

Improving Indigent Defense in Texas

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Recommendations

- Reclassify offenses so that crimes which do not merit incarceration (and for which defendants are rarely incarcerated) are not jail-eligible crimes that trigger the right to counsel.
- Increase diversion to probation and problem-solving courts for appropriate crimes.
- Increase the use of victim-offender conferencing.
- Expand open file discovery.
- Provide vouchers to indigents for the selection of counsel.

Introduction

Indigent defense is broken in Texas—and throughout the United States—and it has been broken for decades. When a prisoner was asked in 1971 whether he had been provided with a lawyer at trial, he replied: “No. I had a public defender.”¹ Excessive caseloads and conflicts of interest are two of the most significant problems behind the notoriously poor quality of indigent defense services. Texas can address these problems through at least five changes to the state criminal justice system: reclassifying several offenses so that they do not trigger the right to counsel, increasing diversion to problem-solving courts, expanding the use of victim-offender conferencing, encouraging “open file” discovery systems, and providing vouchers to indigents for the selection of counsel. These changes, if implemented, will better ensure that Texas is discharging its constitutional obligation to provide effective assistance of counsel to indigents.

Texas’s Constitutional Obligation to Provide Indigent Defense

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence.”² In *Gideon v. Wainwright*, the U.S. Supreme Court held that this right to counsel was fundamental and incorporated against the states through the Fourteenth Amendment.³ In subsequent years the *Gideon* ruling was extended to include a right to counsel for juveniles in delinquency hearings,⁴ for defendants accused of minor offenses that carry a possible sentence of jail time,⁵ and for defendants accused of offenses that are punishable with a suspended jail sentence.⁶ The right is not merely a right to counsel, but a right to effective assistance

of counsel—representation that meets an “objective standard of reasonableness.”⁷ The right attaches when the criminal defendant first appears before a judicial officer because that is the point at which “he learns the charge against him and his liberty is subject to restriction.”⁸ States must conform their indigent defense systems to these rulings (among others) or risk a federal lawsuit.

The right to counsel was not a sudden invention of the federal government. The right dates back to medieval English common law⁹ and was acknowledged in Blackstone’s *Commentaries*.¹⁰ In a 2010 white paper for the Cato Institute, Professors Stephen J. Schulhofer and David D. Friedman argued that a right to state-appointed counsel is philosophically justified from a limited government perspective because it is part of the state’s legitimate role in protecting public safety:

“[O]f all the services that governments provide to the poor, [indigent defense] is arguably the one most defensible on libertarian (as well as other) grounds. Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that government provides to the public as a whole—law enforcement and social protection ... [T]hat service is one of government’s most basic tasks and indeed is typically seen as the primary *raison d’être* of the state.”¹¹

Both the Texas Constitution and the Code of Criminal Procedure identify the right to counsel.¹² In fact, *Gideon* was not a radical decision in Texas because government-appointed counsel was an established right as early as 1857 when the following provision appeared in the

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Code of Criminal Procedure: “When the defendant is brought into Court, for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him.”¹³

Three basic models exist for indigent representation. First, a jurisdiction can maintain a full-time office for indigent representation (a public defender program); secondly, a jurisdiction can contract with attorneys or law firms to handle indigent representation for a fixed fee (a contract defense program); third, the court may appoint defense attorneys from the private bar on a case-by-case basis (an assigned counsel program).¹⁴ Texas counties primarily use the case-by-case appointed counsel model, though about one-third of the state’s 254 counties are served by 16 public defender offices scattered throughout the state.¹⁵ Several counties with full-time public defender offices nevertheless supplement the office with appointed counsel (Dallas County, for example).¹⁶

A 2011 analysis from the Bureau of Justice Statistics concluded that of the three models, defendants in jurisdictions using the appointed counsel model received poorer outcomes.

In general, defendants represented by assigned counsel received the least favorable outcomes in that they were convicted and sentenced to state prison at higher rates compared to defendants with public defenders. These defendants also received longer sentences than those who had public defender representation. Although the offense specific analyzes [sic] did not always find significant associations between assigned counsel and the case processing outcomes being modeled, for several of these models the likelihood of conviction and state imprisonment, as well as the length of sentence, were found to be significantly higher for defendants with assigned counsel representation. The patterns of assigned defense counsel representation and unfavorable case outcomes held even when the various factors in the SCPS [State Court Processing Statistics] data file were statistically controlled.¹⁷

Financing for indigent defense, which has been coordinated since 2001 by the Texas Task Force on Indigent Defense,¹⁸ comes primarily from court and bar association fees, but a small amount also comes from taxpayers and from federal and private grants.¹⁹ The costs are rising quickly. In 2011, Texas courts paid over \$198 million (about \$165 million was paid by counties, and \$33 million was contributed by the state) to serve indigent defendants, a 108 percent increase (in inflation-adjusted terms) over the \$95 million spent in 2001.²⁰ Policy-makers, therefore, will need to think innovatively to ensure that Texas meets its constitutional obligations without raising fees or taxes.

Professor Erik Luna has counseled against the temptation to meet these high costs simply by relying on federal grant funding, which he views as a “bailout” that violates basic principles of federalism²¹ and which is part of the “widely held and erroneous assumption ... that a crisis in America necessarily requires congressional action.”

There is a real question of fairness if the federal government were to bail out states that have failed to hold up their constitutional responsibilities. Why should citizens in a state that meets its Sixth Amendment-based financial obligations have to pay for a state that does not? Under most circumstances, it would be curious (if not perverse) for the federal government to provide funding to a state precisely because it violates the Constitution.²²

The Problems: Excessive Caseloads and Conflicts of Interest

Determining the quality of legal services is an inexact science. A 1945 legal opinion, for example, unhelpfully established the test for ineffective counsel as “circumstances [that] shocked the conscience of the court and made the proceedings a farce and a mockery of justice.”²³

Nevertheless, there is near-universal agreement in the legal profession that the quality of indigent defense counsel is exceptionally poor, in part because indigent defense systems suffer from a high number of cases coupled with a low number of available, qualified defense attorneys.²⁴

This problem is hardly unique to Texas. In 2008, “public defenders’ offices in at least seven states [refused] to take on new cases or ... sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor.”²⁵ U.S. Attorney General Eric Holder has spoken about a county in Tennessee in which six public defenders

handled over 10,000 misdemeanor cases in one year.²⁶ Public defenders in Missouri are now refusing case assignments beyond 395 cases per attorney per year.²⁷ Excessive caseloads are a national problem from which Texas is not exempt.

The conflict-of-interest problem stems from the unavoidable nature of indigent defense. A non-indigent defendant uses market forces to ensure loyal representation: the defendant's attorney knows he must zealously advocate for the defendant if he wants to be paid and if he wants to earn a reputation that will procure future clients. An attorney for an indigent defendant, however, is appointed and/or paid for by the government, and he procures future clients by building a reputation favorable to the very body that is prosecuting his client. As Professors Schulhofer and Friedman explained in their white paper, the government has an interest in selecting counsel based on cooperativeness, rather than aggressiveness, and this may incentivize representation that is not in the best interests of the defendant.

The danger of a publicly funded defense should be obvious: the decisions of the attorney are bound to be affected by the desires of his employer. That is true for public defenders and assigned counsel in criminal cases just as it is for private attorneys in civil cases. While the lawyers and those who assign them to cases—judges, government officials, or private firms contracting with government—are no doubt interested in preventing conviction of the innocent, they are less strongly committed to that objective than are innocent defendants. And they are likely to have other objectives, such as getting criminals off the streets and reducing court backlog, that conflict with that goal.²⁸

At a 2000 symposium in Austin, Scott Wallace, the former Director of Defender Legal Services for the National Legal Aid and Defender Association, made a similar argument about the difficult and inevitable demands faced by judges:

Judges in Texas are at the fulcrum of a series of pressures from above and below and from all sides. Cost pressures, electoral pressures, rocket-docket pressures. And on the other hand, there is an unrelenting series of criminal cases requiring appointments, lawyers with clients to interview, investigations to be conducted, motions to be filed, [reimbursement] vouchers filed and fees to be reviewed, and requests for expenses, experts, and the specter of an endless hemorrhage of public money, if each and every one of these judges does not exercise some toughness and reign in these costs.²⁹

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In Tarrant County, Texas, judges have acknowledged that procedures for the appointment of indigent counsel are made with an eye towards achieving “faster dispositions and ultimately reduced jail populations since cases will be settled more quickly.”³⁰ Bill Piatt, the former Dean at St. Mary's University School of Law and Chairman of the Bexar County Task Force on Indigent Defense, has observed that in Bexar County, judges sometimes ignore the procedures for randomized appointment of counsel and instead appoint a specific attorney who, in their judgment, is “better able to serve the needs of the client *and the court*.”³¹ Although Dean Piatt is a critic of indigent defense in Bexar County, he is sympathetic to the judges who look out for the interests of court administration: “There is nothing sinister about [judges hand-picking indigent counsel]. Judges need to protect the interests of the clients and the state and move cases along.”³²

Some lawyers in Texas also tell troubling anecdotes about counsel appointments that are linked to criminal defense lawyer campaign contributions to judges.³³ There are undoubtedly many judges and appointed indigent defense counsel who buck these incentives in the interest of justice, but the fact remains that there is a fundamental tension between the zealous representation our adversarial system of justice demands—and that is required under the Texas Disciplinary Rules of Professional Conduct³⁴—and the alignment of the current system.

The quality of indigent counsel is not just important to avoid the injustice of convicting an innocent person (which of course also has a negative impact on public safety because it leaves the real offender at large), but also to allow judges and juries to effectively perform their constitutional functions. Unlike civil law systems such as those in most of continental Europe, judges in the American common law tradition are not charged with investigating cases to uncover evidence.³⁵ Instead, they depend upon the diligence of counsel in presenting evidence.³⁶ Overburdened and underqualified defense attor-

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neys undermine the success of this system. In some trials, justice is delayed because appointed counsel is unprepared, and the trial court rightly does not want to punish the defendant for the inadequacies of his lawyer. In some appeals, poor representation also clogs the wheels of justice, as there have been instances where courts have ordered new appointed counsel because the briefing was so wretched.

