# Time is Money But Our Indigents Have Neither

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ARTICLE

# TIME IS MONEY—BUT OUR INDIGENTS HAVE NEITHER

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## I. Introduction

The status of indigent defense in this country now rests on the issue of insufficient time and money—both for the client and her counsel. An accused's lack of time and money may be material to their predicament, but it is her counsel's lack of these necessities that can prove far more fatal to the accused's case. From the criminal client's perspective, the lawyer's role is to charge a set fee, accept the client's money, zealously represent the client's interests, and (hopefully) return freedom: freedom from jail; freedom from liability; freedom from monies owed—which is why so many affluent accused will pay whatever it costs to receive a quality legal defense.[1] The issue regarding lack of resources was most profoundly characterized in *Strickland v. Washington*, a landmark Supreme Court case defining the right to counsel in an increasingly financially polarized American landscape:

> It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares

[1] Indeed, O.J. Simpson famously spent north of $3 Million for his defense. *See* V. Dion Haynes, *The $25 Million Question: What is Simpson Worth?*, CHICAGO TRIBUNE, Feb. 7, 1997,http://articles.chicagotribune .com/1997-02-07/news/9702070269_1_nicole-brown-simpson-los-angeles-civil-lawyer-legal-fees.

> thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. *Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?*[2]

When Justice Marshall first proposed this question in 1984, he wrote with remarkable foresight. Indeed, the state of indigent defense would come to revolve around the question of funding. This paper will attempt to answer Justice Marshall's question. I will also evaluate the legal system's wide array of responses through the Justice Department's most recent participation in *Hurrell-Harring v. New York*, and propose new solutions that could effect positive change.

## II. The Problem

The overall quality of indigent legal defense is affected both by private appointed attorneys and public defenders. Thus, the problem brought to light by Justice Marshall's question is best defined by the *difference* in the justice provided by attorneys with manageable caseloads, who are adequately paid for their work, and those attorneys who are overloaded for their given salary (or those private defense attorneys who work on an appointment basis). In essence, the schism is rooted in simple human self-interest: how does one remain zealously passionate when rewards seem small, or may not materialize at all? For those

[2] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) (emphasis added).

hanging a shingle, passion alone cannot pay the electric bill and keep the lights on. Moreover, the right to counsel depends upon effective assistance being, at the very least, *possible* on the part of the attorney. But lack of funding nationwide has caused numerous public defense programs to provide the accused with lawyers "in name only."[3]

Lack of both time and money on the part of indigent defenders translates to insufficient and inadequate representation in myriad ways. Attorneys who lack sufficient time to investigate, interview, and simply communicate with clients cannot fulfill the most essential requirements of representation. Taken alone, insufficient funding for public defenders—or poor reimbursement for appointed attorneys—also affects many critical stages of a client's case. For example, public defender offices need significant cash flow to investigate their clients' cases, interview witnesses, hire experts (e.g. hematologists, fingerprint experts, ballistics experts), or even set up psychological evaluations required for establishing insanity defenses or combating *mens rea* allegations.

This growing funding problem was evident well before *Strickland* was handed down. In fact, following the landmark case *Gideon v. Wainwright* in 1963,[4] New York founded its Office of Indigent Legal Services in 1965.[5] Like many other states,[6] control over the public defense

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[3] Brief for Respondents at 9, Hurrell-Harring v. New York, No. 03–3674 (N.Y. App. Div. 2009) (citing the need for "standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training").

[4] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] *Counsel at First Appearance*, NYS Office of Indigent Legal Services, https://www.ils.ny.gov/content/
counsel-first-appearance (last visited April 29, 2016).

[6] *See County-Based and Local Public Defender Offices, 2007*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES 2007, (2010) [hereinafter DOJ REPORT], http://www.bjs.gov/content/pub/pdf/clpdo07.pdf (noting that

system was ceded to New York's counties, rather than giving responsibility to the state government itself.[7] This setup was intended to provide more efficient appointment services to local indigents. But the counties were ill-equipped to handle the growing number of indigents facing complex legal issues who could not afford a local attorney. Here in Tennessee, the first public defender office was set up in Nashville in 1962,[8] and another in Knoxville soon after the constitutional mandate was passed down in *Gideon.*[9] But the problem facing public defenders in Tennessee, New York, and across the country is that they are so overloaded with cases that their everyday functioning borders on ineffective assistance of counsel.

Furthermore, when private appointed attorneys become *over*-appointed, their acceptance of a new case is tantamount to professional ethics violations.[10] The ABA Model Rules make it clear that attorneys must provide clients with a baseline amount of communication as well as providing them with information necessary to the variety of client-controlled decisions.[11] Attorneys who accept too many appointments often commit per se ethical violations,

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twenty-seven states operate county-based systems, with the twenty-two remaining states using state-wide oversight).

[7] *Counsel at First Appearance*, NYS Office of Indigent Legal Services, https://www.ils.ny.gov/content/
counsel-first-appearance (last visited April 29, 2016).

[8] *See A Short History of the Public Defender*, NASHVILLE DEFENDERS, http://publicdefender.nashville.
gov/about-us/a-short-history-of-the-public-defender/ (last visited March 29, 2016).

[9] *Becoming the CLO*, CLO, https://www.pdknox.org/who-we-are/becoming-the-clo/ (last visited Nov. 11, 2014).

[10] At the very least, their duties of competence, caseload management, and zealous representation are affected by receiving too many appointments. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 cmt. [2], Preamble cmt. [2] (AM. BAR ASS'N 2013).

