

STRANGE BEDFELLOWS: CAN INSURERS PLAY A ROLE IN ADVANCING *GIDEON*'S PROMISE?

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I. INTRODUCTION

Over fifty years ago, *Gideon v. Wainwright* resoundingly embraced the principle that public defenders are “necessities, not luxuries” and as such, are required to protect the accused person’s fundamental right to a fair trial.¹ Fred Turner, Clarence Gideon’s lawyer on retrial, brought with him what his client lacked—expertise, skill, and knowledge of the law.² Turner researched and argued a series of pre-trial motions; he reviewed the list of potential jurors before trial and knew which individuals to excuse; and he understood the courtroom and community culture.³ Most importantly, Turner conducted a thorough investigation that yielded fodder for his withering cross-examination of the State’s key witness and uncovered new exculpatory evidence.⁴ The jury acquitted after an hour and five minutes of deliberation.⁵

Clarence Gideon’s retrial illustrates what the *Gideon* Court recognized: without the “guiding hand of counsel,” an innocent person “faces the danger of conviction because he does not know how to establish his innocence.”⁶ The rate of wrongful conviction stemming from individual and systemic public defense error is largely unknown.⁷ However, there is a resounding consensus that *Gideon*’s promise is unfulfilled; the rich and poor do not have equal standing in our criminal

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1. 372 U.S. 335, 344 (1963).

2. See ANTHONY LEWIS, *GIDEON*'S TRUMPET 202, 228 (1964).

3. See *id.* at 228, 230.

4. *Id.* at 231-33.

5. *Id.* at 237.

6. *Gideon*, 372 U.S. at 345.

7. See *infra* Part II.

courts. Practitioners, scholars, and social justice activists continue to advocate for public defense reform, whether through litigation, legislation, court rules, or community advocacy.⁸ Each individualized approach has resulted in limited, and often short-term, success. For example, in 1993, the New Orleans public defense system was subject to court challenge due to its excessive caseloads and underfunding.⁹ The Louisiana Supreme Court declined to hold the system constitutionally deficient but announced a rebuttable presumption that public defenders were not providing assistance of counsel “sufficiently effective to meet constitutionally required standards.”¹⁰ This remedy was largely ineffective.¹¹ In 2007, a New Orleans judge found an already weak public defense system had worsened in the aftermath of Hurricane Katrina, and described it as “unbelievable, unconstitutional, totally lacking in the basic professional standards of legal representation and a mockery of what criminal justice should be in a Western civilized nation.”¹² The legislature responded by creating a new state agency with broader regulatory authority and endorsing the vision of a strong public defense system engaged in criminal justice policy and practice.¹³ Yet, in 2016, the New Orleans public defense system is facing another lawsuit alleging its provision of services is unconstitutional.¹⁴ The class action lawsuit was brought when the public defender office, because of budget cuts and hiring freezes, began refusing cases and placing other cases on wait lists.¹⁵ The New Orleans office is in an unusual alliance with the organization bringing the lawsuit; each aspires to reform the chronically underfunded public defense system through the litigation.¹⁶

This Article examines how nontraditional alliances and multiforum advocacy brought about reform in Washington State’s public defense system.¹⁷ Caseload limits are now routinely written into public defense

8. See *infra* Part III.B.

9. *State v. Peart*, 621 So. 2d 780, 783 (La. 1993).

10. *Id.* at 783, 791.

11. See Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735-38 (2005).

12. Laura Parker, *New Orleans Judge May Free Dozens*, USA TODAY (Apr. 2, 2007, 12:01 AM), http://usatoday30.usatoday.com/news/nation/2007-04-01-new-orleans-judge_N.htm.

13. See Frank X. Neuner, Jr., *The Funding Crisis in the Louisiana Public Defender System: Public Defense Reform Has Far to Go*, 60 LA. B.J. 110, 110-12 (2012).

14. Wilborn P. Nobles III, *ACLU Sues Orleans Public Defenders Office over Refusal of Cases*, NOLA.COM (Jan. 15, 2016, 10:22 AM), http://www.nola.com/crime/index.ssf/2016/01/aclu_sues_orleans_public_defen.html.

15. See *id.*

16. Henry Gass, *Why Embattled Public Defenders ‘Welcome’ Lawsuits Against Them*, CHRISTIAN SCI. MONITOR (Jan. 21, 2016), <http://www.csmonitor.com/USA/Justice/2016/0121/Why-embattled-public-defenders-welcome-lawsuits-against-them>.

17. See *infra* Part IV.

contracts as a result of a combination of decades of efforts by public defense advocacy organizations, the legislature, the courts, the state bar association, civil rights litigants, and (perhaps reluctantly) insurers.¹⁸ The Article begins by reviewing what is known about the relationship between inadequate defense lawyering and wrongful conviction.¹⁹ It discusses the legal obstacles innocent people face when litigating ineffective assistance of counsel and criminal malpractice claims.²⁰ It then provides an overview of the current state of our nation's public defense system—which is routinely characterized as being in crisis—and summarize proposed remedies.²¹ The Article then gives the historical context for the Washington Supreme Court's issuance of court rules requiring public defenders to certify their compliance with caseload limits and other standards.²² It discusses the decision in *Wilbur v. City of Mount Vernon*,²³ holding that Mount Vernon and Burlington's public defense systems—where attorneys handled as many as 1000 misdemeanor cases a year—deprived the poor of their right to counsel under *Gideon*.²⁴ The court ordered the cities to undertake remedial measures and awarded over \$2.5 million in attorney's fees and expenses.²⁵ The Article examines how the Washington Cities Insurance Association (“WCIA”) worked with Mount Vernon, Burlington, and other city members to bring public defense contracts into compliance with *Wilbur*.²⁶ The WCIA's advice included incorporating the Washington Supreme Court standards into public defense contracts, an action which was not mandated by the *Wilbur* decision.²⁷ The Article draws upon new research assessing the impact of private insurers on police behavior and compare its findings to Washington's experience.²⁸ The Article concludes by encouraging public defenders to follow the lead of other social justice organizations by engaging in multiforum advocacy, as well joining forces with less traditional partners.²⁹

18. See *infra* Part IV.

19. See *infra* Part II.

20. See *infra* Part II.

21. See *infra* Part III.

22. See *infra* Part IV.A–B.

23. 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

24. See *infra* Part IV.C.

25. Order Awarding Fees and Costs at *5, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2014 WL 11961980, at *1 (W.D. Wash. Apr. 15, 2014).

26. See *infra* Part IV.D.

27. See *infra* Part IV.D.

28. See *infra* Part IV.D.

29. See *infra* Part V.

II. INADEQUATE DEFENSE LAWYERING AS A CONTRIBUTING FACTOR TO WRONGFUL CONVICTION

Wrongful conviction, once dismissed as an “unreal dream,” is no longer considered a rarity.³⁰ As of December 2016, 347 people had been exonerated after post-conviction DNA testing established to a scientific certainty they were imprisoned for crimes they did not commit.³¹ DNA exonerations have also led to an increased acceptance that wrongful convictions occur in cases where there is no biological material to test.³² The National Registry of Exonerations maintains an up-to-date list of all known exonerations from 1989 forward.³³ It has identified more than 1900 cases of wrongful convictions overturned through DNA testing and other new exculpatory evidence.³⁴ The numbers, although significant, do not capture the full extent of the problem of wrongful conviction. As the authors of a study of known exonerations conclude:

We can't come close to estimating the number of false convictions that occur in the United States, but the accumulating mass of exonerations gives us a glimpse of what we're missing. . . . Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.³⁵

Moreover, very little is known about misdemeanor wrongful convictions. As Professor Alexandra Natapoff has argued, the examination of our criminal justice system is felony-centric.³⁶ Yet, the majority of people who interact with the system, over ten million a year, appear in misdemeanor courts.³⁷ In many instances, people are convicted of misdemeanor crimes without ever having consulted with a lawyer or being adequately advised of their right to appointed counsel.³⁸ In other jurisdictions, inadequate resources and overwhelming caseloads result in

30. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (“Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”).

31. INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Dec. 31, 2016).

32. See Sue Russell, *Seeking Second Chances Without DNA*, PAC. STANDARD (Oct. 11, 2012), <https://psmag.com/seeking-second-chances-without-dna-8c3650f06f0a>.

33. NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Dec. 31, 2016).

34. *Id.*

35. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005).

36. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315, 1374-75 (2012).

37. *Id.* at 1320.

38. Robert C. Boruchowitz, *Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. SOC. JUST. 891, 895-903 (2013).

a system of “meet ‘em and plead ‘em,” where public defenders’ clients receive little to no individual attention.³⁹ The consequences of an unjust misdemeanor conviction extend beyond fines and jail time. Misdemeanor convictions can result in the loss of employment, student loans, and public housing; a requirement to register as a sex offender; and deportation.⁴⁰

Although the “overall rate of error in the criminal justice system is unknown, and unknowable,”⁴¹ the factors contributing to wrongful convictions and how to prevent their effects have been studied for more than a century.⁴² The common sources of error are identified as mistaken eyewitnesses, false confessions, tunnel vision, informant testimony, unreliable forensic science, prosecutorial misconduct, and inadequate representation.⁴³ There are few empirical studies on how often poor defense representation leads to wrongful conviction. A study of the first sixty-two DNA exonerations concluded that about twenty-seven percent were caused by “bad lawyering.”⁴⁴ The National Registry of Exonerations attributes “inadequate legal defense” as a contributing factor in about twenty-three percent of identified wrongful convictions.⁴⁵ However, the rate of error stemming from inadequate defense representation is difficult to quantify because other known causes of wrongful conviction, such as mistaken eyewitness identification, faulty scientific evidence, and police misconduct, can be challenged and refuted by competent counsel. As Professor Adele Bernhard explains, “[I]t [is] defense counsel’s responsibility to protect [the innocent] from the mistakes of others: from witnesses’ misidentifications, police officers’ rush to judgment, and prosecution’s reluctance to reveal potentially exculpatory material.”⁴⁶

39. See Jenny Roberts, *Why Misdemeanor Convictions Matter: Defining Effective Advocacy in the Lower Courts*, 45 U.C. DAVIS L. REV. 277, 294-97 (2011).

40. *Id.* at 297-300.

41. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010) (quoting Dan Simon, *Are Wrongful Convictions Episodic or Epidemic?*, Address at the Annual Meeting of the Law and Society Association (July 7, 2006–July 9, 2006)).

42. *Id.* at 827-29.

43. *Id.* at 841.

44. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 263 (2000).

45. See *Registry Detailed View*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ILD&FilterValue1=8%5FILD> (last visited Dec. 31, 2016) (including, as of December 2016, thirty-eight cases where the accused pled guilty).

46. Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 220, 236 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

Challenging a conviction based on counsel's incompetence is an uphill battle. Individuals asserting they were deprived of their Sixth Amendment right to effective assistance of counsel⁴⁷ must show more than "bad lawyering" or "inadequate defense." Under the two-part test established by the Supreme Court in *Strickland v. Washington*, convicted persons must demonstrate their defense counsel's performance was deficient and that the deficient performance prejudiced the defense.⁴⁸ Judicial scrutiny of counsel's performance is highly deferential; the convicted person must overcome the "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgement when making strategic decisions.⁴⁹ To show prejudice, the convicted person must establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁵⁰ If a court can dispose of an ineffectiveness claim under the prejudice prong, it may dismiss the claim without deciding whether counsel's performance was deficient.⁵¹ In many cases of egregious attorney performance, the conviction is affirmed because the court finds defense counsel's deficiencies did not affect the result of the trial.⁵²

Strickland claims seldom prevail. A recent study of over 2500 such claims found that only four percent were granted.⁵³ Even innocent people, who are eventually released because of DNA testing, rarely obtain relief on ineffective assistance of counsel claims brought prior to their exoneration. A study of the first 250 DNA exonerations revealed that ineffective assistance of counsel claims were raised in thirty-two

47. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

48. 466 U.S. 668, 690-92 (1984).

49. *Id.* at 690.

50. *Id.* at 694.

51. *Id.* at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

52. Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 430-32 (1988). In a survey of all federal ineffective assistance claims reviewed by the circuit courts from the *Strickland* decision until May 1988, the counsel's performance was found reasonable in only 54.3% of the cases. *Id.* at 430. However, only 4.3% of ineffectiveness claims resulted in reversals. *Id.* Of the remaining claims in which prejudice was not proven, courts "indicated that defense counsel's performance was inadequate in 5.3% of the claims," while affirming the conviction. *Id.* at 430-31.

53. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 323-24 (2009) (noting that almost half of the cases alleging deficient performance involved "counsel's failure to conduct an adequate investigation").

percent of the cases, but in the overwhelming majority of the cases (about ninety-seven percent), the court rejected the claim.⁵⁴

Individuals who obtain a conviction reversal on the ground that their Sixth Amendment rights were violated may, like Clarence Gideon, face retrial.⁵⁵ They can, even if factually innocent, be convicted again. Fifteen of twenty-one exonerees who obtained reversals on ineffective assistance of counsel claims were retried after their convictions were reversed and all were reconvicted.⁵⁶ Each was later exonerated through post-conviction DNA testing after enduring two, and sometimes three, trials.⁵⁷ If a person is acquitted after retrial or the prosecutor elects to dismiss charges, constitutional tort actions for monetary damages related to the ineffectiveness claim are generally barred under immunity doctrines and prudential concerns.⁵⁸ If a person seeks monetary damages through a criminal malpractice action, they face additional hurdles. In many states, the individual must first litigate and win an ineffective assistance of counsel claim in order to be successful in bringing a criminal malpractice suit.⁵⁹ In several states, an individual must additionally prove actual innocence in order to recover monetary damages against a former criminal defense attorney.⁶⁰

More empirical data is needed regarding how individual and systemic public defense deficiencies lead to wrongful convictions, particularly in misdemeanor courts. As indicated above, individuals who are wrongly convicted because their counsel did not provide the assistance envisioned by *Gideon* face a number of legal obstacles when trying to remedy the miscarriage of justice.⁶¹ And they must face them on their own because, perhaps with the exception of capital cases, they

54. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 36, 201-05 (2011).

55. *Id.* at 197.

56. *Id.*

57. *Id.*

58. Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH L. REV. 277, 293-300 (2012) (concluding there is no reliable way for injured defendants to vindicate the violation of Sixth Amendment rights through constitutional tort actions); *see also* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 433-40 (2009) (describing various constitutional challenges brought in the context of individual lawsuits).

59. Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 723-26 (1991).

60. Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 341-43 (2007) (surveying state requirements for criminal malpractice claims); *see, e.g.*, *Piris v. Kitching*, 375 P.3d 627, 630 (Wash. 2016) (en banc) ("[F]or a plaintiff to bring a malpractice action against a criminal defense attorney, he or she must establish actual innocence of the underlying charge by a preponderance of the evidence.").

61. *See supra* notes 47-60 and accompanying text.

are not entitled to appointed counsel on post-conviction review.⁶² Therefore, it is critical to ensure that individuals accused of crimes who are too poor to hire a lawyer are represented by competent and dedicated public defender advocates.

III. PUBLIC DEFENSE

The majority of people charged with crimes in the United States cannot afford to hire a lawyer.⁶³ After *Gideon* was decided, state and local governments began the effort of developing new systems or expanding existing systems in order to comply with the Court's mandate.⁶⁴ The result is a dramatically varying patchwork of service models.⁶⁵ Public defense systems vary between states, as well as between counties within states, and between municipalities within counties. Three different models are generally used to provide public defense services: (1) public defenders, (2) assigned counsel, and (3) contract attorneys.⁶⁶ The public defender model involves a public or private non-profit organization whose office is staffed with attorneys working exclusively as public defenders.⁶⁷ In a few states, heads of public defense agencies, like prosecutors, are elected.⁶⁸ In jurisdictions using the assigned counsel model, lawyers are assigned cases, generally by a judge, and are paid on a case-by-case basis.⁶⁹ The contract model employs a contract between a jurisdiction and an individual attorney or an organization to provide public defense for the jurisdiction.⁷⁰ The types of contracts under a contract system range from a "fixed-fee, all cases" contract, where the contract price covers all cases in the jurisdiction, regardless of their number or level of complexity,⁷¹ to a

62. Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 853-58 (2013).

63. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) ("Poor people account for more than 80% of individuals prosecuted.")

64. See 1 LEE SILVERSTEIN, AM. BAR ASS'N, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 253-67 (1965).

65. See *id.*

66. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

67. *Id.* at 36.

68. Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 812-22 (2010) (describing the local election of public defenders in Florida, Tennessee, and cities in California and Nebraska).

69. Spangenberg & Beeman, *supra* note 66, at 33.

70. *Id.* at 34.

71. For a discussion of the problems inherent in fixed-fee contracts, see Jacqueline McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J.L. REFORM 773, 816-17 (2006)

“hourly fee, without caps” contract, where attorneys are paid the hourly fee specified in the contract without placing a cap on the total amount of compensation an attorney can receive for each case.⁷²

A. *The System’s State of Crisis*

Gideon’s promise of equal justice for the rich and poor has not been realized. The opinion’s fifty-year anniversary was marked with narratives describing the public defense system’s deficiencies⁷³ and articles recognizing that “[g]overnments have failed to adequately fund defense systems, many judges tolerate or welcome inadequate representation, and the Supreme Court has refused to require competent representation, instead adopting a standard of ‘effective counsel’ that hides and perpetuates deficient representation.”⁷⁴ The nation’s then-chief prosecutor, Attorney General Eric Holder, acknowledged that “America’s indigent defense systems exist in a state of crisis” where the accused routinely have “little understanding of the rights to which they’re entitled, the charges against them, or the potential sentences they may face.”⁷⁵

The greatest challenge public defenders face is a lack of adequate resources, which in turn leads to excessive caseloads.⁷⁶ When public defenders have too little money and too many cases, they are forced to perform triage on cases and cannot communicate with their clients; conduct investigations; interview defense witnesses; consult with expert witnesses; or prepare for pretrial hearings, trial, and sentencing.⁷⁷ The result is a system where, despite the dedication of public defenders and

and Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1830-33 (2000).

72. ROBERT L. SPANGENBERG ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 4 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

73. See generally KAREN HOUPPERT, CHASING *GIDEON*: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE (2013) (discussing cases highlighting this unfortunate reality).

74. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2150 (2013); see also Drinan, *supra* note 58, at 433-40. See generally Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676 (2013); Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2013).

75. 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>.

76. NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 51-52, 65 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>; see also NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 19-20 (2011).

77. NAT’L RIGHT TO COUNSEL COMM., *supra* note 76, at 65.

other staff, quality defense cannot be achieved because of inadequate funding and excessive caseloads.⁷⁸

B. Proposed Remedies for the Public Defense Crisis

Practitioners, scholars, and social justice activists continue to advocate for public defense reform, whether through lawsuits challenging inadequate public defense services,⁷⁹ legislation calling for resource parity,⁸⁰ court rules regulating attorney conduct,⁸¹ or community advocacy.⁸² There is growing recognition that long-lasting reform will require complementary strategies, broad alliances, and increased attention to raising public awareness. Professor Carol Steiker writes of the need to engage in multiform advocacy by working for pretrial diversion legislation and decriminalization; promoting structural reform litigation in federal and state courts; setting higher standards of practice through alliances with state and national bar associations, the private defense bar, and non-profits specializing in criminal defense; advocating for federal government involvement in state defense reform; encouraging social entrepreneurs to generate creative solutions to the public defense crisis; motivating law students to promote reform; and educating the public about the need for reform through media campaigns.⁸³

Media attention can be a powerful factor in bringing about public defense reform.⁸⁴ The *Serial* podcast and *Making a Murderer* documentary captured national attention and helped people recognize

78. *Id.* at 4.

79. Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1962-68 (2014) (discussing strategic litigation examples and concluding they can be effective tools for raising public awareness and precipitating legislative reform); see also Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 321-35 (2002).

80. Ronald J. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 232-33, 238-41, 263-66 (2004) (arguing resource parity will not come from the courts acting alone, without the assistance of the legislature).

81. McMurtrie, *supra* note 71, at 816-17 (urging adoption of ethics rules prohibiting lawyers from entering into public defense contracts obligating the contracting lawyer or law firm to pay for conflict counsel).

82. Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1282-83 (2014-2015) (discussing “participatory defense”—which engages people who face criminal charges, their families, and their communities in reform efforts—as a model for public defense).

83. Steiker, *supra* note 74, at 2701-02, 2705, 2707, 2709-11; see also Drinan, *supra* note 58, at 443-58 (attributing the success of a new generation of lawsuits to multiple factors including the building of external and internal alliances, as well as media attention).

84. See Steiker, *supra* note 74, at 2711 (“Successful indigent defense reform has always been accompanied by media attention that brings the urgency of the problems into public attention.”).

that the criminal justice system is fallible. After *Serial* ended, Adnan Syed (whose case was profiled in the podcast) was granted a new trial on the ground of ineffective assistance of counsel.⁸⁵ When Syed's post-conviction attorney was asked if there was any chance the retrial would have come about without *Serial*, he answered, "I don't think so."⁸⁶ Millions of viewers binge-watched *Making a Murderer*. They saw vulnerable sixteen-year-old Brandon Dassey's public defender allow him to be interrogated by detectives without an attorney present.⁸⁷ The federal judge who overturned Dassey's conviction described the lawyer's conduct as "inexcusable both tactically and ethically."⁸⁸ Jerry Buting and Dean Strang, the highly capable private lawyers who were featured in the documentary, are using their new celebrity status to engage in a speaking tour which addresses issues such as the criminal justice system's underfunding of public defense.⁸⁹

Social media has also brought to light different acts of bravery on the part of public defenders who were arrested when advocating for their clients. A San Francisco public defender's arrest in a courtroom hallway after she objected to an officer taking photographs of her client was filmed and viewed on YouTube millions of times.⁹⁰ The grainy video of a Las Vegas public defender being handcuffed inside the courtroom and made to sit with other prisoners received similar attention.⁹¹ A judge ordered the public defender taken into custody to teach her "a lesson" after she continued to advocate for her client when told to be quiet.⁹² The following month, the judge lost his election.⁹³ Social media was also used to launch the first National Public Defense Day on March 18, 2016, *Gideon v. Wainwright's* anniversary.⁹⁴ A Facebook posting announced that "defender offices around the country will celebrate their hard work

85. Jonah Engel Bromwich & Liam Stack, 'Serial' Podcast Figure Gets New Trial in Murder He Says He Didn't Commit, N.Y. TIMES, July 1, 2016, at A17.

