

THE CALIFORNIA PUBLIC DEFENDER:

Its Origins, Evolution and Decline

LAURENCE A. BENNER*

“It is still the duty of the State and of the court, its instrument, quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought . . .”¹

— Clara Shortridge Foltz, 1897

INTRODUCTION

As California approaches the centennial of the birth of the first Public Defender office in the state and the nation, it is perhaps appropriate to reflect upon the reasons for establishing an institutional Public Defender as part of government and make an appraisal of the institution’s current

* Laurence A. Benner is Professor of Law and Managing Director of Criminal Justice Programs at California Western School of Law in San Diego, California, where he directs the San Diego Search Warrant Project, the Bail Project and the Center for the Advanced Study of Criminal Justice. He is co-founder of the Institute for Criminal Defense Advocacy, which operates the California Innocence Project. He is coauthor of L. BENNER AND B. NEARY, *THE OTHER FACE OF JUSTICE*, NLADA (1973) [hereinafter *THE OTHER FACE OF JUSTICE*].

¹ Clara Shortridge Foltz, *Public Defenders*, 31 AM. L. REV. 393, 395 (1897) [Foltz, *Public Defenders*].

health in California today. The concept of the Public Defender, considered radical at the time of its inception, was initially the brainchild of Clara Shortridge Foltz. A champion of women's rights and the first woman admitted to practice law in California, she spearheaded a national movement to create an elected office known as the Public Defender. The County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914. What would Clara Foltz think of the Public Defender system as it has evolved in California today? How does our present system differ from what she envisioned?

Sadly, while the road has been marked with many successes, and fortified by U.S. Supreme Court decisions establishing the right to the effective assistance of counsel under the Sixth Amendment, if Clara Foltz were to return today she would find a criminal justice system that has broken faith with one of its fundamental underlying premises: the presumption of innocence. Instead, as a consequence of local funding and control over indigent defense services, many counties have chosen to operate under a presumption of guilt, resulting in a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of their innocence.

This should not be surprising. Members of a county board of supervisors, many of whom are not lawyers, can easily be persuaded by political pressures arising from the competition for scarce tax dollars to provide only minimal resources for the defense of those who are accused of crime. That translates into just enough funding to facilitate the plea bargaining regime upon which the entire system relies, as no county has the resources to have trials in all cases. This may seem logical because many defendants are in fact guilty. But the system is based upon a false premise. It is assumed that those who are providing defense representation will somehow be able to distinguish between the many who are guilty and the few who are innocent. It also further assumes that the indigent defense system will be able to provide an effective defense for the innocent by managing to triage the limited resources available. This cannot be done, however, if the system does not ensure adequate defense investigation into the possibility of innocence in the first place. Yet recent empirical research conducted for the California Commission on the Fair Administration of Justice has

shown that the current structure within which indigent defense services are provided in many counties fails to ensure this important safeguard.

This is not to say that all of California's counties across the board are providing indigent defense services that are inadequate. What Clara Foltz would immediately recognize, however, are the glaring disparities that exist between counties in the adequacy of indigent defense services they provide. She would also be struck, although not surprised, by the tremendous disparity in funding that exists between the defense and the prosecution functions. Finally, she would no doubt be alarmed at the growing trend toward unregulated privatization of indigent defense services that threatens the very existence of competent and efficient institutional Public Defender offices. This is because in an ever expanding number of counties justice is now up for sale to the lowest bidder.

ORIGINS OF THE PUBLIC DEFENDER CONCEPT

Clara Foltz first introduced her proposal for an elected Public Defender in a speech at the Chicago World's Fair in 1893, given before the Congress of Jurisprudence and Law Reform.² She envisioned the Public Defender as a counterweight to even the scales of justice and correct the "grave evils" that plagued the administration of criminal justice in her day.³ As she later explained in a law review article, "judicial crimes"⁴ were repeatedly being committed because of 1) the abuses of unchecked and overzealous prosecutors,⁵ 2) the incompetence of untrained, inexperienced and unpaid appointed counsel for the indigent accused,⁶ and 3) the buzzard mentality

² The speech was reprinted in the *ALBANY LAW JOURNAL: Public Defenders — Rights of Persons Accused of Crime — Abuses Now Existing*, 48 *ALB. L.J.* 248 (1893) [WORLD'S FAIR SPEECH]. Other notable presenters at the Congress included John Henry Wigmore, David Dudley Field and James Bradley Thayer. See generally Barbara Babcock, *Inventing the Public Defender*, 43 *AM. CRIM. L. REV.* 1267 (2006) [Babcock] for an excellent account of the life and times of Clara Shortridge Foltz and the influences that led her to originate the idea of a publicly funded attorney for all defendants accused of crime.

³ See Foltz, *Public Defenders*, *supra* note 1.

⁴ *Id.* at 393.

⁵ *Id.* at 395-97.

⁶ *Id.* at 399.

and dishonesty of a “shyster” element among the private bar who preyed upon those defendants with meager resources.⁷

Called the “Portia of the Pacific,”⁸ Foltz was at the time of her World’s Fair speech an able and experienced criminal defense practitioner, who shortly afterwards would win a notable victory in the California Supreme Court. In *People v. Wells*⁹ — a case involving prosecutorial misconduct — she represented a successful business agent who had been charged as an accomplice to a client’s forgery involving a promissory note and mortgage. Wells testified he had been deceived by the client who falsely represented herself as the owner of property which was mortgaged to secure the loan. The California Supreme Court reversed Wells’s conviction because of “utterly inexcusable and reprehensible” conduct by the prosecutor who repeatedly employed improper questions on both direct and cross examination to interject inadmissible and unsubstantiated accusations for the sole purpose of prejudicing the jury against the defendant. In granting a new trial, Justice McFarland declared in a revealing statement:

It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.¹⁰

Foltz identified the causes of such prosecutorial abuse as naturally arising from human nature — the prosecutor’s “vanity of winning,” and “the fear of newspaper criticism” coupled with the ability to rationalize such

⁷ *Id.* at 397-98.

⁸ See LOS ANGELES TIMES, Nov. 12, 1888 at 2, and Nicholas C. Polos, *San Diego’s ‘Portia of the Pacific’ — California’s First Woman Lawyer*, 26 JOURNAL OF SAN DIEGO HISTORY, No. 3, Summer 1980, San Diego Historical Society. Clara Foltz was an eloquent advocate. For an excerpt from one of her closing arguments, see MICHAEL S. LIEF, ET AL., LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW, Chapter 6, *A Man’s World No More*, 211 (1998).

⁹ 100 Cal. 459 (1893). *Wells* was subsequently referenced by the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935), a seminal case on prosecutorial misconduct.

¹⁰ *Id.* at 465.

behavior through the jaded “assumption that the defendant is always guilty.”¹¹ Prosecutors were allowed to go unchecked, Foltz argued, because with rare exception they had no equal adversary. She pointed out that counsel appointed for the poor “have no money to spend in an investigation of the case, and come to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State.”¹² Those of modest means, moreover, had neither the knowledge nor the ability from within the walls of their jail cell to secure competent counsel. They were thus easy marks for the “runners” of unscrupulous “shyster” lawyers who, after having obtained a defendant’s money, would “botch or neglect” their case.¹³

¹¹ Foltz, *Public Defenders*, *supra* note 1, at 396.

¹² WORLD’S FAIR SPEECH, *supra* note 2, at 249.

¹³ Foltz, *Public Defenders*, *supra* note 1, at 397. A vivid account of how such shyster lawyers operated in the lower criminal courts of New York is described in ARTHUR TRAIN, *THE PRISONER AT THE BAR* (1915) 76-77:

A young girl who had fallen from virtue, but who had never been arrested before, was brought into the Jefferson Market prison. She had saved five hundred dollars with which she intended the following week to return to her native town in New Hampshire and start life anew. The [jailer] led her to believe that she would be imprisoned in the penitentiary for nearly a year unless she could “beat the case.” One of these buzzards [i.e. a shyster lawyer] learned of her distress and offered to procure bail for her for the sum of fifty dollars. A straw bondsman was produced, and she paid him the money and was liberated. Meanwhile the lawyer had learned of the existence of her five hundred dollars. By terrifying her with all sorts of stories as to what would possibly happen to her, he succeeded in inducing her to pay him three hundred as a retainer to appear for her at the hearing in the magistrate’s court. He had guaranteed to get her off then and there, but when her case was called he happened to be engaged in reading a newspaper and, looking up from where he was sitting, merely remarked, “Waives examination, your Honor.” The girl had only one hundred and fifty dollars left, and as yet had had no defense, but the shyster now demanded and received one hundred dollars more for representing her in the Special Sessions. She now had but fifty dollars. Immediately after the hearing in the police court the bondsman “surrendered” her and she was locked up in the Tombs pending her trial, for she had not money enough to secure another bail bond. Here she languished three or four days. When at last her case appeared upon the calendar the shyster did not even take the trouble to come to court himself, but telephoned to another buzzard that she still had fifty dollars, telling him to “take her on.” Abandoned by her counsel, alone and in prison, she gave up the last cent she had, hoping thus still to escape the dreadful fate predicted for her. When she was called to the bar the second

Indeed, at the time of the *Wells* decision California did not even have an integrated State Bar that could control the admission to practice law.¹⁴ The reputation of the legal profession also hardly inspired confidence. As one of Foltz's contemporaries observed, the bar in general was considered "a pool of mediocrity."¹⁵

THE PUBLIC DEFENDER ENVISIONED BY CLARA FOLTZ

To remedy the evils afflicting the administration of criminal justice, Clara Foltz proposed that an office of the Public Defender be created in each county. The Public Defender was to be elected and hold office for a three-year term. Only an attorney who had been a resident of the county for at least one year was eligible to stand for election. The duties of the Public Defender were "to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them."¹⁶ The Public Defender's duties also included "appearing for and in behalf of all persons charged with being insane or lunatic."¹⁷ The Public Defender was empowered to hire assistant Public Defenders and employees when such positions were authorized by the county.¹⁸ When a capital or "other important criminal action" was

lawyer informed her she had no defense and the best thing she could do was to plead guilty. This she did and was fined twenty-five dollars, but, having no money, was compelled to serve out her time, a day for each dollar, in the City Prison, at the end of which time she was cast penniless upon the streets.

