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Foreword

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Symposium:

Broke and Broken: Can We Fix Our State Indigent Defense System?

Foreword

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I. INTRODUCTION

Over 45 years ago in *Gideon v. Wainwright*, Justice Black proudly proclaimed:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[1]

Sadly, as numerous national reports,[2] individual state studies,[3] and articles[4] demonstrate, this "noble idea" represents only a cruel illusion to many

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1. 372 U.S. 335, 344 (1963).

2. *See generally* AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/scla-

state criminal defendants in this country. Too many indigent defendants in state courts are represented by undertrained, under resourced lawyers who are

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id/defender/brokenpromise/fullreport.pdf; CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 (2000), *available at* http://webharvest.gov/peth04/20041025225515/http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf; AM. BAR ASS'N SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS (1988); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 22-33 (1986); NORMAN LEFSTEIN, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR, METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 56-57 (1982); AM. BAR ASS'N & NAT'L LEGAL AID & DEFENDER ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982); RICHARD KLEIN & ROBERT SPANGENBERG, AM. BAR ASS'N SECTION OF CRIMINAL JUSTICE, INDIGENT DEFENSE CRISIS (1993); LAURENCE A. BENNER ET AL., NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE (1973).

3. The Spangenberg Project has studied indigent defense systems in nearly every jurisdiction in the United States. Many of the group's reports document severe funding problems in the jurisdiction being evaluated. *See, e.g.*, THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (2009), *available at* http://members.mobar.org/pdfs/public-defender/2009-report.pdf [hereinafter ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM]; THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefensecommission/SpangenbergGroupReport.pdf; THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE (2003), *available at* www.georgiacourts.org/aoc/press/idc/final%20report.pdf. For more information on research and reports done by The Spangenberg Group, see The Spangenberg Group, Indigent Defense Studies, http://dnewhouse.com/TSG/work_indig.html.

4. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1037-40 (2006); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 307 (2002); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 784-87; Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 4-5; Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178 (2003); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 461-62 (2007) ("Nobody disputes either the reality of excessive caseloads in indigent defense systems or their negative effects. More than forty years after Gideon v. Wainwright, however, few seem willing to accept that additional resources will not magically appear to solve the problem."); Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 906 (2004) ("[T]here is overwhelming evidence that defense representation in the United States often is egregiously inadequate.").

under prepared – or at times totally unprepared – to conduct the defense of their clients' cases. Stephen Bright's rousing keynote speech at the 2010 *Missouri Law Review* Symposium provided numerous examples of glaringly incompetent representation by indigent defenders to state court defendants facing serious felony charges or even the death penalty.[5] Other Symposium presenters were equally critical of the indigent defense system in Missouri and in a host of other states. Because most lawmakers in states apparently lack the political will to adequately fund the delivery of indigent defense services, too many state court criminal defendants face prosecution without a defense lawyer ready, willing, and able to provide an effective defense.

That is not to say that all poor defendants uniformly receive shoddy representation. In fact, some indigent defendants receive excellent representation. Indeed, a number of the Symposium presenters described in glowing terms the training, resources, and caseloads at the Washington, D.C. Public Defender Service (PDS).[6] For these former public defenders, PDS illustrates that a well-funded, well-structured, and well-managed public defender office can provide first-class representation.

Moreover, even in states with severely underfunded delivery systems and with lawyers strapped with oppressive caseloads, indigent clients with overworked counsel may be better off than poor clients whose income is just enough to disqualify them from receiving counsel at state expense. Generally, the marginally poor who face criminal charges either represent themselves or scrape up just enough money to hire private counsel to negotiate a plea bargain.[7] On the other hand, well-heeled criminal defendants who retain private counsel often, but not always, receive better representation than that received by indigent defendants or the working poor.[8] Simply put, the assistance of counsel in state courts across the country is disturbingly uneven.[9] It is not, however, just the size of a defendant's pocketbook that determines whether an accused receives competent assistance of counsel. Rather, the quality of representation a state court defendant receives in the United States

5. *See* Stephen B. Bright, *The Diminishing Quality of Legal Representation for the Poor: Can Society Afford this Much Injustice? 2010 Earl F. Nelson Lecture*, 75 MO. L. REV. 683 (2010).