[11] MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2013); *see also id.* at r. 1.2 cmt. [1].

with some admitting they often do not know or recognize their clients' names; indeed, some appointed attorneys fail to speak to clients before their first day in court.[12]

The situation is equally disastrous for public defender offices. To illustrate the reality of the problem, consider the following data recently reported for public defenders and legal aid organizations in New York: in one populous New York county, attorneys regularly carried caseloads of five hundred to six hundred cases.[13] If one attempts to break down this caseload into hours worked on each client's behalf, it amounts to an average of four hours per case, with only one hour of investigation and interviewing.[14] As many practicing attorneys will admit, a proper initial client interview will last *at least* an hour, and drafting motions and pleadings (not to mention correspondence with counsel and client) can take months of work. Worse still, ethical guidelines are intended as a floor, not a ceiling, on proper conduct;[15] attorneys who cannot meet the floor are violating their professional duties on a daily basis. Thus, New York public defenders do not spend nearly enough time with their clients to properly or ethically represent the client's interests.

In Tennessee, the problem is far worse. Public defenders in cities here have reported handling over 10,000 misdemeanors per attorney every year, spending only an

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[12] *See* David Knowles, *Worst Lawyer Ever? Texas Attorney Slept through Client's Trial, Forgot His Name, and Failed to Enter a Plea Bargain*, N.Y. DAILY NEWS, at 1 (Sept. 17, 2013, 9:41 PM), http://www.nydaily news.com/news/national/worst-lawyer-defense-attorney-sleeps-trial-article-1.1459210.

[13] James C. McKinley, Jr., *In New York, Cuomo Pledges More Aid for Lawyers of the Indigent*, N.Y. TIMES, at 2 (Oct. 21, 2014), http://nyti.ms/1FzjyzZ.

[14] *Id.* at 3.

[15] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2013).

hour on each client.[16] My own experience in Tennessee is that, even in a simple civil matter, client interviews often last at least an hour; engagement correspondence and document drafting take longer. Put simply, no reasonable client, if given the option, would permit her attorney to spend so few hours on her case. But these clients do not have an option, largely because they cannot shop around in the market; they cannot request an attorney who is not overworked.

Indeed, national standards exist to define best practices for public defenders to properly manage caseloads. The American Bar Association recommends defenders handling only one hundred and fifty felony cases or four hundred misdemeanor cases per attorney, per year.[17] But nearly seventy-five percent of county-based public defender offices exceeded the maximum number of recommended cases per attorney, per year.[18] These attorneys' time is not the only issue; they must bear excessive caseloads while suffering from low pay. The 2007 Department of Justice census statistics report that the median salary for these entry-level assistant public defenders is around $43,000 nationwide.[19] Even after six years of experience, salaries peaked between $54,000 and $68,000.[20] Thus, it is no surprise that Justice Marshall's dissent in *Strickland* remains true thirty years later.[21]

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[16] *See* Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, ACS [hereinafter BENNER], https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf (citing DOJ REPORT, *supra* note 6, at 1).

[17] DOJ REPORT, *supra* note 6, at 10.

[18] *Id.* at 1.

[19] *Id.* at 13.

[20] *Id.* at 13.

[21] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

## III. New Efforts for Reform

### A. *The Case of Hurrell-Harring: New York's Indigents Fight Back*

The problem has most recently come to the fore in *Hurrell-Harring v. New York*, a class action suit in New York challenging the indigent defense status quo.[22] The *Hurrell-Harring* case was brought as a challenge to New York's county-based system, hoping to force the state to address concerns that its public defenders were so overworked and underpaid that their clients ultimately "receive no legal defense at all."[23] The case hopes to resolve an issue that mirrors Justice Marshall's original question in *Strickland*: that inadequate resources result in constructive ineffective assistance of counsel.[24] In the same opinion, Justice Marshall explained the practical effect of the issue he was attempting to frame, stating that the right to effective assistance of counsel

> "is violated not whenever there is a flaw or "deficiency" in the quality of the legal representation provided indigent criminal defendants, but when that representation, taken as a whole, is *so inadequate* as to "undermine[ ] the proper functioning of the adversarial process [so] that the trial cannot be relied on as having produced a just result."[25]

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[22] Hurrell-Harring v. New York, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009).
[23] Matt Apuzzo, *Holder Backs Suit in New York Faulting Legal Service for Poor*, N.Y. TIMES, at 1 (Sept. 25, 2014), http://nyti.ms/1uqCzRD.
[24] *See* Brief for Respondents, *supra* note 3, at 17.
[25] *Hurrell-Harring*, 883 N.Y.S.2d at 351–52 (citing *Strickland*, 466 U.S. at 686) (emphasis added).

The *Hurrell-Harring* case, in essence, argues that this description befits the current state of indigent defense in New York.[26] Because of its deep systemic criticism, the case has the flavor of a national movement, drawing support from leading legal power players as it began to receive national attention. Indeed, the suit, which was filed by the New York Civil Liberties Union, has drawn support from the Department of Justice and then-Attorney General Eric Holder,[27] and projects to be a model for challenging similar understaffed and poorly run indigent defense organizations.

The case, which was originally filed in 2007, came on the heels of a 2006 report by a New York commission appointed by the state's Chief Judge Judith Kaye that found that the "chronically understaffed" public defender offices amounted to severe constitutional violations. [28] The plaintiffs in *Hurrell-Harring* argued for New York to take back control over the county-run public defense system, invigorating it with sufficient resources to guarantee adequate representation. When the case was filed, indigent plaintiffs described a system in which they were left to "navigate courts nearly alone, relying on spotty advice from lawyers who do not have the time or money to investigate their cases or advise them properly."[29]

As the case has progressed, significant players in today's legal sector have weighed in on *Hurrell-Harring* and come to the indigents' aid. For example, after blame fell at the feet of New York Governor Andrew M. Cuomo for the state's ineptitude, even then-Attorney General Eric Holder joined in the fight.[30] Mr. Holder made public

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[26] *See id.*
[27] *See* Apuzzo, *supra* note 23, at 1–2.
[28] *See* McKinley, *supra* note 13, at 3.
[29] *See* Apuzzo, *supra* note 23, at 1.
[30] *See id.* In the past, Mr. Holder has pushed for reducing harsh sentences, and eliminating mandatory minimum sentences for

statements similar to his support of public-defense reform in Washington State in 2013, demanding that New York address the massive caseloads burdening its public defenders.[31] In his public statement, Mr. Holder implored New York to "truly guarantee adequate representation for low-income defendants [by] ensur[ing] that public defenders' caseloads allow them to do an effective job."[32]

Specifically, Mr. Holder urged the Justice Department to file an interest statement (similar to an amicus brief) in support of the plaintiffs in the *Hurrell-Harring* case.[33] The Justice Department's motion urged New York to address the grievous inequities in its indigent defense system, citing limited funds and excessive caseloads that reduced the counties' attorneys to representation "in name only."[34] The Justice Department also urged New York State Supreme Court Justice Gerald W. Connolly, who heads review of the case, to evaluate the *entire system* of indigent defense, not just the plaintiffs' individual cases.[35] Luckily, nationwide publicity and calls for aid from these high-level officials yielded a settlement with Governor Cuomo and New York.

### B. *The Hurrell-Harring Settlement as Model*

The settlement, reached on October 21, 2014, committed New York State to provide "bigger and better" public defense offices, infusing them with millions of

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nonviolent drug crimes, both of which help return a sense of justice back to America's criminal justice system. *Id.* at 2.

[31] *See id.* at 2.

[32] *See id.*

[33] *See id.*

[34] *See* McKinley, *supra* note 13, at 2.

[35] *See* Apuzzo, *supra* note 23, at 3; *see also* Brief for Respondents, *supra* note 3.

dollars over the next several years.[36] It mandates changes in Long Island and four other upstate counties, with the state agreeing to pay for more defense attorneys, investigators, and experts to assist in the defense of indigent clients. Most importantly, the state agreed to establish new caseload standards for its overworked attorneys: it will define an appropriate level, and then pay whatever expenses arise in meeting that level (which will likely require adding jobs to reduce the workload of its present attorneys).[37] Overall, the settlement creates lock-step improvements that will combine with infusions of cash to aid indigents for at least the next seven years.[38]

While Governor Cuomo stated that the settlement addresses problems his office "inherited" from past administrations, he took a great step forward by making numerous large-scale, specific promises to address the problem in his state.[39] These specific strategies have been hailed as potentially serving as a "model" for other New York counties to address their own broken criminal defense systems.[40] If applied elsewhere, states would need to take responsibility for funding public defender offices and establish (and meet) caseload minimums for attorneys. Because of the shift in funding from county to state, it seems likely that state legislators would need to brace their constituents for new or rising taxes and, perhaps, prepare for an appropriations battle. In that sense, New York has

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[36] *See* McKinley, *supra* note 13, at 3 (stating that the settlement terms will last approximately seven years).
[37] *See* Stipulation and Order of Settlement, *infra* note 44, at 7.
[38] *See* McKinley, *supra* note 13, at 3.
[39] *See* Statement, N.Y. GOV, Andrew M. Cuomo, Statement from Governor Andrew M. Cuomo on Settlement Regarding Indigent Legal Services, (Oct. 21, 2014), https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-settlement-regarding-indigent-legal-services(last visited Oct. 29, 2014).
[40] *See* McKinley, *supra* note 13, at 1.

been bold to take on the indigent defense funding responsibilities under the *Hurrell-Harring* settlement.

However bold, the settlement model does not seem to add anything new to the spectrum of available options already in use across the country. In fact, recent statistics show that twenty-two states already utilize a statewide public defender oversight system.[41] As noted previously, the *Hurrell-Harring* settlement also promises to set caseload standards, with New York agreeing to pay the cost of reducing attorney workloads to the appropriate level.[42] But the ABA and various federal judicial commissions already have long-established "best practice" caseload guidelines in place.[43] While it is clear that New York – and other states for that matter – have not abided by these past guidelines, agreeing to abide by "new" standards seems much more like puffery than actual progress. Anyone with even a slight pessimistic lean can review the *Hurrell-Harring* settlement agreement and find nothing novel about it. In essence, it is a relatively simple settlement that merely forces the New York state government to set standards and pay for the necessary changes. But the settlement agreement is hardly expansive; it merely covers the costs of bringing *five* of New York's *sixty-two* counties to a constitutional level of adequate representation.[44] Thus, the settlement's ability to serve as a model for other states is limited by New York's own willingness to serve only a fraction of its people. The state's promises under the settlement terms are closer to a mere gesture; in order to finally cover the costs of providing justice to *all* of the state's indigents, New York must do much more. Thus, the

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[41] *See* DOJ REPORT, *supra* note 6, at 1.
[42] *Id.*
[43] BENNER, *supra* note 16, at 1, 5.
[44] *See generally* Stipulation and Order of Settlement at 1, *Hurrell-Harring v. New York*, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009) (No. 8866–07) (noting that only five counties are party to the agreement).

settlement might best serve as a model for other New York counties, but its limited terms fail to be sufficiently groundbreaking to gain the attention of other state administrations.

