

Impediments to Independence: How the Workplace Culture of Public Defender Offices Negatively Affects the Representation of Indigent Defendants

MILLAN DAS*

INTRODUCTION

The Constitution guarantees an individual charged with a crime “the Assistance of Counsel for his defense.”¹ This right is a vital protection of civil liberties. This right is and should be more than the right of the accused to have a lawyer stand next to them as they plead guilty. Yet in many places across the United States, attorneys appointed to defend those who cannot afford one of their own are administrative formalities rather than zealous advocates.

Though the Sixth Amendment was ratified in 1791, it was not until 1963 in *Gideon v. Wainwright* that the right to counsel was enforced against the states, requiring them to provide attorneys to represent indigent defendants charged with felonies.² In 1972, the right was extended to those charged with misdemeanors punishable by imprisonment.³ The *Gideon* Court noted that “any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴ It emphasized the right to counsel as a “safeguard designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”⁵

The deprivation of one’s liberty by incarceration is a serious matter; as such, the government’s obligation to provide indigent defendants with counsel is correspondingly essential to a legitimate and fair justice system. The right to counsel is not a mere formality. The responsibility of appointed counsel is more than signing off on guilty pleas. Criminal defendants in the United States have the constitutional right to effective assistance of counsel,⁶ free of conflicts

* J.D., Georgetown University Law Center (expected May 2020); B.A., Villanova University (2017).
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1. U.S. CONST. amend. VI.

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

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

4. *Gideon*, 372 U.S. at 344.

5. *Id.*

6. *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that the Sixth Amendment is violated when defense counsel’s performance falls below an objective standard of reasonableness, giving rise to a reasonable probability that the outcome would have been different had counsel’s performance been adequate).

of interest.⁷ Although these decisions helped give substance to the meaning of the right to counsel, these “safeguards” against injustice envisioned by the *Gideon* Court have largely been inadequate in ensuring the fairness of the criminal justice system.

More than fifty-five years have passed since *Gideon* was decided. In that time, commentary on the state of indigent defense at the local and state level has largely been in agreement—most jurisdictions do not adequately provide for their public defenders.⁸ This Note will seek to explain what sorts of structural and cultural problems interfere with the independence of public defenders in providing indigent defendants effective representation. It is all too common that overworked public defenders who seek to effectively represent their clients by reducing their caseload to manageable levels face obstacles in the forms of unresponsive superiors and a hostile workplace environment.⁹ It is of the utmost importance that a lawyer’s judgment in representing her clients is guided by ethical principles and not by adverse interests—anything less would demean the legal profession.

Part I of this Note will discuss the problematic elements of the organization of indigent defense systems across the country. It will focus on how public defender offices are assigned cases; how the office is subjected to administrative oversight; and the means by which public defenders are remunerated (or not). In Part II, this Note will attempt to use organizational sociology to argue that many of the structural elements of indigent defense systems discussed in Part I—especially those related to the leadership of defender offices—create and perpetuate an office culture hostile to the independence of attorneys in their representation of indigent clients, one that saddles attorneys with unmanageable caseloads and violates the rules of professional conduct. This Note will conclude that, until structural reforms are enacted to ensure that their leadership is free from corrupting influence and their independence is protected, public defender offices will continue to force attorneys to neglect their ethical obligations. Such structural reforms include establishing independent oversight boards, enacting standardized procedures for

7. *Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding that the Sixth Amendment is violated when trial court fails to inquire into potential conflicts of interest in defendant’s representation).

8. See, e.g., Nat’l Ass’n of Criminal Defense Lawyers, *Federal Indigent Defense 2015: The Independence Imperative* (2015) [hereinafter *The Independence Imperative*]; Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011); Nat’l Right to Counsel Comm., *The Constitution Project, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> [<https://perma.cc/SCK3-QATZ>] [hereinafter *Justice Denied*]; Am. Bar Ass’n Standing Comm. on Legal Aid & Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<https://perma.cc/UN7A-NLTQ>] [hereinafter *Gideon’s Broken Promise*]; Allen K. Butcher & Michael K. Moore, *Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas* (2000), available online at <https://www.prisonpolicy.org/scans/last.pdf> [<https://perma.cc/886C-CYUD>] [hereinafter *Muting Gideon’s Trumpet*].

