# ALTERNATIVE STRATEGIES
# FOR PUBLIC DEFENDERS AND ASSIGNED COUNSEL

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## I. Introduction: Institutions to Secure the Constitutional Right to Legal Representation

One of the glories of the American Constitution is its commitment to protect individual rights—particularly when those rights are threatened by the state. Among the most powerful embodiments of this commitment is the declaration (made in a series of Supreme Court cases decided in the sixties and seventies) that citizens of the United States have a constitutional right to legal representation when the state threatens imprisonment. Further, the Court concluded that that right exists independent of the person's ability to pay for it. In the words of the Miranda warning, "If you cannot afford a lawyer, one will be provided for you." It is a remarkable commitment of constitutional authority to the protection of individual rights.

Once the Supreme Court established such a right, however, all federal, state, and local governments faced the problem of how, in particular, to secure it. Some local governments, by the authority of state statutes or state constitutions, had already established public defender offices. For example, the Los Angeles County Public Defender has existed since 1914. However, states without statutory or constitutional mandates were required to comply with the federal constitutional requirements articulated in U.S. Supreme Court rulings that all states must provide counsel regardless of a person's ability to pay. These states had to decide who was eligible, how legal representation was to be provided, and who would pay for it. In effect, public money had to be combined with constitutional authority to secure the right.

The states met this challenge in a variety of ways. Some left the issue up to local courts. Typically, the courts responded by making arrangements with private attorneys who served on a *pro bono* or paid basis (with the money required to support the system and pay the lawyers coming from appropriated tax dollars). Others created statewide or local offices of public defenders (again, supported by appropriated tax dollars). In these offices, lawyers were employed by the state specifically for the purpose of representing defendants too poor to hire their own. Still other states have opted for a contractual arrangement in which the states contract with either individual lawyers, legal partnerships, or nonprofit legal organizations to provide legal representation to the poor on some basis (a fee per case, or a commitment to cover all cases referred to them for a given budgetary allotment).

We can refer to the whole set of these institutional arrangements as "indigent defense systems" or “public defense systems.” We can refer to the subset of these institutional arrangements that involve the creation of publicly financed, publicly staffed agencies or publicly financed but privately staffed nonprofit organizations as "public defender offices."

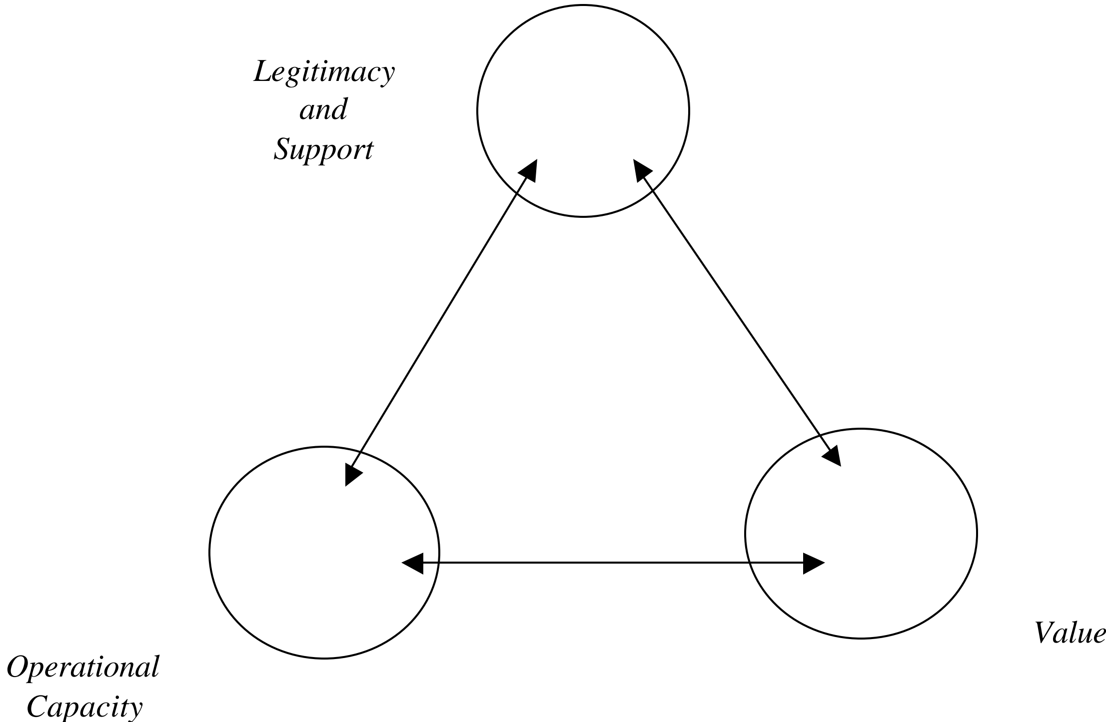
## II. Leadership and the Concept of Organizational Strategy

Regardless of whether one is considering indigent defense systems or public defender offices, some particular individual, occupying a particular office, is both authorized and held accountable for developing, overseeing, and managing public defense. In widely decentralized, court-assigned systems, that "person" is the many judges in the state who have the power to commit public funds to public defense. In such systems, someone in the administrative office of the courts usually is responsible for allocating cases, overseeing the statewide budget for this activity, and reporting to the legislature about the needs and the performance of this particular indigent defense system. In more centralized systems, that person is someone who leads a statewide public defender office. The point is that although the person is sometimes difficult to find, and may not even be very self-conscious about his/her role, someone in a particular office is responsible for keeping the enterprise financed, focused on its goals, and operating efficiently and effectively. That person (or group of people) is also responsible for giving an account of the office's operations, to say what purposes it is trying to achieve, to report its accomplishments, to identify new challenges that have to be faced, and so on. We can think of that person (or group) as the leader of the enterprise of the public defense effort.

To be effective as leaders of these enterprises, such people need what the private sector calls organizational strategies. An organizational strategy is a coherent idea that: 1) sets out the purposes of an enterprise and the value it is trying to produce; 2) identifies the sources of support (financial and otherwise) that it needs to sustain its operations; and 3) describes how the resources granted to the enterprise can best be deployed to accomplish the desired goals. The idea of a coherent organizational strategy can be diagrammed as a triangle with these three elements represented by distinct points on the triangle. (See Figure 1.)

**Figure 1**

**Strategy in the Public Sector**



Note that in developing a strategy, it is important to consider ends and means simultaneously. It does little good to have a valuable set of purposes in mind if these goals cannot attract a flow of resources needed to realize them; or if there are no operational methods (or technologies) that can be used to transform the fungible resources into the desired end results. Similarly, it does little good to sustain a flow of resources to an organization, and keep people employed within the organization, if nothing valuable is being produced. In short, part of the basic wisdom of thinking strategically is to make sure that one can reconcile desired results with plausible means. If these cannot be reconciled, one must find either new sources of support or new means for achieving the desired results. Or, in the most painful cases—when one can find neither the sources of support nor the means for achieving the desired results—one must sometimes change the ends to be more consistent with sources and support and operational means.

Changing the ends of an enterprise in light of immovable constraints is described here as painful because most people in the public sector experience such circumstances in this way. After all, they often joined public enterprises because they liked the particular ends the enterprise is trying to achieve: they liked the idea that they can protect the environment, or fight to reduce poverty, or protect the United States from foreign aggression, or assure justice for those accused of crimes. They may even have sacrificed some things that matter to them such as higher pay, good working conditions, or life outside of work to join these enterprises. If they are not supported in the purposes they judge important and if they are not financed adequately and encouraged, they become discouraged and feel abandoned. Changing the goals in light of such circumstances seems like a betrayal or a failure, and pain is the only possible feeling.

But changing ends does not have to be experienced this way. In the private sector, changing ends often is experienced as an important new opportunity. In one common private sector scenario, an old product line that has long been central to a given company has stopped being profitable. Consumers have stopped wanting the product. Or, competitors have emerged with a better product. If the firm does not change, it will soon go bankrupt. Initially, it seems hard to those in the firm to imagine producing something new, for at least some of the same reasons that change seems hard for those in the public sector. All things being equal, they would like to keep producing the same old products and services in the same old way. But through some reflection and strategic analysis, the firms can sometimes find within themselves capabilities that can be used to develop a new product or activity for which there is much public enthusiasm. In this world, a shift to a new goal, necessitated simultaneously by the decline of support for one's old activities and the discovery of a new alternative use of one's organization, is experienced as something positive—as a chance to increase the value of one's efforts rather than reduce it and, incidentally, to preserve the organization for future use. In this sense, developing a strategy often focuses on finding new opportunities in the future—new sources of support along with new tasks to be undertaken—as well as finding the means to ensure the continuation of an existing set of purposes.