86. *Id.*

87. John Ferak, *Court of Appeals Taken to Task in Dassey Case*, POST-CRESCENT, Aug. 18, 2016, at 4A.

88. *Id.*

89. Deanna Isaacs, *Making a Murderer: The Road Show*, CHI. READER, May 26, 2016, at 16.

90. Vivian Ho, *S.F. Public Defender Files Complaint over Courthouse Arrest*, S.F. CHRON. (Feb. 5, 2015), <http://www.sfchronicle.com/crime/article/S-F-police-won-t-press-charges-against-6063816.php#photo-7450696>.

91. See Matt Ferner, *Las Vegas Judge Who Humiliated Defense Attorney Loses Election in a Landslide*, HUFFINGTON POST (June 15, 2016, 4:46 PM), http://www.huffingtonpost.com/entry/conrad-hafen-judge-loses_us_57618da5e4b09c926cfd61f.

92. *Id.*

93. *Id.*

94. See *National Public Defense Day*, FACEBOOK, <https://www.facebook.com/events/1711294452473730> (last visited Dec. 31, 2016).

fighting routine injustices, upholding the Constitution, and siding with the marginalized.”⁹⁵

Media attention can help generate the political will needed to bring about public defense reform. A prominent civil rights lawyer acknowledged reform lawyers litigate cases “as much in the media as they do in court.”⁹⁶ The starting point for reform is caseload limitation, which is widely considered to be the most objective standard for predicting quality in a public defense program.⁹⁷ A national numeric caseload standard has existed since 1973, when the U.S. Department of Justice’s National Advisory Commission on Criminal Justice Standards and Goals recommended that a public defender caseload should not exceed, per year, 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals cases per attorney.⁹⁸ Yet across the nation, “the vast majority . . . of public defenders carry caseloads far in excess of any recognized standard[s].”⁹⁹ The following Part discusses Washington State’s efforts to ensure lawyers representing clients under *Gideon*’s mandate are in compliance with caseload limitations and other standards of professionalism.¹⁰⁰

IV. WASHINGTON STATE

Washington State’s recent public defense system reform came about through a series of complementary strategies and alliances. Decades of efforts were led by traditional advocates such as public defense organizations, the state bar association, academics, and sympathetic legislators.¹⁰¹ Media stories highlighted the system’s deficiencies and the need for change.¹⁰² Reform was propelled by the

95. *Id.*

96. Drinan, *supra* note 58, at 458 (quoting a telephone interview with Witold “Vic” Walczak, Legal Director of the American Civil Liberties Union of Pennsylvania on August 13, 2008).

97. *See, e.g.*, STANDARDS FOR PUBLIC DEFENSE SERVICES Standard 3 cmt. at 13 (WASH. DEF. ASS’N, Draft Revision of Standards 2006), <http://www.defensenet.org/about-wda/standards/Final%202007%20WDA%20Standards%20with%20Commentary.pdf> (“Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads, even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.”).

98. NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, TASK FORCE ON COURTS Standard 13.12 (1973).

99. Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87, 90 (2010).

100. *See infra* Part IV.

101. *See infra* Part IV.A.

102. *See infra* Part IV.A.

Washington Supreme Court's adoption of rules requiring public defenders to certify compliance with its *Standards of Indigent Defense*, including caseload limits.¹⁰³ The successful litigation outcome in *Wilbur* resulted in municipal insurers taking note of the adverse consequences of continuing to disregard caseload limits and other professional standards.¹⁰⁴ The following Subpart describes the historical context for how a group of strange bedfellows—public defense advocacy organizations, the legislature, the courts, the state bar association, civil rights litigants, the media, and insurers—ended up effecting meaningful change in Washington's public defense system.¹⁰⁵

A. Washington's Public Defense System

When *Gideon* was decided, public defenders in Washington State were chosen from a judge's list of attorney names.¹⁰⁶ The local control over public defense continues to this day. Washington's thirty-nine counties, and the cities operating courts within the counties, each select their public defense service model. As of 2015, twelve counties had a county government public defense agency, four counties contracted with non-profit public defense offices, and three counties employed public defense coordinators to oversee the work of contract attorneys and law firms.¹⁰⁷ The remaining twenty counties contracted with attorneys for public defense services or appointed attorneys as needed from a panel list.¹⁰⁸ A survey of seventy-four Washington cities found that most (seventy-eight percent) contract "with individual attorneys, firms, and/or non-profit organizations" and seventeen percent "contract with another city or county to provide public defense services."¹⁰⁹ Two responding cities stated that they do not maintain contracts, rather, they assign cases to local attorneys; one responding city stated it "has a staffed public defender office"; and one city stated that it contracts with a non-profit agency on an hourly basis.¹¹⁰

103. See *infra* Part IV.B.

104. See *infra* Part IV.C–D.

105. See *infra* Part IV.A.

106. Richard B. Amandes & George Neff Stevens, *Washington*, in 3 SILVERSTEIN, *supra* note 64, at 769–73 (describing Washington's public defense system in 1965).

107. WASH. STATE OFFICE OF PUB. DEF., 2015 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 12 (2016), http://www.opd.wa.gov/documents/0366-2016_StatusReport.pdf.

108. *Id.*

109. HOUSE JUDICIARY WORKGROUP ON MISDEMEANOR PUB. DEF. COSTS IN WASH. STATE, REPORT AND FINDINGS DECEMBER 2014, at 6, 9 (2014), http://www.opd.wa.gov/documents/0307-2014_HJ-MisdemeanorWorkgroupReport.pdf.

110. *Id.* at 9.

Washington's locally-governed public defense system receives minimal state funding.¹¹¹ Since 2005, the Washington legislature has made limited state funds available to counties and cities through a public defense improvement grant program.¹¹² Grants are disbursed and monitored by the Washington Office of Public Defense ("OPD"), an independent agency of the judicial branch.¹¹³ Grant awardees must document compliance with the Washington State Bar Association ("WSBA") *Standards for Indigent Defense Services* ("WSBA Standards"), or show the funds were "used to make appreciable demonstrable improvements in the delivery of public defense services."¹¹⁴ However, with the exception of these state funds, the cities and counties bear the costs of trial-level public defense.