6. Barbara Bergman, Richard Rosen, Norm Lefstein, and Robert Mosteller each spoke of their work at PDS. *See e.g.*, Robert P. Mosteller, Remarks at the Missouri Law Review Symposium 2010 (Feb. 26, 2010), *available at* http://www.law.missouri.edu/faculty/symposium/symposium10/webcast.html; *see also* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931 (2010).

7. *See* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 748-52.

8. *Id.* at 744-45.

9. *See id.* at 744-67.

is primarily "a product of fortuity, of economic status, and of the jurisdiction in which he or she is charged."[10]

In light of all of the reports describing the crisis in the delivery of indigent defense services throughout the United States, including news stories of the serious problems in Missouri,[11] the *Missouri Law Review* decided to focus its attention on indigent defense and to title its 2010 Symposium issue "Broke and Broken: Can We Fix our State Indigent Defense System?" Not surprisingly, all of the Symposium presenters and commentators agreed that the overall picture of indigent defense representation across the United States is dismal. The presenters' focus on broken delivery systems with contract lawyers or public defenders handling far too many cases mirrors the recent observations of Attorney General Eric Holder.[12] Holder has publically condemned the shortcomings of state indigent defense systems and has pledged his help to address the problem of inadequate funding for such systems.[13]

Few jurisdictions have a public defender system as dysfunctional as Missouri. It was hardly a surprise, then, that several Symposium presenters focused on Missouri.[14] This focus was not simply a byproduct of the Sympo-

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10. *Id.* at 741.

11. *See, e.g.*, David Webber, *Improving Public Defender System is Predicament for Missouri*, MISSOURIAN, Mar. 18, 2010, *available at* http://www.columbiamissourian.com/stories/2010/03/18/column-improving-public-defender-system-predicament-missouri/; Michael Amantea, *Missouri Public Defenders Struggle to Provide Justice for All*, KOMU.COM, Nov. 16, 2009, http://www.komu.com/satellite/SatelliteRender/KOMU.com/ba8a4513-c0a8-2f11-0063-9bd94c70b769/ffce0dca-80ce-0971-012e-b57462b25f58; Jill Glavan, *Public Defenders Overloaded*, KOMU.COM, Nov. 10, 2008, http://www.komu.com/satellite/SatelliteRender/KOMU.com/ba8a4513-c0a8-2f11-0063-9bd94c70b769/88c23c92-80ce-0971-007b-5afa7b3128a6; Press Release, Mo. State Pub. Defender, Public Defender Commission Adopts Rule to Limit Availability of Overloaded Offices to Take on More Cases (Nov. 2, 2007), http://www.publicdefender.mo.gov/New-sfeed/20071102.htm; Press Release, Mo. State Public Defender, Missouri's Public Defender System Announces Hiring Freeze (Dec. 15, 2008), http://www.publicdefender.mo.gov/Newsfeed/20081215.htm.

12. Adele Bernhard, *Raising the Bar: Standards Based Training, Supervision, and Evaluation – An Essay*, 75 MO. L. REV. 831, 849-50 (2010); Bright, *supra* note 5, at 684; Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 911 (2010); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 754 (2010); Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010); Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 856 (2010).

13. *See* Eric Holder, U.S. Att'y General, Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010 (Feb. 18, 2010), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html.

14. *See, e.g.*, Hanlon, *supra* note 12, at 762; Joy, *supra* note 12, at 788; O'Brien, *supra* note 12, at 853; *see also* Norman Lefstein, *Commentary*, 75 MO. L. REV. 793,

sium's venue. Rather, it reflects the fact that, almost from its inception, Missouri's Statewide Public Defender program (MSPD) has been underfunded.[15] The program has been in crisis for years, and in 2005 the Spangenberg Project declared that MSPD was "the lowest funded state public defender system in the nation" and "'on the verge of collapse.'"[16] The Spangenberg Project returned in 2009 and once again lamented the deplorable state of the MSPD, finding that "Missouri now has the lowest per-capita expenditures of *all* states, except for Mississippi."[17] As a result, Missouri public defenders – like those lawyers in other underfunded programs – have been laboring under oppressive caseloads for some time.[18] High caseloads and poor working conditions have contributed to the incredibly high turnover in the Missouri public defender system.[19] Ultimately, however, it is Missouri's criminal defendants – like those in other seriously underfunded states – who suffer the most at the hands of their overworked defenders.[20] Not only do inexperienced, unprepared lawyers fail to provide clients their constitutional right to the effective assistance of counsel, such defenders also contribute to wrongful convictions.[21]

