, the benefits to the victors in the litigation stay constant. Economic inflation or increases in arrests or charges should affect the prosecution and the defense roughly equally. If the prosecutors remain under funded during lean budget years, the negative impact of poor funding for the defense will not be so severe.[89]

Yet it is precisely these features of the parity principle that could make judges reluctant to embrace it. Courts traditionally shy away from remedies that dictate to the legislature a method of addressing a legal violation.[90] The Louisiana Supreme Court in *Peart* declined to give the legislature any benchmarks for the proper level of spending to remove the constitutional violation.[91] An Oklahoma court used prosecutor salaries as benchmarks for

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[88] The reference, of course, is to Garrison Keillor's mythical town, where all the children are well above average. GARRISON KEILLOR, LAKE WOBEGONE DAYS (1985).

[89] In particular cases, a poorly funded prosecutors' office might spell bad news for defendants, because the prosecutors will screen out fewer sloppy cases and leave more work for overextended defense lawyers. But when prosecutors cannot devote proper attention to each case, the errors in the file are likely to become more obvious and should not require much additional investment from defense counsel to uncover.

[90] *See generally* STEPHEN C. HALPERN, ON THE LIMITS OF LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999).

[91] *See* State v. Peart, 621 So. 2d 780, 790-91 (La. 1993) (placing limits on remedy ordered by trial judge); *id*. at 792-96 (dissenting opinions, noting lack of specificity in court's remedy); New York County Lawyers' Association v. State, 745 N.Y.S.2d 376 (N.Y. Sup. Ct. 2002) (refusing to grant injunction requiring state to review number of hours billed by appointed lawyers and enforce guidelines for appointed counsel).

setting defense attorney salaries, but only on an interim basis. The legislation responding to the problem increased the rates, but made no long-term commitment to parity.[92]

While a parity principle might be less specific (and thus more tolerable to the courts) than an order naming a particular dollar figure for an annual budget, it nonetheless could force some major shifts in public funding. Any judicial order to enforce parity would also remain in effect over a long time period, and it would generate regular disputes about which prosecutorial advantages require some matching benefit to the defense. Courts would rather avoid this sort of sustained and detailed monitoring of a remedy.[93]

IV. RESOURCE PARITY AND PUBLIC CHOICE THEORY

The short history of defense funding litigation, together with the institutional limits of courts, suggest that litigation alone will not bring the parity principle into common usage. Why not, then, ask the legislature directly to adopt the principle of equal resources for prosecution and defense? This possibility has received only the most cursory and dismissive attention, for several reasons. For one thing, close attention to the legislative branch is a blind spot for legal scholarship, not just in the criminal justice context but in most other fields. Legal scholars from the common law tradition mostly view legal problems from the vantage point of courts; if an issue does not appear on the docket of the U.S. Supreme Court, it does not resonate in the legal academy.[94]

Another reason why the legislative prospects for defense funding get so little attention is a sense of futility. Discussions of defense funding often refer in passing to legislatures, but conclude fatalistically that legislatures are no friends of criminal defendants.[95] As Attorney General Robert

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[92] *See* State v. Lynch, 796 P.2d 1150 (Okla. Crim. App. 1990). For the legislative reaction in Oklahoma, see OKLA. STAT. ANN. tit. 22, §§1355-1370 (creating Oklahoma Indigent Defense System Board).

[93] *Cf.* Wendy Parker, *The Future of School Desegregation*, 94 NW. UNIV. L. REV. 1157 (2000) (discussing challenges of ongoing judicial monitoring of remedies).

[94] For one attempt to remedy this problem in the Criminal Procedure classroom, see MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (2d ed. 2003).

[95] *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 92 (1999) ("Achieving solutions to this problem through the political

Kennedy once put it, "The poor man charged with crime has no lobby."[96] In this view, the legislature will fund legal counsel for criminal defendants only when the constitution and the courts require it.