All organizations have at least an implicit strategy that they are pursuing. Someone, examining an organization from the outside, could show the organization what ends it was pursuing, the sources of support it was relying on, and the primary methods it was relying on to accomplish its goals. The important leadership questions, however, are: 1) whether the organization is both aware of and content with this organizational strategy; 2) whether the current strategy is likely to be sustainable in the future; and 3) whether the current strategy represents the highest value use of the organization's assets. If the organization is unself-conscious about its current strategy (but nonetheless passionately committed to it), and if that strategy looks unsustainable in the future, or seems to have missed some opportunities for increasing the overall value of the enterprise, then it becomes important for those who lead these enterprises to help the organizations both understand and reinvent themselves, to develop new strategies that can be more sustainable, or to make better use of the organization's capabilities.

That is the purpose of this brief document: to help those who lead the nation's indigent defense systems to reflect on and perhaps improve their current organizational strategies. To do so, I will first set out my understanding of the current, predominant strategy embraced by those who lead public defense systems. Then, I will consider some alternative directions in which those systems and offices could go in developing new strategies. As I proceed, I will describe moves that seem increasingly difficult to make—moves that require risks on the "capitalization" side or on the "operations" side. While these moves might seem risky in the way that all change seems risky, it is important to remember that in some circumstances, standing still can be the riskiest strategy of all. In any case, I hope to promote a wider discussion and dialogue about some alternative future strategies for those who lead public defense systems.

## III. The Current Strategy of Public Defenders

The current strategy of public defenders can be examined in terms of the three elements noted in Figure 1: value, legitimacy and support, and operational capacity.

The important *public value* that public defenders are committed to producing is to provide professional legal representation to those charged with crimes who lack the financial means to hire their own attorneys.

*Support* for this mission comes, in the first instance, from the U.S. Constitution that establishes the fundamental right to counsel and the subsequent Supreme Court rulings that further defined this constitutional right, regardless of ability to pay.[1] This constitutional mandate alone, however, is not sufficient to sustain public defenders; and the Supreme Court is not the only public agency that provides authorization and direction to public defenders. State and local court systems necessarily involve themselves in decisions about the organization and operation of indigent defense systems. Indeed, in

1 Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). Throughout the 1960s, the Supreme Court expressly extended the right to counsel to specific stages of the criminal justice process such as custodial interrogation, post-indictment line-ups, preliminary hearings, and direct appeals.

many states, the court systems are the principal administrative units that are charged with overseeing the development and operation of public defense.

In addition to the courts, state and local bar associations have the capacity to be powerful institutional players. This influence comes partly from the fact that some bar associations can be influential lobbyists with legislators, but also from the fact that in some states, bar associations provide the operational capacity needed for public defense. In some instances, bar associations organize to produce public defense on a *pro bono,* voluntary basis. In other places, bar associations provide not only political support but also basic operational capacity for public defenders. Some bar associations, however, strongly resist the notion of members having to provide *pro bono* public defense. In this context then, these bar associations should support funding of professional public defender offices. The general attitude of the bar associations about this kind of work often determines how public defenders are regarded in the legal community, and what sorts of professional career opportunities they can anticipate.

Note that all the institutions described so far are legal institutions—the courts and the bar. Because public defenders serve predominantly legal values, interact primarily with legal institutions, and are staffed primarily by lawyers, it is easy to understand why they might think of themselves as inhabiting a predominantly legal world. It is also easy to understand why they might think of themselves as being at least somewhat insulated from and divorced from the political world.

The problem, however, is that the Supreme Court's mandate costs money to implement—money raised principally through taxation. Once public money is involved, public agencies must be accountable for spending it and oversight must be exercised. The task of raising the money, creating the agencies, and overseeing the operations does not fall strictly on the courts and the bar associations. State legislatures and governors, county boards and county executives, city councils and mayors choose the institutional form through which this constitutional mandate will be achieved. They also decide how much money will be provided, and on what terms it will become available to indigent defense systems. Because these actors are elected, they are influenced by the political currents of the day as well as by the legal values and imperatives at stake.

As we all know, crime remains a very important political issue. Indeed, over the last decade or so, what might be called the "law and order" crowd has been gaining influence over what might be called the "due process" crowd. In principle, this should not be favorable to public defenders, since public defenders' goals are much more aligned with the goals of protecting civil rights than with lowering crime (regardless of the cost in either money or lost liberty). In practice, indigent defense systems may not have been much affected by this. It remains true that the American public thinks it is important that public defense systems be supported.[2] As the number of accused persons requiring

2 In 2000, the Open Society Institute and the National Legal Aid and Defender Association (NLADA) hired a professional public opinion research firm to conduct focus groups nationwide on public views of providing criminal defense to those who cannot afford to hire private lawyers. The researchers concluded in their report that the public overwhelmingly supports state provision of public defense. The study found a

public defense services has increased in most states, so too have operating budgets tended to increase rather than decrease.[3] Still, if one were thinking about politics as a market within which one had to sell the value of public defenders, one would have to be concerned about how the crime issue was developing.

**Response to Mark Moore by Bryan D. Shaha, Alternate Defense Counsel (ADC), Colorado:**

I agree that the "law and order" crowd has gained influence over the "due process" crowd. I call it political pork. Defense budgets are increasing, but at the cost of criticism of spending for both death penalty and general defense work. I have not found that appropriations is an "inside game." I have found that the appropriations are scrutinized carefully, which is why extra expenditures to fund "whole client representation" may be difficult to obtain. Legislators are interested in shrinking funds and programs for indigent defense, not expanding them.

To a large extent, the legal community closely controls the provision of public defense services. Public defense is thought to be their business. Legislatures get involved in paying for the services, but even this decision seems not to be discussed much politically. Within budget expenditures, public defense services are a modest appropriation and decisions about expenditure levels often are contained within larger decisions about financing court operations. One important consequence of this is that neither the media nor the public as a whole are much aware of or concerned about public defenders, although they always have the opportunity to get involved if the public defenders do something that concerns them. Recently, publicity surrounding the various versions of the Innocence Protection Act in Congress[4] has attracted public attention to wrongful convictions, poor quality of defense, and inadequate resources provided to public defense practitioners. In general, though, the politics of public defender appropriations is an "inside game," with relatively little external involvement or discussion. This provides some potential safety for public defender offices, for they do not have to make their case on a daily basis before the court of public opinion. But it also leaves them constrained to whatever it is that the inside players think is appropriate for them to do. (Some public defenders are elected, though. An unanswered question is whether they end up with more or less support and independence than those who are appointed.)

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wide array of opinions regarding the institutional structure and scope of defense services that the public believes should be provided to those who cannot afford to hire their own counsel. *See,* Belden, Russonello, and Stewart, "The Price of Justice: Money, Fairness and the Right to Counsel," September 2000 (report available through the NLADA or e-mail BRS@brspoll.com).

[3] For example, the Maryland Office of the Public Defender's overall budget has increased each year. *See,* www.mdarchives.state.md.us/msa/mdmanual/25ind/html/61pubdb.html

[4] 2001 S. 486; 107 S. 486, 107th Congress, 1st Session in the Senate of the United States; 2001 H. R. 912; 107 H. R. 912, 107th Congress, 1st Session in the House of Representatives (both the Senate and House bills were introduced to reduce the risk that innocent persons may be executed, and for other purposes).

The *operational capacity* of public defenders consists primarily of lawyers. But public defenders (and particularly those who staff public defender offices) are not just any kind of lawyers. Because the wages paid to public defenders (either in the form of fees for handling cases or in salaries) are generally relatively low compared with fees paid for other work that lawyers can do, public defenders often are lawyers who have purposes other than earning their current salaries. Some are powerfully motivated by the cause of public defense. They care either for an abstract ideal of individual rights against the state; or for the ideal of providing equal opportunity for poor people; or for the combination of the two—that the poor as well as the rich ought to have effective rights against state oppression. Others are motivated by the professional skills and challenges provided by the job and by the training and experience that the work provides.

These motivations are important to understand since they tend to shape a culture among public defenders. In states with a hybrid or mixed public defender and assigned counsel system, the culture of public defenders is different from that of contract lawyers or assigned counsel who operate independently for the most part. That culture, in turn, is often a hugely important strategic asset. It helps those who work as public defenders tolerate adverse working conditions, extend themselves on behalf of the clients, and endure a certain amount of public hostility. On the other hand, from the perspective of those who manage the enterprise, that culture can have some strategic liabilities. Because of the sacrifices that the lawyers are making, and because they are hostile to authority in general, public defenders may be particularly resistant to managerial direction from the top. Because they are working primarily for a vision of what the enterprise should be (where each defender potentially holds a different vision), some defenders would be particularly resistant if the leadership were to suggest that the mission or goals of the enterprise should be something different from what they originally signed up to do. An example of resistance to leadership that suggests a change in goals is the reaction of some public defender deputies to the advent of drug treatment courts. Resistors object by claiming: "I didn't join this office to be a social worker." Conversely, the strongest advocates for treatment courts have been those who have worked in the new problem-solving courts, such as drug courts, community courts, and mental health courts. In short, the passionate commitment that allows public defenders to make huge contributions in difficult circumstances comes with a price: they think of themselves as being part of a movement rather than an organization, and entitled to shape as well as respond to the overall strategic direction of the organization.

It is worth noting that this strategy of public defenders is relatively secure. All that it is needed to sustain this strategy is for the Supreme Court mandate to remain solid, for the governments charged with meeting the constitutional requirement to continue to do so, and for the lawyers whose commitment is needed to produce the results to continue to be willing to do so. Because all these conditions are likely to be met, this basic strategy of public defense is not imminently threatened.

## IV. Problems with the Current Strategy

While the current strategy of public defense is relatively simple and secure, it does not necessarily follow that it is coherent or effective. Indeed, some important tensions and difficulties in the current strategy generate a great deal of discomfort and concern—for the public that implicitly authorizes the strategy, for the lawyers who execute it, and for the clients whose interests it represents.

### A. The Desired Quality of Public Defense

Consider first the question of the value that is to be produced. The goal of public defense, generally accepted without controversy, is to "provide legal representation to indigent defendants." What this simple phrase leaves out, however, is any clear idea about the quality of the representation that is to be provided, and who is to be the judge of that quality.

Many professional public defenders and assigned counsel would take issue with the failure to include quality as a standard in this goal statement. What the public thinks about it is unclear, although recent focus groups indicate there is some concern about quality representation. For example, the public might have the goal of "providing the minimum required defense at the lowest possible cost." This would be consistent with the view that the public values crime control more than the protection of civil rights, that it views most defendants as guilty and therefore not deserving of high-quality representation, and that it is uninterested in spending tax dollars on something as useless as defending guilty defendants. In this view, the constitutional standard is something that has to be tolerated, not an important goal to be achieved. We have to provide representation because our constitution requires it; but we do not have to love the idea, or spend a lot of money trying to realize it.

This conception of what the public might demand contrasts rather sharply with what the highly motivated, idealistic staff of lawyers wants to supply. Indeed, existing professional standards to which public defenders are ethically bound call for "the zealous defense of their clients' (liberty) interests." If the lawyers are to retain their self-respect as ethical professionals, they can offer no less than this standard of defense. And, given their values, they might well want to go beyond this standard.

Obviously, there is a difference between these two standards of service. The consequences of that difference are important: if citizens and their representatives want to meet minimum standards for representation and minimize the cost of doing so, and the attorneys want to provide a "zealous defense" of their clients' interests, then something has to give. The citizens might end up having to pay more for public defense than they wanted to. Or (in the more likely case given the power of citizens, taxpayers, and their elected representatives to set the standards when they are spending their own money), public defenders will have to provide higher quality services than they are paid to provide. Such a situation has two likely consequences. Public defenders either will burn out or will have to develop some triage systems within their own offices that will allow them to provide bad services on some cases so that they can have enough resources to provide good services on cases where such services would make a difference. This, too,

will take a toll on dedicated attorneys. It also will cause many of their clients to become disillusioned and dissatisfied with the quality of the defense provided, and the entire system to become a mockery of the constitutional right that was supposed to be protected by the system.

**Response by Bryan Shaha:**

The tension as to the quality of the representation is a point of disagreement. While these discussions ebb and flow with public opinion, I have been successful in Colorado in explaining that we do not have an "Illinois problem."[5] This seems to resonate with legislators on two levels: that the system is reasonably fair and that it will not cost the money that Illinois and other states are appropriating to "fix" the problem.

Unfortunately, the fear of ineffective representation and the damage to the system is in part illusory. Strickland v. Washington, 466 U.S. 668 (1984), is the seminal case with respect to effectiveness of counsel. It is the anchor on which lawyers are found to be effective even if they are sleeping through trial or are suffering from a drug addiction while representing persons charged with crimes. *Strickland* advances a two-pronged test: (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In other words, if everyone knows the defendant is guilty, then an ineffective claim can never prevail.

Note that in the discussion so far we have been acting as though there would be a coherent, articulated, and professional standard for what constitutes high-quality representation. If the standard is how many motions should be filed, how much investigation conducted to challenge the police reports, how many consultations with one's clients, and how many rehearsals of trial strategies should be made to reach a satisfactory level of representation, the answer would be given by lawyers looking at the case and its possibilities. This is true regardless of whether one is trying to set a minimum standard or a more ambitious standard that defines routine professional practice, or an even more ambitious standard that approximates the kind of zealous defense one could get from a highly paid private attorney. In each of these scenarios it is lawyers who set the standards.

The alternative, however, would be to judge the quality of representation not by legal standards, but by the satisfaction of the clients whose interests were being represented. Instead of asking lawyers whether other lawyers have done a good job on the legal aspects of the case, we could ask clients whether they were satisfied with the efforts and accomplishments of their attorneys. This would be the natural way to measure value produced in a private market. It might even be the way to measure quality in a private market for attorney's services. Clients sense a modicum of control if they

[5] The "Illinois problem" refers to the governor of Illinois's moratorium on executions based on the number of people released from death row for lack of adequate representation.

retain private criminal defense lawyers. This adds a positive feature to the relationship that is often lacking initially with public defender representation, and which may affect client satisfaction. (Alternatively, an accused person may be reluctant to acknowledge a bad choice of a retained lawyer, which would constitute an admission of poor judgment.) But it is notable that this is not generally considered an important way of measuring the quality of legal representation in public defender circles. Indeed, most indigent defense systems do not routinely survey their clients to gauge their level of satisfaction with the representation they received, although there are exceptions.[6]

There are many ways to explain this. Most focus on the irrationality and unreasonable expectations of the clients. All clients think they are innocent, and they all expect to be gotten off—regardless of whether the evidence against them is strong and convincing. But this orientation suggests a lack of respect for the clients' judgment. It is the same kind of argument that the police make about the impossibility of taking citizens' complaints about excessive force, brutality, and rudeness seriously in judging how well the police are operating. However, it is instructive that many police departments are overcoming their resistance to asking those whom they police about the experience of being policed, and are increasingly taking those views seriously.

Indeed, for some, the principal reason that clients' judgments about the quality of their representation are not taken seriously is that neither the public nor the public defenders really think the service is for the clients. They think the services are to protect the abstract idea of providing a fair and adequate defense. We will return to this question of what role clients (as opposed to professional, legal standards) might play in determining what constitutes high-quality representation below. For now, it is enough to keep in mind that the legal, professional standards about the quality of representation differ (at least conceptually, and perhaps substantively) from clients' judgments. It is also important to keep in mind that professional standards for quality representation can differ. "Good enough for government work" may be a lot different from "what one would want and expect if one were wealthy and could hire Johnny Cochran."
An alternative approach to measuring quality with input from the client and an assessment of the service by a knowledgeable and neutral person is to examine what happens when a criminal defendant complains to a judge about the quality of representation. Defender operations could track these formally lodged complaints.[7]

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[6] For example, The Bronx Defenders has begun conducting a series of surveys, focusing on different client populations. The first survey was conducted in 2000 and the second is planned for 2001.

[7] In California such proceedings are called "Marsden Motions"—a name derived from the case establishing a defendant's right to challenge the quality of performance of her appointed criminal defense lawyer. The Los Angeles County Public Defender Office conducted an evaluation to measure quality representation by reviewing the results of such motions. Michael Judge, the Los Angeles County Public Defender, reports that "the number of instances in which judges determined clients' Marsden Motions complaints were well-founded were infinitesimally small. However, one must be cognizant that contrary decisions by the judges would result in significant delays for new counsel to be appointed and prepare, and might also establish a record undermining any final judgment on appeal. Consequently, the usefulness of such evaluations and the actual validity of such purported independent judicial decisions are suspect."

**Response by Bryan Shaha:**

The measuring of value or quality of the legal representation by clients, while it may provide an accurate tool in the private market, has, in my estimation, provided little insight within the criminal defense industry. Many of the clients of public defenders and assigned counsel suffer problems outside of their legal problems. The list is numerous, but they include alcoholism, mental illness, poor education, and lack of insight into their actions or consequences. A perusal of the demographics of prison inmates will give a sampling of the population. This population is one in which it would be difficult to draw valid conclusions with respect to value or quality. This is not to say that information and valid suggestions cannot be obtained from interviews and conclusions of particular clients.

The demographics concerning citizens' complaints about police activities are different, although they may overlap. Additionally, there is a mechanism available to address citizens' (defendants') complaints about many of the issues and perceptions that the citizen has about the lawyer. This is the grievance procedure that state bar associations have in place. The Colorado ADC spends more than $700,000 per year investigating and litigating ineffective claims in state court.

### B. Political Advocacy and Its Limits

The potentially wide gulf between the minimum standards for legal defense that a cost-conscious, frightened, and cynical public might wish to provide on one hand and the much higher standards that the committed, ethical attorneys who staff public defense systems would like to provide (and be paid and honored for) on the other generates a high degree of tension in the system. Those who lead public defense systems see an obvious and natural way to resolve the tension: persuade the public and its representatives in legislatures and executive offices that they ought to want to pay for the same level of care that the public defenders would like to supply. This idea encourages many leaders of public defense systems to become political advocates for the offices they lead, and the cause that these offices embody. However, there are problems with this approach.

A major problem is the dispiriting fact that many of the substantive arguments that leaders of public defense systems would like to make on behalf of their offices seem to lack political resonance in today's political climate. It is not that they have no effect. Significant public support remains for some ideas about procedural justice; even more, perhaps, for assuring efficiency in the administration of justice. And this grudging support combined with the constitutional requirements has been enough to leverage continued financial support for public defense systems. Nevertheless, the arguments that are commonly made, and the way they are made, seem to have limited political resonance. Consider the following kinds of appeals.

> Argument #1: The Supreme Court says it is a constitutional right; thus, we have to do it.

This argument puts all the burden of justifying public defense on the Supreme Court decisions. The strength of the position is that the Supreme Court's views are authoritative. The weakness is that the position is not defended substantively—at least not in this formulation. It is a procedural argument rather than a substantive one. Moreover, once one claims that the Constitution has been consistently misinterpreted by "liberal judges," the moral authority of the Court itself begins to disappear. Precisely because the federal courts have been forced to take leadership positions on some of the most difficult social issues of our time—racial segregation in schools, abortion, the civil rights of women, etc.—and precisely because the work of building political as well as legal support for these positions has not been undertaken, the legitimacy of the Court is more fragile now than it has been in the past. Thus, while the power of this argument is significant with lawyers and with members of the public, it allows the public to chafe against the requirement imposed by the Court, rather than embrace the cause of public defense as something that they believe in and are proud of providing. In short, they do not see the glory of providing public support to indigent defendants.

> Argument #2: The court system cannot function without public defenders; thus, we have to pay for public defenders to allow the courts to operate.

This argument really depends on the first argument, since it is only the Supreme Court's decision that legal representation is a constitutional right that makes it necessary to provide legal defense. Nonetheless, it adds something to the first argument by invoking a kind of administrative efficiency argument. The implicit idea is that we have this huge investment in police, prosecutors, and courts that would go to waste if we did not add this final piece of the puzzle. In this view, we need public defenders to keep the machinery of justice clanking along efficiently and effectively. The public defenders offer the lubrication that is linked to reassuring mostly indifferent citizens that the machine is fair as well as efficient and effective. The difficulty with this view, however, is that it tends to encourage the idea that the important goal should be to provide the minimum required level of service so that we can keep the overall costs of the system low. Again, the argument is procedural rather than substantive. Thus, while it offers a justification for providing resources to public defense systems, this formulation keeps the aspirations for the quality of that representation low.

> Argument #3: The adversarial system is the best and most reliable way to achieve substantive justice; that is, to ensure that the innocent are freed and the guilty convicted. Because public defenders are intrinsic to the effective functioning of the adversarial system, they are necessary to the substantive justice of the system.

This argument is the substantive argument that lies behind the idea that society should support the Supreme Court's decisions. In this view, the public is asked to join lawyers and justices of the Supreme Court in believing that the procedures of an adversarial system are the best way to achieve substantive justice. The problem is that many citizens do not believe in the equation of a vigorous adversarial process with substantive justice. They think that procedural justice is as likely to produce injustice as justice. They are particularly concerned that many (substantively) "guilty" offenders are

getting off as a result of (procedural) "technicalities," which are exposed as a result of the adversarial process that not only authorizes but obligates defense attorneys to pursue the zealous defense of their clients.

In thinking about this, it is important for public defenders not to treat the public's suspicion of procedural justice as merely the result of ignorance. It takes a lot of explaining and a lot of experience to understand how frail our institutions are for determining guilt and innocence; and to decide that procedural justice is the best we can do. It is also worth noting that the public does not have this view only about public defenders and indigent defendants: it is as angry when Michael Miliken gets off as when a poor addict who commits burglaries to support his habit does.

> Argument #4: A crucial feature of a system of justice is that it should protect the innocent from unjust punishment. Adequate defense of accused offenders is crucial to ensuring this aspect of justice.

This argument is a more particular version of the idea that public defenders are necessary to ensure substantive justice—one that emphasizes the side of substantive justice that is most popular with public defenders, and the kind that they are most likely to be responsible for producing. This side is concerned about vindicating the innocent rather than convicting the guilty. Obviously, this claim has particular power when the state threatens capital punishment. And this is an important part of the reason that public defender offices end up spending a great deal of time and attention on capital cases.

The difficulty with this argument, however, is that vindicating the innocent is only occasionally the result of public defense. In the majority of cases, public defenders are defending clients who are both guilty of crimes and face powerful evidence against them. Many cases involve complicated questions of mental capacity or intent. While these cases might not be viewed as attractive by the prosecution or the public, it is certainly the duty of public defenders even in such difficult situations to provide a zealous defense of their clients. It also may be true that the only just way of ensuring that the innocent will be vindicated is to provide a zealous defense to all accused offenders. But that argument, again, sounds like the general procedural argument, not the particular substantive argument that the innocent will be vindicated. It is hard for the society to accept the idea that an equally zealous defense for all offenders is the best way to ensure that the innocent will be vindicated or that fairness of the process will be furthered. Indeed, I suspect that few public defenders believe this. Defense lawyers spend a lot of time representing individuals who are overcharged. They must assess each case to make substantive judgments about the severity of a crime, the sanction that might be levied, and then adjust their work intensity accordingly. They must decide which cases require more attention in order to preserve their limited time and allocate their energy wisely.

> Argument #5: The state can be a blind bully, running roughshod over the rights of citizens. Even when the state is right, it is important to provide individuals with a friend and protector to counter-balance the enormous power of the state.

That is only fair. Public defenders are the living expression of the ideal of fundamental fairness.

This argument is similar to the arguments for compliance with Supreme Court judgments, for due process, and for the protection of the innocent. But it differs from these in that it aligns with traditional American fears about the power of the state and a more general sense of fairness in the balance of power. Defense lawyers point to the pervasive practice of overcharging by prosecutors as an example of the powerful discretion that prosecutors wield. This practice can result in grossly disproportionate sentencing results unless effectively countered by qualified and properly resourced defenders. Not only is liberty at stake but the specter of other direct consequences such as unjust forfeiture of property, loss of vocational and drivers' licenses, and deprivation of employment opportunities. Overcharging can create room for exercising strong leverage and intense pressure even on innocent people to plead guilty in order to mitigate mandatory sentences that could result from a conviction in trial.

This fifth argument also reaches out to citizens' sense of empathy: it may be hard for them to imagine that they could ever be an arrested defendant, but it is not so hard to imagine what it feels like to be the victim of a powerful bully. Nearly everyone has had that experience. The important question remains, however, as to whether Americans think poor criminal defendants are entitled to such protection at public expense.

**Response by Bryan Shaha:**

The federal prosecution of Wen Ho Lee crystallizes this argument. Additionally, the "Illinois problem" focuses on mistakes in the criminal justice system. While these types of (mis)prosecution do not come to the attention of the public every day, the cases exist, and it is difficult to dismiss them. I would agree that a large portion of the public does not care about poor defendants.