Policy Recommendations: Five Changes to Improve Indigent Defense

Texas policymakers can begin to address both of the major deficiencies in the state's indigent defense system by making five changes.³⁷ The first four are directed at improving the capacity of overburdened attorneys: reclassification of offenses, increased diversion to probation and problem-solving courts, the use of victim-offender conferencing, and the adoption of "open file" discovery policies. The fifth change, a voucher-based indigent defense model for counties, is aimed at lessening the conflicts of interest faced by appointed counsel and ensuring that attorneys' incentives are better aligned with their clients than with the government.

Reclassification of Offenses

"Reclassification" refers to efforts to categorize some low-level, butailable, offenses so they are punishable only by a civil or criminal fine, not incarceration. Without the prospect of potential jail time, the right to counsel is not triggered, and a county may focus its indigent defense resources on higher-level offenders.³⁸

A Class C misdemeanor is the lowest-level offense in the Texas Penal Code; a Class B misdemeanor is the second-lowest.³⁹ Class C misdemeanors are punishable only by fines, at most of \$500.⁴⁰ Class B misdemeanors are considered slightly more severe. They are punishable, at most, by a fine of \$2,000 and up to 180 days in county jail.⁴¹ The inclusion of possible jail time

is significant because under *Argersinger*, it triggers the right to state-appointed counsel.⁴²

Class C offenders are not entitled to state-appointed counsel. Class C offenses include gambling,⁴³ minor in possession of alcohol (MIP),⁴⁴ the misuse of laser pointers,⁴⁵ criminal mischief with less than \$50 damage,⁴⁶ and theft of less than \$50.⁴⁷ A Class C offense is an act which the state may consider anti-social and which it may have an interest in restricting, but it is not an activity for which incarceration is thought to be necessary. A person can only be incarcerated for a Class C offense if a peace officer decides it is necessary to make an arrest rather than issue a citation (an arrest is only prohibited for speeding and an open container of alcohol) or if the defendant does not appear in court or pay the fine, in which case a warrant is issued.

Class B misdemeanors are different. The category includes such crimes as driving while intoxicated,⁴⁸ inciting a riot,⁴⁹ and making terroristic threats.⁵⁰ All of these offenses involve the potential for significant violence and bodily harm, and it is appropriate to punish them with the threat of incarceration. There are other Class B offenses, however, which do not include a dimension of violence. Making silent calls to 911⁵¹ and the possession of two ounces or less of marijuana⁵² are examples. These may be anti-social behaviors which the state has a legitimate role in restricting and sanctioning, but they are not behaviors for which the threat of incarceration, even for a brief period, is necessary.

Even certain Class A misdemeanors (punishable by up to one year in county jail and/or a fine not to exceed \$4,000) are non-violent offenses for which jail time may be inappropriate.⁵³ Violation of any rule of an occupational licensing agency⁵⁴ and the promotion of gambling⁵⁵ are offenses which might fall into this category.

Also, the offense thresholds for several Class B misdemeanors are often outdated and burden counties with unnecessary indigent defense costs. An offender who is accused of stealing \$60.00 is guilty of a Class B misdemeanor (the crime of theft of \$51-\$500), and because the offense is punishable with possible incarceration, he is entitled to state-appointed counsel. Had the offender been accused of stealing \$50.00, the offense would have been a Class C misdemeanor, and the right to counsel would not have been triggered. Theft of \$60.00 may have been reasonably deemed aailable offense when the statute was enacted in 1991, but in the intervening years, inflation has grown by nearly 70 percent, and the offense threshold has not been commensurately increased.⁵⁶

Obviously, the state must draw a line between what constitutes a Class B misdemeanor and a Class C misdemeanor—and this line will necessarily be somewhat arbitrary. It is important, however, that the legislature periodically revisits offense thresholds and updates them to keep pace with inflation. In the 82nd Legislature, Rep. Roland Gutierrez proposed H.B. No. 1707, which would have updated the penal code to classify all theft below \$100 as a Class C misdemeanor.⁵⁷ The bill, had it passed, would have been a good start to easing the considerable strain on Texas's overburdened indigent defense system.

Other offenses restricting conduct not traditionally criminal (or written so vaguely that it is difficult to understand what action is proscribed⁵⁸) could be eliminated from the criminal code altogether.⁵⁹ Texas has eleven different felonies, for example, relating to the improper harvesting of oysters,⁶⁰ and lying in a fishing tournament is a jailable criminal offense.⁶¹ Professor Luna has even testified before Congress that “states have brought any [indigent defense] crisis upon themselves through, inter alia, overcriminalization—abusing the law’s supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of dubious value.”⁶² Overcriminalization is a problem that generally affects business activities, and realistically, most “business defendants” are unlikely to be ruled indigent.⁶³ Nevertheless, even the small amount of indigent defense funds that would be saved from eliminating unnecessary and misguided criminal laws are funds that could helpfully be redirected to higher-priority indigents.⁶⁴

Diversion to Probation and Problem-Solving Courts

Secondly, increased diversion of defendants to probation and problem-solving courts would remove many indigents from adversarial court trials with the prospect of jail time, and instead place them in treatment programs for drug, alcohol, and mental health problems. Problem-solving courts offer a contrast to more adversarial traditional courts where much time is often spent on gamesmanship, including “hide-and-seek” parlays in which the counsel for the indigent defendant tries to guess what evidence the prosecution holds. In a problem-solving court, the prosecutor and defense counsel maintain their allegiances but are liberated from litigating the question of guilt to instead focus—along with the court—on holding the defendant accountable for going to treatment, passing drug tests, and meeting family obligations.

