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## Big Law, Public Defender-Style: Aggregating Resources to Ensure Uniform Quality of Representation

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# Big Law, Public Defender-Style: Aggregating Resources to Ensure Uniform Quality of Representation

Eve Hanan\*

## *Abstract*

*Stories abound of public defenders who, overwhelmed with high caseloads, allow defendants to languish in pre-trial detention and guilty pleas to be entered without examining the merits of the case. Most defendants cannot afford to hire an attorney, and, thus, have no choice other than to accept the public counsel appointed by the court. In this Essay, I consider whether Professor Benjamin Edwards' central argument in *The Professional Prospectus: A Call for Effective Professional Disclosure*<sup>1</sup>—that attorneys should provide potential clients with a prospectus disclosing their performance history—applies to criminal defense. I reject the proposition that most people charged with crimes would have better representation if they could choose their attorneys and, to that end, had adequate information about their attorney's past performance. I conclude, instead, that the problem of inadequate criminal defense representation can be better remedied by improving the infrastructure for public defense.*

*Others have argued that large, state-wide public defender offices provide better representation than smaller public defender offices or systems in which private attorneys accept public appointments from the court because large offices can aggregate resources. This essay adds to the discussion of the benefits of large public defender offices in two ways. First, it argues that statewide public defender offices can be evaluated for effectiveness, allowing potential clients and the general public to assess the quality of*

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1. Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 75 WASH. & LEE L. REV. 1457 (2017).

*representation they provide. Adequate information about the effectiveness of the large public defender offices can overcome a common mistake that potential clients make regarding criminal defense—that a private attorney is always more effective than a public defender.*

*Second, statewide public defender offices can use performance data and institutional processes to implement uniform structural and attitudinal changes that insure consistently excellent representation from all attorneys working in the office. The question of access to information about attorney performance is still relevant but should be reframed. It is not a question of how individual clients can evaluate individual attorneys, but of how the public sphere can use the information available to institutionalize excellence in public defense.*

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### *I. Introduction*

A firefighter on leave with a back injury begins taking prescribed opioids. He becomes addicted and loses his job. Several months later, he is arrested and charged with possession of heroin with intent to distribute. He could receive one of the following types of legal representation:

1. An assistant public defender who works on salary for the public defender agency in the county or state where he is charged; or
2. A panel attorney, otherwise in private practice, who receives a fee from the court for representing indigent people charged with crimes; or
3. A private attorney, if and only if, the firefighter or someone close to him can raise the money. This attorney must carry a high caseload because she charges a low hourly rate or a low flat-fee.

The firefighter's choice is limited. If he does not have enough money to hire a private attorney, he will either get the assistant public defender or the panel attorney, depending on the system in place in the jurisdiction where he is prosecuted. If he is indigent but has access to money through family or friends, he may be able to retain a private attorney, but perhaps not the attorney he would choose if he had more money.

Is the problem his lack of choice, or is the problem poverty and poorly funded public defense? If the problem is a lack of choice, the quality of information available to the firefighter is essential. He needs to know which attorneys are competent to defend against drug charges. On the other hand, even a defendant with perfect knowledge of the legal market cannot use that information to choose an attorney if he lacks the financial resources to do so.

In this Essay, I consider whether Professor Edwards' central argument in *The Professional Prospectus: A Call for Effective Professional Disclosure*<sup>2</sup>—that attorneys should provide potential clients with a prospectus disclosing their performance history—applies to criminal defense, an area of legal representation in which 80% of defendants are sufficiently impoverished to qualify for court-appointed counsel.<sup>3</sup> Although I agree with Professor Edwards that information deficits cause some potential clients to choose counsel unwisely, the solution is not to give them more information or even more choice. The root problem in criminal defense stems from chronic underfunding. Because of this, a public

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2. Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 75 WASH. & LEE L. REV. 1457 (2017).