¹⁴ The California State Bar was not created until 1927.

¹⁵ MICHAL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1992) at 12. As Professor Belknap points out, the movement to organize state bar associations and regularize admissions to the bar through bar examinations did not begin until the late 1800s. *Id.* The American Bar Association and the Los Angeles Bar Association were both formed in 1878. *Id.* See also Patricia Phillips, *Meeting Challenges: The Association's History of Accomplishment*, *LOS ANGELES LAWYER*, March 2003, 33.

¹⁶ *An Act to Create the Office of Public Defender, Provide for His Election, Define His Duties, and Fix His Compensation in the Several Counties, and Cities and Counties of New York*, reprinted in 55 ALB. L.J. 65 (1897) [Foltz's *Defender Bill*]. The bill is also available in the appendix to Babcock, *supra* note 2.

¹⁷ *Id.*

¹⁸ *Id.*

to be tried, the Public Defender could hire special co-counsel with judicial approval.¹⁹

It is noteworthy that Foltz's bill entitled *all* criminal defendants to representation by the Public Defender regardless of whether they were indigent or not. In her view the person of average means should not be "ruined by payment of counsel fees in order to be protected from a malicious prosecution."²⁰ She reasoned that because the right to the assistance of counsel was a constitutional right, it should be free like other constitutional rights such as the right to a jury.²¹ There was also a practical reason. As Babcock has observed, Foltz correctly foresaw that if the Public Defender was only for "the friendless and destitute" the office "would not command the respect or resources necessary to do the job."²² The bill nevertheless provided that a defendant with means still retained the option to hire his or her own counsel who could defend either alone or jointly with the Public Defender.²³

Although Foltz lobbied tirelessly for the Public Defender concept and introduced bills in state legislatures across the country, it was not until 1913 that the County of Los Angeles amended its charter to create the first Public Defender office, which opened its doors on January 7, 1914.²⁴ In contrast to Foltz's Public Defender who would be available to all, the Los Angeles office represented only those who were financially unable to afford counsel.²⁵ The Los Angeles Defender was tasked with representing

¹⁹ *Id.*

²⁰ Foltz, *Public Defenders*, *supra* note 1, at 393.

²¹ *Id.* at 398.

²² Babcock, *supra* note 2, at 1272.

²³ Foltz's *Defender Bill*, *supra* note 16.

²⁴ REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919) at 117 [SMITH].

²⁵ Section 23, charter of Los Angeles County, which provides:

Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such person in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction.

indigent defendants “charged in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense.”²⁶

Surprisingly, the Los Angeles charter also authorized the Public Defender to bring civil actions to collect unpaid wages (where the amount did not exceed \$100) and to defend any person unable to employ counsel who was sued in civil court where in the opinion of the Public Defender the defendant was being “persecuted or unjustly harassed.”²⁷ The reasons for providing civil legal aid appear to have their origins in the reform movement during the Progressive Era to improve the administration of justice generally. In *Justice and the Poor*, published in 1919, Reginald Heber Smith described in detail the defects in the administration of justice in America which had given rise to the widely held belief during that era that there was “one law for the rich and another for the poor.”²⁸ Because the poor could not afford legal advice and representation, they were easily taken advantage of and exploited. In response to this need for legal assistance, legal aid societies sprang up in many of the larger cities.²⁹ Some, such as the Voluntary Defenders Committee of New York provided criminal defense representation.³⁰ While most legal aid offices were funded by private donations, there were also a handful that operated as public bureaus of city governments.³¹ The Los Angeles County charter’s provision of counsel in certain limited civil cases reflects a similar attempt to give the poor access to the courts, denied them due to the inability to afford counsel.

Although Smith devoted much of his analysis in *Justice and the Poor* to the need for legal aid in civil cases, he also asserted that nowhere was the injustice arising from the lack of adequate counsel more apparent than in the criminal justice system.³² Smith examined the assumption that the rights and procedural protections given to a defendant were adequate safeguards against unjust conviction and concluded that standing alone they

²⁶ *Id.*

²⁷ Section 23, charter of Los Angeles County, *supra* note 25. This same provision was also enacted in state legislation establishing Public Defender offices. See CAL. GOVT. CODE § 27706.

²⁸ SMITH, *supra* note 24, at 105.

²⁹ *Id.* at 176 and 187-191.

³⁰ *Id.* at 117.

³¹ *Id.* at 173.

³² *Id.* at 105.

were ineffective because “[a]dequate protection, in the last analysis, depends on adequate representation.”³³ Most defendants then, as now, could not afford to hire counsel. The fairness of the criminal justice system thus depended upon defense representation provided through a system of assigning counsel for the indigent accused.

Examining the assigned counsel system, Smith echoed many of Foltz’s arguments. Although counsel assigned in capital cases were generally paid and given an allowance for expenses, in routine felonies, counsel was either not provided at all, or went unpaid and without funds to conduct any investigation.³⁴ Thus even a competent criminal defense lawyer appointed to a case was forced not only to provide representation for free, but also to pay for investigation expenses and expert witnesses out of his own pocket. The lawyers who could afford to provide such pro bono representation, however, were generally members of civil law firms and were largely exempt from assignment because they had no experience in criminal work.³⁵

Smith moreover found that the “shyster” lawyers Foltz had complained about had taken over the assigned counsel system and corrupted it.³⁶ Smith observed:

These men have learned how to make a living out of assigned cases. . . . They are willing to take assignments because they . . . know how to strip a prisoner and his relatives of every last cent . . . [by] magnify[ing] the crime . . . and the horrors of prison . . .

If well paid, the professional assigned counsel undertakes a defence [sic] that knows no bounds of honesty or propriety. . . . If not paid, he is perfectly willing to betray his client by neglecting the case, or forcing him to plead guilty, or deserting him altogether.³⁷

Thus except for murder cases, where reputable lawyers would step forward because of a sense of duty and the potential to enhance their reputation, the assigned counsel system deserved, in Smith’s judgment “unqualified

³³ *Id.* at 111.

³⁴ *Id.* at 112.

³⁵ *Id.* at 112-113.

³⁶ *Id.* at 111.

³⁷ *Id.* at 114. Smith maintained that it was because of the dishonest tactics of these shyster lawyers that prosecutors had become “aggressive” and “partisan.” *Id.* at 111 and 114.

condemnation.”³⁸ The salaried professional Public Defender envisioned by Smith, would, by contrast, be honest, ethical, and provide uniformly competent representation.

For Smith there was also an additional ideological reason for providing adequate defense services for the poor. This was necessary in his view to prevent a loss of confidence in the judicial system that might further encourage the anarchist movement. The turn of the century witnessed economic changes that gave rise to conflict as a result of the pressure from two growing influences — the escalating unrest between the laboring class and their employers and the great wave of immigration from eastern and southern European countries. It was a turbulent time in American history — from the Haymarket Square bombing in Chicago in 1886, and Panic of 1893 when the stock market crashed, to the assassination of President McKinley in 1901 by an anarchist and the bombing of the *Los Angeles Times* building in 1910.³⁹ The fear of “sedition and disorder” created by these and other similar events clearly emanated from Smith’s writings.⁴⁰

Smith was especially concerned about the masses of recently arrived unskilled immigrant workers.⁴¹ The International Workers of the World (known as the Wobblies), actively recruited such unskilled workers to join

³⁸ *Id.*

³⁹ See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960), ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920* (1967) and RAY GINGER, EUGENE V. DEBS: *THE MAKING OF AN AMERICAN RADICAL* (1970). See also PBS, *THE AMERICAN EXPERIENCE, TIMELINE: ANARCHISM AND EMMA GOLDMAN*, [PBS TIMELINE] available at http://www.pbs.org/wgbh/amex/goldman/peoplevents/e_freespeech.html (All online sources cited in this article were last visited Dec. 1, 2010).

⁴⁰ SMITH, *supra* note 24, at 11.

⁴¹ Due to political and religious persecution, famine and the lack of economic opportunity, immigration jumped to almost 9,000,000 during the decade from 1900 to 1910. See Table No. HS-8. Immigration — Number and Rate: 1900 to 2001, available at <http://www.census.gov/statab/hist/HS-08.pdf>. See generally ALAN M. KRAUT, *THE HUD-LED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880–1921*. Smith observed in *JUSTICE FOR THE POOR* that the immigrant

comes to this country . . . with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. . . . When he finds himself wronged or betrayed, keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influence of sedition and disorder. *Id.*

its radical agenda, which was based upon Marxist principles.⁴² During one such effort in 1912, for example, San Diego passed an ordinance banning union activity in its business district. This sparked protest demonstrations which were brutally suppressed by both law enforcement and vigilantes.⁴³ It was against this backdrop of violence and unrest that Smith warned in the *Journal of the American Judicature Society* that

the revolutionary proponents of a new world order . . . may undermine public confidence in our justice if they attack its results, and demonstrate its inequality in case after case. Such an attack might come perilously near to succeeding because it has truth on its side. The present drive for Americanization furnishes an illustration. The plan is to educate the immigrant . . . so that he will understand and respect our institutions. But suppose after his education he finds in America institutions which, in part at least, do not deserve the respect of intelligent men. And if his contact with justice has been in the lower criminal courts where he has been preyed upon by runners, shysters and straw bondsmen,⁴⁴ may he not mistake

⁴² The I.W.W.'s constitution, drafted in 1908, called for class warfare, proclaiming: The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

PBS TIMELINE, *supra* note 39.