### C. *Can County-Run Systems Work? Tennessee as Model.*

The theory behind the *Hurrell-Harring* settlement is that county-run programs are no longer sufficient to provide adequate legal representation to indigents. Well before the settlement announcement, Jonathan E. Gradess, the executive director of the New York State Defenders Association, stated that he no longer believed a county-based defense system could be effective.[45] Indeed, Mr. Gradess now dismisses them as "primitive."[46] Is it proper to turn away from those systems? Indeed, there are currently twenty-seven states operating under a predominantly county-based system.[47] Official statistics show that, on average, three-quarters of these county-run systems operate with caseloads that exceed recommended maximums.[48] But if attorney attrition is any indication of an office's health, these offices reportedly have attorney attrition rates of less than one percent.[49] Perhaps these low attrition rates connote job satisfaction, which itself may imply that representation is adequate.[50]

While a state-by-state analysis of constituent county-run systems is far beyond the narrow scope of this

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[45] *See* Apuzzo, *supra* note 23, at 4.
[46] *See id.*
[47] *See* DOJ REPORT *supra* note 6, at 1 (defining county-based systems as those "principally funded" by the county or through combination of county and state funds).
[48] *See id.* (using data from 2007).
[49] *See id.* (using data from 2007).
[50] Of course, low attorney attrition rates may show nothing more than a depressed legal market.

paper, let us consider, for example, Tennessee's unique county-based system. Since its full establishment in the late 1980s, the state's public defender system has operated on a district-by-district basis.[51] But prior to 1987, private counsel took indigent appointments, except in Shelby (whose public defender office was founded in 1917) and Davidson (whose office was founded in 1961) Counties.[52] Today, Tennessee is one of only two states[53] that has *elected* public defenders in each of its thirty-one judicial districts.[54]

Tennessee's county-based system is unique because the state has set up several helpful institutions to assist its indigent defenders. For example, the District Public Defenders Conference (Conference) provides oversight by monitoring and providing funds for these separate public defender offices.[55] The Conference's primary role is to make policy decisions on a statewide basis. The state has also aided its public defender offices by setting up the Office of the Post-Conviction Defender (OPCD) and Post-Conviction Defender Commission in 1995.[56] These institutions assist the public defenders by assisting with investigations related to capital convictions, even providing training for capital defense attorneys.[57] Because a nine-

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[51] TENN. ADMIN. OFFICE OF THE COURTS TENNESSEE'S INDIGENT DEFENSE FUND: A REPORT TO THE 107TH TENNESSEE GENERAL ASSEMBLY 8–9 (2011) [hereinafter AOC REPORT], http://www.tsc.state.tn.us/sites/default/files/docs/aoc_indigent_defense_fund_report.pdf.

[52] *Id.* at 8.

[53] The other state is Florida. *See* STEPHEN D. OWENS ET AL., U.S. CENSUS BUREAU, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012-UPDATED 25 (2015) [hereinafter CENSUS REPORT], http:// www.bjs. gov/content/pub/pdf/idsus0812.pdf.

[54] *See* AOC REPORT, *supra* note 51, at 8.

[55] CENSUS REPORT, *supra* note 53, at 25; *see* Tenn. Code Ann. § 8–14–202 (2016).

[56] *Id.*

[57] CENSUS REPORT, *supra* note 53, at 25.

member, governor-appointed Oversight Commission regulates the budgetary processes for indigent defense in Tennessee, some of the state's most populous counties receive additional funding from state resources.[58] On the whole, only thirteen states spend more than Tennessee on indigent defense services.[59] Thus, Tennessee operates what appears to be a hybrid county-based system with statewide policy regulation and assisted funding. But does it work for Tennessee's public defenders, and most importantly, for the state's indigent defendants?

### D. *Evaluating Tennessee's Hybrid Model*

The Tennessee Administrative Office of the Courts (AOC) issued a detailed report in 2011 to inform the Tennessee General Assembly of the current status of the state's indigent defense program.[60] Speaking to the efficacy of the state's program, the AOC Report stated that despite inadequate staffing, the statewide public defender system was "very cost-efficient."[61] The AOC Report also stated that Tennessee's appointment of private attorneys in cases of public defender conflicts (or in moments of high caseloads) is a "reasonable way to complete" its constitutional obligation to the state's indigents.[62] Notably, the Report shied away from recommending a "shadow"[63] public defender system – essentially an alternate, second office that steps in when conflicts arise – because of the

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[58] *Id.* Shelby and Davidson counties receive both local and state funding. *Id.*
[59] *See id.* at 31–32.
[60] AOC REPORT, *supra* note 51, at 2–4.
[61] *Id.* at 16.
[62] *Id.* at 16.
[63] These offices are also sometimes referred to as Alternate Public Defenders or Offices of Conflict Counsel, depending on the locality. *See id.*

high cost.[64] It also refused to recommend a contract-based system due to national concerns over private attorneys being disincentivized from providing timely and adequate representation.[65] Indeed, the AOC reported that Tennessee's current district-focused system is "likely the best system of its kind" for its current purposes.[66]

Laudably, the AOC attempted to provide its own list of modifications in its report that might improve on this "best system."[67] The AOC recommended two modifications to improve Tennessee's indigent defense system: (1) shifting potential savings from correcting the private-public attorney imbalance[68] to increase the Rule 13 hourly rate for appointed attorneys; and (2) decriminalizing some minor offenses in order to reduce the total number of incarcerations.[69] First, the AOC used numbers prepared by the American Bar Association to provide a per capita analysis for indigent defense costs.[70] They reported that Tennessee does not overspend on indigent defense; its per capita cost ranked in the middle of states.[71] Though Tennessee's per capita costs have risen from $9.01 in 2006 to $11.81 in 2009, the AOC found that the state has continued its middle-of-the-road trend.[72] Ultimately, the AOC recommended that any additional funding should be channeled into providing better hourly rates for private

