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The Saving Grace of Public Defense? Is the “Client-Choice” Method a Cure-all for Problems That Plague This Overburdened System? 50 J. Marshall L. Rev. 307 (2017)

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THE SAVING GRACE OF PUBLIC DEFENSE? IS THE “CLIENT-CHOICE” METHOD A CURE-ALL FOR THE PROBLEMS THAT PLAGUE THIS OVERBURDENED SYSTEM?

SEAN BAKER

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I. INTRODUCTION

“The complicated problem is that the *Gideon* decision created attorney-client relationships barely worthy of the name, between lawyers with conflicting incentives and clients without choices.”¹

1. Adam Liptak, *Need-Blind Justice*, N.Y. TIMES, Jan. 5, 2014, at SR4.

Prior to 1963, the right to the assistance of counsel was unsettled and varied by jurisdiction.² This led to problems for indigent defendants facing the challenge of receiving a fair trial due to their lack of legal knowledge.³ Then in 1963, *Gideon v. Wainwright* established the right for those who could not afford an attorney to have one appointed to them during a criminal prosecution.⁴ Unfortunately, the Court failed to establish the manner in which this should be accomplished.⁵ As stated by George C. Thomas: “. . . [T]here has been for years a slow dawning of awareness that *Gideon* has fallen short of the court’s initial vision The crux of the criticism is that public defense is significantly under-funded and plagued with perverse incentives, leading to huge caseloads for defenders and worse outcomes for defendants.”⁶ This has led to different solutions as to how to provide competent representation to all the indigent defendants who need legal assistance. There have been several issues with the goal of *Gideon* and the systems designed to accomplish the goal of providing representation.⁷ This concern has led Comal County, Texas to implement a new system of appointed defense that varies from any other currently in use in the United States.⁸

The new system is known as the “client choice” method.⁹ This system allows an indigent defendant in a criminal proceeding to

2. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that a defendant, who is unable to employ counsel on their own behalf, and is unable to make reasonable decisions for their own benefit, must be appointed counsel to represent them); *Betts v. Brady*, 316 U.S. 455, 461–62 (1942) (holding “The Sixth Amendment of the national Constitution applies only to trials in federal courts.”).

3. *Powell*, 287 U.S. at 71 (holding “in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble mindedness, or illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . .”).

4. *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (stating that *Brady* is overruled and that the Sixth Amendment ensures that all criminal defendants are given the right to the assistance of counsel as long as it is not otherwise waived).

5. *Id.*

6. George C. Thomas III, *How Gideon v. Wainwright Became Goldilocks*, 12 OHIO ST. J. CRIM. L. 307, 308 (2015).

7. Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 845 (2004). These issues will be discussed later, but the main issues are (1) Inadequacy of funding, (2) large caseloads, (3) busy attorneys leading to ineffective assistance of counsel, and (4) low attorney compensation. *Id.* Issues one, two, and three are covered at: Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 845 (2004). They will be discussed further in other sections of this comment as well. The fourth issue is found at Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 511–12 (2015). Although the main focus on this fourth issue is low attorney compensation, Schulhofer also discusses compensating an attorney too much as an issue. *Id.*

8. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

9. *Id.*

select their attorney for appointment from a court created list of attorneys.¹⁰ The other systems of indigent defense throughout the United States are contract appointments, court assigned appointments and public defender systems.¹¹ The contract appointment method involves individual attorneys or law firms agreeing to represent indigent defendants within a particular court and then handling either part or all of that court's indigent cases.¹² The court assignment method involves a judge selecting a specific attorney for each specific case.¹³ Lastly, the public defender systems are organizations designed to handle specifically indigent defendant cases for a specified area.¹⁴ Public defender programs range from small to very large offices.¹⁵

This comment will address the idea presented in Comal County to determine whether that system of defense could adequately function in larger counties. