Parity of Resources for Defense Counsel and the Reach of Public Choice Theory

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ABSTRACT: The quality of criminal defense counsel desperately needs improving. The strategy this article explores is not a change in the legal standard governing ineffective assistance of counsel claims or a change in the Supreme Court's reasoning, but something far more fundamental: money. The author asks whether it is feasible to link the funding available for defense lawyers to the money that the government spends on prosecution lawyers—in other words, parity of resources.

The author reviews litigation to increase funding for defense counsel systems and concludes that resource parity will probably not come from the courts, at least not if they act alone. Major funding changes like this must come from the legislature, so the author reviews the prospects for resource parity in the state legislatures. The odds that legislators will vote for such a law are surprisingly good, given the willingness of Tennessee and other jurisdictions to experiment with the idea. The author explores more generally the applicability of public choice theory to crime legislation, and classifies criminal justice laws based on their different implications for this theory.

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INTRODUCTION—THE CURRENT MESS, AND A WAY OUT ................................................. 221

I. PARITY AND THE ORIGINS OF THE ADVERSARIAL PROCESS................................. 225

II. RESOURCE PARITY IN CURRENT PRACTICE.......................................................... 250
    A. SALARY PARITY .................................................................................................. 252
    B. CASELOAD AND SUPPORT SERVICES PARITY ................................................. 235
       1. Comparable Worth Issues .............................................................................. 236
       2. A Tale of Resource Parity from Tennessee ...................................................... 238
       3. Resource Parity in Other Legislatures .............................................................. 241

III. RESOURCE PARITY IN THE COURTS .................................................................... 242
    A. LITIGATION TO INCREASE DEFENSE FUNDING ............................................. 244
    B. IMPACT OF THE LITIGATION ......................................................................... 248
    C. CHANGING THE POINT OF COMPARISON ...................................................... 251

IV. RESOURCE PARITY AND PUBLIC CHOICE THEORY ............................................. 253
    A. FOUR PUBLIC CHOICE CATEGORIES FOR CRIMINAL JUSTICE LAWS .......... 255
    B. REFRAMING THE ISSUE .................................................................................. 261

V. LEGISLATIVE AND JUDICIAL SYNERGY ................................................................. 263

CONCLUSION .................................................................................................................. 268
INTRODUCTION—THE CURRENT MESS, AND A WAY OUT

Lawyers hate to admit it, but criminal defendants do get what they pay for; or rather, they get what the government pays for. Although there are genuine debates about the most efficient ways to organize criminal defense work, money can improve any chosen method of delivering defense services.¹ The laws of supply and demand are not suspended within the walls of the criminal courthouse.

Money even overshadows constitutional doctrine when it comes to improving the quality of criminal defense. Forty years ago, Gideon v. Wainwright² put defense counsel into more cases, holding that the state was obliged to provide counsel for all indigent felony defendants. Twenty years ago, Strickland v. Washington³ declared that the Constitution ensures some minimum level of quality in defense work and established the legal standard for determining when counsel provided constitutionally ineffective assistance that invalidates a conviction. But those basic constitutional guarantees have produced little improvement in defense lawyering in the average case. Year after year, in study after study, observers find remarkably poor defense lawyering that remains unchanged by this constitutional doctrine, and they point to lack of funding as the major obstacle to quality defense lawyering.⁴ The power of money, rather than constitutional

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¹ See Bob Sablatura, Study Confirms Money Counts in County's Courts: Those Using Appointed Lawyers Are Twice as Likely to Serve Time, HOUS. CHRON., Oct. 17, 1999, at 1, 1999 WL 24259732 (indicating that privately retained attorneys obtain lower conviction rates and lower sentences than publicly funded attorneys representing clients facing comparable charges). But cf. ROGER A. HANSON ET AL., INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL 103-06 (1992) (noting that publicly funded attorneys in nine jurisdictions process cases as quickly as private attorneys and obtain comparable sentences). See generally Floyd Feeney & Patrick G. Jackson, Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?, 22 RUTGERS L.J. 361 (1991) (analyzing perceptions of judges, attorneys, and defendants regarding the relative quality of three types of counsel). There are certainly situations where a state spending less can nevertheless obtain defense work of equal quality to a state spending more because of more efficient organization. For instance, there may be some economies of scale in moving from an appointed counsel to a public-defender model. See Matthew Dolan, New Study Makes Case for Public Defenders, VIRGINIAN-PILOT, Dec. 18, 2001, 2001 WL 26783618.

² 372 U.S. 335 (1963); see also Alabama v. Shelton, 535 U.S. 654, 658 (2002) (expanding the right to counsel to cases resulting in suspended sentences that might “end up in the actual deprivation of a person’s liberty” (quoting Argesinger v. Hamlin, 407 U.S. 25, 40 (1971))).


⁴ See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64, 95 (1999); Stephen B. Bright, Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1870 (1994) (noting that there exists a lack of funds to “employ lawyers at wages and benefits equal to what is spent on the prosecution”); Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 HASTINGS CONST. L.Q. 625, 655-63 (1986) (describing how poor funding weakens the Sixth Amendment guarantee of effective assistance); Robert L. Spangenberg & Tessa J. Schwartz, The Indigent Defense Crisis is Chronic, 9 CRM. JUST. 13, 13-14 (1994). About 82% of state felony defendants and 66% of federal felony defendants
standards of quality, must drive any large-scale changes for indigent defense in the future. For anyone familiar with how legislatures actually fund defense counsel for the indigent, this is a dispiriting claim. Indigent defense remains on a starvation diet in most jurisdictions in the United States. Although state and local governments periodically revisit the question and reluctantly decide to increase funding, it is more common for them to search for methods to "control the costs" of indigent defense. In normal economic conditions of modest inflation, and with normal (for our generation) annual increases in arrests, charges, and convictions, a frozen budget for indigent defense begins to run short after only a few years. Thus, those who seek adequate funding for indigent defense must return to the legislature year after year, and they hear "No" far more often than they hear "Yes."

An approach that makes some of the choices on funding for defense counsel automatic might solve the predicament. This approach would ensure that the budget increases necessary to stay at current support levels in real dollars would happen without any special legislative attention, along the lines of "cost of living" adjustments for Social Security benefits. This Article explores one such automatic device, the idea of "parity" between funding for defense counsel and the prosecution. If legislators were obliged to give roughly proportional resources to the prosecution and the defense, then the salary increases or new personnel that the legislature gives to the more popular prosecutors would lead mechanically to some comparable increase in defense funding.

Parity of resources is not the current reality in criminal justice funding. Prosecutors tend to draw larger salaries than publicly-funded defense attorneys. All too often they have lower individual caseloads than full-time public defenders and greater access to staff investigators, expert witnesses, and other resources.

Despite this current imbalance, the parity concept theoretically could become the centerpiece of constitutional standards that judges announce use publicly financed counsel. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).

5. For proposals that attempt to use vouchers to harness market incentives for better performance by individual attorneys, see generally Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 AM. CRIM. L. REV. 73 (1993); Peter W. Tague, Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England, 69 U. CIN. L. REV. 273 (2000). These proposals address the optimal use of a given pool of money but do not address the topic of this Article, which is the total amount available in the pool.

7. See infra note 42.
8. See infra notes 118-29.
10. See infra Part II.
Resource parity for the defense is not currently required under the federal or state constitutions, but glimmers of the parity concept have appeared in a few judicial opinions. Perhaps judges could interpret the Constitution to allow the criminal defendant to file a pretrial motion to block the proceedings if the defense does not have rough parity with the prosecutor in terms of compensation and caseload.

To depend on judges alone to spread this idea, however, is folly. Judicial rulings can play some role, but their reach will remain tentative and their staying power weak. In the long run, legislatures themselves must embrace parity if it is to become a meaningful part of their funding habits. Why not champion the parity concept directly to the legislature rather than relying entirely on the clumsy device of judicial rulings to deliver the goods?

For many, the short answer to the question lies in public choice theory. According to this application of microeconomic principles to the work of government officials, legislators act rationally to maximize their personal utility—that is, they vote in ways that will assure their own re-election. When it comes to legislation that could help criminal defendants, there is not much utility to maximize, because government efforts to prevent wrongful convictions and unduly harsh penalties appeal to a politically weak constituency—young males living in poverty, for the most part. Public choice theory, in this view, suggests that there is no hope for legislation to establish ongoing and automatic parity between prosecution and defense resources.

11. See infra Part III. Professor Donald Dripps has argued that the ex post standards for measuring performance of defense counsel under Strickland should be supplemented by ex ante standards that would include attention to the resources available to the defense. See generally DONALD DRIPPS, ABOUT GUILT AND INNOCENCE 179 (2003); Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997). For information documenting depressed wages and heavy caseloads of appointed defense counsel, see William Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 10-11, 70 (1997).

12. For instance, cases such as United States v. Cronic, 466 U.S. 648, 666 (1984) (rejecting presumption of ineffectiveness when an inexperienced attorney was appointed shortly before complex criminal case), make it clear that constitutional "adequacy" can fall short of providing an ideal challenge to the prosecution.


14. See infra Part III.

15. See infra Part IV.


But this pessimistic account from public choice theory, although it casts some useful light on legislative behavior, is too crude a tool to explain all criminal justice legislation. Every so often, legislatures vote for measures that incidentally benefit criminal defendants. Indeed, this happens now and then in the realm of funding for criminal defense lawyers; state and local legislative bodies in the United States have already embraced several different versions of resource parity.\(^{18}\)

In this Article, I analyze the limited experience with resource parity and ask whether the concept has any chance of becoming a viable and widespread technique for funding criminal defense. I conclude that resource parity, under the right conditions, could take hold as a funding principle in the legislative branch.

To reach this conclusion, it becomes necessary to rethink the explanatory reach of public choice theory in the criminal area. Rather than lumping all criminal justice legislation together and hypothesizing that "legislators never vote for accused criminals," we need a more refined account of the theory as it applies to criminal justice topics. It turns out that public choice theory has the most explanatory power when it comes to substantive criminal law but somewhat less power when the topic is criminal punishments. When it comes to the details of criminal adjudication, public choice theory in its simplest form gives an unreliable account of what a legislature is likely to do. In this latter setting, a legislature might enact laws that benefit criminal defendants, even though such statutes are counterintuitive under public choice theory.

Legislatures can do this when the debate becomes framed in terms of competitive balance in criminal justice or the integrity of the convictions that the system produces. When a proposed law taps into public ideals of fair treatment for public employees or reliability of the court system, legislators might vote for it despite the fact that the law happens to help criminal defendants.\(^{19}\) All is not lost for the parity principle in the legislature, after all.

Part I of this Article considers the abstract case for resource parity and how such a funding principle meshes with the history and rhetoric of the adversarial criminal justice system in the United States. Part II moves from rhetoric to practice by describing recent experience with various forms of resource parity. In a handful of jurisdictions around the country, state legislatures and local governments have committed themselves to salary parity: attorneys who work for district attorneys and for public defenders are paid on the same salary scale. And in at least a few jurisdictions, legislatures have begun to think in terms of broader resource parity, passing statutes and budgets that link overall resources for indigent defense to the resources for

\(^{18}\) See infra Part II.B.

\(^{19}\) See infra Part IV.B.
PARITY OF RESOURCES FOR DEFENSE COUNSEL

prosecution. These laws tackle the more difficult job of measuring the parity of caseloads between prosecution and defense, and the parity of support services such as access to investigators and expert witnesses.

Part III reviews recent litigation intended to improve the funding for indigent defense. The litigation has not yet transformed the face of criminal defense funding around the country, but it is starting to create a pressure point. Unfortunately, the litigation has concentrated on the wrong comparison: the litigants ask for parity among defense lawyers in different jurisdictions rather than parity between defenders and prosecutors. This posture makes it difficult for judges to change funding practices in more than a few extremely under-funded jurisdictions. Further, most of the gains in litigation could disappear in only a few years if not reinforced with changes in legislative habits.

Part IV returns to the legislative vantage point, and explores the conditions, theoretically speaking, that might lead a legislative body to adopt a principle of parity to guide its funding choices for indigent defense. The analysis suggests that resource parity has a greater chance of passage than other pro-defense legislation, such as limits on the substantive criminal law or reductions in punishments.

Finally, Part V discusses how interaction between the judicial and legislative efforts can further the parity principle, with the limited judicial successes becoming a leverage point for legislative successes. This dynamic works remarkably well in other contexts such as prison funding, and might also work here. Strangely enough, there are reasons to hope that legislators and judges can reinforce the best instincts that each of them hold on these questions of criminal justice fairness.

I. PARITY AND THE ORIGINS OF THE ADVERSARIAL PROCESS

Resource parity builds on a venerable idea: the defense function is just as important to society as the prosecution function. This proposition has deep roots in both the historical practices and the rhetoric of Anglo-American criminal justice.

Criminal justice in England and the United States was not always adversarial, and lawyers did not always dominate the proceedings. But as professional public prosecutors became involved in wider categories of cases over time, defense attorneys followed in their wake. Wherever government attorneys controlled the charging and prosecution of crime, criminal defense lawyers became available to a wider range of defendants.


Before the end of the seventeenth century, English law did not allow felony defendants to rely on counsel at trial. Defendants presented their own evidence and cross-examined any accusing witnesses themselves. For its part, the Crown did not typically employ prosecuting attorneys in ordinary criminal cases. The victim of the alleged crime presented the facts of the case, and in a few cases the victim retained a private attorney to make any necessary legal arguments. But by and large, the accuser and the defendant developed the facts, with active involvement from the judge and with no lawyers on the scene at all.

The legal bar on defense counsel participation at trial began to break down precisely in those settings where professional prosecutors appeared most often. According to John Langbein, a "steady trickle" of prosecuting attorneys began to appear for the Crown in ordinary criminal cases by the 1730s, and at that same time judges allowed defense counsel to participate in some cases, probably in an effort to equalize the prosecution and defense. By the 1780s, prosecuting attorneys became the norm in serious

22. 4 WILLIAM BLACKSTONE, COMMENTARIES *355; 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 39, § 2, at 554 (John Curwood ed., 1824). Defense lawyers were allowed earlier in misdemeanor cases, including trespass or nuisance cases, where the distinction between civil and criminal proceedings was less clear.

23. Indeed, defendants were even discouraged from consulting attorneys before the trial. See Proceedings Against Edward Fitzharris (1681), in 8 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 592 (1810) (noting that the accused was ordered to give notes of his conversation with his attorney to his wife); See The Trial of Stephen Colledge (1681), in 8 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 585 (1681) (reciting the notes given to King's counsel).


25. Id.

26. Id.; see also David Philips, Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860, in POLICING AND PROSECUTION IN BRITAIN 1750-1850, at 113 (Douglas Hay & Francis Snyder eds., 1989).

27. During the Civil War era of the late seventeenth century, the Crown used prosecuting attorneys in many treason trials; the Treason Act of 1696 made these trials the first where a defendant could present his case through an attorney. The statute declared that treason defendants should be allowed "just and equal means for defence of their innocencies . . . ." 7 & 8 Will. 3, c. 3, § 1 (1695) (emphasis added); HAWKINS, supra note 22, at 556 (stating that defense counsel is justified in treason cases because they "are generally managed for the crown with greater skill and zeal than ordinary prosecutions").

PARITY OF RESOURCES FOR DEFENSE COUNSEL

227

criminal cases in England, and a substantial number of defense lawyers also appeared in felony cases.  

Reliance on defense counsel in the United States followed a similar path: defense attorneys became a routine fixture in criminal proceedings in tandem with the expanded use of attorneys to prosecute crimes. In the daily practice of criminal law in the early national period, the most expensive legal resources available in American states with relatively few lawyers—defense lawyers, professional prosecutors, and legally-trained judges—were not often present.  

State and local governments did appoint public prosecutors, but used them for only the most serious criminal matters. Victims and complaining witnesses, occasionally represented by private attorneys, prosecuted ordinary criminal cases in “summary” criminal proceedings; the defendant personally cross-examined the witnesses and presented evidence; and a justice of the peace or magistrate (typically without legal training) presided.  

During the early nineteenth century, prosecutors became more influential as they transformed from court functionaries into elected officials with their own local constituencies. As prosecutors gained influence, the range of criminal cases they handled expanded and most criminal proceedings became affairs run by professionals. Where the prosecutor appeared, the defense attorney also became a familiar figure.


30. See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664-1776, at xcv (1944).


32. Early state constitutions and statutes guaranteed the right to counsel, thus repudiating the legal bar on defense counsel in felony cases that still existed in a weakened form in England. See, e.g., DEL. DECLARATION OF RIGHTS § 14 (1776) ("[I]n all prosecutions for criminal offences, every man hath a right ... to be allowed counsel."); PA. CHARTER, art. 5 (1701) ("[A]ll Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors.") (emphasis added); Powell v. Alabama, 287 U.S. 45, 61-65 (1932) (collecting sources); JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 9-21 (2002) (tracing the development of the constitutional right to counsel). Nevertheless, most defendants did not invoke these rights in ordinary criminal trials. See ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 48-49 (1930); Eben Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 MICH. L. REV. 1086, 1105-11 (1994).


34. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 96-104 (2003); JAMES D. RICC, The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials 1681-1837, 45 AM. J. LEGAL. HIST. 455, 457 (1996) (showing an increase in the proportion of represented felony defendants from 27.5% in 1767 to 92.1% in 1825).
The link between prosecution and defense functions that was so evident in the origins of the adversarial system remained present as the current system of indigent defense in this country took shape in the middle decades of the twentieth century. Rulings of the U.S. Supreme Court during this period set the contours of the current system of publicly-financed criminal defense. In its pivotal rulings interpreting the Sixth Amendment right to counsel, the Court explicitly invoked the need for a defendant to match the skill of a professional prosecuting attorney. For instance, in *Johnson v. Zerbst*, holding that the federal government had to appoint counsel for any indigent felony defendant in the federal system, Justice Black made this comparison between prosecution and defense: "the average defendant does not have the professional legal skill to protect himself when . . . the prosecution is presented by experienced and learned counsel."36

In *Gideon v. Wainwright*, the Court observed the connection between paid prosecutors and the practical need for defense counsel:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society . . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.37

Rulings such as *Gideon* and an upsurge of arrests and prosecutions in the late 1960s made it necessary to reshape the entire system for providing defense lawyers to indigent defendants. The system shifted from discretionary appointments of practicing lawyers to more regularized institutions such as public defender offices, contract attorneys, and lists of appointed attorneys.38 During this conversion to a more reliable (and more expensive) system meant to handle a larger volume of cases, attorneys explicitly drew parallels between public funding of defense attorneys and the public funding of prosecutors and other components of criminal justice.

For instance, the 1963 report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (the "Allen

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35. 304 U.S. 458 (1938).
36. *Id.* at 462-63.
37. 372 U.S. 335, 344 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972) (Burger, C.J., concurring) ("[S]ociety's goal should be that the system for providing the counsel and facilities for the defense should be as good as the system which society provides for the prosecution." (quoting STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 1 (Approved Draft 1968))).
PARITY OF RESOURCES FOR DEFENSE COUNSEL

Report”), which formed the basis for reorganization of the defense function in the federal system and in several states, took up these themes. Proper funding of indigent defense, said the Committee, is unlike any other “charitable” spending on behalf of the poor, in part because the government itself initiates the criminal process. The public has equivalent obligations to fund the defense along with the other components of the justice system:

The proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.\(^39\)

The history and rhetoric of the adversarial system point to a general principle: When the public funds a skilled professional on the prosecution side, taxpayers should also fund a skilled professional on the defense side. Such a principle might not resonate with those working in a civil law inquisitorial system, but it speaks clearly to the adversarial tradition of Anglo-American criminal justice.

This history and rhetoric do not resolve neatly into a requirement of precisely equal funding for prosecution and defense. Perhaps, following Blackstone’s libertarian principle that it is better to acquit ten guilty men than to convict one innocent man, it might be wise to fund the defense function more generously than the prosecution.\(^40\) At the same time, a jurisdiction might spend more for prosecution than for defense and still honor the principle that both functions are equally important. A government purchasing these legal services might get comparable levels of prosecution and defense for different prices.\(^41\) After all, prosecutors do not perform exactly the same functions as defense attorneys. We turn now to the challenges of matching the work of prosecutors with comparable functions.

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39. REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10–11 (1963) [hereinafter ALLEN REPORT]. Whitney North Seymour, head of the American Bar Association Special Committee on Counsel for the Indigent, said in a 1963 speech that the obligation to provide counsel for the indigent accused is “as much a part of the public obligation to support [the criminal justice system] as the provision of courthouses, judges, attendants, and prosecutors.” ANTHONY LEWIS, GIDEON’S TRUMPET 198 (1964). See also James R. Neuhard & Scott Wallace, The Ten Commandments of Public Defense Delivery Systems, in 1 COMpendium OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS 6, 12 (Neil Miller & Peter Ohlhausen eds., 2000) (“If one leg of the structure comprising the prosecution, the court, and the defendant is fundamentally and chronically weak, the justice system’s classic three-legged stool will collapse.”).

40. WILLIAM BLACKSTONE, COMMENTARIES *352 (1769) (“[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer . . . .”); see also Murray L. Schwartz, The Zeal of the Civil Advocate, 1983 AM. B. FOUND. RES. J. 543, 547 (proposing postulates of “equal competence” and “equal adversariness” for all civil litigation but allowing for defense advantages over prosecution in criminal matters).

41. See infra Part II.B.1.
of the defense attorney, with the aim of producing equally reliable services on the prosecution and defense sides.

II. RESOURCE PARITY IN CURRENT PRACTICE

The equal importance to society of prosecution and defense may get recognition in judicial opinions and in historical accounts of the adversarial process, but the idea gets neglected in today's legislatures. When legislatures consider possible changes to the organization or funding of criminal defense, they normally talk about ways to bring spending down, rather than asking how it compares to prosecution spending. It is common to hear legislators ask for ways to contain the costs of criminal defense alone, rather than criminal justice as a whole.42

When we move from rhetoric to results, it becomes even clearer that parity between prosecution and defense is not the usual operating principle for funding in the legislature. By and large, entry-level prosecutors earn higher salaries than entry-level public defenders. The salary differences persist at every level of experience; prosecutors earn more from bottom to top of the seniority scale.43 While there are many talented and even heroic lawyers who accept the lower salary to become defenders, in the long run defender organizations find it difficult to retain experienced attorneys at a lower salary.44

42. See Ken Armstrong & Justin Mayo, Frustrated Attorney: You Just Can't Help People, SEATTLE TIMES, April 6, 2004, at A1 (describing legislative efforts in 1989 and later to control costs of defense in Washington state); John Caher, Court of Appeals Reviews Staffing in Capital Cases; Fees for Additional Attorneys and Paralegals Challenges, N.Y. L.J., Mar. 11, 2002, at A1 (speculating that the governor's threat to withhold payments from defense attorneys was intended to control costs); Thomas A. Fogarty, Branstad Puts Brakes on Plan to Boost Pay of Some Lawyers, DES MOINES REG., May 1, 1997, at 5A ("The cost of indigent defense is going off the charts.").

Even when actual funding increases become realistic, legislators usually discuss the step as necessary to avoid a "crisis." See, e.g., Andy Court, Is There a Crisis?, AM. L.AW. Jan./Feb. 1993, at 46.


Prosecutors can also fare better than full-time state-funded defense attorneys when it comes to workload. Thus, even if defense attorney salaries matched prosecutor salaries (and therefore attracted comparable legal talent over the long haul), the difference in caseload in some jurisdictions would still mean that there is no parity of funding, on average, for each case.

Finally, prosecutors have greater access to investigators and experts than the typical publicly funded defense attorney. Putting aside the police resources necessary to build a case file to present to the prosecution, the government often spends further resources for a follow-up investigation to strengthen the case in ways identified by the prosecutor's reading of the file. Prosecutors also turn to expert assistance and testimony relating to scientific evidence more often than the defense. All of these components—salary, workload, and support services—combine to produce an overall gap in spending between the prosecution and defense functions.


46. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001, at 2 (May 2002) (reporting national survey results revealing that staff investigators comprise 9.4% of personnel in prosecutors' offices; large offices employ average of 43 investigators, compared to 151 prosecutors).


48. See NLADA LOUISIANA REPORT, supra note 45, at 53–55, 125 (reporting that prosecutors outspend defense statewide by nearly three to one, not including police investigative resources); Alan Cooper, Standards of Justice Needed in Virginia, Critic Says, RICHMOND TIMES-DISPATCH, Mar. 21, 2003, at B3 (discussing a report of the Virginia Indigent Defense Coalition that gives the state an “F” grade for “parity in the resources available to defense counsel and the prosecution”); Kim Taylor-Thompson, Effective Assistance: Reconceiving the Role of the Chief Public Defender, 2 J. INST. STUD. LEGAL. ETHICS 199, 202–03 (1999) (detailing budget difficulties for public defenders in 1990s); Margaret Graham Tebo, Promise Still Unfulfilled, 89 A.B.A. J. 71 (2003) (quoting ABA Standing Committee on Legal Aid and Indigent Defendants Chair L. Jonathan Ross saying that hearings will "shed light on the lack of parity between the resources available to the state versus those available to the defense"). But see HANSON, supra note 1, at 93–100 (finding rough parity of salary and support staff in nine jurisdictions in 1989, but heavier prosecution funding for training, legal research, and expert witnesses).

Macro-level spending gives some glimpse of the lack of parity at the local and case level. A survey of 81 of the nation’s most populous counties in 1999 shows $1.1 billion spent on indigent defense services and $1.9 billion spent on prosecution services. BUREAU OF JUSTICE...
A. Salary Parity

The easiest form of resource parity to defend is salary parity. It is also the form of parity that has made the greatest impact on current practice, and offers the best hope that a parity standard can take root and spread.

The "standards" that professional groups have developed to identify the best practices in structuring indigent defense programs explicitly call for parity of salary between prosecutors and defenders. For instance, the ABA Standards on Providing Defense Services say that attorneys and staff in defender offices should be paid at a rate "comparable to that provided for their counterparts in prosecutorial offices." On a rhetorical level, parity between prosecution and defense funding does get mentioned in some policy debates.49

More striking than the rhetoric, however, is legislation passed in some jurisdictions that embodies some form of salary parity. A Connecticut statute, passed in 1974, provides that the "salaries paid to public defenders, assistant public defenders and deputy assistant public defenders in the superior court shall be comparable to those paid to state's attorneys, STATISTICS, U.S. DEP’T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 3 (Nov. 2000). Given that 82% of felony defendants in state court receive publicly funded lawyers, we might expect to see $1.56 billion spent on defense in those counties if the budgets were comparable. For some potential explanations for this gap, see infra Part II.B.

49. STANDARDS ON CRIMINAL JUSTICE, 5-4.1 (1993); see also NAT'L STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.2 (1974) (stating that salaries for all staff should "in no event be less than" salaries for comparable positions in prosecutor's office). Other standards use trial judge salaries or compensation for private defense attorneys as the relevant comparison points. See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, Standards 13.7, 13.11 (1973) (requiring that a chief public defender be paid at a rate comparable to a presiding judge of trial court and that assistant defenders in their first five years of service be paid comparably to associates in a local law firm); NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS, Standard 4.7.1 (1989), http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel (on file with the Iowa Law Review) (stating that compensation for assigned counsel should be paid commensurate with other contracted work, such as work contracted by the Attorney General).

50. See NATIONAL SYMPOSIUM REPORT, supra note 44, at 14; Spangenberg Group. Illinois Task Force Proposes Increased State Funding for Indigent Defense, SPANGENBERG REPORT, Feb. 2001, at 5 (proposing that the state fund two-thirds of a full-time chief defender's salary if the local government sets the salary at 90% or more of the local state attorney's salary); Gary Neil Astek, Today, The Right to Counsel Needs More Protection, MORNING CALL (Allentown, Pa.), July 6, 2003, at A17 (arguing for "controlled caseloads, parity between defense counsel and prosecution with respect to resources, investigators, and expert witnesses"); Peter Wong, Single Agency to 'rake Over Public Defense, STATESMAN JOURNAL (Salem, Or.), Aug. 28, 2001, at 5C (discussing Chief Justice Carson's request for a $10.5 million budget increase to increase hourly rates paid to lawyers and defense investigators and his request "to let the pay of public defenders achieve parity with prosecutors").
assistant state's attorneys and deputy assistant state's attorneys in the various judicial districts in the court.51

Although statutes that explicitly require parity of salary are unusual, examples of parity in practice appear throughout the country. The most visible example comes from the federal system, where federal public defenders are paid on the same scale as Assistant United States Attorneys.52 The same is true in the military justice system, where the prosecution and the defense draw attorneys from the same pool of certified attorneys and pay them at the same rate.53 Parity of salary is also the practice in Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming.54 Some local jurisdictions also offer salary parity, such as Orange County, California and Maricopa County, Arizona.55 Nationwide, recent surveys indicate that salary parity is the norm rather than the exception for the largest public defender offices.56

Salary parity is easier to achieve than other forms of resource parity. Salaries are relatively easy to equalize because they present few measurement problems: salaries for all government attorneys depend heavily on years of experience, so it is easy to identify the relevant comparison points for prosecutors and defenders. An attorney with three years' experience in the district attorney's office compares naturally to an attorney with three years' experience in a public defender's office.57

51. CONN. GEN. STAT. § 51-293(h) (1974). The original statute applied as well to defenders in the court of common pleas, but it was amended in 1976 to cover only defenders in superior court. Id. § 51-293 note.
55. See N.C. INDIGENT DEF. STUDY COMM'N, REPORT AND RECOMMENDATIONS 4 (2000) (stating that in North Carolina, salaries and benefits for public defenders and district attorneys have historically been the same, with the major exception of retirement); Spangenberg Group, Kentucky, supra note 54, at 13 (Orange County and Los Angeles County, California; and Maricopa County, Arizona); cf. Ariz. Stat. §11-582 (requiring that public defenders earn at least 70% of the salary of the prosecutors).
56. See HANSON, supra note 1, at 94–95 (observing that salaries are nearly at parity in the nine jurisdictions surveyed); Wallace, supra note 52, at 16 (discussing NLADA survey).
57. Setting the proper compensation rate for appointed counsel is more difficult, because it requires some method of converting a prosecutor's annual salary into either an hourly rate or a per-case fee. The rate for appointed counsel would also have to include some estimate of the "overhead" costs that prosecutors devote to cases in the relevant category. These complications, however, should not be a major obstacle in reaching salary parity.
In reality, attorneys with comparable years logged in the two types of offices might develop different skills, and their organizations might value them differently. For instance, if the public defender's office experiences a higher turnover rate among attorneys than the local prosecutor's office, one might argue for increasing the pay scale more quickly in the public defender's office. But years of experience, although an imperfect measure of value, does create a comparison point for salaries based in the realities of criminal practice.

If a government endorses the equal social value of the prosecution and defense functions, it is difficult not to embrace salary parity. It is not so clear, however, which institution of government will adopt the principle. The state legislature might explicitly endorse salary parity and include this requirement in spending and appropriation statutes dealing with defense and prosecution budgets. On the other hand, the legislature might remain silent on this question by delegating the decision about salary parity to others. Perhaps administrators at the state level (within the court system or another body that requests and distributes the funds for defense attorneys) have the power to set pay scales and can implement pay parity without specific statutory guidance. Or perhaps the question shifts to the local level, as local legislative bodies (such as the city council or county commission) or local administrators make the relevant choices about the pay scale for defenders.58

The government can also address the question indirectly when attorneys for the prosecution and the defense belong to an association or union and negotiate their salaries in a single contract; in this setting, the government's contracting unit is the key policy maker.59 The legislature funds salary parity as a question of labor relations rather than as a direct statement about the relative value of the prosecution and defense functions.60

58. See NATIONAL SYMPOSIUM REPORT, supra note 44 (discussing parity in New Mexico and Connecticut). For a survey of the state and local sources of funding for defense counsel, see Spangenberg & Beeman, supra note 38, at 42-44. In 1999, states provided 35.4% of the funds for judicial and legal services in the criminal justice system; local governments provided 43.2% of the funding. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 1999, at 4 (2002).

59. See Staff, Appeals Court Rej ects Bid by Deputy Public Defenders in Riverside to Replace SEIU in Pay Parity Battle, METROPOLITAN NEWS-ENTERPRISE (L.A., Cal.), Mar. 18, 2003, at 1 (discussing a public defenders' attempt to form a new registered employee organization when Service Employees International Union failed to retain salary parity with prosecutors in a new contract with Riverside County); Tracy Wilson, Supervisors OK Pay Hike For County's Attorneys, L.A. TIMES, Oct. 6, 1999, at B1 (discussing prosecutors and public defenders in Ventura County who belong to the same union and negotiated a single contract with a pay increase designed to retain prosecutors that also extended to defenders).

60. Defense lawyers themselves have some influence over events and can increase their negotiating strength through concerted action such as a refusal to accept certain types of plea bargains. See Robin Topping, Attorneys Protest Low Pay for Indigent Cases, NEWSD AY, Jan. 17, 2001,
PARITY OF RESOURCES FOR DEFENSE COUNSEL

B. CASELOAD AND SUPPORT SERVICES PARITY

The next steps toward resource parity go beyond parity of salary. Such further steps, while more difficult politically and technically, are necessary if the functional equality of prosecution and defense is to become reality. If each attorney in a defender's office earns a salary comparable to that of a prosecuting attorney, but each defender carries a dramatically heavier caseload, the equality of salary among the attorneys will mean little to the criminal defendant. The defender will still have less time to spend on the case, and the prosecution will enjoy a systematic advantage. Similarly, if the prosecutor can rely on investigators and other experts to strengthen the case while the well-paid public defender has no access to support services, there is no meaningful parity.

Those who work for improved quality in criminal defense work recognize the need for this broader form of equality between prosecution and defense. Aspirational benchmarks, such as the ABA Standards, call for equal access to support services and rough comparability of workload. The gloomy reports that assess indigent defense periodically mention equalized caseloads and support services as part of the solution.

at A31 (reporting about a week-long strike organized by attorneys to protest against low hourly rates for counsel appointed to represent indigent defendants in New York); cf. Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179, 1249-53 (1975) (discussing public defenders use of coordinated refusals to plead guilty as a "strike" against blanket prosecutorial decisions with which they disagree). However, a boycott on accepting new cases by members of a local association of defense attorneys constitutes an antitrust restraint of trade. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

61. See STANDARDS FOR CRIMINAL JUSTICE, AVOIDING DEFENSE SERVICES, Standards 5-1.4, 5-4.3 (1993) (calling for parity in technology and legal research tools, and for "supporting services necessary to an adequate defense"); ALLEN REPORT, supra note 39, at 39-40 (discussing the need for pretrial investigation and expert witnesses); NAT'L STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.4 (1976) (recommending various nonpersonnel resources that should be available to defenders).

62. STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4.1.3(c) (1993) (finding that defense counsel "should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations"); id. Standard 5-5.3; NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES §§ 5.1, 5.3 (1976) (recommending that "every defender system should establish maximum caseloads for individual attorneys in the system," and caseloads should reflect national standards and consider objective statistical data); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON COURTS 276 (1975) (stating that caseloads should not exceed 150 felonies per year; 400 misdemeanors; 200 juvenile cases; 200 Mental Health Act cases; or 25 appeals).

63. See ABA VIRGINIA REPORT, supra note 43, at 59-68; RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS 11-13 (1993); NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR, at F-1 to F-68 (1982); SPECIAL COMM. ON CRIM. JUST., CRIMINAL JUSTICE IN CRISIS 31-44 (1988); NATIONAL SYMPOSIUM REPORT, supra note 44, at 14 (advocating the need to maintain "comparable staffing and workloads" and parity in "support.
1. Comparable Worth Issues

An agreement in principle that individual prosecutors and full-time defenders deserve equivalent caseloads and support services leaves many difficult questions unresolved. A legislature cannot simply mandate that prosecutors and public defender offices employ the same number of attorneys, because prosecutors and defenders do not work on precisely the same cases and do not perform comparable work on each case.

Prosecutors handle many less serious cases in which defendants represent themselves. They also devote time to some matters that they decline to charge or cases that they divert from the criminal justice system before a defense lawyer is assigned to the case. Prosecutors also staff cases that are defended by private attorneys or counsel appointed to a case to prevent a conflict of interest within the public defender's office. Prosecutors might provide victim support that has no counterpart on the defense side, although public defender offices might offer support to the families of defendants.

Conversely, some public defender offices handle certain juvenile matters or lesser crimes prosecuted by government attorneys other than those assigned to the district attorney (for instance, those working in the City Attorney's office who prosecute criminal violations of ordinances). Multi-defendant cases that one prosecutor can litigate alone often must be staffed with several defense attorneys to avoid conflicts of interest. Moreover, current Sixth Amendment law triggers the right to counsel too late for the modern realities of plea-bargain justice and recognizes too little of the sentencing process as a “critical stage” requiring representation. If investigative, and expert services, physical facilities such as a law library, computers, and proximity to the courthouse”.


66. When it comes to staff support parity, it would be cumbersome to match each category of support for prosecution with some comparable position for the defense. Defender organizations may require a different blend of support services than prosecutors and need the flexibility to change the type of support over time. Establishing a very general "staff to attorney ratio" for the prosecution, and matching that ratio for the defense, might provide rough parity on this question without delving into too much administrative detail. See TENN. CODE ANN. § 8-14-202(e) (establishing five-to-one ratio of defense attorneys to investigators in Public Defender offices).


PARITY OF RESOURCES FOR DEFENSE COUNSEL

budgets were set with these realities in mind, defense lawyers would be available at more points in the process for each defendant.

Even for those cases that call for a single government attorney for both the prosecution and the defense, it is not clear that the two attorneys should invest equal hours in the case. For some categories of cases, it might require more hours to assemble witnesses and other evidence to carry the government's burden of proof, or the legal research and writing necessary to respond to defense challenges to the evidence. In other categories of cases, it may require more hours for the defense attorney to investigate the case and assemble the legal and factual challenges to the government's evidence.

Support services are also difficult to equalize. The largest question is how to account for the work of police officers on a case. Should the police count as support for the prosecution, whose efforts must be matched by investigators or other support services for the defense? At the very least, defense attorneys should insist that they need to match the hours of investigation that the prosecution performs after the police deliver the case file. Prosecutors often supplement the investigative file that the police refer to them, sometimes by directing further efforts by police officers and at other times through the work of investigators formally assigned to the prosecutor's office.69

The defense should also have equal access to physical tests performed in crime laboratories, even though the prosecution uses state and federal forensic services that do not appear in the prosecutor's office budget. The same holds true for expert witnesses such as psychiatrists: the prosecution often can employ experts on the state payroll (meaning that the expense does not visibly increase the prosecutor's budget), but the defense must pay for access to comparable services.70


70. Sometimes resources will come from one-time grants from private foundations or from the federal government for particular training or equipment. The federal government occasionally funds state and local prosecution but not defense functions. See Crime Identification Technology Act of 1998, Pub. L. No. 105-251, 112 Stat. 1871, tit. I (1998) (providing $1.25 billion to fund technology for state and local agencies, including judiciary and prosecution, but not for defense); Wallace, supra note 52, at 16-17 (detailing training programs funded at federal level for state and local prosecutors and judges but not for defense attorneys). While state legislatures might, on an ad hoc basis, match some of these prosecution resources through additional appropriations for the defense, it is more likely that defender organizations will find it necessary to match these prosecution grant funds with their own external fundraising efforts. See Spangenberg Group, Alternative Revenue Sources: Snapshot of a National Trend, SPANGENBERG REPORT, Fall 1995, at 1-6.

On the other hand, the prosecution regularly receives income from asset forfeiture programs. See JIMMY GURULÉ & SANDRA GUERRA, THE LAW OF ASSET FORFEITURE § 2-2 (1998). To the extent that these funds allow prosecutors to hire personnel and perform their ordinary functions, forfeiture proceeds should count as a form of income for prosecutors to be matched on the defense side (perhaps by sharing in the asset forfeiture distributions).
There might be no clean conceptual solution to all of these nettlesome questions. But national professional organizations have developed workable methods of measuring attorney caseloads and support services; such measurements allow for some rough comparisons between prosecution and defense. In reality, such comparisons already crop up in an ad hoc fashion during budget negotiations for particular public defender offices.

2. A Tale of Resource Parity from Tennessee

Tennessee offers one interesting example of an effort to measure, compare, and equalize caseloads between prosecution and defense. It all started when legislators in the state began to link together the budgets for prosecution and defense personnel.

Before 1989, all but two counties in Tennessee depended on appointed counsel. That year, the legislature created a statewide District Public Defenders Conference and set funding levels for the new organization according to a general formula: public defenders would receive half the amount of funds devoted to prosecutors. Within their first two years of operation, the new public defender offices demonstrated that funding at this level was not adequate. So in 1992, the legislature reset the figure at seventy-five percent. Prosecutors, whose own requests for additional


72. See Spangenberg Group, The Balance Sheet Approach to Accurately Comparing Prosecution and Defense Resources, SPANGENBERG REPORT, July 1997, at 1; Nat’l Legal Aid & Defender Ass’n, Indigent Defense Caseloads and Common Sense: An Update 31–32 (1992) (developing a measure for average number of attorney hours available per year and standard times required to handle a typical mix of cases for defender office).

73. Telephone Interview with Mark Stephens, Public Defender for Knox County, Tennessee (July 12, 2004). The amount was based on an initial estimate of the proportion of cases in the state defended by public defenders, as opposed to privately retained counsel and appointed counsel. Public defender offices were expected to handle about half of the total cases. Telephone Interview with Wally Kirby, Executive Director, Tennessee District Attorneys Association (May 5, 2003); Telephone Interview with Andy Hardin, Executive Director, Tennessee District Public Defender Conference (July 7, 2004).

74. See John B. Arango, Tennessee Indigent Defense System in Crisis, CRIM. JUST., Spring 1992, at 42 (stating that the 1992 public defender budget was reduced 5.3% from the previous year). In November 1991, the Knox County Public Defender filed a motion asking the General Sessions court judges to suspend further case appointments because its staff was overextended. The court responded by notifying the members of the bar that each member would be expected to take an appointment in a criminal case to reduce the backlog. See SPANGENBERG GROUP, TENNESSEE PUBLIC DEFENDER CASE-WEIGHTING STUDY 2 (1999), http://www.comptroller.state.tn.us/orca/reports/pubdef.pdf (on file with the Iowa Law Review) [hereinafter TENNESSEE DEFENDER STUDY].
funding were being ignored while the state money flowed to the new defense offices, struck back. In 1994, they convinced the legislature to remove the linkage at the state level between prosecution and defense funds. The amended statute retained the seventy-five percent ratio, but applied it only to local government funding.\(^\text{76}\) Since virtually all funds for prosecution in Tennessee derive from the state government rather than local governments, the remaining statute did not govern most of the pertinent funding choices. Still, the seventy-five percent figure remains a de facto funding ratio at the state level; budget discussions in Tennessee treat this ratio (or something close to it) as the presumptive outcome, even though it has no statutory basis.\(^\text{77}\)

For the next four years, both the prosecutors and public defenders took their own funding proposals to the legislature; not to be outdone, the judiciary in Tennessee also made regular requests for more staffing.\(^\text{78}\) The lawmakers turned aside virtually all of these funding requests, and became convinced that these nominally unconnected funding requests were actually closely related.\(^\text{79}\) In 1998, the legislature instructed the prosecutors, the public defenders, and the judges to conduct three separate “weighted caseload” studies and to make any requests for new funding in light of the caseload information.\(^\text{80}\)

The three studies were prepared by contractors under the auspices of the State Comptroller’s Office.\(^\text{81}\) The study of prosecutor caseloads was

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\(^{76}\) The amended statute now provides:

From and after July 1, 1992, any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75\%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense.

TENN. CODE ANN. § 16-2-518 (1998). The 1994 legislation also adopted salary parity between district attorneys and public defenders. The funding ratio at the local level remains important, however, because district attorneys are often powerful figures in local politics and can convert that political influence into local funding.

\(^{77}\) Telephone Interview with Wally Kirby, supra note 74; Telephone Interview with Gerald Melton, Chief Public Defender, 16th Judicial District, Murfreesboro, Tenn. (July 7, 2004). Because of poor data collection and reporting in the misdemeanor courts, it remains unclear what percentage of defense attorney hours are provided by the public defenders and thus what funding ratio the legislature should use.

\(^{78}\) Telephone Interview with Wally Kirby, supra note 74; Telephone Interview with Andy Hardin, supra note 74.

\(^{79}\) See NATIONAL SYMPOSIUM REPORT, supra note 44, at 30.


\(^{81}\) AM. PROSECUTORS RESEARCH INST., TENNESSEE DISTRICT ATTORNEYS GENERAL WEIGHTED CASELOAD STUDY (1999), http://www comptroller.state.tn.us/orea/reports/distatt.pdf (on file with the Iowa Law Review); NAT'L CTR. FOR STATE COURTS, TENNESSEE JUDICIAL
assigned to the American Prosecutors Research Institute, a research group affiliated with the National District Attorneys’ Association. The defender study was performed by the Spangenberg Group, a national consulting firm dealing with advocates for indigent defense funding, while the National Center for State Courts completed the study of judicial caseloads. For all three studies, the agency in question collected time sheets and other data on the typical hours devoted to various common tasks in criminal adjudication, creating an estimate of the total number of hours (and thus the number of attorney or judge positions) necessary to complete the cases coming into the system. The three studies shared common assumptions in tabulating the number and type of criminal cases that each of the offices would normally handle.

When the studies were complete, the prosecutors requested an additional 126 positions, an increase of 34% from the 375 funded positions at the time. The defenders requested an extra 56 positions, a 22% increase above their 250 funded positions. Finally, the judicial study indicated that the state already employed 11 too many judges.

The Tennessee legislature did not respond right away to the hiring requests based on the weighted caseload studies; tight budget years required attention to other state priorities. But in June 2004, after a decade of stalemate over new criminal justice hiring, the legislature authorized the district attorneys to hire 30 new positions and the public defenders to hire 18 new positions. It is striking that the legislature treated the new hires as a package. While the new defender positions only amounted to 60% of the prosecutor positions, the defenders received a slightly larger proportion of their request, as documented in the 1999 weighted caseload studies.

The moral of this story is not entirely clear. The Tennessee experience perhaps suggests that parity of resources will not take hold right away; the results so far suggest only an ad hoc commitment to linking prosecutor and defense funding rather than routine parity of funding for prosecution and defense. Yet the Tennessee legislature, despite its various changes in course, did develop an overarching insight about parity. It remained convinced over

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82. AM. PROSECUTORS RESEARCH INST., supra note 81, at 45.
83. TENNESSEE DEFENDER STUDY, supra note 75, at 68.
84. NAT’L CTR. FOR STATE COURTS, supra note 81, at 25.
85. Telephone Interview with Wally Kirby, supra note 74. Indeed, budget shortfalls required state agencies to cut their budgets in recent years, resulting in the loss of a few positions for both prosecution and defense. See Brian Lazenby, Layoffs Seen Likely for State Attorneys, CHATTANOOGA TIMES FREE PRESS, April 14, 2003, at B1 (reporting on the effects of budget cuts on attorney employment).
86. Dick Cook, More Money for Court Cases, CHATTANOOGA TIMES FREE PRESS, June 1, 2004, at B2; Telephone Interview with Andy Hardin, supra note 74.
87. See supra notes 82–83 and accompanying text.
time that there was a connection between prosecution, defense, and judicial resources for criminal justice, for the sake of fairness and efficient use of public funds. That insight alone places criminal defense in a better funding position than when public defense must convince the legislature that a crisis of constitutional proportions has arrived.

Caseload studies of the sort used in Tennessee handle some of the comparability issues raised above. The prosecutors and defenders, based on shared assumptions about the number and type of cases in the system, reach consensus on the number of positions necessary to meet ordinary professional standards in their system. If consensus is too much to expect, the basic formulae for conversion of caseload into comparable workloads for both prosecutors and defenders might be entrusted to a third party, such as an administrative body within the judiciary or an existing sentencing commission in the state. A parity law might require prosecutors and defenders to create and update such studies on a regular basis, and commit the legislature to fund the same percentage of certified positions for each side.

3. Resource Parity in Other Legislatures

Defense caseloads and funding might track the overall levels of prosecution caseloads and funding in places other than Tennessee; indeed, other states have also begun to explore this territory beyond salary parity. In Connecticut, the state funding targets for public defense are set at about two-thirds the level of funding for the prosecution.88 A New Mexico law links new public defender staffing to new judicial staffing rather than to prosecutorial resources.89 More generally, legislatures in many subject areas grow accustomed to hearing the funding requests of complementary players in a single system and sometimes require a coordinated budget request from them.90

The parity principle does not always lead to an increase in the defense budget. There may be jurisdictions where the current prosecutorial

88. See NATIONAL SYMPOSIUM REPORT, supra note 44, at 16.
89. See David J. Carroll, U.S. Department of Justice, Bureau of Justice Assistance and American Bar Association, Bar Information Program State Commissions Project: The Year in Review, SPANGENBERG REPORT, Feb. 2000, at 6-7 (reporting that a Vermont Task Force proposed a reduction in defender workload by requiring corresponding defense budget increases for all new legislative enactments affecting defender workloads); NATIONAL SYMPOSIUM REPORT, supra note 44, at 16 (describing the New Mexico Balanced Justice Act); Spangenberg Group, 1996 State Legislative Sessions Scorecard: Developments Affecting Indigent Defense, SPANGENBERG REPORT, June 1996, at 5 (indicating that a New Mexico governor vetoed an earlier parity bill, pegging defense expenditures at 75% of total appropriations for prosecution).
90. See RONALD F. WRIGHT, MANAGING PRISON GROWTH IN NORTH CAROLINA THROUGH STRUCTURED SENTENCING (1998) (Nat'l Inst. of Justice, Program Focus, NCJ 168944; coordinated funding requests for community sanctions replaced budget requests from different agencies and programs).
workload is higher than the comparable defense workload. If a legislature embraces the parity principle, it might ignore the effects on the defense of cost inflation or increased arrests or case filings, provided that these forces have proportionally the same effect on the prosecution. Indeed, a legislature might decide to cut budgets from both the prosecution and the defense in proportional amounts.

The growing acceptance of salary parity, together with the more tentative experiments with broader resource parity based on weighted caseload studies and coordinated funding requests, suggest that some benefits for the defense can emerge from the legislature. Yet the various forms of parity remain the exception rather than the rule; the concept remains more important in aspirational statements than it is in budgetary practice. Which institutions and arguments might bring resource parity more into the mainstream of practices for funding indigent defense? The next Part of this Article explores the prospects for achieving resource parity through litigation in the courts.

### III. RESOURCE PARITY IN THE COURTS

Every year, courts respond to a torrent of traditional ineffective assistance of counsel claims, detailing in case after case the failings of individual lawyers. This litigation is especially fertile in the capital context. But these “ineffective assistance” constitutional claims offer no relief for most defendants, since only the most unthinkable gaffes by defense attorneys can overturn a conviction. Part of the problem lies in the nature of the test chosen in *Strickland v. Washington* for measuring ineffective assistance of counsel. Commentators have diagnosed all sorts of problems with this standard, each of them debilitating. The “performance” prong of the test is phrased generally, without reference to any specific tasks to be performed by minimally competent lawyers; courts have enthusiastically

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92. See, e.g., People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (finding the lawyer was not ineffective even though he consumed large amounts of alcohol on trial days and was arrested for drunk driving en route to the courthouse); Richard Klein, The Constitutionalization of Ineffective Assistance of Counsel, 58 MD. L. REV. 1433, 1445–78 (1999); Jeffrey Levinson, Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel, 38 AM. CRIM. L. REV. 147, 151–54 (2001).


applied the presumption of competence that the Supreme Court created; the prejudice prong saves many cases despite substandard defense lawyering. Indeed, the very attorney responsible for the poor performance is also responsible for creating the record on appeal that could demonstrate prejudice.

The problem goes deeper than the particular formulation of a standard that the Strickland court chose. Even a prejudice test phrased with a standard of proof easier for defendants to meet, or a standard without any formally announced presumption of adequate representation, would still lead to an overwhelming number of convictions affirmed on appeal. So long as the constitutional standard requires appellate courts to judge individual cases retrospectively, successful claims will be the exception rather than the rule. Any other pattern of outcomes would conflict with deep-seated beliefs about the modesty of the judicial role.

The amount of money that legislatures devote to criminal defense will influence the judicial definition and interpretation of the quality standards. Judges might be willing to stop the aberrations to cull the very weakest efforts at criminal defense. But the judges also allow the legislature, through funding choices, to set the average for criminal defense. Judges responding to claims of ineffective assistance of counsel then apply the minimum standards in light of that average.

Granted, the causation might sometimes run from the judiciary to the legislature: constitutional standards could affect the amount that

generally Bruce A. Green, Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment, 78 IOWA L. REV. 433 (1993) (arguing for experience qualification standards).
governments spend on criminal defense. If courts declare that a certain quality of representation is necessary to obtain a valid criminal conviction, legislative bodies will spend enough to meet the standard. But the experience with retrospective standards over many decades, together with a tradition of a limited judicial role, suggests that causation will ordinarily run from the legislative funding choices to the judicial interpretation of quality standards.

The retrospective ineffective assistance of counsel cases, however, do not exhaust the possible judicial contributions to the quality of defense attorneys. This Part surveys cases that pursue an alternative strategy, directly addressing the funding for defense counsel. It then analyzes the current limits of this litigation and suggests how the strategy must evolve before it can prompt widespread changes in the quality of criminal defense lawyering.

A. LITIGATION TO INCREASE DEFENSE FUNDING

Increasingly over the last twenty years, litigants have questioned the adequacy of the overall system for compensating the attorneys of indigent defendants. These challenges take several different forms, generating challenges to the funding for both appointed counsel and public defenders. With very few exceptions, however, the claims succeed only when they are confined to the compensation for attorneys in an individual case. Until recently, courts rejected challenges that extended beyond a particular case to the systemic funding arrangements for all criminal cases.99

Attorneys themselves raised some of the earliest challenges to the funding arrangements for appointed counsel, arguing that statutory caps on compensation amounted to an unconstitutional "taking" of the attorney's property in a particular case. At first, these claims failed because the courts reasoned that attorneys carried a professional obligation to represent indigent defendants without compensation.00

Over time, however, more courts bowed to the reality that criminal defense work requires specialized

99. See infra text accompanying notes 103–07.

100. See Williamson v. Vardeman, 674 F.2d 1211, 1215 (8th Cir. 1982) (holding that requiring an attorney to represent an indigent without compensation is not a taking of property without just compensation); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965) (same); Sheppard & White v. City of Jacksonville, 827 So. 2d 925, 931 (Fla. 2002) (rejecting a challenge to the hourly rate set by the chief judge for appointed counsel in capital cases; also ruling that the inability to make a profit or cover expenses is not a sufficient basis for overturning a conviction on constitutional grounds); State v. Ruiz, 602 S.W.2d 625, 627 (Ark. 1980) (holding that each attorney has taken an oath requiring the performance of services without compensation if necessary); In re Attorney Fees of Meizlish, 196 N.W.2d 129, 135 (Mich. 1972) (avoiding constitutional grounds, the court upheld an award for attorney fees for representing an indigent defendant, because the court was willing to work toward increased compensation but was not ready to thrust that burden on counties yet); Huskey v. State, 743 S.W.2d 609, 611 (Tenn. 1988) (stating that the license to practice law includes the obligation to serve the public).
skills, and unpaid or underpaid work might swamp the few qualified attorneys. In the cases framing the problem as a threat to attorney property rights, courts offered relief for a few extreme outlier cases—such as a capital case in which the attorney spent far more than the statutory caps envisioned for a typical case.

But when the litigation theory shifted from the rights of appointed attorneys to the rights of clients to receive an adequately funded defense, the results were less happy for defendants. As the emphasis moved toward the rights of clients, the courts encountered theories that could apply across the board to many defendants—for instance, the theory that low compensation rates created a conflict of interest between the attorney and the client. Thus, the courts faced the prospect of raising the funding and quality of appointed defense counsel generally, rather than correcting a few injustices on the fringes. Many courts concluded that such a job was overwhelming and not fit for judges to decide.

They sometimes framed this conclusion in terms of standing doctrine: Public defender associations have also claimed, unsuccessfully, that unpaid representation amounts to a violation of the Thirteenth Amendment's ban on slavery.

101. See generally David L. Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. REV. 735 (1980). Some attorneys also framed the challenge as an equal protection claim, pointing out that the burden of unpaid or underpaid representation falls on some members of the bar but not others, particularly in states where some local governments rely on appointed counsel and others use public defenders. See DeLisio v. Alaska Superior Court, 740 P.2d 437, 446 (Alaska 1987) (noting that appointing an attorney to an indigent defendant is unconstitutional when the obligation is not placed on the whole bar); Arnold v. Kemp, 813 S.W.2d 770, 774–75 (Ark. 1991) (holding that the limitation of attorney fees on court-appointed attorneys was unconstitutional); State ex rel. Stephan v. Smith, 747 P.2d 816, 845 (Kan. 1987) (holding that the pro bono requirement that places the burden of representing indigents on only a portion of attorneys is unconstitutional); State v. Lynch, 796 P.2d 1150, 1164 (Okla. 1990). For a discussion of these cases and a call for more broad-based litigation, see Klein, supra note 45.

102. See DeLisio v. Alaska Superior Court, 740 P.2d 437, 442–43 (Alaska 1987) (concluding that forcing an attorney to defend a criminal without just compensation is a taking of property under the Fifth and Fourteenth Amendments); Arnold v. Kemp, 813 S.W.2d 770, 774 (Ark. 1991) (concluding that an appointment system violates attorney rights); Stephan, 747 P.2d at 841–42 (striking down appointed system and reviewing cases from other states); Lynch, 796 P.2d at 1163–64 (holding that statutory compensation violates due process and amounts to a taking of property); Bailey v. State, 424 S.E.2d 503, 508–09 (S.C. 1992) (retaining discretion to override caps in capital cases); Jewell v. Maynard, 383 S.E.2d 536, 547 (W. Va. 1989) (stating that it is an unconstitutional taking of property to require an attorney to devote more than ten percent of the normal work year to appointed cases).


104. See Ex parte Grayson, 479 So. 2d 76, 78–80 (Ala. 1985) (holding that an attorney has an ethical obligation to do a good job regardless of compensation, so the systemwide challenge to the appointed counsel system failed); Lewis v. District Court, 555 N.W.2d 216, 219–20 (Iowa 1996) (stating that the challenge to the appointed counsel system fails); Madden v. Township of Delran, 601 A.2d 211, 217–18 (N.J. 1992) (same).
that pressed the claims for their clients generally did not have proper standing to raise the funding issue.\textsuperscript{105}

Most often, courts still dispose of defendants' claims based on inadequate funding by applying the \textit{Strickland} standard. They conclude that the particular defendant could not show "unreasonable" (that is, aberrational) performance or prejudice, simply because an attorney is underpaid.\textsuperscript{106} Lack of funds is too widespread a condition to create a basis for relief, and defense lawyers regularly prove that an adequate defense for a particular client is possible even without much funding.\textsuperscript{107} Something more than funding choices is ordinarily necessary to demonstrate ineffective assistance.

Claims based on inadequate public funding are especially difficult to win in jurisdictions that use contract attorneys or public defender systems. In such systems, the compensation available to the attorney is standardized and does not vary from case to case.\textsuperscript{108} Thus, any conclusion about one case necessarily has implications for all others. As a result, most of these claims fail.

A new breeze is blowing in the attorney funding litigation, however. In a few cases, most decided in the last fifteen years, courts have accepted claims by defendants and defense attorneys that go to the heart of the funding systems, claims with implications for entire groups of cases. For instance, the Arizona Supreme Court ruled in 1984 that the anemic funding for criminal defense under a contract system created such huge caseloads that the state was violating the defendants' constitutional right to counsel.\textsuperscript{109} A celebrated

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\textsuperscript{105} See Kennedy v. Carlson, 544 N.W.2d 1, 5-8 (Minn. 1996).

\textsuperscript{106} See Foster v. Kassulke, 898 F.2d 1144, 1147 (6th Cir. 1990) (observing that the relationship between compensation and effectiveness is not certain); Coulter v. State, 804 S.W.2d 348, 358 (Ark. 1991) (finding that the conflict of interest could be created by a fee cap, but Coulter made no showing of deficient performance or prejudice); People v. Dist. Court of El Paso County, 761 P.2d 206, 210 (Colo. 1988) (holding that the finding of ineffective assistance must be made after trial, not prospectively); Johnson v. State, 693 N.E.2d 941, 952 (Ind. 1998); Lewis v. State, 555 N.W.2d 216, 219 (Iowa 1996) (rejecting the argument that indigents are harmed); Hansen v. State, 592 So. 2d 114, 153 (Miss. 1991) (finding that counsel exceeded the \textit{Strickland} standard, and that there was no ineffective assistance of counsel).

\textsuperscript{107} Note that Rick Tessier, the overburdened attorney in \textit{State v. Peart}, 621 So. 2d 780 (La. 1993), managed to represent Mr. Peart very capably despite the other demands on his time. For a survey of states and counties with below-average funding situations for defense counsel, see \textsc{Spangenberg Group, Comparative Analysis of Indigent Defense Expenditures and Caseloads in States with Mixed State and County Funding} (Feb. 1998), \url{http://www.abanet.org/legalservices/sclaid/defender/research.html} (on file with the Iowa Law Review).

\textsuperscript{108} See \textsc{Steven Smith & Carol Defrances, Indigent Defense} (Feb. 1996) (describing the contract and public defender systems).

\textsuperscript{109} State v. Smith, 681 P.2d 1374, 1378-84 (Ariz. 1984) (finding a Sixth Amendment violation under contract system in Mojave County); see Zarabia v. Bradshaw, 912 P.2d 5, 7-8 (Ariz. 1996) (en banc) (holding that the Yuma County appointment and contract systems are potentially unconstitutional); cf. Heath v. State, 574 S.E.2d 852, 855 (Ga. Ct. App. 2002) (applying a presumption of ineffective assistance for this defendant based on the caseload and...
1993 decision of the Louisiana Supreme Court in *State v. Pearl*\(^\text{110}\) held that low funding levels, high caseloads, and inadequate investigative support all combined to create a "rebuttable presumption" in every criminal case that public defenders were providing ineffective assistance of counsel. The Michigan Supreme Court in 1993 struck down a "fixed-fee schedule" that compensated attorneys with a flat fee for each case, regardless of whether the case went to trial; such a system gave the attorney too little compensation for trial work and violated the statutory right to an attorney who receives "reasonable compensation for the services performed."\(^\text{111}\) The appellate court ordered the trial court to discontinue the old system of compensation and to develop a new one.\(^\text{112}\) And most recently, trial judges in New York City and Boston ordered increases in the compensation rates for appointed counsel in those cities.\(^\text{113}\)

These cases that take a more systemic approach to defense funding are promising developments and offer an important supplement to the case-by-case claims of ineffective assistance of counsel under *Strickland*. The litigation is spreading, as national organizations such as the NAACP and the National Association of Criminal Defense Lawyers join a conscious strategy to file these claims as a way to improve the funding for criminal defense generally.\(^\text{114}\)

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\(^{110}\) 621 So. 2d 780, 783 (La. 1993).

\(^{111}\) Recorder's Court Bar Ass'n v. Wayne County Court, 503 N.W.2d 885, 892 (Mich. 1993).

\(^{112}\) *Id.* at 893-94 (striking down rules that set flat fees for every case). For more recent litigation over the compensation for appointed attorneys in Wayne County, Michigan, see Shawn D. Lewis, *Lawyers Sue Court for Raise*, DETROIT NEWS, Nov. 12, 2002, at 1A.


The Soros Foundation has awarded some grants to support this litigation. See OPEN SOCIETY INST., *GIDEON PROJECT*, http://www.soros.org/initiatives/justice/focus_areas/gideon/
Do these cases signal that the day has arrived when litigation can bring parity of resources for the defense into mainstream practice in the United States?

B. IMPACT OF THE LITIGATION

The impact of the new breed of "counsel funding litigation" is not limited to jurisdictions where courts actually issue final rulings supporting the claims. A small number of rulings like Peart can have ripple effects in settlement negotiations all over the country. Litigants who present credible threats of obtaining cataclysmic rulings (particularly claimants who survive an initial motion to dismiss) can negotiate favorable settlements with state and local governments, providing in the consent decree for higher levels of funding for criminal defense. This is exactly what happened recently in litigation that settled in Allegheny County (Pittsburgh), Pennsylvania, soon after the claimants survived early motions to dismiss in 1998.115 Similarly, in Connecticut the parties reached a settlement soon after the court denied the defendants’ motion to dismiss in 1999, and the settlement added thirty percent to the attorney and staff positions.116

Nevertheless, these judicial rulings and settlements can only happen in jurisdictions where the defense lawyers are under-funded and overworked in some exceptional way, something beyond the usual stresses of poorly funded defense counsel. The difficulty for litigants in most of these cases is the comparison pool: the caseload for the public defenders in the home jurisdiction is compared to recommended caseloads formulated at the national level, based on mainstream practices.117 The parties argue about

guidelines (last visited Sept. 22, 2004) (on file with the Iowa Law Review) (stating that priorities for funding within this area of public defense include “advocacy to promote increased governmental support for defense services, including public education, grassroots advocacy, defender management training, and litigation”).


A similar story played out in Coweta County, Georgia in 2003. See Bill Rankin, Coweta Settles Suit on Indigent Defense, ATLANTA J.-CONST., Mar. 9, 2003, at 2C (reporting that a constitutional challenge to the contract attorney system was filed in Coweta County, Georgia in 2001; the settlement created a public defender office and tripled the county budget for indigent defense; the county attorney entered negotiations immediately after the lawsuit was filed, saying "We realized we had some problems").

parity among groups of defenders, rather than parity between prosecutors and defenders.

A judge likely will not issue an ambitious order that restructures and increases the funding for criminal defense based only on a showing that local practice falls short of national standards, even if the gap is quite large. In some jurisdictions, many public services do not get the funding that they need to meet aspirational national standards, ranging from safety inspectors to police and fire protection to public health and hospitals. Indeed, the prosecutors in the same jurisdiction and the judge’s own support staff often do not meet national aspirational standards.

When so many public services lack ideal funding, only the most obvious departures from the recommended caseloads for defense attorneys can catch a judge’s attention. Only the defenders currently at the bottom of the national ladder in funding will appear to merit any judicial relief. The need to point to unusually badly funded systems may explain why so little of this litigation is filed, despite longstanding and universal complaints about overall funding for criminal defense.

The judicial rulings, even the most ambitious of them, have another limitation, as well: their help is only temporary. After a judge orders or convinces the state or local government to fund indigent defense at prevailing rates for the time, the world moves on. Inflation immediately starts eroding the salaries of the attorneys and greater numbers of arrests and charges erode the gains in caseload. Over time, the old difficulties for defense attorneys return.

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118. See Darryl K. Brown, Defense Attorney Discretion to Ration Services and Shortchange Some Clients, 42 BRANDEIS L.J. 207 (2004) (stating that under-funding of defense counsel is permanent and should be met by deliberate rationing of services designed to prioritize potentially innocent defendants); Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 COLUM. L. REV. 801, 808-10 (2004) (arguing that under-funding of criminal defense is partially the result of competing demands for scarce public funds).


One such story of erosion comes from Louisiana. Within the first two years after the enormous 1993 litigation victory in State v. Peart, the state legislature increased the annual funding for criminal defense by $5 million. In 1997, the legislature funded a new statewide oversight board for criminal defense, appropriating $7.5 million. The additional money, however, was less impressive over the long run. The amount of the statewide appropriation actually devoted to New Orleans was modest, because so many parishes took a share of the state support, meaning that local revenues remained the most important source of funding for criminal defense. Over time, more defender programs in the state found ways to claim part of the statewide money, and capital and appellate programs started drawing from the same fixed fund. These multiplying claims sliced the pieces of the pie thinner each year.

The annual appropriation from the state remained flat every year, meaning that it decreased after accounting for inflation. Because of increases in arrests, charges, and funding for the prosecution, the funding

While the relief tends to become less effective for defense attorneys over time, changes in circumstance making the judicial relief much more onerous for the government can eventually lead to modification of the decree. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992) (allowing courts to modify injunctive relief or consent decrees when changed factual conditions make compliance "substantially more onerous," or decree proves "unworkable because of unforeseen obstacles," or enforcement "would be detrimental to the public interest"). Most courts hold that Rufo also applies to requests for modifications from plaintiffs. See David G. v. Leavitt, 242 F.3d 1206, 1211 (10th Cir. 2001); Williams v. Edwards, 87 F.3d 125, 131-32 (5th Cir. 1996). But see Holland v. N.J. Dep't of Corr., 246 F.3d 267, 284 n.16 (3d Cir. 2001) (rejecting Rufo, and applying to plaintiffs a modification standard from United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968)).


124. The proportion of the budget for the Orleans Parish Indigent Defense Board deriving from the increased state funding won through the Peart litigation is now relatively small. Between 1999 and 2002, the state grants to Orleans Parish averaged about 18% of revenues for the Defender's office. See NLADA LOUISIANA REPORT, supra note 45, at 110-13 app. H.

125. Individual districts around the state apply for direct grants from the state fund. Over time, the number of districts obtaining direct grants from the Board has increased. Telephone Interview with Steven Singer, Staff Attorney for the Louisiana Crisis Assistance Center (May 12, 2003). Under the rules of the Louisiana Supreme Court, which govern the state funding for the Louisiana Indigent Defense Board, the money can also be devoted to capital litigation support projects around the state, an Appellate Program, an Expert Witness and Testing Fund, and a Pro Bono program to encourage volunteer efforts by the private bar. See Pascal F. Calogero, Jr., The State of Indigent Defense in Louisiana, 42 LA. B.J. 454, 458 (1995). The total amount of state funding devoted to non-capital cases in the trial court dropped to thirty-eight percent by 2003, due to the expansion of appellate and capital programs. See NLADA LOUISIANA REPORT, supra note 45, at 16 n.61.

126. Telephone Interview with Steven Singer, supra note 125.
that litigation brought to indigent defense in New Orleans must stretch further than before. That today, the caseloads for defenders in New Orleans remain remarkably heavy, perhaps even heavier than they were before the Peart litigation.

The heartening victory in the Peart litigation unraveled in less than a decade. This dismal but predictable turn of events should make us wary about the power of litigation to improve defense funding in the long run.

C. CHANGING THE POINT OF COMPARISON

Imagine the difference that a parity principle could make for each of these shortcomings in the litigation that challenges the funding for counsel at a systemic level. Instead of comparing the defense resources available in one jurisdiction to the defense resources available elsewhere, the court would ask how the defenders' resources and caseloads compare to the resources and caseloads of the local prosecutors. Once this becomes the relevant comparison point, relief might go to a larger group of defenders. When the resource norms are set by reference to prosecutor funding rather than a larger pool of defenders, a Lake Wobegon effect becomes possible in reverse: all defenders can be well below average, and all might deserve some help.

A principle of parity between defense and prosecution can also address the fleeting quality of litigation success. If a judicial order requires new resources for the defense every time the prosecution receives new funding, the benefits to the victors in the litigation stay constant. Economic inflation or increases in arrests or charges should affect the prosecution and the

127. See NLADA LOUISIANA REPORT, supra note 45, at 24–25, 59–60 (describing increases in arrests, flat funding, and expanded services).
128. Telephone interview with Steven Singer, supra note 125. Louisiana is not alone; the long-term effect of reform litigation has been disappointing in other locations, as well.

129. The reference, of course, is to Garrison Keillor's mythical town, where all the children are well above average. GARRISON KEILLOR, LAKE WOBE Gone DAYS (1985).

Shifting the point of comparison can prove useful for defense lawyers arguing for more funds in the legislature. Defenders who rank quite highly in national comparisons to other defense lawyers might nevertheless be underfunded in comparison to prosecutors in the jurisdiction. See Spangenberg Group, Iowa Governor Vetoes Indigent Defense Reform Bill, THE SPANGENBERG REPORT, July 1997, at 10–11 (reporting Governor's veto of an increase in defense funds because the state ranked fourteenth out of fifty states for court-appointed attorney compensation).
defense roughly equally. If the prosecutors remain under-funded during lean budget years, the negative impact of poor funding for the defense will not be so severe.\textsuperscript{130}

The abstract principle of parity is simple, and in theory it could become the central inquiry in a revised constitutional test. Instead of (or in addition to) asking whether a lawyer in a particular case performed up to standards or whether a given level of system funding forces lawyers to give clients a substandard performance, the court might ask the comparative question. Courts could give meaning to the "effective" assistance of counsel required under the Sixth Amendment by asking whether defense lawyers have parity of resources with the prosecution.

However, the features of the parity principle that make it a more long-lasting and effective remedy than current constitutional doctrine could also make judges reluctant to embrace parity. The method for comparing caseload and support resources for the defense and the prosecution will require annual inquiries and the details will necessarily shift over time. A judicial order requiring parity of resources would generate regular disputes about which prosecutorial advantages require some matching benefit to the defense. Any judicial order to enforce parity would also remain in effect over a long time period. Courts would rather avoid this sort of sustained and detailed monitoring of a remedy.\textsuperscript{131}

Courts also shy away from remedies that dictate to the legislature a method of addressing a legal violation, particularly when they require the legislature to appropriate public money.\textsuperscript{132} While a parity principle might be less specific (and thus more tolerable to the courts) than an order naming a particular dollar figure for an annual budget, it nonetheless could force some major shifts in public funding.

These hurdles have already affected the defense funding litigation: the Louisiana Supreme Court in \textit{Peart} declined to give the legislature any benchmarks for the proper level of spending to remove the constitutional

\textsuperscript{130}. In particular cases, a poorly funded prosecutor's office might spell bad news for defendants, because the prosecutors will screen out fewer sloppy cases and leave more work for overextended defense lawyers. But when prosecutors cannot devote proper attention to each case, the errors in the file are likely to become more obvious and should not require much additional investment from defense counsel to uncover.


violation. An Oklahoma court used prosecutor salaries as benchmarks for setting defense attorney salaries but only on an interim basis. The legislation responding to the problem increased the rates but made no long-term commitment to parity. All of these examples suggest that courts will be equally reluctant in a new generation of "parity" litigation to monitor disputes for many years or to order the legislature to appropriate funds.

IV. RESOURCE PARITY AND PUBLIC CHOICE THEORY

The short history of defense funding litigation, together with the institutional limits of courts, tell us that litigation alone will not bring the parity principle into common usage. Why not, then, ask the legislature directly to adopt the principle of equivalent resources for prosecution and defense? This possibility has received only the most cursory and dismissive attention, for several reasons. For one thing, close attention to the legislative branch is a blind spot for legal scholarship, not just in the criminal justice context but in most other fields. Legal scholars from the common law tradition mostly view legal problems from the vantage point of courts; if an issue does not appear on the docket of the U.S. Supreme Court, it does not resonate in the legal academy.

Another reason why the legislative prospects for defense funding get so little attention is a sense of futility. Discussions of indigent defense funding often refer in passing to legislatures, but conclude fatalistically that legislatures are no friends of criminal defendants. As Attorney General Robert Kennedy once put it, "The poor man charged with crime has no

133. See State v. Peart, 621 So. 2d 780, 790–91 (La. 1993) (placing limits on remedy ordered by trial judge); id. at 792–96 (Lemmon, J. and Dennis, J., dissenting) (noting the lack of specificity in the court's remedy); N.Y. County Lawyers' Ass'n v. State, 745 N.Y.S.2d 376, 385 (N.Y. Sup. Ct. 2002) (refusing to grant an injunction requiring the state to review the number of hours billed by appointed lawyers and enforce guidelines for appointed counsel).


137. See Dripps, supra note 11; sources cited infra notes 139, 141.


139. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 92 (1999) ("Achieving solutions to this problem through the political process is a pipe dream."); Bernhard, supra note 135, at 309; Bright, supra note 4, at 1870; Dripps, supra note 11, at 251–57; Rigg, supra note 43, at 3; Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 118 HARV. L. REV. 2062, 2066–68 (2000).
In this view, the legislature will fund legal counsel for criminal defendants only when the Constitution and the courts require it.

This observation has some basis both in experience and in theory. It is easy to find examples of legislatures that refuse to increase (or even to maintain) funding for criminal defense work, and legislators are none too subtle in explaining that the defense of accused criminals is a low funding priority.

Public choice theory also contributes to this hopelessness. This model appears to predict low spending on criminal defense: legislators interested in their own political careers will see that those who could benefit from government-funded defense lawyers—convicted criminals, accused criminals, and those likely to be accused of crimes—probably cannot help them get re-elected. This segment of society, poor and alienated, does not and cannot contribute much to election campaigns. The beneficiaries do not publicize or endorse the legislator's work on behalf of a large bloc of voters. Indeed, a felony conviction permanently bars offenders in many jurisdictions from voting at all. In short, because there is nothing to benefit the legislator's political career when voting for stronger criminal defense funding or for linking it to prosecutorial funding, it will not likely happen.

Such pessimism about legislatures in criminal justice, however, is overstated. The facts on the ground tell us that legislatures sometimes vote for things that benefit the defense even when courts interpreting the Constitution do not demand them. For instance, states have long provided defense counsel in a broader range of cases than the Constitution strictly requires. Given the minimal levels of competence required to satisfy the Sixth Amendment and due process guarantee of effective counsel, most states already fund their systems at levels higher than the bare minimum that

140. Kennedy is quoted in Lewis, supra note 39, at 211.
142. Dripps, supra note 11, at 251–57; Ogletree, supra note 45, at 83–85.
144. See generally Morris P. Fiorina, Congress: Keystone of the Washington Establishment (2d ed. 1989); Mayhew, supra note 16.
145. Compare Scott v. Illinois, 440 U.S. 367, 367 (1979) (requiring counsel in cases that could result in actual imprisonment of defendant), with VT. STAT. ANN. tit. 13, §§ 5231, 5201 (West 2004) (requiring counsel in misdemeanor cases that could result in a fine of more than $1000). More generally, Jerry Mashaw points out several contexts where legislative behavior is difficult to square with the public choice vision of a legislature that does not pass legislation with diffuse benefits. Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 200–01 (1997).
the Constitution would tolerate. Counter-examples such as these raise some questions: how far does the explanatory power of public choice theory reach, and why do some areas of crime politics cut against the theoretical grain?

A. FOUR PUBLIC CHOICE CATEGORIES FOR CRIMINAL JUSTICE LAWS

A closer look at public choice theory suggests that criminal justice legislation actually falls into several distinct categories, each with different implications for applying the theory. For us to appreciate the differences among these categories, it is necessary to review the way public choice theory tracks the distribution of costs and benefits that new laws create.146

The costs of a new law might be dispersed broadly among the public (as with traffic laws), or they might fall more heavily on a smaller group (say, residents near the site of a new garbage landfill). Similarly, the benefits of a law might be concentrated on a small group (think of agricultural price supports), or the benefits might be more diffuse and go to the public at large (as with criminal laws punishing fraud).

Different combinations of these situations lead to different predictions about the legislative process: if both the benefits and costs are concentrated on groups that feel the effects and can organize to make their influence felt, the legislature will find it difficult to pass laws in this zero-sum situation where a gain for one group is keenly felt as a loss for some other influential group, and stalemate will often result.147 On the other hand, in situations where a new law would create widespread costs (think of steel users) and concentrated benefits (think of domestic steel producers requesting a tariff), the legislature is quite likely to act. The benefiting group will devote its organized resources to support legislators who vote for the program, while the disorganized public will pay so little individually that they will probably not notice the law and will exact no political price from the legislators who created it.148

The key to understanding public choice theory in the criminal context is this insight: costs and benefits distribute differently for various sub-types of


147. An example of this situation is labor legislation, where the costs and benefits land on well-developed groups on both sides, representing both employees and employers.

148. Two other combinations are also possible. If both the costs and benefits of the law spread lightly across the entire public, the legislature will also hesitate to act, at least in theory, because legislators will receive no credit for a policy that goes unnoticed. Finally, in situations where a new law creates concentrated costs and widespread benefits (think of environmental regulation), the legislature is not likely to act unless some instigator brings the issue to the attention of the public. Even then, the legislators will be inclined to pass vague legislation that endorses the benefit (clean air) without specifying the cost (the amount of pollutants to remove from the air or the type of equipment required).
legislation in the criminal justice arena. The theory applies differently depending on whether the new statute in question deals with substantive criminal law; policing and detection of crime; adjudication of criminal charges; or punishment for crimes.