The Washington legislature passed a law in 1989 requiring counties and cities to adopt standards for the delivery of public defense services.¹¹⁵ It specified that the WSBA Standards "may,"¹¹⁶ and later "should,"¹¹⁷ serve as guidelines for the counties and cities. The WSBA Standards were first adopted in 1984 and based upon the Washington Defender Association ("WDA") *Standards for Public Defense Services* ("WDA Standards").¹¹⁸ Amended standards were endorsed throughout the next thirty years.¹¹⁹ The WSBA Standards cover many areas of professionalism including, but not limited to, the following: responsibilities and duties of counsel; caseload limits; provision of investigators, expert witnesses, and other professional services; attorney training, supervision, and evaluation; and contracts with attorneys.¹²⁰ Notably, the WSBA Standards specify that a public defender's annual caseload should not exceed 150 felony, 400 misdemeanor (or 300 weighted), 250 juvenile offender, or 36 appeals cases.¹²¹

111. See HOLLY R. STEVENS ET AL., THE SPANGENBURG PROJECT, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 65, 74-76 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

112. *Id.* at 65; see also WASH. REV. CODE §§ 10.101.050–.080 (2012).

113. STEVENS ET AL., *supra* note 111, at 65.

114. WASH. REV. CODE § 10.101.060(1)(a).

115. *Id.* § 10.101.030.

116. 1989 Wash. Sess. Laws 2208.

117. WASH. REV. CODE § 10.101.030.

118. Robert C. Boruchowitz, *State Supreme Court Issues Historic Order on Defender Standards*, KING COUNTY B. ASS'N B. BULL., Sept. 2012, at 1, 1.

119. *See id.*

120. *See generally* STANDARDS FOR INDIGENT DEFENSE SERVICES (WASH. STATE BAR ASS'N 2011), http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%202.ashx.

121. *Id.* at 3.

Washington's locally-governed public defense model has resulted in a system where one county's office is heralded as a national leader,¹²² while other cities and counties are sued for providing constitutionally deficient public defense services.¹²³ A lack of professional standards and excessive caseloads are what distinguishes one office from the other.¹²⁴ Many cities and counties simply ignored the legislature's mandate to adopt standards. An American Civil Liberties Union ("ACLU") of Washington report, published in 2004, found the lack of meaningful standards "ha[d] resulted in a checkered system of legal defense with no guarantee that a person who is both poor and accused will get a fair trial."¹²⁵ In the same year, the *Seattle Times* published a three-part investigative series chronicling public defense failures in Washington.¹²⁶ The series described the frustration of an attorney whose caseload was 6.5 times over recommended limits; it included 276 dependency cases, 295 juvenile cases, 5 adult felony cases, and 16 appeals.¹²⁷ Another public defender was appointed to over 1300 misdemeanor cases, while also working part-time as a municipal court judge, as well as representing clients in private practice.¹²⁸ In juvenile courts across the state, public defenders reported carrying 360 to 750 cases a year, well over the then-existing 250 caseload limit.¹²⁹

The WSBA also released a report in 2004, authored by the seventeen member Blue Ribbon Panel on Criminal Defense, appointed to address problems in the delivery of public defense services.¹³⁰ It found that there was no enforcement mechanism to address the failure of many jurisdictions to adopt standards for public defense services.¹³¹ The

122. Kim Taylor-Thompson, *Tuning up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461, 1500 (2003) (singling out the Defender Association of Seattle as a recognized national leader in "innovative and client-centered representation").

123. *E.g.*, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1123 (W.D. Wash. 2013); *Best v. Grant County*, No. 04 2 00189 0, 2004 WL 7198967, at *1 (Wash. Super. Aug. 26, 2004).

124. *See* Boruchowitz, *supra* note 118, at 10.

125. AM. CIVIL LIBERTIES UNION OF WASH., *THE UNFULFILLED PROMISE OF GIDEON: WASHINGTON'S FLAWED SYSTEM OF DEFENSE FOR THE POOR 1* (2004), https://aclu-wa.org/library_files/Unfulfilled%20Promise%20of%20Gideon.pdf. At the time of the report, only fourteen of Washington's thirty-nine counties had adopted standards on some or all topics addressed by the WSBA Standards and just one county's standards included caseload limits. *Id.* at 18.

126. *An Unequal Defense: The Failed Promise of Justice for the Poor*, *SEATTLE TIMES* (Apr. 4, 2004–Apr. 6, 2004), <http://old.seattletimes.com/news/local/unequaldefense>.

127. Ken Armstrong & Justin Mayo, *Frustrated Attorney: 'You Just Can't Help People.'* *SEATTLE TIMES* (Apr. 6, 2004), <http://old.seattletimes.com/news/local/unequaldefese/stories/three>.

128. *Id.*

129. *Id.*

130. *Getting What They Paid for: The Fallacy of Quality Indigent Defense: Bar Association to the Rescue*, *CRIM. PRAC. GUIDES*, May/June 2004, 5 NO. 3 GUIDE 3.

131. *Id.*

report highlighted how the lack of enforceable standards, especially caseload limits, jeopardized public defenders' abilities to provide adequate representation.¹³² It pointed to inadequate funding as a significant cause of the public defense system's failures.¹³³ The report's recommendations included advising the WSBA to form a "Committee on Public Defense Services" tasked with "proposing legislation and/or a Court Rule (or Rules) implementing the Standards for Public Defense Services."¹³⁴ The Committee (and now Council) on Public Defense ("CPD") was created to implement the report's recommendations and address concerns about Washington's public defense services.¹³⁵

B. Washington Supreme Court Standards and Attorney Certification

In 2010, the Washington Supreme Court issued a decision in *State v. A.N.J.*, overturning a guilty plea conviction on the ground of ineffective assistance of counsel.¹³⁶ The case arose out of Grant County, whose public defense deficiencies were familiar to the court through media stories,¹³⁷ as well as its own disciplinary proceedings. In 2004, the court had disbarred a Grant County public defender for charging fees to clients he represented as a public defender, "charging unreasonable fees," and "voluntarily maintaining an excessive caseload" while under contract to provide public defense services.¹³⁸ The court also disbarred a public defender staff attorney for numerous acts of misconduct, including misuse of client funds.¹³⁹ In the same year, a class action lawsuit was filed against Grant County alleging that funding for indigent defense was inadequate, caseloads were excessive, there was no oversight of the defense system, defense services lacked independence, and defendants were deprived of investigation and experts.¹⁴⁰ Grant County officials entered into a settlement agreement with the plaintiffs' lawyers after the presiding trial court judge ruled the plaintiffs had a well-grounded fear of immediate violation of the right to effective

132. *Id.*

133. *Id.*

134. *Id.*

135. *Council on Public Defense*, WASH. ST. B. ASS'N, <http://wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Council-on-Public-Defense> (last visited Dec. 31, 2016).

136. 225 P.3d 956, 971 (Wash. 2010).

137. *See, e.g.*, Ken Armstrong et al., *Attorney Profited, but His Clients Lost*, SEATTLE TIMES (Apr. 5, 2004), <http://old.seattletimes.com/news/local/unequaldefense/stories/two>.

138. *Discipline Notice—Thomas Jay Earl*, WASH. ST. B. ASS'N, <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=594> (last visited Dec. 31, 2016).

139. *In re Romero*, 94 P.3d 939, 940-42, 945 (Wash. 2004).

