

JUSTICE RATIONED: A LOOK AT ALABAMA'S PRESENT INDIGENT DEFENSE SYSTEM WITH A VISION TOWARDS CHANGE

"Thou shalt not ration justice."¹ This admonition given by Judge Learned Hand almost a half century ago rings true across this nation today. In the decision of *Gideon v. Wainwright*,² the Supreme Court issued a call to arms for all jurisdictions to provide for the needs of the indigent defendant.³ Although this nation and this state have enjoyed immense prosperity over the past decade, little has been done to protect the needs of the indigent defendant. Until recently, Alabama ranked extremely low in a national assessment of dollars spent for each indigent defendant.⁴ Certain steps have been taken in Alabama to allow assigned counsel to adequately defend an indigent;⁵ however, the appointed counsel system presently in force in Alabama is flawed. In this era of specialized practice and with judicial resources stretched to their breaking point, a fundamental change in our indigent defense system is necessary to secure the criminally accused's right to counsel and effective representation.

A separate and distinct public defender's office is a necessity in sufficiently populated jurisdictions to ensure the interests of the accused, the state bar, and the public in a dynamic criminal justice system. In assessing the best approach for the State of Alabama, special attention will be focused on both the institutional vision of a public defender's office and the individual vision of each attorney in the office as she serves as an advocate for her client.⁶

Part I of this Comment provides a brief summary of an indigent's right to counsel through an examination of the case law of both the fed-

1. Judge Learned Hand, Address at the 75th Anniversary of the Legal Aid Society of New York (Feb. 16, 1951), in IRVING DILLARD, *THE SPIRIT OF LIBERTY* XIX (1952).

2. 372 U.S. 335 (1963).

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

4. See *infra* note 72 and accompanying text.

5. See *infra* text accompanying notes 102-12.

6. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2459 (1996). A practical public defender's office must properly weigh these often counterbalancing visions in order to function efficiently in an extremely competitive adversarial criminal justice system. *Id.* A movement toward an institutional role may be desirable for furthering the mission of the office, but it may subordinate the client's interests in the process. *Id.*

eral and Alabama state courts. Part I then explores the early forms of the public defender offices as they emerged at the beginning of the twentieth century. Part II surveys the varied models of present day indigent defense systems (public defender system, court appointed counsel system, and a mixed system) as well as the different forms of representation of clients within those models. This Part focuses particular attention on Alabama's present default appointed counsel indigent defense system. Part III utilizes statistical analysis to examine data on past criminal defendants charged with a felony in the State of Alabama. This Part serves as a quantitative partner to the empirical analysis of Parts I and II. Part IV explores a vision for change, proposing a comprehensive approach to this state's indigent defense needs based upon the previous sections' discussion of the attributes and draw-backs of the various alternative indigent defense models. It is outside the scope of this Comment to evaluate the innumerable variables which affect an administrative body and an attorney's relationship with her client. Legislators, judicial officers, and attorneys of this state are encouraged to assess a meaningful alternative to the present system of indigent defense.

I. A HISTORICAL PERSPECTIVE OF INDIGENT DEFENSE

A. *Development through Federal and State Case Law*

In *Gideon v. Wainright*, the Supreme Court fashioned a rule in American jurisprudence which mandated the right to assistance of counsel in a criminal prosecution.⁷ Speaking for the Court, Justice Black wrote 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. This seems to us to be an obvious truth."⁸ The *Gideon* decision was the logical result of *Powell v. Alabama*;⁹ however, the evolution of indigent defense did not develop in a straight line progression. In *Betts v. Brady*,¹⁰ the Court set forth a special circumstances analysis of the facts in a given case to assess whether a state indigent defendant's

7. 372 U.S. 335, 344 (1963).

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

9. 287 U.S. 45 (1932). The *Powell* decision promulgated the rule that due process requires the appointment of counsel in state criminal trials in some circumstances. *Powell*, 287 U.S. at 73. The Court held that based on a factual analysis of the circumstances surrounding the prosecution, it was a clear denial of due process to allow defendants to be convicted while only being afforded pro forma representation. *Id.* at 58 (noting that defendants were black, illiterate, apparently indigent, from out of state, charged with raping a white woman, and sentenced to death).

10. 316 U.S. 455 (1942) *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Sixth Amendment rights were violated.¹¹ The Court held that the Fourteenth Amendment only prohibited the conviction of a state indigent defendant when the trial was "offensive to the common and fundamental ideas of fairness and right."¹² This holding was abrogated by the *Gideon* decision, which held that the Sixth Amendment's guarantee to assistance of counsel is a right of such a fundamental nature that it is therefore immune from state invasion by operation of the Fourteenth Amendment.¹³

Although the *Gideon* decision established a fundamental trial right of indigent defendants, it left open certain questions as to when and necessarily if the right attaches to an indigent defendant accused of certain minor offenses.¹⁴ In subsequent decisions, the Court has noted that the right to assistance of counsel attaches at every critical stage of the criminal prosecution.¹⁵ In the 1966 decision of *Miranda v. Arizona*,¹⁶ the Court held that the presence of counsel is an absolute prerequisite to the admission of a confession obtained during a custodial interrogation.¹⁷ If the accused is indigent, an attorney will be appointed for him if so requested by the accused at or before interrogation.¹⁸ In *Argersinger v. Hamlin*,¹⁹ the Court held that an indigent defendant's Sixth Amendment right to counsel was violated when a court denies a defendant's request for court appointed counsel for an offense punishable by imprisonment for up to six months.²⁰ The right of the indigent defendant to counsel extends through the sentencing phase.²¹ An indigent defendant is entitled to counsel for an initial appeal from the judgment and sentence of the trial proceeding.²² Certain progressive jurisdictions had identified the public defender office as an essential cog in the wheel of indigent defense; however, the upstart of the modern public defender office did not

11. *Beets*, 316 U.S. at 462.

12. *Id.* at 473.

13. *Gideon*, 372 U.S. at 341-42 (comparing the right to assistance of counsel to the First Amendment's freedoms of speech, press, and religion).

14. J.P. Ludington, Annotation, *Constitutionally Protected Right of Indigent Accused to Appointment of Counsel in State Court Prosecution*, 93 A.L.R.2d 747, 751 (1964).

15. See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (holding that a preliminary hearing was a critical stage of the state criminal process and that the defendant's right to counsel properly attached at that stage); see also *United States v. Wade*, 388 U.S. 218, 227 (1967) (noting that a determination as to whether a hearing constitutes a critical stage of the state criminal process depends upon an analysis of "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice").

16. 384 U.S. 436 (1966).

17. *Miranda*, 384 U.S. at 468.

18. *Id.* at 473.

19. 407 U.S. 25 (1972).

20. *Argersinger*, 407 U.S. at 33.

21. *Mempa v. Rhay*, 389 U.S. 128 (1967).

22. *Douglas v. California*, 372 U.S. 353 (1963). But see *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (holding that the indigent's right to counsel does not extend to discretionary appeals).

begin until the *Gideon* decision was handed down in 1963.²³

In the time preceding *Gideon*, Alabama adhered to a belief that the federal Sixth Amendment right to assistance of counsel only attached to the defendant when he was charged with a capital crime.²⁴ The Alabama Supreme Court said that “[t]rial courts can be trusted, we think, to see that every man brought before them, charged with crime, shall have that full measure of protection guaranteed to him by section 6 [sic] of the Constitution.”²⁵ This discretionary grant of power to the trial judge was curtailed by the enactment of a new indigent defense statute in response to the *Gideon* decision.²⁶ The statute afforded counsel to an indigent defendant in a noncapital case where the defendant was charged with a serious offense.²⁷ In 1971, the Alabama legislature amended the statute to extend the right to counsel to all noncapital criminal cases.²⁸

In *Sparks v. Parker*,²⁹ the Alabama Supreme Court addressed the question of whether the appointed counsel indigent defense system violated the state constitutional mandate of providing adequate and reasonable financing for the entire unified judicial system.³⁰ A team indigent defense system was adopted in the Seventh Judicial Circuit in Alabama where fifty-two attorneys were appointed to four teams, each team being eligible for appointment during a three-month period within a given year.³¹ The County Bar Association of Calhoun County opposed the appointed counsel indigent defense system, arguing that compelling the service of attorneys for the statutorily defined compensation rates violated the 328th Amendment to the Alabama Constitution, which required “adequate and reasonable” financing of the judicial system.³² The court noted that the legislature possessed the sole authority to determine the

23. *Gideon*, 372 U.S. at 335.