⁴³ Rosalie Shanks, *The I.W.W. Free Speech Movement: San Diego, 1912*, 19 THE JOURNAL OF SAN DIEGO HISTORY, SAN DIEGO HISTORICAL SOCIETY QUARTERLY, No. 1, Winter 1973.

⁴⁴ Straw bondsmen were individuals secured by shyster lawyers to swear false affidavits pledging non-existent property to secure the amount of the bond. If the prosecutor discovered the fraud, the bond was revoked, the defendant returned to jail, and of course the amount the defendant paid to the straw bondsman was lost. Even if the fraud went undiscovered, the bondsman would “surrender” his client at the first court appearance and the defendant would be returned to jail. News reports suggest that this practice was prevalent in California. A column reporting on court cases in a San Francisco paper in 1887, for example, noted two straw bondsmen were sentenced to significant prison terms (six and seven years, respectively) and described the trial judge’s lengthy speech that “reviewed the evils of the straw bond business and severely cored lawyers who would desecrate their oaths by offering to procure such bonds.” *The Straw*

the part which he knows for the whole and conclude that our judicial institutions ought to be overthrown?⁴⁵

Smith found a solution in the concept of the institutional Public Defender where counsel are paid for their services, resources are provided to cover needed expenses such as investigation and expert witnesses, and where “centralization of work makes for economy, efficiency, and responsibility.”⁴⁶ Smith praised the results of the Los Angeles Public Defender experiment and cited its work as empirical proof that the concept of an institutional defender office was not “visionary” or “subversive of fundamental rights” as a prelude to socialism.⁴⁷

In its first year of operation in 1914 the Los Angeles Public County Defender handled 260 felony cases.⁴⁸ Favorably comparing the results obtained by the Public Defender with that of privately retained counsel, Smith found that the Public Defender took approximately the same percentage of cases to trial as private counsel (22% vs. 26% for private counsel), had roughly the same success rate at trial (34% not guilty or hung jury vs. 36% for private counsel) and obtained probation for a slightly greater percentage of his convicted clients than private counsel (33% vs. 30%).⁴⁹ Smith also argued that the Public Defender had improved the efficiency of the court by filing fewer frivolous motions “for purposes of delay” and spending on average fewer days per trial than retained counsel.⁵⁰ For example, Smith cited statistics showing private counsel filed motions in 17% of their cases but were successful only 6% of the time, while the Public Defender filed motions in only 3% of its cases and was successful 25% of the time.⁵¹

One striking fact revealed by Smith’s statistics was that 70% of the clients represented by the Public Defender pleaded guilty, while retained

Bondsmen Sentenced, DAILY ALTA CALIFORNIA, August 25, 1887, available at <http://www.newspaperabstracts.com/link.php?id=25776>.

⁴⁵ R. H. Smith, *Denial of Justice*, 3 J. AM. JUD. SOC. 112, 113 (1919–1920).

⁴⁶ SMITH, *supra* note 24, at 115–16.

⁴⁷ *Id.* at 115 and 122–24.

⁴⁸ *Id.* at 122. After civil service examinations, Walton J. Wood was chosen as the first Public Defender. *Id.* at 117.

⁴⁹ *Id.* at 123.

⁵⁰ *Id.* at 122.

⁵¹ *Id.*

counsel entered guilty pleas in only 48% of their cases. Foltz had detested plea bargaining. In her view reducing a defendant's sentence because his guilty plea saved the county the time and expense of a trial was akin to bribery. She wrote: "Think of the spectacle of a *court* remitting part of a criminal's legal punishment for a money consideration!! And yet who has not witnessed it."⁵²

Foltz was a strong proponent of the adversary system and believed the truth emerged from the contest at trial fought by ethical advocates on both sides. Smith and the reformers of the Progressive Era, on the other hand, while not rejecting the adversary system, believed in a more collaborative system of justice.⁵³ Reacting to the dishonest tactics in which the shyster lawyers had engaged with impunity, the Public Defender they envisioned was not just an ethical trial lawyer, but also an officer of the court who, while ensuring that the innocent were protected, would not stand in the way of the guilty being fairly punished. This vision of the Public Defender of course begs both the larger philosophical question of whether such "truth" is indeed knowable and the more practical question of whether a busy staff attorney at a Public Defender office with a heavy caseload and limited resources for investigation has the ability to know the truth regarding guilt or innocence. Smith's statistics, however, point to the Achilles' heel of the Public Defender concept: the high volume of cases handled.

As Smith chronicled in *Justice and the Poor*, the Los Angeles experiment was successful in eliminating the abuses of the shyster lawyers, and the California state legislature subsequently passed legislation in 1921 authorizing county governments to create an office of the Public Defender.⁵⁴ That legislation, however, left it up to county governments to determine whether or not to have a Public Defender and also whether the chief Public

⁵² Foltz, *Public Defenders*, *supra* note 1, at 399 n.2.

⁵³ Smith, for example, praised the Los Angeles Defender's handling of insanity cases because, instead of engaging in a battle of experts, the defender and prosecutor agreed to have the court appoint three physicians to examine the accused and stipulated that no other experts would be called at trial on that issue. Smith observed that "[i]nstead of working at odds, it has been possible for the two attorneys to work in harmony to a common end." SMITH, *supra* note 24, at 121-22.

⁵⁴ CAL. GOVT. CODE § 27700. The current statute is derived from legislation enacted in 1921.

Defender would be elected or appointed.⁵⁵ Thus in contrast to Foltz's bill which mandated an elected Public Defender in each county, California has evolved into a hodgepodge of arrangements for providing indigent defense services. Only the Public Defender of the City and County of San Francisco is an elected official.⁵⁶

In the 1960s and 1970s U.S. Supreme Court decisions in *Gideon v. Wainwright*⁵⁷ and *Argersinger v. Hamlin*,⁵⁸ vindicated Clara Foltz's belief that defense counsel was constitutionally required in felony and misdemeanor cases. This spurred the growth of Public Defender offices to handle the constitutional mandate to provide counsel. The U.S. Department of Justice sponsored the National Advisory Commission on Criminal Justice Standards and Goals (1973)⁵⁹ and the National Study Commission on Defense Services (1979) which promulgated maximum attorney caseload standards and other guidelines for establishing such offices. In 1973, *The Other Face of Justice*, reporting the findings of a nationwide study of indigent defense delivery systems, found that California had 31 Public Defender offices and 16 assigned counsel systems.⁶⁰ In 11 counties defense services were provided through contractual arrangements with law firms or individuals.

THE PUBLIC DEFENDER TODAY

Clara Foltz envisioned that a professional Public Defender would represent virtually all criminal defendants. While this concept was never accepted in theory, as a practical matter today more than eight out of ten defendants accused of serious crimes in California are provided with counsel.⁶¹ Foltz

⁵⁵ CAL. GOVT. CODE § 27701.

⁵⁶ Web site of the San Francisco Public Defender's Office *available at* <http://www.sfpublicdefender.org>.

⁵⁷ 372 U.S. 335 (1963).

⁵⁸ 407 U.S. 25 (1972).

⁵⁹ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). *See infra* note 97.

⁶⁰ THE OTHER FACE OF JUSTICE, Appendix 1A, 90-91, and Appendix 1D, 112-13.

⁶¹ *See* L. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California* 45 CALIFORNIA WESTERN LAW REVIEW 263, 311 n.111 [*Systemic Factors*], reporting results from a survey of presiding Superior Court judges indicating a state-wide indigence rate in excess of 85%.

would be dismayed, however, at what has happened to the Public Defender concept and the current crisis confronting the delivery of indigent defense services. She, along with Reginald Heber Smith, would also find that like the themes from Greek tragedies, the problems they identified still persist.

In 2008, the California Commission on the Fair Administration of Justice (“Fair Commission”) reported that 33 of California’s 58 counties now have an institutional Public Defender office which serves as the primary provider of indigent defense services.⁶² While the number of counties employing an institutional Public Defender office grew by only two since 1973, the number of counties using contract defenders more than doubled. In 24 counties (most having a population of less than 100,000) defense services are now provided by contractual arrangements with either a law firm or solo practitioners.⁶³ Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members.⁶⁴

While the San Mateo assigned counsel system has been a success, it appears that the assigned counsel systems in other counties were replaced by contract defenders. Unfortunately, California has had a disturbing history with respect to contract defenders. Contracts for indigent defense services are not regulated by any state standards nor is there even any requirement

⁶² FINAL REPORT, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE 92 (2008) [CCFAJ FINAL REPORT] *available at* <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>. An institutional Public Defender is defined as a county department where attorneys are employed on a salaried basis as public employees. While the primary institutional defender office handles the lion’s share of indigent cases, other arrangements must be made to represent co-defendants and other cases where the primary defender has a conflict of interest. This is done through the creation of one or more alternate defender offices, or through an assigned counsel panel or by contractual arrangement with a law firm or individual.

⁶³ *Id.* There is a variety of contractual arrangements. One law firm, for example, provides representation in eight different counties, while one county has seven separate contracts with solo practitioners.

⁶⁴ See SAN MATEO COUNTY BAR ASSOCIATION PRIVATE DEFENDER PROGRAM ANNUAL REPORT, FISCAL YEAR 2009–2010, *Administration and Structure*, 6-7; *Attorney Training*, 35-37; and *Attorney Evaluation*, 40-44.

that performance of the contractor be monitored for quality control. A monograph published by the U.S. Justice Department's Bureau of Justice Assistance revealed the dangers of such unregulated low bid contracts in the following report of a disastrous experience with a California contract defender:

In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than \$400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases — less than 0.5 percent of the combined felony and misdemeanor caseload — to trial.

One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month.⁶⁵ The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case.

One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.