9. See *id.*

attorney appointment and compensation, and insulating the institutional leadership of public defender officers from undue political influence.

I. ORGANIZATION OF INDIGENT DEFENSE SYSTEMS

The structures of indigent defense systems vary widely across the United States.¹⁰ Some are organized and funded at the county level, others at the state level. Some jurisdictions have institutional public defenders, some have contracts with individual lawyers or law firms to represent indigent criminal defendants, and others maintain panels of attorneys that are appointed by judges.¹¹ However, many systems employ similar organizational practices and thus are afflicted with similar flaws and potential conflicts. Section A of this Part will discuss the problematic elements of how public defenders are paid. Section B will discuss problems with the appointment process and the conflict of interests created in the budget process.

A. STRUCTURAL PROBLEMS OF PUBLIC DEFENDER PAYMENT

The underfunding of public defender offices is not a new or isolated problem. The budget for indigent defense services often pales in comparison to budget allocation for the prosecutor's office, even when one discounts the additional support provided by the police department and other government resources.¹² Professor David Rudovsky notes that the lack of funding, while constitutionally problematic, is not especially surprising, as "... criminal defendants are among the most disliked and politically powerless constituencies in our polity. Indeed, as the criminal justice system expanded in terms of prosecutions and rates of incarceration, defender offices were easy targets for budget-cutting legislators."¹³

Political expediency may be the Occam's razor that explains the widespread failure to live up to the promise of *Gideon*. However, even if there were a generally adequate level of funding for indigent defense, the means by which that money is disbursed creates a cultural problem within public defender offices. Subsection 1 describes the problems with defender contracts; subsection 2 discusses the problems with defenders' requests for vouchers and additional fees.

1. FLAT-FEE CONTRACTS DISINCENTIVIZE VIGOROUS REPRESENTATION

Many jurisdictions have contracts with lawyers or law firms to provide indigent defense services.¹⁴ These contracts are awarded to the lowest bidder and

10. See Nat'l Legal Aid & Defender Ass'n, Evaluation of Trial-Level Indigent Defense Systems in Michigan ii (2008) [hereinafter NLADA Evaluation].

11. See *id.*

12. Justice Denied, *supra* note 8, at 62.

13. David Rudovsky, *Gideon* and the Effective Assistance of Counsel: The Rhetoric and the Reality, 32 Law & Ineq. 371, 373-74 (2014).

14. See NLADA Evaluation, *supra* note 10, at 27 (discussing the contracts for public defenders in Wayne County, Michigan).

often pay a fixed amount, regardless of the number of cases to which they are assigned. The National Legal Aid & Defender Association, in a report evaluating Michigan's indigent defense system, succinctly described the ethical problem such a contract system can create:

In low-bid, flat-fee contract systems an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer's ethical duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit.¹⁵

A cap on the payments a public defender may receive, without respect to the number of cases to which she is assigned or their difficulty, is effectively a cap on how much time and effort she can be expected to give. Without a contractual provision allowing for an increase in compensation for an increased caseload or for complex cases that require additional resources and man-hours, defenders who do more than the bare minimum effectively subsidize the government's obligation to provide counsel for those who cannot afford it.

Those who pursue a career in criminal indigent defense, no matter how altruistic their intentions, can realistically only put in so many additional hours of work without being paid. Given the lack of political will to allocate sufficient funding to indigent defense and the fact that contracts are awarded to the lowest bidder, there is a strong financial disincentive for public defenders to engage in even adequate representation, let alone zealous advocacy.

2. VOUCHER AND FEE APPROVALS ARE SUBJECT TO JUDICIAL APPROVAL

Many jurisdictions maintain a panel of qualified attorneys from which judges appoint individual lawyers to cases. As opposed to attorneys employed through the contract model discussed earlier,¹⁶ panel attorneys appointed to cases are paid at an hourly rate.¹⁷ In addition to their base wages, panel attorneys also request vouchers and fees for additional expenses incurred. These requests are either approved or denied by the same judges responsible for appointing the attorneys to cases and before whom the attorneys are expected to appear in court.¹⁸ This creates a risk of a conflict of interest—the significant power judges have in determining the compensation owed to panel attorneys may be an undue influence on the attorney's professional decision-making.

In a 2015 report on the state of federal indigent defense, the National Association of Criminal Defense Lawyers (NACDL) found that many federal judges would deny or reduce voucher requests submitted by panel attorneys,

15. *Id.* at ii.

16. *See supra* Part I.A.1.

17. *See* The Independence Imperative, *supra* note 8, at 42.

18. *Id.* at 49.

either as an arbitrary cost-cutting measure or in response to requests they deemed frivolous.¹⁹ It is an inevitable reality that some voucher requests will be frivolous; however, some panel attorneys argue their reasonable requests are often denied either because the judge wrongly believed the amount to be excessive or because they wanted the attorneys to bear the cost rather than the court.²⁰ For attorneys who believed their vouchers were wrongly reduced or denied, there is no appeal process—the judge’s decision is final and not reviewable.²¹ Even when voucher requests are approved, attorneys may have to wait several weeks or even months to receive payment.²²

The consequences of arbitrary (or perhaps pernicious) voucher cutting are detrimental to the practice of indigent defense. An attorney who is not assured of her future compensation is forced to think twice before hiring an investigator, performing additional interviews, or expending any additional time or effort on behalf of her clients. Wary of financial repercussions, attorneys may choose not to file certain motions or conduct additional research; indigent defendants suffer as a result.

B. ADMINISTRATIVE AND OVERSIGHT PROBLEMS

Like the means by which they are paid, the means by which public defenders are appointed to cases and are overseen by public administrators creates conflicting interests for attorneys trying to provide the best representation for their clients. Judges exert great influence on public defenders, ranging from how individual attorneys are assigned to cases to the selection of chief public defenders.²³ In jurisdictions that utilize a panel of attorneys, the standards by which the panel is maintained and attorneys are selected are often irregular or even non-existent.²⁴ The commissions responsible for the selection of a chief public defender and establishing funding are often subject to the undue influence of the prosecutor’s office, the legislature, and the judiciary, diminishing their independence and efficacy. Subsection 1 will consider the influence of judges in appointing attorneys to represent indigent clients; subsection 2 considers conflicts of interest in oversight.

1. UNDUE JUDICIAL INFLUENCE ON ATTORNEY APPOINTMENTS

Judges fill many roles in the adversary legal system. Their role in appointing attorneys to represent indigent criminal defendants is one of their most basic. It is also a role that can easily create a substantial conflict of interest in the absence of standardized procedures and meaningful oversight.

19. *Id.* at 49-50.

20. *Id.* at 50.

21. *Id.* at 53.

22. *Id.* at 49.

23. See Justice Denied, *supra* note 8.

24. See *id.*

In jurisdictions that maintain indigent defense panels, judges often enjoy largely unfettered discretion in selecting and removing attorneys from the panel, as well as in appointing attorneys to individual cases.²⁵ Ideally, the decision to appoint a given attorney to a case should be based on objective factors: how much relevant experience she has, how large her current caseload is, the availability of other qualified attorneys, the complexity of the case, and so on. The decision should be made without regard to the judge's personal feelings toward the attorney. However, as noted in the NACDL report:

Giving judges the power to appoint or reappoint panel lawyers generates "built in conflicts," which make it unlikely defense lawyers will "get in the face of a judge," which is "their job," explained one judge. One lawyer who no longer receives appointments was told by others on the panel that the reason she was not receiving appointments was because she advocated too strongly and needed "to kiss the judge's ass more."²⁶

In the absence of objective, fair criteria for attorney appointments, it is not particularly surprising that judges will choose ass-kissers over ass-kickers.

Anecdotal evidence of an individual judge's preference for the obsequious over the obstinate in defense attorney appointments should raise an eyebrow; self-interest and favoritism should sound an alarm bell. A survey in Texas found that nearly half of judges report that their peers appoint counsel because of their reputation for moving cases quickly, regardless of the quality of representation.²⁷ Almost two-fifths reported their peers appoint attorneys they consider friends, and about a third reported that their peers appoint attorneys who are their political supporters or campaign contributors.²⁸ None of these reasons should factor into whether an attorney should be appointed to a case, yet for many judges they frequently do. The fact that these attitudes are so commonplace creates a real risk of impropriety.