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See id.* at 26.
[68] The AOC reports that, in many areas, too many private attorneys are appointed—perhaps out of convenience—for cases that are better suited for the local public defender office. *Id.* at 26. The Report suggests that savings will arise from returning each type of counsel to its proper role, and any such savings should be allocated to increasing the hourly rate for *properly* appointed private attorneys. *Id.*
[69] *Id.* at 19, 23–24.
[70] *Id.* at 16–19.
[71] *Id.*
[72] *Id.* at 18.

attorneys working appointed cases; its polled participants unanimously agreed that the hourly rates for Rule 13 work were too low.[73] Secondly, the AOC Report noted that numerous polled participants indicated their desire to see the number of jailable offenses reduced.[74] Likewise, some data indicated a drive toward decriminalizing some minor offenses.[75] Though the AOC noted that this modification would not be "popular" with legislators, it recommended a committee address the issue to determine which offenses might be best suited for fines, and not jail time.[76]

I feel that the AOC Report's analysis does well to recommend decriminalizing minor offenses, but misses the mark on its complacent approach to per capita spending. The Report fails to properly account for the burdens placed on understaffed defender offices and economically depressed private appointment-seeking attorneys. Indeed, the AOC Report fails to communicate any regard for potential collateral benefits of increased hiring: adding jobs may help spur an economy by putting money into the hands of the under- or unemployed.[77] It dismisses the concept of alternate or "shadow" public defender offices merely because the setup costs would be "prohibitive"[78]—thus, the AOC easily overlooks an investment in its indigent defense system that could yield economic dividends well into the future. For example, setting up a shadow office would

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[73] *Id.* at 19. The AOC, writing aspirationally, stated that any savings gleaned from re-balancing the public-private indigent defense numbers should be applied to increasing the Rule 13 hourly rates. Currently, appointed attorneys receive hourly rates of $40 for out-of-court work and only $50 for in-court work. *Id.*; *see also* TENN. S. CT. R. 13 (2)(c)(1) ("The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars ($40) per hour . . . .").

[74] AOC REPORT, *supra* note 51, at 23.

[75] *Id.*

[76] *Id.* at 23–24.

[77] *See generally* AOC Report, *supra* note 51.

[78] *Id.* at 16.

mean adding a handful of attorneys who would add to the tax base and provide for more manageable caseloads, resulting in better indigent representation.

Of course, setting up an alternate public defender office would require adding several jobs in each county, but imputed conflicts rules necessitate these separate offices.[79] The benefit of adding numerous offices is that more local economies could be affected by job growth and the resulting increase in consumer spending. In reality, Tennessee's larger counties should be able to find room in their budgets for these new offices: indeed, cities ranging in size from Los Angeles to Albany have effectively funded these alternate public defender offices for decades.[80] Therefore, the AOC's myopic evaluation is consistent with conservative disregard for beneficial economic growth via additional hiring. Lobbying for the funds to add jobs – attorneys, investigators, and paralegals alike – in the public defender offices seems the quickest way to alleviate caseload concerns. Meanwhile, setting up a dual system with a shadow public defender office avoids the added costs of private appointments that arise when the public defender is conflicted out.[81]

Furthermore, although I agree that raising the Rule 13 hourly rate might drive more attorneys into the market for appointments, the feedback I have received "on the

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[79] *Id.* at 11.

[80] *Compare* LOS ANGELES COUNTRY, http://apd.lacounty.gov/FAQs.htm (last visited Apr. 7, 2016) (showing data from Los Angeles, California), *with* ALBANY COUNTY, http://access.albanycounty.com/countybudget/2014/executive/_pdf/2014p-alternatepublicdefender.pdf (last visited Apr. 7, 2016) (showing data from Albany, New York).

[81] The AOC reported that allowing public defenders, rather than private appointed attorneys, to handle more cases can and should result in savings to the state's indigent defense fund. *See supra* note 68 and accompanying text.

ground" indicates that other, more nuanced symptoms currently plague the indigent defense economy. In speaking with young attorneys in the Knoxville area, who seek court appointments, many felt distraught at the level of competition for the very same jobs that the AOC thinks require *more* incentives to prove worthwhile.[82] By anecdote, I have heard numerous attorneys beaten out at the courthouse by eager, but perhaps underachieving, young lawyers who seek to pile up appointments at a low cost. Of course, all attorneys need to pay their bills and keep the lights on. But all too often reports surface revealing that appointments have been used as a vehicle for over-billing in a wholesale approach to earning a decent lawyer's salary.[83] The AOC Report hopes only to increase the Rule 13 hourly rates,[84] but due to these current symptoms, that would merely provide a windfall to the attorneys already hoarding or battling for appointments. Admittedly, this unfortunate symptom is difficult for the AOC to recognize through data, as it is made up entirely of attorney competition and financial pressures within certain local bars. But one simple way to counteract negative effects of raising the Rule 13 rate is for courts to tighten their tracking of appointment numbers.[85] Some courts ignore situations when an appointment-saturated attorney requests *even more* appointments; indeed, well-publicized data[86]

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[82] *See* AOC REPORT, *supra* note 51, at 19 (increasing the rates "will encourage greater participation by lawyers who are currently unwilling to take appointments").

[83] *See infra* note 89 and accompanying article (discussing Harris Co., Texas attorneys taking excessive appointment caseloads to make millions).

[84] AOC REPORT, *supra* note 51, at 26.

[85] Of course, a full explication of proposals to counteract this problem would provide enough material to fill several additional essays. Thus, here I will only provide a small bite of the apple.