This observation has some basis both in experience and in theory. It is easy to find examples of legislatures that refuse to increase (or even to maintain) funding for criminal defense work, and legislators are none too subtle in explaining that the defense of accused criminals is a low funding priority.[97]

Public choice theory also contributes to this hopelessness. This model for explaining legislative behavior might predict low spending on criminal defense: legislators interested in their own political careers will see that those who could benefit from government-funded defense lawyers – convicted criminals, accused criminals, and those likely to be accused of crimes – probably cannot help them get re-elected. This segment of society, poor and alienated, probably does not and cannot contribute much to election campaigns. The beneficiaries do not publicize or endorse the legislator's work on behalf of a large bloc of voters. In short, because there is nothing to benefit the legislator's political career when voting for stronger criminal defense funding or for linking it to prosecutorial funding, it will not likely happen.[98]

Such pessimism about legislatures in criminal justice, however, is overstated. The facts on the ground tell us that legislatures sometimes vote for things that benefit the defense, even when the courts interpreting the constitution do not demand them. For instance, states have long provided defense counsel in a broader range of cases than the Constitution strictly requires.[99] Given the minimal levels of competence required to satisfy the

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process is a pipe dream"); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994); Dripps, *supra* note 5; Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2066-68 (2000); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 Am. J. Crim. L. 1, 3 (1999) (Iowa case study).

[96] Kennedy is quoted in Lewis, *supra* note 26, at 211.

[97] Adele Bernhard, *Take Courage: What The Courts Can Do To Improve The Delivery Of Criminal Defense Services*, 63 U. PITT. L. REV. 293, at nn. 96-98 (2002) (recounts futile efforts to get legislation in New York); Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L.J., Sept. 18, 1995, at A1; Mandy Welch, *Death Penalty Chaos Calls for Systemic Change*, TEX. LAW., Dec. 13, 1993.

[98] *See generally*, MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989).

[99] Scott v. Illinois, 440 U.S. 367 (1979); VT. STAT. tit. 13, §§5231, 5201.

Sixth Amendment and due process guarantee of effective counsel, one must conclude that most states fund their systems at levels higher than the bare minimum that the constitution would tolerate.

A. Prosecutors and Bar Groups as Entrepreneurs

A closer look at public choice theory suggests that criminal justice legislation actually falls into several distinct categories, each with different implications for the theory. For us to appreciate the differences among these categories, it is necessary to review the way public choice theory tracks the distribution of costs and benefits that new laws create.[100]

The costs of a law might be dispersed broadly among the public, or they might fall more heavily on a smaller group. Similarly, the benefits of a law might be concentrated on a small group, or the benefits might be more diffuse and go to the public at large. Different combinations of these situations lead to different predictions about the legislative process: if both the benefits and costs are concentrated on groups that feel the effects and can organize to make their views and influence felt, the legislature will find it difficult to pass laws in this zero-sum situation where a gain for one group is keenly felt as a loss for some other influential group, and stalemate will often result.[101] If both the costs and benefits of the law spread lightly among large groups, the legislature is likely to act only when some event (or some person or group) brings this issue to the attention of the public that could benefit.[102]

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[100] *See generally*, MICHAEL HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); JAMES WILSON, POLITICAL ORGANIZATIONS (1973).

[101] An example of this situation is labor legislation, where the costs and benefits land on well-developed groups on both sides, representing both employees and employers.

[102] Two other combinations are also possible. In situations where a new law would create widespread costs (think of taxpayers) and concentrated benefits (think of tobacco farmers hoping for subsidies), the legislature is quite likely to act. The benefiting group will devote its organized resources to support legislators who vote for the program, while the disorganized public will pay so little individually that they will probably exact no political price.

Finally, in situations where a new law creates concentrated costs and widespread benefits (think of environmental regulation), the legislature is not likely to act unless some entrepreneur brings the issue to the attention of the public. Even then, the legislators will be inclined to pass vague legislation that endorses the benefit (clean air) without specifying the cost (the amount of pollutants to remove from the air or the type of equipment required).