2. OVERSIGHT PROBLEMS AND CONFLICTS OF INTEREST

Even outside of jurisdictions with indigent defense panels, the structure of indigent defense systems allows judges to wield undue influence over attorneys. In practice, this results in public defenders that serve judges' needs over those of their clients. As Professor Jonathan Rapping describes, the problems that emerge

25. See, e.g., NLADA Evaluation, *supra* note 10, at 65-69 (discussing judicial control of indigent defense panels in several Michigan counties); The Independence Imperative, *supra* note 8, at 37-39 (discussing judicial control of indigent defense panels in federal district courts).

26. The Independence Imperative, *supra* note 8, at 37.

27. Muting Gideon's Trumpet, *supra* note 8, at 12.

28. *Id.* at 13. Since this survey was conducted, Texas has adopted an indigent defense plan that has significantly curtailed judges' discretion in appoint defense attorneys. See Justice Denied, *supra* note 8, at 82. However, there is still a problem with judges who refuse to appoint qualified attorneys with whom they have personal or political problems. See Willey v. Ewing, 3:18-cv-00081 (S.D. Tex. filed Mar. 19, 2018).

from such a practice are exemplified in New Orleans, where, until recent reforms, local judges selected the members of the Orleans Indigent Defense Board that oversaw public defenders in the city.²⁹ The Board would then assign public defenders to specific judges' courtrooms.³⁰ As a result, attorneys would commonly prioritize their judges' wishes over their clients', as judges who were displeased with an attorney's behavior could simply go to the Board and have them reassigned or dismissed.³¹

At the federal level, the indigent defense services program is administered by the judiciary itself, rather than by an independent board or commission. Though defense services appropriations are separate from the rest of the judiciary's budget, there is a common sentiment among judges and attorneys that reducing the funding for defense equates to making more money available for the courts; in the complex and opaque budget committee process, funding for indigent defense is the first to be cut.³²

The judiciary is not the only branch with the motive and opportunity to slash indigent defense budgets. The cost-conscious legislators identified by Professor Rudovsky³³ are all too eager to slash indigent defense budgets, as are executive branch officials wanting to bolster their "tough on crime" credentials.³⁴ Public defenders who speak out in support of zealous advocacy incur the wrath of public servants who would rather they keep costs down, facing the loss of payments or their jobs.³⁵

Perhaps most worrisome is when chief public defenders, charged with ensuring the effective representation of all indigent defendants in their respective jurisdictions, are subject to political pressure that compromises their obligations to their clients. Chief public defenders that are appointed by local judges, assuming they have an interest in being re-appointed, must remain in the judge's good graces.³⁶ Chief public defenders that are appointed by and serve at the pleasure of the state's governor must prioritize the governor's pleasure over their professional duties.³⁷ As this Note will argue in Part II, a chief public defender who prioritizes

29. Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. LAW 177, 187 (2008).

30. *Id.* at 188.

31. *Id.* at 187-188.

32. The Independence Imperative, *supra* note 8, at 24.

33. Rudovsky, *supra* note 13, at 374.

34. Justice Denied, *supra* note 8, at 80 (discussing the opposition faced by the Essex County, NY Public Defender in employing an assistant from county executives who supported the District Attorney).

35. *Id.* at 81 (discussing the testimony of a Legal Aid attorney before an Onondaga County, NY legislative committee where the attorney defended Legal Aid's policy against pleading cases at arraignment; Legal Aid subsequently lost a contract to handle city court cases).

36. *Id.* at 84 (discussing the conflict of interests in having local judges in North Carolina appoint chief public defenders for renewable four-year terms).

37. *Id.* at 169 (describing the dismissal of the Vermont defender general for advocating for more staff to deal with rising caseloads).

external political influences over effective and independent representation creates an office culture with similar priorities and values.

II. ORGANIZATIONAL SOCIOLOGY AND INDIGENT DEFENSE

The structural problems plaguing the indigent defense system present public defenders with difficult ethical issues every day. These ethical issues, and the negative consequences for clients that they beget, are amplified when the leadership of public defender offices is subjected to corrupting political and financial influence. When chief public defenders are made to answer to persons or institutions with interests adverse to those of indigent criminal defendants, the result is too often that they (and all of their subordinates) neglect the professional duty owed to their clients and breach their obligations under the *Model Rules of Professional Conduct*.

Section A of this Part will discuss theories of organizational sociology to explain generally why subordinate attorneys will comply with unethical instructions from their supervisors. Section B will look at public defender's offices through Section A's theoretical lens, discussing the structural elements of such offices that create a workplace culture hostile to the independence of defense attorneys.

