

# You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring

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Never doubt that a small group of committed people can change the world: Indeed, it is the only thing that ever has.

—Margaret Mead<sup>1</sup>

## INTRODUCTION

On August 21, 2005, twenty-four new public defenders gathered in Vidalia, Georgia to begin an intensive, three-week training period. They graduated from seventeen different law schools in twelve different states.<sup>2</sup> More than thirty years separated the oldest from the youngest. They were male and female; African-American, Caucasian, and Latino. Some were born and raised in Georgia while others had no previous connection to the state. But they shared a commitment to join an exciting movement to reform indigent defense. Before enacting legislation to establish a state-wide public defender system aimed at improving the quality of representation for indigent defendants, Georgia was among a long list of states known for the abysmal quality of representation provided to their poorest citizens in criminal cases. These twenty-four lawyers would soon be practicing in seventeen public defenders' offices across the state,<sup>3</sup> on a mission to help change that dubious reputation. Most had never met one another before that day, but they would soon share a bond, anchored by their commitment to indigent defense. They

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<sup>1</sup> THE YALE BOOK OF QUOTATIONS 508 (Fred R. Shapiro ed., Yale University Press 2006).

<sup>2</sup> This includes the District of Columbia.

<sup>3</sup> This includes the Georgia Capital Defender, the state agency charged with representing Georgia citizens that the state desires to execute.

comprised the first class of the Georgia Public Defender Standards Council Honors Program (“The Honors Program” or “The Program”).<sup>4</sup>

Georgia’s nine-month-old system was created as an attempt, albeit more than four decades late, to live up to the 1963 mandate set forth by the United States Supreme Court in *Gideon v. Wainwright*.<sup>5</sup> In the years since *Gideon* and its progeny made clear that states would have to provide “effective assistance of counsel” to indigents charged with crimes,<sup>6</sup> many legislatures tried to determine the minimum required of them and to spend no more than necessary.<sup>7</sup> As a result, for over forty years states sent court-appointed lawyers the message that poor defendants were not entitled to the time, resources, and commitment the Constitution guarantees. When Georgia was ultimately forced to confront these inadequacies,<sup>8</sup> it responded with legislation designed to address structural and financial problems.<sup>9</sup> While both structural and financial reform were certainly necessary, the past forty years created a culture in the indigent defense arena that could not be transformed by these measures alone.<sup>10</sup> Unless dealt with, the value system that had become a fixture in Georgia’s criminal justice system would ensure that meaningful reform would remain out of reach. The Honors Program was designed to address this element.

The group had its work cut out for it, as the challenges attributable to the replaced indigent defense system still loomed large. Under that system, many poor defendants were forced to resolve their cases without the assistance of a lawyer.<sup>11</sup> When appointed, lawyers far too often refused to visit

<sup>4</sup> The Georgia Indigent Defense Act of 2003, GA. CODE ANN. §§ 17-12-1 to 17-12-80 (2008), established a state-wide public defender system to address indigent defense shortcomings in the state. Pursuant to the Act, the Georgia Public Defender Standards Council (GPDSC) was created to administer services. The Act took effect on December 31, 2003, creating a state-wide public defender system that began operations on January 1, 2005. As the first training director for the Georgia Public Defender Standards Council, I founded and developed the Honors Program. Information about the Honors Program presented in this article comes from personal knowledge.

<sup>5</sup> 372 U.S. 335 (1963) (holding that the Sixth Amendment to the United States Constitution requires that states provide counsel to indigent persons charged with felonies).

<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (affirming that the right to counsel means the right to effective assistance of counsel).

<sup>7</sup> See David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in *CRIMINAL PROCEDURE STORIES* 101, 102 (Carol Steiker ed., Foundation Press 2006) (arguing that while affirming that indigent defendants are entitled to *effective assistance of counsel*, the Court set the bar for what constitutes *effectiveness* so low that states feel no pressure to provide anything more than poor representation).

<sup>8</sup> See Trisha Renaud, *Newsmaker of the Year: Stephen B. Bright—Angry Man of Indigent Defense*, FULTON COUNTY DAILY REPORT, Dec. 3, 2003 (discussing some of the factors giving rise to this reform).

<sup>9</sup> GA. CODE ANN. §§ 17-12-1 to 17-12-80 (2008) (creating public defender’s offices with salaried attorneys across the state along with state funding and oversight).

<sup>10</sup> This article builds on a previous one that argues that in order to successfully usher in change, reformers must understand the existing culture and implement strategies to alter it. See Jonathan Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, LOY. J. PUB. INT. L. (Spring 2008) (forthcoming Fall 2008).

<sup>11</sup> THE SOUTHERN CENTER FOR HUMAN RIGHTS, “IF YOU CANNOT AFFORD A LAWYER. . .”: A REPORT ON GEORGIA’S FAILED INDIGENT DEFENSE SYSTEM 17 (2003).

their clients at the jail, accept their phone calls, or return their letters.<sup>12</sup> “For many people accused of crimes throughout Georgia, their only ‘representation’ [was] a whispered conversation with a lawyer in the courtroom or right outside the courtroom just moments before pleading guilty and being sentenced.”<sup>13</sup> “[T]here [was] scant regard for them as individuals. They [were] numbers on dockets, faceless ones to be processed and sent on their way.”<sup>14</sup>

The indigent defense system in Georgia, like many others nationwide, was driven by a culture that promoted incompetent lawyering. Reform in Georgia would require transforming the value system responsible for the practices described above. For lawyers who learned to practice in this environment, it would be difficult to understand representation of poor people as anything different. Many judges would not welcome change from a system that allowed them to clear their dockets quickly and effortlessly. For a new lawyer aspiring to provide her clients more meaningful representation in this environment, the task would be daunting. It would take personal commitment, training, and the support and encouragement of their classmates to help these new Honors Program lawyers confront these challenges. The Program was founded on the belief that indigent defense reform cannot be achieved without first transforming a culture that ensures sub-par representation for poor people accused of crimes and that the most effective way to achieve reform is by grooming a new generation of public defenders to usher in necessary change. Key to this effort would be identifying candidates most receptive to this mission, instilling in them the desired value-set through intensive training, and supporting them as they develop into conscientious defenders.

Georgia’s indigent defense system is a representative example of a larger national crisis. Because so many indigent defense delivery systems in this country face cultural challenges similar to those in Georgia, legislative approaches that only focus on structural and/or financial reform alone are insufficient. In this article I argue that efforts similar to the Honors Program, aimed at tackling the crisis of culture resulting from efforts to circumvent the mandates of *Gideon*, are indispensable to any indigent defense reform strategy. In Part I of this article, I begin by setting forth some of the key values that are fundamental to the representation of any person accused of a crime. I then examine the quality of representation that poor people receive, and suggest that it reflects a culture devoid of these essential values, making it impossible for quality defense to exist. In this sense I argue that a change in values must occur to achieve reform. In Part II, I argue that many attorneys who are products of the corrupt system will be resistant to change. Therefore, reformers will do best by focusing on strategies designed to groom a new generation of defenders who will embrace the values necessary

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<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 35.

<sup>14</sup> *Id.* at 37 (citing *Argersinger v. Hamlin*, 407 U.S. 25, 34–36 (1972)).

to produce the transformation. I suggest that these strategies must include three components: values-based recruitment, values-based training, and values-based mentoring. Finally, in Part III, I illustrate how this theory can work in practice through an examination of the Honors Program. While Georgia ceased funding the Honors Program two years after its inception, it served as a model for the Southern Public Defender Training Center (SPDTC), its regional successor. I conclude by arguing that these programs can serve as a model for recruitment, training, and mentoring to drive indigent defense reform nationally.

### I. INDIGENT DEFENSE IN AMERICA: A CULTURE SHAPED BY ACCEPTANCE OF THE STATUS QUO

While there is no single best value set for every public defender's office, there is a set of core principles fundamental to representing indigents. These principles are found in the Constitution, as construed in *Gideon* and its progeny; rules of professional conduct based on the American Bar Association (ABA) model rules and subsequently adopted by most states; and performance standards promulgated by the ABA and the National Legal Aid and Defender Association (NLADA), as well as some states. However, because so many defense providers are guided by values inconsistent with these fundamental principles, they frequently fail to live up to the standards of their profession. For simplicity of analysis, I organize these core values into four categories: 1) the duty of zealous and loyal representation; 2) the duty to advocate for the client's cause; 3) the duty to thoroughly study and prepare; and 4) the duty to communicate with the client.

Central to the work of any criminal defense attorney is the duty to provide the "zealous and loyal [representation] required by the Sixth Amendment."<sup>15</sup> "Indeed, . . . the highest claim on the most noble advocate . . . [is] fidelity, unquestioned, continuing fidelity to the client."<sup>16</sup> The lawyer's "function is to assist the defendant,"<sup>17</sup> and his "duty of loyalty [to the client is] perhaps the most basic of counsel's duties."<sup>18</sup> This tenet applies with equal force to the lawyer representing indigents.<sup>19</sup>

From this duty of loyalty "derive[s] the overarching duty to advocate the client's cause."<sup>20</sup> As the assistant to the defendant, the lawyer must re-

<sup>15</sup> *Nix v. Whiteside*, 475 U.S. 157, 189 (1986).

<sup>16</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (citing *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969)).

<sup>17</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>18</sup> *Id.* at 692; *see also* *Burger v. Kemp*, 483 U.S. 776, 784 (1987) (The Court "generally presume[s] that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.").

<sup>19</sup> *See* *Polk County v. Dodson*, 454 U.S. 312, 315 (1981) (relying on lower court's reasoning, after "[c]onvassing the leading authorities," that "a public defender owes a duty of undivided loyalty to his client.").

<sup>20</sup> *Strickland*, 466 U.S. at 688.

main mindful that it is the client's case, and it is the client who determines the goals of the representation. This ideal is reinforced by the Model Rules of Professional Conduct, which bind the lawyer and require, with limited exception,<sup>21</sup> that the "lawyer shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are to be pursued."<sup>22</sup>

The Model Rules recognize that to advocate effectively for a client, a lawyer must possess a certain level of legal knowledge and skill, as well as the time necessary to undertake thorough study and preparation specific to the case at hand.<sup>23</sup> This duty applies to the pre-trial, as well as trial and post-trial components of the representation.<sup>24</sup> Included among several critical pre-trial responsibilities are the duties to conduct investigation, pursue formal and informal discovery, research legal issues, and consider filing applicable pre-trial motions.<sup>25</sup>

Finally, the lawyer is required to communicate with the client to keep her apprised of developments in her case and to ensure that she has sufficient information to decide the objectives of her own representation.<sup>26</sup> This duty "is essential to the very nature of the attorney-client relationship,"<sup>27</sup> for it impacts the lawyer's ability to carry out all other obligations. Without effective communication, the lawyer's duties to provide zealous and loyal representation, to advocate for the client's cause, and to thoroughly study and prepare are severely hampered.

Despite the clear standards delineated for criminal defense lawyers, there are numerous examples of lawyers who have agreed to take on the representation of our country's poorest citizens and then fail even to come close to meeting these benchmarks. Too often public defenders are either unfamiliar with these principles or choose to ignore them. Either way, the results may be tragic.

#### A. *The Absence of Zealous and Loyal Representation*

Zealous and loyal representation must be grounded in the lawyer's concern for and allegiance to the client. We were recently reminded of the tragedy that can result when a lawyer does not take this obligation seriously.

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<sup>21</sup> See *Polk County*, 454 U.S. at 315.

<sup>22</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

<sup>23</sup> *Id.* at R. 1.1.

<sup>24</sup> See generally ABA STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION (3d ed. 1993); PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION (Nat'l Legal Aid and Defender Ass'n, 3d ed. 1995).

<sup>25</sup> See generally ABA STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION (3d ed. 1993); PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION (Nat'l Legal Aid and Defender Ass'n, 3d ed. 1995).

<sup>26</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003); see also *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>27</sup> J. Nick Badgerow, *The Lawyer's Ethical, Professional, and Proper Duty to Communicate With Clients*, 7 KAN. J.L. & PUB. POL'Y 105, 105-06 (1998).

Curtis Osborne was represented by Johnny Mostiler when he was convicted of two counts of murder in 1991 and sentenced to die in Spalding County, Georgia. Despite evidence that Mostiler refused to inform Osborne of a plea offer that would have spared his life<sup>28</sup> because, in Mostiler's words to another client, "that little [racial epithet] deserves the death penalty,"<sup>29</sup> Georgia executed Mr. Osborne on June 5, 2008. Osborne was denied a lawyer who appreciated the duty of loyalty.

While having contempt for one's clients interferes with a lawyer's duty to act as a zealous and loyal representative, perhaps the more common reason for a lawyer's failure to meet this duty is an overriding sense of loyalty to other players in the criminal justice system. This desire to accommodate others at the client's expense is often encouraged by judges and public defender's office leaders who may be more interested in the process moving quickly and efficiently than in justice. This may explain why, three years into Georgia's attempt to reform indigent defense through a state-wide system, Atlanta Judge Andrew Mickle called for a return to "home-cookin," the practice of hiring local lawyers who have good relationships with judges and court staff.<sup>30</sup> Mickle saw the ease with which judges could assign cases to the "many eager (and some starving) attorneys out there jockeying for position on court-appointed lists" as a further virtue of local justice.<sup>31</sup> He suggested that many lawyers will settle for \$50 per case, regardless of the time invested. But, as veteran indigent defense champion Stephen Bright points out so eloquently, "home cooking" is the return to a justice system in which judges appoint "incompetent lawyers who offer[ ] little or no resistance as their clients [are] swiftly dispatched to death row."<sup>32</sup> Although "cheap and efficient[,] . . . [this system] undermine[s] the credibility and legitimacy of the courts."<sup>33</sup> While it "serves judges' interest in obtaining guilty pleas and moving their dockets, . . . it discourages lawyers from spending more than a few minutes on a case."<sup>34</sup> Thus, adds Bright, "[p]eople are processed; they are not represented."<sup>35</sup>

The system Judge Mickle promotes creates powerful disincentives for any lawyer to take seriously her duty to provide zealous and loyal representation. One may wonder where a jurist learns to hold such views about justice. In Mickle's case, his professional education ironically began as a public defender in the Atlanta Public Defenders Office, where he spent three years,

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<sup>28</sup> William S. Sessions, *Death Penalty: Osborne Sentence a Stain on Justice*, ATLANTA J. CONST., June 3, 2008, at A11.

<sup>29</sup> Bill Rankin, *Racism 'Infected' Killer's Defense? Inmate's Trail to Be Scrutinized As Lawyers Ask Board to Commute Osborne's Death Sentence*, ATLANTA J. CONST., May 30, 2008, at D1 (internal quotations omitted).

<sup>30</sup> Andrew A. Mickle, *Is the Process Choking the PD System*, FULTON COUNTY DAILY REP., Apr. 11, 2008.

<sup>31</sup> *Id.*

<sup>32</sup> Stephen B. Bright, Letter, *Mickle's 'Home Cooking' Not Good For Indigent Defense*, FULTON COUNTY DAILY REP., Apr. 17, 2008.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

the last as the chief public defender. Presumably his value system regarding indigent defense was shaped by that experience. This exemplifies the influence that a bankrupt public defender culture can have on a lawyer, and the importance of devising strategies to alter these values.

While the duty of zealous and loyal representation belongs to each individual lawyer, when it goes unappreciated by leadership the entire system will become infected. This is what happened in New Orleans, Louisiana. Largely prompted by deficiencies unmasked in the wake of Hurricane Katrina, numerous outside experts studied the factors that led to the longstanding failure of indigent defense in that city. They repeatedly pointed to an organizational culture that placed the interests of the judges above those of defendants.<sup>36</sup> The dereliction of the duty of client loyalty was so pervasive that one of the teams of experts, coming from the United States Justice Department Bureau of Justice Assistance (BJA), when setting forth recommendations to reform the public defender's office there, concluded that the first recommended goal of a new management team should be to "[c]hange the public defender program from court-and-process-centered to a client-centered public defender program."<sup>37</sup>

### B. *The Failure to Advocate for the Client's Cause*

The BJA experts who studied the public defender program in New Orleans use the term "client-centered" to refer to an allegiance to the client over the court. In this sense, the idea of a client-centered program speaks directly to the lawyer's duty of loyalty to the client. However, the concept equally addresses the manner in which the lawyer advocates her client's cause. Many scholars, lawyers, and legal clinicians charged with training future lawyers embrace a philosophy that gives the client significant autonomy over the decisions that impact her case.<sup>38</sup> The popularity of this approach stems from a recognition that "most [clients] are in a better position to make case decisions because so many decisions ultimately turn on the values and priorities that the client alone best appreciates."<sup>39</sup> While deference to a client's decisions must be preceded by sufficient counsel to ensure that the

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<sup>36</sup> See CATHERINE L. SCHAEFER & ROBERT L. SPANGENBERG, *THE ORLEANS INDIGENT DEFENDER PROGRAM: AN OVERVIEW* 24 (1997) (concluding that "an underlying philosophy among the staff is that satisfying the judges is extremely important," and that when pitting the desires of the judges against "defense counsel's obligation to be vigilant in protecting the rights of each client . . . the balance has shifted inappropriately towards the judge and the court.").

<sup>37</sup> NICHOLAS CHIARKIS, D. ALAN HENRY & RANDOLPH N. STONE, *AN ASSESSMENT OF THE IMMEDIATE AND LONGER-TERM NEEDS OF THE NEW ORLEANS PUBLIC DEFENDER SYSTEM* 10 (2006).

<sup>38</sup> See Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 748 (2008) (conceptualizing the attorney-client relationship as an agency relationship in which "a lawyer-agent serves the interests of the client-principal").

<sup>39</sup> Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 9 (1998).

decisions are informed and that the risks have been appropriately conveyed and considered, “[u]nder this view, the client has the right to make his own choices because it is he who stands to gain or lose the most from decisions made in his case.”<sup>40</sup> This way of thinking comports with the *Strickland* Court’s construction of the defense attorney as assistant to the client.<sup>41</sup>

However, even for the attorney unwilling to cede this much control, pursuant to ABA Rule 1.2, the client clearly controls the objectives of the representation.<sup>42</sup> Although, under any defensible construction, a lawyer may not take from the client the autonomy to decide whether to exercise her right to trial,<sup>43</sup> it frequently occurs. Consider Carlos Ivy, who was fourteen years old when he was arrested in Union County, Mississippi for allegedly taking \$100 from an elderly woman. Despite his protestations of innocence, his lawyer never investigated his claims or consulted with his client. Presumably concluding that Ivy was guilty, and that he would lose at trial, Ivy’s court-appointed lawyer advised him to plead guilty and told him that he was “looking at life” if he lost at trial. Feeling he had no other option, Ivy pled guilty.<sup>44</sup> This incident is not isolated. Lawyers frequently ignore their role as the client’s assistant. Rather than help the client make an informed decision, some defense attorneys “begin with a presumption of client guilt, and both begin and end the representation by looking for the best available bargain.”<sup>45</sup> The defender who presumes guilt finds little reason to investigate the defendant’s claims of innocence or to spend precious time consulting with the client. The lawyer has decided the objective of the representation before meeting the client.

For many defendants with court-appointed lawyers, the choices are bleak. They can succumb to their lawyers’ pressure to take a plea or insist on exercising their constitutional rights and pay dearly. The consequences of the latter course of action became clear to Linda Lambert, charged with felony murder in Detroit, Michigan. Her court-appointed lawyer “spent five minutes or less cross-examining each prosecution witness and called no wit-

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<sup>40</sup> Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503–04 (1994).

<sup>41</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>42</sup> MODEL RULES OF PROF’L CONDUCT 1.2(a) (2003). While there is disagreement over what constitutes an “objective,” the ABA Model Code of Professional Responsibility EC 7-7 (2008) is instructive. It reads: “In certain areas of legal representation not affecting the merits of the case or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . .” See Uphoff & Wood, *supra* note 39, at 4 (discussing differing viewpoints on how far the client’s decision-making authority extends).

<sup>43</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2003) (specifically reserving for the client the right to determine whether to enter a guilty plea).

<sup>44</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 13 (2003) (Ivy’s lawyer actually gave him erroneous legal advice. He told Ivy that if he pled guilty he would be eligible for parole in about six years. After being sentenced to twenty-five years, Ivy learned he was not eligible for parole for ten years. Ivy never heard from his lawyer again.).

<sup>45</sup> Andrew D. Liepold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

nesses for the defense.”<sup>46</sup> She was convicted and sentenced to a prison term of seven to fifteen years.<sup>47</sup> As these examples show, poor defendants are often deprived of any control over their own representation. While there is some debate over the degree to which the client’s desires control the representation, there is a requisite level of client participation mandated. Without sufficient client involvement, the lawyer can hardly be said to be either acting as the defendant’s assistant or advocating for the client’s cause. The above scenarios demonstrate a disregard for the client’s view and fall below any standard of advocacy.

While this section addresses violations of the lawyer’s duty to advocate for the client, these scenarios also shed light on the absence of another important value: the duty to thoroughly study and prepare. For without a comprehensive understanding of the factual and legal aspects of the case, the lawyer will be unable to apprise the client sufficiently of her options, a prerequisite to empowering the client to determine the objectives of her representation. This will be the focus of the next section.

### C. *Lack of Thorough Study and Preparation*

Rules of professional responsibility applicable to lawyers across the country make clear that competent representation cannot be achieved without “thoroughness and preparation,”<sup>48</sup> and while the rules do not specifically define what is required to meet this standard, other prominent sources provide criminal defenders guidance. The ABA Defense Function Standards (developed by a prominent team of defense lawyers, law professors, judges, and prosecutors) and NLADA’s Performance Guidelines (developed by some of the nation’s leading criminal justice advocates) should clearly inform the practitioner.

Through the lens provided by these authorities, we gain a better understanding of the preparation required for competent representation. This section focuses on important preparatory tasks the attorney must undertake in every case — absent an exceptional, case-specific reason to the contrary — regardless of whether it is resolved at or before trial. Three oft-neglected obligations are the duties to investigate, seek discovery, and research and litigate pre-trial motions.

The vital importance of these duties is made explicit through the ABA Standards,<sup>49</sup> the NLADA Performance Guidelines,<sup>50</sup> and case law interpret-

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<sup>46</sup> *Symposium on Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 979, 1056 (2001) (citing *Too Poor to Be Defended*, THE ECONOMIST, Apr. 11, 1998, at 21–22).

<sup>47</sup> *Id.*

<sup>48</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003).

<sup>49</sup> See ABA STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION 4–4.1 (3d ed. 1993).

<sup>50</sup> See PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION 4.1, 4.2, 5.1 (Nat’l Legal Aid and Defender Ass’n, 3d ed. 1995) (Guidelines 4.1, 4.2, and 5.1).

ing the Sixth Amendment right to effective assistance of counsel,<sup>51</sup> yet each is routinely ignored. Think about the plight of an eighteen-year-old pregnant woman in Orleans Parish, Louisiana, who simply accepted a ride from a friend to an appointment with her obstetrician. Unbeknownst to her, the car was stolen. She was arrested and eventually held on a \$20,000 bond. Unable to post bond, the woman gave birth while incarcerated. Her baby was taken from her and given to a grandparent while she remained locked up. It was not until the public defender's office later discovered a conflict that it transferred the woman's case to a third-year, clinical law student. After conducting a basic investigation and sharing it with the prosecutor, the student was able to get the case dismissed.<sup>52</sup> If this woman's public defender had done what we expect of any clinical student, this young woman would have never been jailed. But, public defenders in New Orleans did not see investigation as fundamental to representation.

While most investigation requires the lawyer to go into "the field" to gather information, through the discovery process the lawyer can learn valuable information from the prosecution without leaving her office. While the rules governing discovery vary among jurisdictions, every criminal defense attorney is entitled to basic information necessary to the preparation of a defense. But, she must ask for the information. Take the case of Donald Lambert, who, at the age of fifteen, was accused of a double homicide in Grant County, Washington. Perhaps the most damaging piece of evidence against him was a transcript of a tape-recorded confession in which he allegedly said he went to the couple's home intending to shoot them. Had his lawyer, Guillermo Romero, requested a copy of the tape, he would have learned that Lambert never said this. Instead, based on Romero's advice, Lambert pled guilty and received a sentence of mandatory life without the possibility of parole.<sup>53</sup>

Both investigation and discovery provide the lawyer critical vehicles for learning information essential to case preparation. As seen in the above examples, this can provide invaluable fodder for mounting an effective defense or challenging the state's case. But, as Mr. Lambert's story reveals, it also can raise issues that provide the basis for excluding damaging or unreliable evidence at trial. Such issues are raised through pre-trial motions, an

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<sup>51</sup> With respect to the duty to investigate, see 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, 665–66 (Summer 1986) (noting that "[c]ourts have long recognized that 'effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial'). With respect to the duty to seek pre-trial discovery and file pre-trial motions, see *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (noting that unless the result of a strategic decision, failure to conduct pre-trial discovery and to file pre-trial motions is deemed constitutionally deficient assistance of counsel).

<sup>52</sup> THE NAT'L LEGAL AID & DEFENDER ASS'N, A STRATEGIC PLAN TO ENSURE ACCOUNTABILITY & PROTECT FAIRNESS IN LOUISIANA'S CRIMINAL COURTS, 66 n.11 (2006).

<sup>53</sup> Ken Armstrong, Florangela Davila & Justin Mayo, *An Unequal Defense: For Some, Free Counsel Comes at a High Cost*, SEATTLE TIMES, April 4, 2004, at A1 (a U.S. District Court judge subsequently vacated Lambert's guilty plea based on this and other failings by Romero).

essential defense tool. But even with the most obvious constitutional violation or evidentiary infirmity, a defendant will not get relief absent a request in the form of a motion. Unfortunately, many lawyers fail to file even the most obvious motions. For example, in McDuffie County, Georgia, Bill Wheeler was awarded a contract to defend the county's indigent defendants. Between 1993 and 1996, Wheeler resolved 316 cases and filed only three motions.<sup>54</sup>

While "inadequate preparation [is often] identified as the most prevalent form of incompetence,"<sup>55</sup> it is almost always, in part, the product of a failure of the lawyer to communicate adequately with her client. This can be equally said of the lawyer's neglect with respect to each of the core values discussed thus far. Indeed, most of the examples in previous sections could also be framed as failures of the lawyer to communicate with the client, for effective communication is at the root of loyal and zealous representation, client-centered advocacy, and thorough preparation. Thus, the next section will focus on this critical value.

#### D. *Insufficient Client Communication*

"It cannot be over emphasized that communication with a client is, in many respects, at the center of all services."<sup>56</sup> This is how the lawyer begins to build a relationship with the client.<sup>57</sup> A strong attorney-client relationship will help the lawyer foster a sense of loyalty and fidelity to the client and will allow the client to develop respect and trust for the advocate.<sup>58</sup> Through this relationship, the lawyer learns the client's goals and objectives and provides her with information needed to make informed decisions about the representation. Furthermore, without an understanding of the objectives of the representation and access to information that perhaps only the client knows, the lawyer will not be able to fulfill her obligation to thoroughly prepare. In short, without "effective communication[ ], . . . the attorney[ ] cannot know, understand, or represent the client's goals."<sup>59</sup>

Despite the critical importance of attorney-client communication and counseling, they are among the values most frequently neglected in the legal

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<sup>54</sup> Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. OF AM. L. 783, 789 (1997).

<sup>55</sup> Klein, *supra* note 51, at 665 (citing studies that revealed lawyers and judges alike identify lack of preparation as the single-most common reason for lawyer incompetence).

<sup>56</sup> Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1181 (1988) (citing *State Bar v. Schreiber*, 653 P.2d 151, 151 (Nev. 1982)).

<sup>57</sup> See Wald, *supra* note 38, at 747 ("Communications between clients and attorneys are the cornerstone of the attorney-client relationship").

<sup>58</sup> For a discussion about how public defenders can address many of the challenges inherent to building such a relationship, see Jonathan Rapping, *Building a Relationship With Your Client*, THE ADVOC.: J. OF CRIM. JUST. EDUC. & RES., Nov. 2005, at 4, available at [dpa.ky.gov/library/advocate/pdf/2005/adv112005.pdf](http://dpa.ky.gov/library/advocate/pdf/2005/adv112005.pdf).

<sup>59</sup> Wald, *supra* note 38, at 748.

profession.<sup>60</sup> Anecdotal evidence suggests that in the world of indigent defense the problem is likely even more severe. Consider Tasha McDonald, a single mother with a very sympathetic story, who stole some items for her home under desperate circumstances.<sup>61</sup> Knowing nothing of her situation, the prosecutor would only offer a plea that would require jail time. Afraid that incarceration would mean losing her job and her home, and having her children taken from her, she desperately tried to talk to her court-appointed lawyer. When he would not talk to her long enough to understand her circumstances, Ms. McDonald hired private counsel. It was only then that the district attorney learned of her situation. “‘I am shocked,’ he said [once he found out that one of her children was disabled]. ‘That would have made a difference in terms of her remaining in the home.’”<sup>62</sup> However, after pleading forty-eight people in two days, which he refers to as “a uniquely productive way to do business,”<sup>63</sup> Ms. McDonald’s court-appointed lawyer had little time for client communication.

Nor did Clarence Richardson, a defender from New Orleans, whose twelve-year-old client was charged with driving a stolen car.<sup>64</sup> He first met his client a few minutes before the trial began. The only conversation was in a crowded waiting area outside the courtroom. “‘The judge wants to know what you are going to do,’ Mr. Richardson told the boy . . . ‘Are you going to plead guilty? You have to make up your mind.’”<sup>65</sup> Mr. Richardson, having done no preparation, offered no trial strategy. With no more than this “consultation” to guide him, the twelve-year-old pled guilty and was sentenced to two years in juvenile prison.