Argument #6: The poor should not be disadvantaged relative to the rich when issues of equal protection against state power are at stake. It is the mark of our commitment to democratic equality that with respect to some fundamental rights, we make individuals equal regardless of their ability to pay. The right to legal representation is one of these areas. Public defenders are essential to ensure that our system of justice does not discriminate against the poor, that their rights are protected as ably as the rights of the rich.

Again, this argument lines up with the stream of arguments that focus on due process, fairness, equal protection, etc. This one, however, focuses particular attention not on the substantive question of guilt and innocence, nor on the issue of confronting state power, but instead on equity between rich and poor. As a political matter, then, this argument depends either on a deep commitment to class fairness, or a strong identification with the plight of the poor.

While the arguments of fairness are strong, they are weakened somewhat by the belief that many of the defendants are guilty and continue to plague the communities in which they reside—deepening the disadvantage of the "good" people who live there. In short, whether it is pro- or anti-poor to provide legal defense depends a great deal on one's perceptions of the defendants. If one perceives them as potential assets to the community—as people who can be wage earners, spouses, parents, "guardians" of the community's youth and peace—then one will think of public defense not only as consistent with the desire to be fair, but also with advancing the interests of the poor. If, on the other hand, one perceives the defendants to be liabilities to the community—individuals who prey upon the slender economic resources of the community and set bad examples for children growing up—then one might think of public defense as hostile to the interests of the poor.

> Argument #7: Public defenders ought to be treated equally to public prosecutors. They are both equally needed to assure justice. They are both professionals. Their pay and working conditions ought to be similar.

This argument is most closely related to Argument #2 above, in that it speaks to the administrative arrangements that are necessary to allow the system to work, rather than to the larger values at stake. While it has the advantage of invoking an idea of equity, in my view, this argument appeals more to budgeters and legal professionals than to the broader public.

One can make one's own judgments about the political potency of these different arguments. One can also add others to this list, or make up combinations and variants. But it seems that when one goes through this list, while it is easy to find arguments that point to important values and that will do the job of keeping public defenders around, it is hard to find the arguments that will cause much of the American public to get excited about the cause of public defense. My bet would be that the most powerful would be those that focus on the need to have someone stand with you when the state is on your case, and the idea that the worst thing a state-sponsored justice system could do is to jail the innocent. What will be hard is to link these values up in the minds of the American public with the work that public defenders actually do day in and day out.

It is also interesting to note that what is missing from this list is one of the most powerful political currents of our time: namely, the interest in reducing crime and enhancing security, and in ensuring substantive justice. Indeed, what is awkward for public defenders as a political matter is that they often seem to be on the wrong side of this issue: as the "criminal's lobby," rather than the people who guarantee that citizens won't be victimized by the state, and as people who do harm to substantive justice by "getting people off on technicalities." These claims are the principal political liabilities that public defender offices face.

One member of the Executive Session on Public Defense observed that a common weakness in the management of public defense systems is that the leaders of these systems do not reach out to enough constituencies to support them. They tend to be

insular, viewing the work that they do in the courtroom as far more important than the work they do in the legislature. Moreover, when they advocate at the political and policy levels (rather than at the individual client level) for support for their office, or more generally for the cause of individual rights, or more generally still for more just and effective criminal justice and social policies, they reach out to familiar allies rather than look for unfamiliar ones. They also tend not to tailor their message or use different advocacy strategies when advocating in a legislative setting rather than a courtroom setting. In short, they behave as people who believe that their cause is just and who trust that the justice of their cause will ensure the provision of the resources and authority they need to accomplish their mission. They do not think or act politically because that would be unprincipled and unprofessional. The problem is that weak arguments combined with political inattentiveness virtually guarantees weak support for public defense systems.

## V. Some Emergent Strategic Ideas

As leaders of public defense systems have faced these strategic issues, they have begun to develop new strategic ideas—new ideas about how the assets represented by the public defense system could be used to produce both more public value and more public support. Three ideas seem particularly interesting.

### A. Public Defenders as Public, Political Advocates

The first idea emerges directly from the discussion above. If public defense systems need additional legitimacy and support in their political environments, and if they cannot necessarily get that support simply by doing their job very well, then it is necessary for public defenders to take on the challenge of becoming effective advocates in the political world as well as in the courtroom. This should not be an afterthought or something that the leader of the enterprise does during his or her spare time. It should be the focus of intense attention. Not only must the time of the leader be focused on this activity, but also the organization and operations of the office must be adjusted to accommodate the importance of this activity. The office may need to develop specialized capacities to interact with key legislators and to communicate through the press to the wider public. They may have to alert their staff attorneys to the opportunities for press attention that are present in the cases they are handling. They also may need to create public education and advertising campaigns to strengthen their message. And so on.

The strategic issue for the public defender industry is whether defender offices are simply to be managed as effectively as possible; or, whether they are to embrace a significant leadership role encompassing a public policy advocacy agenda. Articulating a mission that includes such a public policy role will shape the debate and push forward a more balanced platform of sound, progressive measures. Both public defenders and assigned counsel can be more active in the public policy arena to influence and mobilize public attitudes and sentiments, to insist on a fair process and an equitable system. As Michael Judge, the Los Angeles County Public Defender, notes:

> The electorate can provide the impetus for elected and appointed officials to do the right thing without a disabling concern for their own political viability. The electorate will only do this if they are well-informed. Public defenders must engage them, or face the judgment that public defenders must not have cared because they did not try to participate but still congratulated themselves on how much they care.

In short, public defenders and assigned counsel hold valuable perspectives on the system and their clients that enable them to see clearly the path of dysfunction that leads many Americans deeper into a criminal justice system.

**Response by Bryan Shaha:**

Public defenders and others who lead assigned counsel programs are obvious sources that can advocate for the legal rights of the accused. The problem with advocating in the legislatures is that the same body that decides the agency's budget decides whether or not to support legislative changes. Some legislators transfer their assessment of the defender's credibility on criminal justice issues to credibility on budget issues, usually to the defender's detriment.

Note that the advocacy of the office could be directed toward several related but still distinct goals. Given the strategic discussion above, one natural goal of advocacy would be to engender wider support for the enterprise of public defense itself. In effect, the target is to win more public support, and more money for the office to ensure its longevity and its ability to create quality representation. This simply recognizes the painful fact that the Supreme Court's mandate alone is not sufficient to ensure high-quality representation to indigent clients; the legislatures, too, must be persuaded of the importance of the task.

A second, closely related goal would be to advocate for the legal rights of those accused of crimes. This sort of advocacy would focus not on legislative decisions to appropriate money to indigent defense systems, but instead on policy decisions made by both legislatures and courts that affected the legal rights of those accused of crime. For example, the office might want to weigh in heavily on how states plan to use DNA evidence, or whether it stays with a grand jury system, or whether it requires sex offenders to register in the towns in which they live and work. One way to think about this kind of advocacy is that it is directed at increasing the power and authority of public defense systems instead of increasing their funding. Note also that part of this work will be the same kind of political work that is necessary to maintain a flow of appropriations: namely, work with legislators and committees that do the legislative work. But another part of this work will be done in courts through various kinds of legal appeals. The reason is that both legislatures and courts can hand out or take away authority from public defender offices. Finally, note that victories won in this arena benefit not only the

clients of public defender offices, but all criminal defendants, and thus the private criminal bar as well.

A third goal, closely related to the others, would be to advocate for criminal justice policies that are more just and effective than those that emphasize longer prison terms for convicted offenders. This sort of political advocacy would go beyond concerns both for the office and for the general rights of the accused, and would seek to join the debate about what constitutes a just and effective response to crime in the community. This sort of advocacy could focus on the importance of dealing with the "root causes" of crime through various social policies. Or, the advocacy could focus on preventing crime through more effective efforts to deal with at-risk youth. Or, it could focus on finding and making wider use of sanctions that were less expensive, less intrusive, and more effective than jail and imprisonment for those convicted of offenses. This sort of advocacy, because it is concerned with general crime policy rather than narrow legal issues, will typically require more legislatively oriented political strategy than legal advocacy to carry out.