3. Rodney Uphoff, *Convicting the Innocent: Aberration of Systemic Problem?*, 2006 WIS. L. REV. 739 (2006).

system that relies on large public defender offices pooling resources will ultimately provide better representation than a market-based system in which defendants choose attorneys based on enhanced information about their performance.

Since the landmark case of *Gideon v. Wainwright*,<sup>4</sup> states have assembled a patchwork of public defense systems.<sup>5</sup> Two models are common: In the first, the county or state establishes a public defender office that hires attorneys to work full-time as assistant public defenders. In the second, private attorneys, often referred to as “panel attorneys,” accept appointment to criminal cases for an hourly or per-case fee. Some jurisdictions have a hybrid model that consists of both a public defender and a bar of panel attorneys. In 2007, the Census of Public Defender Offices noted that there are over 1,000 state and county public defender offices, including capital units and offices handling conflicts.<sup>6</sup> Twenty-two states have public defender offices either at the county or state level or have a county-state hybrid.<sup>7</sup>

In every respect, states and the federal government have failed to provide adequate resources to ensure that the legal right to counsel is fulfilled in practice.<sup>8</sup> Public defender offices and panel attorneys lack the resources to maintain low caseloads, to train their new attorneys, and to hire the investigators, social workers, and experts. The right to counsel has ensured only a warm body standing in the courtroom. It has not ensured zealous representation in any meaningful sense.<sup>9</sup>

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4. 372 U.S. 335, 344 (1963).

5. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 (2016), <https://www.bjs.gov/content/pub/pdf/saids13.pdf>.

6. *Data Collection: Census of Public Defender Offices (CPDO)*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=401> (last visited Mar. 9, 2018) (on file with the Washington and Lee Law Review).

7. *Id.*

8. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (surveying and discussing numerous reports, which concluded that defense funding is “drastically underfinanced”).

9. Defendants have a right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Practitioners and legal scholars have criticized the *Strickland* standard as providing an inadequate means to address indefensibly bad representation of indigent defendants. See generally, e.g., William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal*

To be sure, there are many zealous, hardworking, and effective defense attorneys in every system of public defense, often laboring without the benefit of resources that they merit. There are also excellent public defender offices, which have the resources to keep caseloads low so that their attorneys can mount an effective defense for their clients.<sup>10</sup> I had the honor of working for some of the best—the Public Defender Service for the District of Columbia, the Committee for Public Counsel Services in Boston, and, most recently, as a strategic litigation planner for the Maryland Office of the Public Defender. But the overall impression of public defenders, and one that is confirmed in post-conviction litigation where their mistakes are documented, is that many attorneys providing public defense are too overworked, underpaid, and psychologically defeated to competently represent their clients.

Much has been said, written, and debated about the problem of bad representation for poor defendants. Some consider it a problem of funding, or of funding combined with a public defender culture of complacency.<sup>11</sup> Others frame the problem as a failure to create incentives, through market-based competition, to motivate public defenders to compete for clients.<sup>12</sup>

In this Essay, I first discuss how information deficits may harm criminal defendants in their limited choice of counsel, using the case of our hypothetical firefighter described above. I examine what information is lacking and whether it is feasible to provide the defendant with the information he would need to choose wisely. After concluding that it would be exceedingly difficult to arm this defendant with the information he would need to choose a private

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*and Practical Undermining of the Right to Counsel*, 4 WM & MARY BILL RTS J. 91 (1995).

10. PAUL BUTLER, CHOKEHOLD 212 (2017). Professor Butler notes that Washington D.C., the Bronx, Harlem, San Francisco, Miami, Oakland, Philadelphia, West Palm Beach, Seattle, New Hampshire, and Colorado have well-regarding public defender offices. This list is not, in my experience, exhaustive. From my professional experience, I would include the Maryland Office of the Public Defender and the Clark County Public Defender in Nevada. I am sure there are more.