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798 (2010); Cat Kelly, Deputy Dir., Mo. State Pub. Defender Sys., Remarks at the Missouri Law Review Symposium 2010 (Feb. 26, 2010), *available at* http://law.missouri.edu/faculty/symposium/symposium10/webcast.html.

15. *See* STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2007 ANNUAL REPORT 6 (2007), http://www.publicdefender.mo.gov/about/FY2007AnnualReport.pdf [hereinafter ANNUAL REPORT]. When MSPD was first established, hiring contract counsel was an essential component of the system. *Id.* However, it became too difficult for MSPD to find private attorneys willing to work for the low fees set by the state. *Id.* This made a contract counsel system unworkable, which led to the reorganization of MSPD just seven years after it was established. *Id.* In 2009, the Spangenberg Project concluded that MSPD had experienced underfunding in at least the last decade. ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 3, at 14.

16. Press Release, Mo. State Pub. Defender, Public Defender Commission Adopts Rule to Limit Availability of Overloaded Offices to Take on More Cases (Nov. 2, 2007), http://www.publicdefender.mo.gov/Newsfeed/20071102.htm.

17. ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 3, at 12.

18. ANNUAL REPORT, *supra* note 15, at 3, 10.

19. *Id.* at 3.

20. O'Brien, *supra* note 12, at 853-54.

21. *Id.* at 855; *see also* Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 773 (2008) ("The most effective way to increase accuracy and reduce the number of wrongful convictions is to achieve this reform [of the systems that provide counsel to indigent defendants]."); Uphoff, *supra* note 7, at 742 ("Providing defendants access to competent counsel with the time and resources to meaningfully test the prosecution's case is a badly needed step that would enhance the fairness and reliability of our criminal justice system. . . . [O]ur state criminal justice systems, as they currently operate, inadequately protect those wrongfully accused of crimes.").

Even though almost everyone concedes that the caseload crisis in Missouri is real,[22] the dire state budget situation makes a significant infusion of new resources virtually impossible. So if Missouri, like most other states, is truly broke, then realistically can the state find the funds needed to fix its broken indigent defense system? That was the question at the heart of the Symposium. The Symposium presenters and commentators, most of whom had worked at some point in their career as a public defender, brought a wealth of experience to the discussion. While the presentations and comments made that day, together with the articles that follow in this Symposium issue, do not provide any quick fix or easy solution, they do offer some important lessons for lawmakers to consider as states struggle to improve the plight of indigent defenders and their clients.

II. SYMPOSIUM LESSONS

The first lesson is painfully obvious to informed observers but not necessarily to many in the general public who lack a good grasp of the actual workings of the criminal justice system at the state level: many defendants in many jurisdictions receive only limited assistance of counsel. Indeed, the picture painted of indigent defenders and their work by the Symposium presenters was, for the most part, quite disturbing. Presenters like Stephen Bright and Sean O'Brien horrified the audience with alarming examples of shockingly poor representation.[23] None of the speakers suggested that such horrific examples are rare or that a majority of defendants in most jurisdictions actually do receive the effective assistance of counsel guaranteed by the Sixth Amendment. Rather, all agreed that too many state court defendants are represented by a lawyer without the time or resources to do more than facilitate a plea bargain.

A second lesson to be drawn from this Symposium is that the high caseloads generated by underfunded indigent defense systems place enormous pressure on indigent defenders and on those responsible for administrating such systems. Representing indigent defendants can be a challenging job even for the most committed lawyers with access to adequate support services, investigators, and experts.[24] For lawyers who handle an enormous case-

22. At least a few prosecutors maintain there is no caseload crisis but rather an evenly distributed lack of resources throughout the entire judicial system. *See* Dean Dankelson, *Missouri's Public Defender System Not Alone in Struggle*, MISSOURIAN, Mar. 22, 2010, *available at* http://www.columbiamissourian.com/stories/2010/03/22/column-entire-criminal-justice-system-needs-resources/.