24. *Campbell v. State*, 62 So. 57, 59 (Ala. 1913) (construing ALA. CODE § 7839 (1907) (amended by later enactment) as not requiring the appointment of counsel for a defendant not accused of a crime subject to capital punishment).

25. *Gilchrist v. State*, 173 So. 651, 651 (Ala. 1937).

26. 1963 Ala. Acts 526 (repealed by subsequent statutes).

27. *Irvin v. State*, 203 So. 2d 283, 287 (Ala. Ct. App. 1967) (stating that whether or not the charge is serious enough to afford the defendant appointed counsel must be viewed from that point in time with regard to the potential punishment, not from hindsight after conviction).

28. 1971 Ala. Acts 2420 (codified as amended in ALA. CODE § 15-12-20 (1995)). Prior to the 1971 enactment, appointed counsel were only entitled to a fee fixed by the trial judge not to exceed \$100.00. See 1963 Ala. Acts 526.

29. 368 So. 2d 528 (Ala. 1979).

30. *Sparks*, 368 So. 2d at 531. The state constitutional right at issue was section 6.10 of amendment 328 to the 1901 Constitution of Alabama. *Id.* The amendment states in relevant part: “Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system. . . .” ALA. CONST. amend. 328, § 6.10 (1990).

31. *Sparks*, 368 So. 2d at 529.

32. *Id.* at 531. Appointed counsel were compensated at a rate of \$10.00 per hour for out-of-court time and \$20.00 per hour for in-court time, with a maximum compensation (which included fees and reimbursed expenses) not to exceed \$500.00. 1971 Ala. Acts 2420. For the constitutional provision, see *supra* note 30.

amount of appropriations necessary for the performance of the judicial system.³³ The only recourse the court had was to determine if the fee structure was indeed "adequate and reasonable," which the court held it was.³⁴ The *Sparks* case has been the most compelling adjudicative challenge to the appointed counsel system of indigent defense in the State of Alabama.³⁵ Although the court dismissed the allegations of the County Bar Association based strictly³⁶ on a monetary analysis of the issue, the idea that the statutorily defined fee system violates the "adequate and reasonable" provision of the state constitution still rings true today, if not in the ears of appointed counsel, then surely in the ears of the indigent defendant whose prospects for freedom are relegated to a predetermined withdrawal from the state treasury.

B. *The Right to Counsel as Contemplated in Early Public Defender Offices*

The right to assistance of counsel has two distinct elements:³⁷ 1) the right to retain counsel, and 2) the right to have counsel assigned in certain circumstances.³⁸ The right to retain counsel is well entrenched in American jurisprudence.³⁹ The right to have counsel assigned has traveled a bumpy road from private incorporated societies⁴⁰ to the establishment of the first legal aid societies dedicated to serving the public as

33. *Sparks*, 368 So. 2d at 531.

34. *Id.*

35. A handful of capital defendants have appealed their convictions utilizing the "adequate and reasonable" basis which first surfaced in *Sparks*. See, e.g., *Smith v. State*, 581 So. 2d 497, 527 (Ala. Crim. App. 1990), *rev'd on other grounds*, 581 So. 2d 531 (Ala. 1991). However, no appeals have been successful, tending in large part to the courts' unwillingness to depart from the *Sparks* rationale.

36. The court affirmed the appeal from the circuit judge's order establishing the appointed counsel system of indigent defense. *Sparks*, 368 So. 2d at 531. The Fifth Amendment "takings" argument under the federal constitution was similarly rejected by the court. *Id.* at 533. The court premised its decision on the belief that members of the Alabama Bar were in a unique position in their communities and were obligated to render their services for limited compensation. *Id.*

37. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE NAT'L LEGAL AID AND DEFENDERS ASS'N, EQUAL JUSTICE FOR THE ACCUSED 40 (1959) [hereinafter NLADA].

38. *Id.*

39. The right to retain counsel has its origins in a 1695 English statute that authorized and required assignment of counsel when a defendant was accused of a crime involving treason. NLADA, *supra* note 37, at 40. The next grant of rights to the English defendant occurred through the common law. By the middle of the nineteenth century there was a gradual relaxation of the general prohibition against representation. *Id.* at 41. Not until 1836 did an English defendant accused of a felony enjoy the statutory right to a full defense by counsel. *Id.* (citing 6 & 7 WILLIAM IV, ch. 114, § 1 (1836)). The English rule was summarily rejected in the United States by the adoption of the Bill of Rights. Although the Sixth Amendment plainly provides for the right to retain counsel, it did not logically follow that counsel would be appointed to represent an indigent defendant. *Id.* at 42.

40. In 1840, both the German Society and the Irish Emigrant Society separately incorporated in New York to "afford advice, information, aid and protection, to emigrants . . . and generally to promote their welfare." NLADA, *supra* note 37, at 43.

a whole.⁴¹ The right of an indigent defendant to assigned counsel was enunciated as law by the Supreme Court's 1963 *Gideon* decision.⁴²

The emergence of the original public defender offices in the United States was neither the result of civic minded attorneys nor the result of actions of benevolent legislatures, but rather was the necessary end of the increased stratification of the legal profession at the turn of the twentieth century.⁴³ The low social status of solo practitioners in New York City at the turn of the century inspired the attorneys to become not only advocates for fee-paying clients, but also adversaries of the state.⁴⁴ In reaction to the increased zealotry of the disenchanting solo practitioners, reformers called for the institutionalization of the public and private defender agencies as a means to curb what was viewed as disruptive behavior.⁴⁵ In 1917, Manhattan's civic and cultural elite chartered the Legal Aid Society,⁴⁶ an organization which sought to advance the non-adversarial method of criminal advocacy.⁴⁷ The Defenders Committee of the Legal Aid Society had three primary goals: (1) to reduce social unrest created by the practices of the private defense bar; (2) to elevate the public's perception of the administration of justice; and (3) to eliminate the effects of disreputable defense attorneys on the criminal justice system.⁴⁸

With these goals in mind, the public defenders sought to reduce conflicts with the prosecution because many of them fancied themselves public officials rather than champions of their client's best interests.⁴⁹ The Los Angeles County Public Defender, in its first year of existence, secured more guilty pleas, filed fewer motions and took fewer cases to trial than did private assigned counsel the preceding year.⁵⁰ This apathetic philosophy was evidenced by the enacting statutes of the first

41. *Id.* at 43-47.

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

43. Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891, 894 (1999) (noting that due to the rise in "immigration and the emergence of the corporate state, . . . the non-elite [lawyers] who were often times precluded from participating in reputable lawyering endeavors" had to turn to criminal defense work as a means of livelihood).

44. *Id.* at 894. "In the name of adversarial advocacy, [the disenchanting attorneys] often sought only to undermine the prosecution's ability to proceed through maneuvers aimed at obstructing the operational efficiency of the courts." *Id.*

45. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 602-10 (1986-87).

46. Mirsky, *supra* note 43, at 896. The first public defender's office was created in Los Angeles County by enactment of statute in 1913. Taylor-Thompson, *supra* note 6, at 2424. The Los Angeles County Public Defender was responsible for representing any case in the Los Angeles County Superior Court when requested by a judge or an accused. *Id.* at 2424 n.18.

47. Mirsky, *supra* note 43, at 896.

48. Taylor-Thompson, *supra* note 6, at 2424 n.19 (citing McConville & Mirsky, *supra* note 45, at 617-31).

49. Taylor-Thompson, *supra* note 6, at 2424.

50. *Id.*

government-led public defender offices.⁵¹ Following the Court's pronouncement in *Gideon*, the 1960s and 1970s saw an explosion in the number of public defender offices and a fundamental change in offices' philosophy of representation.⁵² Apathy was replaced by zealous representation of the indigent's interests.⁵³

II. PRESENT METHODS OF PROVIDING INDIGENT REPRESENTATION

While there are many variations on the basic methods of providing for the defense of the indigent. Primary attention is focused on the following three methods of representation: (1) public defender systems; (2) appointed counsel systems; and (3) mixed systems.⁵⁴

A. Public Defender Systems

A public defender system contemplates an organizational structure which provides for representing the vast majority of indigents, with a small portion of the cases being assigned to private attorneys due to conflicts of interest often arising with multiple indigent defendants at one trial. The most straightforward approach to establishing a public defender office is for the state legislature to create a state-wide entity dedicated to providing for the needs of the indigent defendant.⁵⁵

For example, the legislature for the State of Maryland established a state-wide public defender's office which is administered on the district court level, Maryland's general jurisdiction court.⁵⁶ The Office of the

51. *E.g.*, Cal. Gen. Laws Act 1910, § 5 (1921) (amended by later enactment) (placing restrictions on the public defender by allowing the defender to pursue appeals to higher courts only where the appeal would or might reasonably be expected to result in a reversal or modification of the judgment of conviction).