It is worth distinguishing these different political advocacy goals for at least two reasons. First, as noted above, the various goals must be pursued through different channels of decisionmaking. There is always a choice to be made about whether to work through political/legislative channels or legal/court channels. But these various channels can yield different returns depending on which of the three goals laid out above is being pursued. Additional resources in the form of money and authority can be sought either through legal/court or political/legislative channels, but the greater payoff is likely to come through the latter. In contrast, ensuring the legal rights of the accused is best accomplished through the legal/court channel. With respect to advocacy for criminal justice policy, a good deal can be accomplished through courts, but the political channel will generally be more effective. One important conclusion to draw from this quick overview is that politics is important to all three objectives, while the legal channel is a useful element of only one kind of advocacy. This is important because legal/court advocacy will come quite naturally to public defense systems. Political advocacy will seem less appropriate, and the skills will be harder to come by and develop. Yet, it is here that the greatest payoff could come.

Second, depending on what goals one is advocating, different coalitions become possible. Many people and groups will join a coalition to support some minimal level of funding for public defense systems if they are necessary to support the overall operations of the system. For example, potential alliances may be built between public defense stakeholders and minority groups who share the values of defenders. This group may be more effective than the private bar in mobilizing communities of color. They may be able to engage minority business leaders who share a common concern for controversial government conduct, such as "driving while black" police stops. Similarly, faith-based communities often share the same concerns as public defenders, such as the concern over rising incarceration rates and the lasting negative impact upon families and communities.

Today, probably fewer people will support wider protection of the rights of those accused, but one might find support for this position in some unexpected places—including not just the civil libertarians on the left, but also the political libertarians of the right. Many more might support more preventive crime control policies than those now being embraced if they could be confident that they would work. Many people agree that the restrictive policies now in place are successful at incapacitation in the short term but are costly and ineffective in the long term; however, they do not believe that the alternatives would be effective. Indeed, it seems that one of the most valuable things that public defenders could offer to the public is the capacity to ensure that those convicted of crimes do not reappear in the criminal justice system. It is not clear that public defenders could actually produce this result. But if they could, they would help to solve a problem that everyone would like to have solved.

One final note about improving the capacity of public defender offices to advocate not only in courts but also in legislatures is worth recording. If one is interested in developing this advocacy capacity, one may have a strong reason for preferring the creation of a statewide public defender office over the development of a contract system for individual lawyers. The reason is that a centralized office provides a platform for such advocacy that may differ from the kind of platform provided by a state contract system. Of course, the differences can be overcome by the individual qualities of the people who occupy the offices. A very well connected, savvy, committed leader of a contract system can become an effective advocate for the system, for individual rights, and for rational criminal justice policy; while someone who leads a statewide public defender office could end up squandering the opportunity for leadership it provides. But the point is that, all other things being equal, a statewide public defender office provides a stronger platform for leadership on these matters than does a contract system. There is a better chance in a centralized system to create a kind of self-consciousness about the work and to translate that into an effective political consciousness of the problems the system is facing. There are also probably some important economies of scale in doing the kind of research and creating the staff capacities that translate into effective political advocacy.

The main difficulty with moving public defense systems towards increased advocacy, though, is that legislatures are often hostile to such efforts. They do not like to have their primacy in defining public purposes challenged by those they pay with public dollars; nor do they like to have their options limited. Indeed, if political advocacy appears as an explicit organizational structure within an office, or as a specific appropriation, it could be sliced out. Some public defense organizations are expressly forbidden from engaging in lobbying of any sort or risk loss of public and private funds. Several private foundations will not contribute funds to organizations that conduct lobbying efforts.

At the opposite end of the spectrum are those public defender offices that hire former state lobbyists to engage full-time in political advocacy on behalf of public defense. They deal with budget concerns and substantive criminal justice issues before the legislature. These lobbyists also coordinate the direct involvement of public

defenders who take time away from direct case representation to lobby lawmakers when the legislature is in session. For example, the Minnesota Public Defender legislative liaison has been an integral part of their budget for many years.

### B. Public Defenders as Supporters of the Criminal Defense Bar

A different way of thinking about public defense systems, which may also strengthen their base of political support, is as enterprises designed to support not only indigent defense but the defense bar more generally. In essence, the enterprise would add to the direct assistance of indigent defendants a set of activities that would be valuable to the criminal defense bar more generally. This could include: 1) information about effective representation provided through libraries, newsletters, and other publications; 2) training programs and conferences open to all; 3) joint action to protect the interests of criminal defense in the legislature; and 4) a public education and advertising campaign to shape public values and improve the public image of criminal defense.

In principle, the implementation of a set of collaborative strategies with the larger criminal defense bar will create value for public defenders by improving the overall quality of legal defense. A public defender office's contribution would reach beyond those whom it represents directly to ensure the quality of legal defense on a larger level. Moreover, this strategy may improve public defender resources at lower cost by taking advantage of economies of scale in monitoring legal developments, in communicating about them, and in organizing political action to deal with them.

There is enormous potential in a collaborative public advertising campaign, as the private and public defense communities share many of the same professional goals and obstacles. In particular, both communities face a public largely hostile to their work, a view that is often shared by members of the bar at large. Such views undermine appeals for increased funding for public defender offices, but also create unpleasant professional conditions for the private and public defense bar alike. Public disdain for defense work may also erode confidence in our adversary system. This hostility and skepticism can be addressed through an effective public advertising campaign that helps the public to understand and appreciate the role of the defense bar. Ultimately, the tenor of such a campaign will depend upon the articulation of organizational strategies and goals, itself a process that this paper seeks to promote.

This collaboration may also help the overall strategy by reaching out to and securing the political and financial support of a potentially important political ally: namely, the criminal defense bar, and perhaps the bar more generally. Both substantively and politically, then, the idea of adding service to the wider criminal bar can be seen as a strategically important new "product line" for public defense systems to consider.

### C. Representing the Whole Client

A third idea, more radical in many ways than those discussed so far, is the idea that public defense systems should embrace the goal of representing the "whole client."

Those who advocate for and seek to practice whole client representation as a way of doing their legal work draw a sharp contrast between this kind of representation and the traditional kinds.

In their view, the traditional model of legal representation is limited in various ways. First, it is limited to the legal issues the client faces—not any other aspect of their circumstances nor any of the causes of their involvement with the criminal justice system. Second, advocates of whole client representation view traditional advocates as focused exclusively on protecting their clients' liberty interests: that is, ensuring that they do as little jail time as possible, and that there be as few restrictions on their liberty as possible when they are not in jail but still under some kind of state supervision.

It is important to understand that this traditional conception of professional practice enjoys the sanction of professional standards. This is what the code of ethics requires lawyers to do for their clients. Moreover, sometimes lawyers pursue these objectives on behalf of their clients even when their clients would like them to take into consideration other interests they may have besides liberty. There is no small amount of paternalism in these professional judgments about what is really in the best interests of the client. But, as we discuss below, there are real ethical risks in doing anything other than this narrow definition of the lawyer's duty.

This traditional model of legal representation is contrasted with the whole client concept in two important ways. First, in the whole client concept, the lawyers (and/or the public defense system) are concerned with more than the client's legal problems. They see the client as enmeshed in a set of family and community relationships, all of which can be disrupted and are therefore at stake in the legal proceedings against the client. They also see the imminent criminal charge as part of a larger set of problems that underlie and contribute to the present circumstance. Where the welfare of the client and the public safety needs of the community converge, some public defenders try to address clients' life outcomes. Michael Judge, the Los Angeles County Public Defender, affirms that public defender goals have evolved beyond the traditional focus on due process and liberty interests. This development towards whole client representation can be summed up by his statement that "the goal is to ensure people are better off when they leave the justice system than when they entered, for their sake and that of society."

Second, in trying to determine how best to handle the criminal prosecution of their clients, it is not always clear that their principal goal should be to protect the liberty interests of the clients. For example, in those cases where it is virtually certain that the defendant will go to jail, they might have some responsibility for reconciling the client to that fact, and helping him or her to make suitable arrangements to meet their obligations to family, friends, and employers while in jail or under some form of state supervision. Or, in some cases, they might be interested in developing a disposition that would have some chance of preventing a return to the criminal justice system even if that disposition involves more restrictions on liberty in the short run. Or, it may be that the public defender has some responsibility to construct a disposition that would benefit the client's family and community as well as the defendant. Michael Judge states:

> The fallacious myth that something that is good for a defendant must be bad for the community must be demolished. A person who temporarily bears the title of defendant is also a neighbor, schoolmate, brother, son, husband, employee, friend, customer, etc. There often is a convergence between society's needs (public safety) and the needs of a defendant and his family, friends, employer, church, and children.

To achieve lasting benefits for the whole community, defenders must convince prosecutors and judges to address the individual needs of clients and the fundamental underlying dysfunction that manifests itself through criminal behavior.