Criminal justice legislation fall into this second category: both the costs and the benefits of these laws fall broadly on the public (although it is also true that some segments of society feel these costs and benefits more acutely than others). The social benefits of criminal justice laws include public safety, cultural solidarity, and all the other virtues that are said to serve as the "purposes" of the criminal law.[103] The widely-shared costs include the funds necessary to operate police departments, criminal courts, prisons, and other corrections programs. These costs include the privacy and liberties that all must sacrifice to some extent for effective law enforcement.

Political scientist Douglas Arnold examined the reasons that legislators might respond to the "inattentive public" rather than devoting all their energies to special interest legislation.[104] He identified several conditions that could awaken the inattentive public on a particular issue, allowing the legislator to benefit by supporting new laws on that subject. One of the key conditions Arnold identified was the presence of a "policy entrepreneur" who powerfully and repeatedly brings the issue to the attention of the public. The entrepreneur might be motivated by a principled commitment, or because she will benefit above and beyond the benefits that flow to the public, or by both types of reasons.

In the criminal justice realm, the prosecutor is the most important policy entrepreneur, and this becomes most obvious in debates over the coverage of the substantive criminal law. When a prosecutor promotes a new criminal law expanding the reach of the code, no organized or effective opposition is likely to appear to point out any costs of the expansion. In this setting where the costs of new legislation are inchoate, as William Stuntz has noted, the criminal law is bound to expand, regardless of the merits of the arguments: "Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious."[105]

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[103] For some of the classic explanations of these purposes, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. OF POLITICAL ECONOMY 169 (1968) (deterrence); Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC'Y REV. 581 (1975) (incapacitation); Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000) (social cohesion).

[104] R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990).

[105] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001). It is also not surprising that the legislature often adopts symbolic legislation to add to the criminal code, because a non-attentive public is not likely to insist on crime legislation that is used effectively and extensively. *See* John Dwyer, *The Pathology of Symbolic*

The situation is different when it comes to changes in the criminal punishment statutes. Here, prosecutors regularly request increases in authorized punishment ranges and oppose any decreases in the ranges, but entrepreneurs sometimes appear on the scene to point out the costs, as well. State corrections officials who operate prisons and other programs, along with local government officials who operate jails, remind the legislators that increased use of punishment resources is costly.[106] With some frequency, the legislature makes the connection between the costs and the benefits, and acts with restraint on new punishment legislation.[107]

Changes to the criminal adjudication process, such as the funding scheme for defense attorneys, fall into a third category, where prosecutors are even less likely to sway the legislative debate. In this setting, policy entrepreneurs step forward to point out the benefits of better funding and more reliable results.

Convicted and accused criminals are not alone in wanting to see decent levels of funding for criminal defense counsel, and some of the groups with opinions on these questions can be very helpful during election campaigns. The legal community generally favors such spending: the American Bar Association periodically opines about the importance of adequate funding.[108] The affinity of lawyers for public spending on legal services might be easy to explain to cynical terms, but it also speaks to some of the deepest aspirations of the profession.[109] Some specialists in criminal justice also tend to favor additional spending for criminal defense. Judges, for instance, know that when defense counsel become involved effectively in more cases, their sentencing options increase along with their confidence in the outcomes.[110]

Legislation, 17 ECOLOGY L.Q. 233 (1990); Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

[106] The reminder could also come from educators and others who compete with corrections for a limited state or local budget. *See* Marc Miller, *Cells vs. Cops vs. Classrooms*, in THE CRIME CONUNDRUM 127 (Lawrence M. Friedman and George Fisher, eds., 1997).

[107] *See* Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 1980-2000, 29 CRIME & JUSTICE 39 (2002). In Arnold's terms, the costs of more severe criminal sanctions, though spread broadly among the public, becomes more noticeable because the voter can trace the costs of prison to at least some changes in the sentencing laws, and the magnitude of that cost is sometimes large enough to be noticeable. Arnold, *supra* note 104.

[108] See the ABA policies discussed *supra* in part II.

[109] Note that many loan repayment assistance programs cover both prosecutors and defense attorneys within the qualifying definition of "public interest" lawyering. Some federal educational loans, however, are available only to prosecutors.

[110] *See, e.g.*, Judith Kaye, *State of the Judiciary, 2003*.