140. *Best v. Grant County*, No. 04 2 00189 0, 2004 WL 7198967, at *1-3 (Wash. Super. Aug. 26, 2004).

assistance of counsel.¹⁴¹ The county agreed to “reduce excessive caseloads, guarantee that public defender lawyers [were] qualified to handle serious felony cases, and provide adequate funding for investigators and expert witnesses.”¹⁴² The agreement provided that the county’s compliance with the terms of the settlement would be monitored for six years.¹⁴³

It was against this backdrop that the court considered the case of twelve-year-old A.N.J., who entered a guilty plea to a first-degree molestation charge.¹⁴⁴ His public defender conceded that he spent as little as fifty-five minutes with his client before the plea.¹⁴⁵ The public defender did little to no investigation or research, did not follow up with witnesses who could have provided an alternative explanation for the victim’s report, did not consult with any experts, made no requests for discovery, did not file any motions, and did not carefully review the plea agreement with his client.¹⁴⁶ The court found the public defender had allowed his client to erroneously believe his juvenile conviction as a sex offender “could be removed from his record and failed to adequately distinguish between the registration requirement and A.N.J.’s criminal record” of conviction.¹⁴⁷ The court held A.N.J.’s right to effective assistance of counsel was violated and allowed him to withdraw his plea because he entered it without understanding the nature of the charge or the consequences of the plea.¹⁴⁸

When rendering its decision, the *A.N.J.* Court acknowledged the existence and importance of the WDA and the WSBA Standards.¹⁴⁹ It noted that in the year the public defender represented A.N.J., he represented 263 juvenile clients, carried an average of 30 to 40 active dependency cases, and handled another 200 cases.¹⁵⁰ The existing WSBA Standards established caseload limits of either 250 juvenile cases or 80 open dependency cases.¹⁵¹ Although the court did not adopt the WDA or WSBA Standards, it held they “may be considered with other

141. STEVENS ET AL., *supra* note 111, at 65.

142. *Id.*

143. *Id.*

144. *State v. A.N.J.*, 225 P.3d 956, 958 (Wash. 2010).

145. *Id.* at 962 (noting that A.N.J.’s parents also testified that the public defender spent only thirty-five to forty minutes with their son before the plea).

146. *See id.* at 961.

147. *Id.* at 969.

148. *Id.* at 970.

149. *Id.* at 965-66.

150. *Id.* at 960-61.

151. STANDARDS FOR INDIGENT DEFENSE SERVICES Standard 3 (WASH. STATE BAR ASS’N 2007), [http://wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/WSBA%20Indigent%20Defense%20Standards%20\(2007\).ashx](http://wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/WSBA%20Indigent%20Defense%20Standards%20(2007).ashx).

evidence concerning the effective assistance of counsel.”¹⁵² It lamented the lack of funding for public defense, and stated as follows:

[Forty-five] years after *Gideon*, we continue our efforts to fulfill *Gideon*'s promise. While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.¹⁵³

Shortly after deciding *A.N.J.*, the Washington Supreme Court took the historic step of issuing an order requiring lawyers who represented indigent clients on misdemeanor, felony, and juvenile criminal charges, to certify compliance with “applicable *Standards for Indigent Defense Services* to be approved by the Supreme Court.”¹⁵⁴ It then requested the WSBA CPD to advise the court about which standards should be approved for certification.¹⁵⁵ Over the next two years, the WSBA CPD conducted a review of the existing WSBA Standards, heard from stakeholders, and recommended to the WSBA Board of Governors which standards it should request the Washington Supreme Court approve for certification.¹⁵⁶

In 2012, the Washington Supreme Court adopted the *Standards for Indigent Defense*, addressing caseload limits and types of cases, administrative costs, limitations on private practice, attorney qualifications according to the severity or type of case, appellate representation, and use of legal interns.¹⁵⁷ The court limited a full-time public defender's caseload, per year, to 150 felonies, 400 (or 300 cases weighted) misdemeanors, 250 juvenile cases, or 36 appeals.¹⁵⁸ Public defenders carrying a mix of cases are required to apply the limitations proportionately.¹⁵⁹ Contract lawyers representing private clients must limit their caseloads based upon the percentage of time they devote to public defense.¹⁶⁰

152. *A.N.J.*, 225 P.3d at 966.

153. *Id.* at 960.

154. Andrea Woods, *The Undersigned Attorney Hereby Certifies: Ensuring Reasonable Caseloads for Washington Defenders and Clients*, 89 WASH. L. REV. 217, 228 (2014) (emphasis omitted).

155. *Id.* at 229.

156. *See id.*

157. *See generally* Order *In re* Adoption of New Standards for Indigent Defense and Certification of Compliance, No. 25700-A-1004 (Wash. June 15, 2012), <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf>.

158. *Id.* at 2.

159. *Id.* at 1.

160. *Id.*

The caseload limit standards, particularly for misdemeanors, were the most fiercely debated portion of the adopted standards.¹⁶¹ Contract lawyers voiced the opinion that experienced misdemeanor attorneys are able to handle a “significantly higher number of cases.”¹⁶² City attorneys and mayors expressed concerns with the cost of complying with caseload limits and predicted that municipalities would no longer be able to hire experienced and effective lawyers.¹⁶³ Because “many misdemeanor public defense attorneys statewide had been operating with caseloads exceeding the [Washington] Supreme Court’s limits,” implementation of the misdemeanor caseload standards was delayed to give local jurisdictions “additional time to prepare and budget for the change in practice.”¹⁶⁴ Certification for felony and juvenile caseload began in October 2013.¹⁶⁵ Implementation of misdemeanor caseload standards was delayed until January 2015.¹⁶⁶ During the interim, *Wilbur* was issued, providing additional incentive to cities and counties to address misdemeanor caseload limits.

C. *Wilbur v. City of Mount Vernon*

On December 4, 2013, Judge Robert S. Lasnik of the Western District of Washington U.S. District Court ruled that Mount Vernon and Burlington’s public defense systems deprived indigent defendants of the Sixth Amendment right to counsel guaranteed under *Gideon v. Wainwright*.¹⁶⁷ The court focused on the misdemeanor caseloads carried by the two lawyers who contracted with the cities to provide public defense services part-time. The lawyers handled approximately 1000 public defense cases each for the three years they contracted with the cities.¹⁶⁸ Their public defense caseload was in addition to their private practice.¹⁶⁹ There was little evidence that the lawyers met with clients outside the courtroom, there was almost no evidence they conducted investigations or engaged in legal research, and they rarely went to trial.¹⁷⁰ After the lawsuit challenging the constitutional adequacy of this

161. Woods, *supra* note 154, at 230.

162. *Id.* at 235 & n.158.

163. *Id.* at 237 & n.171.

164. HOUSE JUDICIARY WORKGROUP ON MISDEMEANOR PUB. DEF. COSTS IN WASH. STATE, *supra* note 1099, at 3.

165. *Id.*

166. *Id.*

167. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013).

168. *Id.* at 1124.

169. *Id.*

170. *Id.*

system was filed, the cities contracted with another law firm.¹⁷¹ Still, the lawyers continued to handle caseloads far exceeding the 400 caseload limit, resulting in a “shockingly low” trial rate.¹⁷² The court concluded the cities’ public defense system was “broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.”¹⁷³

The court found the constitutional deprivations were the “direct and predictable result of the deliberate choices of City officials charged with the administration of the public defense system.”¹⁷⁴ The cities knew the public defense attorneys’ caseloads were excessive for many years, the part-time public defenders under city contract when the suit was filed were handling thousands of cases per year, and the cities failed to provide any meaningful oversight of the public defense system.¹⁷⁵ The court noted the significance of the fifty-year anniversary of *Gideon* and stated, “[t]he notes of freedom and liberty that emerged from Gideon’s trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.”¹⁷⁶

As part of its remedial authority, the court ordered the city officials and public defenders to read the WDA Standards; reevaluate existing public defense contracts; and hire a public defense supervisor to monitor, evaluate, and report upon the work of public defenders.¹⁷⁷ The court acknowledged the cities’ public defense systems would be evaluated by the Washington Supreme Court’s *Standards for Indigent Defense* moving forward, but it declined to adopt a hard caseload limitation.¹⁷⁸ The court ordered the cities to provide plaintiff’s counsel with fifty case files on the twelve, twenty-four, and thirty-four month dates following the date of the court’s decision to allow plaintiff’s counsel to evaluate the cities’ compliance.¹⁷⁹ And, the court awarded over \$2 million in attorney fees and costs, which were in addition to what the cities paid to defend the lawsuit.¹⁸⁰

171. *Id.* at 1125.