Diversion to problem-solving courts (also called “accountability courts”) that seek to help offenders recover from drug addiction, alcohol addiction, or mental illness would reduce prospective jail time for many offenders and thus reduce the need for state-appointed counsel. Problem-solving courts, if

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properly established, have demonstrated their ability to hold offenders accountable and reduce recidivism, thereby ensuring that the cost-savings for indigent defense would not occur at the expense of public safety.⁶⁵

Furthermore, legislative changes to sentencing laws could greatly alleviate the capacity challenges in indigent defense. For example, requiring drug court placement or probation with mandatory treatment for all first-time, low-level drug possession offenders with no prior violent, sex, property, or drug delivery crimes would reduce the number of indigents facing jail time, and thus reduce the number entitled to state-appointed counsel.⁶⁶

Victim-Offender Conferencing

Victim-offender conferencing programs (also called victim-offender mediation⁶⁷) would also reduce the number of offenders subject to jail time and thus reduce the need for indigent defense resources. Agreements that emerge from victim-offender conferencing may include binding requirements for restitution, community service, and other alternatives to incarceration.⁶⁸ Conferencing has been recommended by the U.S. Department of Justice since at least 2000.⁶⁹ In jurisdictions where conferencing is regularly utilized, it is typically reserved for property offense cases, particularly those involving first-time offenders. Texas has no specific statute on pretrial victim-offender conferencing, but no statute precludes it either.⁷⁰

Victim-offender conferencing, where possible, would be a dramatically cheaper option than a legal proceeding with state-appointed counsel—especially if the resulting agreement required the offender to bear the costs of the conferencing. In Lubbock County, where the Dispute Resolution Center already conducts up to 600 conferences per year, the cost is as low as \$75 per case.⁷¹

Most victim-offender conferencing programs do not include attorneys in the conferencing itself, illustrating the potential for large savings in both prosecutorial and indigent defense costs. Concerns that victim-offender conferencing would conserve indigent defense resources at the cost of public safety or victims' satisfaction appear to be unfounded. Restitution

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agreements are fulfilled in 89 percent of cases, and 72 percent of conferencing programs reduced the rate of re-offending.⁷² Furthermore, 79 percent of victims who participate in conferences report being satisfied with the process, compared to 57 percent of victims who report satisfaction from the traditional court system.⁷³

Open File Discovery

An “open file” discovery system is one in which prosecutors are required to provide defense counsel with all discovery materials in their possession—with the exception of materials that are necessary to protect the safety of witnesses. Often, advocates who have urged open file policies have done so because it increases government transparency. This is true, and it is an important factor in favor of open file policies. It is also true, however, that open file policies are likely to improve indigent defense representation.

Under current U.S. Supreme Court precedent, prosecutors are obligated to disclose all “exculpatory evidence” to defense counsel, but the process of obtaining this evidence can be cumbersome.⁷⁴ Defense counsel is subject to the standard discovery process with its lengthy schedules, endless motions and responses, and picayune evidentiary arguments. This process is expensive and exhausting for defendants who have the means to pay for private defense counsel; for indigent defendants with resource constraints, the discovery process is practically impossible to navigate.

Some states, like North Carolina, have addressed this problem by instituting open file policies that make all discoverable evidence immediately available.⁷⁵ No such policy exists in Texas, but it would be enormously helpful. With an open file system, counsel for indigent defendants could devote fewer resources to the discovery process and more resources to actually marshaling the arguments for a proper defense.

Interestingly, one of the national models for open file discovery is located in Tarrant County, Texas.⁷⁶ In Tarrant County, discovery files are not only open, they are accessible electronically. Governor Rick Perry’s deputy general counsel has referred to

the system in Tarrant County as a “slam dunk.”⁷⁷ If Texas policymakers are looking for a model on which to build a statewide policy, they do not even need to look outside of Texas.