The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's Sixth Amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over

⁶⁵ The national standard is only 400 misdemeanor cases per attorney *per year*.

the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.⁶⁶

The Justice Department report concluded: “In this California county, critics’ worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system.”⁶⁷

In a deposition arising out of a lawsuit brought by the associate who had been summarily dismissed, the contract defender stated that he was able to handle such a high volume of cases because he pleaded 70% of his clients guilty at the first court appearance after spending thirty seconds explaining the prosecutor’s offer.⁶⁸ The county of Shasta, where this occurred, subsequently established an institutional Public Defender office.⁶⁹

The Fair Commission observed that despite the notoriety of this disturbing example of abuse, nothing has been done to prevent its recurrence and reported that “flat fee contracts are still being negotiated for defense services with no separate funding for investigators and ancillary services.”⁷⁰ Indeed, testimony before the Fair Commission revealed that some counties employing contract defenders have solicited bidding wars in an attempt to further cut the cost of indigent defense services. The Commission reported the story of one contract defender of long standing who had repeatedly fought off low bidders in the past with the support of the judiciary. His budget, which had been 41% of the District Attorney’s budget in 2000, declined to only 27% in 2005. Yet in 2006, he was undercut by a bid from a competitor that was almost 50% less than his submission. He lost the contract he had repeatedly held since 1990. According to the Commission:

He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts

⁶⁶ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 1-2 (2000).

⁶⁷ *Id.*

⁶⁸ CCFAJ FINAL REPORT, *supra* note 62, at 95 (citing deposition of Jack Suter in *Fitzmaurice-Kendrick v. Suter*, Civ. S-98-0925 (E.D. Cal. 1999)). The lawsuit reportedly resulted in a substantial settlement for the plaintiff. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

with eight California counties to provide defense services. . . . Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors won't." Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages. While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for investigative services.⁷¹

The Commission noted that the successful bidder's Web site contains an advertisement stating: "What Would Your County Do With Hundreds of Thousands of Dollars?" The advertisement suggests the answer ("Better schools? Better fire protection? More police? Improved roads? More parks?") and boasts: "Every county we have contracted with has saved substantial funds over their previous method of providing these services. Additionally, our firm has an excellent record of containing cost increases."⁷²

In hard economic times, competitive bidding can obviously lead to a dangerous downward spiral of cost-cutting that can result in bids that provide an inadequate number of attorneys who have little or no experience, and who are given little or no training, supervision, or support services.

Unfortunately, no action has been taken to regulate indigent defense contracting and evidence of abuse continues to be reported. For example, Fresno County awarded a flat fee contract for \$80,000 to an attorney in a death penalty case where the Public Defender was unable to provide representation because of a conflict of interest. On appeal, after the defendant was sentenced to death, it was revealed that the contract attorney spent less than \$9,000 for investigation and expert witnesses, although in justifying his bid he had budgeted \$60,000 for such expenses. The attorney instead pocketed \$71,000 of the \$80,000 fee.⁷³ It was conceded that even

⁷¹ *Id.* at 95 (quoting Cheryl Miller, *Calif. Defense Firm Borrows Wal-Mart Business Model*, THE RECORDER, Dec. 26, 2007).

⁷² CCFJA FINAL REPORT, *supra* note 62, at 94-95 n.4.

⁷³ *People v. Doolin*, 45 Cal.4th 390, 457-58 (2009) (opinion of Kennard, J. concurring and dissenting). The California Supreme Court assumed without deciding that

though counsel was aware that the defendant had a learning disability and had been abused as a child, the contract attorney failed to conduct a background investigation and social study of defendant as required by ABA standards governing the duties of defense counsel in capital cases.⁷⁴ In *Sears v. Upton*,⁷⁵ the U.S. Supreme Court recently held that the failure to conduct an adequate investigation into the defendant's background before deciding on a mitigation strategy constituted deficient performance, even where counsel employed a plausible mitigation strategy.

Another example that reveals the contrast in the quality of representation between flat fee contractors and institutional Public Defenders was seen in the case of two juveniles who were both charged with the same crime: assault with a deadly weapon. The older of the two was represented by the Public Defender, but the younger, aged 15, was assigned a contract attorney who took juvenile cases for a flat fee of \$345 regardless of complexity. The Public Defender's client was adjudicated in juvenile court, but the younger boy, represented by the contract attorney, was charged as an adult. Upon transfer to Superior Court he was represented by the alternate Public Defender who immediately recognized that the child had serious mental deficits and should not have been transferred to adult court. It was later determined that the contract attorney had "failed to provide even a minimal level of representation" and the case was transferred back to juvenile court.⁷⁶

The Fair Commission, noting that state laws impose standards for county contracts involving public works, has recommended that the state legislature adopt at least minimal standards to protect against such demonstrated abuses where the liberty of a citizen is at stake.⁷⁷

counsel's performance was deficient, but on the record produced on direct appeal found no prejudice was shown as required by *Strickland v. Washington*, 466 U.S. 668 (1984). Two Justices (Kennard and Werdegar) dissented arguing that prejudice should be presumed because of the inherent conflict of interest created by the flat fee contract. Post conviction proceedings are still pending.

⁷⁴ AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

⁷⁵ 130 S. Ct. 3259 (2010).

⁷⁶ Molly Hennessy-Fiske, *Juvenile Justice Diverges in Court*, LOS ANGELES TIMES, June 14, 2010.

⁷⁷ CCFAJ FINAL REPORT, *supra* note 62, at 97.

THE IMBALANCE BETWEEN DEFENSE AND PROSECUTION

Clara Foltz saw the institutional Public Defender as a means of correcting the imbalance between counsel for the accused, who was often either inept or dishonest, and the strong district attorney, who was often overzealous because the “pride of contest” overcame the “spirit of justice.”⁷⁸ The institutional Public Defender office has, when properly implemented, eradicated this gross imbalance. By providing an organization where properly trained and supervised attorneys can embark upon a professional career as a Public Defender, defense counsel can be on a par with their counterpart in the district attorney’s office and provide excellent and cost-effective defense representation. The San Francisco Public Defender, for example, represented over 28,000 clients during 2009, obtained an acquittal rate at trial of 46.5% (which would be the envy of many private practitioners who get to choose their clients) and saved an estimated “\$5 million in incarceration costs [through placement of clients] in vocational, educational, substance abuse and mental health programs.”⁷⁹

There can be no doubt, therefore, that the scales of justice have tipped toward a more even balance as thousands of dedicated career Public Defenders and their support personnel strive daily throughout California to provide the best representation possible. As a former client of the Los Angeles County Public Defender’s Office stated in tribute after being acquitted of murder on the grounds of self defense:

Even if I had \$10,000 I couldn’t buy that kind of defense. . . . And here I am a nobody, just a 52-year-old bartender in a jam. When a plain nobody gets a defense only a rich somebody could buy, you got a real great country.⁸⁰

⁷⁸ C. Foltz, *Duties of District Attorneys in Criminal Prosecutions*, 18 CRIM. L. MAG. & REP. 415 (1896).

⁷⁹ Web site of the San Francisco Public Defender’s Office, available at <http://sfpublicdefender.org/media/2010/01/year-report-demand-public-defenders-remains-high-economic-crisis/>.

⁸⁰ Web site of the Los Angeles County Public Defender, available at <http://pd.co.la.ca.us/History.html>.

Despite such successes, however, serious imbalances still remain. Foltz could not have envisioned the tremendous volume of cases our criminal justice system handles today. As a nation we imprison more citizens per capita than any other country in the world.⁸¹ Starting with only 260 felony cases in 1914, the Los Angeles County Public Defender (LACPD), for example, now handles an “estimated 420,000 misdemeanor cases, 100,000+ felony cases, 41,000 juvenile cases and 11,000 mental health cases, for a total of over 571,000 cases annually.”⁸²

Funding Disparities

The financial burden of providing counsel falls primarily upon county governments. Recent empirical research conducted in 2007 for the Fair Commission reveals, however, that tremendous disparities exist from county to county regarding the resources allocated to indigent defense services. For example, while the average spent per capita on indigent defense for all counties is \$19.62, Sutter County with a population of 91,000 spends only \$5.85 per capita.⁸³ Significant disparities in expenditure also exist between counties within the same population class. Butte County, for example, with a population of 217,000 spends less than \$10.00 per capita on indigent defense while Yolo County, with a population of 190,000 spends almost \$31.00 per capita.⁸⁴

Still more glaring is the disparity between funding for the prosecution and funding for indigent defense. As a consequence of local budgetary decisions, the Yolo County Public Defender Office, for example, has been forced to provide representation (including representation in a death penalty case) with less than half of the resources of the prosecution.⁸⁵ Looked at from the viewpoint of resources per attorney, the district attorney has the advantage of over \$100,000 more per staff attorney than the Public

⁸¹ The United States imprisons over 700 persons per 100,000 population. R. WALMSLEY, *WORLD PRISON POPULATION LIST* (7th ed.) King's College, London, International Centre for Prison Studies, available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf>.

⁸² COUNTY OF LOS ANGELES, ANNUAL REPORT 2009–10, 24.

⁸³ *Systemic Factors*, *supra* note 61, at 309.

⁸⁴ *Id.* at 310.

⁸⁵ *Id.*

Defender.⁸⁶ An even more extreme example is Sutter County, which spends five times more on prosecution than it does on indigent defense.⁸⁷

In *Argersinger v. Hamlin*, Chief Justice Burger declared that “the system for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution.”⁸⁸ Yet statewide, for every dollar spent on prosecution, California counties spend only fifty-three cents on indigent defense.⁸⁹ At least 85% or more of the criminal docket in the Superior Courts of California, however, must be handled by the indigent defense system.⁹⁰ In some counties the indigence rate is as high as 95%.