11. *See, e.g.*, Eve Brenske Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1806–12 (2018) (discussing the relationship between under-funding and office culture in public defender offices).

12. *See generally, e.g.*, Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO J. CRIM. LAW 505 (2015) (arguing that free enterprise incentives could improve indigent defense).

attorney, I turn to a discussion of the alternative—investing resources to build and improve state-wide public defender offices that ensure attorney quality through shared resources and oversight.

While discussing attorney performance, it is important to keep in mind that good lawyers are not the panacea for harsh and unjust criminal and immigration laws. While attorneys can sometimes tilt the scales into equipoise against the well-resourced state and its powers of prosecution, many criminal defendants do not stand a chance of winning, even with the assistance of an excellent attorney. If we want less harsh outcomes in their cases, we need to change the laws and hold prosecuting agencies accountable for their charging decisions.

### *I. Defendants Who Have a Choice*

#### *A. To Hire or Not to Hire*

Many people who may qualify for a public defender may, through sometimes heroic efforts, rally the money to hire a private attorney. Consider our hypothetical client, the firefighter described above. He is indigent, because he is unemployed and has no assets, but some members of his extended family are middle class. Imagine he was charged in a jurisdiction where indigent defendants are represented by a state-wide public defender office. The office has investigators and social workers on staff and provides attorneys with regular training, oversight, and mentorship. Within forty-eight hours of appointment, the assistant public defender assigned to his case files a motion to have the judge lower his bail amount, sends an investigator out to interview witnesses, and asks her staff social worker to develop a treatment plan that will be included in her proposed plea deal.

When the firefighter's extended family finds out about the case, they mortgage their home to hire a private attorney who assures the family that she can get a better deal than the public defender. The private attorney does not visit the defendant in jail after the retainer agreement is filed. She does not file a bail appeal or return the family's phone calls. At the next court date, the private attorney tells the defendant that he should plead guilty to

whatever the prosecutor offers because he had enough heroin in his possession to support a conviction for distribution. The defendant asks about a social worker evaluation for treatment, but the attorney tells him that retaining a social worker is expensive, and there is no time.

What happened? As a public defender practicing in Boston, I witnessed this predicament. In many ways, it reflected the information deficit that Professor Edwards describes. It also reflected *misinformation*. The public view is that public defenders are the equivalent of having no attorney at all.<sup>13</sup> This reputation stems from the reality of many public defender offices, where chronic underfunding prevents good lawyering and destroys morale.<sup>14</sup> But it did not apply to the public defender office described, which was providing our firefighter with competent representation.

Here are four common errors that reflect information asymmetry between the legal professionals and potential clients facing criminal charges:

1. Hiring a private attorney in a county or state that has a great public defender
2. Hiring a private attorney without knowing that you will be charged out of pocket for expenses such as investigators and experts, expenses you cannot afford
3. Hiring a private attorney who is well-regarded in some areas of practice yet has no practical experience with the type of crime with which you are charged or in the courthouse where you face trial
4. Hiring an attorney without knowing that he has a horrible reputation among his peers.

The first two errors require generalized information to correct. The second two errors require specific information about the individual

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13. See, e.g., Matthew Yglesias, *What If George Zimmerman Had A Public Defender?*, SLATE (July 15, 2013, 8:09 PM), [http://www.slate.com/blogs/moneybox/2013/07/15/zimmerman\\_what\\_if\\_that\\_matters\\_what\\_if\\_he\\_d\\_been\\_poor.html](http://www.slate.com/blogs/moneybox/2013/07/15/zimmerman_what_if_that_matters_what_if_he_d_been_poor.html) (last visited Apr. 22, 2018) (imagining that a public defender would have been unable to mount a successful defense for George Zimmerman, and, instead, would have provided ineffective legal advice) (on file with the Washington and Lee Law Review).

14. See Primus, *supra* note 11, at 1783–87 (discussing the inadequacy of various public defender funding schemes).



attorney considered for retention. All four are areas of information that are, for the most part, ill-suited to inclusion in the prospectus-style disclosure that Professor Edwards suggests.

