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Zachary Cloud, *The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America*, 22 B.U. PUB. INT. L.J. 403 (2013).

ALWD 7th ed.

Zachary Cloud, *The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America*, 22 B.U. Pub. Int. L.J. 403 (2013).

APA 7th ed.

Cloud, Zachary. (2013). *The problem of low crime: constitutionally inadequate criminal defense in rural america*. *Boston University Public Interest Law Journal*, 22(2), 403-438.

Chicago 17th ed.

Zachary Cloud, "The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America," *Boston University Public Interest Law Journal* 22, no. 2 (Summer 2013): 403-438

McGill Guide 9th ed.

Zachary Cloud, "The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America" (2013) 22:2 BU Pub Int LJ 403.

AGLC 4th ed.

Zachary Cloud, 'The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America' (2013) 22(2) *Boston University Public Interest Law Journal* 403

MLA 9th ed.

Cloud, Zachary. "The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America." *Boston University Public Interest Law Journal*, vol. 22, no. 2, Summer 2013, pp. 403-438. HeinOnline.

OSCOLA 4th ed.

Zachary Cloud, 'The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America' (2013) 22 BU Pub Int LJ 403
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NOTES

THE PROBLEM OF LOW CRIME: CONSTITUTIONALLY INADEQUATE CRIMINAL DEFENSE IN RURAL AMERICA

ZACHARY CLOUD

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On March 18, 2013, the right to counsel turned fifty years old. This birthday led to a flurry of articles by writers at media outlets such as the *New York Times*, the *Atlantic*, the *Guardian*, *USA Today*, and the *Washington Post*, to name a few.¹ As the titles of many such articles suggest, reporters were

¹ See, e.g., Paul Butler, Op-Ed., *Gideon’s Muted Trumpet*, N.Y. TIMES, Mar. 17, 2013, http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html?_r=0; Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, <http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=all>; Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES, Mar. 9, 2013, <http://>

interested in shedding light on the current difficulties associated with providing a right to counsel for criminal defendants unable to afford legal representation. However, the crisis in providing effective public defense is nothing new. Nearly forty years ago, members of the legal community were already discussing deficiencies in providing criminal defense to the poor.² Indeed, since the United States Supreme Court's 1963 ruling in *Gideon v. Wainwright*,³ a large body of literature has developed examining the right to counsel and its implementation across the country.⁴ States have taken varied approaches to providing for the right.⁵ However, not all systems are created equally and many are failing defendants on a level that violates the Constitution.⁶

But why are they failing? Prior scholarship places the blame on poor funding and stops there.⁷ Yet one look at rural America makes it clear that the problem is more complex. Inadequate funding is only a symptom of a more fundamental issue: lack of high crime rates. This Note advances the novel

www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?ref=opinion&_r=0; Andrew Cohen, *Eric Holder: A 'State of Crisis' for the Right to Counsel*, ATLANTIC, Mar. 15, 2013, <http://www.theatlantic.com/national/archive/2013/03/eric-holder-a-state-of-crisis-for-the-right-to-counsel/274074/>; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon,'* ATLANTIC, Mar. 13, 2013, http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/?single_page=true; Andrew Cohen, *In Texas, From a Chief Justice, Welcome Candor About Unequal Justice*, ATLANTIC, Mar. 10, 2013, <http://www.theatlantic.com/national/archive/2013/03/in-texas-from-a-chief-justice-welcome-candor-about-unequal-justice/273872/>; David A. Love, *Why It's One Law for the Rich in America and McJustice for the Rest*, GUARDIAN, Mar. 14, 2013, <http://www.guardian.co.uk/commentisfree/2013/mar/14/law-rich-america-mcjustice>; Rick Hampson, *You Have the Right to Counsel. Or Do You?*, USA TODAY, Mar. 12, 2013, <http://www.usatoday.com/story/news/nation/2013/03/12/you-have-the-right-to-counsel-or-do-you/1983199/>; Karen Houppert, *Indigent Clients Suffer as Public Defenders Struggle to Keep Up with Caseloads*, WASH. POST, Mar. 15, 2013, http://www.washingtonpost.com/opinions/legal-aid-for-indigent-clients-needs-help/2013/03/15/65dcbe56-8cc9-11e2-b63f-f53fb9f2fcb4_story.html.

² See, e.g., Joseph S. Lobenthal, Jr., *How Much "Justice" Can't We Afford?*, 26 STAN. L. REV. 1209, 1221 (1974).

³ 372 U.S. 335 (1963). See *infra* Part II.B for a detailed account of how the right to counsel developed.

⁴ See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968-76 (2012) (reviewing the literature and highlighting how "indigent defense in the United States remains in a state of crisis").

⁵ See JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, NAT'L RIGHT TO COUNSEL COMM. 53-64 (Norman Lefstein & Robert L. Spangenberg eds., 2009) [hereinafter "JUSTICE DENIED"].

⁶ *Id.* at 50 (noting numerous ways in which delivery of public defense is inadequate across jurisdictions).

⁷ See, e.g., KATE TAYLOR, JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 6 (2011).

theory that the geographic locations with the highest crime are more likely to provide quality public defense due to a triage effect.⁸ In support, this Note presents and examines data, which illustrates that rural areas face lower crime rates than their urban counterparts and have fewer criminal defendants requiring court-appointed counsel.⁹ The upshot is that large, urban areas require and receive more attention while rural areas are largely left behind. With a few notable exceptions,¹⁰ rural areas must overcome significant challenges in order to provide the right to counsel—at least in any meaningful way. Therefore, improving the quality of public defense in rural areas requires a focus on solutions that go beyond funding issues and address the lower incidents of crime that rural areas experience.

This Note proceeds in four parts. Part I defines key terms and describes the legal background for providing counsel to indigent defendants, giving attention not only to the federal constitutional requirements that mandate providing counsel but also to the varying manners in which states have developed the right. Part II considers the practical methods of providing indigent defense and presents examples of successful approaches to public defense delivery. With this background in place, Part III lays out this Note's theoretical framework by first presenting data to show that the amount of crime in rural areas is different from that in urban areas and then explaining why these differences drive the inadequacy of rural indigent defense. Finally, Part IV proposes solutions that can resolve the problem of inadequate indigent defense by responding to the low crime problem. Specifically, this Note suggests a more uniform distribution of public defense across urban and rural areas, which can be achieved by creating subject-matter public defender offices, expanding case venues to areas where quality public defense is available, and making use of cooperative federalism to expand the pool of available attorneys.¹¹

I. LEGAL BACKGROUND

A. *Defining Key Terms*

The first order of business is to come to some consensus about what certain frequently-used terms mean. A number of words are frequently used in examinations of the constitutional right to counsel of poor criminal defendants. The most frequent term that will come up throughout this Note is “indigent.”¹² In a

⁸ See *infra* Part III.

⁹ Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 239-40 (2010) (comparing rural and urban defense in Arizona).

¹⁰ See *infra* Part III.B for a discussion of several state agencies that prove the exception to the rule.

¹¹ See *infra* Part IV for a thorough discussion.

¹² BLACK'S LAW DICTIONARY 842 (9th ed. 2009).

general sense, the word simply refers to a person who is poor.¹³ In the legal context, the word is used to identify “[a] person who is too poor to hire a lawyer and . . . [is] eligible to receive aid from a court-appointed attorney and a waiver of court costs.”¹⁴ There is no national criterion for what income threshold must be satisfied for someone to qualify as “indigent.”¹⁵ Indeed, the criterion varies by state.¹⁶ Some states do not explicitly define who is “indigent,” whereas others provide a detailed explanation of which defendants qualify.¹⁷

Another crucial term is “public defender.” As used in this Note, the term refers to an attorney who is paid by the government to represent a criminal defendant who is too poor to pay for counsel on his or her own.¹⁸ As a natural extension of this term, “public defense” is the general practice of providing counsel to poor criminal defendants.¹⁹

B. *The Right to Counsel Under Federal Law*

1. The Constitutional Framework

Today, *Gideon* and its progeny dictate that every indigent criminal defendant is entitled to have an attorney to represent him.²⁰ This was not always true: A poor person’s right to obtain appointed counsel is relatively new in America.²¹ During the nation’s founding years, no such right existed here or in England.²² In fact, the English tradition had been to *prevent* criminal defendants from hav-

¹³ *Id.*; see, e.g., CONCISE OXFORD ENGLISH DICTIONARY 724 (Catherine Soanes & Angus Stevenson, eds., 11th rev. ed., 2009) (defining the term as “a needy person”).

¹⁴ BLACK’S LAW DICTIONARY 842 (9th ed. 2009).

¹⁵ See, e.g., 18 U.S.C. § 3006A(a) (2006) (requiring only that counsel be appointed for “any person financially unable to obtain adequate representation”). At the federal level, each judicial circuit creates a plan and can determine how a person qualifies as indigent. See *infra* Part II.B for a detailed explanation.

¹⁶ See JUSTICE DENIED, *supra* note 5, at 219 (listing the various state statutes regarding public defense).

¹⁷ Compare N.H. REV. STAT. § 604:B1 (2001) (not defining the term) with MASS. GEN. LAWS ch. 211D § 2 (2005) (empowering the Committee for Public Counsel Services to establish a definition of indigence).

¹⁸ BLACK’S LAW DICTIONARY 1349 (9th ed. 2009). See also CONCISE OXFORD ENGLISH DICTIONARY 1161 (Catherine Soanes & Angus Stevenson, eds., 11th rev. ed., 2009) (defining the word as “a lawyer employed by the state in a criminal trial to represent a defendant who is unable to afford legal assistance”).

¹⁹ Cf. BLACK’S LAW DICTIONARY 1349 (9th ed. 2009) (using the term “public defender” to describe both individual attorneys and an office of attorneys).

²⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

²¹ Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUT. L.J. 361, 361 (1991).

²² *Id.*

ing access to an attorney.²³ However, when the colonies adopted the Bill of Rights, the Sixth Amendment included a provision that was a clear break from English custom: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."²⁴

The effect of this clause as originally enacted was narrow.²⁵ It was not a sweeping commandment that required indigents to be provided with counsel whenever charged with a crime.²⁶ On the contrary, this clause only ensured a right to retain counsel²⁷ and it was intended to serve only as a direct response to the English practice of *preventing* criminal defendants from using counsel.²⁸ Given this conception of the Sixth Amendment and its limited reach,²⁹ it is unsurprising that the federal right to counsel did not develop for quite some time.³⁰

In 1932, the first development toward establishing the right to counsel occurred in *Powell v. Alabama*.³¹ In *Powell*, a group of "ignorant and illiterate"³² black boys were accused of raping two white girls.³³ At the time, rape was a capital offense in Alabama.³⁴ The boys were taken to Scottsboro, Alabama, where they were arraigned and entered pleas of not guilty.³⁵ On the day of trial, "[n]o one answered for the defendants or appeared to represent or defend them."³⁶ Observing this, an out-of-state attorney volunteered to help, and the court discussed how to deal with appointing counsel for the boys.³⁷ The defendants lost both their trial and direct appeal in the State of Alabama.³⁸ After agreeing to hear the case, the United States Supreme Court found that the defendants never received the benefit of counsel, noting that "until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants."³⁹ The Court concluded that the Fourteenth Amendment's Due

²³ *Id.*

²⁴ U.S. CONST. amend. VI.

²⁵ Feeney & Jackson, *supra* note 21, at 362.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Note, *An Historical Argument for the Right to Counsel During Police Interrogations*, 73 YALE L.J. 1000, 1031 (1964).

²⁹ See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, Justice Marshall made it clear that the Bill of Rights were not "applicable to the states." *Id.* at 247.

³⁰ See *supra* note 28, at 1031 (noting that between the years of 1791 and 1932, "state and federal courts saw practically no cases on the right to counsel").

³¹ 287 U.S. 45 (1932).

³² *Id.* at 52.

³³ *Id.* at 49.

³⁴ See *id.* at 50.

³⁵ *Id.* at 52.

³⁶ *Id.* at 53.

³⁷ *Id.* at 53-56.

³⁸ See *Weems v. State*, 141 So. 215, 220-21 (Ala. 1932).

³⁹ *Powell*, 287 U.S. at 56.

Process Clause demanded "in a capital case . . . [that] it is the duty of the court, whether requested or not, to assign counsel for [an indigent defendant] as a necessary requisite of due process of law."⁴⁰

The *Powell* Court made a noteworthy comment at the end of its opinion. In describing part of the motivation for its ruling, the Court observed:

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions. . . . A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed. . . .⁴¹

Put simply, most states had already taken steps above and beyond what *Powell* required.⁴² *Powell* only regarded capital cases, and the Court refused to decide whether the Fourteenth Amendment's Due Process Clause required the same appointment of counsel in non-capital cases.⁴³

It would be thirty-one years until the Court made such a decision.⁴⁴ In fact, the Court arguably pulled back from its holding in *Powell* in *Betts v. Brady*.⁴⁵ Just ten years after *Powell*, the Court heard a case regarding a Maryland defendant accused of robbery.⁴⁶ Though the indigent defendant requested counsel, the trial court refused to appoint an attorney, claiming that the defendant's crime did not qualify as a serious felony.⁴⁷ The Supreme Court affirmed and underscored the fact that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment."⁴⁸

In 1963 with *Gideon*, the Court set aside its holding in *Betts*.⁴⁹ The defendant, Clarence Gideon, was accused of breaking and entering a pool hall in Panama City, Florida.⁵⁰ Although he requested counsel, the trial court refused to appoint him an attorney, and the case progressed to the United States Supreme Court.⁵¹ The issue before the Court was whether the trial court's refusal

⁴⁰ *Id.* at 71.

⁴¹ *Id.* at 73.

⁴² *Id.*

⁴³ *Id.* at 71.

⁴⁴ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁵ *Betts v. Brady*, 316 U.S. 455 (1942).

⁴⁶ *Id.* at 456-57.

⁴⁷ *Id.* at 457. In fact, the local court said that its policy was to appoint counsel only in cases of "murder and rape." *Id.*

⁴⁸ *Id.* at 461-62.

⁴⁹ *Gideon*, 372 U.S. 335.

⁵⁰ JUSTICE DENIED, *supra* note 5, at 20.

⁵¹ *Gideon*, 372 U.S. at 337-38.

to appoint Gideon an attorney violated the Fourteenth Amendment's Due Process Clause.⁵² Writing for the majority, Justice Black quickly noted the similarities between *Betts* and *Gideon*, and then announced: "Upon full reconsideration we conclude that *Betts v. Brady* should be overruled."⁵³

Citing other examples of incorporation,⁵⁴ the Court held that the Sixth Amendment right to counsel fell into the category of rights that were "fundamental and essential to a fair trial."⁵⁵ Accordingly, the right to appointed counsel in a criminal trial was incorporated into the Fourteenth Amendment and is applicable to the states.⁵⁶ Like the *Powell* Court, the majority in *Gideon* ended its opinion with an observation of state practices: "Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree."⁵⁷ As the majority's remark shows, the Court indicated that it was only following a trend.⁵⁸

Nevertheless, there were more unanswered questions after *Gideon*. Four such questions were whether the constitutional right to defense counsel attaches to juveniles, whether the right to counsel attaches to those charged with misdemeanors, at what point in time does a person have a right to counsel, and whether the right extends past criminal matters. The Court provided answers to these questions in *In re Gault*,⁵⁹ *Argersinger v. Hamlin*,⁶⁰ *Rothgery v. Gillespie County*,⁶¹ and *Turner v. Rogers*,⁶² respectively. For the most part, these rulings have been pro-indigent. *In re Gault* established that the right to appointed counsel does extend to juveniles.⁶³ *Argersinger v. Hamlin* made it clear that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."⁶⁴ However, more recent precedent suggests that *Argersinger* is more narrow than it originally appeared.⁶⁵ In *Scott v. Illinois*, the Supreme Court construed the *Argersinger* holding quite narrowly and said that a right to counsel does not exist if the punishment falls short of imprison-

⁵² *Id.*

⁵³ *Id.* at 339.

⁵⁴ *Id.* at 341-43 (collecting cases that incorporated other amendments in the Bill of Rights to the Fourteenth Amendment's Due Process Clause).

⁵⁵ *Id.* at 342.

⁵⁶ *Id.*

⁵⁷ *Id.* at 345.

⁵⁸ *Id.*

⁵⁹ 387 U.S. 1 (1967).

⁶⁰ 407 U.S. 25 (1972).

⁶¹ 554 U.S. 191 (2008).

⁶² 131 S. Ct. 2507 (2011).

⁶³ *In re Gault*, 387 U.S. at 36.

⁶⁴ *Argersinger*, 407 U.S. at 37.

⁶⁵ See *Scott v. Illinois*, 440 U.S. 367 (1979).

ment.⁶⁶ Thus, when an indigent defendant is only fined, his constitutional rights have not been violated if he does not receive appointed counsel.⁶⁷

An indigent's right to counsel does have limits. First and foremost, the right to have an attorney appointed generally attaches at the moment when an indigent defendant is haled into court and informed of the charges filed against him.⁶⁸ Thus, indigent defendants who have not yet been charged with a crime do not have a Sixth Amendment right to counsel.⁶⁹ Nor does the right to counsel extend beyond the criminal context, which seems clear from the text of the Sixth Amendment.⁷⁰ However, the language of *Argersinger* and *Scott v. Illinois* raised the serious question of whether a civil contemnor facing imprisonment has a right to counsel.⁷¹ One might wonder if the right to counsel would extend beyond traditional criminal prosecutions based on the holdings⁷² that no person could be imprisoned in comport with the Due Process Clause unless he had access to appointed counsel. According to the Supreme Court, the answer is no—in *Turner v. Rogers*, an indigent father was imprisoned for failure to pay child support.⁷³ Although he attempted to demonstrate his inability to pay due to indigence, the South Carolina family court imprisoned him.⁷⁴ On appeal, the South Carolina Supreme Court affirmed and the United States Supreme Court granted certiorari.⁷⁵ The Supreme Court held that, “the Sixth Amendment does not govern civil cases. Civil contempt differs from a criminal contempt case in that it seeks only to ‘coerc[e] the defendant to do’ what a court had previously ordered him to do.”⁷⁶

⁶⁶ *Id.* at 373.

⁶⁷ *Id.*

⁶⁸ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008). It is fair criticism to point out that this oversimplifies the holding somewhat. Yet, the Court itself said, “[w]e merely reaffirm what . . . an overwhelming majority of American jurisdictions understand in practice: a criminal defendant’s appearance before a judicial officer . . . marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Id.*

⁶⁹ *But see* *Miranda v. Arizona*, 384 U.S. 436, 472-73 (1966) (requiring that indigents be apprised of their Fifth Amendment privilege against self-incrimination). Of course, *Miranda* does not compel police to provide counsel but merely prevents them from denying access to counsel. The practical effect is that indigents have a right to end interrogation—not to force the provision of counsel on the spot. *See id.* at 473.

⁷⁰ The text specifies that it applies in “all criminal prosecutions.” U.S. CONST. amend. VI.

⁷¹ *See* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott*, 440 U.S. 367.

⁷² *Argersinger*, 407 U.S. at 37; *Scott*, 440 U.S. at 373.

⁷³ *Turner v. Rogers*, 131 S. Ct. 2507, 2512-14 (2011).

⁷⁴ *Id.* at 2513.

⁷⁵ *Id.* at 2514.

⁷⁶ *Id.* at 2516. Though the key holding rejected a *per se* right to counsel, the majority in *Turner* actually did find due process requirements in the civil contempt setting and determined that Mr. Turner had been deprived of these rights. *See id.* at 2520. Because these due process requirements fall short of a right to counsel, they are not discussed any further here.

2. The Federal Statutory Framework

When the United States charges an indigent for a federal offense, the Criminal Justice Act of 1964 (the “Act”) defines the defendant’s right to counsel.⁷⁷ All defendants who are “financially unable to obtain adequate representation” may qualify for appointment of counsel if their case falls into one of the defined categories.⁷⁸ The Act does not define how an individual qualifies as indigent but instead leaves this matter to the individual court.⁷⁹ The Act *does* specify in which types of cases an indigent may be provided with counsel.⁸⁰ An indigent defendant is eligible to receive appointed counsel if he or she is charged with a felony or class A misdemeanor, is accused of violating his or her probation terms, is facing a mental health hearing, or is a juvenile.⁸¹ Magistrate and district court judges are also given the discretion to provide counsel to indigents facing minor misdemeanors and to those bringing federal habeas corpus petitions.⁸²

More noteworthy is how the Act provides for the appointment of counsel. First, appointed counsel come from a panel of attorneys who are “designated or approved by the court.”⁸³ Alternatively, counsel may be appointed from a federal public defender office or community defender organization.⁸⁴ The key distinction between the two types of defender organizations is one of independence.⁸⁵ Federal public defender offices are run by an official appointed by the applicable Circuit Court of Appeals.⁸⁶ Community defender organizations, on

⁷⁷ See 18 U.S.C. § 3006A (2006). The original legislation, Pub. L. No. 88-455, 78 Stat. 552 (1964), has undergone ten minor amendments since it was enacted.

⁷⁸ *Id.* § 3006A(a).

⁷⁹ See, e.g., 1ST CIR. R. 46.5(a) (“Every person . . . desiring counsel . . . shall address to this court a request in writing and a statement of the person’s inability to pay.”). The Fourth Circuit has authored a plan entitled “Implementation of The Criminal Justice Act.” See Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of The Criminal Justice Act, available at <http://www.ca4.uscourts.gov/pdf/CJAplan.PDF>. The Eighth Circuit has also published a plan to this effect. See Plan to Implement the Criminal Justice Act of 1964, available at <http://www.ca8.uscourts.gov/newrules/coa/cjaplan.pdf>.

⁸⁰ 18 U.S.C. § 3006A(a)(1).

⁸¹ *Id.* Moreover, this subsection provides a “catch-all” that ensures counsel whenever the indigent “is entitled to appointment of counsel under the [S]ixth [A]mendment to the Constitution.” See *id.*

⁸² *Id.* § 3006A(a)(2). With respect to habeas petitions, the Act covers petitions brought under 28 U.S.C. §§ 2241, 2254, and 2255. Astute observers may rightly point out that prisoners under federal custody seeking relief under § 2255 are not technically filing writs for habeas corpus but rather motioning for their sentences to be vacated. See 28 U.S.C. § 2255(e) (noting that an application for habeas corpus generally may not be made in lieu of the motion to vacate sentence).

⁸³ 18 U.S.C. § 3006A(b).

⁸⁴ *Id.* § 3006A(g).

⁸⁵ Compare *id.* § 3006A(g)(2)(A), with *id.* § 3006A(g)(2)(B).

⁸⁶ *Id.* § 3006A(g)(2)(A).

the other hand, are independent, non-profit entities that execute an agreement with the Judicial Conference of the United States to provide legal representation to indigents in a given judicial district.⁸⁷ In sum, an indigent person charged with a federal crime will receive counsel either through a private panel attorney or an attorney in a federal defender organization.⁸⁸

C. *The Right to Counsel Under State Law*

The body of federal law on public defense is only half of the story. The other half focuses on *state* laws regarding public defense. Although the United States Constitution is a legal baseline for an indigent criminal defendant's right to counsel, most states recognized a right to counsel prior to federal recognition.⁸⁹ In fact, this was so even in the infancy of the United States.⁹⁰ All but two of the original thirteen colonies implemented some form of the right to counsel by the time of the Constitution's drafting.⁹¹ For example, New Hampshire provided criminal defendants the right to be heard in court either by presenting the case on their own or through counsel.⁹² Vermont and Massachusetts similarly established the right to counsel in their state constitutions.⁹³ In short, the colonies' actions set the stage for how a right to counsel would be established at the federal level and for the states to adopt the Sixth Amendment.⁹⁴

Over the past two centuries, the United States has gained thirty-seven new states and, accordingly, a detailed historical account of state law development is not feasible here. Instead, this Note focuses only on the current landscape. In the first twenty years after the *Gideon* decision, indigent defense was primarily performed on a part-time basis by private attorneys who also represented paying clients.⁹⁵ Today, states have adopted three models of indigent defense.⁹⁶ The first model provides indigent defense through a public defender

⁸⁷ *Id.* § 3006A(g)(2)(B).

⁸⁸ *Id.* § 3006A(b).

⁸⁹ *See, e.g.,* *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (noting that the majority of states provided the right); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (pointing to twenty-two states that had preceded the Supreme Court in doing away with *Betts v. Brady*).

⁹⁰ *See supra* note 28, at 1030.

⁹¹ *See id.*

⁹² *Id.* at 1055.

⁹³ *Id.* at 1055-56. Additionally, New York, Pennsylvania, New Jersey, and Maryland all included the right in their constitutions shortly before the federal Constitution was drafted. *Id.* at 1056-57.

⁹⁴ *Id.* at 1031.

⁹⁵ *See JUSTICE DENIED, supra* note 5, at 51.

⁹⁶ Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 844 (2004). While the three models are distinct, it is important to note that many states apply them in tandem. *Id.*

office.⁹⁷ Typically, a public defender office looks a lot like any other law office because it employs full-time staff attorneys and a support staff, all of whom exclusively handle indigent cases.⁹⁸ New Hampshire provides a good example of a state that relies heavily on the public defender office model.⁹⁹ By statute, New Hampshire establishes a public defender office for each of its counties,¹⁰⁰ and dictates that an attorney working in the office should be appointed to represent an indigent criminal defendant except when the office is unable to take the case.¹⁰¹ When the office cannot accept a case, New Hampshire law authorizes the court to contract the case to private counsel.¹⁰² Perhaps most importantly, each public defender office is funded by the state rather than obtaining its funding at the county level.¹⁰³ This system avoids potential disparities in funding among counties.¹⁰⁴

A second method for providing public defense is the contract counsel model.¹⁰⁵ As the name suggests, the government enters into a contract with a private attorney or firm to provide representation to indigent defendants.¹⁰⁶ Consider California, which nicely illustrates how the model works.¹⁰⁷ California leaves its counties to bear the brunt of indigent defense funding, requiring them to cover ninety percent of the cost.¹⁰⁸ As a result, twenty-four counties have foregone establishing a public defender office and have relied on flat-rate contracts instead.¹⁰⁹ An attorney or firm is provided a lump sum to cover a defendant's case.¹¹⁰ As one notable instance illustrates, this system has the potential for abuse: An attorney who was awarded \$80,000 to defend a man

⁹⁷ JUSTICE DENIED, *supra* note 5, at 53.

⁹⁸ *See id.*

⁹⁹ *See* N.H. REV. STAT. § 604:B1 (2001), which establishes the legal framework for New Hampshire's public defense system.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 604:A2(II). The usual reason an office would be unable to take a case is due to a conflict of interest. *See id.* § 604:A2(I). Conflicts of interest are likely to arise when two people are charged with a crime as co-defendants because the interest of the first defendant may be diametrically opposed to the interests of the second defendant. *See* N.H. Rules of Prof'l Conduct R. 1.7 cmt. 6.

¹⁰² N.H. REV. STAT. § 604:A2-b.

¹⁰³ JUSTICE DENIED, *supra* note 5, at 54; *see also* N.H. REV. STAT. § 604:A1-b (allowing for additional appropriation of state funds when necessary).

¹⁰⁴ *See infra* pp. 414-15. *See also* Pruitt & Colgan, *supra* note 9, at 307-08.

¹⁰⁵ JUSTICE DENIED, *supra* note 5, at 53.

¹⁰⁶ *Id.*

¹⁰⁷ Lefstein, *supra* note 96, at 844.

¹⁰⁸ JUSTICE DENIED, *supra* note 5, at 54 & n.32. *See generally* CAL. GOV'T CODE §§ 15400-15404, 15420-15424 (2008) (statutory provisions establishing California's public defender system).

¹⁰⁹ Brad Branan, *Cut-Rate Lawyer Aims to Replace Public Defenders*, FRESNO BEE (Aug. 21, 2010, 10:36 PM), available at 2010 WLNR 16708749.

¹¹⁰ *Id.*

accused of multiple murders did little work on the case and kept over \$50,000.¹¹¹

In the third model, the courts appoint private attorneys off a list.¹¹² While it is similar to the contract model, it differs in that the appointed attorney is compensated on an hourly scheme rather than with a flat fee.¹¹³ No state appears to rely upon this model exclusively, but some states use it in conjunction with established public defender offices.¹¹⁴ Massachusetts is one such state.¹¹⁵ By statute, Massachusetts created the Committee for Public Counsel Services (“CPCS”),¹¹⁶ which has the authority to establish a system that provides compensation to private attorneys who represent indigent defendants.¹¹⁷ In turn, CPCS assigns the majority of cases to private attorneys.¹¹⁸ These private attorneys bill the government by the hour with the rate varying based on the type of case.¹¹⁹ In some states that employ this model, the local court handling an indigent defendant’s case is in charge of appointing counsel.¹²⁰ Consider, for example, Nebraska. Like California, Nebraska leaves its counties in charge of providing over ninety percent of the funding for indigent defense.¹²¹ The job of appointing counsel is left to the local court by statute: “If the court determines the defendant to be indigent, it shall formally appoint the public defender or, in counties not having a public defender, an attorney or attorneys licensed to practice law in this state.”¹²² Along with this authority, the court is also the entity that provides compensation and funds to the appointed counsel.¹²³

¹¹¹ *Id.*

¹¹² Lefstein, *supra* note 96, at 844.

¹¹³ *Id.*

¹¹⁴ Kansas, Kentucky, and Massachusetts are examples. See KAN. STAT. § 22-4507(c) (2011); KY. REV. STAT. § 31.071(4) (2011); MASS. GEN. LAWS ch. 211D § 5 (2005). The federal system also utilizes this system. See *supra* Part I.B.ii.

¹¹⁵ Over the past couple of years, there has been a major legislative push in Massachusetts to overhaul the public defender system. See Andrea Estes, *Call for Public Defender Overhaul*, BOS. GLOBE (Jan. 24, 2011), http://www.boston.com/news/politics/articles/2011/01/24/patrick_wants_to_end_use_of_private_attorneys_for_public_defense/. As of the time of this writing, full-time public defenders in Massachusetts still handle a small percentage of indigent criminal defendants’ cases. See, e.g., COMM. FOR. PUB. COUNSEL SERVS., <http://www.publiccounsel.net/> (last visited April 17, 2013) (noting “[m]ost representation is provided by approximately 3000 private attorneys”).

¹¹⁶ MASS. GEN. LAWS ch. 211D § 1.

¹¹⁷ *Id.* § 12.

¹¹⁸ Estes, *supra* note 115.

¹¹⁹ See *Policies and Procedures Governing Billing and Compensation*, COMM. FOR PUB. COUNSEL SERVS. (Apr. 10, 2006), http://www.publiccounsel.net/billing_information/attorney_billing/pdf/payment_structure_for_compensation_of_attorneys.pdf.

¹²⁰ See, e.g., NEB. REV. STAT. § 29-3903 (1995).

¹²¹ JUSTICE DENIED, *supra* note 5, at 54.

¹²² NEB. REV. STAT. § 29-3903.

¹²³ *Id.* § 29-3905.

These three models provide a foundation for how indigent defense is delivered in the varying states.¹²⁴ But an interconnected and important issue is how states fund indigent defense. Twenty-eight states bear full responsibility of providing funding and do not require their counties to contribute.¹²⁵ The remaining states either use a combination of state and county funding or leave it up to the counties entirely.¹²⁶ Sixteen states require their counties to provide the majority of public defense funding—two require their counties to bear the full cost of public defense.¹²⁷ At the state funding level, money is generally allocated from a state's general fund although some states have increasingly turned to special funds for support.¹²⁸ At the county level, funding sources are more varied.¹²⁹ Nevertheless, it is not uncommon that revenue sources like property taxes will play a major role,¹³⁰ which all but guarantees that there will be inequalities in funding from county to county.¹³¹ These observations about how states structure their public defense systems make it clear that understanding *Gideon*¹³² and its progeny is only an entry-level requirement to examining the quality of public defense in America.

II. PUBLIC DEFENSE IN PRACTICE

A. Metrics for Measuring the Quality of Public Defense

In order to truly understand the state of public defense in America, practical considerations are crucial. This is so because, while the federal and state law requirements for public defense provide the *foundation* for ensuring the right to counsel, they say little about the level of *quality* that public defenders should provide to clients.¹³³ Aside from the constitutional requirement under *Strickland v. Washington*¹³⁴ that appointed counsel provide competent representation, there is little law dictating how good of a job indigent defense attorneys must do.¹³⁵ *Strickland* itself only stands for the proposition that a criminal defen-

¹²⁴ JUSTICE DENIED, *supra* note 5, at 54.

¹²⁵ *Id.* at 53.

¹²⁶ *Id.* at 54.

¹²⁷ *Id.*

¹²⁸ *Id.* at 57.

¹²⁹ See, e.g., Pruitt & Colgan, *supra* note 9, at 242-43 (discussing various ways counties raise funds for indigent defense).

¹³⁰ See, e.g., *id.*

¹³¹ *Id.* at 239-40; see also JUSTICE DENIED, *supra* note 5, at 55.

¹³² *Gideon v. Wainwright*, 372 U.S. 335 (1973).

¹³³ Of all the cases discussed thus far, only *Powell* has any significant discussion about the *quality* of representation that an indigent criminal defendant deserves. See *Powell v. Alabama*, 287 U.S. 45, 57-60 (1932) (noting that although attorneys were appointed for the defendants, their time and preparation were so inadequate that the defendants lacked counsel in any meaningful way).

¹³⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³⁵ See *id.* at 687 (holding that a criminal defendant has a Sixth Amendment right to

dant's attorney must not prejudice the client's case by failing to perform at an objective standard of reasonableness.¹³⁶ In the absence of controlling law on how public defenders should ensure quality representation, the American Bar Association ("ABA") has promulgated a list of ten guiding principles (the "Ten Principles") many organizations and researchers use to measure the effectiveness of indigent representation.¹³⁷ Examining these ten principles and examples of organizations that have been following them will help provide an understanding of how public defense delivery systems are labeled "effective" or "inadequate."¹³⁸

The ABA's Ten Principles are simple and succinct. Principles one, two, three, four, and eight all address the systemic factors that bear upon providing quality representation.¹³⁹ Respectively, these principles dictate that: (1) public defense should be independent of the government; (2) the private bar should be enlisted to provide defense to indigent people when the public defender office's caseload is too high; (3) clients should be financially screened for eligibility and a defense attorney should be appointed as quickly as practical after arrest; (4) the defense attorney should be provided sufficient time and confidentiality to meet with the client; and (8) there should be parity between resources allocated to prosecutors and public defenders.¹⁴⁰ Principles five, six, seven, nine, and ten address the quality of the services provided at the individual attorney level.¹⁴¹ Also respectively, the principles dictate that: (5) the defense attorney's workload should be controlled to allow for adequate representation; (6) the defense attorney's skill, training, and experience should match the complexity of

representation that meets an objective standard of reasonableness); Lefstein, *supra* note 96, at 842 ("Neither in *Gideon* nor in any of its other right to counsel decisions has the U.S. Supreme Court discussed the way in which defense services for the indigent should be structured nor the unit of government responsible for paying lawyers.").

¹³⁶ *Strickland*, 466 U.S. at 687 (1984). *Strickland* requires a defendant to show two things in order to demonstrate that his or her counsel rendered ineffective assistance: (1) the attorney failed to perform at an objective standard of reasonableness—usually measured against the "prevailing norms of practice"—and (2) but for this inadequate representation, the outcome of the case would have been different. *See id.* at 687-94. Because of the prejudice requirement, prevailing on a *Strickland* claim of ineffective assistance is very difficult. *See JUSTICE DENIED, supra* note 5, at 41 ("[T]he decision has been criticized due to the exceedingly difficult burden of proof placed on defendants in challenging counsel's representation and because it has led appellate courts to sustain convictions in truly astonishing situations.").

¹³⁷ NAT'L LEGAL AID & DEFENDER ASSOC., HALTING ASSEMBLY LINE JUSTICE: PDS: A MODEL OF CLIENT-CENTERED REPRESENTATION 6 (2008) ("The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and used version of national standards for indigent defense.").

¹³⁸ *See id.*

¹³⁹ *ABA Ten Principles of a Public Defense Delivery System*, A.B.A. 1 (2002).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

the case; (7) the same attorney should provide representation until completion of the client's case; (9) the defense attorney should be required to attend continuing legal education; and (10) the defense attorney should be supervised and their work reviewed to ensure quality and efficiency.¹⁴²

More recently, the Brennan Center for Justice at New York University School of Law has proposed ten principles of its own: principles of community-oriented defense referred to as "COD Principles."¹⁴³ The Brennan Center asserts that the COD Principles are more ambitious than the ABA Ten Principles.¹⁴⁴ Unlike the ABA Ten Principles, they push public defense systems to move from simply managing cases toward a "holistic" approach.¹⁴⁵ A defense system can become "holistic" by providing broader legal representation than simply defending criminal prosecution, advocating for systemic reform, and becoming actively engaged in the community.¹⁴⁶ COD Principles one, two, seven, and eight are tailored to meet the first overarching goal of providing more complete representation of the client.¹⁴⁷ Respectively, the principles call for public defenders to "create a client-centered practice," "meet clients' needs," "address civil legal needs," and "pursue a multidisciplinary approach" to helping clients.¹⁴⁸ Accordingly, a community-oriented public defender office might ensure that its staff can also help clients who are in need of counseling, treatment, and assistance with civil issues such as a custody dispute or disability claim.¹⁴⁹ The remaining COD Principles simultaneously address effecting systemic change while collaborating with the community.¹⁵⁰ The goal of a community-oriented approach is broader than just resolving cases because it seeks to reduce recidivism and improve community safety.¹⁵¹

Beyond the COD Principles, there is no controlling definition of precisely what a public defender office must do to be considered "holistic" or "community-based" in its advocacy.¹⁵² Indeed, public defender organizations vary in the

¹⁴² *Id.*

¹⁴³ MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 13 (2010).

¹⁴⁴ *Id.* at 12-13.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 8-9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (noting examples of defender organizations that provide such assistance).

¹⁵⁰ *Id.*

¹⁵¹ See Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 371-72 (2004). See also Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L & SOC. CHANGE 57, 73-76 (2004) (noting ways in which holistic defense can help reduce crime).

¹⁵² That is, no agreed-upon definition in the literature.

manner and extent of holistic defense.¹⁵³ Nor do such offices demonstrate a clear preference for the COD Principles as opposed to the ABA Ten Principles.¹⁵⁴ The usefulness of the COD Principles lies in their ability to further refine an analysis of public defense quality. Some organizations might excel in meeting COD Principles while facing difficulty implementing ABA Principles, and vice versa.¹⁵⁵ As such, utilizing both standards provides for a more detailed approach to examining the quality of public defense in urban and rural areas.

B. *Examples of Effective Public Defense Delivery*

Organizations, such as the National Legal Aid & Defender Association (“NLADA”), have highlighted public defense systems across the country, which are effectively providing counsel to indigent defendants.¹⁵⁶ The Brennan Institute and similar organizations have also noted progressive examples of defender systems taking a “holistic” or “community-based” approach.¹⁵⁷ For illustrative purposes, the Public Defender Service for the District of Columbia (“PDS”) and the Bronx Defenders provide excellent examples. The NLADA singled PDS out as being “a beacon of hope” among public defender offices that provides a “voice for the voiceless.”¹⁵⁸ Such praise is based on the organization’s independence from political interference, manageable workload, quality control systems, financial resources, and focus on holistic representation.¹⁵⁹ Bronx Defenders have also built their office around a holistic and community-based approach to advocacy.¹⁶⁰ Both of these organizations function similarly to private law firms because they employ full-time staff attorneys who work in specific divisions such as the trial, appellate, civil, and special litigation divisions.¹⁶¹ Moreover, to assist attorneys with their casework, these offices have well-staffed support divisions, such as social work and investigation divisions, that assist attorneys in their casework.¹⁶² In addition to client representation,

¹⁵³ Lee, *supra* note 151, at 387 (drawing a distinction between “traditional defender offices” that “supplement” their practice versus offices that “focus intensively on holistic representation”).

¹⁵⁴ *Id.* at 431 (noting that some criminal defense attorneys do not find a holistic model “appealing” and prefer “the traditional mode of doing things”).

¹⁵⁵ For example, a defender organization might have a strong, client-centered practice but lack the independence from local government that the ABA Principles recommend.

¹⁵⁶ See, e.g., NAT’L LEGAL AID & DEFENDER ASSOC., *supra* note 137, at 2.

¹⁵⁷ TAYLOR, *supra* note 7, at 29.

¹⁵⁸ NAT’L LEGAL AID & DEFENDER ASSOC., *supra* note 137, at 2.

¹⁵⁹ *Id.*

¹⁶⁰ TAYLOR, *supra* note 7, at 32.

¹⁶¹ See, e.g., *Mission and History*, PUB. DEFENDER SERV. FOR D.C., <http://www.pdsdc.org/PDS/MissionAndHistory.aspx> (last visited Feb. 20, 2012); *Our Staff*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-staff> (last visited Feb. 20, 2012).

¹⁶² See, e.g., *Who We Are*, PUB. DEFENDER SERV. FOR D.C., <http://www.pdsdc.org/PDS/>

both organizations regularly perform community outreach and actively advocate for policy reform.¹⁶³

These two organizations are good examples of quality public defenders offices but they are far from the only organizations providing quality representation to clients.¹⁶⁴ The Brennan Institute, for example, lists fifty private and public organizations that provide holistic indigent criminal defense.¹⁶⁵ Public defender organizations in twenty-three states and the District of Columbia are listed as part of the “Community Oriented Defender Network.”¹⁶⁶ Among this list, several organizations are worth highlighting. In particular, the Colorado State Public Defender, the Kentucky Department of Public Advocacy, the Rhode Island Office of the Public Defender, and the New Hampshire Public Defender are all state-wide organizations that have taken concrete steps to ensure quality public defense across all of the state rather than only in urban areas. For example, Colorado requires that new hires are willing to be placed in any of the state’s twenty-one offices.¹⁶⁷ In Kentucky, the Department of Public Advocacy manages public defense delivery throughout the state and has established regional offices that are all under the umbrella of the agency.¹⁶⁸ By doing this, the agency is able to manage and distribute resources as needed across the state.¹⁶⁹ Rhode Island and New Hampshire both have a similar organizational structure allowing them to manage and allocate resources proportionate to need.¹⁷⁰

The examples given thus far have been of organizations that provide public defense to indigent defendants charged in state courts. Focusing on state rather than federal court systems generally makes sense because the majority of criminal prosecutions occur in state courts.¹⁷¹ However, a brief look at indigent

MissionAndHistory.aspx (last visited Feb. 20, 2012); *Our Staff*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-staff> (last visited Feb. 20, 2012).

¹⁶³ TAYLOR, *supra* note 7, at 29-30, 32.

¹⁶⁴ CLARK & SAVNER, *supra* note 143, at 60-61.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* Specifically, the network includes organizations in Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Louisiana, Rhode Island, Tennessee, Texas, Virginia, and Washington. *See id.*

¹⁶⁷ *See* COLO. STATE PUB. DEFENDER, http://pdweb.coloradodefenders.us/index.php?option=com_content&view=section&layout=blog&id=38&Itemid=61 (last visited Jan. 8, 2013).

¹⁶⁸ KY. DEP’T PUB. ADVOCACY, <http://dpa.ky.gov/div/trial.htm> (last visited Jan. 8, 2013).

¹⁶⁹ *See* FISCAL YEAR 2012 ANNUAL LITIGATION REPORT, KY. DEP’T PUB. ADVOCACY 1-3 (2012), available at <http://dpa.ky.gov/NR/rdonlyres/A4E59688-A807-4914-BAC3-3FB616475BD6/0/2012AnnualReportDraftFINAL090612REDUCED.pdf>.

¹⁷⁰ *See* N.H. PUB. DEFENDER, <http://www.nhpd.org/about-us/> (last visited Jan. 8, 2013); R.I. PUB. DEFENDER, <http://www.ripd.org/aboutus/locations.htm> (last visited Jan. 8, 2013).

¹⁷¹ In the 2008-2009 year, U.S. Attorneys disposed of cases against 95,891 defendants. *See* Federal Justice Statistics 2009 – Statistical Tables, U.S. Dep’t of Justice 8 tbl.2.1 (2011).

defense in federal courts is also useful despite the fact that discussions of federal public defender performance are fairly scant in the academic literature on public defense quality.¹⁷² The research that *has* been done tends to suggest that federal public defender offices perform fairly well.¹⁷³ Anecdotally, such a conclusion is supported because some of the most widely-respected criminal defense attorneys work as federal public defenders.¹⁷⁴ Furthermore, organizations such as the Federal Defenders of San Diego and the Community Defenders for the Eastern District of Pennsylvania have achieved national recognition for their quality defense of clients in federal court.¹⁷⁵ These offices, along with their state counterparts highlighted above, are representative of how public defense *should* be done.

C. *Where Public Defense Is Failing*

Offices like PDS, Bronx Defenders, and the Federal Defenders of San Diego may illustrate how public defense *should* look but they do not represent how public defense often *does* look. Regrettably, public defender offices that can provide quality representation to their clients are still the exceptions to the rule.¹⁷⁶ Funding remains one of the leading obstacles to providing quality indigent representation.¹⁷⁷ Other factors such as incompetent counsel, late appointment of counsel resulting in inadequate trial preparation, disparity between prosecutor and public defender budgets, and excessive caseloads have also

In comparison, prosecutors in state courts for 2007 disposed of nearly three million cases against defendants. PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES, U.S. DEP'T OF JUSTICE 1 (2011). Given the close temporal proximity of these two studies to each other, it seems unlikely differences between federal and state prosecutions are a result of the time difference.

¹⁷² *But see* Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007).

¹⁷³ *Id.*

¹⁷⁴ *See* Michael Mello, *United States v. Kaczynski: Representing the Unabomber*, in LEGAL ETHICS STORIES 143 (Deborah L. Rhode & David J. Luban eds., 2006) (acknowledging the federal defenders appointed to represent Ted Kaczynski as “two of the best in the business”). One of those two—Judy Clarke—has represented numerous high-profile defendants and is currently counsel of record for Jared Loughner, who is charged with the Arizona “shooting spree” that wounded Congressional Representative Gabrielle Giffords and thirteen others. *See* Paul H. Jepsen, *The Law and, Notably, Juror Attitudes Will Make Insanity Defense Difficult for Loughner*, NAT'L L.J., Apr. 4, 2011, available at <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202488696993>; *United States v. Loughner*, No. 4:11-CR-00187 (D. Ariz. 2012).

¹⁷⁵ *See* FED. DEFENDERS OF SAN DIEGO, http://www.fdsdi.com/our_history.html (last visited Feb. 20, 2012); FED. CMTY. DEFENDER OFFICE FOR E. DIST. OF PA., <http://pae.fd.org/default.htm> (last visited Feb. 20, 2012).

¹⁷⁶ JUSTICE DENIED, *supra* note 5, at 50 (calling the problem “decades old”).

¹⁷⁷ *See generally* TAYLOR, *supra* note 7, at 6; JUSTICE DENIED, *supra* note 5, at 50; CLARK & SAVNER, *supra* note 143, at 11.

been identified as barriers to providing clients with effective representation.¹⁷⁸

Yet identifying these factors only tells part of the story. There is a significant difference between the quality of public defense in urban areas as opposed to that available in rural areas, and this geospatial distinction is an under-examined aspect of the right to counsel.¹⁷⁹ Rural areas do not tend to have a dedicated public defender office but rather tend to contract cases to private attorneys.¹⁸⁰ Also—and perhaps consequently—rural public defenders often have significant difficulties even defending one serious case.¹⁸¹ For example, a capital murder case can be so resource-intensive that an under-resourced county simply cannot afford to fund the defense.¹⁸²

Identifying some examples will be useful in illustrating the issue and two states are worth considering. In the rural areas of New York State, town and village courts frequently handle approximately 300,000 criminal matters annually.¹⁸³ About seventy-five percent of the judges presiding over these courts are not lawyers and do not have legal training.¹⁸⁴ An investigation performed by a special commission, which New York formed to study the future of its public defense system, illustrated that many of these judges are unaware of their constitutional obligations to provide indigent criminal defendants with counsel.¹⁸⁵ Moreover, local public defender offices face understaffing problems that prevent attorneys from attending all first appearances sessions and counsel that *are* appointed may not even have experience or training handling criminal cases.¹⁸⁶ Therefore, there is often a complete absence of an adequately trained attorney to correct mistakes that town and village court judges are making with regard to the appointment of counsel.¹⁸⁷

New York is not alone in its failure to provide constitutionally adequate indi-

¹⁷⁸ JUSTICE DENIED, *supra* note 5, at 50-51.

¹⁷⁹ *Id.* at 50; Pruitt & Colgan, *supra* note 9, at 223 (“Courts have rarely considered place-to-place variability in access to indigent defense services, and they have not analyzed indigent defense systems through the critical lens of spatial inequality or, in particular, in relation to the rural-urban axis.”).

¹⁸⁰ Pruitt & Colgan, *supra* note 9, at 242.

¹⁸¹ *Id.* at 221-22 (noting that one murder case created a “great financial strain” on Apache County). As the authors note later, a defense attorney assigned to a capital case in Maricopa County bills the government at \$125 per hour. *See id.* at 298-99. Of course, this does not cover the numerous other expenses such as investigation, mitigation, and expert fees that all mount very quickly in capital cases.

¹⁸² *Id.* at 239-40.

¹⁸³ JUSTICE DENIED, *supra* note 5, at 90.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

gent defense.¹⁸⁸ Though other states have been noted, Arizona provides an especially clear illustration of failures to provide adequate public defense in rural areas.¹⁸⁹ For example, Apache County is a rural county that contracts with private attorneys to provide public defense.¹⁹⁰ The county spends very little money on indigent defense compared to more urban counties in Arizona.¹⁹¹ Specifically, Apache County spent less than one percent of what Maricopa County, where Phoenix is located, spent despite the fact that Apache County's population is nearly twenty percent of that of Maricopa County.¹⁹² Appointed counsel must engage in significant travel in order to be present in different courthouse locations and the use of rotational assignments creates a high risk that defendants will be assigned attorneys who lack experience or competence handling a particular type of case.¹⁹³ These rural Arizona counties often have to borrow attorneys from each other to provide for appointment of counsel and even then, none of them have attorneys who specialize in criminal law.¹⁹⁴ Compounding these problems are the disparities in funding for prosecution and public defense.¹⁹⁵ In Apache County, the prosecution has a budget almost five times of that allocated for public defense.¹⁹⁶

To better understand the significance of a funding disparity between the prosecutor and public defender, follow this simple hypothetical: The local district attorney receives \$100,000 to prosecute one hundred defendants. Seventy-five of those defendants require the services of the local public defender. Thus, if there were a 1:1 parity in funding, then the public defender should receive \$75,000 to represent those defendants. It follows that if the prosecutor gets five times what the public defender does—as in Apache County—then the public defender only receives \$15,000.¹⁹⁷ This concretely shows how counties like Apache allocate more money to help prosecute a defendant than provide him or her with appointed counsel.¹⁹⁸

One might think that solving funding problems would ameliorate or even eliminate the disparity between rural and urban public defense quality, but the facts suggest otherwise.¹⁹⁹ Consider Arizona again, where the state allocates

¹⁸⁸ For instance, attorneys in rural Maine often are required to drive over eight hours just to complete continuing legal education. *See id.* at 93.

¹⁸⁹ Pruitt & Colgan, *supra* note 9, at 291.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 273 tbl.11.

¹⁹² *Id.* at 273 tbl.11, 256 tbl.1.

¹⁹³ *Id.* at 291.

¹⁹⁴ *Id.* at 292.

¹⁹⁵ *Id.* at 302.

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* at 302-03 (noting that neighboring counties also provide two to three times more *per capita* funding to prosecutors than public defenders).

¹⁹⁹ *Id.* at 248-49.

funding to counties for public defense based upon a metric utilizing felony case rates in the county.²⁰⁰ As a result, the more metropolitan counties in Arizona receive more funding due to their higher number of felony cases.²⁰¹ The upshot is that metropolitan areas of Arizona benefit from the increased number of criminal cases being prosecuted in their jurisdiction.²⁰² The higher crime of urban areas like Phoenix has actually benefited criminal defendants there because it has necessitated a public defense system capable of handling the volume of defendants that need appointed counsel.²⁰³

III. THE ROLE OF LOW CRIME IN PUBLIC DEFENSE

Maricopa County is far from the only urban area that benefits from this high-crime effect.²⁰⁴ To the contrary, a trait that effective public defender agencies, such as Bronx Defenders and PDS, share is that they operate in high-crime jurisdictions.²⁰⁵ New York City alone had approximately 48,489 incidents of violent crime in 2010.²⁰⁶ Adding in nonviolent offenses, the number jumps to 188,104.²⁰⁷ Similarly, Washington, D.C. reported 7,468 violent crime incidents and 27,138 nonviolent crime incidents, for a total of 34,606.²⁰⁸ In comparison, the much less populated area of Poughkeepsie in upstate New York had only 398 instances of violent crime and 1,055 instances of nonviolent crime.²⁰⁹ This illustrates a basic but intuitive concept: Less populated areas typically have lower incidents of crime.²¹⁰ A careful analysis of crime rates in rural and urban areas is important for understanding the quality of public defense.

A. *The Meaning of “Rural” and “Urban”*

As an initial matter, it is important to define the terms “rural” and “urban.” The term “rural” has both lay and technical meanings, both of which are important to understand.²¹¹ Generally, “rural” is used to describe a remote area, usu-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See *infra* Part III.D for a general explanation of this effect.

²⁰⁴ See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS tbl.6 (2010) [hereinafter UCR DATASET], available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u-s/2010/crime-in-the-u.s.-2010/tables/table-6>.

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Pruitt & Colgan, *supra* note 9, at 248-49. This does not suggest that rural areas have less *per capita* crime than urban areas; in some instances *per capita* crime rates in rural areas may well be similar to urban areas. See *id.* Yet, as will be explained, *per capita* crime is not necessarily a useful measure for examining the effectiveness of public defense systems.

²¹¹ Compare CONCISE OXFORD ENGLISH DICTIONARY 1260 (Catherine Soanes & Angus

ally in the countryside instead of near a town.²¹² In population studies, three different definitions of this term are widely accepted.²¹³ The United States Census Bureau promulgated the first definition, which defines rural as “all territory, population and housing units located outside of urbanized areas and urban clusters with a population of 2,500 or less.”²¹⁴ The second definition comes from the Office of Management and Budget (“OMB”), which draws a distinction between metropolitan and non-metropolitan counties.²¹⁵ A county is only considered metropolitan if its population is over 100,000 *and* if there is an urbanized area inside of the county (i.e., a city) that has a population of 50,000 or more.²¹⁶ It follows that the OMB definition also recognizes some counties may be neither rural nor metropolitan.²¹⁷ Finally, the United States Department of Agriculture (“USDA”) created a “Rural Definition data product” that incorporates “nine representative rural definitions” accounting for socioeconomic factors as well as population density.²¹⁸ There is no definition of the term that is clearly superior to the others. That said, the OMB and USDA methods have the benefit of excluding suburban towns that, while small, may be near larger metropolitan areas.²¹⁹

These three methods of defining rural areas generally encapsulate what counts as urban as well. However, the Census Bureau breaks “urban” into two separate categories: “urbanized areas” and urban places outside of urbanized areas.²²⁰ Urbanized areas are those with a population of 50,000 or more whereas urban places are any areas that are incorporated and have 2,500 residents or higher.²²¹ The definitions of rural and urban, taken together, are necessary to understand how crime is measured.

B. *The Meaning of “Crime”*

Before examining methodology used to *measure* crime, it is important to

Stevenson, eds., 11th rev. ed., 2009), with U.S. CENSUS BUREAU, THE URBAN RURAL CLASSIFICATION (2010), available at www.census.gov/geo/www/GARM/Ch12GARM.pdf.

²¹² CONCISE OXFORD ENGLISH DICTIONARY, *supra* note 211, at 1260 (defining “rural” as “relating to, or characteristic of the countryside rather than the town”).

²¹³ Steven M. Virgil, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 9, 12 (2010).

²¹⁴ U.S. CENSUS BUREAU, *supra* note 211.