[86] A common example of courts condoning excessive appointment numbers is the situation in Harris County, Texas. *See* Robb Fickman, *We Must Change Harris County's Shameful Appointment System Now,*

exists to show the level of over-appointment that courts condone.[87] If courts refuse to consistently compile data on an appointment-per-attorney basis, then a rising Rule 13 rate would inevitably result in appointment hoarding and exacerbate inadequate indigent representation.

Consequently, the AOC appears to have misunderstood the present issue: indigents are not suffering from a lack of attorneys taking appointments; rather, they suffer from *poor performance* from those attorneys hoarding appointments (one need only Google the name "Jerome Godinich" to plainly see the abuse present in our nation's appointment system).[88] Without better appointment tracking, higher Rule 13 rates would only serve to channel more money into the hands of those already accepting appointments, not drive better lawyers into the field in an attempt to re-take those responsibilities.

## IV. Proposing New Solutions

The AOC Report provides quality data analysis and decent recommendations for the future of indigent defense

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http://blog.fickmanlaw.com/2013/01/we-must-change-harris-countys-shameful-appointment-system-now/ (last visited Apr. 7, 2016); *see also* TEXAS INDIGENT DEFENSE COMMISSION, *infra* note 88 (displaying table of appointment numbers).

[87] Fickman, *supra* note 86, at 1. For the data table, *see* TEXAS INDIGENT DEFENSE COMMISSION, *Harris County Appointment Caseloads 2011*, GOOGLE DOCS, https://docs.google.com/file/d/0By1E7S WXMpKnRUVydEw3Um1zUW8/edit (last visited Apr. 7, 2016).

[88] Consider, for example, that Mr. Godinich, a Houston, Texas attorney, has been appointed cases to the tune of $250,000 per year, all while gaining national attention for his missed habeas corpus deadlines, among other infractions. *See* KHOU.COM, *Experts: Harris Co. Taking Risks with Lawyer Appointment System*, http://www.khou.com/story/news/local/2014/07/11/11209168/ (last visited Nov. 8, 2014); *see also* TEXAS INDIGENT DEFENSE COMMISSION, *supra* note 87, at 1 and accompanying data table (showing Mr. Godinich's over-appointment ratio in his Houston, Texas practice).

in Tennessee. But its proffered modifications do not appear to be *solutions* to the present symptoms. Indeed, new solutions should be proposed that square with the nuanced economic and client-felt symptoms reported today. The client-centered symptoms can best be categorized as either (1) inadequate attorney-client contact, including failures of communication, and (2) insufficient public funding that creates *de facto* inadequate and ineffective legal representation. Proposed solutions to each of these symptoms will be addressed in turn.

### A. *Solving Inadequate Attorney-Client Relations*

Indigent defense statistics nationwide reflect attorney-client communication that fails to even meet the floor set by professional legal ethics standards.[89] Attorneys who fail to meet with clients for mere minutes prior to pleas, or those who cannot recognize the faces or names of their clients on the day of court, amount to little more than legal representation "in name only."[90] In essence, these sad realities are the inevitable conclusion of an indigent defense system in which both public defenders and private appointed attorneys are overworked and undercompensated. Thus, when facing prevailing attorney-client relationships the answer to Justice Marshall's query in *Strickland* is clear: effective representation arises from counsel who are not overworked *and* adequately paid.[91]

First, a side issue looms large when attempting to define new procedures to meet Sixth Amendment constitutional standards. Indeed, one must fire at the proper target. The target here is defined by the fact that adequately paid retained representation and today's appointed

[89] *See* KHOU.COM, *supra* note 88, at 2.
[90] *See* Knowles, *supra* note 12, at 2–3.
[91] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

attorneys produce two completely distinct forms of justice. Indeed, no one seems to argue that indigents are denied effective counsel because they did not receive Johnnie Cochran-style zealousness.[92] The difference in those two legal economies has produced best practice status quos that provide high justice only for those willing and able to fork over the cash. But should the two modes of representation be forced to comply with the same just result? In other words, should the public take it upon itself to provide indigents with results *at least as good as* results received by private hired counsel? The answer to that question would prove fruitful for an entirely new essay on the matter. However, for the limited purpose of this article, it seems that a *floor* of justice might be the line to consider when addressing economic strategies to improve indigent defense. That is, sufficient funds are not generally available to provide all indigents with top-of-the-line counsel, and present cues indicate that baseline efforts to provide reasonably competent counsel are widely tolerated. Sadly, indigent justice is a lower justice—and strategies to improve that standard must address the proper opposition and attempt to reach the correct goal. Thus, solutions proposed to remedy indigent defense must be directed at the *actual* style of representation that indigents deserve under the state and federal constitutions.

Given the above status quo, we must propose solutions to the "lower" form of justice that marks inadequate attorney-client relationships and communication with indigent clients. In my view, the acceptable floor of communication must be that detailed by the ABA Model Rules regarding professional ethics and responsibility. The Model Rules' proscriptions are easy enough to follow,[93] but

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[92] *See* Haynes, *supra* note, 1.

[93] The Model Rules require reasonably timed call-backs and keeping clients reasonably informed as to the status of their litigation, among

given the reports *supra*, many current public defenders and private appointed counsel fail to meet the low standard. The real systemic issue today is that lawyers fail to report—and thus courts fail to enforce—these simple practice guidelines when potential misconduct arises.[94] While the judiciary cannot force the legislature to add jobs or fund appointments, it can be sure that the democratic wheels will begin to churn when reversal upon reversal piles up following a showing that attorneys did not adequately communicate with their clients. My instinct is that numerous judges overlook the fact that attorneys are providing wholly inadequate representation, often failing to communicate with clients even *once* prior to plea, because they are sympathetic to local defense offices' lack of resources. But why should judges – of all people – permit *constitutional* inequities due to budget concerns? This lack of enforcement of known ethics rules is tantamount to ruling from a political bench. The failure to do their part, permitting reversals based on ineffective assistance and lack of communication, means that judges have abdicated their proper role in our society.