There are innumerable examples of “[p]eople languish[ing] in jail for weeks or months . . . before meeting with a lawyer;”<sup>66</sup> “lawyers for the poor never meet[ing with] their clients until the day of trial;”<sup>67</sup> and “[m]eetings between lawyer and client [that are] brief, and often take place in the courtroom, just minutes before critical hearings.”<sup>68</sup> These scenarios stand in stark contrast to the landscape envisioned by the authorities cited above. Attorney-client communication with poor defendants is thus often perfunctory, undermining the lawyer’s duty of loyalty to the client, her obligation to ad-

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<sup>60</sup> See Stephen E. Schemenauer, *What We’ve Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation’s Most Common Ethical Complaint*, 30 *HAMLIN L. REV.* 629, 646 (2007) (the most common complaint nationwide to state disciplinary agencies charged with overseeing the practice of law is a “failure to communicate”); see also Badgerow, *supra* note 27, at 105 (“[F]ailure of communication still represents the single-most common reason for client complaints against lawyers.” (citing Marty M. Snyder, *Disciplinary Complaints Reach All-Time High*, *J. KAN. BAR ASS’N*, Sept. 1997, at 4)).

<sup>61</sup> Amy Bach, *Justice on the Cheap*, *THE NATION*, May 21, 2001.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Fox Butterfield, *Few Options or Safeguards in a City’s Juvenile Courts*, *N.Y. TIMES*, July 22, 1997, at A1.

<sup>65</sup> *Id.* at A14.

<sup>66</sup> THE SOUTHERN CENTER FOR HUMAN RIGHTS, *supra* note 11, at 11.

<sup>67</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *supra* note 44, at 6.

<sup>68</sup> *Id.*

vocate the client's cause, and her ability to thoroughly study and prepare for the representation. The above examples illustrate that if we are ever to achieve meaningful reform, we must transform the value system that has rendered so many defenders ill-equipped for the job. Part II considers strategies for doing so.

## II. CHANGING VALUES: AN ESSENTIAL INGREDIENT TO MEANINGFUL REFORM

From the examples in Part I, it is obvious that many public defenders fail to uphold values fundamental to their profession. Leaders have two options to remedy this situation: changing the way existing lawyers perform or bringing in a new population of lawyers who practice in accordance with the desired values. It is my thesis that the latter is the critical element to achieve this goal. First, I make the case that resistance will likely thwart efforts to alter the practices of seasoned lawyers and argue that grooming a new generation is a critical component of any strategy for effective reform. Then, I suggest a three-prong approach to accomplishing this objective: values-based recruitment, values-based training, and values-based mentoring.

### A. *You Can't Teach an Old Dog New Tricks: The Argument for Focusing Value Transformation Efforts on New Public Defenders*

While it is easy to demonize the lawyers discussed above as consciously working against the people they represent, from my experience many lawyers are so unaware of what good representation looks like that they believe they are fulfilling their obligation. They have been shaped by systems that teach that what is described above is all poor people deserve. Acceptance of the status quo is ingrained into a lawyer early in her career. If we do not intervene before these attorneys internalize these values that reflect the status quo, it may be too late. It is far easier to shape a person's value set than to change it once developed. Transforming values is a process, and scholars who study organizational change warn us to expect resistance from those who are asked to alter their mindset. In fact, researchers suggest that this may be the major problem in creating change.<sup>69</sup> One would certainly expect this to be so in the case of indigent defense reform, where the demand for transformation is almost always in response to the revelation of systemic injustice. Lawyers who represent indigents under the corrupt system will likely view the acknowledgement of the need to modify their attitudes and behaviors as an admission of their incompetence and acceptance of a share of the blame for past injustices.<sup>70</sup> From my own experience

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<sup>69</sup> DAVID K. CARR, KELVIN J. HARD & WILLIAM J. TRAHANT, *MANAGING THE CHANGE PROCESS* 73 (1996).

<sup>70</sup> Cf. Geetu Orme & Sean Germond, *Managing Change: Emotional Intelligence in Changing Times*, 9 J. PERFORMANCE THROUGH PEOPLE, COMPETENCY & EMOTIONAL INTELLI-

training public defenders, there is far more resistance to learning new approaches from seasoned practitioners than from newer lawyers. A common refrain is, "I have been doing it this way for thirty years," implying an unwillingness to change.

In addition to the denial that one might expect from someone being asked to accept criticism of her performance, change theory suggests other reasons leaders should expect stiff resistance in the face of change. In their work, Harvard Business School professors John Kotter and Leonard Schlesinger<sup>71</sup> proposed four reasons why people resist organizational change: parochial self-interest, misunderstanding and lack of trust, different assessments, and low tolerance for change.<sup>72</sup> Each of these helps explain why public defenders are reluctant to modify their behavior. With respect to "parochial self-interest," adopting the values discussed will entail effort. The time it takes to build the attorney-client relationship, and to otherwise sufficiently study and prepare, is significant. Given the caseloads that public defenders carry, the work necessary to meet these obligations cannot be completed in a forty-hour workweek. Good public defenders typically work into the evening and through many weekends without additional compensation. Against this backdrop, many lawyers choose to ignore these values.

Regarding what Kotter and Schlesinger call "misunderstanding and lack of trust," some indigent defenders do not realize that the new values represent a more effective way to practice.<sup>73</sup> Failing to understand some of the ancillary benefits, they may not see the value in investigating for a client they presume guilty or litigating a legal issue they do not think they can win. The lawyer who has only experienced antagonistic relationships with her clients will hardly comprehend the value in trying to establish a relationship of mutual trust and cooperation with them. The lawyer who cannot see the importance of the values she is asked to adopt will defy reform efforts.

Because some lawyers have a different assessment of the benefits of pursuing certain values, they will resist incorporating them. Often this is tied to the misplaced loyalties discussed above. Frequently, when chief defenders are confronted with conforming to new standards of practice, they express concern about judges' reactions. On one occasion, following a training session on the importance of filing basic suppression motions, one office head told me that the judges would really be upset if his lawyers started filing such motions. He explained that in his jurisdiction everyone gets along, and he did not want his lawyers to cause trouble. His assessment of the cost of zealous representation explained his resistance to change. This is

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GENCE Q. 22, 25 (2002) (addressing humans as emotional beings that respond to change as both loss and a perceived threat to integrity).

<sup>71</sup> John Kotter is currently professor emeritus at Harvard Business School and Leonard Schlesinger is currently the president of Babson College.

<sup>72</sup> John P. Kotter and Leonard A. Schlesinger, *Choosing Strategies for Change*, HARV. BUS. REV. 107-08 (1979).

<sup>73</sup> *Cf. id.* at 108 (According to Kotter and Schlesinger, this misunderstanding is intensified when the employee does not trust the leader initiating change, hence, "misunderstanding and lack of trust.").

not an isolated concern. Perhaps the most common reason lawyers fail to commit to new values is their fear of its impact on their relationship with judges, prosecutors, and law enforcement.<sup>74</sup>

Furthermore, “people also resist change because they fear they will not be able to develop the new skills and behaviors required of them.”<sup>75</sup> When a lawyer practices a certain way for years, learning a new skill often involves unlearning many bad habits. The learning curve can be steep, and fear of failure can be paralyzing. Therefore, it is often the lawyers most in need of change who are least willing to learn something new. This phenomenon can lead even the seasoned lawyer who agrees that change is needed to resist reform efforts.

While there will certainly be experienced practitioners in every system who embrace change for all of the reasons mentioned above, there is a correlation between a lawyer’s tenure in a corrupt system and her resistance to change. Because it is difficult to alter the practices of veteran attorneys, any reform strategy must incorporate a plan to groom a new generation of defenders charged with ushering in desired change. This process must include a three front focus — recruitment, training, and mentoring — each calculated to promote the desired values.

### *B. Values-Based Recruitment, Training, and Mentoring: A Three-Prong Strategy for Grooming the Next Generation of Defenders*

Accepting the importance of transforming the values of corrupt systems, and that it is significantly easier to instill values in a new attorney than to alter those of a lawyer wedded to the status quo, in this section I argue that values-based recruitment, training, and mentoring are each essential to a larger reform strategy. Through values-based recruitment the organization head can identify candidates who are most receptive to the agency’s values. Through values-based training, the leader will instill these values in new hires. And, through values-based mentoring, she ensures that these lessons are reinforced and, ultimately, internalized.

#### *1. Values-Based Recruitment: Identifying the Potential to Internalize Desired Values*

As any successful business manager knows, a recruitment strategy is critical to an organization’s success.<sup>76</sup> Like successful business models, indigent defender programs must have a clearly defined vision and an apprecia-

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<sup>74</sup> See Rapping, *supra* note 10 (discussing how the relationship between the public defenders office and the judiciary in New Orleans led to some of the most flagrant violations of lawyers’ duties to their clients).

<sup>75</sup> *Id.* at 6.

<sup>76</sup> See, e.g., EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 261 (Jossey-Bass 2004) (1985) (discussing the vital role that recruitment and hiring play in transforming organizational culture).

tion of the values that promote it. Effective recruitment identifies individuals likely to perform in accordance with these values.<sup>77</sup> In the context of a public defender's office, the best predictors of an applicant's performance are her attitudes about the people the office represents and her commitment to the protection of their Constitutional rights.<sup>78</sup> The chief public defender needs to identify lawyers who embrace the importance of client loyalty, see their role as empowering and speaking on behalf of their clients, are driven to put in the necessary time and energy, and appreciate the importance of attorney-client relationships premised on communication.

When I began helping to reform the public defender's office in New Orleans in 2006, one of our first tasks was to hire attorneys.<sup>79</sup> Frustrated that the positions were not filled more quickly, one judge volunteered his opinion. He told the office chief about an unemployed lawyer who was working as a server at a local restaurant and expressed concern that with out-of-work lawyers in the city, the office still had vacancies. Without knowing anything more than the fact that the server had a law degree, the judge concluded this person was qualified to represent poor people charged with crimes. Rather than seeing public defense as a highly specialized field of law, this judge viewed it as an occupation of last resort for lawyers who cannot get hired elsewhere. This judge's attitude is shared by some chief public defenders. There are some who, when faced with a staff vacancy, begin and end their list of requirements with "admitted to practice law in [the State]," limiting their applicant pool to local, unemployed lawyers. Others demand slightly more: they seek a licensed lawyer who has experience trying cases. However, because only a small fraction of a public defender's cases end up in trial, the latter strategy is hardly better than the former.

Values-based recruitment is a strategy for identifying applicants most likely to embrace the desired values based on their attitudes about their responsibilities as public defenders and about their clients. It is a two stage process: first, offices must attract the appropriate pool of candidates; and second, they must select candidates whose attitudes demonstrate that they will likely become public defenders who embrace these values.<sup>80</sup> In the first stage, the leader must make it clear that the office will promote the quality of practice in which applicants desire to engage. In the second stage — per-

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<sup>77</sup> See Linda K. Treviño, *Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 BROOK. L. REV. 1195, 1201 (2005) ("Leaders influence [organizational] culture by portraying a vision" and "by recruiting and hiring personnel who fit the vision and values of the organization.").

<sup>78</sup> See generally Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 65–66 (2005) (arguing the importance of recruiting based on employees "mindsets" and "attitudes.").

<sup>79</sup> When the Board of the Orleans Public Defenders decided to do away with the practice of part-time public defenders, many staff attorneys, unwilling to give up relatively lucrative private practices, left the agency leaving a number of vacancies that needed to be filled. For further discussion, see generally Rapping, *supra* note 10.

<sup>80</sup> Each public defender office will define the desired value set differently.

haps more appropriately called values-based hiring — the leader has to devise strategies for identifying these attitudes in candidates.

With respect to the first stage, while many lawyers see public defense as a short-term job where they can gain trial experience, a job for passing time until other opportunities come along, or employment of last resort, there are many graduating law students throughout the country committed to careers in indigent defense. These young lawyers, who understand both their Constitutional obligations and that their work is client-centered, are eager to provide excellent representation. However, there are rarely more than a few such dedicated prospects at any given law school. These candidates want to be part of a larger mission and work in an office that appreciates their enthusiasm, shares their commitment, and promises to help them become great public defenders. The best candidates know that, with the exception of a handful of offices nationally which have invested significant time and resources developing and promoting their reputations for excellence, public defender's offices often greet new attorneys with a stack of case files and expect them to immediately begin processing clients. These aspiring attorneys are understandably unwilling to do so. Therefore, the challenge for the reform-minded leader is to inspire these applicants to join her effort to provide every client with the representation to which she is entitled.<sup>81</sup>

## 2. *Values-Based Training: Instilling the Desired Values*

Once the organization has hired attorneys who will embrace the preferred values, it must provide values-based training to reinforce these principles.<sup>82</sup> While it is not uncommon to find public defender training programs that focus on trial skills or substantive law updates, it is less common to find sessions designed to teach and develop the values discussed above. This is a critical omission.

Many chief public defenders mistakenly believe that law schools prepare graduates to represent clients whose liberty is at stake. Absent training, even the recent law graduate who is enthusiastic about joining a client-centered organization will have little idea how to successfully represent criminal defendants. While law schools may teach principles of criminal procedure, criminal law, evidence, and professional responsibility, it is unlikely that the law graduate was trained in the practical application of these tenets. Furthermore, absent participation in a criminal defense clinic or an internship at a client-centered public defender's office, the new lawyer has probably had no exposure to attorney-client relationship-building, public defender problem-

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<sup>81</sup> This is akin to what Professor John Kotter calls "establishing a sense of urgency." JOHN P. KOTTER, *LEADING CHANGE* 35–36 (HARVARD BUSINESS SCHOOL PRESS 1996).

<sup>82</sup> Mark B. Baker, *Promises and Platitudes: Toward A New 21st Century Paradigm for Corporate Codes of Conduct?*, 23 *CONN. J. INT'L. L.* 123, 137 (2007) (arguing that, in the context of efforts to have employees follow corporate codes of conduct, training is a critical vehicle through which values are integrated into an organization).

solving, or developing an overall case-preparation strategy. A good public defender training program will introduce the new attorney to each of these topics and, through simulation and role-play, equip the trainee with strategies for confronting related challenges.

While courtroom skills and legal knowledge are essential to any training program, alone they are inadequate. Values-based training educates participants about their duties to the client and reinforces these lessons throughout the first few years of the lawyer's development. Fundamental to this value set is the notion of client loyalty. Lawyers lose sight of this obligation when they are unduly concerned about relationships with other players in the criminal justice system. Therefore, basic to any training program is an examination of the role of the public defender. One effective way to teach this value is through exercises that force the participant to choose between alternate courses of action, each of which requires the lawyer to trade on the interests of various parties. By pitting the trainee's duties to the client against the demands of judges, prosecutors, sheriffs, or the client's family members, the trainer can help the new public defender develop strategies for confronting challenges in a manner consistent with her obligations to the client.

Giving a voice to the client and serving as her advocate is another important value that must be part of public defender training. Role-play exercises are effective for exploring the extent to which new lawyers are able to counsel clients to help them make important decisions. By confronting the trainee with scenarios in which the client's desires conflict with what appear to be the most reasonable strategic decisions, the trainer can promote dialogue about who controls which aspects of the representation, which considerations are legitimate, and the implications of disregarding a client's decision about how to handle her case. The role play described also helps to teach the importance of client communications and relationship-building. By having a person playing the client respond to the trainee in accordance with how well she uses communication skills, the trainer can work with the young lawyer to hone her expertise in building client relations.

Likewise, exercises in which new lawyers work through sessions designed to teach various aspects of pre-trial preparation, in a coordinated effort to put together a hypothetical case, teach the importance of thorough preparation. Workshops build on one another so lawyers see how each task informs their larger litigation strategy. The importance of this preparation is further reinforced through sessions in which participants see how their work impacts the trial, by using all of the information gathered to develop a defense theory and to work on trial preparation consistent with it.

These suggestions only provide a subset of methods for providing values-based training. For the reader who routinely practices in accordance with these values, these lessons may appear obvious. For some lawyers, they assuredly are not. What is taught to the new hires helps to lay the foundation for their development as public defenders. However, a one-time training program, regardless of how intensive it may be, is not sufficient to

ensure that the lawyer resists incorporating corrupted values of the existing system. Follow-up training programs, which provide additional instruction and opportunity for reflection upon how previously taught strategies have worked, are also necessary. However, even in between these training programs, the newer attorney needs guidance and affirmation. This brings us to the third prong of the strategy: values-based mentoring.

### 3. *Values-Based Mentoring: Reinforcing the Desired Values*

It is critical that public defender's offices employ mentoring to ensure that the values taught are further developed and reinforced.<sup>83</sup> A model office will provide supervision, allowing positive, informal mentor-mentee relationships to develop. As the young lawyer seeks answers to questions and advice for dealing with challenges, she will look to more senior lawyers in the office. If all staff attorneys practice in accordance with the leader's values, informal relationships will reinforce positive practice in young lawyers. However, where new lawyers must be change agents, the leader does not want them to emulate existing behavior. Without a formal mentorship program, new lawyers may seek guidance from those who reinforce corrupt values. Even with an intensive training program, the inexperienced lawyer will look for direction on how to put the lessons into practice. Therefore, a seasoned mentor, who practices in accordance with the values envisioned, is strategically critical to grooming a new generation of public defenders. I refer to this as values-based mentoring.

Values-based mentoring should touch on four areas: 1) assisting the mentee to address challenges to her ability to practice in accord with the desired values; 2) working with the mentee to ensure that she properly prepares and litigates each case; 3) serving as a role model for how to uphold the expected standards; and 4) helping the mentee to remain inspired and enthusiastic about the work being done. With respect to the first, it is not enough that the mentor be available when the mentee recognizes the need to discuss a challenge. The mentor should push the mentee to recognize challenges, and brainstorm strategies for addressing them consistently with the lessons taught through values-based training.

In addition to pushing the new lawyer to recognize obstacles to good practice, the mentor should also conduct regular case reviews to ensure that her protégé is giving adequate thought and preparation to each case. While the mentor will not be able to review every case, she should closely monitor several of the mentee's cases from inception to conclusion. Thus, the mentor can make sure that the mentee is undertaking all of the necessary preparation and effectively using the results to prepare a thoughtful litigation strategy. At regularly scheduled meetings, that mentor can explore the reasons the

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<sup>83</sup> Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 737 (1998) (arguing that moral values are reinforced in a novice lawyer through mentoring).

mentee undertook various courses of action or neglected to pursue others. This will allow the mentor to catch any mistakes while they can still be corrected and teach the mentee lessons she can apply in other cases.

The mentor should also look for opportunities to model the behavior and attitudes being taught. An effective method for doing this is to have the newer attorney join the experienced lawyer as co-counsel in a case. By shadowing the senior lawyer through all aspects of the case, the mentee can see good habits put into practice. The mentor should discuss her reasons for making various decisions and encourage the mentee to question the mentor's choice of strategy. Even when outside the context of a formal co-counsel relationship, the mentor should make available opportunities to have the junior lawyer accompany her to court hearings, investigative ventures, jail visits, and meetings with the prosecutor. Through modeling, mentors cement the lessons taught to young lawyers.

One of the greatest challenges facing the young public defender is sustaining her enthusiasm for the job. Particularly in the environments discussed in Part I, indigent defense is often a job with little reward. For the lawyer who truly cares about her clients, it is discouraging to continually see painful case outcomes. It is easy to blame oneself and feel a sense of failure. The young public defender will need reassurance that she is doing meaningful work and making a difference in her clients' lives. In a model office, this sustenance comes from the community of like-minded lawyers who serve to inspire one another. However, in a smaller office, particularly one in which not all lawyers embrace the same values, it can be difficult to remain inspired. The mentor can play an important role here, whether in the context of the job or outside of the formal relationship. In the former case, the mentor should praise the mentee's efforts, reminding her that success is not limited to not guilty verdicts. The extra investigative effort that led to a dismissal, the creative bond review motion that resulted in the client's release, or the dogged negotiations with the prosecutor that resulted in a better plea deal are all victories. The mentor should celebrate these with the mentee. Outside of the formal relationship, the mentor may relay examples about particularly sympathetic clients or grievous injustices that remind the lawyer why she wanted to be a public defender. In the absence of a larger community, this role can be a pivotal factor in a young lawyer continuing her work.

### III. THE HONORS PROGRAM: PUTTING THEORY INTO PRACTICE

The theory outlined in this article served as the foundation for the establishment of the Honors Program. Recognizing the depth of dysfunction in Georgia's previous indigent defense system, and seeing the need to begin rebuilding from the ground up, the Program was to be the vehicle through which a new generation of public defenders could incrementally usher in a systemic internalization of the core values set forth above. With a focus on values-based recruitment, the Program sought to identify lawyers who em-

braced the desired values at the outset of their public defender careers, and place them in offices throughout the state. Through values-based training conducted throughout the course of the three-year program, we worked to instill in young lawyers an appreciation of these values. Using values-based mentoring, we sought to provide the lawyers the support and encouragement they needed as they worked to provide client-centered representation in sometimes hostile environments. By bringing in a new group of lawyers each year as a class, and holding regular group gatherings, the Program attempted to build the community so important to reinforcing these values and promoting and sustaining what Professor Barbara Babcock calls the “heart-set, mind-set, soul-set” required to effectively defend persons accused of crimes.<sup>84</sup>

In exchange for a three-year commitment to join any office in the state, the Program promised an intensive, three-week, initial training led by a faculty composed of some of the best public defenders in Georgia and nationwide, followed by quarterly, weekend-long trainings over the next thirty-six months. In between meetings, all faculty members were available, via e-mail and telephone, to provide guidance. In addition, the members of the Program would serve as a support network for one another, linked by a distribution list that allowed the constant exchange of resources, ideas, and encouragement. With lawyers coming into the program as a class, there was a strong emphasis on building a state-wide public defender community sharing a common vision.

A major recruitment hurdle was that the offices most in need of transformation were often in locations applicants found undesirable. Many lawyers who otherwise have no ties to an area are reluctant to relocate to a small, rural county. However, this challenge also proved to be one of the factors that helped to identify the best candidates. An applicant’s willingness to go anywhere in the state exhibited an unparalleled devotion to our mission. It also provided a recruitment hook, allowing us to offer something that appealed uniquely to the type of candidate sought. While it takes unquestioned commitment to join the public defender ranks anywhere, signing up for the Honors Program required a special kind of dedication. Thus, the recruitment created that “urgency” that motivates people to action.