23. Bright, *supra* note 5, at 691-96; O'Brien, *supra* note 12, at 853-54.

24. *See generally* Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1205 (2004); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240-41 (1993) [hereinafter Ogletree, *Beyond Justifications*]; *see also* Charles J. Ogletree, Jr.,

load without adequate support, the demands are incredibly taxing. Moreover, juggling high caseloads severely limits the time counsel can spend with any individual client or devote to a particular case, often leaving indigent clients angry and unsatisfied. That anger frequently is directed at defense counsel.

Not only does the overworked defense counsel have to endure angry clients, counsel regularly must deal with irate judges unsympathetic to counsel's lack of preparedness or timeliness. It is professionally draining to be subjected repeatedly to a judicial tongue lashing for arriving unprepared for a hearing, especially when counsel knows that she is unprepared for the full docket that awaits the next day. Nonetheless, even in the face of these extremely trying circumstances, most of the defense lawyers handling indigent defense cases are striving to do their best for their clients. Not surprisingly, frustrations mount as defenders struggle to cope with oppressive caseloads and the burnout that often follows.[25] Nor is it surprising that burnout produced by these high caseloads leads to high turnover rates in many underfunded indigent defender systems.[26] That turnover, unfortunately, only exacerbates the pressure on the remaining lawyers in the office and increases the number of clients who will be ill-served by a replacement lawyer without the time to get up to speed on a client's case.

In addition to individual public defenders, indigent defender supervisors and administrators in underfunded jurisdictions also confront enormous challenges. As Phyllis Mann[27] and Peter Joy[28] describe in their articles, lawyers in these roles also must comply with ethics rules and attempt to ensure that the lawyers they are supervising are affording their clients competent representation. As caseloads rise and their budgets remain flat, however, these lawyers are painfully aware of the diminished services provided by their staff lawyers to their clients. As repeated requests for adequate funding goes unheeded, the options for indigent defense program administrators are quite limited.

An Essay on the New Public Defender for the 21st Century, 58 LAW & CONTEMP. PROBS. 81, 85-90 (1995) [hereinafter Ogletree, *New Public Defender*].

25. *See, e.g.*, Ogletree, *New Public Defender*, *supra* note 24, at 85-86; Ogletree, *Beyond Justifications*, *supra* note 24, at 1240-41; *see also* Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13, 15 (1994); ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 3, at 6, 16-17.

26. *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, 1851 (1994); *see also* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 393-94 (1993); ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 3, at 16-17.

27. Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 734 (2010).

28. *See* Joy, *supra* note 12, at 779.

Yet not all indigent defender administrators or indigent defenders face oppressive caseloads or are strapped with woefully inadequate budgets. Robert Mosteller, Barbara Bergman, and Richard Rosen all spoke of their extraordinarily positive experiences at PDS and of the high quality of the lawyers and of the representation provided by that defender program.[29] Similarly, I touted the Milwaukee office of the Wisconsin State Public Defender (WSPD) program, where I worked in the early 1980s.[30] That program, albeit more financially strapped in recent years, has been consistently well funded with manageable caseloads and experienced, well-trained lawyers capable of providing high quality representation to their clients. Most of the clients served by a Wisconsin public defender or private lawyer appointed by the WSPD do, in fact, receive the effective assistance of counsel as promised by *Gideon*. One clear message from the Symposium is that it is possible for states to provide the funding needed to deliver constitutionally acceptable indigent defense services.