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other things. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2013).

[94] For example, note the massive amount of "covered up" instances of prosecutorial misconduct by the Department of Justice itself. *See* PROJECT ON GOVERNMENT OVERSIGHT, *Hundreds of Justice Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 13, 2014), http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html. *See generally* DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, *Annual Report* 2012, at 7–13, http://www. justice.gov/opr/annualreport2012.pdf (summarizing complaints and investigations of attorney conduct).

### B. *Solving Insufficient Public Funding for Public Defenders and Appointment Processes*

Secondly, the focus of Justice Marshall's *Strickland* query lies within the constraints placed on legal representation by both time and money.[95] But, as we are often reminded, time *is* money—and that *ipse dixit* proves true for indigent defense economies. All at once, appointed attorneys lack the funding necessary to commit their time to their appointments, while public defenders have too many cases (which acts as a drain on their time) and not enough money to pay for additional investigators, paralegals, interpreters, experts, and anything else necessary for a proper defense. It is clearly not a novel concept that increased public funding should solve problems of both time and money, but apparently the best arguments in favor of increased funding have not yet been heard by the powers that be. Indeed, it seems the only manner in which justice can be restored to indigent defense programs is to increase funding to add attorney positions, raise hourly appointment rates, and provide for the ancillary services necessary for proper legal representation.

Critically, we face a new age of legal economies. The larger American economy faces a unique paradox of having a concurrent glut of jobless but trained JDs and chronically understaffed public defense programs.[96] Indeed, all JDs graduate with problem-solving skills[97] and the legal analytics necessary to address myriad concerns of the average citizen, including criminal matters.[98] Perhaps law

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[95] *See Strickland*, 466 U.S. at 709 (Marshall, J., dissenting).

[96] For a brief but knowledgeable perspective on this paradox, see William E. Foster, *There Are Not Too Many Lawyers*, HUFFINGTON POST, http://www.huffingtonpost.com/william-e-foster/not-too-many-lawyers_b_2631224.html (last updated Apr. 8, 2013).

[97] *See id.*

[98] This is precisely why the Model Rules on permissive withdrawal do not allow attorneys to refuse an appointment based on ignorance or

schools could create cooperative programs with the local bar to commit several new graduates to the local public defender offices for one- or two-year terms, or even pledge them to a program for a term of appointment work to help reimburse tuition debt. Law schools could use program funding from their "access to justice" initiatives to assist these cooperative programs in paying new graduates' salaries. In exchange for their commitment to indigent defense programs, these young lawyers would receive basic courtroom experience, reduce law school debt, and develop a greater sense of the public service essential to a life in the law. Just as programs like Teach for America have proven, I believe young and skilled graduates will happily trade an uncertain future for the lower-pay, high-reward positions in underserved areas.[99] Indigent defense co-ops would be rebranded as a valuable way to gain experience while serving the public, and, if they follow the Teach for America model, these positions may even become highly competitive and prestigious.[100] A prestigious rebrand would ultimately draw the attention of the law schools' best students. These concepts are just the tip of the iceberg, but any effort to merge a market of attorneys who *need work* with those indigents who *need representation* is a fine way to alleviate the inadequate representation caused by excessive caseloads.

Furthermore, it is no secret that every state and local government faces financial challenges that hardly permit

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inexperience alone. All JDs are equipped with basic skills to address common criminal matters, especially with a bit of extra study or help from an associated attorney. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, r. 1.1 cmt. [2], r. 6.2 cmt. [2] (AM. BAR ASS'N 2013).

[99] Valerie Strauss, *How Teach for America became Powerful*, WASH. POST, Oct. 22, 2012, https://www.washingtonpost.com/news/answer-sheet/wp/2012/10/22/how-teach-for-america-became-powerful-2/

[100] *See id.*; *see also* 2015 Annual Report, TEACH FOR AMERICA, https://www.teachforamerica.org/about-us/annual-report.

finding room in the budget for new hiring.[101] Moreover, in some areas it may be politically unpopular to seek additional funding to aid representation for the indigent accused.[102] However, budgetary challenges have not been addressed from the correct perspective. It seems to me that in any government, regardless of its tax base, funds should be doled out *first* to those issues facing *constitutional level* discrepancies. That is, budgets cannot be balanced while also excluding the proper funds to *merely* meet the constitutional floor on indigent representation. Of course, *Gideon v. Wainwright* and its progeny demand that the indigent be provided with effective counsel.[103] Judges' frequent use of the blinder method[104] is appalling, commonly overlooking indigents who fail to receive *any* of the essential duties of representation set by the ABA Model Rules: competence, communication, and zealousness.[105] Funding programs that meet this floor for *every* indigent – a

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[101] For a comprehensive report on post-recession state and local budget woes, *see generally* 60 MINUTES, "State Budgets: The Day of Reckoning," (CBS television broadcast Dec. 19, 2010), http://www.cbsnews.com/news/state-budgets-the-day-of-reckoning/.

[102] *See, e.g.*, Brenda Goodman, *Official Quits in Georgia Public Defender Budget Dispute*, N.Y. TIMES, Sept. 7, 2007, at A18, http://www.nytimes.com/2007/09/07/us/07georgia.html?_r=0.

[103] Gideon v. Wainwright , 372 U.S. 355, 344 (1963).

[104] Judges sometimes choose to ignore clear ethics violations in the indigent defense context, a tactic I refer to as "putting on blinders." *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, at 10, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf ("LDF's investigations found that in circuit courthouses throughout the state, [ethics rules] are often ignored by defense attorneys, prosecutors, and judges who are sworn to uphold them").