Even more critical than the presence of entrepreneurs on the "benefit" side of funding debates is the altered role of prosecutors on the other side. Prosecutors in some jurisdictions might actually favor increased funding for defense attorneys to promote the reliability and predictability of the criminal process.[111] Even if prosecutors oppose parity of salary or resources for defense counsel, they may appear self-interested and lose some credibility with the legislators.

Thus, the configuration of policy entrepreneurs who can awaken the inattentive public to the costs and benefits of criminal justice legislation will look quite different in these three settings. The prospects for new laws that incidentally benefit criminal defendants are best when dealing with the quality of the adjudication process, an issue that attracts attention from the organized bar and other motivated and influential groups.

B. Reframing the Issue

Funding for defense counsel has another advantage over other criminal justice issues, in addition to the favorable alignment of interested parties. The public has mixed views on the issues involved, and the parties (and legislators) have several options in how to frame the issue when explaining votes to the public.

Many voters favor, at least in the abstract, the notion that litigants should have some rough equality of resources, simply as a matter of fair play and taking proper precautions during weighty decisions.[112] They also favor abstract principles of equal pay for comparable work. Some legislators, particularly those with legal training, may be even more sympathetic to procedural fairness than their constituents. They appreciate that the integrity of an adversarial system like criminal justice depends on adequate resources for both sides.[113]

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[111] For instance, during the current litigation over funding for appointed attorneys in New York City, Manhattan District Attorney Robert Morganthau has remained pointedly (and supportively) silent.

[112] Spangenberg Group, *Kentucky*, 5 SPANGENBERG REPORT (2001) (Kentucky survey).

[113] Legislators themselves may have conflicting views on these funding questions, and deliberation on the question may help them clarify those views. To put the point in the vocabulary of those who criticize the public choice model, the debate may create endogenous shifts in preferences; we should not assume that the legislator's views are static and exogenous to the process. *See* DONALD GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994).

In this setting where lawyers and judges favor a specific funding decision, and voters have conflicting views about the question, strange things can happen. A predictive rule of thumb along the lines of "criminal defendants always lose" will prove to be too crude. Legislators in such a setting might look for ways to reframe (or to obscure) the defense counsel funding question at higher levels of abstraction thatmight appeal to the voters. If the budget decisions become associated with these public ideals about competitive balance and equity among employees, the public choice account that focuses on benefits for powerless criminal defendants does not capture the reality.

Legislatures develop strategies in many areas to reframe issues at a different level of abstraction – think of the use of sentencing commissions around the country over the last two decades.[114] The legislation creating sentencing commissions speaks generally (and often incoherently) about the goals of criminal punishments. The laws also instruct the commission to consider the state's available resources and tell judges to place particular weight on certain recurring facts when they sentence individual defendants. The final products that the legislatures adopt contain some unpopular outcomes, such as limits on the use of prison for some lesser felony offenses.[115] But legislatures adopt them in the name of larger principles, such as "truth in sentencing" or "rational allocation" of corrections resources.[116]

In a related technique, legislators who try to build momentum for unpopular but necessary measures might link a set of unpopular choices to another related and more popular set of choices. For instance, at the federal level, members of Congress link any salary increases for themselves (highly unpopular) to salary increases for judges (relatively uncontroversial). In the

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[114] *See generally* MICHAEL TONRY, SENTENCING MATTERS (1996).

[115] *See* David Boerner, 28 CRIME & JUSTICE: A REVIEW OF RESEARCH (Michael Tonry, ed. 2001).