Prosecutors have argued that they need greater resources because they have to screen arrests made by police that do not result in charges. This argument has been refuted, however, by a statistical analysis which shows that the additional prosecution workload to screen such arrests is more than offset by the additional workload imposed on indigent defense systems to handle non-traffic misdemeanor cases that occur within cities.⁹¹ Because these cases are prosecuted by the city attorney rather than the district attorney, they are not part of the prosecution’s workload. In addition, the indigent defense system has other added workloads not shared by the district attorney. It must also provide representation for clients involved in involuntary mental health commitments and conservatorships. Thus, even if privately retained counsel handle between 5% to 15% of the criminal caseload, one would not expect to see such gross disparities in funding between the prosecution and defense functions.

The disparity in funding between prosecution and defense is also not limited to less populated counties that might be expected to have less

⁸⁶ *Id.* This comparison actually overstates the resources per Public Defender staff attorney because it is based upon the indigent defense budget for the county as a whole and not all those funds go to Public Defender office. It also does not include additional investigative resources available to the prosecutor from the city police, county sheriff’s department and state highway patrol.

⁸⁷ *Id.* at 310.

⁸⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

⁸⁹ *Systemic Factors*, *supra* note 61, at 311.

⁹⁰ *Id.* at 311 n.111.

⁹¹ *Id.* at 314 n.117. The comparison showed that indigent defenders handled over 60,000 more cases statewide than did county prosecutors.

adequate financial resources. The Fair Commission study conducted an in-depth examination of funding for the district attorney's office and the indigent defense system in Santa Clara County, one of the richest counties in the nation. In terms of per capita income, Santa Clara ranked 17th out of 3,000 counties in 2008.⁹² Yet in terms of parity with the prosecution, funding for Santa Clara County's indigent defense system was below the state average. For fiscal year 2007 the Santa Clara prosecutor's budget was more than twice that of all the indigent defense components combined.⁹³ This translates into a dramatic disparity in staffing resources. The Santa Clara County District Attorney's Office, which has its own crime lab (funded out of a separate budget financed in part by fines from convicted drug offenders pursuant to Health and Safety Code section 11372.5) had a staff of over 500 in 2007.⁹⁴ The primary and alternate Public Defender offices combined had a budgeted staff of only 206.

This type of disparity in resources has consequences, as the indigent defense system simply cannot keep up with the volume of cases generated by the more generously resourced law enforcement and prosecution components of the criminal justice system. Once held to be an exemplary office, the primary Santa Clara County Public Defender was forced after budget cuts to ration representation and had to take the drastic step of no longer providing counsel at misdemeanor arraignments. After newspaper articles revealed that uncounseled defendants were pleading guilty at arraignment without being aware of the consequences, some funding was

⁹² *Id.* at 318 n.122.

⁹³ In addition to county funding, the Santa Clara District Attorney received \$1.4 million from the State of California's Department of Insurance and \$1.9 million from the federal government's Office of Emergency Services. Other grants included an Anti-Drug-Abuse Enforcement Program Fund, Child Abuse Vertical Prosecution Fund, D.A. Worker's Compensation Fraud Grant Fund, Hi-Tech Identity Theft Program Fund, and Welfare Fraud Investigation Fund. Combined with county funds and money from the Public Safety Sales Tax (known as Proposition 172 funds) the prosecutor's budget for 2007 totaled over \$86 million. The total funding for the Santa Clara County Public Defender Office, Alternate Public Defender Office, and Legal Aid Society of Santa Clara County, which administers an assigned counsel panel to handle conflict of interest cases the Alternate Public Defender cannot represent, totaled only \$42.7 million. *Id.* at 318 n.123.

⁹⁴ *Id.* at 319.

finally restored to the office.⁹⁵ If a prosperous county like Santa Clara can only grudgingly muster the will to provide even basic defense services, the picture appears bleak for the future of indigent defense in counties across the state that are less financially well-endowed.

Excessive Caseloads

The disparity in funding might be less disturbing if Public Defender offices were given adequate staffing to handle the caseloads generated by the prosecution. However, as U.S. Attorney General Eric Holder candidly acknowledged in his keynote address at the 2010 National Symposium on Indigent Defense, Public Defender offices across the country are overloaded with too many cases. California is a prime example. When asked to rate the health of the institutional Public Defender in the county in which they practiced, 73% of private practitioners certified as criminal defense specialists indicated that excessive caseloads were a significant problem for the institutional Public Defender in their jurisdiction.⁹⁶ The majority of Public Defender offices in California carry caseloads that exceed the national standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC).⁹⁷ In Santa Clara County, for example, the Primary Public Defender office staff attorneys were attempting to handle more than 300 felonies annually, which is twice the national standard.

A recent examination of the Los Angeles County Public Defender (LACPD) shows the impact that the excessive caseload crisis has had on

⁹⁵ Aram James, *Public Defender Must Staff Misdemeanor Courts*, SAN JOSE MERCURY NEWS, January 7, 2010; *Public Defender Access Expanded*, SAN JOSE MERCURY NEWS, June, 26, 2010.

⁹⁶ *Systemic Factors*, *supra* note 61, at 286.

⁹⁷ *Id.* at 286 citing NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). Standard 13.12 specifies maximum caseload standards per attorney per year as follows: for felonies (150), misdemeanors (400), juvenile (200), mental health (200), and appeals (25). As the National Study Commission on Defense Services later observed, however, these standards should only be used as a starting point because only an actual workload study can determine the maximum number of cases an attorney can effectively handle given the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation such as prosecutorial charging and plea bargaining practices and judicial sentencing practices.

misdemeanor defendants. Observing the arraignment of misdemeanor defendants, the author reported:

The processing of L.A. citizens in misdemeanor arraignment court is nothing short of Orwellian. Detainees are brought into the courtroom in groups, shackled together in pairs at the wrist, and held in a cage-like enclosure [the 'box'] off to one side of the courtroom during the proceedings . . . and must communicate with the judge through slats.

LACPD misdemeanor attorneys dispose of 1,200 cases per attorney per year, about three times the recommended national maximum. In-court observation supports the conclusion that LACPD's misdemeanor caseload is grossly excessive. . . . Only after their arrival at misdemeanor arraignment court do detainees have the opportunity to speak with counsel for the first time. Police reports are transported along with detainees, so that Public Defenders must await the arrival of their prospective clients before viewing the evidence [against them]. . . . The majority of misdemeanor cases are disposed of by guilty pleas at arraignment. Since detainees generally meet their Public Defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview. Terms of the plea agreement generally include a fee representing recoupment of a portion of the cost of providing Public Defender services.

The author witnessed a group of African American women paraded into the box in groups of six, each shackled to a partner. In order to rise and approach the slats when her case was called, each woman was dependent upon the willingness, or unwillingness, of her partner to rise and take a few steps. Each woman signed a plea agreement, clumsily juggling papers between her free hand and her shackled hand. . . .

The confusion apparent in the L.A. misdemeanor arraignment court is illustrative of an assembly-line type of justice. On one occasion, a male defendant stood in the box, straining to hear the judge, who spoke in a soft voice. The defendant called out, "I can't hear you. I don't know what's going on!" A second defendant, a

female, was informed that her bail would be \$10,000, whereupon she changed her plea to guilty so that she could be released. In the latter case, California's bail bond system⁹⁸ and the defendant's poverty determined the outcome.⁹⁹

Recent news reports reveal that excessive caseloads in several counties have become markedly worse. In June of 2010, for example, it was reported in a "Gideon Alert," published by the National Legal Aid and Defender Association, that both the Sacramento County and San Joaquin County Public Defender offices were operating with caseloads that were two to four times the maximum allowed by national standards.¹⁰⁰

Lack of Investigative Assistance

The maximum attorney caseload standards, moreover, are predicated upon having adequate investigative assistance. Yet over two-thirds (69%) of the presiding Superior Court judges surveyed in the study conducted for the Fair Commission stated that the lack of resources to investigate indigent cases thoroughly was a problem in their jurisdiction.¹⁰¹ Two rural Public Defender offices had no investigator on staff at all and one of those offices reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.¹⁰²

Public Defender offices employing staff investigators reported that their investigators were also laboring under excessive workloads.¹⁰³ The

⁹⁸ To obtain bail the defendant would have had to pay the bondsman 10% (\$1,000) which was apparently more than the fine. L. BENNER, BAIL PROJECT MANUAL, 25, California Western School of Law (2010).

⁹⁹ Nancy Albert Goldberg, *Los Angeles County Public Defender in Perspective*, 45 CAL. W. L. REV. 445, 466-67 (2009).

¹⁰⁰ See David Carroll, GIDEON ALERT: CALIFORNIA COUNTIES EXHIBIT WIDE DISPARITY OF SERVICES, National Legal Aid & Defender Association, available at <http://www.nlada.net/jscri/blog/gideon-alert-california-counties-exhibit-wide-disparity-services>.

¹⁰¹ *Systemic Factors*, *supra* note 61, at 278.

¹⁰² *Id.* at 288 and Figure 6 at 282. Also revealing was the fact that 100% of the institutional Public Defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as "serious." *Id.* at 289.

¹⁰³ *Id.* at 288.

recommended standard is one investigator for every three attorneys.¹⁰⁴ In several counties, however, the ratio was discovered to be as high as eight attorneys to just one investigator. One of these offices handled ten death penalty cases during the year.

As the U.S. Supreme Court has explained, the “core” of the Sixth Amendment right to counsel “has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial.”¹⁰⁵ In *Powell v. Alabama* the Court recognized that the period between arraignment and trial is “perhaps the most critical period” of the proceedings against an accused.¹⁰⁶ Because the majority of felony cases in California are disposed of by guilty pleas that are entered less than 45 days after the filing of charges,¹⁰⁷ the inability of defense counsel to conduct a prompt investigation into guilt or innocence thus amounts to nonrepresentation at this critical investigative stage. Not surprisingly, an analysis of over 2,500 California appellate court decisions involving claims of ineffective assistance of counsel revealed that the failure to conduct an adequate investigation has been a major cause of ineffective representation.¹⁰⁸ By continuing to tolerate excessive attorney and investigator workloads, we continue to run an unnecessary and unacceptable risk that an innocent accused will be wrongfully imprisoned or executed.