Sadly, a majority of states appear content to provide only the bare minimum to fund indigent defense services. Especially in hard economic times, legislators and indigent defense systems administrators are tempted to deal with rising caseloads and budget shortfalls by raising indigency levels, thereby reducing the number of clients a program is required to serve. Such an approach is seriously flawed. First, in many states, indigency levels are already so unrealistically high that many of the working poor are deemed ineligible for an indigent defender even though they cannot possibly afford to pay for an adequate defense.[31] These poor clients are then forced either to represent themselves or to pay whatever they can raise to a lawyer who will do nothing more than facilitate a plea.[32]

Not only does this place the poor defendant, especially an innocent one, in an untenable position, it also imposes additional costs on the criminal justice system. Unrepresented defendants must appear at court to explain the efforts they have made to secure counsel, and the matter is generally adjourned until another day. Repeated adjournments often lead to missed court

29. *See* Mosteller, *supra* note 6, at 940; *see also* Robert P. Mosteller, Remarks at the Missouri Law Review Symposium 2010 (Feb. 26, 2010), *available at* http://www.law.missouri.edu/faculty/symposium/symposium10/webcast.html.

30. *See* Missouri Law Review Symposium 2010 Presenters, http://www.law.missouri.edu/faculty/symposium/symposium10/presenters.html (last visited Aug. 26, 2010).

31. For a thorough look at the extent to which the Supreme Court's failure to establish a meaningful indigency standard has undermined the promise of *Gideon*, see Adam M. Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571, 590-91 (2005). *See also* Uphoff, *supra* note 7, at 748-52.

32. For a compelling look at the difficulties confronting the working poor, see *United States v. McVay*, 32 Fed. Appx. 661 (4th Cir. 2002), a case discussed in detail in Adam Gershowitz's article, *supra* note 31.

appearances, bench warrants, and, ultimately, to hasty guilty pleas regardless of the defendant's guilt or innocence.

In addition, in some jurisdictions, time consuming battles ensue between defendants and defender program lawyers regarding eligibility for indigent defense services, as public defenders enforce unduly strict eligibility standards in an effort to control their caseloads. In doing so, the indigent defenders may well be blocking needy clients from their only access to competent representation. Although it is wholly appropriate for indigent defender administrators to establish workable rules to ensure defense services are only provided to defendants who are truly unable to pay for counsel, it is particularly troubling for indigent defenders to be advocating positions or adopting policies that deprive defendants who clearly are without adequate resources to fund their own defense from access to competent counsel.

In a similar vein, several jurisdictions have statutes or policies creating a presumption that a defendant who posted bail, *any* amount of bail, is ineligible for indigent defense services.[33] Yet a defendant's ability to muster a small amount for bail actually tells us nothing about that defendant's wherewithal to retain counsel. In fact, bail is often posted by a family member or friend who may not have any funds or may be unwilling to loan the defendant money to retain a lawyer. Such presumptions often make it extremely difficult to gain access to an indigent defender and unfairly force people who are presumed innocent to choose between their pretrial freedom and access to counsel.

Several Symposium speakers cautioned indigent defense administrators and legislators not to try to solve the indigent defense crisis at the expense of the working poor. Rather, legislators ought to consider other measures that will reduce indigent defender caseloads and generate substantial savings. One obvious solution is to consider reducing more misdemeanors to infractions or civil forfeitures, offenses for which the penalty is only a fine and not jail time.[34] Our tendency to overcriminalize bad behavior directly affects the number of criminal cases the indigent defense system is required to handle. Removing the threat of jail for more minor offenses is unlikely to significantly affect the way people behave. It will, however, markedly decrease the number of cases indigent defenders are required to handle.

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33. *See, e.g.*, OKLA. STAT. tit. 22, § 1355A (2003). In Missouri, as of 2005, the Public Defender Commission had created a presumption that anyone released on bail of $5,000 or more was ineligible for a public defender. *See* THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, 20 (2005), *available at* http://members.mobar.org/pdfs/legislation/span-genberg.pdf.

34. There is a Sixth Amendment right to counsel in every state misdemeanor proceeding in which actual imprisonment is imposed. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). However, there is no such constitutional mandate if the sentence imposed is only a fine. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

Second, mandatory minimum sentences, three strike laws, and truth in sentencing legislation have led to an explosion in state prison populations.[35] Legislators ought to re-examine such sentencing provisions and instead enact measures that will minimize putting non-violent offenders in prison and allow for the release of inmates who no longer pose a serious threat to the community.[36] States must explore ways to check spiraling corrections budgets and utilize some of the savings to provide adequate funding to indigent defense programs.

