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Understanding the Crisis: The Evolution of Indigent Defense in Oregon

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Understanding the Crisis:

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by

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On Tuesday, February 22nd, 2022, a 33-year-old man walked out of a Multnomah County courthouse onto the rain-soaked streets of Portland, Oregon, and disappeared. According to court documents, the man was accused of raping a woman and sending an explicit video of the assault to the victim's father– a horrific crime. His charges included felony strangulation, coercion, and unlawful dissemination of an explicit image– a felony under the circumstances. However, this man would not stand trial for his crimes or even agree to a plea bargain in exchange for a lesser sentence. Instead, his charges were dismissed by the Circuit Court judge because there was no available public defender to represent him.[1] This case was only one of the hundreds that would be dismissed throughout 2022 and into 2023 in Multnomah County, ground zero for what has become known as the"public defender crisis" in Oregon.

On any given day in Oregon, hundreds of people charged with a crime do not have an attorney to represent them. Many of these people are in custody, and some face charges as serious as murder. Much of the focus has been on Multnomah County because judges in that jurisdiction have chosen to dismiss cases against unrepresented people. This extraordinary move by the judiciary only adds to the widespread perception of lawlessness and disorder in Portland and its neighbor to the east, Gresham. Still, the crisis is playing out in other jurisdictions in Oregon just as profoundly, with equally dire consequences.

I wanted to know: how did our public defense system get to the point of crisis, and what is being done to resolve it? Media coverage of this ongoing situation paints a picture of massive systemic failure– broken by years of inaction and neglect. Activists claim that we simply prosecute too many crimes, which overburdens our justice system. The common narrative is of a

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[1] Noelle Crombie, *Large Washington County Public Defense Firm to Temporarily Stop Taking Felony, Misdemeanor Cases*, Oregonian (March 02, 2022, 3:20 pm). https://www.oregonlive.com/politics/2022/03/large-washington-county-public-defense-firm-to-temporarily-stop-taking-felony-misdemeanor-cases.html

State Legislature unwilling to properly fund a politically unpalatable enterprise– defending poor people accused of committing crimes. As a result, public defenders are chronically underpaid and overworked, and now there are simply too few lawyers willing to do the work, resulting in a statewide shortage.

As I began researching the problem, I expected to find evidence supporting both the activist and media narratives. It made perfect sense. A combination of heavily punitive prosecutors overloading the system with an ever-increasing number of criminal charges combined with a legislature loath to allocate the funds necessary to pay public defenders a reasonable wage for their work– a recipe for disaster. Initially, I assumed that the way out of this crisis was simple– stop charging so many crimes and pay public defenders more money. At least pay them at parity with their counterparts in the District Attorney's office. The focus of my inquiry would therefore be directed toward reframing the debate– away from indigent defense as an unpopular form of charity toward an expenditure that was integral to public safety and a well-functioning society. If prosecutors would simply focus on serious crimes and legislators could be persuaded to open the purse strings a little bit, surely we would be on the path back to normalcy.

Of course, this theory presupposes increased caseloads with a commensurate decrease or stagnation in funding over time. The actual numbers tell a more complicated story. According to the Office of the State Court Administrator (OSCA), charges filed for both felonies and misdemeanors have decreased significantly over time.[2] In 2011, for example, there were 32,848 felonies and 61,274 misdemeanor charges filed statewide. In 2022, there were 21,921 felonies and 36,678 misdemeanors filed statewide– a 38% decrease in just ten years. The decrease in Multnomah County, considered the crisis's epicenter, is even more profound at 73%. Meanwhile,

[2] Reports, Statistics, & Performance Measures : About OJD : State of Oregon

the budget for public defense has increased 60% in the last ten years, from approximately $275 million to $439 million today (not including emergency appropriations paid out during the 2021-2023 budget cycle).[3] At the same time, there has not been a decrease in the number of public defense attorneys operating in Oregon. In fact, there are more public defenders working today than there have ever been.

Given the disconnect between the situation on the ground and the numbers mentioned above, I wanted to dig deeper into the issue to understand how our public defense system works– or does not work in Oregon. As I began my research, it quickly became clear that there were no simple answers to be had. Public Defense in Oregon is an exceptionally complicated endeavor, differing in administration and implementation between and within jurisdictions according to a number of historical and present-day factors. There is no question that public defenders are underpaid or that the system has always been underfunded. And while underfunding has brought the system to the brink of collapse in the past, it does not appear to be the only reason for our current predicament. The more I learned, the more questions I had.

To better understand where we are today, I first had to go back– all the way back– and trace the evolution of public defense from one sentence in the U.S. Constitution to the multi-faceted, ever-changing obligation of individual States to their residents. An exhaustive overview is beyond the scope of this paper. Still, a general understanding of Supreme Court jurisprudence around the issue provides a helpful roadmap of important inflection points, each of which has shaped the system that we have today. To this end, I will explore some of the key cases decided by the Supreme Court, from *Powell v Alabama*[4] to *Strickland v Washington*[5]. I will

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[3] https://www.oregon.gov/opds/commission/reports/Oregon%20Public%20Defense%20Services%20Legislatively%20Adopted%20Budget%202021-23%20(002).pdf

[4] *Powell v. Alabama*, 287 U. S. 45 (1932)

[5] *Strickland v. Washington*, 466 U. S. 668 (1984)

explain how the findings from these cases expanded upon the original Constitutional guarantee and established the right to *effective* assistance of counsel, according to prevailing professional norms. I will touch upon historical efforts to use this additional right to improve indigent defense through court actions seeking adequate compensation for public defenders– for better or for worse. The lack of adequate compensation for public defenders is nothing new– but the reasons for it are surprising, as I will explain in detail.

After a brief overview of the right to counsel nationally, I will narrow the focus to my home state of Oregon. Understanding the historical underpinnings of the right to counsel makes studying Oregon's unique system more contextually relevant. And Oregon's system is indeed unique- no other state in the country has a similar one. Although there are no comprehensive sources of information about the history of public defense in Oregon, I assembled an overview based on fragments and footnotes, bits of history provided as background information in various government reports, transcripts from agency meetings, and interviews with representatives of key constituencies.[6] I will explore the shift from a county-run, ad hoc system to a state-funded and administered system, including the trial and error of the original State Indigent Defense Board in the 1980s and the Indigent Defense Services Division of the 1990s up through the formation of the Public Defense Services Commission and Oregon Public Defense Services in the early 2000s. I will trace the rise and fall of different indigent defense delivery models and explore each of them in depth.

As a picture of the evolution of public defense in Oregon emerges, it will become clear that this is not the first time an unrepresented persons crisis has occurred. However, the fix was temporary, and the potential for another, bigger crisis simmered under the surface, ready to

[6] Due to the sensitivity of this issue and upon request from certain interviewees, I have decided to withhold identifying information and direct attributions from my sources. All interviews were conducted via Zoom between January and May of 2023 and have been transcribed for reference.

explode under the right circumstances. Those circumstances presented themselves alongside the implementation of a series of profound structural changes intended to reform our system– during a global pandemic. I will show that what we are seeing play out in our courts today is the direct result of an intentional shake-up undertaken to bring visibility and a sense of urgency to the state of indigent defense in Oregon. With that understanding, I will delve deeper into some of the political conflicts and power struggles within the public defense community to show how they have shaped the current crisis and delineated public defense into two distinct camps. On one side are the mission-driven, nonprofit attorneys who want stricter caseload limits. On the other are the business-minded, private bar attorneys, some of whom believe that the current caseload limits are too restrictive. I will explore their respective positions and how they cut to the heart of public defense as a constitutional mandate, forcing us to grapple with a difficult question– how much does society owe the indigent criminally accused?

Although I have formed my own personal opinions about the situation, I do not claim to have the answers– or any brilliant ideas about how to move forward. The best that I can do is provide a more detailed analysis than what is currently available in hopes that it might illustrate some of the complexities in a meaningful way. I have had the privilege to speak with people who have been at the forefront of this crisis. While they differ in perspective and ideology from each other, it is clear that everybody wants the same thing– a public defense system that works for everyone. It is also clear that what we currently have is not that.

An Overview of the Right to Counsel from a Historical Perspective

There are two distinct legal frameworks that most modern democracies adhere to; common law or civil law. Common law, or more accurately, English common law, is a system

that developed in England during the medieval period. In the early feudal system, the King's court was all-powerful, and the verdicts rendered were, to a degree, binding upon the present and future cases. Although the King had the ultimate authority to define and apply the law, it was the judges who interpreted it, relying heavily on precedent to reach their decisions. In cases that resembled previous ones but differed on certain points, the judge had the discretion to apply the rules from earlier or distinguish them as only applicable to a specific point of fact. Sometimes, a judge could overrule a previous decision and establish an entirely new precedent. In this manner, the English common law developed as a general body of law derived from judicial decisions but heavily influenced by the hand of the King[7]. After Britain became a constitutional monarchy, common law began to evolve into what is known today as the adversarial system of justice, in which counsel for either side of a dispute or criminal proceeding is expected to advocate for their client zealously.

Before this evolution into adversarial justice, it had long been the practice of the courts to allow the assistance of counsel in misdemeanor cases if the defendant could afford to hire an attorney. However, counsel in more severe cases, such as treason, was permitted only on matters of law, not points of fact. In other words, if one was to stand trial for high treason, an attorney could only be called upon to assist in interpreting the relevant law, not for pleading an individual case on behalf of the accused.[8] Noted sixteenth-century jurist Sir Edward Coke reflected the sentiment of the time by explaining that the judge was expected to act as counsel to the defendant, whose innocence should "require no manner of skill to make a plain and honest defense." [9] Conversely, a guilty party might be too easily shielded from discovery by "the

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[7] Joseph Dainow.*The Civil Law and the Common Law: Some Points of Comparison*. 15 Am. J. Comp. L. 419 (1966-1967)
[8] Felix Rackow,*The right to counsel: English and American precedents,* 11 The William and Mary Quarterly 3 (1954).
[9] Laura Appleman, *The Community Right to Counsel,* 17 Berkeley J. Crim. L. 1 (2012)

artificial defense of others speaking for him." [10] Although this borders on magical thinking from a twenty-first-century perspective, it perfectly served the Crown's interests. Sir James Fitzjames Stephen compared the plight of the criminally accused to "a race between the King and the prisoner, in which the King has a long head start, and the prisoner was heavily weighted." [11] It was not until 1836– long after American Independence– that the right to assistance of counsel in all cases became widely available in England by statute. Even then, however, this right was broadly interpreted to mean that the accused was not prevented from hiring an attorney, not that the state would provide one for them. [12]

The early colonies necessarily reflected much of the established common law from the motherland, in both content and procedure, albeit in a much more primitive and utilitarian context. One notable exception is that colonists did not prevent the use of counsel during felony criminal proceedings. As early as 1641, the Massachusetts Bay Puritans published the *Body of Liberties,* a document of legal code that included the right of the accused to seek counsel in mounting a defense. Some scholars believe this was an intentional break from English common law and is believed to represent the Puritan's desire to reform elements of their legal system considered oppressive and unfair.[13] Others argue that the presence of counsel helped facilitate trust and social protection, which was critical to establishing any new society.[14] The right to seek counsel (or at least, the lack of prohibition against it) thus took hold in all of the original colonies, although in varying forms over different timelines. Pennsylvania allowed for representation from its inception, as did New Jersey, Delaware, and Maryland. New York,

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[10] *Id.*
[11] James Fitzjames Stephen *The History of Criminal Law* , I, *pg. 397-8*
[12] *See* RACKOW, *Supra* note 8
[13] John Felipe Acevedo, *The Ideological Origins of the Right to Counsel,* S.Carolina L. Rev. Vol. 68: Iss. 1, Article 5. (2016)
[14] *See* APPLEMAN *supra* note 9

Virginia, and the Carolinas moved more cautiously, adhering to the English common law practices until the mid-eighteenth century. Georgia did not speak to the issue until its 1798 Constitution, which stated that "no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both.".[15] By this time, of course, Georgia was no longer a colony under the British crown. The American Revolution had been won, and the United States Constitution and the first ten amendments had been ratified.

Those amendments, which came to be known as the Bill of Rights, were a compromise between the Federalists, who believed in a strong central government, and the Anti- Federalists, who favored more substantial state control. The Sixth Amendment was adopted as originally written by James Madison:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[16]

At the time of its inception, the Sixth Amendment right to counsel was interpreted to mean only that the courts could not prohibit access to an attorney by the accused, not that the court was obligated to provide that access. Similarly, of the original 13 states, only two adopted statutory language compelling the courts to provide counsel in select cases– Massachusetts for treason and South Carolina for capital offenses. Only one state, Pennsylvania, made the appointment of counsel mandatory in all criminal proceedings. The Judiciary Act of 1790 clarified the federal

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[15] *See* Rackow, *Supra* note 8
[16] U.S. Const. Amend. VI

position somewhat, requiring the appointment of counsel in all cases of treason or capital crimes.[17]

At this point, it is important to pause and consider the landscape of the fledgling legal profession in the newly formed nation of America. Having just won independence from England, the prospect of continuing with a burdensome, complex, and archaic common law legal tradition was anathema to the notion of freedom and democracy in the minds of many.[18] Instead of demanding access to attorneys through a process of subsidization for the indigent, activists at the time sought to reform the entire system through a process of codification. The idea was that an overreliance on common law precedent had made access to the legal system impossible for most ordinary people.[19] Reforming the entire tradition toward a civil law framework would allow laypeople to understand and apply the law for themselves, simplifying the process so that access to an attorney would no longer be necessary. This was seen as an existential threat by attorneys of the time, who began a vigorous campaign to defeat and derail the movement. Although the codification of laws did begin in earnest during the nineteenth century, the conservative bar managed to insinuate itself and successfully co-opt the movement to the point of controlling much of the drafting process.[20] Furthermore, it was common practice to force complex amendments and precedential interpretations to newly codified laws through litigation and sheer persistence. Having thus failed to make access to the law available for the people through simplification, reformers at the turn of the twentieth century turned their focus to pushing for an affirmative right to counsel, or as Spaulding writes, "conservative legal elites…forced reformers to settle for lawyers–to settle for a reform agenda that concentrated heavily on expanding access

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[17] *See* Rackow, *Supra* note 8
[18] Norman Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel* 73 Fordham L. Rev. 983 (2004).
[19] *See Id.*
[20] *See Id.*

to counsel."[21] This push came on the heels of ratification of the Fourteenth Amendment, itself a game-changer in the legal landscape throughout the young nation.