The first two errors could be corrected by providing general information about the quality of the public defender office, rather than through specific information about each individual attorney practicing in the jurisdiction. How can the public learn the relative value of the local public defender office? The widespread belief that *any* paid attorney is better than a public defender is based on a stereotypical view that lawyers become public defenders only when they have failed in private practice. When I was a public defender, a frequent compliment I received from clients was, “you are good enough to be a paid lawyer!”<sup>15</sup> (I simply said, “thank you.”)

Before mortgaging a home or borrowing money from relatives, defendants should know the quality of the public defense in their jurisdiction and that private attorneys may only be able to afford to charge low fees by carrying a high caseload, resolving cases quickly, and minimizing spending on investigators and experts. In contrast, the indigent defendant is entitled to public funds for necessary investigation and expert opinions.<sup>16</sup> Potential clients should also know whether people represented by private attorneys serve shorter sentences than people represented by public defenders in their county or state.<sup>17</sup>

This information deficit is surmountable, in part because it is easier to assess the quality of public defender offices than private attorneys. As Professor Edwards notes, it is easier for a potential client to learn the reputation of a large law firm than to grasp the differences in reputation and quality among many solo

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15. Clients also perceive that public defenders have a conflict of interest because they are paid by the same government that is prosecuting the case. This is a real concern in some jurisdictions where public defender independence is compromised by pressure from the court or the public to expedite cases and operate on reduced budgets. *See generally* Primus, *supra* note 11, at 1789.

16. *See generally* Ake v. Oklahoma, 470 U.S. 60 (1985) (finding that an indigent defendant is entitled to funds for expert necessary to ensure Sixth Amendment right to defense).

17. One study concluded that defendants with paid attorneys receive shorter sentences, but study results will likely vary depending on both the quality of the local bar and the quality of the public defender's office. *See generally* Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by The Marginally Indigent*, 3 OHIO ST. J. CRIM. L. 241, 242 (2005).

practitioners or small firms.<sup>18</sup> Moreover, fifteen states now have *Indigent Defense Commissions* charged with reviewing the quality of public defense.<sup>19</sup> The model could be replicated in other states, and the findings of the commissions' studies could be made available to defendants in the courthouse and the jail.

Turning to the second two information errors, which relate to the quality of the individual attorney, it must first be noted that the variability among the private defense bar is great. And, it is not always apparent who is the best attorney for the case. Often the best lawyer for a case is not the most prestigious lawyer in the field, but the lawyer who has handled similar cases in the same courtroom. Using the example of Mike Tyson's rape trial, Professor Paul Butler points out that an expensive attorney at a big firm who has not tried rape cases may be less effective than a more reasonably priced solo practitioner who has tried many rape cases in the same courtroom.<sup>20</sup> This example shows that even a defendant with ample resources may be at a disadvantage when trying to assess whether an attorney is experienced and competent in a particular kind of case. Here, a prospectus that includes the kinds of cases the defense attorney handled in the past and how many cases went to jury trial could be helpful.

The final information problem is one that I witnessed in court many times and always with distress. It is the local lawyer who is experienced—perhaps brags of the hundreds of jury trials he has handled—but whom everyone on the courthouse agrees is a spectacularly ineffective lawyer. Although I am attracted to the idea of a prospectus or pamphlet could alert defendants to this attorney's limited skills, a prospectus could not capture the kind of information that would protect against this error. The defense attorney would disagree vigorously with his peers' assessment of his representation. It would be difficult, if not impossible, to turn the legal community's opinion of the attorney's general courtroom performance and negotiation skills into data points collected in a prospectus.

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18. Edwards, *supra* note 1, at 1484–85.

19. See generally Jennifer E. Laurin, Gideon By the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense, 12 OHIO ST. J. CRIM. L. 325, 337–38 (2015).