Finally, those states with the death penalty should abolish it. There is no empirical evidence that citizens in those states using the death penalty are safer and more secure than those who live in states without the death penalty. Those states with the death penalty, however, use a disproportionally high percentage of their criminal justice budget litigating death penalty cases.[37] Eliminating the enormous costs involved in litigating the issue of death, including special public defender units handling such cases, will save millions of dollars in court time, expert witness costs, and lawyers' time. Those savings could go far, not only in shoring up defender budgets, but also in improving the overall functioning of the criminal justice system.

Neither individual public defenders nor program administrators are well positioned to achieve meaningful systemic reform acting alone. Several Symposium speakers addressed the difficult dilemma facing the individual defender who is often pulled in different directions by clients, supervisors, judges, and his or her own ethical compass as the defender attempts to cope with a huge caseload. Simply declining to accept additional cases may be ethically required,[38] but individual lawyers taking such action may well, in practice, risk termination. Nor are defender administrators who threaten to take action to protect their lawyers and clients by systematically refusing to handle more cases likely to be warmly embraced by beleaguered legislators who themselves are struggling to allocate scarce resources to needy stakeholders who are also clamoring for their fair share. Unquestionably, indigent

35. *See* Jackie Rothenberg, *For State Prisons, West Isn't Best*, A.B.A. J., Dec. 2009, 15-16, *available at* http://www.abajournal.com/magazine/article/for_state_prisons_west_isnt_best/; *see also* Erwin Chemerinsky, *The Essential But Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 308-311 (2008); Marie Gottschalk, *Dismantling the Carceral State:The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006).

36. For a brief discussion of similar successful measures taken to reduce incarceration rates in New York, see Rothenberg, *supra* note 35, at 15-16.

37. *See, e.g.*, Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 890-93 (2007); *see also* Emanuella Grinberg, *Budget Concerns Force States to Reconsider the Death Penalty*, CNN.COM, Mar. 2, 2009, http://www.cnn.com/2009/CRIME/03/02/economy.death.penalty/index.html; Ed Barnes, *Just or Not, Cost of Death Penalty is a Killer for State Budgets*, FOXNEWS.COM, Mar. 27, 2010, http://www.foxnews.com/us/2010/03/27/just-cost-death-penalty-killer-state-budgets/.

38. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

defenders must secure allies in the private bar and use the media effectively if they are to have any hope for a fair piece of the declining state budget pie. In her presentation, Cat Kelly, deputy public defender for the Missouri Public Defender System, described that program's extensive efforts to rally support for their embattled program.[39]

In the past, some defender programs have attempted to secure adequate funding through litigation. Stephen Hanlon, among other speakers, spoke at length of the merits of this approach.[40] Unquestionably in some instances, litigation has resulted in some underfunded jurisdictions obtaining additional funding.[41] Too often, however, the funding obtained has provided only a temporary fix.[42]

The Symposium speakers debated the likely impact of the recent Supreme Court of Missouri decision, *State ex. rel. Missouri Public Defender Commission v. Pratte*,[43] in which the court addressed the Public Defender Commission's efforts to control the MSPD caseload crisis. Although Stephen Hanlon argued that the court's decision signaled an important victory for the MSPD, others were far more skeptical and felt the court ducked the ultimate issue.[44] In my view, the court's proposed solutions – that the local judge, prosecutor, and defender mediate the caseload crunch by either having the prosecutor agree not to seek incarceration for certain cases, by appointing private lawyers to handle the excess cases, or by the judge simply opting to not appoint counsel in certain cases, which will result in those cases not being able to be tried or disposed of by a guilty plea[45] – will prove unworkable.

The court's call in *Pratte* for "cooperative decision making,"[46] albeit theoretically intriguing, will largely fall on unreceptive ears. Adversarial battle scars and practical realities of the criminal justice system make it unlikely that the actors in most jurisdictions will be able to craft cooperative solutions. For example, the court says it is "reluctant" to order the state to pay if judges appoint private lawyers to take cases after the public defender caseload in a county exceeds the maximum caseload set by the Public De-

39. *See* Cat Kelly, Deputy Dir., Mo. State Pub. Defender Sys., Remarks at the Missouri Law Review Symposium 2010 (Feb. 26, 2010), *available at* http://law.missouri.edu/faculty/symposium/symposium10/webcast.html.