52. Taylor-Thompson, *supra* note 6, at 2425, 2426 & n.33 (contrasting the enabling statutes of early public defender offices to present day statutes which grant broad discretion to the attorneys in the offices and do little more than identify indigency standards). *Compare* Cal. Gen. Laws Act 1910, § 5 (1921) with D.C. CODE ANN. § 1-2702 (1996) (evidencing the same analysis).

53. Taylor-Thompson, *supra* note 6, at 2426.

54. Methods of providing funding for these systems is discussed at length below. *See infra* Part II.C.

55. *See, e.g.*, CONN. GEN. STAT. § 51-289 (1985 & Supp. 2000); MD. ANN. CODE art. 27A, § 3 (1997 & Supp. 2000); N.J. STAT. ANN. § 2A:158A-3 (West 1985 & Supp. 2000).

56. MD. ANN. CODE art. 27A, § 3. Identifying the need for a state-wide apparatus to defend the rights of the state's indigent defendants, the legislature made the following declaration of policy.

It is hereby declared to be the policy of the State of Maryland to provide for the realization of the constitutional guarantees of counsel in the representation of indigents, including related necessary services and facilities, in criminal and juvenile proceedings within the State, and to assure effective assistance and continuity of counsel to indigent accused taken into custody and indigent defendants in criminal and juvenile proceedings before the courts of the State of Maryland, and to authorize the Office of Public Defender to administer and assure enforcement of the provisions of this article in accordance with its terms.

Id. § 1.

Public Defender ("OPD") is an executive branch agency where the head and deputy public defenders are both appointed "by the board of trustees and who shall serve at the pleasure of the board of trustees."⁵⁷ Although Maryland has only twelve judicial districts, many of Maryland's population statistics are strikingly similar to those of Alabama, namely, total population and the percent of population between the ages of eighteen and sixty-five.⁵⁸ The OPD is split into four functioning groups with the public defender being responsible for the entire system.⁵⁹ The four divisions represent one of the most complete social welfare mechanisms in existence with regard to the advocacy of indigents' interests. The four divisions include: (1) district operations of the OPD; (2) appellate and inmate services; (3) involuntary institutionalization services; and (4) capital defense division.

The OPD is a centrally-administered indigent defense system that has many advantages over a locally controlled, community-based system. Disparities as to the scope and range of representation and the quality of services provided are eliminated.⁶⁰ A centralized system offers efficiency and economy of operation and protects the professional independence of the individual defenders because they are insulated from the political pressures present at the local level.⁶¹ Although centralized systems do seem to afford the state and the indigent defendant increased benefits, certain locally-based defender offices have made significant strides in furthering the interests of the poor in metropolitan areas.⁶²

57. *Id.* § 3.

58. In 1998, the population of Alabama was 4.3 million, whereas the population of Maryland was 5.1 million. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 28 (1999). In Alabama, approximately 62% of the population is between the ages of eighteen and sixty-five. Similarly, in Maryland the figure is 63%. *See id.* at 33.

59. MD. ANN. CODE art. 27A, § 3. The public defender is appointed by the board of trustees and carries out her responsibilities through, among other mechanisms, the general administration program. The public defender and deputy public defender handle all personnel and fiscal matters for the Office of the Public Defender. The general administration program handles such tasks as budgeting, planning, accounting, data collection, procurement, and training coordination. *See* STATE OF MARYLAND, GOVERNOR'S BUDGET BOOK: FISCAL YEAR 2001 1-56 (2000).

60. NANCY ALBERT GOLDBERG & JAY LAWRENCE LICHTMAN, GUIDE TO ESTABLISHING A DEFENDER SYSTEM 34 (1978).

61. GOLDBERG & LICHTMAN, *supra* note 60, at 36. A Georgia Commission noted that when public defender offices are controlled at the local level, it is more difficult for the defenders to handle unpopular cases and they are subject to more political pressure. *Id.*

62. *See generally* Harold R. Washington & Geraldine S. Hines, "Call My Lawyer": Styling a Community Based Defender Program, 8 BLACK L.J. 186 (1983). In 1971, the Roxbury Defenders Committee ("RDC") was founded in Roxbury, Massachusetts, a predominantly black section of Boston. In addition to offering a 24-hour answering service for clients who were in need of legal representation, the RDC had a social service component to its "community" based office which allowed clients to utilize the office's services even if they were not accused of a crime.

The benefits of [a community based] approach may not be readily quantifiable, but it is interesting to note that clients have a greater proclivity for defaulting on pre-trial interviews if the interview site is far removed from their residences. Inaccessibility of counsel for indigent defendants may often involve nothing more than lack of carfare downtown.

The district operations division is responsible for the traditional pre-trial and trial representation of indigent defendants.⁶³ It is no small undertaking to provide representation for indigent defendants in Maryland, which ranks sixth in the nation for violent crimes.⁶⁴ In 1999, district operations employed 445 full time employees and had to enlist the services of 208 contract employees to provide for the indigent defense needs of the entire state.⁶⁵

The appellate and inmate services division is responsible for all appellate litigation involving OPD clients; it provides educational services for the twelve district offices and assists indigent inmates with post-conviction actions.⁶⁶ The primary purpose of this division is to provide legal representation to clients challenging their convictions on the basis of a denial of constitutional and fundamental rights.⁶⁷

The involuntary institutionalization services division represents all indigent persons facing civil involuntary commitment to mental hospitals.⁶⁸ The capital defense division coordinates representation with the district offices in capital murder cases.⁶⁹

Maryland's OPD represents a commitment by the state legislature of Maryland to a viable state-wide indigent defense system. The four divisions cover the spectrum of civil liberties and fundamental freedoms for the state's indigent population—freedoms and liberties which all Americans should be able to recognize. However, these services for the indigent population in Maryland are not without cost. For the 1999 fiscal year, Maryland's expenditure for the OPD was approximately \$40 million.⁷⁰ Compare that with Alabama's \$21 million⁷¹ expenditure for its

Id. at 190. The RDC targeted young and aggressive attorneys to staff its office and "as a direct result of RDC efforts, [district court proceedings] at least are moving towards models of what tribunals of justice should resemble." *Id.* at 192.

63. See STATE OF MARYLAND, *supra* note 59, at I-59. Representation is provided to qualified indigents in the district courts, juvenile courts, circuit courts, police custody, and related collateral hearings. *Id.*

64. Maryland experienced 847 violent crimes per 100,000 in population in 1997, ranking the state sixth in the nation. U.S. CENSUS BUREAU, *supra* note 58, at 215. By comparison, Alabama ranked 20th with 565 violent crimes per 100,000 in population. *Id.* The fact that Maryland experiences a greater propensity for violent crimes may not necessarily entail an increased burden on the OPD. Maryland enjoys the distinction of being the state with the smallest percentage of its population living at or below the poverty line. *Id.* at 485.

65. STATE OF MARYLAND, *supra* note 59, at I-61.

66. *Id.* at I-63.

67. *Id.*

68. *Id.* at I-66.

69. *Id.* at I-69. The duties of the capital defense division involve consultation with district defenders, arranging for expert witnesses and investigators, gathering data on sentencing in homicide cases, and tracking costs. STATE OF MARYLAND, *supra* note 59, at I-69.

70. *Id.* at I-58.

71. Expenditures for the entire indigent defense mechanism in Alabama amounted to only \$21 million in 1999. See Report for Robert L. Childree, Comptroller of Alabama Unified Court System (Jan. 20, 2000) (on file with *Alabama Law Review*). In 1998, that figure was \$17 million and in 1997 the figure was \$14.6 million. *Id.* Although the data evidences that total expenditures

indigent defense system, and it is clear that there is a noticeable difference in each state's financial commitment to the needs of its indigent defendants.