Additions to the substantive criminal law—extending the law to punish new conduct or to describe more specifically some conduct that already falls under a general prohibition—create benefits for the entire public. The social benefits of new criminal laws include public safety, vindication of public morality, cultural solidarity, and all the other virtues that are said to serve as the “purposes” of the criminal law. The costs include the privacy and autonomy that all must sacrifice to some extent when those laws are enforced. However, many criminal laws will apply more often to the activities of some social groups than others. Thus, voters perceive these laws to have general benefits and a mix of general costs and focused group costs.

Generally speaking, a legislator should hesitate to vote for a law creating diffuse benefits and concentrated costs, since only the latter will attract attention and provoke opposition in the next election. That is not the end of the story, however, for there are some environments that allow legislators to take credit for creating diffuse general benefits.

Political scientist R. Douglas Arnold examined the reasons that legislators might respond to the “inattentive public” rather than devote all their energies to special-interest legislation. He identified several conditions that could awaken the inattentive public and make a particular issue “salient,” allowing the legislator to benefit by supporting new laws on that subject. One of the key conditions Arnold identified was the presence of an “instigator” who powerfully and repeatedly brings the issue to the attention of the public. The instigator might be motivated by a principled commitment, by benefits above and beyond the benefits that flow to the public, or by both of these reasons.


151. Id.

152. Id. Other conditions include the magnitude of the costs or benefits, the timing of those costs or benefits (near-term benefits or costs are more likely to be noticed), and the proximity of other voters who experience the same costs or benefits. Id.
In the criminal justice realm, the prosecutor is the most important policy instigator, and this becomes most obvious in debates over the coverage of the substantive criminal law. Prosecutors, as local elected officials with effective political operations of their own, have ready access to the media and communicate often with large groups of voters. When a prosecutor promotes a new criminal law expanding the reach of the code, no organized or effective opposition is likely to appear to point out any costs of the expansion. The groups bearing most of the costs are poorly organized and wield little political influence.

In this setting, where the costs of new legislation are inchoate or remote in time and the key instigator highlights the public benefits, the criminal law is bound to expand. William Stuntz describes the partnership between prosecutors and legislators in the drafting of new crimes: "Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious."

Other instigators of the substantive criminal law come from the private sector. For instance, when business owners suffer property losses, they approach the legislature to add new crimes to cover their specific factual setting.

In such an environment, we find legislators willing—even eager—to pass statutes expanding the substantive criminal law. Much the same analysis holds true for a second category of legislation: laws establishing, funding, and directing the work of police agencies and other investigators of potential criminal violations. The benefits of such legislation are mostly general. Some of the costs, such as the funding necessary to operate the departments, spread out among all taxpayers, while other costs, such as intrusions on privacy and autonomy that are bound to happen with some enforcement techniques such as aggressive targeting of street sales of


narcotics, fall more heavily on a few groups.156 Once again, the work of instigators such as prosecutors and police organizations makes the general benefits salient for a wide range of voters.157

So far, our analysis leads to the same predictions to be found elsewhere in criminal justice scholarship: criminal suspects and defendants are likely to lose in the legislature, and criminal prosecutors are likely to win. The public choice analysis changes, however, when we move to a third category of legislation, changes in the criminal punishment statutes. Here, prosecutors regularly request increases in authorized punishment ranges and oppose any decreases in the ranges, and the same is true for some private actors, such as influential victims of crime. But in the punishment setting, instigators sometimes appear on the scene to point out the costs as well. State corrections officials who operate prisons and other programs, along with local government officials who operate jails, remind the legislators that increased use of punishment resources is costly for taxpayers.158

Some of the costs of new punishments still fall on specific groups; convicted offenders bear the risk that the punishment will prove disproportionate to the offense.159 Still, when compared to expansion in the substantive criminal law, the mix of general costs and group costs tips more toward general costs (especially the costs to taxpayers) when the legislature debates marginal additions to expensive punishments.

Sometimes the legislators and the public find it difficult to trace the linkage between a vote for longer punishments and the resulting expansion in prison usage that occurs years later. However, it is now becoming more common for state legislators to receive routine analyses of pending legislation that makes precisely this connection, showing with reliable


157. The potential targets of law enforcement in some fields are well organized and very influential, and they can use these resources to point out to legislators the costs of enforcement that might flow from new legislation in the field. Consider, for instance, enforcement in the securities fraud, environmental, and corporate settings. See generally Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 CAL. L. REV. 323 (2004).

158. The reminder could also come from educators and others who compete with corrections for a limited state or local budget. See Marc Miller, Cells vs. Cops vs. Classrooms, in THE CRIME CONUNDRUM 127 (Lawrence M. Friedman & George Fisher eds., 1997). The competition between corrections and other government spending is not so keen in the federal system. For an insightful case study of increases in federal fraud sentences that passed as part of a package expanding the substantive criminal law, see generally Frank O. Bowman, III, Pour Encourager les Autres? The Curious History and Disturbing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed, 1 OHIO ST. J. CRIM. L. 373 (2004).

159. This may be particularly true for sentencing laws that target repeat offenders. Here, the political dynamic of the substantive criminal law is more likely to operate. See generally FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (examining the harsh effects of California's Three Strikes policy).
accuracy the prison costs of a bill over five, ten, or even twenty years. With the help of these budgeting devices, the legislature makes the connection between the costs and the benefits and with some frequency now they act with restraint on new punishment legislation.

Changes to the criminal adjudication process, such as the funding scheme for defense attorneys, fall into a fourth category, where prosecutors are even less likely to dominate the legislative debate. In this setting, policy instigators step forward to point out the general public benefits of better funding and more reliable results.

Convicted and accused criminals are not alone in wanting to see competitive levels of funding for criminal defense counsel, and some of the groups with opinions on these questions can be very helpful during election campaigns. The legal community generally favors such spending—the American Bar Association periodically opines about the importance of adequate defense funding. The affinity of lawyers for public spending on legal services might be easy to explain in cynical terms, but it also speaks to some of the deepest aspirations of the profession. Some professionals who work in criminal justice also tend to favor additional spending for criminal defense. Judges, for instance, know that when defense counsel become

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161. See DEMLEITNER ET AL., supra note 143, at 476–82. For a case study of such restraint in operation, see generally Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, 29 CRIME & JUST. 39 (2002). In Arnold's terms, the costs of more severe criminal sanctions, though spread broadly among the public, becomes more noticeable because the voter can trace the costs of prison to at least some changes in the sentencing laws, and the magnitude of that cost is sometimes large enough to be noticeable. ARNOLD, supra note 150, at 19–25.

On this score, the analysis here contradicts the views of Darryl Brown, who argues that in the criminal punishment area, just as with the substantive criminal law, legislators align themselves with law enforcement, in contrast to other regulatory environments, where the legislature checks the administrative agencies to prevent "capture." Brown, infra note 156, at 360–63.

162. See supra Part II.A (discussing ABA policies); see also Robert A. Stein, Reaching Our Goals, A.B.A. J., June 2004, at 65 (describing work of the Access to Justice State Support Project, an initiative of an ABA committee and the National Legal Aid and Defender Association).

163. See Adam Lynn, Commissioners Asked to Boost Pay for County Public Defender; Backers Say Job Is Just as Important as Prosecutor's, So Pay Should Be Equal, SPOKESMAN REV. (Spokane, Wash.), Mar. 7, 2001, at B1 (reporting that judges and local lawyers call for an increase in chief defender salary to achieve parity with chief prosecutor); Trisha Renaud, Bar Group: Indigent Reform Plans Stay, FULTON COUNTY DAILY REP., July 25, 2001 (noting that the State Bar committee on indigent defense report recommends parity of resources between prosecutors and defenders). For a proposal that proposes the chief public defender as a viable advocate for defense funding, see Taylor-Thompson, supra note 48, at 199. Note that many loan repayment assistance programs cover both prosecutors and defense attorneys within the qualifying definition of "public interest" lawyering. Some federal educational loans, however, are available only to prosecutors. See Wallace, supra note 52, at 16–17.
involved effectively in more cases, their sentencing options increase along with their confidence in the outcomes.  

Even more critical than the presence of instigators on the "benefit" side of funding debates is the altered role of prosecutors on the other side. Prosecutors in some jurisdictions might actually favor increased funding for defense attorneys to promote the reliability and predictability of the criminal process. The prosecutors know that whatever the contributions of defense lawyers to fair outcomes, they can also make the justice system more efficient when it comes to the serious cases that receive increased scrutiny on review. Even if prosecutors oppose parity of salary or resources for defense counsel, they may appear self-interested and lose some credibility with the legislators. Prosecutor arguments against funding for their adversaries will strike many legislators as special pleading.  

Thus, the configuration of policy instigators who can awaken the inattentive public to the costs and benefits of criminal justice legislation will look quite different in these four settings: substantive criminal law; regulation of policing and enforcement; adjudication; and punishment. The prospects for new laws that incidentally benefit criminal defendants are best when dealing with the quality of the adjudication process, an issue that attracts attention from the organized bar and other motivated and influential groups.  

164. See, e.g., Judith Kaye, State of the Judiciary 2003: Confronting Today's Challenges (2003), available at http://www.courts.state.ny.us/ctapps/soj2003.pdf; cf. Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1973-74 (1992) ("Compulsion to represent criminal defendants is scandalous, as are the payment scales offered to those involuntary agents. You get what you pay for."). Under Alabama v. Shelton, 535 U.S. 654 (2002), the judge sentencing a defendant who was not represented by counsel at trial or at the guilty plea hearing (or one who did not waive that right) may not impose an active sentence of imprisonment, or a suspended sentence that "might result" in the actual deprivation of liberty.  

If funding for defense counsel runs out, the judges might postpone cases or proceed without attorneys and convict defendants of lesser crimes that may only result in fines. This occurred in early 2003 in Oregon. See David L. Hudson, Jr., Cutting Costs . . . and Courts: Judicial Resources Dwindle as States Cope with Budget Crises, A.B.A. J. 16, April 2003, at 16.  


B. Reframing the Issue

Funding for defense counsel has another advantage over other criminal justice issues, in addition to the favorable alignment of interested parties. The public has mixed views on the issues involved, and the parties (and legislators) have several options for framing the issue when explaining votes to the public.

Many voters favor, at least in the abstract, the notion that litigants should have some rough equality of resources, simply as a matter of fair play during weighty decisions. One bit of evidence on this point appears in the periodic favorable press coverage of litigation challenging inadequate defense funding. Recent publicity about wrongful convictions uncovered through DNA evidence has renewed the public's appreciation for accuracy in criminal justice, and funding for defense lawyers could be framed as an investment in accuracy. Legislators and voters might also view the funding of defense attorneys as a method of maintaining the efficiency of the system, without stressing any gains in fairness or accuracy. Some legislators, particularly those with legal training, may be even more sympathetic to procedural fairness than their constituents. They appreciate that the integrity of an adversarial system depends on adequate resources for both sides.

Once again, there are important differences here among the various categories of laws in our criminal justice typology for public choice theory. The public has no powerfully split impulses when it comes to the coverage of the substantive criminal law: more is almost always better. On the other hand, the appeal of punishment must compete with a distaste for deficits and public debt when the legislature turns to criminal punishments.

167. See Editorial, Justice on the Cheap is Justice Denied, THE VIRGINIAN-PILOT (Norfolk, Va.), May 14, 2004, at B10 (expressing a favorable response to the ABA's report on Virginia's indigent defense system); Editorial, Injustice Unchallenged, WASH. POST, Feb. 22, 2004, at B06 (same); Editorial, Indigent Defense, RICHMOND TIMES-DISPATCH, Feb. 9, 2004, at A10 (expressing a favorable opinion on ABA report on Virginia indigent defense, from a traditionally conservative editorial board); Editorial, Public Defenders Are Overloaded, HARTFORD COURANT, Jan. 10, 1995, at A10; Edward M. Kennedy, What Gideon Promised, LEGAL TIMES, Mar. 24, 2003, at 46 (encouraging attorneys to challenge deficiencies in systems through civil rights lawsuits and arguing that fairness in criminal trials "is the responsibility of us all"). When framed at a lower level of abstraction, the public sentiment is probably more negative. See Ogletree, supra note 45, at 86–87 (describing public hostility to the work of defense attorneys).


169. Legislators themselves may have conflicting views on these funding questions, and deliberation on the question may help them clarify those views. To put the point in the vocabulary of those who criticize the public choice model, the debate may create endogenous shifts in preferences; we should not assume that the legislator's views are static and exogenous to the process. See generally DONALD GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994).
In the trial procedure category, where lawyers and judges favor more defense funding and voters have conflicting views, strange things can happen. Legislators in such a setting might look for ways to reframe (or to obscure) the defense counsel funding question at higher levels of abstraction that might appeal to the voters. If the budget decisions become associated with these public ideals about competitive balance and equity among employees, criminal defendants might reap the incidental benefits.

Legislatures develop strategies in many areas to reframe issues at a different level of abstraction—think of the use of sentencing commissions around the country over the last two decades. The legislation creating sentencing commissions speaks generally (and often incoherently) about the goals of criminal punishments. The laws also instruct the commission to consider the state's available resources and to tell judges to place particular weight on certain recurring facts when they sentence individual defendants. The final products that the legislatures adopt contain some unpopular outcomes, such as limits on the use of prison for some lesser felony offenses. But legislatures adopt them in the name of larger principles, such as "truth in sentencing" or "rational allocation" of corrections resources.

This reframing of issues accomplishes more than just a change of labels. It also allows the legislature to divide blame and credit for different portions of a policy. Consider how the commonplace legislative practice of delegating authority to administrative agencies allows the legislature to control the relevant level of abstraction for its debates. In many areas of regulation, the legislature passes a statute endorsing a popular and abstract principle (say, 170. See generally Michael Tonry, Sentencing Matters (1996).