Until the ratification of the Fourteenth Amendment, the Bill of Rights, including the Sixth Amendment right to counsel, was interpreted to apply only to the Federal government. *Barron v Baltimore*[22] was the first of many cases decided by the Supreme Court reflecting this interpretation. Following ratification of the Fourteenth Amendment, however, the Court decided that– through a process called incorporation– states could no longer restrict freedoms guaranteed by the Bill of Rights. State and Federal governments were, therefore, similarly prohibited from preventing the accused access to counsel in criminal proceedings. Since most criminal trials were held in state courtrooms, the demand for access to counsel was increasing around the same time the profession permanently ingrained itself into the legal landscape of America.[23] As lawyering became a respectable pursuit, fees for service rose accordingly. Those with the means were willing to pay the fees, as the outcome at trial for those represented by counsel was unquestionably superior to those who were not. Of course, those without the means had little hope of obtaining the services of an attorney despite the Sixth Amendment incorporation, as it was still seen as an unrestricted privilege rather than an affirmative right.

Supreme Court Jurisprudence and the Evolution of the Right to Counsel

This began to change, starting with the decision in *Powell v. Alabama* (1932), wherein nine Black men were charged with rape, then a crime punishable by death. The men were tried, convicted, and given the death penalty over a single day without access to meaningful representation by counsel. The Supreme Court found this to be a violation of the Sixth

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[21] *See Id. at* 991
[22] *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833)
[23] *See* Spaulding *supra* note 18

Amendment right to counsel, holding that if defendants in a capital case could not afford an attorney, one must be appointed for them by the court.[24] *Johnson v Zerbst* [25] followed soon after, in which the Supreme Court held that the affirmative right to counsel existed in all federal cases where "life or liberty" was at stake– not just capital cases. In delivering the majority opinion, Justice Hugo Black wrote that the criminally accused requires "the guiding hand of counsel at every step in the proceedings against him" unless he has "competently and intelligently" waived that right. However, *Betts v. Brady*[26] represented a sudden about-face, where the Supreme Court confusingly held that the right to counsel was not required in all state proceedings. The majority opinion expressed that the Fourteenth Amendment did not "embody an inexorable command" that precluded every trial from being conducted fairly where counsel was denied to the defendant.

Twenty years later, this finding was overruled by a unanimous decision in the landmark case *Gideon v. Wainwright*.[27] One of the three dissenting voices from the *Betts* decision, Justice Black, delivered the opinion in *Gideon* writing that "Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[28] The court recognized the complexity of legal proceedings and the specialization required to navigate them effectively. The majority viewed assistance of counsel as a necessity, not a luxury. This was clear in that the government employed well-trained and compensated prosecutors to pursue its interests against the citizenry. An inherent imbalance was created whenever an ordinary citizen–

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[24] John D. King, *Beyond "Life and Liberty" :The Evolving Right to Counsel.* 48 Harv. C.R.-C.L. L. Rev. 1 (2013)
[25] *Johnson v. Zerbst*, 304 U. S. 458 (1938)
[26] *Betts v. Brady*, 316 U. S. 455 (1942)
[27] *Gideon v. Wainwright*, 372 U. S. 335 (1963)
[28] *See Gideon, 372 U.S.* at 374

considered an untrained layperson– had to fight for their freedom against a specialized professional. The only way to balance the scales–in the court's opinion– was to ensure that both sides had equal access to justice through assistance of counsel– and not just in federal court. States bore the same obligation to their citizens.

Gideon established the right to counsel in state trials upon request by an indigent defendant standing trial for a serious crime, but it left many questions unanswered. Importantly, what kinds of crimes could be considered "serious," and at what point in the process must an attorney be assigned? Many scholars of the time believed that an attorney should be present much earlier in the process than at trial. Krash writes that "the right to an attorney should attach at the time of the arrest. That is the moment when the state assumes an adversary role. It is also the time when an accused may be most in need of legal assistance".[29] These legitimate concerns were left to later courts to determine. Still, *Gideon* laid the foundation for our modern understanding of the court's responsibilities in protecting the rights of the indigent criminally accused.

Since *Gideon*, the court has heard a number of precedent-setting cases that further clarified its reasoning. An exhaustive list is far beyond the scope of this paper, but some noteworthy cases are worth mentioning. *Argersinger v Hamlin*[30] involved a misdemeanor crime for which the defendant was sentenced to ninety days in jail. The Supreme Court agreed with Argersinger, who claimed that deprivation of counsel violated his Sixth Amendment rights. Not so in *Scott v. Illinois*[31], where the defendant only had to pay a fine. From these two cases, it was determined that the right to counsel for indigent defendants extended only so far as the

[29] Abe Krash, *The Right To A Lawyer: The Implications Of* Gideon V. Wainwright, 39 Notre Dame Law. 150 (1963-1964)
[30] *Argersinger v. Hamlin*, 407 U. S. 25 (1972)
[31] *Scott v. Illinois*, 440 U. S. 367 (1979)

possibility of "actual incarceration" was concerned.[32] *Escobedo v. Illinois*[33] held that the right to assistance of counsel begins during the process of police interrogation and cases such as *White v. Maryland*[34] and *Coleman v Alabama*[35] affirmed that right at all critical stages of criminal proceedings, including arraignment and the preliminary hearing. *Douglas v. California*[36] held that indigent defendants were entitled to counsel on appeal. Finally, the famous case of *Miranda v. Arizona*[37] held that all prisoners must be informed of their right to counsel, and no questioning can occur after a suspect has asked for an attorney. These cases help illustrate the philosophy of the Supreme Court regarding the indigent accused and access to counsel: it attaches at the first serious point of contact between the accused and law enforcement, continuing through the first appeal, it is required in cases where incarceration is a possibility, and the Sixth and Fourteenth Amendments guarantee it at the federal and state levels.

Compensating Court-Appointed Indigent Defense Attorneys

Although the Court was unequivocal about the state's duty to provide access to counsel, it provided no guidance on funding the mandate, leaving those decisions entirely up to each state. At the time, federal compensation to court-appointed indigent defense attorneys was rare. *Nabb v United States*[38] established that the United States bore no responsibility to pay for court-appointed counsel. Later courts affirmed this finding by declaring that practicing law was a privilege. By accepting the privilege, lawyers became officers of the court and were required to fulfill the obligation to help administer justice. Court-appointed attorneys could not ask for

[32] *See* King, *supra* note 24 at pg.16
[33] *Escobedo v. Illinois*, 378 U. S. 478 (1964)
[34] *White v. Maryland*, 373 U. S. 59 (1963) (per curiam)
[35] *Coleman v. Alabama*, 399 U. S. 1 (1970)
[36] *Douglas v. California*, 372 U. S. 353 (1963)
[37] *Miranda v. Arizona*, 384 U. S. 436 (1966)
[38] *Nabb v. United States*, 1 Ct. Cl. 173 (1864);

compensation, nor could they turn down an appointment without cause.[39] States, on the other hand, varied considerably regarding compensating court-appointed attorneys. Pre- *Gideon,* most all states appointed counsel to represent indigent defendants in murder trials, and some jurisdictions developed statutes with payment schemes, ranging from fixed fees to reimbursing counsel a "fair and reasonable"[40] amount. However, the underlying philosophy that an attorney owed gratuitous service to the courts ensured that an attorney representing an indigent client not be compensated at anywhere near the same rate as a private attorney. In *State of New Jersey v. Horton*[41], the court summarized the position taken by progressive jurisdictions concerning compensation:

> The recompense must be considerably less than what would be considered full compensation were the accused able to pay. While the philosophy of the assigned counsel system is founded on the basic obligation of the bar to render gratuitous services to the indigent, legislative authorization to make any recompense from public funds, especially where that authority prescribes a general standard keyed to reasonableness, must necessarily rest on recognition that the community too should assume some financial responsibility in the matter and that the bar should not have to carry the whole load.[42]

The amount of responsibility born by "the community" varied considerably from state to state and by jurisdiction within states. In New York, capital cases were compensated generously, but non-capital cases were not renumerated at all. Twenty-one counties in California established public defender offices, which paid competitive salaries. At the same time, Kansas compensated court-appointed defenders a per diem of $10 ($102 in today's dollars). However, even as late as

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[39] Jack Komar, *Court-Appointed Counsel-Right to Compensation* 16 Hastings L.J. 274 (1964)
[40] *See* Carter, *infra* note 42 at 104
[41] State of New Jersey v. Horton, 34 N.J. 518, 170 A.2d 1 (1961).
[42] Roch Carter, *Attorney-Client: Compensation of an Attorney Appointed to Defend an Indigent*, 47 Marq. L. Rev. 103 (1963) at 106

1961, six states and the federal government still specifically disallowed compensation of court-appointed defenders.[43]

The disallowing of compensation by the federal government was challenged in *Dillon v United States* (1964).[44] The attorney representing defendant Dillon, upon being denied compensation, successfully argued that requiring an attorney to work for free violated the Fifth Amendment prohibition against the taking of property without just compensation. The District Court for the District of Oregon agreed, noting that "any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights." [45] That year, Congress passed the Criminal Justice Act of 1964, establishing the right of court-appointed attorneys to compensation from the federal government. The Act called for no more than $15/hr (approximately $148.00/hr today) to be decided by judges per jurisdiction and applied to all District courts in the United States.[46] Shortly after the Act passed into law, *Dillon* was overturned on appeal. The United States Court of Appeals held that "Representation of indigents [without compensation] is a traditional professional obligation of the bar, which a lawyer undertakes when he becomes a member of the bar. There is thus no "taking" when a lawyer is required to fulfill that obligation." [47] Although the Criminal Justice Act of 1964 rendered the decision substantively moot (court-appointed attorneys would be compensated by statute), the essence of the decision, that court-appointed indigent defense attorneys should be expected to work for nothing, has cast a long shadow over the profession.

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[43] Neil Brockmeyer, *Compensation of Trial Counsel Appointed for Indigent Defendants,* 49 Cal. L. Rev No. 5 954 (Dec., 1961)
[44] *Dillon v. United States* 230 F. Supp. 487 (D. Ore. 1964)
[45] Ronald Carlson, *Appointed Counsel in Criminal Prosecutions: A Study of Indigent Defense* 50 Iowa L. Rev. 1073 (1965)
[46] Will Shafroth, *The New Criminal Justice Act* 50 Amer. Bar Assoc. J. 1049 (1964)
[47] *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965)

Although it was clear that *Gideon* would put considerable pressure on States to provide counsel for indigent defendants, allocating money toward indigent defense was not a high priority. Legislators were much more likely to allocate funding to politically palatable projects like parks, roads, schools, and transportation. Constituents were not in favor of their tax dollars being spent on defending "murderers and drug dealers,"[48] and as the country moved into a "tough on crime" stance, this sentiment was endorsed by judges and prosecutors. In Georgia, for example, when the state legislature introduced a bill to create a statewide funding mechanism for indigent defense, the District Attorney's Association called it "the greatest threat to the proper enforcement of the criminal laws of this state ever presented"[49] and vowed to fight vehemently against it.

Over time, the states adopted developed methods of oversight and funding for their growing indigent defense delivery services, some more successful than others. Some states delegated this responsibility to local governments at the city and county level; some kept it at the state level, while others developed a system of shared responsibility between local and state governments. More and more states created Public Defender Offices where salaried attorneys worked together in a law firm environment and shared services like investigators and paralegals. Others continued to assign counsel to supplement their Defender Offices or as a stand-alone solution. Assigned counsel worked on a case-by-case basis and were not necessarily criminal defense attorneys by training. Contract counsel were private attorneys contracting with the state or local government to provide services. Contracts were awarded to the lowest bidder and often took the form of "flat fee" contracts wherein all the costs associated with a case come from a set

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[48]Stacey Reed, *A Look Back At* Gideon v. Wainwright *After Forty Years: An Examination Of The Illusory Sixth Amendment Right To Assistance of Counsel* 52 Drake L. Rev. 47 (2003-2004)
[49] See *Id.* at pg. 59

fee that the government pays.[50] Many states placed caps on spending per case, with some as low as $1000 to defend a capital murder case. Defense attorneys trying to do the bare minimum for their clients often found themselves working for a below-minimum wage and not being reimbursed for hours spent outside of court. Many defense attorneys could not provide effective assistance without funds for investigators and expert witnesses, while others were simply incentivized to do the least amount of work possible and churn cases through the system.[51] This slapshot, experimental approach is why, according to the Brennan Center for Justice, an indigent defendant on trial in Washington DC today can enjoy quality legal representation while that same person in Missouri or Louisiana might languish in jail for months or years before even meeting with his attorney for the first time.

Effective Assistance of Counsel

Although the link between proper funding and effective assistance was becoming clear, the Supreme Court did not address this issue head-on, instead implying that effectiveness should be determined on a "case by case basis." [52] A popular standard used by lower courts was the "farce and mockery [of justice]" test.[53] However, this was a vague standard with ample room for interpretation. Then, in the 1970s, the court held that counsel must be "competent,"– causing lower courts to move toward a "reasonableness" standard.[54] Competency was replaced by

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[50] Bryan Furst*, A Fair Fight: Achieving Defense Resource Parity* Brennan Center for Justice https://www.brennancenter.org/our-work/research-reports/fair-fight (2019)
[51] Millan Das, *Impediments to Independence: How the Workplace Culture of Public Defender Offices Negatively Affects the Representation of Indigent Defendents.* 32 Geo. J. Legal Ethics 469 (2019)
[52]Gary Feldon and Tara Beech, *Unpacking the First Prong of the Strickland Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases,* 23 Univ. of Florida J. of L. and P.P. 1 (2012)
[53] *See Id.*
[54] *See Id.*

effectiveness in *United States v. Cronic* (1984)[55] when the Court held that the Sixth Amendment protects the right of the accused to *effective* assistance of counsel. Finally, *Strickland v Washington* (1984)[56] established a two-prong test for determining what constituted ineffective assistance of counsel. First, a defendant must show that his counsel's performance was unreasonable in light of prevailing professional norms. Then he must establish a reasonable probability that the outcome of the proceeding would have been different had representation been effective.[57] Although this seems reasonable enough, the reality is that the courts have been remarkably averse to declaring a given attorney's performance deficient *post opinione*. Defendants whose attorneys were "asleep, drunk, unprepared or unknowledgeable"[58] have all been deemed competent enough to the point that "any lawyer with a pulse will be deemed effective."[59] *Strickland* created a seemingly insurmountable barrier for defendants seeking to have their convictions reversed for ineffective assistance of counsel. It did, however, leave open the possibility for creative interpretations by defense attorneys themselves.

Most compellingly, the court did not provide any guidance about determining what "prevailing professional norms" meant. However, a number of cases decided between 2000-2005 suggested that the Court might accept the American Bar Association (ABA) standards of representation as "a definitive measure of reasonableness." [60] These standards include the ABA Model Rules of Professional Conduct, which govern the behavior of attorneys admitted to the bar. Rules exist for many topics, such as competence, diligence, communications, fees, and confidentiality.[61] This suggestion was called into question by Justice Alito in a 2009

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[55] *United States v. Cronic,* 466 U. S. 648 (1984)
[56] *See* Strickland, 466 U. S.
[57] *See* Feldon and Beech *Supra* note 52
[58] *See* Bibas, *infra* note 67 at 1
[59] *See Id.*
[60] *See* Feldon and Beech, *Supra* note 52 at 7
[61] Model Rules of Prof'l Conduct R. 1.1, R 1.2, R1.3, R 1.5 (ABA 2023)

concurrence[62] wherein he wrote that it was the sole determination of the courts to decide what effectiveness meant and that ABA guidelines should only be used as a guide.[63] Nonetheless, the Court did not offer a definition of effectiveness– eschewing a "one size fits all" solution for a problem that could manifest differently depending on the circumstances of a case. To this day, the lower courts vary in their interpretation of what constitutes "prevailing professional norms" and can use any kind of evidence available to make that determination. That evidence is typically divided into distinct categories– primary and secondary. Primary evidence relies on historical records like legal malpractice cases, decisions from attorney disciplinary hearings, ethics opinions from bar associations, and the like. It is less frequently used than secondary evidence, however. The ABA, being the foremost professional association of attorneys in America, provides some of the most oft-cited evidence of professional norms, but it is not the end all. Other forms of evidence have included guidelines from the National Legal Aid Defender Association, the U.S. Department of Justice's Office of Justice Programs, law reviews, and scholarly articles.

Notwithstanding the lack of any firm rules regarding prevailing professional norms, there is one universally powerful directive among attorneys in all areas of practice– to avoid conflicts of interest. It might seem obvious that an attorney must decline to represent a client whose interests conflict with an existing client, but this directive has less apparent applications. In the realm of public defense, it could be argued that taking on too many clients creates an inherent conflict, as each additional client on an already overburdened attorney's docket necessarily detracts from the level of service provided to his existing clients. It is not difficult to make the connection between underfunded public defense systems and overworked public defenders,

[62] *Bobby v. Van Hook,* 130 S. Ct. 13 (2009)
[63] *See* Feldon and Beech, *Supra* note 52

therefore illustrating a direct link between funding and effective assistance of counsel. Ten years after *Strickland* was decided, a New Orleans public defender named Mark Tessier did just that.[64] He filed suit claiming that the lack of funding for public defense within the New Orleans Criminal District Court rendered his services ineffective and his clients without meaningful assistance of counsel. In what would become *State v Peart*,[65] the lower court agreed and ordered the Louisiana legislature to provide more funding and access to witnesses, investigators, and a law library. The Louisiana Supreme Court reversed, and although it agreed that the system was underfunded and overburdened, it declined to order the state to spend more money. Instead, it established an individual rebuttable presumption of ineffective assistance unless the state could prove otherwise, opening the door to an avalanche of individual ineffective assistance claims. This decision moved the Louisiana legislature to increase indigent defender funding by over twelve million dollars, but inflation and rising caseloads quickly caught up and neutralized those gains. In Oklahoma, *State v. Lynch*[66] similarly lit a fire when the Oklahoma Supreme Court found a $3200 statutory cap on defender attorney's fees unconstitutional. Further, the court established guidelines that tied defense counsel salaries to that of prosecutors, an early attempt at the concept of pay parity between prosecutor and defender offices. *Peart* and *Lynch* are noteworthy because they showcase what the judiciary is capable of in terms of affecting indigent funding by tying it to ineffective assistance claims. However, with limited exceptions, the judiciary has generally avoided inserting itself into an issue it found to be strictly within the purview of the legislative branch.[67]

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[64] Jay Hauser, *Funding the Unfunded Mandate: An Equal Justice Case for Adequate Funding of Public Defense,* U. of Penn. 25 J. of L. and Soc. Change 288 (2022)
[65] *State v Peart* 621 So.2d 780 (La. 1993)
[66] *State v. Lynch* 90-74259 | Oklahoma state trial court (1990)
[67] Stephanos Bibas The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel Faculty Scolarship at Penn Carey L. 935

This hands-off approach by the judiciary has created something of a catch-22. Legislatures are representative of the people, and the people have historically shown an aversion to allocating precious resources toward an unpopular and often maligned class: poor people accused of committing crimes. Although there is evidence, particularly in Oregon, that this view is evolving in favor of allocating more tax dollars toward indigent defense, there is still a disconnect between theory and practice. The judiciary has enabled chronic underfunding and a patchwork system with little accountability by deferring to state legislatures to decide the contours of their indigent defense delivery systems. The high bar set in *Strickland v. Washington* has all but neutralized the threat of having convictions overturned for ineffective assistance of counsel– thereby limiting any relief through the courts.

The Right To Counsel in Oregon

According to Moore,[68] *Gideon* and *Douglas* did not impact Oregon as profoundly as other states. That is because the Oregon Constitution, drafted in 1857 and ratified upon statehood in 1859, states that "in all criminal prosecutions, the accused shall have the right…to be heard by himself or counsel".[69] This guarantee mainly applied to felony cases, but serious misdemeanors were considered in some instances. As early as 1864, courts were statutorily required to inform defendants of their right to counsel and ask if they desired counsel at the time of arraignment. If a defendant qualified as indigent and requested counsel, Oregon courts had "inherent or incidental"[70] power to appoint where needed. Appointed attorneys were not compensated for their time until 1937, when the Legislature passed a statute authorizing compensation from

[68] Michael Moore, *The Right to Counsel for Indigents in Oregon* 44 Or. L. Rev. 255 (1964-1965)
[69] OR. CONST. art 1 § 11
[70] *See* Moore, *supra* note 68, at pg. 257

county funds. This statute was drafted by the newly formed Oregon State Bar Association (OSBA) and intended to provide for but also limit compensation to court-appointed indigent defenders.[71] The fee schedule as proposed in 1937 permitted payment of a $5 flat fee for misdemeanor cases pled guilty, $10 a day (two-day limit) for misdemeanors pled not guilty, $15 flat fee for felony cases pled guilty, $15 a day (three-day limit) for felony cases pled not guilty and a sum "not exceeding $150" for murder.[72] These rates stayed relatively unchanged until 1961 when they increased significantly to $25, $50/day, $35, and $75/day. A questionnaire posed at the time found that most respondents (judges and attorneys) deemed these wages inadequate. However, the philosophy of providing legal services to the indigent at a token fee precluded increasing compensation to rates that were comparable to private practice.[73] Although attorneys might accept the requirement to represent indigent clients for a token fee, many were loathe to come out of pocket for expenses incurred during representation, and courts were reluctant to reimburse. For this reason, the quality of indigent defense was beginning to suffer.[74]

In 1969 the Oregon Supreme Court issued an opinion in *Stevenson v. Holzman*[75] which affirmed that the right to counsel extends to misdemeanor cases. According to *Stevenson,* the state was responsible for providing counsel for "all indigent defendants whose conviction may result in a loss of liberty."[76] This opinion upended the historical practice of appointing counsel only in cases of serious crimes. The Oregon Supreme Court went further in its opinion than *Gideon* mandated, and Oregon became one of the first states to require appointed counsel in *all criminal prosecutions*, including misdemeanors. Lorrigan and Decker theorize that a spirit of

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[71] OR. State Bar Assoc. *Proceedings of the Third Annual Meeting of the Oregon State Bar* 17 Or. L.Rev. 36 (1937)
[72] *See Id.*
[73] *See* Moore, *supra* note 68
[74] *See* Moore, *supra* note 68
[75] *Stevenson v. Holzman*, 458 P.2d 414, 417 (Or. 1969).
[76] *See Id.* at 419

"justice for all" [77] played a role in the nascent public defender movement, which could be one explanation for the generous interpretation by the Oregon Supreme Court. Just as likely was that the War on Drugs –and its resultant influx of indigent defendants needing representation– had yet to begin. In the 1960s, there were approximately 200,000 people incarcerated in state or federal prisons throughout the United States. By 2010, there were over 7.1 million. During that forty-year period, public funding for police and prosecutors increased exponentially while public defense spending decreased commensurately.[78] Scholars such as John Martin[79], Michelle Travis[80], and William Lawrence[81] point to this acceleration of the punitive state as the underlying cause of a perpetual public defense crisis.

Although arrest numbers are hard to come by for the state of Oregon specifically, it is safe to assume that the nationwide trend of increased drug-related arrests put a similar strain on public defense services in Oregon. The first attempt to establish a trial-level state public defender's office by statute failed to pass through the legislature in 1969, so post-Gideon, every county remained individually responsible for administering and funding indigent defense services. As had become the custom, attorneys were appointed from lists of private-bar attorneys, who were compensated according to statutorily defined limits based on the tradition of service to the community. As the demand for services began to increase, counties felt burdened by the cost imposed upon them by the State. Between the *Gebhardt v Gladden* finding that misdemeanants were entitled to counsel, and the legislative overhaul of substantive law definitions, county

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[77] John Decker and Thomas Lorrigan. *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States* 3 Creighton L. Rev. 103 106 (1969-1970)
[78] William Lawrence, *The Public Defender Crisis in America: Gideon, the War on Drugs and the Fight for Equality*, 5 U. MIA Race & Soc. Just. L. Rev. 167 (2015)
[79] John Martin and Michelle Travis. *Defending the Indigent during a War on Crime,* 1 Cornell J. of L. and P.P. 69 (1992)
[80] *See Id.*
[81] *See* Lawrence, *supra* note 78

leaders felt that they had little say in the circumstances yet full responsibility for the finances. A movement began to transfer this burden to the State, and after several unsuccessful attempts, the legislature passed HB 3293 in 1983. This bill transferred responsibility for administering and paying for indigent defense from individual counties to the State.[82]

After the passage of HB 3293, various entities under the State Court Administrators' (SCA) office were charged with contracting and authorizing payments for indigent defense, including local judges and administrators. This ad-hoc, loosely organized system made controlling costs difficult, so in 1985, the Oregon Legislature formed the State Indigent Defense Board (SIDB). The board assumed responsibility for authorizing payments, studying indigent defense services, and reporting to the legislature. However, the two years between 1985-1987 saw the first of what would soon become a familiar pattern– a funding crisis. Having failed to budget for the reinstatement of the death penalty or increasing caseloads, an 8.3 million dollar shortfall severely hampered the board from performing its assigned role, and it was dissolved in 1987. Administrative duties were returned to the Indigent Defense Services Division (IDSD) of the State Administrators Office, which then oversaw two conflicting budgets: court operating costs and indigent defense. [83]

Costs continued to increase under the IDSD, despite various attempts by the agency to get a handle on them. The agency established methods to collect and analyze budget, expense, caseload, and contract data to gain legitimacy with the legislature. Still, throughout the 1990s, IDSD had difficulty securing enough funding for growth and improvements. The reasons for this were studied in earnest throughout that decade. A 1989 report pointed to "prosecutorial charging

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[82] Barnes Ellis and Ann Christian. *Historical Context: Creation of the Public Defense Services Commission and the Office of Public Defense Services* Public Defense Services Three Branch Workgroup (2022)
[83] See *Id.*

and negotiation practices which, if revised, could reduce the cost of public defense services."[84] District Attorneys and their deputies were funded at the county level, while public defense had moved to the state. A disconnect in the system was therefore introduced that would have lasting effects on indigent defense delivery. Later, in 1993, a comprehensive study involving a newly formed Legislative Task Force on Indigent Defense Cost and Caseloads reported that, among other things, public defense administration should be separated from the judicial function "to reduce the conflict of interest between judges and public defense".[85] The next year, it was noted in the "Final Report of the Oregon State Bar Indigent Defense Task Force" that,

> Paying for the cost of indigent defense is an obligation of the state that charges persons with crimes, seeks to affect parental rights, or seeks to involuntarily commit individuals. That obligation has never been a popular one. Because it is not popular, the effort to create a permanent and reliable system for providing indigent defense services has never been made in any truly systematic way. Instead, funding of indigent defense has been grudgingly doled out and loudly condemned. Today, rising costs of providing indigent defense services, coupled with new and extreme limitations on the availability of funds to the Legislature will no longer permit a piecemeal, insular, and ad hoc approach to the problem.[86]

A 1995 Oregon Criminal Justice Council report synthesized several previous studies and reported a "lack of coordination between system components." It noted that, for example, "increasing the number of police officers on the street resulted in more arrests and prosecutions which, in turn, directly impacted indigent defense costs."[87] In other words, the State was on the hook to pay for decisions that cities and counties made, a reversal of the earlier complaint that initiated the change from county to state control of indigent defense. A 1994 report of the Oregon State Bar Indigent Defense Task Force found a surprisingly wide variety of delivery

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[84] Ken Rocco and Larry Niswender. *State Funding of Trial Court Representation for Eligible Persons* Leg. Fiscal Office Budget Information Report (2004)
[85] *See Id.*
[86] *See Id.*
[87] *See* Rocco and Niswender, *supra* note 84 at 4

models throughout the state, stating that "there may not be two judicial districts, statewide, employing exactly the same model for providing indigent defense services."[88] A 2000 report by the Oregon State Bar found that "funding is the key to fulfilling the state's obligation to provide adequate representation. Although mechanisms exist for promoting high-quality indigent defense services, these mechanisms are dependent, finally, on a provider organization's ability to fund them."[89]

The ability to fund high-quality indigent defense services was stifled by the IDSD introducing cost containment protocols such as "case counting"– limiting how many counts of an indictment a contractor could be paid for. This saved money by forcing defenders to service multiple count indictments for a single flat fee, rather than collect payment for each count defended against. Furthermore, IDSD refused to offer cost of living increases or acknowledge the rising cost of practicing law.[90] Their policy was that contractors would not see any more money unless they took on more cases, a position that the legislature applauded as a means to "hold public defenders accountable."[91] This resulted in attorneys taking on more work to make enough money, inevitably leading to poor representation quality. By the late 1990s, it was again recommended that the state do away with contracting altogether and move toward a state-employee-based public defense system. Even though it was projected to cost only marginally more than the system already in place, there was no appetite for it legislatively, and the recommendation was a non-starter.[92]

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[88] *See* Rocco and Niswender, *supra* note 84 at 4
[89] *See Id.*
[90] *See* Barnes and Christian, *supra* note 82
[91] *See Transcript* subject 2
[92] Paul Levy, Amy Miller and Eric Deitrick *The Future of Public Defense in Oregon: The Discussion Continues* Pub. Def. Serv. Comm. and Ofc. of Pub. Def. Serv. (2017)

The Formation of PDSC and OPDS

In 2001, the Oregon Legislature created the Oregon Public Defender Services Commission (PDSC) through Senate Bill 145. The goal was to consolidate the IDSD and the Office of the Public Defender, which provided services at the appellate level. At the time, it was thought that the constant lack of funding for indigent defense was a product of direct competition among priorities within the court system for budgetary consideration. By removing indigent defense from under the umbrella of the State Court Administration system, the hope was that funding could be more efficiently addressed. Although it still technically fell under the Judicial Branch, the PDSC was created as an independent governing board with the authority and mandate to advocate for proper funding from the legislature, independent of any other court function. At the time, there were high hopes that PDSC could remedy some of the most pressing complaints against IDSD– that it was insensitive to the needs of contractors, woefully underfunded those contractors, and presided over a system that was inconsistent and impenetrable without proper oversight, training or standards for employee performance.[93]

Duties of the new commission (PDSC), as detailed in ORS 151.216,[94] included establishing and maintaining a public defense system consistent with the United States and Oregon Constitution and establishing an Office of Public Defense Services (OPDS). OPDS is an agency with an Executive Director who serves at the pleasure of the commission. Although PDSC was established under the Judicial Branch of state government, the Chief Justice of the State Supreme Court, as the administrative head of the Judicial Department, was not authorized to exercise administrative or supervisory control over OPDS directly. However, the Chief Justice

[93] *See* Levy et al. *supra* note 92
[94] 14 ORS 151.216

was given the power to appoint the nine PDSC commissioners to serve and could remove any or all of them at will. This arrangement would become problematic later on, as it gave undue power to one branch of government and created tension between the agency and the judiciary. The commission was to consist of nine members pulled from a diverse cross-section of civic life: at least three could not be members of the bar, at least one had to have formerly been a public defender, and at least one had to have been previously served by a public defender. Commissioners were to serve four-year terms, and although expenses would be reimbursed, the position was unpaid.[95]

PDSC, the commission, was also tasked with developing contractor compensation, and caseload plans consistent with national standards. A clear directive was to promote policies for public defense compensation and resources comparable to prosecution compensation and resources– in other words, parity. The list of duties under ORS 151.216 is long and aspirational. Still, by design, the PDSC as a "collegial, volunteer board of directors"[96] was meant to tackle policy issues, macro-level structural problems, and advocacy to the Legislature directly. OPDS, the agency, was intended to focus on the day-to-day implementation of policy, along with the micro-level performance issues arising from individual attorneys or consortia of attorneys. Under ORS 151.219, the duties of the OPDS Executive Director included: recommending a cost-effective and constitutionally sound system of administering indigent defense to the PDSC, implementing and monitoring compliance with contracts, policies, procedures, and standards adopted by the PDSC, negotiating contracts with service providers to be approved by the commission, reconciling contractor requests for expense reimbursement, employing personnel

[95] *See* Levy et al. *supra* note 92
[96] *OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties) Part II: Benton, Lincoln & Linn Counties* (March 2004)

and supervising all operation and activities of the PDSC, submitting budget requests, and preparing annual reports to present to the PDSC and biennial reports to present to the legislature.[97]

From its inception, the PDSC claimed to have no interest in organizing a "one size fits all"[98] template for indigent delivery services in the state. Although earlier task force findings advocated for a state employee system, PDSC chose instead to continue with the model already in place, with the thought that it could be improved. A common disclaimer found in its reports states that "The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions, resources, policies, and practices and that a viable balance has frequently been achieved among available options for delivering public defense services."[99]At the time, those options included not-for-profit public defender offices, consortia of individual lawyers or law firms, law firms independent of a consortium, individual attorneys under contract, and individual attorneys on court-appointed lists. Most counties employed some combination of those options. The PDSC–responsible for the stewardship of tax dollars allocated for public defense– set out to determine which combinations worked and which needed restructuring. One of the first undertakings carried out by the OPDS was to divide the state into seven service regions, each consisting of several counties, and embark on a comprehensive analysis of each region. This began by breaking each region down further into individual counties, holding public meetings to hear from interested parties, analyzing cost efficiency and delivery models, and presenting their findings to the PDSC. The PDSC would then issue a Service Delivery Plan for the region, which might either support the

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[97] *See Id.*
[98] *See Id.* at 5
[99] *OPDS's Report to the Public Defense Services Commission on Service Delivery in Multnomah County (Region 1)* Mtg. of the Pub. Def. Serv. Comm. (9/9/2003) at 5

existing structure or make changes as it saw fit to correct inefficiencies or confront any particular challenges. OPDS would then take charge of overseeing implementation and ensuring compliance.[100]

Service Delivery Models

At the time, not-for-profit public defender offices (NPDOs) were operating in eleven counties and represented 35% of public defense services in the state.[101] The first NPDO, Multnomah Public Defenders Services Inc. (MPD), was established with a federal grant in 1971 and contracted with Multnomah County until the state took over in 1983. Similar NPDOs followed in various other counties afterward.[102] NPDOs employed attorneys who practiced public defense exclusively and provided them with a salary and benefits. Offices were operated as non-profit entities, overseen by a board of directors, and managed by a professional administrator. Significant infrastructure was often in place, including auxiliary staff like investigators, paralegals, automated systems, formal personnel, recruitment, and management processes.[103] PDSC recognized the advantages of this kind of organization and expected cooperation and partnership from the various Boards as it sought to analyze and possibly restructure a county-wide system. Since NPDOs operated as law firms, they often had conflicts of interest in cases with co-defendants.[104] Because of this, NPDOs could never be the sole provider of public defense in any given county, despite the advantages of their operational structure.[105] However, PDSC had an expectation that NPDOs share their resources and expertise

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[100] *See Id.*
[101] *Public Defense Services Commission Meeting* (1/1/2005)
[102] *See* Barnes and Christian, *supra* note 82
[103] *See* Meeting, *Supra* note 101
[104] Sylvia Stevens *Former Client Conflicts* OR. SBA (2009) "the "firm unit" rule under which every member of a firm is disqualified if any one of them is." *See also* OR. RPC 10.1 a
[105] *See* Meeting, *supra* note 101

with other contractors in the same county, which may have been somewhat unrealistic given the competitive nature of separate law practices.

Consortia of attorneys were another common structure for delivering indigent defense. Often a consortium would exist in the same county as an NPDO, absorbing conflict cases and overflow. However, just as often, a consortium would exist as the only system–especially in the sparsely populated counties of Eastern Oregon. Consortia first formed in the 1990s as a result of the low hourly pay for court-appointed attorneys ($30/hr) and the state's emerging preference for contracting.[106] Some consortia were loosely structured without a central administrator or any kind of membership requirements, while other (usually larger) consortia enacted stricter guidelines and employed a centralized management structure. Consortia included independent attorneys or entire law firms. Attorneys could take public defense work as a percentage of their overall work, enabling them to keep private clients. Consortia offered some advantages from the perspective of the PDSC, mainly in the area of conflicts. Since consortium members were independent of each other, a conflict case could be re-assigned to a different attorney in the consortia without running afoul of the "firm unit"[107] rule. Well-organized consortia offered some of the same structural advantages as NPDOs, especially if they had a board of directors with which the PDSC could partner. However, the PDSC was not empowered to penetrate the inner workings of law firm consortium members, making it difficult to track quality and performance issues effectively. Furthermore, the absence of an internal management structure required PDSC to develop methods to monitor training, ethical standards, discipline, and a qualification process for receiving court appointments.[108]

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[106] *See* Barnes and Christian, *supra* note 82 at 15
[107] *See* Stevens, *supra* note 104
[108] *See* Meeting, *supra* note 101

Law firms that operated independently of a consortium also supplied public defense services under direct contract with PDSC. However, this model presented more difficulties without the balancing advantages. Just as PDSC was unable to penetrate the inner workings of a consortium law firm, independent law firms operating as for-profit enterprises lacked transparency and accountability. However, whereas law firms operating as consortium members could efficiently re-distribute conflict cases, independent law firms offered no such flexibility. Furthermore, PDSC would have to develop external mechanisms to ensure the delivery of quality, cost-efficient services and maintain adherence to a baseline of training and certification. On the other hand, individual attorney contractors could be selected and evaluated directly by the PDSC. Although they offered none of the administrative advantages of NPDOs or well-organized consortia, PDSC believed that the personal nature of the relationship allowed for its own kind of quality control and oversight. Over time though, PDSC moved away from individual attorney contracts in favor of contracting with entities. By 2019 PDSC had only four contracts with individual attorneys, one out of Clatsop and three out of Malheur County, one of the most remote and least populous in the state of Oregon.

The Case-Credit Payment Model in Action

When PDSC took over, most contracts were administered using a case credit payment system. Court-appointed, hourly trial-level attorneys still existed but were in the minority. Cases and credits were not the same things– although a judge might appoint a contractor to a certain case, he was paid based on a credit– defined by the PDSC as "an event or circumstance which counts toward contractor's satisfaction of [their] contract."[109] OPDS used a code matrix, which

[109] Sixth Amendment Center *The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services* (2019) available at https://sixthamendment.org/oregon-report/

included at least 77 individual codes for charges such as CMUR for capital murder, BFEL for class B felony, DFEL for felony DUI, and so on. A single felony case might warrant payment for multiple credits– the initial charge of BFEL, for example, and then subsequent BFEL credits if a different attorney took over after a period of time or an additional FPV credit for probation violation. The type, complexity, duration, and disposition of a case were all factored into the number and kind of credits the state paid out.[110]

Case credit contracts were awarded and renewed in two-year cycles based on a projected number of credits that a contractor might earn on their cases over that period. At the end of the contract period, a reconciliation occurred whereby contractors might owe the state funds back for not servicing the projected number of credits. Similarly, the state might owe a contractor for having serviced credits above their projected caseload. Early on, the different delivery models landed on opposite sides of the reconciliation process with regularity. NPDO offices frequently found themselves with a deficit– owing the state for falling short of their quota. On the other hand, private attorneys often had a significant overage– wherein the State owed them for cases taken above and beyond their quotas. [111]

The prevailing logic behind case credit contracts was that paying a flat fee, according to the type and severity of the charge, would negate the possibility of attorneys padding their bills and relieve OPDS from the responsibility of determining whether billable hours were appropriate in a given case– a huge administrative burden. Additionally, attorneys would be encouraged to work more efficiently, and a de-facto pay scale would be established between novice and experienced attorneys. This is by virtue of the fact that a novice necessarily spends more time doing the same amount of work as an experienced attorney, making the hourly rate higher for the

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[110] *See Id.*
[111] *See Id. and* Transcript, *supra* note 91

experienced attorney as a result. The Commission was not blind to the potential down-sides of per-unit contracts, however. Testimony before the commission, mostly by NPDO directors, consistently expressed dissatisfaction with this payment model. Contractors were paid a flat rate, regardless of how much or how little time they spent on a case, and with no consideration for the outcome of the case or the quality of services rendered. [112] A prominent indigent defense lawyer later pointed out, "[under the case credit system], I could not afford to do a misdemeanor for $400, but I could do a thousand misdemeanors for $400 each. That is because, in bulk, I could rely on a portion of my cases to fail to appear, a portion of them to plead out in a straightforward manner, and all of those other cases would subsidize the few who insisted on going to trial. We had a funding model dependent on volume and failure."[113]

A Slowly Sinking Ship– Public Defense Struggles Through Excerpted PDSC Meetings

Even after PDSC took over from the IDSD, case credits and hourly rates remained stagnant, a situation that failed to consider inflation and the rising cost of doing business as an attorney. As of 2007, the $40 hourly rate paid to private attorneys had not changed since 1991, and OPDS did not reimburse for overhead or any other expenses. To put this in perspective, the $15/hr guaranteed to a court-appointed indigent defense attorney by the 1964 Criminal Justice Act equates to $148.00/hr in today's money. The $75 per diem awarded to indigent defense attorneys by Oregon Statute in 1961 equates to $783 in today's money. By contrast, the $40/hr paid to court-appointed indigent defense attorneys in 2007 equates to $59/hr in today's money. That is a breathtaking decline in the value of services provided by indigent defenders over time–not to mention that the fees awarded in the 1960s were designed to be an honorarium based

[112] *See* Levy et al. *supra* note 92
[113] *See* Transcript, *supra* note 91

on the philosophy that attorneys owed a debt of service to the courts, paid by accepting indigent clients at a profound discount.

The only option many attorneys had in the face of such low pay was to accept increasingly high workloads to remain financially solvent, a continuation of the phenomenon that first appeared in the 1990s. Without caseload standards in place, there was no meaningful limit to the number of cases an attorney could accept. According to Levy et al, "contractors face[d] a terrible dilemma: maintain manageable caseloads that allow for competent, client-centered representation or maintain an economically viable and sustainable law practice. To do both is nearly impossible."[114] Although OPDS was tasked with ensuring constitutionally adequate indigent defense, case-credit contracting made oversight nearly impossible. Unlike an employer-employee relationship, contracting does not allow for control over the service delivery method or means. OPDS had to maintain an arm's length from contractors, who in turn had to maintain an arm's length from participating attorneys. The result was a "stunning lack of oversight."[115] Additionally, the model created such a complex bureaucracy that it was difficult for legislators who made funding decisions to understand the financials involved. This directly conflicted with PDSC's mandate to advocate to the legislature for adequate resources.[116] Legislators simply did not know what they were buying, and so they kept the purse strings pulled tight.

Just like the earlier doomed State Indigent Defense Board, OPDS began life in the midst of a funding shortfall. By 2003, the state Legislature had cut 16% of its budget, which might have been restored if the voters approved a 1% increase in state income tax. The measure failed, resulting in a massive disruption to the already tenuous delivery of indigent defense throughout

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[114] *See* Levy et al. *supra* note 92 at 5
[115] *See* Sixth Amendment Center, *supra* note 109 at IV
[116] *See* Levy et al. *supra* note 92

the state.[117] The Chief Justice of the Oregon Supreme Court established a Budget Reduction Advisory Committee–BRAC– to consider all options available to address the budget cuts (this period of time has come to be known as the BRAC crisis). Under consideration were steps taken during previous budgetary shortfalls, such as reducing contract payments (without reducing workloads) and continuing to appoint attorneys until all funding was exhausted. Ultimately the BRAC recommended a "glide path[118] solution, which entailed stopping the appointment of attorneys in all new cases in order to maintain funding for pending cases.

This solution compromised virtually every aspect of public defense throughout the state . Defendants were left without counsel and had to be released from jail, their cases set over until the following year. Court staff were furloughed, and courtrooms were closed on Fridays. Both indigent contractors and private bar attorneys experienced significant economic hardship, and many left the profession. [119] This was the first unrepresented persons emergency that the State had ever experienced, and it had tangible consequences. PDSC meeting minutes from this era reflect a sense of helplessness and resignation. Attorneys were asked to do more with less, and astonishingly, some of them agreed to work for lower pay until the new biennium funding cycle, citing their commitment to public service and personal sacrifice.[120] Still, others discussed the fact that the legislature was beginning to recognize "for the first time" that "without defense system funding, the public safety system couldn't function."[121] Although this understanding presented potential leveraging opportunities, the record of that time reflects an aversion toward entering a "self-destruct mode"[122] in order to force the legislature's hand.

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[117] Pub. Def. Servs. Comm'n, *Executive Director's Biennial Report to the Oregon Legislature Assembly 7* (2005)
[118] *See* Barnes and Christian, *supra* note 82 at 27
[119] Mary Sue Backus and Paul Marcus *The Right to Counsel in Criminal Cases, A National Crisis* 228 Wm. and Mary L. S. Scholar. Repos. Fac. Pubs. 1031 (2006)
[120] *Public Defense Services Commission Meeting* (Feb. 2004)
[121] *See Id.* at 39
[122] *See Id.*

Although the legislature took steps to restore some of the funding lost during the 2003-2005 biennium, the mood among providers before the PDSC remained bleak throughout the first decade of the twentieth century and into the second. Testimony from providers and among commissioners consistently reflects a system ill-equipped to meet its mandate of providing quality indigent defense services. Minimal biennial budget increases by the Oregon legislature did not keep up with increasing costs to do business. Appeals to the legislature for more funding were generally unsuccessful, as the case-credit system made it difficult to educate lawmakers about exactly what they were paying for. Year to year, the system hobbled along, but cracks on the surface that had always existed became impossible to ignore. As a result of uncompetitive pay and crushing workloads, attorney retention, particularly within NPDOs, was becoming a serious problem. Attorneys fresh out of law school would join public defense offices only to leave after a few years of training to take higher-paid jobs or join defense consortiums. Every time an attorney left, their caseload had to be transferred to a new attorney, creating an administrative nightmare under the case-credit system. [123]

The 2017 legislative budget had a crushing effect on the morale of provider attorneys. OPDS appellate division, being state employees, received standard merit and Cost of Living (COLA) pay increases. However, no such funds were available for contractors, and the budget allocation remained flat from the previous biennium funding cycle. Due to inflation, a flat budget was a cut budget, as far as attorney providers were concerned. During the September PDSC meeting, representatives from indigent defense communities across the state testified, one after the next. From Douglas County, Daniel Brouck pointed out that his attorneys get paid less than minimum wage for misdemeanors that go to court and that his office is becoming ethically compromised. As an example, he explained that although case rates have remained flat, he is

[123] *Public Defense Services Commission Meeting* (Dec. 2017)

now dealing with police body camera footage. Defense attorneys are ethically obligated to watch the footage, but this adds hours to a case for which they already do not have adequate funding.[124] Jack Morris called public defense in Oregon a "slowly sinking ship," noting that in the 1990's he would receive up to one hundred resumes for an open position but recently received only one.[125]

Tom Crabtree, Executive Director of the public defender's office in Bend, said that lack of increases would be "disastrous"[126] for his organization. He noted that historical language, directing first the SCA and then PDSC to achieve parity between DAs and public defenders, was a farce– in 1990, there was a 22% disparity, which had grown to almost 50% by 2017. Adjusting for inflation, public defenders made 61% less in 2017 than in 1985. He testified that "The only thing the legislature recognizes–they don't recognize parity [or] equality. They recognize crisis and caseload increase, and I think we need to give them one or the other or both" .[127] Lane Borg, head of Metropolitan Public Defender (MPD) in Multnomah County, testified that he was coming from a "dark space of discouragement and despair"[128] due to the lack of cohesiveness within the public defense provider community. The NPDO and Consortium models were in opposition over what reforms, if any, were needed, and the only movement he had seen toward parity occurred after the BRAC crisis of 2003. "The only time we've gotten real movement was when we shut the system down in 2003 when the money ran out, and there was no defense counsel…they realized they can't hold the party without us. So I think whatever can be done needs to be done to foment that crisis".[129] His words would prove prescient in the coming years.

The Reform Movement and Fissures in the Provider Community

[124] *See Id.* at 25
[125] *Public Defense Services Commission* (Sept. 2017) at 26
[126] *See Id.* at 17
[127] *See Id.* at 18
[128] *See Id.* at 20
[129] *Id.*

By 2018, Lane Borg had moved from his position with MPD to the Executive Director role with OPDS. This change was lauded by many from the NPDO community, as they saw one of their own ascend to a position of power within the agency.[130] Immediately he sought to restructure OPDS into a more functional and efficient agency, but many of his ideas were met with resistance from consortium attorneys. During this period, the rift that had begun to appear ideologically and politically between the non-profit world and the private bar became even more apparent. It has been explained to me by various sources that the type of attorney who is attracted to non-profit work differs in many respects from those who are drawn to the private bar. As one consortium attorney explained to me, "If I were sitting in jail and I was interviewing two lawyers and the first one came in and said– I feel really strongly about social justice, and I'm going to change the whole criminal justice system with your case, the judge might be tough on you though– and the second guy says– I voted for Trump, but I'm going to kick their ass and get you out of here for free– I'm pretty sure that defendant would choose the second guy."[131] NPDO attorneys have a reputation for being mission-driven and singularly focused on issues of social justice and systemic change. In contrast, private attorneys are thought to be more focused on business, devising efficient means of closing cases and holding a more narrow view of the public defender's role in their client's life.

In Oregon, all defense attorneys, public and private, are represented by the Oregon Criminal Defense Lawyers Association (OCDLA), a trade group and advocacy organization. However, after Borg rose to the Executive Director position within OPDS, consortia attorneys formed their own advocacy group, the Oregon Defense Consortium Association (ODCA). They began to lobby the legislature to protect their interests, which they saw as distinctly different

[130] *Public Defense Services Commission Meeting* (June 2018)
[131] *See* Transcript, subject 3

from the non-profit attorneys.[132] Reflected in the transcripts from PDSC commission meetings of the time was a sense of skepticism about the consortia model in general and private bar attorneys in particular. How could anybody be sure how much time a private lawyer was dedicating to his paid clients relative to those he was being paid to represent by the state? How could it be that consortium attorneys made more money than non-profit attorneys, and was it fair? These questions seemed to hang in the air like unspoken accusations. An attorney who previously worked for a MPD told me that "[When I was working for MPD] we were running deficits that made us feel like we could never turn cases down, whereas the consortiums [would] engage in these practices where they were blatantly encouraging too large of a caseload…They were creating these pots of money that were a temptation, and we saw bad behavior."[133] OPDS even went so far as to terminate contracts with consortiums in Jefferson, Clackamas, and Yamhill counties, citing "manipulation of caseload" and "harassment of court staff to achieve that end." Representatives from all three groups vehemently denied the accusations.[134]

Under Borg, the legislature approved funding to commission a study by the Sixth Amendment Center (6AC)– a nonprofit think tank based in Washington, DC. The 6AC had a reputation for in-depth assessments and effecting change. A source that I spoke with suggested that it was a foregone conclusion that 6AC would find an untenable situation in Oregon. The hope was that a comprehensive study by such a reputable organization would give the legislature little choice but to finally address the systemic problems that providers had been complaining about for years.[135] Additionally, PDSC commissioners were in talks with the American Bar

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[132] *See* Transcript, subject 1
[133] *See* Transcript, *supra* note 91
[134] Emily Cureton Cook *Oregon Memo says Madras Public Defense Group Manipulated Caseload, Concealed Dysfunction* (2010) available at: https://www.opb.org/news/article/madras-oregon-public-defense-group-caseload-manipulation-allegation/
[135] *See* Transcript, *supra* note 91 and *Public Defense Services Commission* (March 2018)

Association to conduct a caseload analysis of Oregon indigent defense providers.[136] Although the 6AC report was a collaborative effort between the nonprofit and PDSC, in the end, 6AC referred to the commission (PDSC) and the agency that it oversaw (OPDS) as a "complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel."[137] After studying indigent defense delivery in a sampling of Oregon counties, the 6AC found that the flat-rate contracting system was unconstitutional and "prohibited by national public defense standards"[138] to nobody in the agency's surprise. The report recommended that fixed fee contracting be abolished and replaced with an hourly model that pays attorneys a reasonable fee and overhead costs or that the state hires trial-level attorneys and compensate them as employees. It also recommended moving away from the consortium model of indigent defense delivery.

In testimony before the PDSC general meeting of January 17, 2019, David Caroll and Jon Mosher– director and deputy director for the 6AC, further elaborated on the findings and recommendations from their report. Specifically, PDSC's governing statutes should be amended to allow each of the three branches of government to appoint members of the commission, not just the judicial branch.[139] This would create a system of checks and balances wherein no single branch of government exercises complete control over the agency. Additionally, the Oregon Legislature should direct the PDSC to enforce a list of standards, especially pertaining to workload and training requirements. Carroll and Mosher noted that, although the private attorney rate had increased from the 1991 level of $40/hour to $46/hour, adjusting for inflation, it should

[136] *Public Defense Services Commission Meeting* (June 2018)
[137] *See* Sixth Amendment Center, *supra* note 109 at V
[138] *See Id.*
[139] *Public Defense Services Commission Meeting* (Jan. 2019)

be at $125/hour. He recommended that Oregon look to Massachusetts as a model for transitioning to a system composed of state employees and assigned private counsel, noting that some parts of Eastern Oregon could only support a regional office due to low case counts. A mixed system of state employees and private bar counsel would be necessary to cover overflow and conflicts (overflow resulting from excessive caseloads and conflicts resulting from multiple defendants in a single case whom lawyers from the same office cannot represent), but private bar attorneys should be supervised and closely monitored. He estimated a 3-5 year transition period for any new system to go into effect. [140]

Although many in the NPDO world welcomed these findings as the first step toward much-needed reform, consortium attorneys detected an existential threat. Consortium attorneys generally did not object to the case-credit payment model. Although they agreed that the fee per credit should be higher, their position was that it made sense and allowed for maximum flexibility within their provider networks. A consortium attorney from Washington County explained that, for example, an attorney might lose a private client, which opened up unexpected time in her schedule to take on some court appointments. (CITE) Many consortium members had developed efficient and effective ways of disposing of cases. They resented the implication that the caseloads they took on were too high or precluded them from delivering effective assistance of counsel. Instead, they pointed to several factors that enabled them to work in a different, and to their mind, more effective manner than those in the non-profit world. Consortium attorneys often got their start working in NPDO offices– that problem with retention that NPDO directors complained about? Many of those attorneys who left went into private practice and joined consortiums, bringing their training and experience with them. A more business-minded approach enabled them to dispose of cases in less time and–they say– with better outcomes.

[140] *See Id.*

Consortium attorneys handled 30-40% of all trial-level indigent defense. Yet, there was zero evidence pointing to a deficiency in the level of service or client satisfaction relative to the other provider types.[141] And yet, moving to a state-employee-based system would impact their livelihood and likely do away with their ability to contract with the state at all. Because of this, there was ever-growing dissension in the ranks, and a fragmented provider community that increasingly lacked a unifying vision for change.

Still, the appointment of Lane Borg (a former public defender) to the executive director position at OPDS, combined with the findings and recommendations from the 6AC report, brought about a fundamental change in the tone and tenor of PDSC meetings. As a staff attorney at OPDS explained, "All of the OPDS directors had been institutionalists…[they] didn't know what was going on on the ground and were disconnected from the practice. Then when [Lane Borg] was hired, I knew…now we're actually going to get stuff done."[142] 2019, in general, was a year filled with hope for reform and the promise of legislative movement toward what many thought would be a more just system. Changing to a state-employee model for trial-level providers also came into focus as a possible way to achieve parity with prosecutors and caseload caps to ensure a reasonable work-life balance.[143] House Bill 3145B, which would have facilitated that change, made it through committee only to die on the House floor in May of 2019. Still, there was momentum for change. In an unusual move, Governor Kate Brown took steps toward developing a Public Defense Transformation Committee and developed funding proposals that signified her commitment to prioritizing indigent defense. These included an 8% increase for trial-level contractors and parity with Justice Department prosecutors for appellate-level attorneys, who are employed by the state (Oregon law mandates parity between similarly situated

[141] *See* Transcript, *supra* note 131 and note 133
[142] *See* Transcript, *supra* note 132
[143] *Public Defense Services Commission Meeting* (January, 2019)

counterparts among state employees). After the PDSC voted to do away with case-credit contracts, Borg was empowered to move OPDS toward an hourly Full Time Equivalent (FTE) model. Due to the rapidly evolving changes, OPDS offered temporary 6-month extensions to contracts up for renewal in the Fall, with the understanding that they might be significantly altered for the better after the passage of much-needed reforms. House Bills were drafted, including HB 4004, which provided a roadmap for PDSC to implement the recommendations of the 6AC report. Provisions in the bill directed PDSC to adopt policies that brought compensation and caseloads in line with national best practices and allowed for greater transparency and oversight.[144] HB 5204, referred to as the "Christmas Tree Bill," included a twenty million dollar special allotment for indigent defense spending as a temporary stop-gap to increase provider pay while the more expansive reforms took shape.[145]

Systemic Reform during a Global Pandemic– Moving Away from Case-Credits

Then, a perfect storm arrived. Republican state senators staged the latest in a series of walk-outs during the 2020 legislative session, halting progress on HB's 4004 and 5204. HB 4004 had passed the house and was literally the next bill up for a vote when the walkout occurred. Then Covid-19 hit. Despite the momentum toward reform, neither bill could make it through to the Governor's desk before the legislative session was cut short. By the time the PDSC regrouped enough to have its first (remote) Covid-era meeting, everything had changed. Public defense reform was no longer on anybody's radar. From the Governor on down, all attention was focused on the pandemic.[146] Kimberly McCullough, the legislative director of OPDS, testified

[144] Kimberley McCullough *RE: HB 4004* available at https://olis.oregonlegislature.gov/liz/2020R1/Downloads/CommitteeMeetingDocument/217698
[145] *Public Defense Services Commission Meeting* (April, 2020)
[146] *See Id.*

that all public defense reform work had been put on hold, and she was unsure when or if it would resume. Furthermore, due to the chaos that Covid-19 created from an economic and budgetary standpoint, any structural changes being considered would likely need to have no fiscal impact (PDSC 4-16-2020, p. 8),[147] a huge letdown from just months previous. OPDS itself had to shift focus and found itself consumed with the minutia of guiding its providers through the unchartered waters of a global pandemic. Tasks as basic and fundamental to public defense, such as meeting with a client or appearing for an arraignment, had to be completely rethought.

Despite the chaos of the early Covid-19 era, PDSC–the commission– did try to get some of the twenty million dollar allotment released but was only marginally successful. Although the legislature allocated some funds, they were earmarked to pay for things like staff positions at OPDS– the agency–, increased pay for investigators and interpreters, juvenile training, and internal OPDS IT workers. No funds were available to increase the pay of public defenders themselves. In fact, OPDS and all other government agencies were asked to undergo budget reduction exercises to prepare for the inevitable shortfall caused by the economic crisis brought about by the pandemic.[148] Still, OPDS was tasked with re-negotiating contracts under an FTE model, despite the lack of funding, a process that Eric Dietrick, general counsel to OPDS, described as "rearranging desk chairs [without] adding capacity, [without] adding new money."[149] Contractors would now be paid according to the number of FTE attorneys providing public defense services, a simplified mechanism that allowed for transparency but also revealed the "inequities that had been baked into [the] system, but covered up by the case-credit model."[150] Simple math– dividing the contract value by the number of FTE attorneys working

[147] See *Id. at 6-8*
[148] *Public Defense Services Commission Meeting* (May, 2020)
[149] *See Id.* at 12
[150] *See Id.*

under it– revealed a wide disparity across contractors. It became obvious that more time was needed to develop a fair and equitable system. In light of this, OPDS decided to extend existing contracts yet again and work on building a better model.[151]

By the end of 2020, OPDS had settled on a model that paid urban contractors $200,000 and rural contractors $190,000 per FTE attorney–inclusive of everything that a contractor needed to do business, including rent, support staff, and insurance.[152] Under the FTE system, a contractor must report an FTE percentage for each attorney to OPDS. NPDOs typically report each of their attorneys as 1.0 FTE, a status that precludes them from accepting any other kind of paid legal work. Consortia, private law firms, and individual contractors often report an FTE percentage for each attorney to OPDS. However, the agency has no way to track or verify the amount of time spent on public defense versus private practice caseload for these attorneys.

Along with the change in payment model, OPDS began incorporating new contract language that required contractors to track public defense caseloads and workloads. A case was defined as "any action in which there is one eligible client on one charging instrument, or on one petition and its successor." Caseload referred to "the number of cases assigned to an FTE attorney on an annual basis," and workload referred to the number of open cases assigned to an FTE attorney at a given point in time" (PDSC Contract for Public Defense Services, p.9). The new contracts set a caseload threshold above which a contractor could take no more cases, but it was clear that this should not be considered a quota. In fact, OPDS now required contractors to not take caseloads and workloads above what they could ethically handle. This had always been a rule under the Oregon Rules of Professional Conduct (ORPC) but had previously been impossible to track. At first, they aimed for a caseload threshold that did not exceed 115% of the

[151] *See* Meeting, *supra* at 148
[152] *Public Defense Services Commission Meeting* (Dec. 2020)

National Advisory Commission on Criminal Justice Standards (NAC Standards) of 400 misdemeanors and 150 felonies, but it quickly became apparent that these standards were neither empirically devised nor substantiated.[153] OPDS later refined its FTE model into a Maximum Attorney Caseload (MAC), which assigned weighting points to various case types and limited a 1.0 FTE attorney caseload to 300 points per year. A workforce proposal memo from 2022 states that "lowering the caseload per attorney will put an additional strain on Oregon's already significant capacity deficits in the short term, but is required to provide sustainable, adequate representation as well as recruit and retain lawyers in the public defense system.".[154] OPDS understood that limiting caseloads could have consequences, but pointed to studies that consistently showed "the way to raise quality of representation in public defense is to limit the number of cases per attorney."[155]

Developing and implementing an entirely new system for delivering indigent defense during a global pandemic was no easy task. The entire criminal justice apparatus ground to a shuddering halt, which made it impossible to forecast the sufficiency of the new model relative to the demand for indigent services. Jury trials basically stopped altogether. Jails adopted COVID protocols which necessitated all but the most violent offenders be released to some kind of home confinement or another arrangement as their cases languished in the court system. As one attorney explained, " If you are advising a client, particularly if they are out of custody, they generally want their case delayed… they have no interest in going to jail or pleading guilty. And because there were no jury trials [during the pandemic], a case *could* be delayed. There was no final incentive to resolve a case."[156] A cursory look at data from this period can be misleading

[153] *See* Transcript, *supra* note 132
[154] *Public Defense Services Commission Meeting Amended Agenda* (September, 2021)
[155] *See Id.*
[156] *See* Transcript, *supra* note 132

without context. For example, in 2019, 74,573 total criminal cases were represented by court-appointed attorneys–slightly less than the previous year's 76,929 cases. In 2020, there were 67,738 cases; in 2021, there were only 44,710.[157] These numbers might suggest that individual caseloads for attorneys declined over those years. However, the pandemic caused a temporary backlog. Before the pandemic, cases would resolve within a year, but beginning in 2019, all of the open cases just stacked up. So, by the end of 2021, an estimated 137,448 open criminal cases were assigned to public defenders in Oregon– a 100% increase from a typical year.

This unprecedented backlog in cases presented a compelling backdrop for the long-awaited American Bar Association (ABA) study on caseloads, published in January 2022.[158] The study measured the amount of time that attorneys should spend on their cases by case type according to a list of metrics such as ABA best practices and *Strickland*-based benchmarks of effective assistance. The results would ostensibly give OPDS reliable data to forecast the number of attorneys needed and estimate reasonable caseloads to include in contracts. The study found, among other things, that Oregon had only 31% of the public defense attorneys needed to provide indigent defendants with constitutionally acceptable representation.[159] According to the ABA, Oregon was short 1,296 full-time trial-level and juvenile attorneys. The ABA analysis considered a full-time attorney to be working 40 hours a week, 52 weeks a year. It did not account for lunchtime, breaks, travel time, or any other incidentals that might take an attorney away from her desk. In other words, even the 1,296 attorney deficiency was likely an undercount. Additionally, the ABA report found severe

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[157] Office of the State Court Administrator, *Reports, Statistics, and Performance Measures* available at https://www.courts.oregon.gov/about/Pages/reports-measures.aspx

[158] American Bar Association *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards* (January, 2022). Available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf

[159] *See Id.* at 26

deficiencies in OPDS's ability to collect and analyze data, resulting in a lack of oversight. "Even if funding and a sufficient number of qualified attorneys were readily available, the Commission and OPDS lack the infrastructure and capacities to triple the number of FTE attorneys for which they contract,"[160], the report concluded.

Shortly after the ABA report was published, Lane Borg, the reform-minded director of OPDS, stepped down from his position at OPDS. Sources within the agency claim that he was forced out– but the record reflects an amicable parting, at least on the surface. Per Rjamford, chair of PDSC, said at the time that "[Borg] had accomplished much of what he set out to do,"[161] but the facts do not reflect that sentiment. The agency was in the midst of systemic changes, many of which were watered-down versions of the sweeping change that Borg had initially proposed. Public defenders were nowhere near parity with prosecutors, and attempts to form a state employer had stalled in the legislature. His departure came at a time when a combination of backlogged cases and increased rates of serious crime were putting strain on a system already in flux. Cases were also becoming increasingly complex, with clients suffering more from acute behavioral health problems and serious addiction issues.[162] At the same time, public defender pay was still uncompetitive and becoming ever more so by surging inflation, which caused a deficit in the ability of indigent defense providers to recruit, hire and retain attorneys. Further complicating matters was a budget shortfall within the agency that left contractors waiting months to be paid for their work. Different time, different circumstances, but the same old agency problems.

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[160] *See Id.* at 36

[161] Jayati Ramakrishnan. *As State Public Defense Offices Emerges from Nearly $4 Million Defecit, Attorneys Raise Other Concerns About Mismanagement* Oregonian (July 13, 2021). Available at:https://www.oregonlive.com/pacific-northwest-news/2021/07/as-state-public-defense-office-emerges-from-nearly-4-million-deficit-attorneys-raise-other-concerns-about-mismanagement.html

[162] *See* Transcript *supra* note 91

The Crisis Arrives

As the courts began to open back up and return to some semblance of pre-pandemic operating capacity, cracks appeared in the public defense system. By the Autumn of 2021, PDSC was becoming aware of "capacity issues" in many counties throughout the state. The interim director of OPDS, Ed Jones, suggested borrowing attorneys from various counties to cover cases in counties experiencing capacity shortages.[163] Still, this solution was complicated by the new contract language that limited caseloads and prevented most contractors from accepting hourly appointments on top of their 1.0 Maximum Attorney Caseload (MAC) designation. Furthermore, as Billy Strehlow, a contract analyst from OPDS, explained, "the market was no longer responding to the standard hourly rate," [164] which had increased to $70/hr. Strehlow further advised that the lack of available attorneys was reaching a crisis level and would require additional funding to resolve. By the Winter of 2022, the crisis had arrived. As of January 2022 there were 45 people in Oregon facing criminal charges without representation.[165] By February 2022, there were 80 unrepresented people in Multnomah County alone, with 21 in custody. In March of 2022, that number reached 150,[166] and by September of 2022, 1063 people in Multnomah County were unrepresented.[167] At various times, the county's two major NPDOs announced they would no longer accept new cases, as their attorneys were at their ethical limit.

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[163] *Public Defense Services Commission Meeting* (November, 2021)
[164] *See Id.* at 4
[165] Conrad Wilson *Oregon's chief justice asks lawyers to step up as public defenders.*OPB. (January 28, 2022) Available at: https://www.opb.org/article/2022/01/28/oregons-chief-justice-asks-lawyers-to-step-up-as-public-defenders/
[166] Conrad Wilson. *Oregon's public defense leaders look to long term changes as shortage continues.* OPB.(March 17, 2022). Available at: https://www.opb.org/article/2022/03/17/oregon-public-defenders-office-shortage-long-term-changes/
[167] Lucas Manfield. *The Number of People Without Court-Appointed Attorneys in Multnomah County Is Growing.* Willamette Week (September 14, 2022). Available at:https://www.wweek.com/news/courts/2022/09/14/the-number-of-people-without-court-appointed-attorneys-in-multnomah-county-is-growing/

Consortium attorneys were at their contractual caseload limits. Hourly, court-appointed attorneys simply refused to take on indigent cases due to low hourly pay.

Defendants who were out of custody but without an attorney had their cases "set over" for a later date in hopes that an attorney could be located by the next appearance. Many cases were set over multiple times. Defendants in custody waited weeks, sometimes months before being appointed counsel. Then, cases began being dismissed by circuit court judges in Multnomah County.[168] Mike Schmidt, Multnomah County District Attorney, published an Op-Ed in the Oregonian, citing an ongoing threat to public safety posed by the crisis. He wrote about serious felony cases being dismissed and others languishing in the system, unable to be fully prosecuted for lack of public defenders.[169] Felonies like theft, burglary, possession of a stolen vehicle, gun charges, and assault were dismissed throughout 2022 as judges in Multnomah County reluctantly acknowledged that without a defense attorney, the defendant's constitutional rights were being violated.[170] By December of 2022, a total of 220 defendants accused of felonies and 75 of misdemeanors had their cases dismissed by circuit court judges in Multnomah County. DA Schmidt has claimed that he intends to re-file the cases once the public defender crisis has been resolved, but it is unclear how realistic that is. The statute of limitations kicks in, memory fades, witnesses disappear, and momentum is generally lost as time goes on.

Power Struggles and Political Infighting

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[168] Aimee Green. *Multnomah County public defender shortage leads to criminal cases dropped for alleged child beater, robbers, DUII drivers.* Oregonian. (December 4, 2022). Available at: https://www.oregonlive.com/news/2022/12/multnomah-county-public-defender-shortage-leads-to-criminal-cases-dropped-for-alleged-child-beater-robbers-duii-drivers.html

[169] Mike Schmidt. *Opinion: A system in crisis puts safety at risk.* Oregonian.(November 16, 2022) Available at: https://www.oregonlive.com/opinion/2022/03/opinion-a-system-in-crisis-puts-safety-at-risk.html

[170] *See* GREEN *supra* note 168

As the unrepresented person's crisis unfolded throughout 2022, the response from PDSC, OPDS, and the judiciary was, at times, conflicted and counterproductive. By statute, any directive given to OPDS by PDSC overrides court authority– specifically, "Policies, procedures, standards, and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of…the State Court Administrator, circuit courts, the Court of Appeals and the Supreme Court.".[171] Yet, circuit court judges were threatening to hold OPDS in contempt for failing to provide public defenders in some instances and even appointing OPDS staff attorneys to represent indigent defendants.[172] One of my sources explained that, although the Chief Justice of the Oregon Supreme Court (CJ) Martha Walters theoretically had the authority to direct lower court judges on policy matters, she was hesitant to do so in this instance out of fear that they would simply ignore her directive. This kind of usurpation of the CJ's authority would bring chaos into a system already on the brink, so instead, CJ Walters focused her attention on Stephen Singer, the newly appointed Executive Director of OPDS.[173] The entirety of his short-lived tenure was defined by conflict with the CJ over what he perceived to be overreach by the judicial branch into OPDS affairs.[174] As an OPDS staff attorney explained to me, "We have a weird stepchild relationship with the courts because they used to run us and, frankly, they think they still do…the Chief Justice never understood that…we don't have enough attorneys to defend every case in the state, and she just would not believe it."[175] Despite overwhelming support from the provider community and having made measurable progress within the agency, Singer was fired after eight months on the job.[176] The circumstances around his firing raised more than a few eyebrows; when the PDSC commissioners failed to remove him after being asked to do so by CJ

[171] Oregon Revised Statute 151.216 § 2
[172] *See* Transcript, *supra* note 132
[173] *See Id.*
[174] *See Public Defense Services Commission Meeting* (August, 2022)
[175] *See* Transcript, *supra* note 132
[176] *See* Meeting, *supra* note 174

Walters, she dissolved the commission. Shortly thereafter, the newly rebuilt commission voted to fire Singer.[177]

From the onset of the crisis until she resigned in December of 2022, CJ Walters took an active role in PDSC business. She was present at the commission meetings, actively engaged in developing and implementing a plan to address the crisis, and assisted with securing more funding from the legislature. She also exerted enormous pressure on the commission to find a fix for the problem and do it quickly. But, as Singer pointed out in testimony before the PDSC, there was no quick fix for this problem.[178] The firing of Stephen Singer illustrated the importance of one of the 6AC's core findings- PDSC commissioners should be appointed by all three branches of government, not just the judicial branch. Allowing the CJ unfettered power over the makeup of the commission that governs OPDS can be seen as a conflict of interest, especially since the interests of the courts and the indigent defense provider community had begun to diverge in some key areas. The change-makers within the agency and in the larger community were concerned with increasing pay and decreasing caseloads of public defenders. They had set in motion a carefully orchestrated series of events that they hoped would eventually accomplish these goals. The judiciary was primarily concerned with ensuring every indigent defendant was appointed an attorney at the earliest opportunity so that cases could flow through the justice system without delay. They were less concerned with the means than the ends, which threatened to undo some of what the agency believed was progress made over the previous years.

Further complicating matters was the ongoing dichotomy between the NPDO and consortium attorneys. While many of the former claimed to be at their ethical limit and unable to

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[177] Dirk Vanderhart and Conrad Wilson. *The head of Oregon's public defense system is fired, after months of tumult.* OPB. (August 18, 2022) Available at: https://www.opb.org/article/2022/08/18/oregon-public-defense-system-head-removed-after-tumultuous-months/

[178] *See* Meting, *supra* note 172

take on more cases (even though they had not yet met their caseload limits), the latter had reached their caseload limit and were available to take on more. If the commission voted to allow consortiums to take on more than the MAC caseload limits, it could be seen as a de facto admission that paying for cases was a legitimate model.[179] The temporary solution was to increase the hourly pay for non-contract court-appointed attorneys from $70 to $105 an hour. When this pay raise failed to generate much interest from the private bar, the scale was raised again to $158 an hour.[180] The program became more successful after being opened to contract entities with less than 1.0 MAC– consortium attorneys that combined public and private work. Initially, this was intended to be a stopgap, emergency solution to provide counsel for unrepresented in-custody defendants. However, the agency quickly came to rely upon these providers, and the added capacity did begin to chip away at the number of unrepresented defendants, albeit at a high cost to the state.