²¹⁵ Virgil, *supra* note 213, at 13.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*; see also *Measuring Rurality: What Is Rural?*, USDA ECON. RESEARCH SERV. (2010), available at <http://webarchives.cdlib.org/sw15d8pg7m/http://ers.usda.gov/Briefing/Rurality/WhatIsRural/>.

²¹⁹ Virgil, *supra* note 213, at 13, 14.

²²⁰ U.S. CENSUS BUREAU, *supra* note 211.

²²¹ *Id.*

define what *constitutes* crime. Definitions of this term can range from the philosophical to the practical.²²² In lay usage, “crime” is defined as conduct that law prohibits and that may be punished.²²³ *Black’s Law Dictionary* similarly defines “crime” as “[a]n act that the law makes punishable.”²²⁴ This makes a more granular classification of what counts as crime difficult because the definition depends upon law, which changes by jurisdiction. Yet, the Federal Bureau of Investigation (“FBI”) has attempted to overcome this problem in their Unified Crime Reports datasets.²²⁵ The FBI collects data from local police agencies across the United States and uses two overarching categories for classifying crime: violent and nonviolent.²²⁶ Violent crimes encompass criminal homicide, forcible rape, robbery, and aggravated assault.²²⁷ Nonviolent crimes are comprised of burglary, theft, motor-vehicle theft, and arson.²²⁸ In other words, the differences between the categories are crimes against a person compared to crimes against property.²²⁹ There are some crimes not included in the FBI’s statistics, such as kidnapping, fraud, soliciting, white-collar crimes, and so forth.²³⁰ According to the FBI, the reason for leaving such types of criminal offenses out of the data collection is that they occur infrequently and/or are infrequently reported, which makes them hard to quantify with statistical accuracy.²³¹

An alternative to the FBI’s UCR data is the National Crime Victimization Surveys (“NCVS”).²³² The NCVS gathers data on crime by surveying households about their experiences as victims of crime.²³³ This victim-based approach has an important implication: Victims may report crimes to the NCVS

²²² See Antony Duff, *Theories of Criminal Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 14, 2008), <http://plato.stanford.edu/entries/criminal-law/#CriPubWro> (discussing both the philosophical and practical aspects of crime).

²²³ CONCISE OXFORD ENGLISH DICTIONARY, *supra* note 211, at 338 (crime is defined as “an action which constitutes a serious offence against an individual or the state and is punishable by law”).

²²⁴ BLACK’S LAW DICTIONARY 427 (9th ed. 2009).

²²⁵ UCR DATASET, *supra* note 204.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ UCR General FAQs, FED. BUREAU OF INVESTIGATION (Apr. 2009), http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs.

²³² Larry J. Cohen & Mark L. Lichbach, *Alternative Measures of Crime: A Statistical Evaluation*, 23 SOC. Q. 253, 253 (1982). These surveys used to be labeled as the National Crime Survey but have since been restyled. See *Nat’l Crime Victimization Survey Res. Guide*, NAT’L ARCHIVE OF CRIMINAL JUSTICE DATA (2012) [hereinafter NCVS GUIDE], <http://www.icpsr.umich.edu/icpsrweb/NACJD/NCVS/>.

²³³ NCVS GUIDE, *supra* note 232.

that are never formally reported to police.²³⁴ It follows that the inverse is true, and that there are crimes that police collect data on but that lack a victim to report the offense. As an example, the police could arrest someone for narcotics possession, the case could go to trial, a public defender might be assigned to the defendant, and yet the NCVS will never detect this instance of crime.²³⁵ Though some social scientists have attempted to statistically compare crime under the UCR and NCVS, such research does not tend to offer definitive answers to how the two relate.²³⁶ Of the two methods, the UCR data is more useful for the purposes of this Note because it can provide a better look at the number of criminal incidents that formally enter the legal system.²³⁷ Since the UCR data presents the best available option for empirically examining crime rates across the country, this Note will rely upon the FBI's terminology and classification unless otherwise indicated.

C. *Public Defense Performance in Rural and Urban Areas*

Intuitively, it seems that more populated areas would have greater problems than their rural counterparts in providing constitutionally adequate public defense because of higher incidents of crime. However, Caddo Parish, Louisiana serves as an example of how lower crime rates do not translate to better public defense.²³⁸ Shreveport, a smaller, isolated city of 200,000, is located inside the parish.²³⁹ Although the city of Shreveport sees low crime both in absolute and *per capita* terms, its public defense system faces multiple hurdles to providing constitutionally adequate defense.²⁴⁰ For example, new attorneys are assigned cases without regard to their experience level, attorneys fail to make timely and consistent contact with their clients, and offices lack essential equipment such as copiers and computers.²⁴¹ All of these problems illustrate that a jurisdiction's public defense quality can be constitutionally inadequate regardless of its crime rate.

²³⁴ See *id.* (noting that the survey measures whether the respondent reports incidents to the police and, if not, why not).

²³⁵ Roger Tarling, *Statistical Applications in Criminology*, 35 J. ROYAL STAT. SOC'Y 369, 370 (1986) ("[V]ictim surveys are not without their own limitations. They cannot easily count crimes against organizations . . . nor 'victimless' crimes involving drug abuse. . ."). See also NCVS GUIDE, *supra* note 232.

²³⁶ See, e.g., Cohen & Lichbach, *supra* note 232, at 264 (finding close correspondence between the UCR and NCVS on some crimes but more variance on other crimes).

²³⁷ See UCR General FAQs, *supra* note 231.

²³⁸ UCR DATASET, *supra* note 204.

²³⁹ *Id.*

²⁴⁰ *Id.*; see also JUSTICE DENIED, *supra* note 5, at 92, 96, 97.

²⁴¹ JUSTICE DENIED, *supra* note 5, at 92, 96, 97. The absence of regular contact with clients is especially concerning because it is a fundamental aspect of professional responsibility. See LA. R. PROF. CONDUCT 1.4 (requiring attorneys to "reasonably consult" with clients).

In fact, the data tends to suggest that heavily urban areas with significant crime problems have done better than rural areas at providing constitutionally adequate and effective public defense.²⁴² As an example, Los Angeles experienced 21,484 incidents of violent crime in 2010 and 89,704 incidents of nonviolent crime.²⁴³ Despite that fact, the Brennan Center has praised the Los Angeles County public defenders office for its effective, holistic approach to indigent representation.²⁴⁴ The office has more than forty branches across the county, employs 700 attorneys, and has a support staff of 300 additional employees.²⁴⁵ New York City, as mentioned, also has high incidents of crime but nevertheless is home to multiple acclaimed public defender organizations including Bronx Defenders, Neighborhood Defenders of Harlem, and Brooklyn Defender Services.²⁴⁶ Philadelphia had 18,535 incidents of violent crime and 57,788 incidents of nonviolent crime in 2010 but the Defender Association of Philadelphia continues to achieve recognition for its high-quality work.²⁴⁷ Miami had 4,879 incidents of violent crime and 21,218 incidents of nonviolent crime in 2010 yet its public defender office has been recognized for its effectiveness and public involvement.²⁴⁸ Thus, many cities with significant crime issues are not merely managing but effectively handling the need for indigent defense.²⁴⁹

What about rural areas? The next issue is determining how many are going above and beyond the constitutional minimum and providing the same type of quality defense as the organizations listed above. At the outset, it is important to note the difficulty in answering these questions because there may be organizations providing quality defense that are not achieving recognition.²⁵⁰ This is so because the remoteness and low population of rural areas might work against the likelihood that agencies providing quality defense will be discovered and nationally recognized. That said, very few organizations located in rural areas are gaining recognition.²⁵¹ Two exceptions are the Plaquemines Parish Defender Services Program in Louisiana and the Calcasieu Parish Public Defender

²⁴² UCR DATASET, note 204.

²⁴³ *Id.*

²⁴⁴ CLARK & SAVNER, *supra* note 143, at 39.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 19, 43. *See also* BROOKLYN DEFENDER SERVS., <http://www.bds.org/aboutus.aspx> (last visited Feb 20, 2012).

²⁴⁷ UCR DATASET, *supra* note 204; DEFENDER ASS'N OF PHILA., <http://www.philadefender.org/about-us.php> (last visited Feb. 20, 2012).

²⁴⁸ UCR DATASET, *supra* note 204; CLARK & SAVNER, *supra* note 143, at 35.

²⁴⁹ *See* CLARK & SAVNER, *supra* note 143, at 35.

²⁵⁰ If there *are*, they have not received attention in industry literature or press.

²⁵¹ CLARK & SAVNER, *supra* note 143, at 60-61. Of the fifty-two organizations highlighted, only three are in areas that would qualify as rural under the U.S. Census Bureau's definition. *See id.*

Office, also in Louisiana.²⁵²

D. *The Disadvantage of Low Crime Rates for Public Defense*

It is not clear why many of the nationally recognized public defender organizations are in urban areas that have high crime rates. Nor is it clear why they are *not* in rural areas. Regrettably, there currently is no publicly available data that provides empirical answers to these questions. In the absence of such data, this Note puts forth a theoretical explanation and offers an open invitation for future works to test the theory empirically. The theory asserted here is that quality public defense is a product of necessity. It is simple logic that the higher incidences of crime in an area will lead to a larger number of criminal defendants needing appointed counsel.²⁵³ As a result, people respond where the need is greatest. A sort of “triage” occurs and jurisdictions where 5,000 or 10,000 defendants a year need appointed counsel receive attention before jurisdictions where 50 or 100 defendants a year do.²⁵⁴ In short, this Note suggests that rural areas are held back by their low absolute crime rates and, until urban areas can provide constitutionally adequate indigent defense, the rural areas will not.

One might infer from this hypothesis that public defense quality *benefits* from higher crime rates. Quite understandably, there may be resistance to this proposition. For instance, some will argue that crime rates should only be considered in *per capita* rather than in absolute terms.²⁵⁵ That is a sensible position and in the study of Arizona’s rural public defense, the researchers pointed to the observation that rural counties in Arizona have similar *per capita* crime rates to their metropolitan counterparts.²⁵⁶ Yet this fails to look at the bigger picture. As explained below, it might make more sense when studying public defense to include crime rates in absolute terms.²⁵⁷

1. Comparing Urban and Rural Crime Rates

The first important point is that there is less *absolute* violent crime in areas with lower population.²⁵⁸ Indeed, this is clear from a glance at the data.²⁵⁹ In

²⁵² *Id.*

²⁵³ This does assume that the ratio of indigent to non-indigent defendants stays constant as incidence of crime increases. If the distribution displays heteroskedasticity, then higher crime does *not* imply greater need for appointed counsel.

²⁵⁴ This Note’s “triage” theory is different from one recently proposed by Benjamin Barton and Stephanos Bibas. See Barton & Bibas, *supra* note 4. Barton & Bibas’ theory relates to triaging funding for criminal versus civil indigent defendants. See *id.* at 971-72.

²⁵⁵ Pruitt & Colgan, *supra* note 9, at 278-79.

²⁵⁶ *Id.*

²⁵⁷ See *infra* Part III.D.ii.

²⁵⁸ UCR DATASET, *supra* note 204.