Although Maryland's OPD is a comprehensive approach to indigent advocacy, many states do not enjoy either the geographical logistics or the balanced population dispersion which allows the Maryland system to function properly and efficiently. One way states have remedied this situation is to create public defender offices in a given jurisdiction only if there is sufficient population to warrant the establishment of an office.⁷² The Illinois indigent defense system utilizes both the appointed counsel and the public defender systems even absent a conflict of interest. A county with a population below the 35,000 threshold may still establish an office of the public defender; however, the county is not required to do so.⁷³

The Illinois system, even though not a state-wide system, lacks a statutorily created mechanism to assess the quality of the services rendered by appointed counsel and public defenders. The judges in each jurisdiction only maintain an oversight responsibility over appointed counsel and the public defenders, as they do for all members of the bar. Many commentators have spoken to the benefits of utilizing an apparatus to ensure the quality administration of indigent representation.⁷⁴ An oversight commission much like the Public Defender Commission in Mississippi would play a large part in maintaining quality representation, ensuring the continuity of operations across the entire state, and solidifying the office of the public defender as an institutional actor in a state's political environment.⁷⁵

When assessing the staffing needs of an office, it is necessary to

on the indigent defense system have risen in past years, Alabama still spends far less administering its indigent defense system than do comparable states.

72. 55 ILL. COMP. STAT. 5/3-4001 (West 1993) (creating an office of the public defender in all counties with a population over 35,000); *Id.* 5/3-4002 (permitting counties with less than 35,000 in population to create an office of the public defender); *Id.* 5/3-4003 (allowing adjoining counties in the same judicial circuit to join offices by joint resolution of the respective county boards); *Id.* 5/3-4004 (mandating that the circuit judges in the counties with population in excess of one million appoint by majority vote an individual to assume the role of head public defender).

73. *See id.* 5/3-4002.

74. *See, e.g.,* ABA STANDARDS FOR CRIMINAL JUSTICE 5-1.3 (3d ed. 1992) (noting that an "effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. . . . The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender").

75. *See* MISS. CODE ANN. § 25-32-39 (1999) (repealed by 1998 Miss. Laws, ch. 575, §5). Among other responsibilities, the Mississippi Public Defender Commission is responsible for establishing standards for determining which counties require full-time district defender offices, which would be best served by part-time contract district defenders, and which could be effectively served by a system of court-appointed defenders. The Commission also evaluates the performance of each defender (full-time/part-time defender, contract defender, and/or court appointed defender), provides for quality control, and creates incentive programs for meritorious performance. *Id.*

contemplate the mode of representation which will be utilized by the defenders. In an effort to address large caseloads and increase efficiency, many offices have utilized the mode of horizontal or stage representation.⁷⁶ With horizontal representation, a defender is assigned a specific courtroom or a particular task and is responsible for matters within that purview. Often times a client may have to interface with two or three individuals as his case progresses through the system. Some commentators have suggested that this mode of representation discourages personal and professional responsibility and may on occasion contribute to serious errors in the legal representation provided.⁷⁷

The American Bar Association has criticized horizontal representation, instead advocating vertical representation.⁷⁸ Vertical representation entails a defender being assigned a client and following that client through all phases of the criminal process, including any post-verdict motions. The Cook County, Illinois Public Defender's Office organized a Homicide Task Force which established a policy of vertical rather than horizontal representation for all homicide cases.⁷⁹ Cook County encompasses the city of Chicago and has a large volume of cases funneling through its office each year. Although vertical representation offices have traditionally been reserved for smaller offices, the Homicide Task Force in Cook County enjoyed an influx of young aggressive attorneys seeking the close client contact and increased prestige that went along with serving as a member of the task force.⁸⁰

B. Appointed Counsel Systems

In appointed counsel systems, members of the private bar are appointed by judges to represent all indigent defendants. Alabama statutory law provides for the establishment of an indigent defense system in each county by a vote of the circuit judges with the advice and consent

76. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 484 (1982).

77. Mounts, *supra* note 76, at 484-85.

78. See ABA STANDARDS, *supra* note 74, at 5-6.2 (stating that "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary"). The commentary to this standard identifies the following deficiencies with horizontal representation:

The disadvantages of [horizontal] representation, particularly in human terms, are substantial. Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been "processed by the system." This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be reinterviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased.

Id.

79. See LISA J. MCINTYRE, *THE PUBLIC DEFENDER* 124 (1987).

80. See *id.*

of the indigent defense commission.⁸¹ Despite this statutory grant of discretion to the circuits, only four counties in four different circuits have established a public defender's office.⁸² Tuscaloosa County's Public Defender's Office handles a high volume of cases and is situated in the second largest county by land volume and fifth largest by population.⁸³ Tuscaloosa County did not create its public defender's office alone; it required an act of the Alabama Legislature to establish the office.⁸⁴ Given that only four of forty judicial circuits have a public defender's office, much of the following discussion focuses on Alabama's present state-wide indigent defense system and its characterization as an appointed counsel system.

The indigent defense commission is a circuit-based commission, with each of the five members appointed by the presiding circuit judge for a six-year term.⁸⁵ The duties of the commission include: (1) advising the presiding circuit judge on the particular indigent defense system to be used in each county of the circuit; (2) submitting advice on the operation and administration of the existing system; (3) selecting a public defender (if a public defender system is established within the circuit), determining the budget for the public defender, removing the public defender for cause if necessary; and (4) selecting contract counsel for delivery of the indigent defense services for the circuit if so needed.⁸⁶ Alabama's indigent defense system is substantially funded by the Fair Trial Tax Fund ("FTTF") which is a system of docket fees levied on all actions in Alabama state courts.⁸⁷

In 1988, the date of the last independent, comprehensive report on Alabama's indigent defense system, two principal themes emerged through the numerous problems noted with the current system. First, there was simply not enough money to meet the demands of the indigent

81. ALA. CODE § 15-12-2 (1995). An indigent defense system in Alabama is defined as: "Any method or mixture of methods for providing legal representation to an indigent defendant, including use of appointed counsel, use of contract counsel, use of public defenders, or any alternative method meeting constitutional requirements." *Id.*

82. Elmore County Public Defender, 19th judicial circuit; Tuscaloosa County Public Defender, 6th judicial circuit; Limestone County Public Defender, 39th judicial circuit; Monroe County Public Defender, 35th judicial circuit. The Shelby County Public Defender, 18th judicial circuit, is a "public defender office" by operation of contractual agreement but is not included in this list.

83. U.S. CENSUS BUREAU, COUNTY AND CITY DATA BOOK 18 (1994).

84. See 1980 Ala. Acts 1054; 1971 Ala. Acts 2208.

85. ALA. CODE § 15-12-4 (1995). Composition of the commission is as follows: two members must be attorneys licensed to practice law in the state of Alabama; one member must be a member of the county commission within the circuit; one member must be the mayor or member of the governing body of a municipality within the circuit; and one member must be a nonlawyer citizen. *Id.*

86. *Id.*

87. See *id.* (noting that withdrawals from the Fair Trial Tax Fund are to pay the expenses of administering the indigent defense system); *id.* §§ 12-19-71, -72, -171 to -176, -178, -179, -250, -251, (1995) (allocating the docket fees amongst the different funds).

defense system on a yearly basis.⁸⁸ Second, the statutorily created reimbursement rates for appointed counsel were so low *that competent attorneys had been steadily driven out of the system of representing indigent defendants.*⁸⁹

The conundrum of financing an indigent defense system has plagued legislatures since the first establishment of a "public" defender office in the early twentieth century. The idea that those who use the judicial system the most should bear the expense of financing the indigent defense system is a logical extension of the user-based excise tax plans that have been successful in increasing equity in endeavors such as the federal and state highway projects funded by gasoline taxes. As the highway projects of the 1950s and 1960s demonstrate, a continued government commitment to the project was required in order for the projects to be successful. The FTTF has consistently failed to meet the financial burdens of the present system⁹⁰ and cannot begin to contemplate the financing of a system which affords increased services to the state's indigent population.⁹¹

One example of the underfunding and inadequate defense of indigents is evidenced by the court-appointed defense of a capital murder case in Calhoun County. Jimmy Davis, Jr. was tried and convicted of capital murder by a Calhoun County court on December 10, 1993.⁹² Mr. Davis now sits on death row at Holman state prison.⁹³ Several attorneys are presently campaigning Mr. Davis' cause by way of a Rule 32 post-judgment petition for relief alleging, inter alia, ineffective assistance of counsel based upon the compensation rate paid to the defendant's appointed trial counsel.⁹⁴ In some very poignant language, the petition chastises the present system of indigent defense as underfunded and inadequate.⁹⁵

The paltry sums provided for expert investigation and assistance

88. Robert L. Spangenberg, The Spangenberg Group, Review of the Indigent Defense System in Alabama—Executive Summary 4 (June 1988) (unpublished manuscript, on file with the *Alabama Law Review*) (noting that the FTTF is not capable of producing enough revenue each year to assume the burden of supporting the indigent defense system).

89. Spangenberg, *supra* note 88, at 4 (emphasis added).

90. The FTTF has failed to collect sufficient revenue to meet the expenditures of the present system. For the fiscal year ending September 30, 1999, the FTTF was short on revenue by \$11.82 million, and the balance had to be withdrawn from the State's General Fund. This imbalance is a recurring event. In 1998, the fund was short \$9.25 million; in 1997, \$7.71 million; in 1996, \$5.05 million. See Report for Robert L. Childree, Comptroller of Alabama Unified Court System (Jan. 20, 2000) (on file with *Alabama Law Review*).

91. See *supra* text accompanying notes 88–89.

92. State v. Davis, No. CC-93-534, (7th Jud. Cir., Calhoun County, filed Jan. 25, 2000) (Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure).

93. *Davis*, No. CC-93-534, at 2.

94. *Id.* at 1.

95. *Id.* at 7-8.

in this case prevented the adequate investigation of mitigating circumstances, compilation of family history, location and preparation of witnesses, location and preparation of experts, and other preparations required for both [the guilt and sentencing] phases of the trial. This failure to provide adequate funds for these fundamental tasks severely prejudiced Mr. Davis and *made it virtually impossible for him to present a meaningful defense with court-appointed counsel.*⁹⁶

In fact, Mr. Davis' appointed counsel only called a single witness in his defense, whereas the prosecution called twenty-five witnesses.⁹⁷ Although this is a blatant example of the inadequate and underfunded operation of indigent defense in Alabama, other less striking deficiencies occur on a daily basis and are no less prejudicial to the defendant's rights.

In an effort to contain costs of the present system, the Alabama Administrative Office of Courts and individual judges have been successful in implementing numerous methods aimed at cost containment.⁹⁸ These measures have been so successful⁹⁹ as to warrant the observation that little more can be done to contain costs.¹⁰⁰

One major factor contributing to the cost containment is the blatant failure of the legislature to increase the rate of reimbursement payable to appointed counsel to keep pace with inflation. Section 15-12-21 of the Code of Alabama sets out the schedule of reimbursement for appointed counsel. As amended in 1971, the reimbursement rate for appointed counsel for out-of-court time was \$10.00 per hour and for in-court time it was \$20.00 per hour, with the maximum amount reimbursable not to exceed \$500.00.¹⁰¹

96. *Id.* at 8 (emphasis added).

97. *Id.* at 4.

98. Spangenberg, *supra* note 88, at 6-7. The promulgation of written indigency standards, uniform fee guidelines, data collection and analysis, recoupment, and monitoring of the FTF have brought down the cost of indigent defense. *Id.*

99. Although the state-wide efforts have trended towards cost containment, certain local practices have evidenced the abuses which can run rampant in an appointed or contract system. An attorney appointed by Birmingham Mayor Richard Arrington to defend indigent defendants in Birmingham Municipal Court had been paid an average of eight times more per case than Legal Aid attorneys performing the same tasks. See John Archibald & Jeff Hansen, *Public Defender Paid 8 Times More Than Legal Aid Lawyers Earned*, BIRMINGHAM NEWS, Feb. 20, 2000, at A1. Based on an average case load of 23 municipal court cases per month, the attorney took home an average of \$218 per case compared with the Legal Aid's average expense of a mere \$27 per case. *Id.* at A10.

100. Spangenberg, *supra* note 88, at 7.

101. 1971 Ala. Acts 3851 (codified as amended in ALA. CODE § 15-12-21 (1995)). Recall the discussion of the *Sparks v. Parker* case, *supra* pp. 4-5, which held that the statutory appropriations made by the state legislature could not be characterized as violating the "adequate and reasonable" provision of Amendment 328 to the Constitution of Alabama.

The Investment in Justice Act of 1999¹⁰² increased the rates payable to appointed counsel in the following manner: From the date of enactment until October 1, 2000, the rate payable to appointed counsel was \$30.00 per hour for out-of-court time and \$50.00 per hour for in-court time.¹⁰³ Beginning on October 1, 2000, the rate increased to \$40.00 per hour for out-of-court time and \$60.00 per hour for in-court time.¹⁰⁴

Comparing the rates payable to appointed counsel in 1971 to the rates payable today, it is clear that the present reimbursement rate is lower than the rate payable in 1971, if those figures were adjusted for inflation. An equivalent amount of \$10.00 in 1971 would be \$41.71 in 1999 dollars (after the October 1, 2000 increase, appointed counsel are only entitled to \$40.00 per hour for out-of-court time¹⁰⁵).¹⁰⁶ Similarly, an equivalent amount of \$20.00 in 1971 would be \$83.42 in 1999 dollars (after the October 1, 2000 increase, appointed counsel are only entitled to \$60.00 per hour for in-court time¹⁰⁷).¹⁰⁸ Despite the recent increases in the rates payable to appointed counsel, the rates do not keep pace with inflation as calculated from 1971. There has been a blatant failure on the part of the Alabama Legislature to maintain the rates payable to appointed counsel at, much less above, the inflation rate for the past thirty years. Although the Alabama Supreme Court in *Sparks v. Parker*¹⁰⁹ did not find the rates to be so low as to bring into question state constitutional concerns,¹¹⁰ this allegation may be ripe for further pleadings today.¹¹¹

Although the Investment in Justice Act of 1999 did not even bring the appointed counsel rates back in line with 1971 levels, other expenditures saw a substantial increase. From 1998 to 2000, the basis by which all state judgeship salaries are calculated experienced an almost nineteen percent increase.¹¹² The base salary of a circuit judge in the state of Alabama increased from \$84,564 in 1998 to \$100,526 in 2000.¹¹³ The com-

102. Investment in Justice Act of 1999, No. 99-427, 1999 Ala. Acts 759.

103. ALA. CODE § 15-12-21(d) (1995 & Supp. 2000).

104. *Id.*

105. ALA. CODE § 15-12-23 (1995 & Supp. 2000).

106. Figures were calculated by compounding the base dollar figure in 1971 based upon an inflation rate in accordance with the Consumer Price Index. S. Morgan Friedman, *The Inflation Calculator* (visited Mar. 15, 2000) <<http://www.westegg.com/inflation/infl.cgi>>.

107. ALA. CODE § 15-12-23 (1995 & Supp. 2000).

108. *The Inflation Calculator*, *supra* note 106.

109. 368 So. 2d 528 (Ala. 1979).

110. *See supra* text accompanying notes 29-36.

111. *See supra* text accompanying notes 87-91.

112. 1999 Ala. Acts 427 (codified in ALA. CODE § 15-12-23 (1995 & Supp. 2000)). The statute seeks to eliminate salary disparities which result from individual counties supplementing the salaries of their judges. In exchange for phasing out the supplements, the increased salary basis was implemented with each sitting judge to receive an increase of 1.25% for every year they served as a judge or justice of a state court with a maximum increase of 25% of the base salary. *Id.*

113. Salary amounts furnished by Barbara Kummel, Personnel Department, Administrative

penetration paid to appointed counsel must be re-examined in the same fashion as the problems of low and oftentimes disparate judicial compensation that were dealt with in the recent Act. The present problems must be addressed in earnest in order to alleviate the inequities for both the indigent defendant and appointed defense counsel.