Of course, as we go through this list of examples, it is apparent that we are beginning to tread on ethically dangerous and operationally difficult territory. It is by no means clear that doing anything other than providing a zealous defense of a client's liberty interests is ethically permissible. Yet, there might be some interesting terrain to explore that lies between the idea that the sole commitment of public defenders is to defend clients' liberty interests on one hand, and that defenders might become part of an oppressive regime on the other. For example, a client may wish to go into a drug treatment program for, say, 18 months instead of taking a plea to 4-6 years. However, the district attorney may demand that if the client is dismissed from the program his sentence will increase to 8-12 years. Where the client prefers treatment, and it is clearly in his short-term liberty interests, does the lawyer take on any additional ethical responsibility if she knows that there is a very slim chance that the client will in fact complete the program? As in this example, once the attorney begins to take up more than just the client's immediate interest in liberty, questions arise about whether she is providing effective counsel or setting her client up for failure if the client will not complete the program and then face a much harsher sentence in the long run.

Figure 2 sets out a framework in the form of a matrix for considering this "dangerous terrain" analytically. The rows of Figure 2 describe the aim or the objective of advocacy: to protect the client's liberty interests, to promote the best overall interests of the client, or to protect the best interests of a client's family or community. The columns of Figure 2 describe the client's desires: he either does or does not want particular interests to be defended.

**Figure 2**

**"Dangerous Terrain"**

***Client's Preferences***

| ***Focus of Advocacy*** | | *Client Wants* | *Client Does Not Want* |
|---|---|---|---|
| | *Client's Liberty Interests* | **COMFORTABLE** | |
| | *Best Interests of Client* | | |
| | *Best Interests of Family and Community* | | **WRONG** |

We can see that the standard assumption about public defense is captured by the upper left-hand cell of this matrix: the focus of the advocacy is on the liberty interests of the client, and that is what the client prefers. In this context, there is a clear duty for public defenders to protect their clients' liberty. And that is what we usually assume is the case.

We can also clearly see some prohibited terrain. The bottom right-hand cell of the matrix describes a place where no ethical public defender could possibly stand: where his advocacy is focused on promoting the best interests of family and community, but the client has no desire to protect these interests. The client's own interests in liberty are more important to him. In this situation—while some social good might come from advocacy focused on family and community interests and one might feel somewhat ambivalent about a client who is uninterested in doing something for his family and community—the ethical public defender still has no choice but to defend the liberty interests of his client.

The interesting parts of this matrix, however, are the remaining four cells. The upper right-hand cell of the matrix describes a situation in which a client is not particularly interested in defending his liberty interests. This creates an ethical dilemma for the public defender: should he be for the abstract defense of liberty even if his client does not want it, or should he be responsive to the stated preferences of his client? Of course, stated preferences might not be enough. If the defendant has given up because he is fatigued, or mentally distraught, or feels guilty about something other than the offense with which he is charged, the public defender would be responsible for trying to figure out what the client's interests would be if he were whole and autonomous. But, as in the case of doctors who often seek to prolong life even when their patients are ambivalent, no small amount of paternalism is associated with insisting that defendants accept the burdens of liberty when they would rather not.

More interesting still are the middle and bottom left-hand cells of the matrix. These cells describe situations where the client claims to be interested in advancing something other than his liberty interests. Perhaps he wants access to drug treatment. Or, he wants to find a way to stop hitting his wife and kids. Or, he recognizes that he is going to go to jail and wants to make the best possible arrangements for his family. On behalf of these goals, he would be willing to sacrifice some liberty interests that he might otherwise be entitled to. In these cases, again, the public defender faces the ethical challenge of deciding whether the "zealous defense of his client" means only the zealous defense of his liberty interests, or whether this principle includes the idea of helping the client accomplish what he wants to achieve in the disadvantaged circumstances in which he finds himself.

The last remaining cell—the middle cell in the right-hand column—defines a situation where the advocacy is focused on the best interests of the client as the public defender conceives it, but not the way in which the client views it. This cell probably describes inappropriate advocacy behavior by public defenders. While this might be a less egregious offense than the bottom cell in that column (since it involves acting for the

interests of the client rather than those who would like to make claims on the client), it still has too much unsanctioned paternalism in the judgment about what is in the best interests of the client. It has neither the general warrant of liberty protection, nor the special warrant of a client's stated preferences. Still, it might well be that some important advocacy occurs in this cell, and that cases that start out in this cell might gradually be transformed into cases in which the client eventually comes to agree with his advocate's assessment of his best interests.[8]

This dangerous ethical terrain would not be particularly worth exploring if little advocacy value were to be created in the three or four ambiguous cells. But some important value might well be created for the individual, his intimates, and the wider society by practices developed within these cells. For example, clients might be better satisfied with their defense if they found a counselor, or someone who could provide something more than and different from the mere defense of their liberty interests—an effort that is often highly circumscribed in any case. It might also be true that if public defenders could fashion practices and dispositions that would result in defendants' not coming back for additional offenses, then society might well be willing to pay a lot for that result.

**Response by Bryan Shaha:**

Funding agencies might be hesitant to fund beyond the strict mandates of public defender and assigned counsel duties. Many funding agencies view anything more as a raid on public moneys as well as an expansion of service agencies that they would prefer to keep small, both in size and influence.

Some of the more successful collaborations have proved to descend into box 6 of the matrix. In a North Carolina Law Review Commentary, "The Drug Court Scandal" 78 N.C.L. Rev. 1437 (June 2000) on the Denver drug court, Judge Morris B. Hoffman criticizes several aspects of the court. His concerns include a "popcorn effect" (sometimes called "net-widening") in which law enforcement concentrates on a particular kind of crime such as drug use, and thereby increases the number of arrests and prosecutions in a category of cases. Judge Morris finds support for this popcorn effect because caseloads have increased from 1,047 drug cases in 1993 when there was no drug court, to 2,661 drug cases in 1995, which was the first full year of the drug court. This has caused the prison sentences to increase at about the same rate (434 received drug sentences in 1995 and 625 received them in 1997). These drug court activities have gone directly to box 6 in a program that was originally supposed to focus on box 3, the "best interest of client."

Finally, learning how to practice in these ambiguous cells might bring public defenders more effectively into those parts of the criminal justice system that are moving away from the disciplines of procedural justice in the interests of problem solving. In

[8] *See,* Steven Zeidman, "To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling," 39 Boston Coll. L.Rev. 841 (1998) (discussing a case where a defense attorney—in order to meet effective assistance of counsel standards—should have strongly persuaded a client to accept a plea; yet, a lawyer cannot go too far by usurping the final decision to be made by the client).

most places, less than 10 percent of the cases go to trial, although trials receive the most public attention. The quality of the dispositions in the other 90 percent of the cases should receive greater emphasis, especially in terms of training to deal with these less-adversarial dispositions. Drug courts, juvenile courts, and family violence courts are all emerging as institutions that reject the idea that cases are to be judged guilty or not guilty, and time under state supervision is meted out according to the seriousness of the offense. These new institutions operate on the defendant and his offense in a social context, and seek dispositions that are satisfactory to those involved in and capable of preventing future offending.

For all of these reasons, then, whole client representation might be a new kind of practice that produces a different kind of value, reaches for a different kind of legitimacy and support, and requires new capabilities and cultural commitments from public defender offices. In this respect, whole client representation may provide a particularly challenging new direction for public defenders to consider.