Creating a Voucher-Based Model

All four of the recommendations above would better allocate limited indigent defense resources, but they would not change the fact that indigent defendants are represented by attorneys selected by the government. This conflict-of-interest creates the perception of compromised loyalty, regardless of whether the attorney is a public defender or court-appointed. That problem can never be completely resolved because an indigent defendant, by definition, does not pay for his attorney; a third-party pays. The relevant question, therefore, is not how to eliminate the conflict of interest, but how to ameliorate it. Lubbock County recently won a \$320,000 grant from the Texas Task Force on Indigent Defense to become the first county in Texas to implement a model in which a county administrative agency, rather than the judge, appoints indigent counsel.⁷⁸ This procedure would certainly be better than the current system, but still not the best possible procedure. In their thought-provoking white paper, Professors Schulhofer and Friedman suggest that free-market principles provide the best answer.⁷⁹

Schulhofer and Friedman explain that in indigent defense, “in violation of free-market principles that are honored almost everywhere else, the person who has the most at stake is allowed no say in choosing the professional who will provide him one of the most important services he will ever need.”⁸⁰ A government is unlikely to be interested in seeing a defendant receive a zealous defense. Courts may care deeply about defendants’ rights, but they also care—as they should—about maintaining efficient and orderly dockets. This desire may lead a court to select attorneys who are more cooperative rather than adversarial. In Texas, where the judge is often responsible for selecting appointed counsel, he or she may make the selection based on how likely it is that an attorney will quickly “plead out.”⁸¹ This may or may not be the best option for a defendant. Either way, the defendant has no say.⁸²

With a voucher system, however, the indigent defendant would at least have some voice in the selection of his attorney. This plan would soften the conflict of interest problem (though not eliminate it), and it would not require additional funding.⁸³

In the model proposed by Schulhofer and Friedman, courts would provide indigent defendants with a voucher that could be redeemed by a defense attorney of the indigent’s choosing.⁸⁴ The voucher would either be worth a lump sum or be tied to a predetermined hourly rate, and the defense attorney could redeem the voucher by reporting to a court administrator the

number of hours worked.⁸⁵ The court administrator would of course need to review the hours reported by the attorney to determine whether the figure is reasonable.⁸⁶ Jurisdictions could select different reimbursement rates for misdemeanors, felonies, capital crimes, etc.⁸⁷

This solution is not perfect. “[F]rom the taxpayer’s perspective,” write Schulhofer and Friedman, “government review is a costly and imperfect monitoring device, while from the defendant’s perspective it provides the court system with a tool for punishing attorneys who serve the interests of their clients rather than those of the court.”⁸⁸ Nevertheless, the authors point out that these problems already exist.⁸⁹ A voucher system may not extinguish the problems, but it gives the defendant a slightly greater voice in his own representation, and it slightly dilutes the voice of the government. This shift is achieved purely by changing the design of the system, not by taking additional resources from taxpayers.

Some might argue that a voucher plan is flawed because it imbues defendants with discretion over decisions which they often lack the appropriate knowledge to make. This objection may be paternalistic, but it is not unreasonable, particularly given that a disproportionate number of indigent defendants are unsophisticated legal consumers and may not be in the best position to make informed decisions, especially if they are incarcerated prior to trial. To address this concern, county bar associations could provide a “screening function.” The Bar would evaluate defense attorneys to determine which ones met certain basic criteria (such as being members of the bar in good standing or not being overburdened with an excess caseload), and provide indigent defendants with a reasonable range of options from which to choose. This is the system that is successfully used in both England and Scotland.⁹⁰ Here is how Schulhofer and Friedman address the issue:

The court or county government could maintain a list of attorneys and firms it considers particularly well qualified to defend the indigent. Such lists might appear to involve unseemly favoritism, but of course nearly all indigent defense systems bestow such favoritism on designated attorneys already. And the favoritism that currently exists is far more pernicious because it carries not just a positive recommendation, but a guarantee of business. In a voucher system, defendants would be free to discount the recommendation if they suspected that the state was more concerned with its own interests than with their own.⁹¹

Once again, this is reasonable solution that increases individual liberty and decreases government influence—without

requiring significant contributions from taxpayers. It is comparable, in a sense, to the Chilean model of privatized social security, in which citizen-investors are provided a range of investment options by the government, and it is from this range that they select their own investment strategies.⁹² If the bar association maintained a ratings system (comparable perhaps to the website Angie’s List, which aggregates consumer reviews) that reflected ratings of attorneys by previous defendants, then the defendant would be free to pick an attorney even if he did not have the top rating.

A truly free-market process is impossible with any taxpayer-funded service. Voucher-based systems, however, tap into the benefits of free-market forces more effectively than top-down, government-directed systems. School vouchers and food stamps are not perfect free-market programs, but they are far more reflective of market forces than a system in which a government mandates what school a child should attend and what food a family should consume. Vouchers for indigent defense would be similar. Texas, with its celebrated free-market ethos, is an excellent place to launch pilot programs for voucher-based indigent defense.⁹³

Conclusion

By using all five of the above recommendations, unnecessary incarceration for low-level offenses in Texas could be substantially decreased and the conflict of interest problems which afflict the indigent defense system could be substantially alleviated. Thousands of indigent defendants would be removed from the rolls, and no additional costs to taxpayers or risks to public safety would be involved.