172. *Id.* at 1125, 1128.

173. *Id.* at 1127.

174. *Id.* at 1132.

175. *Id.* at 1132-33.

176. *Id.* at 1137.

177. *Id.* at 1134-37.

178. *Id.* at 1134.

179. *Id.* at 1137.

180. Order Awarding Fees and Costs at *5, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2014 WL 11961980, at *1 (W.D. Wash. Apr. 15, 2014).

D. *The Washington Cities Insurance Authority's Response to the Washington Supreme Court Standards and Wilbur*

The WCIA was founded in 1981 “as the first liability risk pool in Washington State.”¹⁸¹ A risk pool is a non-profit organization formed by a group of local governments to finance risk by pooling, or sharing, risks.¹⁸² The WCIA public entities “join[ed] together for the purpose of providing liability and property financial protection to its members,” which own and govern the pool.¹⁸³ Although a risk pool is not an insurer, the services it provides are “virtually indistinguishable” from insurance and it is essentially a small mutual insurer.¹⁸⁴ In Washington, risk pools are governed by statute and subject to audit by the state auditor.¹⁸⁵ Cease and desist orders can be issued to risk pools operating under unsafe financial conditions or which are in violation of other statutory provisions.¹⁸⁶

The WCIA currently has more than 100 members, including the cities of Mount Vernon and Burlington.¹⁸⁷ The WCIA's services encompass “risk management education and aggressive claims and litigation assistance.”¹⁸⁸ The WCIA does not appear to have offered educational programs after the Washington Supreme Court adopted the *Standards for Indigent Defense*. This stood in contrast to the Washington State Association of Municipal Attorneys (“WSAMA”), which devoted a portion of its 2012 fall conference to the newly adopted standards.¹⁸⁹ WSAMA members were advised to (1) adopt standards using the Washington Supreme Court standards and WSBA Standards as guidance; (2) amend current contracts to ensure they were in compliance with the Washington Supreme Court and city standards; (3) build a record for if the city counts cases; and (4) “[u]se the request for qualification process as an opportunity to build a record that [the] public defender[s] ha[ve] warranted . . . awareness of and ability to comply

181. *About WCIA*, WASH. CITIES INS. AUTHORITY, <http://www.wciapool.org/about-wcia> (last visited Dec. 31, 2016).

182. John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. (forthcoming 2017) (manuscript at 21), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733783##.

183. *About WCIA*, *supra* note 181.

184. Rappaport, *supra* note 182 (manuscript at 21).

185. WASH. REV. CODE § 48.62.031(5) (2014).

186. *Id.* § 48.62.091(3).

187. *WCIA Members*, WASH. CITIES INS. AUTHORITY, <http://www.wciapool.org/about-wcia/wcia-members> (last visited Dec. 31, 2016) (featuring an interactive map listing current membership).

188. *About WCIA*, *supra* note 181.

189. *Program Highlights*, WSAMA NEWS, Aug. 2012, at 2, 2, http://www.wsama.org/newsletters/wsama_news_08-10-12.pdf.

with” the applicable standards.¹⁹⁰ They were provided model resolutions, ordinances, and contracts for delivery of public defender services, which incorporated the Washington Supreme Court standards and provided alternatives for determining misdemeanor caseload limits, based on the 400 case counting or the 300 case weighting limitations.¹⁹¹ WSAMA members were advised of the opportunity to engage in cost saving measures, such as developing interlocal agreements between cities to achieve economies of scale and cutting costs through the elimination of direct filing and decriminalization of minor traffic offenses.¹⁹²

However, the *Wilbur* decision did capture the WCIA’s attention. After it was issued, the WCIA’s Claims Manager sent an e-mail to members asking to meet with city employees who oversaw public defense contracts.¹⁹³ The e-mail began by discussing the \$2.2 million attorney fees award and warning that the ACLU was going to investigate other litigation targets.¹⁹⁴ WCIA’s Claims Manager wanted to work with member cities on “possible responses the Court may look for if the ACLU knocks on your door.”¹⁹⁵ The e-mail was followed by a news article advising members of the following:

Responding to the *Wilbur v. Mount Vernon* case will bring significant change and increased cost for the public defense system in most cities. It is vital that cities respond to *Wilbur* now, before they are in litigation. The good news is there is time for you to assess your system and begin the process of making needed changes in conjunction with the city’s normal budget cycle. WCIA is committed to providing assistance to its members through exclusive risk management education and training.¹⁹⁶

A Risk Management Bulletin issued the same month counseled members of the WCIA to change practices and act quickly:

Cities are responsible for actively monitoring their public defenders and ensuring that they have the resources and wherewithal to zealously defend their clients. This now requires more than simply hiring someone competent. It requires a level of engagement that will be new to many jurisdictions. And significantly, this is not something that can

190. W. Scott Snyder, Ogden Murphy Wallace, P.L.L.C., *Developing a Public Defender Contract* (2012), <http://www.wsama.org/wsamaproc/2012f/2012f-01snyder.pdf>.

191. *Id.*

192. *Id.*

193. E-mail from Reed Hardesty, Claims Manager, Wash. Cities Ins. Auth., to Tina Smith (May 13, 2014, 10:44 PST) (on file with author).

194. *Id.*

195. *Id.*

196. *Responding to Wilbur v. Mount Vernon*, WASH. CITIES INS. AUTHORITY (June 12, 2014), <http://www.wciapool.org/communications/news-article/110>.

be done upon receipt of the lawsuit. Both the case law and practical defense considerations require action *now*.¹⁹⁷

The WCIA then held a series of “Responding to *Wilbur v. Mount Vernon*” trainings for public defense systems contract administrators throughout the state.¹⁹⁸ The risk management presentation topics included assessing public defense systems based on *Wilbur*’s factors, determining the cost impacts of *Wilbur*, and providing ongoing recommendations for overall risk management.¹⁹⁹ Attendees were advised to assess public defense systems on the basis of (1) case counts and percentage of cases tried, (2) complaints, (3) whether lawyers met with clients within seventy-two hours of appointment, (4) use of investigators, and (5) peer review.²⁰⁰ They were provided with recently adopted resolutions from cities that had incorporated the Washington Supreme Court standards,²⁰¹ a model contract for indigent defense services, and the OPD memorandum on best practices in indigent defense services.²⁰² As the WCIA reported in its 2014 annual report, the “state-wide exposure regarding the administration of public defenders received significant training, risk management consultation and litigation support.”²⁰³

WCIA member cities, many of which had previous public defense systems with excessive caseloads, expanded their public defense budgets. Longview’s 2015 public defense budget increased by \$200,000, which represented a forty-three percent increase over the prior year; Kelso allocated an additional \$80,000 to its budget in 2015, representing an eighty-nine percent budget increase; and Aberdeen increased its public defense budget from \$92,000 to \$200,000.²⁰⁴ Issaquah, Sammamish, Snoqualmie, and North Bend (a non-WCIA member)

197. See WASH. CITIES INS. AUTH., RISK MGMT. BULLETIN ADMIN. NO. 64, *WILBUR V. MOUNT VERNON*’S EFFECT ON MOST CITIES PUBLIC DEFENSE SYSTEM 2 (2014), http://epay.ci.walla-walla.wa.us:8066/docs/2016/ccws/20160208_233/1973_WCIA%20Wilbur%20effect%20re%20public%20defense%20bulletin%2064.pdf.