20. See generally BUTLER, *supra* note 10, at 212.

*B. Information Delivery Issues*

The information that could be included in a prospectus would not be sufficient to determine whether the attorney is good, only whether the attorney is a charlatan. It seems almost too easy to say that potential clients want to know and should know about an attorney's past suspensions from practice, censures by the state bar, and judicial determinations of ineffectiveness. But this, like licensure itself, seems to set the bar too low. A good lawyer is not just a lawyer who has never faced public censure.

Moreover, some of the metrics of public censure are imprecise. Disclosing all bar complaints, for example, may result in false positives, that is, falsely determining that a lawyer is inadequate because of a bar complaint. Former clients may file bar complaints that lack merit.<sup>21</sup> Likewise, ineffective assistance of counsel claims may result in false negatives or positives. They may falsely suggest no problems with the attorney because few reviewing courts find defense counsel ineffective. The standard for winning an ineffective assistance of counsel claim is so onerous that even meritorious claims are denied because the attorney error is deemed unlikely to have changed the outcome of the trial.<sup>22</sup> Attorneys may sleep through portions of the trial and still be deemed "effective."<sup>23</sup> Conversely, counting the number of ineffective assistance of counsel claims without regard to their resolution may result in false positives because almost every post-conviction proceeding involves at least one claim of ineffective assistance of counsel. There is always something more the trial attorney could have done. It would take an experienced criminal defense attorney to comb through the cases to determine how each claim reflects the attorney's competence. This is more than a prospectus can do.

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21. See Edwards, *supra* note 1, at 1499 (noting that this problem occurs in criminal defense).

22. See generally Strickland v. Washington, 466 U.S. 668, 685 (1984).

23. See Muniz v. Smith, 647 F.3d 619 (6th Cir. 2011) (noting that defendant failed to demonstrate ineffectiveness of his defense counsel, who slept through portions of the trial).

Other quality metrics are perplexing as well. Requiring a lawyer to provide a record of wins and losses is difficult in the criminal context. Most criminal cases resolve through plea-bargaining.<sup>24</sup> This makes it impossible to calculate “win rates.” It may also penalize attorneys who are willing and able to go to trial. In the context of criminal defense, being willing to try a “loser” can be an indication of good lawyering. It signals that the attorney is willing to follow her client’s wishes to hold the government to its burden of proof.<sup>25</sup>

Both the bar complaint and ineffectiveness claims and the wins versus losses ratio metrics pose the threat of unintended consequences. An attorney concerned that he must proactively disclose all bar complaints may stop representing “difficult” clients, including clients with mental health issues who are at high risk of incarceration for behavior that is better addressed through mental health treatment.<sup>26</sup> If an attorney knows that her ratio of wins to losses at trial must be provided up front to any client, she may strenuously press her clients to take plea deals to avoid a loss.

Other forms of information about quality of representation, like time spent with clients, researching, conducting investigation, and overall hours per case, present problems of capture. This information is typically gleaned in the interview process.<sup>27</sup> As Professor Edwards points out, potential clients are unlikely to seek out the relevant information. Few defendants will properly question their potential counsel and, if they do, the answers may be incomplete and falsely reassuring.

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24. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (noting that between 94% and 97% of criminal cases resolve in guilty pleas).

25. There are no “frivolous” assertions of the presumption of innocence in criminal cases.

26. Approximately 64% of jail inmates suffer from mental illness. KIDEUK KIM ET AL., URBAN INST., *THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM: A SCAN OF PRACTICE AND BACKGROUND ANALYSIS* (2015), [www.urban.org/sites/default/files/publication/48981/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf](http://www.urban.org/sites/default/files/publication/48981/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf).

27. BUTLER, *supra* note 10, at 213–14. Professor Butler advises defendants to interview their potential attorney about their experience with similar cases, as well as the attorney’s speed and thoroughness in returning calls and keeping clients apprised of developments in their case. Professor Butler also suggests that defendants should ask the lawyer for three references of former clients and call them. *Id.* at 214.