C. *Mixed Systems*

The mixed indigent defense system institutes an organized and coordinated blend of the public defender and appointed counsel to meet the indigent defense needs of the jurisdiction.¹¹⁴ Substantial participation by each group of attorneys is necessary for the system to work effectively.¹¹⁵ A majority of the discussion above concerning the functionality of each individual system translates verbatim to the present discussion. The key point for consideration given a mixed system is the structural design of the system's administration. The two conventional choices are a defender-administered mixed system and an independently-administered system.¹¹⁶

An independently-administered system contemplates that both the public defender and appointed counsel components are separate and distinct entities.¹¹⁷ The public defender's office operates under the direction of a head public defender or director and the appointed counsel entity is operated by an administrator.¹¹⁸ One component would not have authority over the other, although some coordination of their efforts would lead to an efficient use of resources.¹¹⁹

Utilization of this model may provide greater flexibility to a jurisdiction within a centrally administered state public defender system, recognizing some of the special needs of a particular jurisdiction.¹²⁰ Moreover, this model may also prove useful in the event a new state public defender system is established and a particular jurisdiction, or the state as a whole, enjoys a high quality of appointed counsel representation.¹²¹

In order for a system to work most efficiently, there must be an overall governing authority, be it a single individual as with Maryland's appointed public defender,¹²² or a commission composed of a group of

Office of Courts.

114. GOLDBERG & LICHTMAN, *supra* note 60, at 71.

115. *Id.*

116. *Id.* at 72-75.

117. *Id.* at 74.

118. *Id.*

119. GOLDBERG & LICHTMAN, *supra* note 60, at 74.

120. *Id.*

121. *Id.*

122. MD. ANN. CODE art. 27A, § 3 (1997 & Supp. 2000).

individuals, as is embodied in Mississippi's Public Defender Commission.¹²³ With an overall governing authority, the system could be characterized as a defender-administered system. An indigent defense system administered wholly by the public defender or a public defender commission is designed to offer centralization in structure and design.¹²⁴ The defender/director's responsibilities include managing the public defender offices, developing operational policies, and staffing the various defender offices.¹²⁵ The defender/director is also the administrator of the assigned counsel component of the mixed system.¹²⁶ The defender-administered mixed system offers the benefits of uniformity, efficiency and accountability at the expense of a small level of local flexibility.¹²⁷

Maryland's Office of the Public Defender¹²⁸ is an excellent example of a defender-administered mixed system. The appointed public defender administers the various district defender offices.¹²⁹ The district defenders in-turn assign private attorneys, as needed, from a panel of attorneys selected according to standards of ability and experience set by the OPD.¹³⁰ Only when there is a conflict of interest is a Maryland state court's authority to appoint counsel fully recognized.¹³¹

The empirical discussion involved in the above two parts lays a solid framework on which to build a more balanced discussion of this topic. It is clear that although a public defender system is more expensive, the amount and quality of services provided to the indigent defendant is invaluable to the protection of the indigent's civil liberties. The following section will gauge whether the added expense of a public defender is warranted given the treatment of the indigent defendant under Alabama's present system.

III. STATISTICAL ANALYSIS

The hypothesis that Alabama's present appointed counsel system is grossly inadequate to service the indigent defense needs of this state must counterbalance many competing causes. Basic summation and averaging of the available data was utilized to create a tangible observation of the effect a public defender's office has on the criminal justice system. Although no analysis will be able to perfectly predict future occurrences or explain past happenings, a careful selection and classification

123. MISS. CODE ANN. § 25-32-37 (2000).

124. GOLDBERG & LICHTMAN, *supra* note 60, at 72.

125. *Id.*

126. *Id.*

127. *Id.*

128. See *supra* text accompanying notes 56-71.

129. MD. ANN. CODE art. 27A, § 6(a) (1997 & Supp. 2000).

130. *Id.*

131. MD. ANN. CODE art. 27A, § 6(f) (1997 & Supp. 2000).

of the data will demonstrate the general trends in the litigation and disposition of criminal cases in Alabama.

The variables for these analyses were acquired from the Alabama Administrative Office of Courts. The data reflects all individuals charged with a felony¹³² in the State of Alabama. Unless otherwise indicated, the following figures and analysis refer to data collected and analyzed for the purposes of this Comment.

In an effort to modernize the court recording system in Alabama, the Administrative Office of Courts has undertaken measures to revamp the information systems utilized by each judicial circuit. While this effort has accomplished much, some changes are still needed. As will be uncovered below, there is a disturbingly large number of "no data" observations throughout the various years for different variables. The ongoing effort to bring Alabama's Unified Judicial System into the twenty-first century must be stepped up if future policy makers are to be given the resources to identify and address problems with the criminal justice system.

The variables chosen were taken from among all information entered by the circuit clerk offices at the forty judicial circuits. Of those figures available, determinations were made to group different variables together and limit the relevant observation pool in an attempt to accurately represent the past and present treatment of Alabama's indigent defendants as compared with other non-indigent criminal defendants.¹³³ All sixty-seven counties in the State of Alabama are accounted for with an additional seven classifications representing those judicial circuits which have two divisions.¹³⁴ Each county has been assigned a numeric value according to the state-assigned numerical value. Special attention will be focused on Tuscaloosa County, as it is the only county in the state with an established public defender's office.

A. Defense Counsel Status

As the statistics demonstrate, the defense of indigents is big business. Of all criminal defendants in the State of Alabama, over half are counseled by the indigent defense system.¹³⁵ The defense counsel status

132. ALA. CODE § 13A-1-2(4) (1994) (defining a felony as a crime punishable by more than one year imprisonment).

133. Several observations were deleted from the Administrative Office of Courts' data set as being inconsequential to the analysis at hand. The observations include all Rule 32 petitions, all habeas corpus petitions, and all bond forfeiture cases.

134. Although Alabama has 67 counties, the Administrative Office of Court has data for 75 jurisdictions which include the 7 additional satellite offices that derive their jurisdiction from the original judicial circuit (e.g., Jefferson County has a Birmingham seat and a Bessemer seat).

135. The appointed counsel and public defender classifications of defense counsel, taken together, represented 52.13% of the total criminal case load for Alabama in 1998. See Figure 1.

refers to the type of attorney representing the criminal defendant. The possible variables include: retained counsel, appointed counsel, public defender, contract counsel, and pro se defendants.

Figure 1

Counsel Status	1998		1999	
	Number of Cases	Percent of Total	Number of Cases	Percent of Total
Appointed	23,370	48.25%	23,061	47.44%
Public Defender	1,878	3.88%	1,503	3.09%
Contract	19	0.04%	268	0.55%
Retained	12,467	25.74%	12,195	25.09%
Pro se	100	0.21%	42	0.09%
No data given	10,602	21.89%	11,537	23.74%
Totals	48,436	100%	48,606	100%

Appointed counsel were responsible for 48.3% of the criminal defendants in the state for 1998.¹³⁶ There are numerous reasons for this high figure; whether it be that the poor have a high propensity to commit crime or that the poor are more likely to be caught committing the crime. Whatever the conventional explanations may be, the majority of those explanations will be left to the social scientists of the state to contemplate. Policy-makers must accept this fact and move forward to initiate programs necessary to address the problems. The indigent defendant is being prejudiced by appointed counsel who may not be as well versed in the practice and procedure of criminal law. Not only that, but some portion of the appointed attorneys do not wish to serve as such. The appointed attorney's law practice may be interrupted and other clients' interests jeopardized. Although the need for appointed counsel will never disappear, the predominance of this classification of criminal defense counsel should not continue into the future.

B. Defendant's Age, Gender, and Race

This subpart will attempt to put a face on the defendants that utilize the different counsel classifications in the criminal justice system. The

136. See *supra* Figure 1.

available observations consist of those data samples which had a defense counsel status listed. Of those observations, only those with age, gender, and race indicated in the data were included in the analysis. A total of 37,098 criminal felony cases were surveyed for the year 1998. As Figure 2 sets out, over half of the defendants utilizing the services of the state's indigent defense system are black. Of note is the fact that of the entire observation pool using the indigent defense system for counsel, 50% of the total number are black males.¹³⁷ Compare this figure to the 38% of black males that seek the assistance of retained counsel.¹³⁸ A marked decrease of as much as 11% casts light on the degree of consistency with which the state's laws are enforced.