Texas State Representative Jerry Madden, a Republican from Plano who holds an engineering degree from West Point, once compared crowded Texas prisons to a pipe on the brink of bursting.⁹⁴ “There seemed to be two answers to this from an engineering standpoint,” Madden said, “let ‘em out the door faster, or slow ‘em down coming in.”⁹⁵ Concluding that letting prisoners out the door faster was untenable and undesirable, Rep. Madden championed legislation that focused on slowing down the rush of inmates entering prison. In a sense, Texans can think about indigent defense in the same way. It is simply not practical to provide adequate services for the number of indigents currently in the criminal justice system, so it is worth asking whether all of these indigents really need to be in that system. If not, they should be removed, and limited available resources should be prioritized on those who need them the most. ★

- ¹ Jonathan D. Casper, "Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender," *Yale Review of Law and Social Action* 1 (1971).
- ² U.S. CONST. AMEND. VI.
- ³ *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). *Douglas v. California* was a similar case decided on the same day as *Gideon*, and the ruling in *Douglas* guaranteed the right to counsel on appeal. 372 U.S. 353, 355 (1963). Although less celebrated than *Gideon*, Prof. William Stuntz argued that *Douglas* was the more significant case because the right to state-paid counsel was already widely secured outside the South in 1963, but the expansion of the right to appellate counsel was genuinely radical. See William J. Stuntz, *The Collapse of American Criminal Justice* 222 (2011).
- ⁴ *In re Gault*, 387 U.S. 1, 36 (1967) ("assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21").
- ⁵ *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972) ("The United States Supreme Court rejects . . . the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer").
- ⁶ *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) ("[A] defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel.") (citations omitted).
- ⁷ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
- ⁸ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).
- ⁹ Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 1, 4 (1954); see also Akhil Amar, *The Bill of Rights: Creation and Reconstruction* 116 (1998) ("The landmark English Treason Act of 1696, which first affirmed a right of counsel, explicitly spoke of "[c]ounsel learned in the law.") (citations omitted).
- ¹⁰ William Blackstone, *Commentaries on the Laws of England* 349 (Oxford, Oxford University Press 1769) (cited in Richard A. Posner, *The Economics of Justice* 30 (1981)).
- ¹¹ Stephen J. Schulhofer & David D. Friedman, Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System 3 (September 2010). The Supreme Court's most succinct statement on this point may have been made in an opinion by the conservative Justice Hugo Black in 1956: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).
- ¹² "In all criminal prosecutions, the accused shall have the right of being heard by himself or counsel." TEX. CONST. ART. 1 § 10; TEX. CODE CRIM. PROC. ANN. ART. 1.051 (Vernon 2011).
- ¹³ 1857 TEX. CRIM. STAT. 466; see also Allan K. Butcher and Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas* 3, n. 1 (22 Sept. 2000) (making the avant-garde argument that "some slight differences between the U.S. Constitution's Sixth Amendment and Article 1, Section 10 of the Texas Constitution . . . would permit Texas courts to provide a more expansive interpretation of the right to counsel).
- ¹⁴ Schulhofer & Friedman at 2.
- ¹⁵ Brandi Grissom, "Advocates: Texas Indigent Defense Nearing Crisis," *Texas Tribune*, 19 May 2010 ("...91 counties are served in some capacity by a public defender system").
- ¹⁶ Robert L. Spangenberg, Jennifer M. Saubermann & David J. Newhouse, *A Review of Dallas County's Indigent Defense System* 2 (Aug. 2004).
- ¹⁷ Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?* 45 (National Bureau of Justice Statistics 2011).
- ¹⁸ See TEX. GOV'T CODE ANN. §§ 71.051-71.063 (Vernon 2011).
- ¹⁹ See supra note 18. A portion of the fees that fund indigent defense in Texas come from the state bar's arguably unconstitutional Interest on Lawyers' Trust Accounts (IOLTA) "comparability" rule. The rule obligates Texas attorneys to place client trust accounts in banks that pay interest comparable to the interest that would be paid on other accounts. This earned interest is then collected by the bar and distributed to legal aid programs. Although Professor Laurence Tribe, in his role as Senior Counselor for Access to Justice at the U.S. Department of Justice, has praised IOLTA as 'creative,' (see Laurence H. Tribe, Keynote Remarks at the Annual Conference of Chief Justices at 28), the procedure can be criticized as an uncompensated taking of private property. See, generally, Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455 (2011). Indeed, the courts have acknowledged that IOLTA is a Fifth Amendment taking, but upheld it on the grounds that the interest that any individual client would have earned would purportedly be insignificant. See *Brown v. Legal Found.*, 538 U.S. 216, 240 (U.S. 2003). An extensive critique of IOLTA is beyond the scope of this paper, but it is sufficient to say that one of the benefits of reduced indigent defense caseloads would be a commensurate reduction in Texas's reliance on this questionable program.
- ²⁰ *Texas Indigent Defense Commission FY11 Annual and Expenditure Report* 21 (January 10, 2012); see also Martha Deller, *Task Force Wants Texas Legislature to Improve Indigent Defense System*, FORT WORTH STAR TELEGRAM, November 26, 2011; Grissom, *Advocates: Texas Indigent Defense Nearing Crisis* (noting that the state contributed \$28 million). Over this period in which indigent defense costs grew by 91 percent, the state population increased by only 20 percent. See *United States Census Bureau: State & County QuickFacts*, accessed July 19, 2012.
- ²¹ Erik Luna, *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States? Before the Subcommittee on Crime, Terrorism, and Homeland Security*, Committee on the Judiciary, U.S. House of Representatives (26 Mar. 2009).
- ²² *Ibid.*
- ²³ *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945).
- ²⁴ See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 50-64 (The Constitution Project 2009); Robert C. Scott, *Indigent Representation: A Growing National Crisis Before the Subcommittee on Crime, Terrorism, and Homeland Security*, Committee on the Judiciary 1-3, U.S. House of Representatives (24 June 2009).
- ²⁵ Erick Eckholm, "Citing Workload, Public Lawyers Reject New Cases," *The New York Times*, 8 Nov. 2008 ("Public defenders' offices in at least

seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor.”).