²⁵⁹ See *id.*

per capita terms, a more careful look is required. *Per capita* incidents of crime are measured as a percentage where the number of criminal incidents is divided against the population total for a city. For the purposes of this Note, thirteen cities were randomly selected from the FBI's Uniform Crime Reports based on their small population size—all have populations below 30,000—and their remoteness.²⁶⁰ While not as small in population as might be desired, these cities come the closest to “rural” areas for which data is readily available. None of these cities are located near larger cities and thus cannot be considered “suburbs.”²⁶¹ Furthermore, the cities are from a range of different U.S. regions including the South, the Northeast, and the Midwest. Table 1 in the Appendix reproduces the UCR data in order to show the *absolute* and *per capita* incidents of crime for each rural city.²⁶² As the table illustrates, the average *per capita* incidence of violent crime in these thirteen cities was 0.602% and the average *per capita* incidence of nonviolent crime was 5.28%.²⁶³ Compare that with the averages of the thirteen largest cities in the UCR dataset.²⁶⁴ As Table 2 in the Appendix illustrates, the thirteen cities with the highest populations for which the FBI collects statistics averaged a 0.739% incidence of violent crime and a 3.76% incidence of nonviolent crime.²⁶⁵

This alone is not enough knowledge to make a determination about whether there are any *differences* in the crime rates between rural and urban areas. Those familiar with statistics will remember the *t*-test.²⁶⁶ Without delving into mathematics too much, a *t*-test allows one to compare the means (i.e., averages) of two sample distributions in order to see if there is a statistically significant difference between them.²⁶⁷ All one needs to perform a *t*-test is the mean for two groups of data, the standard deviation for each, and the number of individ-

²⁶⁰ The thirteen small cities are as follows: Anderson, S.C.; Oxford, Ala.; Brunswick, Ga.; Cumberland, Md.; Elizabethtown, Ky.; Glen Falls, N.Y.; Grand Haven, Mich.; Johnstown, Pa.; Lebanon, Pa.; Ocean City, N.J.; Salisbury, Md.; Sandusky, Ohio; and Steubenville, Ohio.

²⁶¹ See Virgil, *supra* note 213, at 13 (discussing the OMB population measures).

²⁶² See *infra* p. 436 Table 1.

²⁶³ See UCR DATASET, *supra* note 204.

²⁶⁴ The thirteen largest cities are New York, N.Y.; Los Angeles, Cal.; Houston, Tex.; Philadelphia, Pa.; Phoenix, Ariz.; Las Vegas, Nev.; San Antonio, Tex.; San Diego, Cal.; Dallas, Tex.; San Jose, Tex.; Honolulu, Haw.; Detroit, Mich.; and Jacksonville, Fla. All of these cities have an urban population of over 800,000 residents. See UCR DATASET, *supra* note 204.

²⁶⁵ See *infra* p. 437 Table 2; UCR DATASET, *supra* note 204.

²⁶⁶ See, e.g., William C. Guenther, *Sample Size Formulas for Normal Theory T Tests*, 35 AM. STATISTICIAN 243, 243 (1981) (discussing the test and explaining formulas). For a more basic introduction, see generally Bob Hagin, *What Practitioners Need to Know About t-Tests*, 46 FIN. ANALYSTS J. 17 (1990).

²⁶⁷ Guenther, *supra* note 266, at 244.

ual observations in each.²⁶⁸ The resulting value of “*t*” is then cross-referenced with a table to see if it is statistically significant based on the degrees of freedom.²⁶⁹ Alternatively, computerized statistical software packages will do this.²⁷⁰ A “*p*” value indicates how likely it is that differences between the two samples are a result of chance rather than a meaningful difference and researchers commonly set the bar at values of $p = 0.05$ or lower.²⁷¹ Thus, if the *t* score provides a *p* value greater than 0.05, there is more than a 5% chance that differences between two samples are random.²⁷²

Returning to the criminal incidents data, STATA²⁷³ is employed to provide information about the statistical significance between crime in rural and urban areas. The results of the *t*-tests, detailed in Tables 3 and 4 of the Appendix, illustrate that there is no statistically significant difference between the *per capita* rates of violent crime in rural and urban areas.²⁷⁴ The *t* value is -0.7833, with 24 degrees of freedom.²⁷⁵ As a result, there is a 44% chance that the difference between rural and urban violent crime incidents is only a result of chance.²⁷⁶ Similarly, there is no statistically significant difference between the *per capita* incidents of rural and urban nonviolent crime.²⁷⁷ Table 4 demonstrates that the *t* value for nonviolent crime is 1.5542, also with 24 degrees of freedom.²⁷⁸

With regard to *absolute* incidents of crime, one needs no statistical test to see the vast difference between rural and urban areas. Nevertheless, STATA confirms that the difference is statistically significant.²⁷⁹ Since the disparity is

²⁶⁸ *Id.* (listing the equation for the two-sample *t*-test).

²⁶⁹ See James R. Lackritz, *Exact p Values for f and t Tests*, 38 AM. STATISTICIAN 312, 312 (1984).

²⁷⁰ *Id.* Lackritz notes that

Investigators have come to rely on *p* values in making decisions regarding hypotheses, largely because of the availability of computer statistical packages. Without a computer, finding *p* values for standard tests with nonnormal sampling distributions . . . becomes difficult. Tables for these distributions generally present only the most commonly used values at each end of the curve

Id.

²⁷¹ Andrew F. Siegel, *Multiple t Tests: Some Practical Considerations*, 24 TESOL Q. 773, 773 (1990) (noting that a statistically significant result is “declared by statistical tradition whenever the *p* value is less than .05”). See also Lackritz, *supra* note 269, at 312.

²⁷² Siegel, *supra* note 271, at 774.

²⁷³ STATA™ is statistical analysis software. See generally STATA.COM, <http://www.stata.com/products/> (last visited Apr. 25, 2012).

²⁷⁴ See *infra* p. 438 Table 3.

²⁷⁵ *Id.*

²⁷⁶ See *id.* A small caveat is in order. The *t*-test in this Note only contemplates the difference between the thirteen rural towns and thirteen largest cities previously discussed.

²⁷⁷ See *infra* p. 438 Table 4.

²⁷⁸ *Id.*

²⁷⁹ The STATA results indicate the following: the *t* value for *absolute* violent crime in

readily observable and all the data necessary to verify the following results are in Tables 1 and 2, no separate tables for *absolute* incidents of crime are included. Indeed, the rural–urban difference in both violent and nonviolent incidents of crime is very statistically significant.²⁸⁰

2. Why Relying Only on *Per Capita* Measures Is Unwise

The data show that there is no statistical difference in *per capita* incidents of crime but there *is* in *absolute* terms. In general terms, the debate over using absolute versus *per capita* measures is not new in scholarly work.²⁸¹ Based on *per capita* measures, it might initially appear that low crime rates cannot impact the quality of public defense in rural areas. Yet that position is hard to reconcile with the fact that urban areas have observably better public defense in place.²⁸² This Note theorizes that the error with the position lies in its assumption that the crime rate is the sole and direct influence on the quality of public defense. Specifically, the concern lies with resource-recruitment. Even if the data shows that rural areas have the same relative amount of crime, such rural locations are probably far less likely to attract criminal defense attorneys as are metropolitan areas due to factors such as pay and the ability to specialize in a particular field.

The following hypothetical example may make the danger of relying only on *per capita* crime rates more concrete. Consider a young attorney who wishes to practice criminal law: Even if a rural area can match the salary potential that a metropolitan position may offer, it cannot match the amount of experience that he can gain by taking a job in the city. Rather than seeing a dozen or so violent crimes in a year in the rural position, he has the potential to see hundreds in the metropolitan position. Unsurprisingly, he and other like-minded attorneys seek jobs in urban areas. The few generalist attorneys in a rural area will likely be left to provide indigent defense. As noted earlier, the data tends to provide support to this hypothesis.²⁸³ Rural counties in Arizona frequently have to borrow attorneys from other counties because they lack enough attorneys to handle their indigent defense needs.²⁸⁴ Even the attorneys who they

rural and urban areas is -4.0734 with 24 degrees of freedom. Accordingly, there is a statistically significant difference at the $p < 0.001$ level. Finally, the difference in *absolute* incidents of nonviolent crime is also significant, with a t value of -6.4000 at 24 degrees of freedom. Thus, there is a significant difference at the $p < 0.0000$ level.

²⁸⁰ See Siegel, *supra* note 271, at 773 (noting what p values are considered statistically significant).

²⁸¹ See, e.g., Cohen & Lichbach, *supra* note 232, at 260 (highlighting several statisticians who have expressed concerns using relative, weighted measures may lead to spurious results and also highlighting those in favor of standardizing data).

²⁸² See *supra* Part III.C.

²⁸³ See *supra* Part II.C.

²⁸⁴ Pruitt & Colgan, *supra* note 9, at 292.

borrow often lack adequate training in criminal defense.²⁸⁵

All of this clarifies the causal relationship. Unless the *per capita* number of criminal defense attorneys is the same in rural areas as it is in urban places, there is little usefulness in a relative crime measure. Put another way, a *per capita* measure of crime is only meaningful if it also contemplates the ratio of criminal incidents to criminal defense attorneys. Ideally, one could examine this assertion empirically, but data on the ratio is not readily available. This is where the importance of absolute measures comes into play. It seems very unlikely that attorneys looking to practice criminal defense are carefully contemplating the *per capita* crime rates in differing locations. Rather, an attorney looking to gain criminal defense experience—and earn a living—is likely to see a city with 200 homicides a year and view it as a better place to practice than a rural area with maybe a few annual homicides, if any.²⁸⁶ After all, not only does he have a greater chance individually to handle significant cases, he also has a support network of other attorneys specializing in criminal defense. In fact, even if an attorney is aware of the *per capita* similarities, the absence of other criminal defense attorneys means that he has less chance to learn the craft well. This theory helps resolve the problem of why rural and urban areas have comparable *per capita* crime but do not have comparable public defense. Future work should seek to empirically test it.

Setting aside the distinction between *absolute* and *per capita*, some may find fault with another aspect of this Note's theory and suggest the true impediment to quality public defense lies in inadequate funding in rural areas. Such an argument is unpersuasive because almost no area, rural or urban, receives adequate funding.²⁸⁷ In fact, the organizations that have been highlighted as providing effective public defense have all sought outside funding beyond what their state or local government provides.²⁸⁸ Inadequate funding is at best a symptom of a system that perceives little urgent need to provide public defense. It is not the core impediment to improving rural public defense.

IV. POTENTIAL SOLUTIONS

Now that the negative impact of low crime has been highlighted, a hard question arises. How can rural public defense be improved? The start of any meaningful change needs to occur at the legal level; the statutory frameworks for how states provide indigent defense need to be re-tooled so that public

²⁸⁵ *Id.*

²⁸⁶ As an example, the small town of Glens Falls, N.Y., had zero homicides in 2010 whereas New York City had 536. See UCR DATASET, *supra* note 204. Similarly, Johnstown, Pa. had only three homicides compared to Philadelphia's 306. See *id.* Both of these examples are used because all of these locations are used in this Note's analysis.

²⁸⁷ JUSTICE DENIED, *supra* note 5, at 55 (recognizing that even urban areas are often "crippled" due to underfunding); TAYLOR, *supra* note 7, at 6 (same).