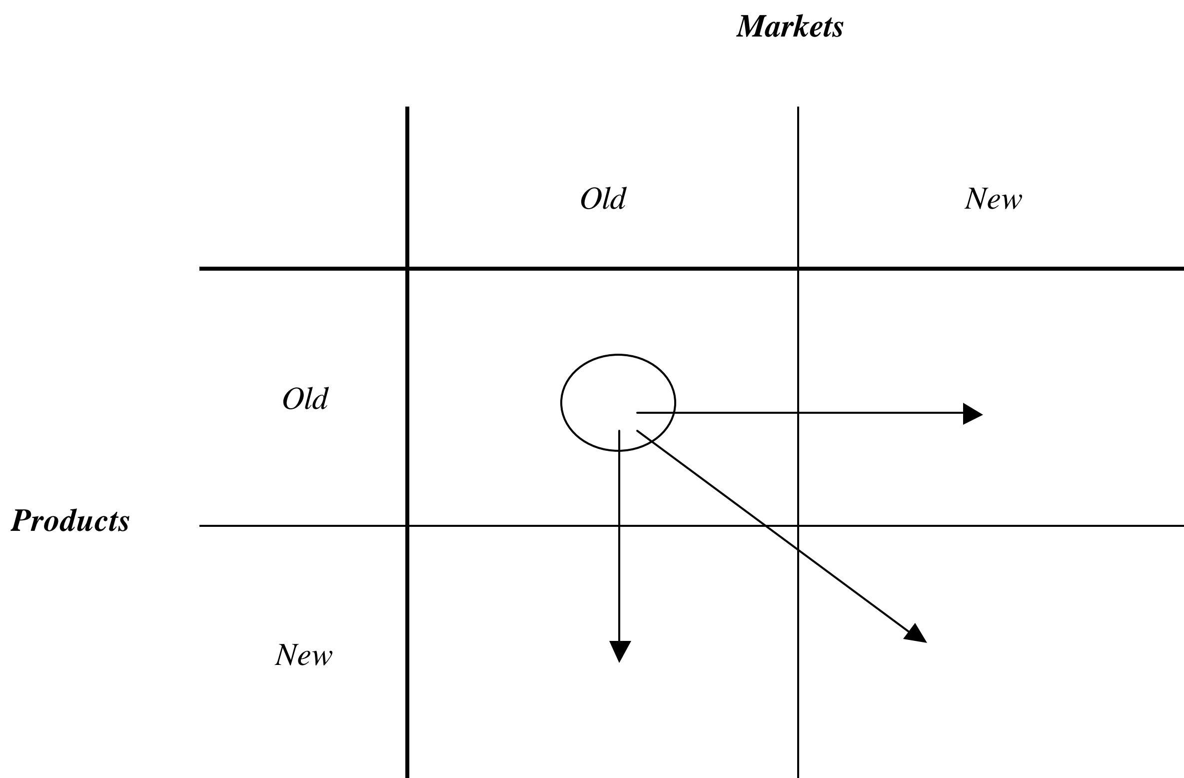
## VI. Contemplating Shifts in Organizational Strategy

For most organizations, it is scary to contemplate shifts in organizational strategy. This may be particularly true when one occupies a relatively secure niche that has come to have important cultural meaning to those who occupy the niche. In these cases, the ordinary reluctance to contemplate the twin challenges of change and uncertainty will be aligned with a strong emotional commitment to the idea that any change from the past represents an offense against tradition, a reluctance to "stay the course" and "fight the good fight." Still, some organizations are forced to consider a change in strategy because their old strategy is leading them off a cliff. Other organizations choose to consider a change in strategy because they think they see a better use of the assets represented by their organization than they do in the strategy to which they are now entirely committed.

The McKinsey Company has developed a matrix that many private firms have found useful in contemplating the risks and challenges of shifting their strategy. This matrix is presented as Figure 3. In this matrix, a change in strategy is essentially identified with a firm's efforts to develop either new markets for old products (cell 2); new products for old markets (cell 3); or new products for new markets (cell 4). Obviously, moving from the firm's current strategy (cell 1) to either of these new positions entails risks, but the risks are of different kinds, and probably of different magnitudes. The move to cell 2 (old products to new markets) involves risks associated with breaking into a new market—not the development of new products or production processes. The move to cell 3 (new products to old markets), in contrast, uses the firm's knowledge of customers and markets, but faces the uncertainty of developing and producing new products. The riskiest move, obviously, is to move to new products and new markets simultaneously, for one is then absorbing both kinds of risks.

**Figure 3**

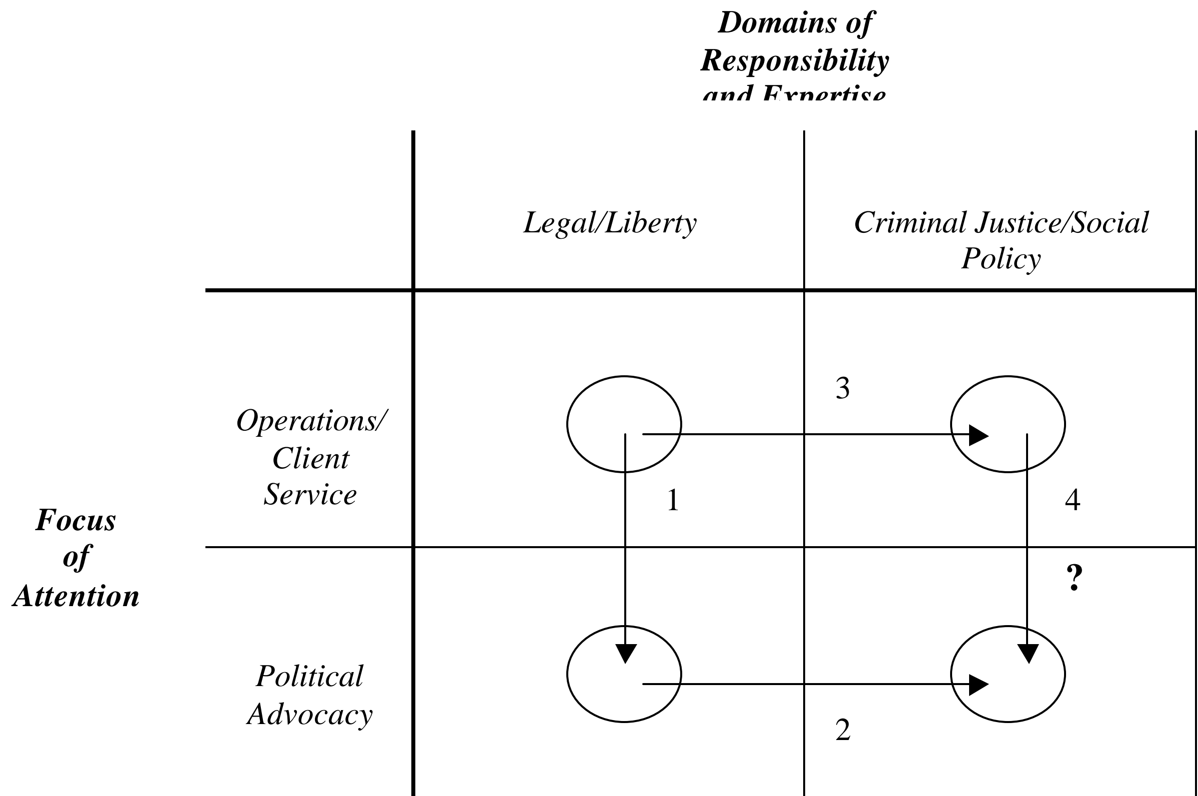
**Dynamic Strategy Model**



One might use this matrix to lay out the risks for changing the current strategy of public defense. Public defenders now occupy a fairly comfortable, well-defended niche. Support may be eroding around the edges, and there are some important tensions in the way the mission is now being defined, but it is hard to imagine that the Supreme Court will reverse its holdings and knock the struts out from under these offices. On the other hand, there may be some new products to be developed and new markets to be served by enterprises that have the capabilities of public defense systems. Public defenders can try to serve a new market in the public policy-making world by developing their advocacy capabilities. These political advocacy skills, in turn, could be focused on relatively narrow and traditional concerns such as the protection of the offices and the support of procedural rights for defendants; or they can be focused on broader issues of crime and social policy. On the other hand, staying at the operational level, they might be motivated to change from the representation of the liberty interests of their clients to a commitment to whole client representation. These possibilities are sketched in Figure 4.

**Figure 4**

**Dynamic Paths for Indigent Defense Systems**




1. The Move to Rights Advocacy
2. The Move to Criminal Justice/Social Policy Advocacy
3. The Move to Whole Client Representation
4. The Complementarity Between Whole Client Representation and Social Policy Advocacy

Note that this matrix does not map exactly onto the McKinsey matrix, since all three cells involve creating both new products and new markets. But in considering these different departures from the current strategy, three issues are worth considering. First, how valuable to society and the clients whom public defenders seek to represent would each departure be, and what new sources of legitimacy and support (or their opposites!) would each idea attract? Second, how far is each idea from current practice? How exotic a concept is it in the external and internal understandings of what a public defense system is and does? And how much investment would be required to build the new capabilities? Third, to what extent do the different departures complement one another in producing helpful synergies, and to what extent do the different ideas compete with one another? Obviously, in the short run, they will compete with one another in terms of managerial attention and resources. But the question is whether these ideas will compete with one another over the long run. These are the important questions that those who wish to lead public defenders must answer for themselves and for one another.