40. For a look at the use of litigation to force state legislatures to disgorge funding, see Hanlon, *supra* note 12, at 757.

41. *See, e.g.*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731-41 (2005) (discussing indigent defense litigation in Arizona and Oklahoma).

42. *Id.* at 1738; *see also* Lefstein, *supra* note 14, at 801.

43. 298 S.W.3d 870 (Mo. 2009) (en banc).

44. Hanlon, *supra* note 12, at 766.

45. *Pratte*, 298 S.W.3d at 887-89.

46. *Id.* at 890.

fender Commission.[47] Nonetheless, the court also declines to take a stance on the "troubling question" of whether a private lawyer can be required to work without pay.[48] Undoubtedly, if this solution is pursued, the court will soon face the question. Given some of the concerns expressed in *Pratte* regarding the uneven distribution of the assignment of counsel and the principles of taking,[49] it seems unlikely that the Supreme Court of Missouri ultimately will attempt to resolve the funding crisis at the expense of a small number of private lawyers. It is also hard to imagine, until the issue is resolved, most trial judges asking lawyers in the local bar to accept such appointments knowing that the lawyer faces the uncertain prospect of ever being paid. If judges do saddle unwilling lawyers with such cases, however, it is not difficult to imagine the quality of representation that is likely to be provided by these unpaid, conscripted lawyers, very few of whom will have access to an investigator or expert.

Perhaps in a limited number of cases, the local prosecutor will agree to back off and not ask for incarceration when he or she initially felt incarceration was warranted. Presumably, however, since the prosecutor generally will have already exercised her discretion prior to charging, she will be reluctant to give a group of defendants a sentencing concession that she initially felt was undeserved. Nonetheless, prosecutors in Missouri counties where public defender offices have excessive caseloads – perhaps as a result of more turnover in that office – will be pressured to treat a group of similarly situated defendants quite differently from fellow prosecutors in adjoining counties. Admittedly, prosecutorial discretion already allows for disparate treatment of similarly situated defendants from county to county or even within a county. My point, however, is that this pressure and potential restriction on prosecutorial discretion as a solution to the caseload crisis is unlikely to be favorably received by most prosecutors, thereby adversely affecting its widespread use.

Moreover, these excess cases are ones in which counsel has not yet been appointed. The prosecutor may well not have a full appreciation for all of the mitigating – or even aggravating – factors in the case since it has just been

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47. *Id.* at 888. In a footnote, however, the court does indicate that in an individual state case or in federal court, the state may be ordered to spend money "to avoid or remediate constitutional violations." *Id.* at 889 n.40.

48. *Id.* at 888.

49. For discussion of the taking issue in the context of criminal defense representation, see *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987):

> [R]equiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of the attorney's labor is a 'taking' under the provisions of Alaska Constitution article I, section 18.

See also State v. Lynch, 796 P.2d 1150, 1163 (Ok. 1990).

filed. The prosecutor again is being asked to give this group of offenders a sentencing concession that some but not all of this group may deserve. On the other hand, those defendants initially passed over for this non-incarceration status will now get the benefit of counsel. They may well find, however, that their lawyers have a markedly more difficult time convincing the prosecutor to give them a plea bargain that results in no jail time. Understandably, the prosecutor may feel like he or she has already been compelled to give too many offenders a break so that defendants with lawyers end up with harsher treatment than they otherwise might have received.

The court's third suggested solution – that the judge simply not appoint counsel in certain cases – is potentially even more problematic. In essence, these cases would be put in limbo. Since these cases have been filed and bail set, the court presumably will not relegate any confined defendants to this status because that would create serious speedy trial issues. Although limbo status may serve the interests of some defendants, it may ultimately compromise the interests of others, especially the innocent, because no lawyer will be working on their behalf to do a timely investigation, preserve evidence, or find witnesses. Consequently, when these cases eventually are placed back on the active docket and counsel is provided, the defendant may be in a far worse position as a result of the caseload crisis.[50]

Additionally, this proposed solution works against the prosecution in the majority of cases in which delay may adversely affect a prosecutor's ability to successfully present the state's case. Although a speedy disposition benefits some criminal defendants, the prompt resolution of criminal matters almost always is in the best interest of victims and their families. In sum, a solution to the caseload crisis which operates to build in more delay to a system that already moves too slowly does more harm than good. The prompt administration of justice, an important goal that normally ought to be pursued, is not served by this solution.