Attorneys could report this information in a prospectus, but how will it be confirmed? An interesting idea would be to audit the data presented on the prospectus by random checks. The state bar could do this using data-scraping software attached, temporarily, to the attorney's case-management software to trap data on hours, motions filed, and sentence imposed after negotiated plea. Of course, data collection from case management software raises issues of confidentiality and inadvertent waivers of attorney-client privilege that would have to be addressed before implementation.

In summary, even in cases in which the defendant can hire a criminal defense attorney, it is very difficult to think of how to give the potential client the information needed to make an informed choice. While a prospectus could provide some information about the quality of past representation, it poses problems both in terms of content and feasibility. Most importantly, a prospectus fails to address the most significant issue for most defendants in criminal cases, which is the problem of poverty. Most defendants have their freedom to choose curtailed by poverty, not by a deficit of information.

### *III. Big Law, Public Defender-Style*

The best way to ensure competent and zealous representation is through state-wide public defender offices—big law, public defender style. Studies demonstrate that public defenders are more effective than panel attorneys, and state-wide public defenders are more effective than county-based public defender offices.<sup>28</sup> In the world of public defense, bigger is better.

State-wide public defender offices can pool resources, both financial and intellectual, and institutionalize a culture of zealous advocacy.

#### *A. Pooling Resources*

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28. James M. Anderson & Paul Heaton, *How Much Difference Does A Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes* (RAND Corporation working paper, WR-870-NIJ, 2011) [https://www.rand.org/content/dam/rand/pubs/working\\_papers/2011/RAND\\_WR870.pdf](https://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf).

The size and structure of public defender offices make them better able to marshal both the resources and the culture of excellence necessary to ensure that the defendants receive zealous representation. Even chronically underfunded public defenders have the means of sharing resources that rely on human capital and wisdom. Senior attorneys can mentor new attorneys; briefs and motions can be stored and shared. Many offices have a staff attorney with special training and experience in forensic science, as well as social workers to write sentencing recommendations and release plans.

Compare the ability to pool resources in a public defender office to the common situation faced by panel attorneys who may receive a flat fee per case or a low hourly rate that is capped at less than \$1000. The limited fee encourages the panel attorney to accept the maximum number of cases, and to do the minimum amount of work on them.<sup>29</sup> This is not greed; it is keeping the office lights on. Many panel attorneys cannot sustain a practice without taking on hundreds of cases at a time. Panel attorneys may be excellent, and, when they are, it is because they believe in and take pride in the work they are doing, not because they are adequately compensated. It is no surprise, then that, on average, public defender offices outperform panel attorneys, at least according to one analysis of the federal system.<sup>30</sup>

Whether panel attorney practice could be improved through market-based incentives is currently being tested.<sup>31</sup> Defendants who are unable to afford an attorney may choose from a list of panel attorneys. It remains to be seen whether competition for court appointment will raise the standard of practice or whether, instead, the chronic underfunding of the entire panel system will keep the level of practice sub-optimal. Market-based solutions have some appeal but are often inappropriate in contexts where uniform performance is desirable and limited public funds make

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29. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 *YALE L.J.* 154, 196 (2012) (calculating that a zealous and thorough defense attorney would make approximately \$2 per hour under the flat-rate fee in Philadelphia).

30. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), <http://www.nber.org/papers/w13187>.

31. Schulhofer, *supra* note 12.

the pooling of resources more efficient than hoarding of resources by individual attorneys seeking to beat their competitors. If nothing else, competition among panel attorneys raises the concerns posed by information asymmetries. Defendants pick panel attorneys from a list but have limited information about attorney performance. As discussed above, it is exceedingly difficult to provide the relevant information in a prospectus or otherwise.