It should be noted that the difficulty created by the lack of adequate investigative resources is aggravated by several additional factors. First, virtually all of the Public Defender offices have no contact with an indigent defendant until they are appointed at the arraignment, several days after arrest.¹⁰⁹ This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses who may be favorable to the defense.

¹⁰⁴ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, STANDARD 4.1 (1976).

¹⁰⁵ *Kansas v. Ventris*, 129 S. Ct. 1841 (2009) at 1844-55.

¹⁰⁶ *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

¹⁰⁷ See CALIFORNIA JUDICIAL COUNCIL, 2010 COURT STATISTICS REPORT (covering fiscal year 2008–09) Tables 8a and 10a disclosing that the disposition of 71% of all felony filings in California occurs in less than 90 days, while over half (56%) are disposed of in less than 45 days.

¹⁰⁸ *Systemic Factors*, *supra* note 61, at 277-78, Figure 3.

¹⁰⁹ *Id.* at 290.

Second, as a result of the loss of California's traditional preliminary hearing, occasioned by the passage of Proposition 115, defense counsel no longer have the right to confront prosecution witnesses at a preliminary hearing.¹¹⁰ The statements of witnesses, untested by cross-examination, can simply be presented by a police officer, who may not even have been the interviewing officer.¹¹¹ As a result, the preliminary hearing has become an empty ritual that deprives defense counsel of the ability to make an informed assessment of the prosecutor's witnesses' credibility and, given the limited investigative resources otherwise available to the defense, effectively precludes an intelligent evaluation of the merits of the case against an accused.¹¹² To make matters worse, almost half of the Public Defender offices surveyed by the Fair Commission study reported that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment, prior to the time set for preliminary examination.¹¹³ Where the prosecutor presents a "take it or leave it" offer at this early stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

Perhaps only a defense attorney who has advised a defendant to plead guilty to reap the benefits of a "good deal" — and later discovers that the client was innocent — can truly appreciate the wisdom of the law's command that a defendant should be presumed innocent until proven guilty. When defense counsel, without adequate investigation, recommends that a client pleaded guilty, the weight of that advice can tip the scales and cause an innocent defendant to rationally forego a trial, the outcome of which he believes is a foregone conclusion. Numerous cases have documented that innocent defendants have pleaded guilty to avoid a more severe prison sentence even though the evidence against them was later discovered to be perjured testimony and planted evidence.¹¹⁴ Recognizing the vital role defense

¹¹⁰ *Id.* at 335-339.

¹¹¹ *Id.*

¹¹² While the prosecutor retains the right to call key witnesses, both indigent defense providers and certified criminal defense specialists reported that key witnesses, such as victims and eyewitnesses, were rarely or only occasionally called at a preliminary hearing. *Id.* at 337.

¹¹³ *Id.* at 294.

¹¹⁴ See Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, LOS ANGELES TIMES, Dec. 31, 1999, reporting on the Rampart Division police scandal in Los Angeles

investigation serves in our adversarial criminal justice system, the ABA Standards on Criminal Justice state that counsel has a duty to investigate “the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . regardless of the accused’s admissions or statements to defense counsel.”¹¹⁵ An example demonstrating the necessity for fulfilling this duty is found in the reported case of an innocent juvenile who was charged with armed robbery of a cab driver and tried as a adult:

Footprints in the snow led from the crime scene to the defendant’s family home, where he was arrested and identified by the victim as the robber. Although the youthful defendant expressed his willingness to plead guilty, investigation disclosed that his older brother, who would have faced life imprisonment as a habitual offender, was the actual assailant. The family, believing the younger brother would only be sentenced as a juvenile, had kept silent about the misidentification in order to protect the older brother.¹¹⁶

Prosecutorial Misconduct

“When a prosecutor plays by Machiavelli’s rules and neither judge nor counsel for defense resists, our system and all hope for justice is destroyed.”¹¹⁷

In a thoughtful and revealing book, Arthur Campbell, tells of convicting an innocent man as a young prosecutor. Defense counsel had failed to conduct an adequate investigation, the police had been inept, and Campbell candidly confessed that he perhaps had been overzealous in his prosecution of the hapless defendant because of “my warrior’s will to win.” The story corroborates Foltz’s view that prosecutors, in the heat of an adversarial contest, can become caught up in, as Campbell puts it, “the fighter’s lust

where corrupt officers committed perjury and planted evidence causing numerous guilty pleas to be overturned. *See also* WHEN THE INNOCENT PLEAD GUILTY, The Innocence Project, available at http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php.

¹¹⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 126, Standard 4-1.3(3) (3d ed. 1992).

¹¹⁶ *Systemic Factors*, *supra* note 61, at 289 n.49.

¹¹⁷ Arthur W. Campbell, TRIAL & ERROR: THE EDUCATION OF A FREEDOM LAWYER, VOLUME TWO: FOR THE PROSECUTION, 123 (2010).

for victory” and lose sight of the “spirit of justice” which should properly guide their conduct.¹¹⁸

While intended to be a counterweight to correct this condition, under-resourced and overburdened Public Defenders have not proven to be very successful in preventing the type of prosecutorial abuses Foltz sought to eliminate. Among the litany of unfair prosecutorial practices described by Foltz, many would not be unfamiliar to readers of California appellate court opinions today. A recent study of California appellate cases from 1997 to 2009 documented over 700 instances in which the court found that a prosecutor had committed misconduct.¹¹⁹ In addition to the misconduct found in *People v. Wells*¹²⁰ (interjecting inadmissible evidence for the purpose of prejudicing the defendant), the types of misconduct found by the Misconduct Report ranged from intimidating witnesses to presenting false evidence.¹²¹

Also documented were constitutional violations that would not yet have been established as such in Foltz’s time, including discriminatory jury selection, violating the defendant’s Fifth Amendment right to remain silent and, perhaps most important of all, the failure to disclose exculpatory evidence.¹²² The Fair Commission likewise found substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady*

¹¹⁸ *Id.* at 122. Campbell, after discovering evidence post-trial that exonerated the defendant, corrected the error. *Id.* at 105.

¹¹⁹ K. RIDOLFI AND M. POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 [MISCONDUCT REPORT], Northern California Innocence Project, Santa Clara University School of Law at 3.

¹²⁰ Discussed *Id.* at 3.

¹²¹ See also *Genzler v. Longanbach*, 410 F.3d 630 (2005) detailing allegations in a civil rights case against a San Diego prosecutor for suborning perjury in a murder case. The lawsuit later settled out of court. Confirmed by conversation with Patrick L. Hosey, attorney for Genzler.

¹²² MISCONDUCT REPORT, *supra* note 119, at 25. Prosecutors have a constitutional duty to disclose evidence favorable to the accused, including evidence that could be used to impeach a prosecution witness. *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985).

evidence) and delayed providing even routine information the defense is statutorily entitled to receive in discovery.¹²³

The Misconduct Report concluded:

[P]rosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts' reluctance to report prosecutorial misconduct and the State Bar's failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.¹²⁴

Professional Independence

Gideon v. Wainwright established the right of state criminal defendants to the “guiding hand of counsel at every step in the proceedings against [them].” . . . Implicit in the concept of a “guiding hand” is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.¹²⁵

Clara Foltz thought the Public Defender should be elected to ensure the professional independence necessary to carry out the defense function in an adversary system and guarantee equal stature with the District Attorney. However, with the exception of San Francisco, today all Public Defenders are chosen by county government, sometimes with judicial approval required, and serve at the will of either the county board of supervisors or the county's chief executive officer.¹²⁶

Reginald Heber Smith had been wary of local government control over the provision of civil legal aid and indigent defense services. In *Justice and the Poor*, he wrote: “It is commonplace that many American municipalities possess improper and inefficient governments in which politics play

¹²³ *Systemic Factors*, *supra* note 61, at 279-80.

¹²⁴ MISCONDUCT REPORT, *supra* note 117, at 5.

¹²⁵ *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

¹²⁶ *Systemic Factors*, *supra* note 61, at 299-300, CAL. GOVT. CODE § 27702 (West 2009).

an undue part. It is always a question whether it is safe to entrust an essential service such as legal aid to such a government.”¹²⁷ Smith was here referring to the unfortunate experience he had witnessed with respect to publicly funded legal aid bureaus that were controlled by municipal governments. Initially there had been adequate funding and little political interference.¹²⁸ However, in 1917 several incidents made the dangers of politically controlled legal services manifest. After an election in Dallas, Texas, the new mayor dismissed the department head responsible for overseeing the Legal Aid Bureau and attempted to appoint his personal friend to the bureau. When this prompted a “storm of protest” the mayor abolished the Legal Aid Bureau.¹²⁹ Similarly, in Portland, Oregon, that same year, the attorney who headed the combined legal aid and defender office (established in 1915) had not supported the newly elected mayor. Because the attorney held a permanent civil service appointment and could not be fired, the new mayor simply had the city council abolish the legal aid and defender office.¹³⁰ Smith therefore concluded in 1919 that although the “ultimate goal” was for legal services for the poor to “become part of the state’s administration of justice,” whether they should be publicly or privately funded in the short term was a matter that depended upon local conditions.¹³¹

Smith’s insight that funding and control at the local level makes the delivery of legal services for the poor vulnerable to political interference unfortunately still resonates today almost a century later.¹³² California has

¹²⁷ SMITH, *supra* note 24, at 184.

¹²⁸ *Id.* at 185.