²⁸⁸ CLARK & SAVNER, *supra* note 143, at 14.

defense delivery is uniform across the state. As highlighted earlier, states like Colorado and New Hampshire provide an example framework.²⁸⁹ In particular, Colorado's requirement that new attorneys be willing to work anywhere in the state ensures that public defense quality can be uniform.²⁹⁰ Because new hires are centrally trained and receive the same salary regardless of placement, the state agency has ensured that there are not significant disparities in urban and rural public defense.²⁹¹ The statutory scheme that a state might implement to achieve similar results can be flexible so long as it ensures that some areas of the state are not treated or affected disparately. The effect of this requirement is to ensure that rural areas start off on a level playing field in terms of their resources. Without provisions to ensure this, states will probably see results such as the counties in California with flat-rate contracts disincentivizing zealous defense.²⁹²

Uniformity is a key ingredient but there are some other mechanisms that might be useful to codify. These mechanisms are aimed at satisfying the ABA Ten Principles. First, the statute should ensure that public defender offices are independent of the local court systems and local politics.²⁹³ This would ensure that local offices can zealously represent indigent defendants without fear that it will compromise their ability to receive adequate funding or otherwise perform their duties.²⁹⁴ Secondly, an auditing or review board should be established at the state level that oversees public defense quality at the local level.²⁹⁵ This step would ensure independence of public defenders offices while providing a system of accountability.²⁹⁶

Another recommendation that targets inadequate indigent defense in rural areas would be to establish public defender offices based upon the type of casework done rather than the area served. The system would essentially work like this: Offices would be founded to defend clients charged with a particular type of crime such as narcotics cases. This would allow attorneys to pool their experience, knowledge, and resources in order to provide a higher quality defense. This type of a framework would naturally work better for geographicaly smaller states where attorneys could easily travel to meet with clients. Indeed, such a public defense structure is likely impractical in a large Western

²⁸⁹ See *supra* Part I.C.

²⁹⁰ See COLO. STATE PUB. DEFENDER, http://pdweb.coloradodefenders.us/index.php?option=com_content&view=section&layout=blog&id=38&Itemid=61 (last visited Jan. 8, 2013).

²⁹¹ *Id.*

²⁹² See *id.*

²⁹³ See *Ten Principles of a Public Defense Delivery System*, A.B.A. 1 (Feb. 2002) available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

²⁹⁴ See *id.* at 2.

²⁹⁵ See *id.* at 1.

²⁹⁶ See *id.* at 2-3.

state but could work quite well at ensuring quality defense to indigents in rural areas of smaller states.

An alternative option would be to “farm out” complex or resource-intensive cases to federal defenders in that federal district. This solution would require change not just in a state statutory framework but also at the federal level. Each federal circuit would probably have to amend its Criminal Justice Act plan to allow federal defenders to take state cases as well.²⁹⁷ Accordingly, this solution faces practical hurdles to implementation. Nevertheless, opening up available federal defenders to take on hard state cases from rural areas in their district or to help divide high caseloads of state public defenders would be an effective solution because it would tend to ensure access to high quality attorneys who are relatively well-funded.

These sorts of suggestions would be effective *if* they could be implemented. However, it is certainly possible that implementation is not possible and some may seek more immediate solutions. The easiest solution would be to change the venue of a case. For example, suppose a man is charged with a first-degree murder in a rural county that is poorly equipped to provide adequate indigent defense for capital crimes. The defendant might be allowed to obtain a change in venue to a state court where public defenders with homicide defense experience are located and equipped to handle such a case.

The aforementioned solutions’ common element is that they act as mechanisms that unify and redistribute resources evenly across a state. Yet, this is only a useful step if it makes the quality of defense uniformly good. Some might fairly criticize these proposals for their tendency to merely shift the burden of defense to a different area or organization rather than eliminate it. The point is noted but there is probably no practical way to improve some geographic areas without changes in state funding. Of course, such changes may do more good than bad. If states raised or allocated more money for public defense, it would be possible to create uniformly quality public defense across the state. Yet it remains impractical to do so and a solution that seeks to ensure rural areas are providing constitutionally adequate defense should be welcomed.

V. CONCLUSION

Across the country, urban areas tend to have higher incidents of crime while also having some of the most effective, high-quality public defender offices.²⁹⁸

²⁹⁷ It is worth noting, however, that Federal Community Defenders would not be barred by either the circuit plan or the Criminal Justice Act itself. *See* 18 U.S.C. § 3006A (1997). Indeed, the Federal Community Defender for the Eastern District of Pennsylvania does precisely this. Its attorneys regularly appear in both Pennsylvania state courts and federal courts. *See* FED. CMTY. DEFENDER OFFICE FOR E. DIST. OF PA., <http://pae.fd.org/CHU.html> (last visited Feb. 20, 2012).

²⁹⁸ *See infra* p. 437 Table 2.

Conversely, rural counterparts are generally still struggling to provide constitutionally adequate defense let alone effective defense.²⁹⁹ While previous authors tend to place the blame on inadequate funding, the problem runs deeper.³⁰⁰ Crime in rural areas is lower in *absolute* terms, which deters attorneys who may specialize in criminal practice from working in such areas.³⁰¹ The urban areas with severe crime problems are “triaged” ahead of these rural areas and necessity lends itself to effective solutions such as holistic/community-based public defense.³⁰²

Solutions to the problem must therefore respond to the qualitative difference between rural and urban areas and should seek uniformity of quality and resources. Solutions include practice-based rather than geographically-based offices, change of venue for cases that local rural public defenders cannot handle, and potential assistance from federal defenders as potential ways of responding in an effective manner. Ultimately, publicly available empirical research on this topic is needed and researchers are encouraged to test and expand upon this Note’s theory.

²⁹⁹ See JUSTICE DENIED, *supra* note 5, at 55.

³⁰⁰ See, e.g., TAYLOR, *supra* note 7, at 6.

³⁰¹ See *infra* p. 436 Table 1.

³⁰² CLARK & SAVNER, *supra* note 143, at 39.

APPENDIX

TABLE 1. UCR INCIDENTS OF CRIME IN RURAL LOCATIONS

| Location | Absolute Violent Crime | Per Capita Violent Crime | Absolute Nonviolent Crime | Per Capita Nonviolent Crime |
|--------------------|------------------------|--------------------------|---------------------------|-----------------------------|
| Anderson, S.C. | 200 | 0.0073193 | 1,924 | 0.07041171 |
| Oxford, Ala. | 53 | 0.0028809 | 1,079 | 0.05865087 |
| Brunswick, Ga. | 238 | 0.0149959 | 1,418 | 0.08934535 |
| Cumberland, Md. | 196 | 0.00958482 | 1,442 | 0.0705169 |
| Elizabethtown, Ky. | 48 | 0.00194238 | 956 | 0.003868566 |
| Glens Falls, N.Y. | 42 | 0.00307692 | 209 | 0.01531136 |
| Grand Haven, Mich. | 27 | 0.00255343 | 359 | 0.0339512 |
| Johnstown, Pa. | 105 | 0.00458515 | 786 | 0.03432314 |
| Lebanon, Pa. | 98 | 0.00402348 | 678 | 0.02783594 |
| Ocean City, N.J. | 27 | 0.00183362 | 894 | 0.06071307 |
| Salisbury, Md. | 450 | 0.01549267 | 2,238 | 0.0770502 |
| Sandusky, Ohio | 150 | 0.00591017 | 1,273 | 0.0501576 |
| Steubenville, Ohio | 75 | 0.00404924 | 1,098 | 0.05928086 |
| | | | | |
| Average | 138 | 0.00601908 | 1,104 | 0.05278722 |
| Median | 102 | 0.00404924 | 1,079 | 0.05865087 |
| Standard Deviation | 121.846401 | 0.00464866 | 570.458273 | 0.02163719 |

TABLE 2. UCR INCIDENTS OF CRIME IN LARGEST CITIES

| Location | Absolute Violent Crime | Per Capita Violent Crime | Absolute Nonviolent Crime | Per Capita Nonviolent Crime |
|--------------------|------------------------|--------------------------|---------------------------|-----------------------------|
| New York, N.Y. | 48,489 | 0.00581682 | 139,615 | 0.01674844 |
| Los Angeles, Cal. | 21,484 | 0.00559231 | 89,704 | 0.02335004 |
| Houston, Tex. | 22,491 | 0.00986076 | 115,323 | 0.05056121 |
| Philadelphia, Pa. | 18,535 | 0.01189378 | 57,788 | 0.03708215 |
| Phoenix, Ariz. | 8,002 | 0.00518121 | 61,362 | 0.03973124 |
| Las Vegas, Nev. | 12,648 | 0.00892967 | 43,219 | 0.03051325 |
| San Antonio, Tex. | 8,434 | 0.00605805 | 88,353 | 0.06346296 |
| San Diego, Cal. | 5,616 | 0.00427582 | 30,753 | 0.02341421 |
| Dallas, Tex. | 9,161 | 0.00701038 | 64,125 | 0.04907119 |
| San Jose, Cal. | 3,215 | 0.00331357 | 22,081 | 0.02275801 |
| Honolulu, Haw. | 2,548 | 0.00268135 | 31,668 | 0.03332534 |
| Detroit, Mich. | 16,976 | 0.01887382 | 47,787 | 0.05312931 |
| Jacksonville, Fla. | 5,469 | 0.00664994 | 37,424 | 0.04550506 |
| | | | | |
| Average | 14,082 | 0.00739519 | 63,785 | 0.03758865 |
| Median | 9,161 | 0.00605805 | 57,788 | 0.03708215 |
| Standard Deviation | 12,347.9676 | 0.00430286 | 35,307.3683 | 0.01415626 |

TABLE 3. TWO-SAMPLE *T*-TEST FOR VIOLENT CRIME

| Variable | Observations | Mean | Standard Error | Standard Deviation | [95% Confidence Interval] | |
|------------|--------------|------------|----------------|--------------------|---------------------------|-----------|
| Rural | 13 | 0.0060191 | 0.0012893 | 0.0046487 | 0.0032099 | 0.0088282 |
| Urban | 13 | 0.0073952 | 0.0011934 | 0.0043029 | 0.004795 | 0.0099954 |
| Combined | 26 | 0.0067071 | 0.0008716 | 0.0044443 | 0.004912 | 0.0085022 |
| Difference | | -0.0013761 | 0.0017568 | | -0.0050021 | 0.0022498 |

Difference = mean(Rural Towns) – mean(Urban Cities) $t = -0.7833$

H_0 difference = 0 degrees of freedom = 24

Ha: difference < 0 Ha: diff $\neq 0$ Ha: difference > 0

$\Pr(T < t) = 0.2206$ $\Pr(|T| > |t|) = 0.4411$ $\Pr(T > t) = 0.7794$

TABLE 4. TWO-SAMPLE *T*-TEST FOR NONVIOLENT CRIME

| Variable | Observations | Mean | Standard Error | Standard Deviation | [95% Confidence Interval] | |
|------------|--------------|-----------|----------------|--------------------|---------------------------|-----------|
| Rural | 13 | 0.005019 | 0.0070342 | 0.0253623 | 0.0347827 | 0.0654353 |
| Urban | 13 | 0.0375886 | 0.0039262 | 0.0141563 | 0.0290341 | 0.0461432 |
| Combined | 26 | 0.0438488 | 0.0041404 | 0.0211118 | 0.0353216 | 0.052376 |
| Difference | | 0.0125203 | 0.0080558 | | -0.004106 | 0.0291467 |

Difference = mean(Rural Towns) – mean(Urban Cities) $t = 1.5542$

H_0 difference = 0 degrees of freedom = 24

Ha: difference < 0 Ha: diff $\neq 0$ Ha: difference > 0

$\Pr(T < t) = 0.9334$ $\Pr(|T| > |t|) = 0.1332$ $\Pr(T > t) = 0.066$