It is important to note that pooling resources is not a panacea for chronic, pervasive underfunding. The New Orleans Public Defender Office, for example, reported that its attorneys have such a high volume of cases that, given their limited size, each attorney can spend just seven minutes on each case.<sup>32</sup> As a midsized, county public defender office, the New Orleans Public Defender is still in a better position to advocate for more funding than panel attorneys or small public defender offices. In recent years, some public defender offices have used their power to gather data supporting increased funding and decreased caseloads. Public defender offices can commission workload studies, which can then be used in legislative advocacy and litigation designed to ensure defenders have manageable workloads.<sup>33</sup> The chief public defender can use the workload studies to argue for legislative change, or as part of a system-wide litigation effort to reduce caseloads through increased public defender funding.<sup>34</sup> Although far from easy, the task of leveraging data to advocate for increased funding is more likely succeed when advanced by a large institutional actor like a state-wide public defender.

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32. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21–22 (2009).

33. Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 420–422 (2017) (describing new methods of workload assessment developed through the Missouri Project workload study).

34. See, e.g. Della Hasselle, *New Orleans Public Defenders to Judge: Stop Assigning Us New Cases*, AL JAZEERA AM. (Nov. 24, 2015), <http://america.aljazeera.com/articles/2015/11/24/neworleans-public-defenders-to-judge-stop-assigning-us-new-cases.html> (last visited May 4, 2018) (on file with the Washington and Lee Law Review).

*B. Fostering Cultures of Excellence*

The big-firm size of public defender offices results in the gravitational pull of organizational culture.<sup>35</sup> The culture can be toward zealous advocacy, but that is certainly not always the case. Even if they joined the public defender's office eager to defend the rights of the accused and protect the Constitution, "cynicism and disillusionment" can set in and, ultimately, can become part of the culture of the office.<sup>36</sup> As Professor Primus puts it, the pressures of the criminal justice system can take attorneys intending to be zealous advocates and "beat the fight out of them."<sup>37</sup>

The pull of organizational culture can be an asset as well. Large public defender offices have extraordinary potential to create an environment in which attorneys receive support, encouragement, and motivation to continue to fight zealously for clients who are reviled by the rest of the courtroom professionals. They can standardize and institutionalize training that teaches practical litigation skills as well as the public defender values of zealous advocacy and collaboration among attorneys within the office. The nonprofit, Gideon's Army, an initiative of MacArthur Genius Award recipient Jonathon Rapping, has rallied public defender offices and supported the training of law students eager to provide equal justice through public defense. As the culture of the office shifts, attorneys who do not demonstrate this may be pushed out by cultural norms or fired. The reputation of the agency is enhanced, resulting in more applications from qualified attorneys interested in joining the office. As a result of personnel changes, uniform training, and attitudinal shifts in the organization, a public defender office can ensure quality criminal defense services with relatively low variability in quality among its staff attorneys.

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35. See generally Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008).

36. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 85 (1995).

37. Primus, *supra* note 11.



*C. Reframing the Need for Information*

The question of adequate information about attorney performance is relevant but should be reframed. It is not a question of how individual clients can evaluate individual attorneys, but of how the public sphere can use the information available to institutionalize excellence in public defense. First, policymakers and lawmakers who create and fund public defender entities need information about what works and how best to fund it. In this regard, great headway has been made in the last fifteen years through the indigent defense commissions described above and other state efforts. Public defender performance can be measured against benchmarks such as the American Bar Association's Ten Principles of a Public Defender Delivery System, which describes the principles that a public defender agency "should embody in order to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."<sup>38</sup>

Second, public defender agencies need to use all available internal resources, as well as external consultants, to get feedback on the quality of representation they provide. The public defender agency has the best access to information about its attorneys. It can court watch, review case files, and even interview former clients. Rather than expecting members of the public to discover the good and bad attorneys, the public defender can simply fire the bad ones. Moreover, it can address structural problems within the agency that impede quality representation.