A. USING ORGANIZATIONAL SOCIOLOGY TO EXPLAIN ATTORNEYS' ETHICAL VIOLATIONS

The *ABA Model Rules of Professional Conduct* impose ethical obligations upon both supervisory³⁸ and subordinate attorneys.³⁹ The *Model Rules* state that supervisors must "make reasonable efforts to ensure"⁴⁰ that subordinates comply with ethical rules, and that subordinate attorneys are "bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."⁴¹ It would appear that these complementary ethical duties would reinforce one another in ensuring the ethical practice of law.

Though Rule 5.2(a) requires subordinate attorneys to comply with the Rules, even if directed otherwise by a superior, Rule 5.2(b) allows subordinates to defer to the judgment of a supervising attorney's "reasonable resolution of an arguable question of professional duty."⁴² Professor David Luban identifies a conflict between the individual's ethical responsibility and the deference owed to the supervisor's judgment. "The problem is that the pressures on subordinate lawyers

38. MODEL RULES OF PROF'L CONDUCT R. 5.1 (AM. BAR ASS'N 2018). Though the text of the rule applies to supervisors and partners within "firms," the rules define "firm" as including any legal services organization authorized to practice law. *Id.* R. 1.0(c).

39. *Id.* R. 5.2.

40. *Id.* R. 5.1(b).

41. *Id.* R. 5.2(a).

42. *Id.* R. 5.2(b).

may lead them to misjudge when a question of professional duty is arguable and when the supervisor's resolution of it is reasonable," writes Professor Luban.⁴³

Professor Luban also notes that the ethics rules are "almost entirely individualist in their focus," ignorant of

... the prospect of being pressured by their boss to do something unethical. Not only do [attorneys] worry about losing their jobs if they defy their boss to do the right thing, they also fear that the pressures of the situation might undermine their ability to know what the right thing is.⁴⁴

In gray areas, subordinate attorneys who question the propriety of their actions will likely lean towards conforming to their supervisor's instructions, per Rule 5.2(b). In addition, Professor Andrew Perlman notes that:

Numerous factors contribute to conformity, including the size of the group, the level of unanimity, the ambiguity of the issues involved, group cohesiveness, the strength of an individual's commitment to the group, the person's status in the group, and basic individual tendencies, such as the desire to be right and to be liked.⁴⁵

Professor Perlman then identifies that several of these factors exist in a public defender's office: lawyers must deal with legally and ethically ambiguous issues on a regular basis; lawyers operate in a hierarchical structure where compliance is rewarded and dissent is punished; and newly-hired lawyers may feel the pressure of financial burdens and of finding a new job should they lose their current one.⁴⁶

When these factors are present, it becomes all the more difficult for subordinate attorneys to fulfill their ethical obligations under Rule 5.2. Professor Irwin Miller argues that the ethical rules applicable to both supervising and subordinate attorneys are inadequate to ensure ethical behavior, especially as to the subordinate who bears the ultimate disciplinary responsibility of an ethical violation.⁴⁷ The flaw of the rule as it exists is that it implies that subordinate attorneys can clearly identify certain instructions as unethical and are in a position to correct them, a contestable assumption.⁴⁸ Rule 5.2, Professor Miller argues, should be amended to affirmatively obligate subordinates "to seek out effective guidance and supervision from superiors or others when a question of professional conduct is raised."⁴⁹

43. David J. Luban, *The Ethics of Wrongful Obedience*, Ethics in Practice 95 (Deborah L. Rhode, ed., 2000).

44. *Id.* at 94-95.

45. Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 460 (2007).

46. *Id.*

47. Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 295 (1994).

48. See *supra* notes 43-44 and accompanying text.

49. Miller, *supra* note 47, at 295.

Furthermore, a subordinate attorney, who does not merely doubt their capacity to provide ethical representation but is actually aware of their inability to do so, can only fulfill their ethical obligations by ensuring that their supervisor is fulfilling their obligation not to instruct subordinates to violate the ethical canons. Professor Miller writes:

If the subordinate lacks the time, training, resources, or expertise to represent the client competently . . . the subordinate is obligated to correct that situation to avoid potential ethical breaches. To correct the deficient practice setting, the subordinate may need to bring the matter to the attention of his or her supervisor.⁵⁰

Here lies the problem of the ethical rules as they stand. Subordinate attorneys are already limited by several organizational factors⁵¹ from identifying and speaking out against unethical behavior. Even when subordinates can clearly spot an ethical violation, they are saddled with the responsibility of holding their superiors to their ethical obligations to avoid a violation of their own. It is difficult to imagine that a subordinate attorney who struggles with complying with his own ethical obligations would be in a position to make a request of his supervisor, let alone actually finding success.