²⁶ *Ibid.*

²⁷ Schulhofer & Friedman 2 (citing Remarks by Attorney General Eric Holder, Brennan Center for Justice Awards Dinner, 16 Nov. 2009).

²⁸ *Ibid.* The authors note that one public defender “was . . . told by a county supervisor that he should join the District Attorney in his effort to keep the streets of Essex County safe.” *Ibid.* (citing *The Constitution Project, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* 80-81).

²⁹ Scott Wallace, *Remarks at A Symposium on Indigent Criminal Defense in Texas: The Economics of Representing Indigent Defendants 2-3, December 7, 2000.*

³⁰ Wesley Shackelford, *Review of Tarrant County Indigent Defense System* 12 (Texas Task Force on Indigent Defense: 10 Mar. 2006).

³¹ See Bill Piatt, “County Needs More Efficient Indigent Defense System,” *San Antonio Express-News* (1 June 2011).

³² *Ibid.*

³³ “Political factors also play a role in indigent criminal representation by influencing the appointment process. . . . [J]udges consider whether an attorney contributed to their campaign or was a political supporter when making appointments. It is not uncommon for judges to solicit campaign contributions from criminal defense attorneys and then imply that the attorney will recoup their contributions in the form of court-appointed work. At the very least, attorneys feel pressured to contribute so that they can stay in good favor with the judge whom they depend on for favorable court assignments.” Butcher & More at 13.

³⁴ *Texas Disciplinary Rule of Professional Conduct Preamble 2* (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

³⁵ “A central difference between the common-law and civil-law systems . . . is that the common-law system ‘leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.’ In contrast . . . in the civil-law system . . . judges more actively control the investigation and fact-finding process.” James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System* 27-28 (Federal Judicial Center: 1995).

³⁶ *Ibid.*

³⁷ Calls for more resources are commonly made to deal with problems in indigent defense. See, e.g., Allan Butcher, *Remarks at A Symposium on Indigent Criminal Defense in Texas: The Economics of Representing Indigent Defendants*, 7 Dec. 2000 (“This is where the rubber meets the road. We can talk about change. We can talk about reform. The thing that keeps coming back, time after time, is the question of resources. Without resources we’re not really going to get much change.”). More resources may be helpful in addressing the quality problem (they would not affect the conflict-of-interest problem at all), but additional resources are simply not practical—especially in the current budget environment. Texas confronted a \$13 billion budget shortfall in 2011, and it is expected to tackle an equally onerous shortfall in 2013. The state is in no position to allocate additional funds to indigent defense. In fact, in 2011, the state reduced indigent defense funding for the biennium by \$1 million. (In the regular session of the 82nd Legislature, indigent defense funding was reduced by \$8.6 million, but \$7.6 million was restored in a called session.)

³⁸ *Argersinger*, 407 U.S. at 32.

³⁹ TEX. PENAL CODE ANN. § 12.03 (Vernon 2011).

⁴⁰ *Ibid.*, § 12.23.

⁴¹ *Ibid.*, § 12.22.

⁴² *Argersinger*, 407 U.S. at 32.

⁴³ TEX. PENAL CODE ANN. § 47.02 (Vernon 2011).

⁴⁴ TEX. ALCO. BEV. CODE ANN. § 106.071 (Vernon 2011).

⁴⁵ TEX. PENAL CODE ANN. § 42.13 (Vernon 2011).

⁴⁶ *Ibid.*, § 28.03.

⁴⁷ *Ibid.*, § 31.03.

⁴⁸ *Ibid.*, § 49.04.

⁴⁹ *Ibid.*, § 42.02.

⁵⁰ *Ibid.*, § 22.07.

⁵¹ *Ibid.*, § 42.061.

⁵² TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon 2011).

⁵³ TEX. PENAL CODE ANN. § 12.22 (Vernon 2011).

⁵⁴ TEX. OCC. CODE ANN. § 165.151 (Vernon 2011).

⁵⁵ TEX. PENAL CODE ANN. § 47.03 (Vernon 2011).

⁵⁶ See *supra* n. 22.

⁵⁷ H.B. 1707, 2011 Leg., 82nd Sess. (Tex. 2011).

⁵⁸ Ronald M. Dworkin, *Law’s Empire* 143 (1986) (“In one department, criminal law, Anglo-American practice . . . believe[s] that no one should be found guilty of a crime unless the statute or other piece of legislation establishing that crime is so clear that he must have known his act was criminal, or would have known if he had made any serious attempt to discover whether it was. In the United States, this principle has the status of a constitutional principle, and the Supreme Court has on many occasions overturned criminal convictions because the supposed crime was too vaguely defined to give the necessary notice.”) (citations omitted).