Third, defendants and their families should be provided with a rating of their local public defender agency. Perhaps this is where a prospectus would be helpful—not to provide information about individual lawyers, but to provide a rating of the public defender agency as an institution. While most public defender clients are not free to choose their lawyer, providing clients with an honest

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38. AM. BAR ASS'N, 10 PRINCIPLES OF A PUBLIC DEFENDER DELIVERY SYSTEM (2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf); see also *ABA Ten Principles of a Public Defense System*, NAT'L LEGAL AID & DEFENDER ASS'N (2010), [http://www.nlada.net/library/article/na\\_abatenprinciples](http://www.nlada.net/library/article/na_abatenprinciples) (last visited Dec. 13, 2017) (on file with the Washington and Lee Law Review).

appraisal of the quality of representation offered by the public defender will go a long way toward dispelling myths about public defenders and helping clients decide whether to call on outside resources to hire a private attorney. It may also encourage the general public to pressure their lawmakers to increase funding for public defense.

#### IV. Conclusion

While the phrase, “knowledge is power,” is often true, it is a complex truth when it comes to selecting an attorney. It is difficult to get the necessary information, most of which could not be summarized in a prospectus. More importantly, most defendants, even when equipped with accurate information, lack the funds to hire the attorney of their choice. Thus, although many defendants who are unable to hire an attorney acutely feel the predicament of their lack of choice, the root problem is one of resources, not deficits in information and choice. This may be true in Professor Edwards’ example of the immigration context as well. Only 37% of noncitizens in removal proceedings and 14% of noncitizens in detention in removal proceedings hire counsel.<sup>39</sup> Many immigration clients do not have the ability to retain counsel of their choice, and may be priced out of retaining successful attorneys who charge higher rates.

There is still something to be said for the public sphere. As we watch school systems dismantled in favor of decentralized, competing schools and reimbursement schemes for private education, it is worthwhile to remember that institutions bring stability, identifiable culture, and pooled resources that can prevent waste through duplication. Big law, public defender-style works. We have examples that could be replicated throughout the country to increase access to equal justice. Big law, public defender style, could work for immigration too. The idea has been widely discussed and may gain public support, even in the absence of a

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39. INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf). Detention results from, *inter alia*, financial inability to pay a bond. *Id.* at 31.

constitutional mandate.<sup>40</sup> Immigration defender offices could be set up as a matter of policy, and, in some places, they have.<sup>41</sup>

As a final note, it is important to remember that better attorneys are only part of the solution. Bad outcomes in court are often the product of harsh laws more than poor representation.<sup>42</sup> If defendants face lengthy mandatory minimum sentences, they are virtually forced to plead guilty to any offer the prosecutor makes, regardless of the quality of their defense attorneys. The real solutions lie with the prosecutors, who are beginning to exercise their discretion to be “smart on crime,” rather than simply “tough on crime,”<sup>43</sup> and lawmakers who could decriminalize nonviolent misdemeanors and reduce maximum punishments so that defendants can exercise their right to trial without fear of quadrupling their exposure to prison time.<sup>44</sup> Good lawyers matter, but fair laws matter too.

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40. See generally, e.g., Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013) (discussing issues related to establishing public immigration defense).

41. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Immigration Court*, 164 U. PENN. L. REV. 1, 4–5 (2015) (noting advocacy for immigration public defense from judges, lawyers, and policy makers).

42. See generally, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

43. Maura Ewing, *Philadelphia's Top New Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018), <https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html> (last visited Apr. 12, 2018) (on file with the Washington and Lee Law Review).

44. Misdemeanor statistics are staggering. They account for 80% of state court dockets. It is difficult to overstate how dramatically they affect both defendants and lawyers for the poor. See generally, e.g., Brian Altman, *Improving the Indigent Defense Crisis Through Decriminalization*, 70 ARK. L. REV. 769 (2017); Alexandra Nataposs, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015).