Legal Maneuvering and an Important Motion Before the Court

As PDSC and OPDS were scrambling to find ways to address the crisis, others sought relief through the courts. The Oregon Justice Resource Center (OJRC), a nonprofit civil rights organization, filed a lawsuit against the state on behalf of four indigent defendants in custody without attorney representation. Despite acknowledging the seriousness of the situation, Multnomah County Circuit Court Judge Shelley Russell dismissed the case for lack of class standing.[181] A similar case was refiled by OJRC in October, asking for relief for "all indigent persons, including the named plaintiffs, who have been or will be charged with a crime by the

[179] *See* Transcript, *supra* note 132
[180] *Public Defense Services Commission Meeting* (July, 2022).
[181] Conrad Wilson. *Civil rights attorneys make 2nd attempt to sue Oregon over public defense failures.* OPB (October 19, 2022) Available at:https://www.opb.org/article/2022/10/19/oregon-public-defence-failures-civil-rights-lawsuit/

State of Oregon, arraigned in criminal court, and left without legal representation for an unreasonable amount of time during the pendency of this litigation."[182]Along with the State, the lawsuit named all nine PDSC commissioners and Jessica Kampfe, the newly appointed director of OPDS, as defendants. By March of 2023, the judge accepted a motion to dismiss the case due to "problems determining who is legally responsible for the crisis and who has the authority to fix it.".[183] Then, only days later, Shannon Wilson, director of Public Defender of Marion County (PDMC), filed a motion in Marion County Circuit Court (MCCC) asking that public defenders under her watch be allowed to withdraw from cases and decline new appointments, citing an unmanageable workload leading to ethical violations. She is seeking the dismissal, *with prejudice,* of all cases in which an indigent defendant lacked counsel as a direct result of any relief awarded by the court.[184] Although it seems unlikely to be granted by the lower courts, it is designed to be appealed directly to the Oregon Supreme Court (OSC) expeditiously.[185]

The motion before the Marion County Circuit Court is important for several different reasons. First, it lays bare the power struggle beneath the surface between the judiciary and OPDS. Even when contractors have reached their ethical limit, judges still assign cases to them in many jurisdictions. This is despite the language in their contracts requiring them to abide by American Bar Association Best Practices[186] and that statutorily, PDSC directives supersede those of the judiciary. The situation needs clarity from the Oregon Supreme Court so that contractors no longer have to choose between violating their ethics (and contract) or being found in

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[182] *See Id.*
[183] Emily Hamer. *New legal action over Oregon public defense crisis seeks case dismissals, attorney withdrawals.* Albany Press-Democrat. (March 16, 2023). Available at:https://democratherald.com/news/local/crime-courts/new-legal-action-over-oregon-public-defense-crisis-seeks-case-dismissals-attorney-withdrawals/article_8c89b5b8-c346-11ed-bf0b-a3473fdcdbe3.html
[184] MOTION TO WITHDRAW FROM CURRENT APPOINTMENTS AND TO DECLINE FUTURE APPOINTMENTS in the Circuit Court of the State of Oregon for the County of Marion *State of Oregon v. Kerten Salle* No. 23CR00153
[185] *See* Transcript, *supra* note 132
[186] *See* Rules, *supra* note 61

contempt of court for refusing an appointment. Second, litigating based on effective assistance of counsel claims was eschewed intentionally due to the present makeup of the U.S. Supreme Court and the fear that they may be inclined to overturn *Gideon* entirely.[187] Third, from a legal standpoint, it makes more sense to attach the motion to enforcement of the Oregon Rules of Professional Conduct, which courts have consistently found apply to all lawyers. A private attorney would be violating these rules by taking on more cases than she could handle, so the theory is that there is no basis for determining that a public attorney is not subject to the same constraints even though cases are appointed to them. After all, *Strickland* emphasizes "professional norms," regardless of whether an attorney is private or public, non-profit or consortium. The outcome of this motion is far from certain, but there is cautious optimism within the NPDO community for a favorable ruling.[188]

However, it is critical to understand what a favorable ruling on this motion would mean in the larger scheme of things. Dismissing cases with prejudice means the case can never be re-opened, even if the public defender shortage is resolved. This has enormous consequences for the victims of crime, who, it could be argued, have just as much of a right to justice as those accused of committing the crime. Furthermore, if a new rule is articulated by the Oregon Supreme Court that empowers, or even requires, public defenders to decline cases that they think violate their ethical obligation to provide effective assistance of counsel, then courts in many jurisdictions, not just Multnomah, would be required to start dismissing cases. This sets a powerful precedent that may affect how society has come to rely upon the criminal court system to deter crime. It is also difficult to understate the political backlash. Communities are already facing increased crime, and it is unlikely that any appetite exists for actions that can be seen as

[187] *See* Transcript, *supra* note 132
[188] *See Id.*

overly permissive. Moreover, if NPDO attorneys are empowered to decline cases, and PDSC votes to allow private attorneys to exceed their caseload caps, then we could, at least theoretically, wind up with two separate indigent defense systems where 30-40% of providers are incentivized to take on more and more cases yet again.

The Ongoing Ideological Divide and a Critical Analysis of the ABA Study

One perplexing aspect of my research has been the disconnect between what attorneys working at NPDO offices consider to be an ethical caseload and what consortium attorneys are willing and–they say– able to take on. Although the new OPDS contracts specify maximum yearly caseloads, they do not address the number of cases that an attorney can have open at any given time. For this reason, it is feasible that an attorney who is nowhere near their maximum caseload limit might still be at their ethical limit. Too many open cases at one time might ethically preclude an attorney from accepting a new appointment if they believed doing so would diminish their capacity to service existing clients according to the standards set forth in their contracts. For many, this means extensive outreach to the family of the accused, building trust, and helping their clients access social services that might prevent them from re-offending. This "mission-driven" approach to public defense has been alluded to in several interviews that I have conducted[189] and, to my mind, represents an aspirational, idealized notion of what a public defender should be. Over the years, this philosophy has become increasingly embedded in the culture of NPDOs, and as a result, has spread up to the staff of OPDS, many of whom came to the agency from the not-for-profit world. This is not a bad thing– but it might be too much of a good thing. After all, we live in a world of compromise– of budgetary restrictions and systemic realities.

[189] *See* Transcript, *supra* note 91, note 131 and note 132

In her motion before the Marion County Circuit Court, Shannon Wilson references the recent ABA study, concluding that– according to its formula– her office had only 63% of the attorneys necessary to meet constitutional muster.[190] At first glance, this seems like an unmanageable deficiency, but a closer look at the methodology used in the ABA report reveals several layers of complexity that warrant closer scrutiny. For example, it was determined–via the Delphi method–[191] that a simple misdemeanor charge requires an average of 22.26 hours of attorney time. This average was formulated by determining how many hours a simple misdemeanor would require in the case of a plea bargain (12) or trial (45) and then factoring in the percentage of cases that should plea out (69%) or should go to trial (31%).[192] Simple misdemeanor charges include shoplifting, trespass, vandalism, and other low-level, non-violent crimes. Complex misdemeanors might include DUI, harassment, reckless driving, simple assault, or interfering with a police officer. The ABA study found that an attorney should spend 17.26 hours to plea bargain and 61.08 hours to go to trial, averaged by 55% that should plea and 45% that should go to trial to arrive at 36.98 hours of attorney time to service a complex misdemeanor properly.[193] In other words, according to the ABA report, it should take an attorney an average of 22.26 hours to dispose of a petty shoplifting case and 36.98 hours to resolve a DUI– that is one

[190] *See* Motion, *supra* note 184

[191] *See* ABA *supra* note 158 at 37-39 "The Delphi method requires that a succession of surveys be given to a group of experts, with structured feedback presented to the experts at each interval stage. The surveying practices applied by the Delphi method could be interviews or questionnaires that focus on some fundamental question of significance to the group of experts convened for feedback" *and* " Experts typically complete a questionnaire over multiple iterations with the goal of allowing participants to change their opinions and judgments when presented with controlled feedback regarding the opinions and judgments of their fellow participants. This controlled feedback is normally presented as a statistical summation of the group's responses, e.g., a mean or median. The structured feedback at each successive iteration consists of "available data previously requested by the expert, or of factors and considerations suggested as potentially relevant by one or another respondent." *and* "At the conclusion of the final iteration, the final iteration's mean or median response is used asthe measure of the group's opinion.In theory, the number of iterations required of the Delphi method can be unlimited until consensus among participants is achieved, however it has been found that three to four iterations is usually all that is required to reach consensus.

[192] *See* ABA *supra* note 158

[193] *See Id.* at 71

full week of work, 8 hours a day to resolve one DUI case. Even more remarkable than the time estimates was the finding that 31% of simple misdemeanors and 45% of complex misdemeanors should proceed to trial and not accept a plea bargain. One of my sources dismissed these numbers as patently ridiculous. He claimed to have been one of the attorneys who participated in the ABA study and expressed concerns about the methodology used. He believed that participants were being coached into providing sufficiently high estimates– about double what he believed reasonable. Furthermore, he explained that simple misdemeanors are usually straightforward and backed by solid evidence.[194] A DA will not invest much time investigating a simple misdemeanor. If they do not have the evidence, they simply will not press charges. For that reason, this class of charge should have the absolute lowest percentage of cases that proceed to trial. Instead, most simple misdemeanors should resolve with a plea bargain. Complex misdemeanors might have a few more twists but are, again, often accompanied by strong evidence– like a blood alcohol reading above .08 in cases of DUI, for example.

One of my sources within OPDS assured me that the numbers arrived at by the ABA report were reasonable.[195] He explained that even a simple shoplifting charge has larger implications, and the defender must hold the system accountable by investigating the situation thoroughly. Was the interaction between the police and the defendant done by the book? Were they questioned in a constitutional manner? A public defender has two jobs in his view– to defend their client and also to provide a check and balance on government power. The ABA report reflects the time necessary, according to the severity of the offense, for a defender to properly execute that dual function. He did provide an important qualifier: “There is the world as

[194] *See* Transcript, *supra* note 131
[195] *See* Transcript, *supra* note 132

it is, and the world as it should be." The ABA report simply reflects the amount of time an attorney would like to spend on a given case in a perfect world, with unlimited resources.

This notion seems to get lost in media coverage of the public defender crisis. Virtually every article I have read on the subject references the ABA report as empirical fact, not aspirational ideal. "Earlier this year, the American Bar Association published a report finding that Oregon barely had 31% of the public defenders it needed to provide adequate criminal defense to those facing criminal charges." reads an article published by Allison Frost for OPB.[196] Claire Rush for the Associated Press writes that, "An American Bar Association report released in January found that Oregon has only 31% of the public defenders it needs to run effectively."[197] Another article published by KGW8 and written by Devin Haskins claims that "To provide effective counsel for the current caseload, each attorney would need to work 26.6 hours a day. The report suggests that to meet demand, Oregon would need to hire 1,296 more full-time public defenders."[198] This is just a small sampling of what has been a consistent narrative across media platforms. I have not found one instance of critical analysis of the numbers contained in this report, but it's important to consider. Effective assistance of counsel, as defined in *Strickland,* doesn't necessarily warrant an attorney spending 22 hours to resolve a simple shoplifting charge. Yet, that's exactly what the media is, perhaps unknowingly, portraying in their coverage. In an attempt to resolve a legitimate crisis, it's important not to overstate the case.

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[196] Allison Frost. *Oregon public defender crisis reaching into all corners of criminal justice system.* OPB. (December 7, 2022). Available at https://www.opb.org/article/2022/12/07/oregon-public-defender-crisis-reaching-into-all-corners-of-criminal-justice-system/

[197] Claire Rush. *Oregon public defender shortage: nearly 300 cases dismissed.* Associated Press. (November 23, 2022). Available at https://apnews.com/article/health-oregon-covid-portland-a13c2ecf6e4648272dfa12fb9244b7a6

[198] Devon Haskins. *Every attorney is doing the work of 3 attorneys': Report shows Oregon needs more public defenders.* KGW8. (January 25, 2022). Available at https://www.kgw.com/article/news/politics/report-oregon-public-defenders-shortage/283-6f0f93fe-44c8-44cb-835c-a736758fd67e

How Does this Crisis Get Resolved– Or Does It?

As of this writing, the Oregon Judicial Department Unrepresented Persons Dashboard (UPD) shows 2,867 defendants without court-appointed counsel in the State of Oregon.[199] Five of those are for murder. On the same website is a memo from OPDS offering an increased hourly rate up to $200/hr to any attorney willing to take a case from the UPD. This memo explains OPDS's new policy regarding caseload limits: Any attorney contracted with OPDS who has met their annual caseload limit would now be permitted to take on extra cases from the UPD, as long as they certify that they have the capacity to do so ethically. The certification form lists a provider's responsibilities to their clients as follows: Interviewing and counseling clients, promptly meeting with clients after initial appointment by the court and regularly thereafter, advocating for pre-trial release for incarcerated clients, conducting necessary investigations, including reviewing all records and material related to mitigation, obtaining and reviewing all discovery, conducting sufficient and necessary legal research, making sufficient preparations for all pre-trial hearings and trials and making sufficient preparations for sentencing and disposition hearings.[200] Although this policy shift is intended to add capacity back into the system, it is not clear how much of an impact it will have. According to a source within OPDS, the only takers thus far have been consortium attorneys.[201]

Along with relaxing the newly imposed caseload limits, OPDS has initiated several programs to increase the system's capacity and stability. One such program is an incentive

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[199] Oregon Public Defense Services. *Oregon Judicial Department Unrepresented Individuals Dashboard.* Available at https://app.powerbigov.us/view?r=eyJrIjoiNDQ2NmMwYWMtNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNlYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9

[200] Oregon Public Defense Services. *OPDS Memo to Presideing Judges Re; Unrepresented Persons*

[201] *See* Transcript, *supra* note 132

package for existing attorney retention.[202] Each package of retention payments equals about $15,000 and is disbursed to the contractor per attorney retained over the contract term. Another program invites civil bar attorneys to work alongside criminal defense attorneys, providing support work such as drafting motions and performing legal research. This de-facto training program pays the supervising criminal defense attorneys an enhanced hourly rate of up to $200/hr.[203] Finally, OPDS began to solicit proposals for increasing attorney capacity from the provider community, offering to recommend approval to PDSC for any proposal "deemed to have merit."[204]

OCDLA, the advocacy group for defense attorneys, similarly formed a task force to make recommendations on procedural changes that might make the system more efficient, saving attorneys time and resources that could then be spent on additional clients. One of the most promising recommendations is for courts to schedule omnibus hearings some number of days before the trial is scheduled instead of on the same day as it currently is in Oregon's most populous counties. Since omnibus hearings often adjudicate important motions, the outcome of which might influence whether a case goes to trial, it makes sense to space them out. Currently, attorneys have to prepare for both the omnibus hearing and trial. If the defense succeeds with an omnibus motion, such as a motion to suppress evidence, then the prosecution will likely drop the charges. While this is a good outcome for the defense, it wastes hours of time preparing for a trial that did not happen. Other recommendations include streamlining mass scheduling dockets, allowing aspects of the process to be done online or via email instead of in a series of courtroom appearances, eliminating plea deadlines, increasing the effectiveness of settlement conferences,

[202] Oregon Public Defense Services *Existing Attorney Retention Program.* Available at https://www.oregon.gov/opds/general/pages/unrepresented.aspx
[203] Oregon Public Defense Services *Supervised Civil Attorney Program.* Available at https://www.oregon.gov/opds/general/pages/unrepresented.aspx
[204] Oregon Public Defense Services *Discretionary Approval for Provider Plan to Increase Attorney Capacity.* Available at https://www.oregon.gov/opds/general/pages/unrepresented.aspx

and reducing the number of cases in the system by increasing the number of cases dismissed in furtherance of justice.[205]

Meanwhile, a tri-branch workgroup comprised of State Senators and Representatives has been studying the issue since March 2022. Recently they have proposed two Senate Bills for consideration by the legislature. Senate Bill 1093 is a short-term emergency bill requiring every district's presiding judge to enact an unrepresented defendant crisis plan by September 1st, prioritizing in-custody defendants. The Bill further instructs judges to enter orders consistent with orders from the Chief Justice of the Oregon Supreme Court and respond to guidance disseminated by PDSC– the commission that oversees OPDS– regarding the unrepresented persons' crisis.[206] The Bill itself is vague, but it could be interpreted as an attempt to bring judges into line with a common understanding of what is and is not an appropriate response. It may preclude judges from unilaterally taking action that is seen as counterproductive or outside of the directives of the CJ, such as appointing OPDS staff members or threatening to hold OPDS in contempt of court.