[116] Another example of this phenomenon involves the federal law in the 1990s that required Congress to vote up-or-down on an entire package of military base closings. Congress passed this law knowing that the abstract concept of fewer bases was sound, but equally aware that each member would hope to spare the base in his or her home district. Efforts to amend the specific entries on the closing list often unraveled the entire package. Similarly, we could view a pay parity statute as a technique for changing the level of abstraction in the debate. Few legislators will vote for ad hoc budget increases to give accused criminals a more vigorous and effective defense. More legislators – particularly those with legal training and sympathy for ideas of fair play in litigation – might vote for spending enough, in principle, on criminal defense to have confidence in the quality of the convictions that our system produces.

same vein, state and local legislators might link unpopular spending increases for indigent defense to the more popular increases in resources for prosecutors.[117]

Finally, consider how the commonplace legislative practice of delegating authority to administrative agencies allows the legislature to control the relevant level of abstraction for its debates. In many areas of regulation, the legislature passes a statute endorsing a popular and abstract principle (say, "safety" or "clean air") and leaves the unpopular and more concrete details to an administrative agency (say, the amount the public must pay for cars that burn less gasoline).[118] Similarly, in the area of criminal defense services, state legislators can endorse general principles of fairness and respect for individual liberties, and deliver such general instructions to local governments, while making them responsible for the "details" of funding and organization of defense counsel.

Under the right conditions, then, legislators pass laws that produce unpopular applications of shared public ideals. It happens when these laws attract more attention from the small group of supporters than from the larger group of opponents; it happens when the debate becomes framed in terms of a popular (or tolerable) abstract principle rather than an unpopular practical tradeoff. The potential exists for legislators to do the same when it comes to funding criminal defense attorneys for the indigent.

V. LEGISLATIVE AND JUDICIAL SYNERGY

Resource parity for indigent criminal defense is more than a foolish hope in the legislature; on the other hand, it is no sure thing. The conditions have to be favorable before this unlikely result comes out of the legislature. At the same time, the institutional habits of courts make it unlikely that judges will order full-blown resource parity on a regular and ongoing basis. Where neither the judiciary nor the legislature is likely to complete the job acting alone, they could reinforce one another because a very small number of litigation successes anywhere in the country can improve the legislative environment. The threat of litigation can move funding issues to the center of legislative attention, and create a presumption against the status quo.

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[117] Alternatively, the salaries of both prosecutors and defense attorneys could be set as some fixed percentage of the salary paid to judges who preside in criminal proceedings.

[118] *See* Peter Aronson, Ernest Gellhorn, & Glen Robinson, *A Theory of Legislative Delegation*, 69 CORNELL L. REV. 1 (1982).

Modest courtroom victories on the issue of prison conditions played a similar reinforcing role in the legislature.[119] Shocking conditions and severe overcrowding at prisons around the country did produce some judicial rulings stating that the conditions violated the Eighth Amendment bar on cruel and unusual punishment.[120] A few of the opinions were bold and eloquent, and raised the prospect of major litigation and judicial rulings all over the country. In this environment, legislatures acted (and spent) decisively in many states to improve prison operation and to relieve the overcrowding through a combination of expanding prisons and releasing inmates.

In retrospect, it is surprising that legislatures reacted as strongly as they did to the prison conditions litigation. In many states, the existing prison conditions were not so horrifying as the Arkansas and Alabama work camps that produced the most sensational judicial rulings.[121] There was plenty of room for states to litigate the question of just how extreme the overcrowding must become to qualify as a constitutional violation; it remained unclear exactly what a state would have to spend to satisfy a judicial ruling. In some states, officials fought every step of the way. But in others, the legislature took the lead in reshaping the state prisons after litigation (or merely the threat of litigation) put the issue into play. In North Carolina, for example, state officials entered settlement negotiations fairly early in the litigation, and passed a "prison population cap" statute that seemed to go beyond the minimal changes that a judicial order probably would have required. The litigation also inspired a series of changes to the sentencing laws that improved the state's ability to control prison admissions and plan for future correctional resources as needed.[122]

The reasons why legislators in some places passed laws that provided more resources to prisons than judicial rulings would have ordered are difficult to reconstruct. Perhaps the legislators handicapped the litigation risks poorly, as parties in litigation often do. It is also possible that legislators were genuinely troubled by prison conditions, and the litigation created an occasion to change the prisons while blaming the federal courts for the costs.

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[119] Dripps, *supra* note 5, at n. 182, makes the prison analogy.