B. WORKPLACE CULTURE IN PUBLIC DEFENDER OFFICES AND ITS NEGATIVE EFFECT ON INDEPENDENT REPRESENTATION

The structural problems that plague public defender offices across the nation highlight the inadequacy of Model Rules 5.1 and 5.2 in ensuring effective, ethical representation. Generally speaking, most jurisdictions have not lived up to the ideals of indigent defense. Public defense offices are meant to be independent of corrupting political or financial influence.⁵² Defense counsel must have a manageable caseload in order to provide ethical and independent representation to their clients.⁵³ As Professor Norman Lefstein writes:

A well-organized and effective defender program needs to encourage its lawyers to assess their caseloads and to make judgments about whether they have too much work . . . Lawyers themselves know better than anyone else whether they can handle the caseload assigned to them.⁵⁴

A defense attorney's ethical obligations in representation include being able to exercise their best judgment in refusing new clients that they cannot adequately represent.

50. *Id.* at 299.

51. *See supra* note 45 and accompanying text.

52. THE ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) [hereinafter ABA TEN PRINCIPLES].

53. ABA TEN PRINCIPLES, *supra* note 52, Principle 5.

54. Lefstein, Securing Reasonable Caseloads, *supra* note 8, at 111.

As discussed above in Part I, there are numerous obstacles between reality and the ideals of indigent defense. Public defenders receive limited funding⁵⁵ and must often jump through hoops to secure any extra compensation when they perform extra work.⁵⁶ Public defenders who advocate for more funding are often faced with a legislature hostile to their goals and increased expenditures⁵⁷ that has the power to replace them.⁵⁸ A chief public defender that owes her job to the local judge⁵⁹ or to executive branch officials⁶⁰ is susceptible to their influence, and will forgo requesting additional fees or support (and thus the improved advocacy that it would provide) in order to remain in good standing and ensure her continued employment. Subordinate public defenders, concerned with their professional and financial futures, follow the chief's lead in lockstep and decline to protest their working conditions.⁶¹ Thus, a workplace culture hostile to independent and zealous advocacy is created and unmanageable caseloads are accepted as a matter of routine.

Professor Rapping discusses the cultural problems of the public defender's office in pre-Katrina New Orleans and how, ultimately, the leadership of an office bears responsibility for creating such a culture. He argues that in a jurisdiction that chronically underfunds its indigent defense, where there is little in the way of material or personnel support, where the chief public defender makes no effort to obtain more resources or reduce the caseload for fear of irritating the judges that employ him, defense attorneys are conditioned to make do with what little they have.⁶² Attorneys are taught and encouraged by their superiors to handle cases quickly, filing guilty pleas without investigation as a matter of course. This results in a workplace culture that is manifestly perverse to the ideals of indigent defense, a workplace where the quantity of defendants processed is valued over the quality of the defense provided. Professor Rapping writes:

Attorneys learned their practice through a pervasive "'sink or swim' culture." Those who survived in this environment were heralded as the best trial lawyers. A willingness to try cases with minimal preparation was seen as a qualification for a good public defender rather than as a sign of irresponsibility and dereliction to one's client.⁶³

This cultural problem is one of values and is not easily dealt with. Professor Rapping further notes that the "tacit assumptions" shared by attorneys constitute "deepest and most engrained level" of culture, assumptions that would be

55. See *supra* Part I.A.1.

56. See *supra* Part I.A.2.

57. See *supra* note 13 and accompanying text.

58. See *supra* note 35 and accompanying text.

59. See *supra* note 36 and accompanying text.

60. See *supra* notes 34, 37 and accompanying text.

61. See Rapping, *supra* note 29.

62. *Id.* at 191.

63. *Id.*

explained as simply as “how things are done around here.”⁶⁴ Once attorneys have become conditioned to how the workplace operates, they will contravene or disregard the established rules of professional conduct without a second thought.