[105] *Id.; see also* MODEL RULES OF PROF'L CONDUCT r. 1.1, r. 1.4, Preamble (AM. BAR ASS'N 2013).

low standard for bare-minimum justice, indeed – must take precedence over more common legal requests, such as increasing judicial salaries. I fail to see how common funding requests like road improvements have for a generation been taken more seriously than efforts to fund adequate indigent legal representation. Only *one* of these expenses sounds in our state and federal constitutions, not to mention extensive post-*Gideon* Supreme Court jurisprudence.

## V. Defending and Improving the Solution

### A. *Can a Lawsuit be a Solution?*

Lawsuits like *Hurrell-Harring* are effective insofar as they bring media attention to a worthy cause, but litigation fails to address problems stemming from the judiciary. Litigation that forces states to address inequities – as *Hurrell-Harring* does – will obviously change the way lawyers deal with indigent clients. In fact, as discussed *supra*, the *Hurrell-Harring* settlement model forces New York to set new standards for caseloads, and then to pay for any ancillary costs of meeting those lower caseloads: adding new attorneys, offices, staff, etc.[106] Those remedies will undoubtedly affect the quality of legal representation experienced by New York's indigent clients. Indeed, indigents will be represented by attorneys who have more time and resources to represent their interests.

But what this sort of litigation-based reform does not do – and thus does not model for other states facing similar issues – is affect the way judges appoint attorneys or rule on (or even perceive) ineffective assistance claims. Specifically, a settlement like *Hurrell-Harring* will *permit* attorneys to spend more time and money on needy clients, but the settlement will not *ensure* that clients are actually

[106] *See* Stipulation and Order of Settlement, *supra* note 44, at 7.

receiving better services. The settlement does not include terms tied to particular outcomes, but merely regulates the front-end infusion of resources.[107] In reality, judges may not be able to tell when clients receive the settlement's intended benefits or if an attorney has actually committed her extra time to the client's cause. Thus, states like New York may not see fewer ineffective assistance claims following the *Hurrell-Harring* settlement, despite having more money to remedy poor indigent defense.

### B. *How Can We Ensure Litigation-based Reform Improves Indigent Defense?*

States like Tennessee that may face litigation as local indigents attempt to improve the quality of defense should be careful to tie settlement terms to specific and measurable outcomes. Litigation can certainly bring attention to a needy cause, but states should only promise resources that affect results. A complete settlement should also include terms that *stop* providing resources to programs that do not see improved outcomes over time. Indeed, if infusions of cash do not reduce ineffective assistance claims or, at the very least, reduce reports of indigent dissatisfaction, then the state's funds are better spent elsewhere.

But outcomes-based funding tied only to objective data can wreak its own sort of havoc—see the litany of No Child Left Behind critics[108]—so I would suggest measuring progress through a combination of subjective and objective

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[107] *Id.* at 13. Note that the settlement includes some reporting measures, but fails to specify any terms that connect funding with measurable improvements, much less the criteria upon which to evaluate efforts. *Id.*

[108] *See, e.g.*, *No Child Left Behind Worsened Education*, HUFFINGTON POST, (Aug. 21, 2012, 5:18 PM), http://www.huffingtonpost.com/2012/08/21/no-child-left-behind-wors_n_1819877.html; *Democrats Decry "No Child Left Behind,"* CNN.COM, (Feb. 21, 2004 11:59 AM), http://www.cnn.com/2004/ALLPOLITICS/02/21/dems.radio.reut/.

reports. Litigation that results in a settlement similar to *Hurrell-Harring* could be extremely effective if funds are linked to improved experiences by the indigents the litigation hopes to serve. Subjective improvements could be measured by administering exit polls or similar evaluations of the clients' experience. Judges could also be polled on the quality of representation they experience in the courtroom and, perhaps, make a good faith attempt to report more indigent defense attorneys who consistently fall below the "effective" standard. For example, if judges in a locality know that a particular public defender receives added resources to improve representation, then they can be "on notice" to remain aware of the quality of service. Compiling this subjective data and combining it with objective outcomes (such as data on ineffective assistance claims) will take manpower, but it could go a long way to ensuring state resources are being well-spent. Settlement terms such as those in *Hurrell-Harring* are just votes of good faith, if not tied to measurable outcomes that improve indigent representation on the ground.

## VI. Conclusion

Just as Justice Marshall's powerful dissent in *Strickland* foreshadowed,[109] indigent defense now centers on disputes over limited resources. Both counsel's and the indigent accused's lack of time and money to defend their case has greatly impacted the quality of justice the indigent experience. Moreover, insufficient resources have forced public defenders and private appointed attorneys into a new status quo marked by inadequate representation that is tantamount to legal ethics violations. Brave settlements, such as that in *Hurrell-Harring*, can go a long way to bringing media attention to the arguably lower form of

[109] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

justice indigents commonly receive.[110] But litigation and their associated settlements will only be as effective as their terms permit; indeed, if infusions of resources are not conditioned on measurable improvements, then attorneys may experience a windfall without passing along benefits to their indigent clients. Indigents in states like Tennessee who may hope to improve their situation should insist on both subjective and objective analyses to ensure they receive the intended benefits of a richer indigent defense system. Justice Marshall's words[111] have never been truer: reasonably competent attorneys must have sufficient time and money to fight for the justice that indigents undoubtedly deserve.

[110] *See supra* pp. 16–19 and accompanying Part A (discussion on disparate resources causing two distinct forms of justice, where indigents receive a "lower form" than wealthier clients).

[111] *See* Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).