172. See, e.g., 28 U.S.C. §§ 994(c), (d), (g) (2000); OKLA. STAT. ANN. tit. 22, § 1501 (West 2003); N.C. GEN. STAT. § 164-42(b) (2003).


174. Another example of this phenomenon involves the federal law in the 1990s that required Congress to vote up-or-down on an entire package of military base closings. Congress passed this law knowing that the abstract concept of fewer bases was sound, but Congress was equally aware that each member would hope to spare the base in his or her home district. Efforts to amend the specific entries on the closing list often unraveled the entire package. Similarly, we could view a pay parity statute as a technique for changing the level of abstraction in the debate. Few legislators will vote for ad hoc budget increases to give accused criminals a more vigorous and effective defense. More legislators—particularly those with legal training and sympathy for ideas of fair play in litigation—might vote for spending enough, in principle, on criminal defense to have confidence in the quality of the convictions that our system produces.
“safety” or “clean air”) and leaves the unpopular and more concrete details to an administrative agency (say, the amount the public must pay for cars that burn less gasoline). Similarly, in the area of criminal defense services, state legislators can endorse general principles of fairness and respect for individual liberties and deliver such general instructions to local governments or to statewide administrative bodies that set salaries and support levels for defenders, while ducking responsibility for the “details” of funding and organization of defense counsel.

In a variation on this theme, legislators can build momentum for unpopular but necessary measures by linking one set of unpopular choices to a second, more popular set of choices. This occurs any time a legislature passes an omnibus bill (particularly budget bills). In the same vein, state and local legislators might link unpopular spending increases for indigent defense to the more popular increases in resources for prosecutors.

Under the right conditions, then, legislators pass laws that produce unpopular applications of shared public ideals. It happens when these laws attract more attention from the small group of supporters than from the larger group of opponents, and it happens when the debate becomes framed in terms of a popular (or tolerable) abstract principle. The potential exists for legislators to do the same when it comes to funding criminal defense attorneys for the indigent. Legislators might cast their vote on defense funding as a vote for equal pay for comparable work or a vote for reliability in criminal justice.

V. LEGISLATIVE AND JUDICIAL SYNERGY

Resource parity for indigent criminal defense is more than a foolish hope in the legislature; on the other hand, it is no sure thing. The conditions have to be favorable before this unlikely result comes out of the legislature. At the same time, the institutional habits of courts make it unlikely that judges will order full-blown resource parity on a regular and ongoing basis. Although neither the judiciary nor the legislature is likely to complete the job acting alone, each could reinforce the other because a very small number of litigation successes anywhere in the country can improve the legislative environment everywhere else. The threat of litigation can

175. See Peter Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 33-34 (1982) (discussing the manner in which the legislatures delegate the execution of their goals to agencies).

176. See Spangenberg Group, 1999 State Legislative Scorecard: Developments Affecting Indigent Defense, SPANGENBERG REPORT, Oct. 1999, at 7 (stating that the Kentucky legislature amended the statute so that compensation rates for appointed attorneys are set by the Department of Public Advocacy and no longer by statute).

177. ARNOLD, supra note 150, at 119.

178. Alternatively, the salaries of both prosecutors and defense attorneys could be set as some fixed percentage of the salary paid to judges who preside in criminal proceedings.
move funding issues to the center of legislative attention and create a presumption against the status quo.

Litigation and legislation to address crowded prisons during the 1970s and 1980s offer an interesting parallel to the counsel funding issue. Shocking conditions and severe overcrowding at prisons around the country did produce some judicial rulings stating that the conditions violated the Eighth Amendment bar on cruel and unusual punishment. A few of the opinions were bold and eloquent and raised the prospect of major litigation and judicial rulings all over the country. Courtroom victories by advocates for improved prison conditions then played a reinforcing role in the legislature. In this environment, legislatures acted (and spent) decisively in many states to improve prison operation and to relieve the overcrowding through a combination of expanding prisons and releasing inmates.

In retrospect, it is surprising that legislatures reacted as strongly as they did to the prison conditions litigation. In many states, the existing prison conditions were not as horrifying as the Arkansas and Alabama work camps that produced the most sensational judicial rulings. There was plenty of room for states to litigate the question of just how extreme the overcrowding must become to qualify as a constitutional violation; it remained unclear exactly what a state would have to spend to satisfy the Constitution.

In some states, officials fought every step of the way. But in others, the legislature took the lead in reshaping the state prisons after litigation (or merely the threat of litigation) put the issue into play. In North Carolina, for example, state officials entered settlement negotiations quite early in the litigation, and passed a "prison population cap" statute that seemed to go beyond the minimal changes that a judicial order probably would have required. The litigation also inspired a series of changes to the sentencing laws that improved the state's ability to control prison admissions and plan for future correctional resources as needed.

The reasons why legislators in some places spent more on prisons than the judges would have ordered are difficult to reconstruct. Perhaps the legislators handicapped the litigation risks poorly, as parties in litigation

180. Dripps, supra note 11, at 182 (making the prison analogy).
181. See Wright, supra note 161, at 48-52 (discussing North Carolina legislation to bring prisons into compliance with constitutional standards).
182. See FEELEY & RUBIN, supra note 179, at 51-79.
184. See Wright, supra note 161, at 48-52.
185. See id.
often do. It is also possible that legislators were genuinely troubled by prison conditions, and the litigation created an occasion to change the prisons while blaming the federal courts for the costs. 186

The threat of litigation might operate in a similar way for indigent defense counsel systems. Legislators, some because of legal training and others because of experience with labor relations and personnel management, will respond with sympathy to the idea that defense attorneys and prosecutors deserve equal treatment. The judges who hold the hammer of a potential litigation loss for the government will be state judges rather than federal, 187 but the legislators might still treat the risk of an adverse court ruling as the necessary political cover for reshaping the counsel system.

Interaction between litigation and legislation has already produced better indigent defense funding in a few states. As we saw earlier, litigation filed in Connecticut, Pennsylvania, Georgia, and elsewhere to challenge the funding systems for defense counsel led to early settlement negotiations and new funding from the state legislatures. 188

A shift in emphasis, from intra-defense comparisons to parity between defense and prosecutor, might improve this interaction between judges and legislators. Shifting the litigation strategy toward resource parity gives judges a potential outcome that is more consistent with existing constraints on the judicial role. In turn, once the judicial rulings draw the attention of legislators more often to the disparity in funding, the parity strategy has greater chances of long-term success in the legislature than periodic requests for funds to attain "normal" levels of defense funding according to national standards.

We might discover over time that judges can become more actively involved in some forms of parity than others. For instance, salary parity seems a more prototypical legislative issue involving relations among state employees. In jurisdictions that rely entirely on appointed counsel, the willingness of a legislature to link the compensation for defense work to prosecution salaries will address a large part of the overall resource balance.


187. See Luckey v. Miller, 976 F.2d 673, 676–79 (11th Cir. 1992) (per curiam) (abstention); Wallace v. Kern, 481 F.2d 621, 629 (2d Cir. 1973) (indicating that the principle of comity means that federal courts should not intervene in internal procedures of state courts).

188. See supra text accompanying notes 115–17.
Appointed attorneys, accepting one case at a time, are better able than full-time public defenders to manage caseload.\textsuperscript{189}

Judges might take the lead in other areas. For instance, parity of access to expert witnesses might become more of a judicial specialty. Judicial orders relating to funding on this question would only require a modest extension of existing constitutional doctrine. In \textit{Ake v. Oklahoma},\textsuperscript{190} the Supreme Court held that the government must in some cases pay for a defendant to consult a psychiatrist or some other expert in building a defense. Judges currently make a case-by-case determination of whether such experts constitute a "basic tool" for a defendant raising a defense such as insanity.\textsuperscript{191} They might make such judgments in light of the experts available to prosecutors in the district for similar classes of cases.

Judges might also exercise some special influence over the quality of counsel provided in \textit{capital cases}. The judiciary has created an elaborate body of constitutional doctrine to regulate the peculiar features of capital trials, many of them relating to the quality of defense counsel, and a modest extension of this constitutional doctrine would place judges out in front on salary and resource parity for defense counsel in capital cases. Indeed, judges already show an exceptional interest in the funding for capital cases. Take, for example, a rule of the Tennessee Supreme Court setting guidelines on payments for court-appointed defense lawyers in capital cases.\textsuperscript{192}

There is some risk involved in starting with capital cases, since these cases attract such close attention and strong emotions. Legislators may question the merits of funding these cases above the bare constitutional minimum, and they might lead a backlash against any judicial rulings in this

\textsuperscript{189} This is not to say that appointed counsel will in fact manage their caseloads well. Analyses of the workload of some appointed counsel in New York and in Washington state show that they responded to reduced compensation by reducing the number of cases accepted, while other attorneys took on more cases than they could manage. See Albert W. Alschuler, \textit{The Defense Attorney's Role in Plea Bargaining}, 84 \textit{Yale L.J.} 1179, 1182 (1975); Ken Armstrong, \textit{Follow the Money: 781 Cases, 4 Attorneys, $500,000}, \textit{Seattle Times}, April 5, 2004, at A2 (Washington state); Adam M. DeStefano, \textit{Lawyers: You Get What You Pay For}, \textit{Newsday} (New York), Dec. 11, 2002, at A8. As for public defenders, the manager of the office has an ethical obligation to refuse additional cases once the caseload per attorney gets too large. See Am. Council of Chief Defenders', Ethics Op. 03-01 (April 2003), \textit{reprinted in NLADA Louisianan REPORT, supra note 45, at 117.}

\textsuperscript{190} \textit{470 U.S. 68, 74} (1985).

\textsuperscript{191} See \textit{State v. Mason}, 694 N.E.2d 982, 943 (Ohio 1998); \textit{Lenz v. Commonwealth}, 544 S.E.2d 299, 304-05 (Va. 2001) (holding that experts available to a defendant through public funding need not be the same as experts available to a defendant retaining experts through private funds).

\textsuperscript{192} \textit{Tenn. Sup. Ct. R. 13(3).}
area. Indeed, legislators have gone so far as to de-fund centers that train and coordinate capital defense attorneys.

Yet there is a powerful need for reliable process in capital cases that are scrutinized so carefully on appeal, and resource equity can improve the chances for a reliable outcome at trial. Over the last decade, the public debate about reliability of criminal cases has changed in important ways, especially in capital cases. DNA evidence or other investigations have uncovered far too many examples of erroneous convictions, and inept lawyering is cited as one of the leading causes of error. The public cannot afford to lose much more confidence in the correctness of outcomes in capital cases.

Legislators who vote for defense funding in the capital context routinely point out these advantages to the voters. Several jurisdictions, including Mississippi, already provide salary parity for defense attorneys in the capital context. Capital litigation resource centers also provide the sort of investigative and expert support services that are available only rarely for other criminal matters. Although the politics here are volatile, it appears that defense in capital cases has already become a testing ground for the parity principle, in several of its forms. Salary parity, in particular, has found a niche in capital cases in some states.

On the other hand, there is some danger that judges and legislators who find extra funds for defense counsel in the capital area will stop at that point, rather than moving to the much more expensive efforts needed in non-capital cases. Any lessons learned in measuring the workload of defense


195. See generally Wayne A. Logan, Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millenium, 100 MICH. L. REV. 1336 (2002).

196. See Liebman et al., supra note 166, at 1850 (stating that “egregiously incompetent defense lawyering” is a leading cause of error); Ken Armstrong & Steve Mills, Inept Defenses Cloud Verdict, CHI. TRIB., Nov. 15, 1999, at N1 (describing the ineptitude of attorneys on capital cases). See generally BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000).


advocates in the capital arena will probably not transfer to the higher-volume defense work that happens in non-capital cases.

CONCLUSION

Parity shows particular promise when compared to other more directive "command-and-control" strategies to regulate a complex art like defense lawyering. Quality standards are possible to formulate, but it is virtually impossible to measure, for an entire system, how close the defense attorneys come to fulfilling their obligations under the standards.\textsuperscript{199} Furthermore, the level of departure from the ideal that is acceptable will vary greatly from place to place, depending on the quality of public services that citizens typically accept.

Parity regulates more indirectly, asking only about the relative strength of certain defense resources, without specifying how attorneys should use those resources. Resource parity for the defense can reduce to a few manageable indicators the whole complex of judgments that cannot easily be measured or regulated.\textsuperscript{200}

In the arena of indigent criminal defense, nothing can add value faster than money. While public choice theory cautions us about the difficulties involved, it is not a foregone conclusion how any given legislative debate on defense funding will end. On this issue, public ideals about competitive balance and the presence of policy instigators who favor defense funding might interfere with simple anti-defendant crime politics. Given the known limits of litigation for improving criminal defense in the forty years since \textit{Gideon},\textsuperscript{201} we should treat the unknowns of the legislative process as reasons to hope and work and study.

\textsuperscript{199} See Bernhard, \textit{supra} note 116, at 335 ("Finding horror stories or empirical evidence has not been the major obstacle for plaintiffs confronting systemic litigation. The major impediment has been the absence of an objective measuring tool to evaluate competence of counsel."). The Vera Institute has recently issued a report proposing methods of measuring the quality of defense counsel. \textit{JON WOOL, K. BABE HOWELL, & LISA YEDID, VERA INST., IMPROVING PUBLIC DEFENSE SYSTEMS: GOOD PRACTICES FOR FEDERAL PANEL ATTORNEY PROGRAMS} (2004), \url{http://www.vera.org/publications/publications.asp} (on file with the Iowa Law Review).


\textsuperscript{201} \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963).