Figure 2¹³⁹

Counsel Status	Gender	Black	White	Hispanic	Indian	Other	Totals
Appointed Counsel	Male	49.3%	32.7%	0.0%	0.0%	0.3%	82.3%
	Female	8.8%	8.9%	0.0%	0.0%	0.1%	17.7%
	Totals	58.1%	41.5%	0.0%	0.0%	0.4%	100%
Public Defender	Male	47.7%	33.8%	0.0%	0.0%	0.1%	81.6%
	Female	8.3%	10.2%	0.0%	0.0%	0.0%	18.4%
	Totals	56.0%	43.9%	0.0%	0.0%	0.1%	100%
Retained Counsel	Male	38.6%	42.4%	0.0%	0.0%	0.4%	81.4%
	Female	7.3%	11.2%	0.0%	0.0%	0.1%	18.6%
	Totals	45.9%	53.6%	0.0%	0.0%	0.5%	100%

The ratio of white defendants to the total for indigent defendants is just over 40% for both the public defender and appointed counsel classifications.¹⁴⁰ What is alarming is the almost mirror image of the black and white male ratios in the appointed counsel classification as compared to the retained counsel classification. This fact reflects poorly on a criminal justice system in which all are supposed to be equal under the

137. See *infra* Figure 2.

138. See *infra* Figure 2.

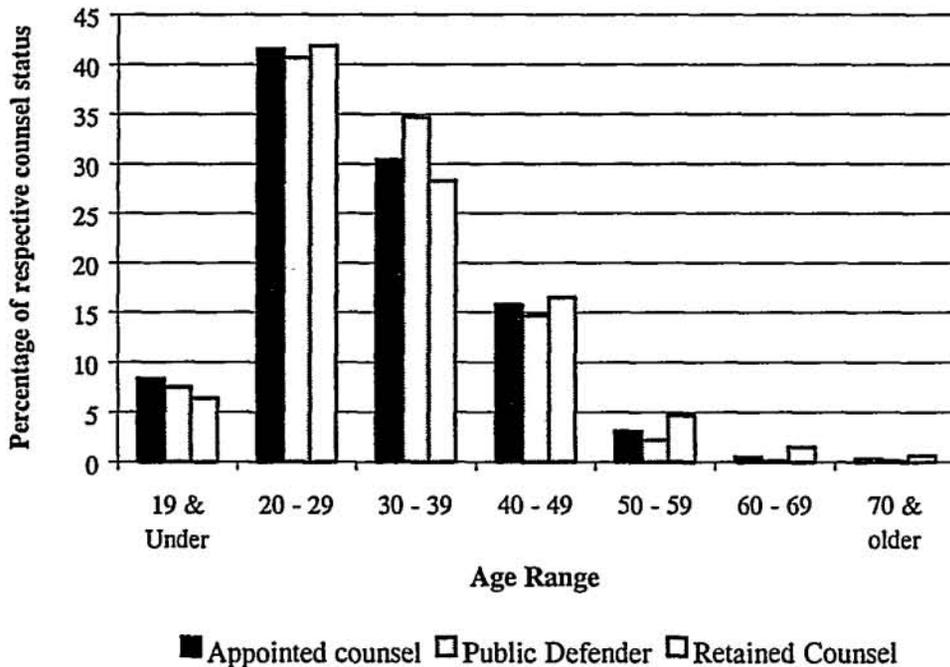
139. Information for this Figure was compiled by the author from data gathered by the Alabama Administrative Office of Courts' Database of Felonies Charged in the State Courts of Alabama.

140. See *supra* Figure 2.

law.

The average age of the Alabama criminal defendant for 1999 was 31.4 years of age.¹⁴¹ For defendants utilizing retained counsel, the average age was 32.3 years of age, whereas the average age for defendant utilizing appointed counsel and a public defender was 31.1 and 30.6 years of age, respectively.¹⁴² Not surprisingly, the age group which experienced the highest propensity for criminal misconduct was the twenty to twenty-nine year old age range.¹⁴³ Figure 3 sets out the breakdown of the felony defendants by age range and attorney classification for the year 1999.

Figure 3¹⁴⁴



C. Bond (Pretrial Release)

The bond variable allows for analysis of internal costs of processing a criminal defendant's case through the system. When a defendant is held over for trial, the state incurs basic custodial expenses such as food,

141. See *supra* Figure 2.

142. See *supra* Figure 2.

143. See *infra* Figure 3.

144. Information in this figure was compiled by the author from data gathered by the Alabama Administrative Office of Courts' Database of Felonies Charged in the State Courts of Alabama.

boarding and increased guard and facility needs.¹⁴⁵ Where an experienced public defender or private defense counsel may be able to arrange an acceptable pretrial release agreement with the prosecutor and the court, this task may elude inexperienced appointed counsel.

The figures available only allow for analysis of whether bond was posted or not. No allowance is made for other pretrial release mechanisms other than the posting of a bond. Given the prolific use of bond guarantees as a means of ensuring appearance of the defendant, this author does not believe that other pretrial release mechanisms have a marked effect on the results obtained in this section.

Defendants represented by a public defender have an increased propensity to post bond than do those defendants represented by appointed counsel. In Alabama for the year 1998, the public defender and defendant were successful 56.8% of the time in attempting to post bond, whereas appointed counsel were only successful posting bond 49.2% of the time.¹⁴⁶ Retained counsel enjoyed a much greater success with respect to posting bond. Retained counsel and their clients were successful 74.1% of the time when attempting to post bond.¹⁴⁷ Based on the generalized assumption that those defendants who are wealthy enough to hire private counsel have the ability to more readily post bond, the 74.1% figure will be taken at face value and no comparison will be made between it and the indigent defendant figures.

There are many reasons why the numbers demonstrate the proficiency of the public defender in obtaining pretrial release. The public defender may be better versed in the practice and procedure of the district court. Similarly, the public defender is more likely to have an amicable working relationship with the prosecutor who usually handles initial appearances and preliminary hearings. Whatever the reason may be, the state and the jailer reap the benefits. With less inmates to house, the county's prison expense will decrease.

D. Case Disposition

The Administrative Office of Courts provided twenty-eight case disposition categories, of which twenty-six were utilized. These twenty-six categories were collected into three classifications: favorable, unfa-

145. The cost of housing an inmate in county jail ranges anywhere from \$20-\$55 per day. Telephone Interview with Brice Paul, Director of Jail Services, Alabama Sheriff's Association (Mar. 7, 2001).

146. Of a total number of 48,436 observations, the public defender handled 1,878 cases, of which bond was posted in 1,067 of them. Appointed counsel were responsible for 23,370 cases of which bond was posted for 11,509 of those cases. The complete data for 1997, 1998, and 1999 is on file with the *Alabama Law Review* and available upon request.

147. *Id.*

avorable, and neither.¹⁴⁸ The classifications are viewed from the perspective of the defendant; for example, a favorable disposition for the defendant would be an acquittal or a dismissal of the case.

With respect to case disposition, there is no appreciable difference between a defendant being represented by a public defender versus appointed counsel. For 1998, the favorable rating for public defenders was 18.8% compared to 17.9% rating for appointed counsel.¹⁴⁹ There is a noticeable difference if the defendant is represented by retained counsel. The favorable rating for retained counsel was 25.7% in 1998.¹⁵⁰

Reasons abound for the differences between the retained ratings and those of the indigents. Much has to do with the ability of the defense counsel to build and advance a viable defense in the face of the seemingly endless resources of the prosecutor's office. As the Rule 32 petition demonstrates in the capital murder case of Jimmy Davis, Jr., indigent defenders feel as though they do not have adequate resources to mount a spirited defense.¹⁵¹ Recall the admonishment by the 1988 Spangenberg Report which stated that Alabama's indigent defense system simply does not have enough money to meet the monetary demands of the indigent defense system on a yearly basis.¹⁵² The Report went on to state that the statutorily created reimbursement rates for appointed counsel are so low that competent attorneys have been steadily driven out of the system of representing indigent defendants.¹⁵³ While the Alabama Legislature has raised the rate payable to counsel for the indigent, recall that the rates which are payable today are less than the rates which were payable in 1971 when adjustments for inflation are made.¹⁵⁴

The unfavorable ratings for appointed counsel for 1998 was 62.6%.¹⁵⁵ For public defenders, the rating was slightly lower at 57.7%.¹⁵⁶ These figures demonstrate that over half the time indigent defendants

148. Case dispositions comprising the favorable category include: acquittal, dismissal, nol pross, probation not revoked, dismissed/nol pross, probation terminated with conditions, not guilty by reason of insanity, felony case withdrawn conditions, felony case withdrawn and filed with district court, conditional forfeiture set aside, final forfeiture set aside, pretrial diversion, no probable cause, youthful offender, and petition granted. Case dispositions comprising the unfavorable category include: convicted, probation revoked, guilty plea, transferred, waived to grand jury, and petition denied. Case dispositions which were neither favorable nor unfavorable consisted of: probationer sanctioned, bound over to grand jury, docketed by mistake, time lapsed for preliminary hearing, indicted prior to district court adjudication, and the miscellaneous "other" disposition code.