⁵⁹ This argument for improving indigent defense services has also been made in states outside of Texas. See, e.g., John Stuart, “Could we get by with a little less crime?” *Minnesota Lawyer* (30 Aug. 2010).

⁶⁰ Chapter 76 of the Parks & Wildlife Code governs oysters, and section 76.118 promulgates penalties for various oyster offenses. +TEX. PARKS CODE ANN. § 76.118 (Vernon 2011). If an offender has been found guilty on two or more occasions in a five-year period of having violated sections 76.101 (Oyster Licenses Required), 76.107 (Sale of Sport Oysters Prohibited), 76.109 (Night Dredging Prohibited), or 76.116 (Oysters from Restricted Areas), then his third offense within that period is a felony. *Ibid.* Similarly, if an offender has been found guilty on just one prior occasion of having violated section 76.109 and section 76.116, then the offense is a felony. *Ibid.*

⁶¹ TEX. PARKS CODE ANN. § 66.119 (Vernon 2011).

⁶² Erik Luna, *Indigent Representation: A Growing National Crisis Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary 3*, U.S. House of Representatives, June 24, 2009.

⁶³ See Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes that Punish Standard Business Practice at 2-6 (Manhattan Institute Civil Justice Report: Nov. 2009)* (“[C]riminalizing business conduct raises special concerns because the prohibited behaviors are often hard to distinguish from the kinds of productive activities that businesspeople are obligated to engage in.”). Gryphon’s observation is about federal overcriminalization, but the argument is equally applicable to state and local overcriminalization also.

⁶⁴ Erik Luna, “States Shouldn’t Shirk Responsibility to Indigent Defendants,” *National Law Journal* (29 Mar. 2010).

⁶⁵ See Marc A. Levin, *Drug Courts: The Right Prescription for Texas* at 1 (Feb. 2006).

⁶⁶ See, e.g., S.B. 1909, 2007 Leg. 80th Sess. (Tex. 2007). The bill was passed by the Texas Senate in 2007, but not by the Texas House of Representatives.

⁶⁷ Marc A. Levin, *Treating Texas Crime Victims as Consumers of Justice* at 1 (Texas Public Policy Foundation Policy Perspective: March 2010).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 2.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

⁷⁵ Robert P. Mosteller, “Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery,” 15 *George Mason Law Review* 257, 316-18 (2008).

⁷⁶ Alex Branch, “Tarrant County’s electronic open-file system seen as gold standard for reducing wrongful convictions,” *Fort Worth Star-Telegram* (18 Mar. 2010).

⁷⁷ *Ibid.*

⁷⁸ Anglea Morris, “Lubbock County to Try Novel Indigent-Defense Approach,” *Texas Lawyer* (13 June 2011).

⁷⁹ Schulhofer & Friedman at 1.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 8.

⁸² *Ibid.*

⁸³ *Ibid.*, 17 (“We do not claim that our voucher proposal will solve every problem—especially if resource constraints generate a wide gulf between the demand for competent defense attorneys and the available supply. What we do claim is that at any level of funding, our voucher model can produce gains for both criminal defendants and society generally.”).

⁸⁴ *Ibid.*

⁸⁵ This is the model that is successfully used in Ontario, Canada. Schulhofer & Friedman at 22, n. 63 (citing Legal Aid Ontario, “Fact Sheet: Legal Aid at a Glance” (2009); Legal Aid Ontario, “LAO Common Measurements Tool” (2008)).

⁸⁶ Schulhofer and Friedman suggest that lump-sum vouchers “would grant a fixed amount to cover the cost of defense, with the amount presumably depending on the nature of the charge.” Lump-sum vouchers give the taxpayer more security, but at the expense of the indigent defendant because an attorney receiving a lump-sum is unlikely to defend a case beyond the level of resource-commitment that would be reimbursed by the voucher. Schulhofer and Friedman believe that regardless of these flaws, the lump sum voucher may nevertheless be preferable in some jurisdictions. *Ibid.*, 13-15.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 14.

⁸⁹ *Ibid.*

⁹⁰ Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* 240-41 (American Bar Association Standing Committee on Legal Aid and Indigent Defendants: 2011).

⁹¹ *Ibid.*, 13.

⁹² L. Jacobo Rodríguez, *Chile’s Private Pension System at 18: It’s Current State and Future Challenges* 5 (Cato Institute: July 30, 1999). I am indebted to my colleague Marc A. Levin for this analogy.

⁹³ S.B. 1070, 2011 Leg., 82nd Sess. (Tex. 2011). In fact, in the 82nd Legislature, Senator Rodney Ellis sponsored a bill that would have authorized the implementation of such pilot programs, but it was not placed on the intent calendar.

⁹⁴ Eve Conant, “The GOP’s Born-Again Prison Reformers,” *The Daily Beast* (3 July 2011).

⁹⁵ *Ibid.*

About the Author

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