The Program provided an opportunity for young lawyers to be among the vanguard of indigent defense reformers. Whether marketed as “this generation’s civil rights movement,” a “Peace Corps” for public defenders, or an indigent defender “Teach For America,” the Program piqued the interest of idealistic lawyers. The promise of incomparable, intensive training and support over the course of the three-year program sealed the deal for many. Word was spread through an aggressive campaign, which included presentations at law schools and career fairs across the country.

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<sup>84</sup> Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983).

While this strategy certainly required an investment in resources and energy, the results were impressive. Promising candidates were signing up for placement in offices that previously filled openings with any licensed lawyer looking for work. In the year of its inception, the Honors Program attracted well over 100 applicants from more than fifty law schools, representing roughly half the states in the country. These figures answer the concerns of some public defender leaders who head offices in remote areas and are worried that good candidates, who are not local, will not consider practicing in their jurisdiction. The data also demonstrate that there is a pool of law school graduates who, given the opportunity to be a part of a meaningful reform effort, and to practice in accordance with the values above, are open to going anywhere. While Georgia ultimately supported only two Honors Program classes, they included forty-two lawyers, from twenty-six different law schools, who worked in twenty-three different offices across the state.

Janelle was a member of the first class. She applied to the Honors Program to receive the training and support it promised. Janelle went to work in Bartow County, Georgia. Despite her business suits and briefcase, as one of two African-Americans practicing in the courthouse, it took some time before courthouse personnel stopped asking her where her lawyer was when she would enter the courtroom. Undeterred, she threw herself into her new career, and quickly won over those with, and before, whom she practiced. Over time, she brought change to Bartow County. In one example, Janelle prepared a seemingly obvious release argument for her client that she had not heard made by any of the more experienced practitioners. She consulted one, who advised her that the argument would be a waste of everyone's time. Unmoved, Janelle made her pitch to the judge against a backdrop of snickers from some of the more experienced members of the bar. But the judge agreed with Janelle and released her client. Some of the snickerers subsequently adopted Janelle's argument. Rather than conforming to the traditions of the courthouse, which promoted a process that moved cases efficiently, Janelle acted on her duty to her client. She achieved the best possible outcome for her client and, in the process, began to gradually change the practice in the courthouse. In subsequent conversations, Janelle has attributed this, and other successes, to her participation in the Honors Program.

Janelle's story is just one illustration of how participants in the Honors Program, by living up to the fundamental values discussed, have been agents of change in Georgia. The experiences of the other forty-one members of the Honors Program provide many more such impressive examples. For instance, I received a letter from Jason, a member of our inaugural class, after he successfully represented a twenty-three-year-old single mother charged with the sale of cocaine. Although there was videotaped evidence of her crime, she insisted that the police had set her up. She wanted a jury to hear her story. Through Jason's advocacy, the jury agreed with the young woman. She was acquitted and sent home to her children. I shared this letter with

Stephen Bright, who responded, “Thanks to the Honors Program, a woman is free — not guilty. Pre-Honors Program, she would have been coerced into pleading guilty by her lawyer. This young lawyer, inspired by the training and support of the Honors Program, is changing the culture in [the jurisdiction where he practices], and there is no telling how many people that will help in both the short run and the long run.”

Regular communication with members of the Honors Program revealed that each had their own similar stories of triumph, largely attributed to the strong training and support they received through the Honors Program. However, Georgia terminated the program, ceasing to provide these lawyers the tools essential to their continued development. As a result, some have left the system and others have grown increasingly dispirited. One particularly passionate lawyer recently sent me an e-mail expressing his discouragement. He says there is “still nothing I’d rather be doing, but it doesn’t feel quite as pure as before[, when we had the Honors Program].” He closes with his concern that “I’m just becoming part of the machine.”

His words serve as a recognition that, despite legislative reform in Georgia, there remains work to be done. The “machine” about which this lawyer speaks is a criminal justice system that simply processes indigent people. His words confirm that it still exists in Georgia, and without an effort like the Honors Program it is hard for a young lawyer to resist adopting a sub-par standard of practice. Today, in Georgia, there remain counties in which lawyers routinely waive their clients’ rights to preliminary hearings without talking to them first. There continue to be defenders who do not file necessary motions because doing so is inconsistent with the “culture” of the courthouse in which they practice. And, there are still many examples of lawyers who acquiesce to a system that, by design, ensures that lawyers go to trial without preparation. The decision to end the strategy of building a generation of lawyers who refuse to practice this way has had dire consequences for poor people accused of crimes, and should serve as a warning to reform-minded leaders that their efforts must embrace a plan to transform values.

#### CONCLUSION

Even had Georgia decided to continue the Honors Program, the participants would have continued to face overwhelming challenges without additional resources and financial support. While the Program alone would not have fixed Georgia’s broken system, it was an essential element of providing the representation that the Constitution requires. While Georgia has not lived up to the promise that came with the Honors Program, it did develop a model that other reform efforts can replicate. One example of this came on the heels of Georgia’s abandonment of its seeming commitment to reform. Immediately upon leaving the Georgia Public Defender Standards Council, I received a fellowship from the Open Society Institute to found the Southern

Public Defender Training Center (SPDTC). Through the SPDTC we have endeavored to achieve on a regional basis what the Honors Program set out to do for Georgia. By working with public defenders' offices across the South to recruit committed lawyers to the region, train them under the Honors Program model, and provide support through remote mentoring and community building, the SPDTC keeps alive, and seeks to spread, the fire that was lit in Georgia. The inaugural SPDTC class, including sixteen lawyers from New Orleans and Atlanta, went through its initial training at the Cumberland School of Law in Birmingham, Alabama in August 2007. The Class of 2008 is even larger and more geographically diverse, including twenty-nine lawyers from Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. With dozens of lawyers who are products of this model being agents of change across the South, the SPDTC finally addresses a critical component to reform. A model is in place that can transform corrupt indigent defense cultures nationwide.

While the achievements of these young lawyers represent only the beginnings of a long march toward more just and reliable outcomes in criminal cases, their significance cannot be overstated. They demonstrate that through recruitment, training, and mentoring, we can build a community of lawyers who resist the pressure to conform to sub-par standards. But, as the lawyer concerned with "becoming part of the machine" reminds us, these successes are merely a dent in a larger problem, and without a long-term commitment to this strategy, short-term gains will quickly evaporate. Efforts to change indigent defense delivery systems so that they more effectively provide poor people services and to ensure adequate funding must continue. But, as reformers continue to push for legislators to address the structural and financial obstacles that threaten the promise of *Gideon*, we must also take on the culture of neglect that makes meaningful reform impossible. Efforts aimed at populating the indigent defense landscape with a new generation of committed lawyers, and at grooming these defenders to become the leaders of tomorrow, are indispensable to this mission.

There are myriad indigent defense-related issues that have been identified and discussed since *Gideon*. Many have addressed structural and economic problems and the political challenges that hinder reformers. However, cultural challenges have remained largely overlooked. By addressing this component of the landscape, reformers can also strengthen their efforts to promote other reform, as a new generation of lawyers will grow into forceful advocates for a fair system. In this sense, these approaches are mutually reinforcing and, as I hope I have demonstrated, the failure to address cultural hurdles is a fatal omission in the discussion about how we are to reform indigent defense nationwide.