198. See *Responding to Wilbur v. Mount Vernon*, *supra* note 196.

199. See, e.g., *Training Calendar*, WASH. CITIES INS. AUTH., <http://www.wciapool.org/education-training/calendar/id/785> (last visited Dec. 31, 2016).

200. W. Scott Snyder, Attorney, Ogden Murphy Wallace, P.L.L.C., Address at Arlington City Council Chambers Public Defense Systems Contract Administrators Training: Responding to *Wilbur v. Mt. Vernon* (July 24, 2014).

201. *Id.*

202. *Id.*

203. WASH. CITIES INS. AUTH., 2014 ANNUAL REPORT 3 (2014), <http://www.wciapool.org/communications/annual-reports-view/157>.

204. WASH. STATE OFFICE OF PUB. DEF., 2014 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 2-3 (2015), http://www.opd.wa.gov/documents/0319-2015_StatusReport-web.pdf.

“formed an innovative regional partnership” and hired a monitor to evaluate public defense services in the four cities to improve their public defense representation.²⁰⁵ Olympia doubled its public defense services budget.²⁰⁶ Selah adopted a resolution to comply with applicable public defense standards as well as *Wilbur*.²⁰⁷ Shelton hired a second public defender, making both attorneys’ caseloads within the caseload limits.²⁰⁸ Sunnyside went from two to four public defenders, who are within caseload limits.²⁰⁹ The cities of Anacortes, Battle Ground, Tukwila, Union Gap, and Westport adopted or amended already existing public defense ordinances to codify, or incorporate by reference, the Washington Supreme Court standards, including caseload limits.²¹⁰

WCIA’s training and risk management consultations influenced its members to improve public defense systems when other efforts, such as legislative mandates, had failed. As the Washington experience demonstrates, insurers should be considered an important stakeholder in criminal justice system reform. Professor John Rappaport’s research documented their influence on police behavior through a series of interviews with individuals in the police liability insurance industry, and a review of “trade literature, insurance applications, advertisements, and other primary sources.”²¹¹ He discovered that insurers sometimes promulgate standards for their clients which go beyond the dictates of court doctrine.²¹² As an example, Rappaport discusses the Supreme Court’s most recent decision on strip searches, which does not require a person to be searched by someone of the same gender or that a search be conducted in a clean location.²¹³ Yet, an insurer newsletter advised clients that in order for their searches to comply with the Fourth Amendment, they “should be conducted in a professional manner using a searcher of the same sex, conducted without physical contact under sanitary conditions, and done with a degree of privacy.”²¹⁴ Rappaport’s research shows the meaningful impact insurers can have upon change within the police agencies they insure.²¹⁵

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205. WASH. STATE OFFICE OF PUB. DEF., *supra* note 107, at 60.
206. *Id.* at 62.
207. *Id.* at 64.
208. *Id.* at 65.
209. *Id.* at 68.
210. *Id.* at 55-56, 70-73.
211. See Rappaport, *supra* note 182 (manuscript at 10, 36-59).
212. See *id.* (manuscript at 44-45).
213. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517-23 (2012).
214. Rappaport, *supra* note 182 (manuscript at 44).
215. *Id.* (manuscript at 36-59) (discussing examples of this impact).

Similarly, the WCIA training and consultations advised members to make certain their public defenders were complying with standards of professionalism, including caseload limits, which are not mandated by constitutional doctrine.²¹⁶ Although both *A.N.J.* and *Wilbur* declined to adopt hard caseload limits, they are now routinely being written into WCIA member's public defense contracts.²¹⁷ Caseload limits, and other professional public defense standards, provide objective criteria by which insurers can manage risk. *Wilbur* incentivized the WCIA to limit the liability of its members by working with them to improve their public defense services. The result could be public defense systems where, because of lower caseloads, public defenders have time to work on cases, resulting in fewer requests for continuances, a quicker time to resolution of cases, improved advocacy, and better quantity and quality of communication with clients.²¹⁸ And, this will result in fewer lawsuits against cities and counties.

V. CONCLUSION

The next chapter in Washington's public defense reform still remains to be written. However, current improvements came about through a series of complementary strategies and decades-long efforts undertaken by public defense advocacy organizations, the state bar association, the legislature, and civil rights litigants.²¹⁹ Yet, the WCIA had the greatest impact on the actions of those responsible for administering public defense contracts within cities and municipalities.²²⁰ To be sure, the WCIA's interest in working with its members on reform was driven by the strategic litigation of *Wilbur*'s civil rights attorneys. However, proactively reaching out to insurance providers to educate them about the need for a strong public defense system, and the consequences of failing to provide such a system, is a previously untested strategy for advancing reform.

Public defense organizations are becoming increasingly aware of the need to engage in multiforum advocacy, as well as to join forces with

216. WASH. CITIES INS. AUTH., *supra* note 197, at 2-3.

217. *See id.* at 3-4.

218. *See* BILL LUCHANSKY, THE PUBLIC DEFENSE PILOT PROJECTS: WASHINGTON STATE OFFICE OF PUBLIC DEFENSE 6-8, 11-13 (2010), http://www.opd.wa.gov/documents/0058-2010_PilotProject.pdf (reporting results of caseload reduction pilot projects, which included increasing the quality and quantity of client communications, improved motion filings, reduction in case filings, and faster processing of cases).

219. *See, e.g.*, Order *In re* Adoption of New Standards for Indigent Defense and Certification of Compliance, *supra* note 157.

220. *See* WASH. CITIES INS. AUTH., *supra* note 197, at 2-5 (outlining requisite steps for municipalities to take in response to *Wilbur v. City of Mount Vernon*).

less traditional partners.²²¹ As Professor Deborah Rhode observed in a study of approximately fifty public interest legal organizations, the past three decades has brought about a decrease in the percentage of resources the organizations spend on litigation and an increase in other advocacy modalities, such as legislative work and public education.²²² She provides examples of Lambda Legal “reach[ing] out to local black ministers in the push for same-sex marriage”; the Mexican American Legal Defense and Education Fund “work[ing] with the business community on immigration issues”; and Earth Justice “partner[ing] with ranchers, commercial fishers, Native American tribes, Latino farm workers, health service providers, and the American Lung Association” on environmental issues.²²³ In an era of diminishing resources and increased competing needs for those resources, public defense reform advocates would do well to reach out to partners outside of the criminal justice community to advance their clients’ interests. As the past fifty years have demonstrated, creative and innovative solutions are needed to address *Gideon*’s unfulfilled promise.

221. See Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2332-35 (2013) (urging public defense reformers to integrate into the emerging “smart-on-crime” criminal justice reform movement and partner with other criminal justice stakeholders in this movement).

222. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2047-48 (2008).

223. *Id.* at 2065.