149. The complete data for 1998 and 1999 was gathered by the author and is on file with the *Alabama Law Review* and available upon request.

150. *Id.*

151. *See supra* text accompanying notes 92-97.

152. Spangenberg, *supra* note 88, at 4.

153. *Id.*

154. *See supra* text accompanying notes 102-108.

155. The complete data for 1998 and 1999 was gathered by the author and is on file with the *Alabama Law Review* and available upon request.

156. *Id.*

appear before a tribunal for a decision which will affect their liberty rights, what transpires is unfavorable for the defendant. Such results can range anywhere from conviction or a guilty plea to having probation revoked.

The Tuscaloosa County Public Defender suggests that there are several reasons why the favorable and unfavorable observations for the defense of indigents are so divergent.¹⁵⁷ The first of these reasons is the practice of the Tuscaloosa County Public Defender to try to beat the prosecutor's best offer. This means that the public defender will advance strategies aimed not only at seeking acquittal of his defendant, but also at seeking to reduce the class of felony the defendant may ultimately be made to atone for. This may mean that the public defender counsels the defendant to take the case to trial rather than plea bargain with the prosecutor.

The practice of attempting to beat the best offer leads to the second point. A defendant may be convicted of a lesser included offense which would appear in the data, on its face, as an unfavorable disposition but in reality was quite favorable from the defendant's perspective. An example of this occurred recently in Tuscaloosa County. In 1997, Robert Gene Turner was indicted on the charge of murder in the first degree, a class A felony.¹⁵⁸ After receiving no favorable plea agreements from the prosecution, the public defender took the case to trial. Defendant Turner was convicted by a jury of manslaughter, a class B felony.¹⁵⁹ Despite the fact that the data provided by the Administrative Office of Courts notes the disposition of this case as a conviction, the defendant and the public defender's office viewed it as a victory.

The third explanation for the divergent figures in favorable and unfavorable dispositions is the fact that, on occasion, a defendant indicted for a felony may plead guilty to or be convicted of a misdemeanor, a result which is not captured by the present statistical analysis. An example of this phenomenon can also be taken from Tuscaloosa County. In 1999, Elijah Johnson was indicted on the charge of burglary in the first degree, a class A felony.¹⁶⁰ Be it through exemplary advocacy on the public defender's part or simply good facts, Mr. Johnson pleaded guilty to criminal trespass in the first degree, a class A misdemeanor.¹⁶¹ This astonishing plea agreement for Mr. Johnson and the public defender's office goes unnoticed by the statistical analysis on hand.

These examples do not mean that the figures are faulty. What the

157. Interview with Robert Wooldridge, Tuscaloosa County Public Defender, in Tuscaloosa, Ala. (Jan. 8, 2001).

158. *State v. Turner*, No. CC-97-432 (6th Jud. Cir., Tuscaloosa County, Mar. 28, 1997).

159. *Id.*

160. *State v. Johnson*, No. CC-99-920 (6th Jud. Cir., Tuscaloosa County, Apr. 16, 1999).

161. *Id.*

foregoing discussion demonstrates is the imprecise nature of analyzing case disposition. The variation of both the favorable and unfavorable may be as much as 5% given the commonplace occurrence of situations such as the three discussed above. Whatever the difference between favorable and unfavorable dispositions is for indigent defendants, this should not distract from the understanding that the figures for retained counsel and indigent counsel should be somewhat comparable. With the disparity in the disposition of criminal cases along the lines of the "haves" and "have-nots," there comes an undercurrent of resentment and distrust of the justice system by the "have-nots." Focus should be drawn to leveling the playing field for the indigent defendant in the State of Alabama. No one should have a better chance of being acquitted just because they can afford their own attorney.

IV. A VISION FOR CHANGE

In order for Alabama to properly serve the needs of its indigent defendants, a state-wide public defender office should be established. This new system will not, however, completely eradicate the need for appointed counsel. The compensation paid to appointed counsel should be increased to adequately reflect the special services appointed counsel render to the criminal justice system. The compensation rate should be indexed to a standard inflation measure in order to eliminate the eroding effects of inflation which are so clearly present with the current compensation rates.

Alabama's state-wide public defender's office ("Office") should be separate from the judicial branch and responsible only to a commission appointed by the governor with the advice and consent of the legislature. Possible exemplars of the commission may be drawn from either the present circuit indigent defense commissions¹⁶² (contemplated on a state level) or the Mississippi Public Defender Commission,¹⁶³ which is composed of appointed individuals from various backgrounds. The Office should have jurisdiction over all felonies and misdemeanors punishable by more than six months imprisonment. Determination of a defendant's indigent status and the criteria employed should remain within the

162. ALA. CODE § 15-12-4 (1995) (extending the circuit-based commission to the state level, the composition would be as follows: the governor or other selection body would choose two members who are attorneys licensed to practice law in the state of Alabama; one member must be a present or past member of the Alabama legislature; one member must be a mayor or member of the governing body of a city in Alabama that meets a minimum population threshold; and one member must be a non-lawyer citizen).

163. MISS. CODE ANN. § 25-32-37 (1999) (consisting of a nine-member board as appointed by different officials in the state government with appointment powers emanating from such individuals as the governor and the president of the Magnolia Bar Association).

power of the trial judge.¹⁶⁴ Juvenile charges should also be within the purview of the Office. Post-conviction remedies and initial appeals from conviction (when feasible) should be handled by the Office.

The logistical operation of the Office should resemble Maryland's Office of the Public Defender ("OPD"). The Office should be departmentalized to ensure quality representation and advocacy of the indigent's position. It would be within the discretion of the commission to establish and maintain the various departments,¹⁶⁵ taking into consideration present needs and the availability of adequate funding sources.

County and circuit interaction with the Office should be encouraged, but must not detract from the Office's institutional role as a stable, viable state entity. The Office must be a centrally administered system with participation mandated in counties with a population in excess of 100,000. Counties below this threshold may: (1) opt for inclusion into the program; (2) combine with an adjacent, nonmandated county and continue with an appointed counsel system of indigent defense; or (3) continue as a single appointed counsel county.

Funding for the system would come primarily from the state's general fund with the FTTF being wholly incorporated into the state's general revenue. Should a county opt not to be included, the county would be entitled to retain its portion of the FTTF with a per capita ratio of the projected state general fund expenditures for indigent defense being forwarded to the counties not participating. As the Maryland OPD demonstrates, this is not a small undertaking. Substantial funding would be required for initial start-up expenses as well as the ordinary, annual expenses associated with such an office. Maryland's established office cost \$40 million in 1999,¹⁶⁶ Alabama should expect to spend slightly more than that during the first years of operation.

V. CONCLUSION

It is incumbent upon the policy-makers of this state to advance a legitimate mechanism for the defense and advocacy of indigents in this state's judicial system. When a comprehensive indigent defense system is established, not only will the state's indigent defendants be properly served; the true adversarial system of American jurisprudence will gain legitimacy in the eyes of the entire population. "Laws are like spiders' webs: they catch the weak and the small, but the strong and the powerful

164. See ALA CODE § 15-12-5.

165. Maryland has four distinct departments: (1) district operations of the OPD; (2) appellate and inmate services; (3) involuntary institutionalization services; and (4) capital defense division. See *supra* text accompanying notes 56-71.

166. See *supra* text accompanying note 70.

break through them.”¹⁶⁷ This observation will no longer be true, an individual will only be judged upon the merits of the case. Justice will not be subverted by political squabbles and budget deficits. For justice rationed is no justice at all.

David Allan Felice

167. Anacharsis, Scythian Prince of 6th Century B.C. (visited Mar. 18, 2001) <<http://www.richardworth.co.nz/quotations.html>>.