[120] Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

[121] *See* Kathryn Abrams & Ronald F. Wright, *Judge Frank Johnson in the Long Run*, 51 ALA. L. REV. 1381 (2000) (reviewing Alabama prison conditions litigation).

[122] Wright, *supra* note 107.

The threat of litigation might operate in a similar way for indigent defense counsel systems. Legislators, some because of legal training and others because of experience with labor relations and personnel management, will respond with sympathy to the idea that defense attorneys and prosecutors deserve equal treatment. The judges who create the litigation risk will be state judges rather than federal,[123] but the legislators might still treat the risk of a court ruling as the necessary political cover for reshaping the counsel system.

Conditions that favor parity of resources are likely to develop slowly. For this reason, supporters of criminal defense funding should move incrementally, starting with easier issues such as salary parity. In jurisdictions that rely entirely on appointed counsel, linking the compensation for defense work to prosecution salaries will address a large part of the overall resource balance. Appointed attorneys, accepting one case at a time, are better able than full-time public defenders to manage caseload.

We might discover over time that judges become more involved in some forms of parity than others. For instance, salary parity seems a more prototypical legislative issue involving relations among state employees. Parity of access to expert witnesses, on the other hand, might become more of a judicial specialty, an application of Sixth Amendment principles announced in *Ake v. Oklahoma*.[124]

Attorneys working on capital cases might be an attractive starting point for introducing the concept of salary parity. There is some risk involved here, since these cases attract such close attention and strong emotions; legislators may question the merits of funding these cases above the bare constitutional minimum. Indeed, legislators have defunded centers that provide training and coordination for capital defense.[125] Yet there is a powerful need for reliable process in capital cases that will be scrutinized so carefully on appeal, and resource equity can improve the chances for a reliable outcome at trial. Legislators who vote for defense funding in the capital context routinely point out these advantages to the voters. Several jurisdictions, including Mississippi, already provide salary parity for defense attorneys in the capital context.[126] Capital litigation resource centers also

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[123] *See* Luckey v. Miller, 976 F.2d 673, 676-79 (11th Cir. 1992) (per curiam) (abstention).
[124] 470 U.S. 68 (1985).
[125] *See* Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L.J., Sept. 18, 1995, at A1.
[126] *See* Spangenberg Group, *Mississippi*, 6 SPANGENBERG REPORT, Issue 1 at 6 (August 2000) (prosecutor salary parity for capital cases); Gibeaut, *supra* note 78, at 37, advocates say

provide the sort of investigative and expert support services that are available only rarely for other criminal matters. Although the politics here are volatile, it appears that defense in capital cases has already become a testing ground for the parity principle, in several of its forms.

CONCLUSION

Parity shows particular promise when compared to other more directive "command and control" strategies to regulate a complex art like defense lawyering. Quality standards are possible to formulate, but it is virtually impossible to measure, for an entire system, how close the defense attorneys come to fulfilling their obligations under the standards.[127] How much of a departure from the ideal to tolerate will vary from place to place, depending on the quality of public services that citizens typically accept.

Parity regulates more indirectly, asking only about the strength of certain defense resources, without specifying how attorneys should use those resources. Resource parity for the defense can reduce to a few manageable indicators the whole complex of opportunities and judgments that cannot directly be measured or regulated.[128]

In the arena of indigent criminal defense, nothing can add value faster than money. While public choice theory cautions us about the difficulties involved, it is not a foregone conclusion how any given legislative debate on defense funding will end. On this issue, public ideals about competitive balance might interfere with simple anti-defendant crime politics. Given the known limits of litigation for improving criminal defense in the forty years since *Gideon*,[129] we should treat the unknowns of the legislative process as reasons to hope and study.

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publicity over the death penalty has improved the climate for their attempts to improve representation outside the capital context.

[127] The Vera Institute has recently issued a report proposing methods of measuring the quality of defense counsel.

[128] *Cf.* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (bond dealers in competitive market charged lower bond rates to black and Hispanic defendants than to white defendants, indirectly suggesting that judges set amounts higher than necessary to account for risk of flight).

[129] Gideon v. Wainwright, 372 U.S. 335 (1963).