Senate Bill 337 is much more detailed, providing the groundwork for completely restructuring the current system.[207] Among its provisions are to dissolve the PDSC as it is currently, and rebuild it as an entity whose commissioners are appointed from all three branches of government, not just the judicial branch.[208] Additionally, the State would begin to hire public defenders as state employees. The target would be 30% of public defenders as state employees by the year 2035. In the meantime, a specialized "strike force" of state employees would be

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[205] OCDLA Public Defense Reform Task Force. *Legal System Efficiencies to Move Cases Along and Increase Capacity of Public Defense Attorneys and Staff.* (September 8, 2022). Available at https://www.oregon.gov/opds/commission/Lists/Meetings%20Schedule/Attachments/196/PDSC%20Agenda%20&%20Meeting%20Materials%2009%2015%202022_Revised%2009%2014%202022.pdf

[206] Senate Bill 1093, 82nd OR. Legis. Assembly (2023)

[207] Senate Bill 337, 82nd OR. Legis. Assembly (2023)

[208] *See id.* § 8(1)

available to be dispatched to counties on an as-needed basis, to relieve capacity problems. The NPDO model would continue to supply another 30-40% of the state's public defenders, with hourly attorneys from the private bar taking on the rest. The State would cease contracting with consortiums, and this model would be phased out over time.[209] Consortiums would either have to reorganize themselves into a NPDO model, or switch to independent hourly contracts.[210] A State Representative I spoke to about this bill conceded that eliminating the consortium model was receiving significant pushback from the community. However, he opined that it was a "strange practice to…contract and then subcontract out this constitutionally required work." [211]

Although SB 337 offers a glimpse into the future of public defense in Oregon, it does little to address the current crisis of unrepresented people in our criminal justice system. In fact, one of the key aspects of the legislation– eliminating the consortium model of contracting– seems to be in direct opposition to the goal of reducing the number of unrepresented people in the system since consortium attorneys are currently the only ones taking on cases above their contractual caps. According to Jonathan Sarre, director of the Oregon Defense Consortia Association, the nonprofit, hourly, or state employee models are less attractive to attorneys because they offer significantly less flexibility and more administrative bureaucracy..[212] I spoke with a consortium member who works on a .5 MAC contract with the state. She told me that "most defense attorneys like to be self-employed. No one wants to be owned by the state. We essentially fight the state for a living, so none of us wants to be controlled in that way." [213]

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[209] *See* Transcript, *supra* note 132
[210] Tony Schick *Oregon lawmakers consider bi ll to overhaul public defense system.* OPB. (April 3, 2023). Available at https://www.opb.org/article/2023/04/03/oregon-legislature-bill-to-overhaul-public-defense-system/
[211] *See* Transcript, subject 4
[212] *See* Schick *supra* note 210
[213] *See* Transcript, subject 5

Although an argument can be made that consortium attorneys would simply become hourly attorneys, it is surprising that the state would consider returning to a model– uncontracted private bar attorneys who bill hourly for their time–that it had intentionally moved away from decades ago. Doing so would also necessitate expanding the administrative capacity of OPDS significantly to audit, monitor and process the payment requests. It is unclear how this would be budgeted or how effective it would be. At least from the perspective of one of the attorneys that I interviewed, "The people who review invoicing aren't even qualified to know whether the work that people are doing is appropriate or not."[214] It is not difficult to envision history repeating itself with this model.

Apart from the concerns around eliminating consortiums, nothing in SB 337 speaks to the need for flexibility in the system. Currently, Measure 110 has decriminalized personal possession of narcotics, but it has proven unpopular with the general electorate and could be rescinded. This would inevitably re-introduce many misdemeanor charges into the system. So too would a change in leadership at the Multnomah County DA's office. It is troubling to consider the strain on our system if we were to return to anything like the number of prosecutions common even 10 years ago. If that were to happen, using the math of the oft-cited ABA caseload study, we would be short many thousands of defenders. SB 337 does not even consider that.

In conversation with one of my first interview subjects, an attorney on staff at OPDS, I asked, "Will there ever be enough money for public defense?" His answer, predictably, was "no."[215] University of Pennsylvania Law Professor Stephanos Bibas agrees. Bibas is a rare voice among the many who hold strong opinions on the state of indigent defense in America. Rather

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[214] *See Id.*
[215] *See* Transcript, *supra* note 132

than advocating for increased funding, or judicial intervention, Bibas wants to re-think the entire endeavor. "As Gideon turns fifty, " he writes, "it shows its age."[216]

Bibas argues against the "expansionist dream"[217] of applying *Gideon* to each and every instance–including, in some cases, civil proceedings. Instead of providing substandard legal representation to everyone who cannot afford to hire an attorney, lawyers should only be assigned to serious criminal cases, where they are most needed and most effective. Charges of a less-serious nature should instead be heard in a courtroom modeled more on an inquisitorial system, where defendants represent themselves *pro-se* and the judge is tasked with determining the facts at hand.[218] Other, more practical solutions that he suggests include allowing paraprofessionals a more robust role in assisting with defense strategies. The bottom line, from Bibas' perspective, is that we need to reform our courts to reflect the political realities of the world we live in.[219]

Conclusion

Ever since the failed first attempt to create a statewide, trial-level Public Defender back in 1969, Oregon has been scrambling to prop up a dysfunctional, hopelessly complex system. But the real root of our problem dates back further than that. As a nation, we chose to adopt an adversarial legal system that requires experts to navigate. Given the opportunity and the will to change this system, we chose not to. In the early twentieth century, the Supreme Court understood the imbalance inherent in our system. It took steps to ensure that those charged with serious crimes have access to assistance of counsel, later going so far as to declare it a

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[216] *See* Bibas, *infra* note 219 at 1287
[217] *See Id.*
[218] *See* Bibas, *infra* note 219 at 1301
[219] Stephanos Bibas *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 Wash. & Lee L. Rev. 1287

constitutional right incumbent upon individual states to provide. What the court did not do, however, was provide guidance on how states should accomplish this. This oversight resulted in a dizzying array of delivery models and systems with vague benchmarks and dubious standards.

As Sixth Amendment right to counsel jurisprudence evolved, a central theme emerged: assistance of counsel must be *effective* assistance of counsel according to *prevailing professional norms*. Despite the obvious link between effective assistance and funding that assistance, the courts have been reluctant to step in and impose upon the legislative duty of States to allocate funds sufficiently. They have been likewise hesitant to grant relief to defendants claiming ineffective assistance of counsel– setting a high bar for proof and giving wide latitude to defense attorneys in pursuing legal strategies of their choosing. Despite the difficulty of pursuing effective assistance claims as a means of reforming the system from the outside in, the phrase "according to prevailing professional standards" has become pivotal in reforming public defense from the inside out. And therein lies the rub. How are prevailing professional norms determined when it comes to indigent defense? Are they determined by how things were, how they are, or how they should be?

In Oregon, the two prevailing models of indigent defense delivery are the non-profit law firm and the consortium of private bar attorneys. These models are philosophically and functionally different. Lawyers who go into non-profit work are often mission-focused, ideologically driven, and determined to provide their clients with the kind of wrap-around services that should be available through other avenues. However, connecting indigent clients with housing, addiction, and mental health resources takes time, and in our system, time is money. Attorneys who choose to work privately as consortium members tend to work more efficiently, providing a level of service more typical of what an attorney should be expected to

do– but that efficiency is often seen as suspect. Many consortium attorneys report an aversion to working under any other kind of model and value their freedom to work at arm's length from the state. Consortiums are in an existential struggle as the legislature considers solutions to the unrepresented person's crisis.

As we move forward, it is important to be clear about the origins of this crisis. However, clarity requires a level of understanding that goes much deeper than the current media narrative can provide. Virtually every newspaper article I have read while researching this paper reduces the situation to a lack of public defenders, itself the result of low pay and crushing caseloads. But offering an enhanced hourly rate of up to $200/hr has failed to put a noticeable dent in the number of unrepresented persons in the state, and all evidence points to far fewer cases making their way through our court system than at any other point in recent history. These articles all cite the ABA caseload study showing that Oregon has only 31% of the public defenders necessary to provide constitutionally adequate, effective assistance of counsel to those in need. What is absent is any kind of critical analysis of that study, or careful consideration of what effective assistance of counsel actually means. Does effective assistance of counsel, according to prevailing professional norms, require an attorney to dedicate an average of 22 hours to resolve a simple misdemeanor? Does it presuppose that 31% of simple misdemeanor charges should proceed to a full jury trial? Does it include finding housing, treatment, and mental health services for a client? The answer to these questions is beyond this paper's scope and this writer's abilities– but it is difficult to see a path forward until these questions are considered, and a consensus is reached.

The problem is that any meaningful consideration of those questions forces us to grapple with some uncomfortable and unpopular realities. The first of which is that we live in a capitalist

society. In every aspect of life, money talks. Whether you rent or own, whether you drive or ride the bus, what neighborhood you live in, where your children go to school, the quality of your medical care, the food you eat, the air you breathe– all of these things depend on the amount of money in your pocket. Representation by an attorney is no different. Those with the resources can afford to hire an attorney who might take the kind of time alluded to in the ABA report. Those without the resources cannot, so they are instead appointed representation by the state. Should the quality of representation in those two different instances be the same? Maybe in a perfect world. But we do not live in anything even remotely resembling a perfect world. The ABA, being the foremost professional association of attorneys, has a strong voice in determining professional standards and does not draw a distinction between private and public attorneys. All are beholden to the same ethical considerations, including avoiding conflicts of interest. Although this has always been the case, it is only now– since OPDS adopted new contract language alongside a model that pays for an attorney's time, not the number of cases serviced– that public defenders are empowered to cite this as a reason not to accept new court appointments. They can now provide their indigent clients with the same level of service a private attorney might provide– a welcome development from an ideological perspective but devastating to a system not equipped for it.

The second uncomfortable reality we must meet head-on is this: most offenders are guilty of the crime for which they have been arrested and charged. Especially misdemeanor charges, which make up the vast majority of cases moving through our criminal justice system. What exactly do taxpayers owe to poor people accused of committing crimes? Do we owe them the services of a competent guide to explain the charges against them, the options before them, and the most reasonable route toward disposition? Or do we owe them the kind of representation

aspired to in the ABA report, where a simple misdemeanor might take twenty-two hours of an attorney's time to dispose of? Obviously, some cases are more complex than others, particularly in instances of serious felonies, or murder. Should we not allocate resources accordingly? Otherwise, it is easy to picture our system as a snake eating its own tail– taxpayer funds spent to arrest and detain offenders for petty crimes, met with taxpayer funds spent to defend them vigorously against those same charges.

Finally, and most importantly, what do we owe attorneys representing indigent defendants? The evolution of public defense missed a beat in the 1960s with the reversal of *Dillon v. United States.* As far as the judiciary is officially concerned, lawyers appointed to represent indigent defendants are not owed compensation by the government at all. Although the Criminal Justice Act of 1964 established federal indigent defense payment requirements by statute, it was all predicated on the philosophy that court-appointed attorneys are repaying a debt to the court and should not expect to be compensated for it at a rate comparable to what private attorneys are paid. The compensation established in Oregon pre-Gideon was based on this same underlying tenet. Fees were meant to represent an honorarium, or token payment– for services obligatorily rendered. If it made sense at all, this philosophy only made sense in the context of periodic appointments to represent indigents by otherwise industrious private attorneys. That indigent defense became a specialty in its own right was never reconciled with historical payment schemes. Instead, post Gideon, statutory fees–intended as a token–became the established pay rate. From there, compensation increased incrementally over time, often so little as to progressively lose value to inflation. The system was built by exploiting the labor of a uniquely dedicated class of professionals, and the legislature grew accustomed to underfunding and de-prioritizing their work. It's gone on for so long that any meaningful attempt to balance the

scales comes with an astronomical price tag. But this is true for any system that has survived despite compounding deferred maintenance. There comes a time when the decision must be made to spend the money or let the entire house sink into the ground.

As the Oregon legislature works to pass the 2023-2025 budget, it is clear that there will not be enough money allocated toward indigent defense to put a dent in the number of unrepresented defendants. The situation that once felt so urgent has now settled into the new status quo. As the media focus has shifted away from the crisis of unrepresented people, politicians have returned to the more popular priorities of housing, education, and healthcare– in a cycle that has played out repeatedly over time. But a crisis still exists, as a quick visit to the unrepresented persons dashboard on the OPDS website will show. Finding a meaningful way out will require more than throwing money at the problem, even if the money was there to throw. Instead, we must agree on some fundamental issues and find a compromise between two divergent theories of providing indigent defense for the criminally accused. In our attempts to bring stability to our system, we must be mindful of the limits to what we can and what we *should* do. We have to establish clear guidelines that balance the obligations of the State with the burden it imposes on taxpayers. As the Oregon State Legislature considers two Senate Bills aimed at remedying the problem, we have to be careful not to repeat the mistakes of the past but instead, move toward a system that actually works.