¹²⁹ *Id.* at 185-86.

¹³⁰ *Id.* at 186.

¹³¹ *Id.*

¹³² Although direct interference in the operation of a Public Defender office by county officials would seem unthinkable today, it does occur. Recently, Chief Public Defender Edwin Burnette of Cook County, Illinois, successfully sued the president of the Cook County Board of Commissioners to prevent such interference with management of the Public Defender Office in Chicago. The county board president had unilaterally selected thirty-four assistant public defenders for termination (called lay-offs) and had ordered other staff to take unpaid furlough days. In a unanimous decision, the Illinois Appellate Court ruled that the county board president “lacked the authority to select whom to hire, fire or retain among the public defender’s staff.” *Burnette v. Stroger*, No. 1-08-2908, slip op. at 32 (Ill. App. Ct. Mar. 30, 2009). Unfortunately the

had a sad history of harassment and termination of chief Public Defenders who have had the courage to fight against excessive caseloads. Chief Public Defender Sheldon Portman of the Santa Clara County Public Defender Office, for example, was first reprimanded, then denied a pay raise and finally fired after persistently challenging excessive caseloads. His offense was stating at a public budget hearing that his staff attorneys would be violating their ethical duty to provide competent representation and could face professional disciplinary action if the board did not provide funding for additional lawyers. Although Portman was later vindicated by an ABA Ethics Opinion regarding the duties of defense counsel when faced with an excessive caseload,¹³³ he lost the legal battle over his vindictive firing.¹³⁴

Unfortunately the Portman example is not an isolated incident. A chief Public Defender, who was a member of the Fair Commission, related that at the time they were offered the position, it was made very clear to them that they would be expected to do the job with the limited resources given to them and if they could not, then the board would find somebody else who would.¹³⁵ In research conducted for the Fair Commission, three fourths (73.1%) of the responding institutional Public Defenders reported that county board pressure to keep costs down was a significant problem

courageous Chief Defender paid the ultimate price for this victory. While he was not an “at will” employee, having secured the protection of a contract for a term of years, he was nevertheless at the end of his contract, which was not renewed. See Hal Dardick, *Public Defender Wins Last Case Over Stroger; County Board Chief has Limited Control of Appointee’s Office*, CHICAGO TRIBUNE, Apr. 1, 2009, at C6. Clara Foltz, who believed in the democratic process, would perhaps not have been surprised to learn that county board President Stroger subsequently lost his bid for reelection. Patrick Boylan, *Stroger era ends in Cook County*, NWI.COM, Dec 1, 2010, available at http://www.nwitimes.com/news/local/illinois/article_def_7c4be-8d14-502b-87e3-ee4366014780.html.

¹³³ ABA FORMAL OPINION 06-441: ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION, May 13, 2006.

¹³⁴ See *Portman v. County of Santa Clara*, 995 F.2d 898, 901 (9th Cir. 1993) holding that Portman had no standing to challenge the constitutionality of the “at will” statute on Sixth Amendment grounds, and had no due process rights concerning his termination because as an “at will” employee he had no property interest in his job. See also *Wilson v. Superior Court*, 240 Cal. Rptr. 131 (Cal. Ct. App. 1987) and Gail Diane Cox, *Public Defenders Find Independence Can Be Precarious*, L.A. DAILY J., Feb. 21, 1986 (both describing other similar incidents).

¹³⁵ *Systemic Factors*, *supra* note 61, at 300 n.82.

in their jurisdiction.¹³⁶ The American Bar Association has recommended that to safeguard professional independence, the oversight of a Public Defender system should be in the hands of a nonpartisan board of trustees.¹³⁷ However, none of the institutional Public Defenders in California appear to have the protection of such a board.¹³⁸

WHAT WOULD CLARA FOLTZ THINK OF TODAY'S PUBLIC DEFENDER?

If Clara Foltz could return today to see how her concept for a Public Defender has evolved, she would no doubt be gratified to see how popular and widespread it has become. The majority of California's counties have adopted her basic idea, and for good reason. The institutional Public Defender office is, in theory, the most effective delivery system for providing quality representation in a cost-effective manner. Its capacity to develop and maintain skilled expertise, provide comprehensive training and supervision, and furnish the support services and supportive environment necessary for effective representation is without equal.

At the same time, however, she would undoubtedly be disappointed to find that California's Public Defenders have been denied the independence she sought to ensure. Imagine a district attorney or a judiciary that served at the will of the county board of supervisors. Why should an equally important component of the criminal justice system be treated differently? The lack of independence has been due in part to the failure to make the position of chief Public Defender an elected office as Foltz envisioned, or in the alternative, to insulate it from political pressure by having a governing board of trustees, as the ABA has recommended. The lack of independence has also been a result of the refusal to make the Public Defender available to all

¹³⁶ *Id.* at 299-300.

¹³⁷ ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. These standards, approved by the ABA House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id.*

¹³⁸ *Systemic Factors*, *supra* note 61, at 299.

criminal defendants, as Foltz planned. These omissions have made it difficult for the Public Defender to marshal political support for the institution.

The failure to have a broad base of political support for the Public Defender has of course, as Foltz foresaw, made it more difficult to secure adequate resources. Yet the Public Defender today represents more than 85% of the defendants accused of serious crimes. While the average citizen probably never thinks about whether he or she could afford competent criminal defense representation, a staff attorney from the Public Defender's office is in fact the attorney upon whom innocent middle class citizens must rely for their defense if wrongfully accused of a crime.

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

While Foltz would have been appalled at our current system of plea bargaining, she would have been equally disturbed at the tremendous imbalance between the resources allocated to the prosecution and the system for providing defense services. The fact that on average a Public Defender office receives only about half the resources granted to the District Attorney makes it exceedingly difficult, even given heroic efforts, for the Public Defender to serve as the counterweight that she envisioned would balance the scales of justice. Equally troubling is the glaring disparity *between* counties in their ability and in some cases their willingness to adequately fund indigent defense services.

Nevertheless, the Public Defender has been able to achieve one goal of both Clara Foltz and Reginald Heber Smith: the elimination of the incompetent assigned attorney and the unethical and greedy "shyster" lawyer who preyed upon criminal defendants with limited resources and corrupted the unregulated assigned counsel system. Institutional Public Defender offices have been successful in building a cadre of competent, professional, well-trained career defense attorneys in many jurisdictions across the state. But even here it would appear that the Public Defender has become

a victim of its own success. Making the Public Defender a career office at relative parity with the district attorney in terms of salary, health care and retirement benefits, has caused it to become increasingly expensive.

Efforts by county administrators to curb expenditures on indigent defense have thus taken two approaches. The first option has been to make budget cuts which reduce staff levels and increase the caseloads handled by the Public Defender office. Because Chief Defenders are “at will” employees they risk their jobs (and their healthcare and retirement benefits) if they resist. When courageous chief Public Defenders stand up to this pressure they can either be replaced or the county can move to the second option.

The second approach has been to contract indigent defense representation out to the lowest bidder. While properly regulated contract defenders can provide competent and cost effective services, this system is also open to abuses. The primary contractor winning the bid, can in turn subcontract indigent cases out in lots to individual private attorneys. In this way the entrepreneurial primary contractor can eliminate the overhead expenses necessarily incurred in having a career office. No healthcare or retirement benefits need be provided to subcontracting attorneys who may be just starting out and need the work to help pay their office overhead while they develop their practices. Because such contracts are unregulated, there are no minimum requirements regarding the training or experience levels of such subcontractors. Even where the primary contractor is qualified, at least in terms of experience, that is no guarantee a qualified attorney will actually perform the representation if there is no requirement that the county monitor who is providing the services.

Likewise, in the absence of any regulation, there is no requirement that the attorney providing the representation be currently trained, or supervised or provided with adequate investigative services. Where flat fee contracts are employed, there are built-in incentives to pocket the money that should be used to conduct an adequate investigation and obtain competent experts to assess forensic evidence that has increasingly been shown to be unreliable.¹³⁹ Our criminal justice system should not be reduced to

¹³⁹ See COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES OF SCIENCE, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). See also Harry T. Edwards, *The National Academy of Sciences Report on Forensic*

the status of a bargain basement where unregulated contracting of constitutionally mandated legal services makes possible the return of the inept and the shyster lawyer whom Clara Foltz sought to eliminate by creating a public office that would attract career professionals.

As a result of making funding decisions based upon the presumption of guilt, many Public Defender offices operate under crushing caseloads while an increasing number of counties are cutting costs by providing indigent defense services through unregulated low bid contracts. The dangers existing under both approaches are clear. So are the consequences. During a 15-year period examined by a recent study, courts released more than 200 inmates from California prisons because they had been wrongfully convicted.¹⁴⁰ While this is an astonishing figure, it does not mean that the concept of the Public Defender has been a failure. Nor does it mean that contract defenders cannot provide competent representation. It does, however, mean that reforms are necessary to fulfill the potential of either system to provide the effective assistance of counsel guaranteed by the Constitution.

SOLUTIONS

“I have been a public defender for over thirty years in three different counties. There is a great disparity in the quality of defender services throughout the state.”¹⁴¹

What can be done? The fact that the members of the Fair Commission in 2008 were unable to agree on any recommendation to solve California’s admitted funding crisis in indigent defense services speaks volumes about

Sciences: What it Means for the Bench and Bar, paper presented at the Conference on The Role of the Court in an Age of Developing Science & Technology, Superior Court of the District of Columbia, May 6, 2010, available at [http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/\\$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf).

¹⁴⁰ Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE, November 2004, available at <http://www.deathpenalty.org/downloads/SFMag.pdf>.