The Supreme Court of Missouri's reluctance in *Pratte* to tackle head-on the funding problem because of separation of powers concerns is not surprising. Although state courts have the obligation to ensure constitutionally mandated services are provided, few judges want to command the legislative branch to make funds available to an indigent defense program. After all, state court judges look to the legislature for their own funding and most have to run for re-election. State court decisions that mandate funding for an unpopular activity such as indigent defense limit the ability of the legislature to decide how to allocate state monies. To legislators, such a decision improperly encroaches upon legislative power of the purse. Indeed, to most legislators and many in the public, judicial decisions that order scarce funds to defender programs at the expense of other legislative priorities smack of judicial activism at its worst.

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50. And, as stated above, this will mean similarly situated defendants receive much different treatment in some counties than in others.

Wayne Logan's article traces the separation of powers battle in Florida as the courts of that state have wrestled with the problem of adequate funding for indigent defense services.[51] At times in the past, the Florida courts have forcefully insisted that the Florida legislature provide adequate funding for such services.[52] More recently, however, the Florida legislature has taken action to try to limit the inherent power of the judicial branch to make rulings that require additional funding of indigent defense services.[53] As Logan concludes, the Florida courts cannot ignore attempts by the legislature to usurp the power of the judiciary to function as an independent, co-equal branch of government.[54] Courts must have the power to order the expenditures of public funds needed to operate a fair system of justice. Moreover, that system of justice cannot operate fairly without the funds to ensure that all defendants receive the effective assistance of counsel to which they are constitutionally entitled. In the end, the resolution of the funding crisis in Florida, Missouri, and around the country turns on the willingness of the judiciary to exercise its inherent power. I agree with Logan that it remains to be seen if state court judges possess the needed fortitude to use that power to secure adequate funding for the delivery of indigent defense services.

III. CONCLUSION

In the face of the decades-long struggle for adequate indigent defense funding in most states and the limited success litigation has wrought, no one at the Symposium identified an easy fix to the serious problems that plague most of our state indigent defense systems. Nonetheless, if state bars are willing to rally behind indigent defender administrators and lobby for adequate funding as in Missouri, the prospects for better funding increase. Additionally, bar leaders and lawyer legislators are in the best position to advocate for decriminalization and sentencing reform to free up additional funds for defender programs. Finally, albeit controversial, those same leaders also are well positioned to lead the debate on the merits of abolishing the death penalty, given its enormous costs.

If state legislatures refuse to take action to address the funding shortfalls for indigent defense programs, the judicial branch must act as the court did in New Mexico.[55] It is the court's constitutional obligation to take appropriate

51. *See* Wayne A. Logan, *Litigating the Ghost of* Gideon *in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 887-90 (2010).

52. *Id.* at 889.

53. *Id.* at 889-90.

54. *Id.* at 904-05.

55. In *State v. Stock*, the Court of Appeals of New Mexico agreed with the District Court that it was "'humanly impossible for lawyers to practice law under the conditions that we're asking them to practice law,'" referring to New Mexico's overburdened and underfunded public defender system. 147 P.3d 885, 888 (N.M. Ct.

action to protect the constitutional rights of the powerless in the face of the will of the majority.[56] Judges ought not shy away from exercising the power demanded of them under our constitutional framework. If courts fail to act, then, as Stephen Bright passionately declared, it may indeed be time to sandblast the words "equal justice for all" off of the United States Supreme Court building.[57]

App. 2006). The court dismissed the charges against the defendant, holding that his right to a speedy trial was violated when he awaited trial for more than three years, a wait the court attributed to the neglect of the state and overworked public defenders. *Id.*

56. THE FEDERALIST NO. 10 (James Madison).

57. Bright, *supra* note 5, at 711.