Just as a workplace culture can encourage attorneys to succumb to outside pressures and reinforce negative behaviors, it can also strengthen attorney independence and improve advocacy in the face of structural obstacles. Professor Eve Brensike Primus notes that, while the general lack of independence from political influence negatively affects representation,⁶⁵ like-minded public defenders do have some power in challenging the status quo if they are able to effectively organize. Professor Primus posits that a group structure can provide practical benefits,⁶⁶ such as additional resources, guidance, and support, as well as a strategic advantage in protesting oppressive caseloads:

Group structure is also important because there is strength in numbers. When a public defender office has a policy of not taking cases once it reaches a certain caseload, line attorneys can enforce the policy. Even if the trial judge holds one attorney in contempt for refusing to take on yet another case, the next line attorney will do the same thing. Individual attorneys do not have that kind of power, because no individual attorney is a necessary player in ninety percent of a court’s docket. And when a public defender office appeals the trial court’s refusal to honor its caseload limits, the appellate courts will often listen.⁶⁷

This sort of collective action empowers individual attorneys to exercise their best judgment. An attorney that knows she has the support of her colleagues is free to act independently of outside political or financial pressure and provide the best representation she can.

Professor Primus’s proposal is an encouraging one, but it requires that public defenders share a passion for reform and a plan to enact it. Frankly, this will not occur in places where public defenders are entrenched in a workplace culture hostile to such reform. How can the innermost beliefs and values of attorneys be changed? How can the cultural obstacles to independent and zealous advocacy be removed? Professor Lefstein argues that change comes from the top. He argues that “change in public defender programs when leaders have a clear idea of how things should operate.”⁶⁸ Chief public defenders set the standard for adequate representation for subordinate public defenders. Those who are merely trying to avoid the financial or professional retribution of judges and other political authorities will discourage zealous advocacy and accept all cases regardless of the office’s capacity for effective representation.

64. *Id.* at 202.

65. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1790 (2016).

66. *Id.* at 1791-92.

67. *Id.* at 1793.

68. Lefstein, *Securing Reasonable Caseloads*, *supra* note 8, at 107.

Professor Lefstein continues: “Change can only occur when those in charge of defense programs appreciate the excessive caseload problem and actively address it. Because the overwhelming majority of defenders will not protest excessive caseloads . . . it is incumbent upon management to institute reform efforts.”⁶⁹

In the absence of structural reforms to ensure the independence of indigent defense, it is difficult to imagine that chief public defenders will act against their own self-interest in order to ensure that subordinates comply with ethical obligations and provide effective, independent representation to indigent defendants. An indigent defense system that holds attorneys to their ethical obligations must not subject the selection and compensation of defense attorneys to the corrupting interests of judges, prosecutors, and legislatures.

CONCLUSION

There are various structural elements common to indigent defense systems across the country that impede defense attorneys’ obligations to their clients. These elements—payment and contract structure, attorney appointment, oversight and administration—are designed to give judges and other actors undue influence on public defenders. Chief public defenders are subjected to economic and political pressure to have their subordinates process cases as quickly as possible, rather than honor their ethical obligations and provide zealous advocacy.

The structural foundations of indigent defense create a workplace culture within public defender offices that encourages attorneys to take on unmanageably large caseloads and provide their clients with a pale imitation of representation. Without structural reforms to ensure the independence of chief public defenders, it is difficult to expect that they will jeopardize their finances and employment by resisting the demands of the judiciary and political branches of government. Subordinate attorneys are not in a place to challenge their supervisors, let alone judges or other authorities. As a result, a workplace culture hostile to the ideals of indigent defense emerges.

Given the wide variety of indigent defense systems nationwide, it is difficult to say that any one arrangement is a panacea to all of the ills suffered by public defender offices. However, a politically independent body charged with overseeing the administration of indigent defense, standardized procedures to manage client appointments and workloads, and institutional leadership committed to effective advocacy are all vital to holding public defenders to the highest ethical standards. Without ensuring that public defenders are independent from the influence of judges who want to clear their docket and governmental authorities with adverse political interests, the ethical standards set out by the *Model Rules of Professional Conduct* will go unmet and the promise of *Gideon* will go unfulfilled.

69. *Id.* at 110.