¹⁴¹ Comment made by a chief Public Defender from an urban Public Defender office. *Systemic Factors*, *supra* note 61, at 351.

how politically difficult the problem is to solve.¹⁴² It was estimated in 2007 that to bring indigent defense services up to 85% of parity with the prosecution, funding would have to be increased by approximately \$300 million.¹⁴³ The gap between prosecution and defense was widening then and has likely increased substantially since that estimate.¹⁴⁴

A significant portion of the funds needed to improve California's indigent defense system could be found by simply rethinking how we spend our criminal justice dollars and redirecting the cost savings from some of California's current poor choices. There are a number of areas where cost savings could be achieved. These include: (1) abolishing the death penalty, (2) abolishing mandatory minimum sentences, and (3) decriminalizing some non-violent misdemeanor offenses by making them infractions. In addition, fines currently given exclusively to law enforcement should be shared so that an appropriate portion is given to the defense component of the criminal justice system. Finally, the bail system could be reformed so that defendants would pay 10% of the amount of bail to the state rather than a private bail bondsman.¹⁴⁵

While some of these solutions can only be addressed by state legislation, local prosecutors can also exercise their discretion to reduce the number of cases in which the death penalty is sought, and to make appropriate charging decisions. It is clear, for example, that more than a third of the funding needed to improve indigent defense systems in California could be found by simply eliminating the death penalty. The Fair Commission estimated that it costs \$137.7 million annually to maintain the present death penalty system in California. By contrast, only \$11.5 million would be required to handle these same cases if a sentence of life without parole were imposed. Thus, \$126.2 million in current expenditures could be employed to improve indigent defense in California.¹⁴⁶

¹⁴² The Fair Commission essentially punted on this issue by recommending that the California State Bar reconsider the issue by convening yet another commission. CCFAJ FINAL REPORT, *supra* note 62, at 99.

¹⁴³ *Systemic Factors*, *supra* note 61, at 313.

¹⁴⁴ The gap widened from fiscal year 2003–2004 to fiscal year 2007–2007 by 20 per cent. *Id.* at 317.

¹⁴⁵ Illinois, for example, operates such a system. See 38 ILL. COMP. STAT. 110-7 (2009).

¹⁴⁶ CCFAJ FINAL REPORT, *supra* note 62, at 156.

The Fair Commission also considered a proposal to establish at the state level an Indigent Defense Commission similar to those that exist in Texas, Virginia, Massachusetts and Indiana.¹⁴⁷ Such commissions are empowered to set minimum performance and caseload standards and provide reimbursement to counties for meeting those standards. This proposal has been objected to, however, by those who believe that California counties currently funding above such “minimum” standards would cut their funding in a “race to the bottom.”¹⁴⁸ In any event, given the state’s current economic condition (the current 2010 budget deficit is approximately \$20 billion and is projected to rise to \$25 billion by 2012¹⁴⁹) it seems unrealistic to expect that funding for indigent defense services can be shifted to the state. A recent study by the federal Bureau of Justice Statistics of state funded and organized public defender systems, revealed that state funding was no guarantee that adequate resources would be provided. In 15 of the 22 statewide systems, felony and misdemeanor caseloads still exceeded national standards.¹⁵⁰

For over thirty years there has also been a call for federal assistance and the creation of a national Center for Defense Services. In 1977 the ABA Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the National Clients Council, prepared a “Discussion Proposal” for such a Center.¹⁵¹ The basic concept underlying this proposal was an

¹⁴⁷ *Id.* at 99.

¹⁴⁸ *Id.*

¹⁴⁹ Anthony York, *Brown calls Sacramento budget meeting for Wednesday*, LOS ANGELES TIMES, December 2, 2010.

¹⁵⁰ L. LANGTON, D. J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS, 2007, September, 2010, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.

¹⁵¹ THE CENTER FOR DEFENSE SERVICES: A DRAFT DISCUSSION PROPOSAL FOR THE ESTABLISHMENT OF A NONPROFIT CORPORATION TO STRENGTHEN INDIGENT DEFENSE SERVICES, ABA Standing Committee on Legal Aid and Indigent Defendants, October, 1977. Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979, Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA JOURNAL 1629, November 1979.

independent federally-funded granting entity constructed upon the following four principles:

- (1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years,
- (2) financial support should be instituted through a grant in aid program;
- (3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
- (4) the entity administering the program must be independent of any of the three branches of the federal government.¹⁵²

Based upon these principles it would be possible for federal assistance grants to fund a Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is neither accurate nor politically feasible in California, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county. The audit would determine the need for additional attorneys, investigators, and other support personnel by conducting a Workload Assessment. Using methodology similar to that designed by the National Center for State Courts to determine when additional judges are needed, time studies can be employed to create objective data upon which to make evidence-based decisions. Such time studies can translate raw caseload filings into actual workload by measuring real events that accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation, such as prosecutorial charging policies and judicial sentencing practices. By learning how much time it actually takes to handle different types of cases given, on average, their various levels of complexity, it can be mathematically determined how many attorneys will be needed to handle a given mix of cases.

¹⁵² *Id.* at 53-54.

After determining appropriate staffing levels, the center would then certify that a county is in compliance when those staffing levels are met.¹⁵³ Certification would also be conditioned upon the professional independence of the Public Defender being assured either by making the office a nonpartisan elected position for a term of years, or by creating a nonpartisan board of trustees, independent from any of the branches of local government, to oversee the office. While provision would be made to retain the existing chief Public Defender, the board would thereafter be empowered to select the chief Public Defender and only the board would have the power to terminate the chief Public Defender for good cause. The Board would also be authorized to award contracts for indigent defense services that would be governed by the same standards created for institutional Public Defender offices.

Upon satisfaction of these requirements, the county would then be reimbursed for the amount needed to bring the county's indigent defense system into compliance with its own locally established standards. This amount would become an annual subsidy payment to the county. The center would also assist in providing training for new attorneys, investigators, and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty and other appropriate cases.

A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit it to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop the annual subsidy payment. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center. Because this proposed hybrid system would provide each county its own unique workload standard, there would be no race to the bottom.

¹⁵³ The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction.

The argument for federal assistance is compelling especially because it is the federal Constitution that requires the provision of effective assistance of counsel. However, waiting for a federal bailout may also not be feasible in the short term as action is needed now to correct currently existing conditions. In *Ligda v. Superior Court*,¹⁵⁴ the California Court of Appeal stated: “When a public defender reels under a staggering workload, he . . . should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him.”¹⁵⁵ Litigation may thus be the most immediate way to obtain a remedy. As New York’s high court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where “systemic” deficiencies result in the denial of “core” assistance by counsel, despite the nominal appointment of counsel.¹⁵⁶ The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing the indigent defense system was “structurally incapable” of providing legal representation at critical stages prior to trial as required by the Constitution.¹⁵⁷

There are also a number of other systemic conditions that could be reformed such as bringing back the traditional preliminary hearing and improving the discovery rules to ensure prompt and meaningful discovery by the defense. But until we reduce the glaring disparity in resources both between counties and between the prosecution and defense functions, we destroy the promise of the Public Defender that Clara Foltz envisioned to ensure administration of criminal justice honestly and equally for all.

¹⁵⁴ *Ligda v. Superior Court*, 5 Cal.App.3d 811 (1970). The Court stated: “Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds, facilities and personnel for a public defender’s office adequate for the demands placed upon it.” *Id.* at 828. The court was apparently not aware that county administrators would come up with a third option: low bid contracts.

¹⁵⁵ *Id.* at 827-28.

¹⁵⁶ 15 N. Y. 3d, 8, at 22-24, 930 N.E. 2d 217 at 224-226 (2010).

¹⁵⁷ *Hurrell-Harring v. New York*, Brief for Plaintiff Appellants, 8, 2009 WL 6409871 (N.Y.). A multitude of systemic deficiencies were asserted including the fact that in some circumstances misdemeanor defendants were not provided counsel at arraignment. The complaint alleged as an independent claim that attorneys did not have any meaningful contact with their clients nor were investigative services essential to preparing a defense provided.

EPILOGUE

On October 20, 2010, the County of Fresno took the first step toward deinstitutionalizing its primary Public Defender office by issuing the following Request for Proposal:

The County of Fresno is soliciting proposals to provide appropriate and competent primary indigent defense services and associated criminal investigation services to financially eligible persons accused of crime in Fresno County, persons subject to the laws of the juvenile court, and to all those entitled to services of court-appointed counsel in other proceedings (services which have been historically provided by the Public Defender's Office in the Fresno County Superior Court).¹⁵⁸

In fiscal year 2006–2007, the institutional Public Defender had 76 staff attorneys and 19 investigators and was handling both felony and misdemeanor caseloads twice the maximum allowed by national standards. For fiscal year 2010–2011, the office was cut to only 48 staff attorneys and 9 investigators. As a result of such severe budget cuts, the chief Public Defender felt he was ethically obligated to declare the office unavailable to accept new cases and began refusing some new cases, which had to be assigned to private counsel.¹⁵⁹ The County's response was to put all the primary indigent defense services up for sale to the lowest bidder.

Research conducted for the Fair Commission found that the gap in funding between indigent defense and prosecution was significantly larger in counties employing contract defenders and those having an institutional Public Defender office.¹⁶⁰ There was also a statistically significant relationship between the type of provider and the rate at which felony cases were taken to trial: institutional Public Defenders were twice as likely to take a case to jury trial as a contract defender.¹⁶¹ If Clara Foltz were here today she would no doubt sound the alarm as she watched the dismantling of her legacy. ★

¹⁵⁸ COUNTY OF FRESNO, REQUEST FOR PROPOSAL NUMBER 962-4878: PRIMARY INDIGENT DEFENSE, October 20, 2010.

¹⁵⁹ Brad Brannon, *Fresno Co. public defender cuts may backfire*, FRESNO BEE, September 25, 2010.

¹⁶⁰ *Systemic Factors*, *supra* note 61, at 315.

¹⁶¹ *Id.* at 316.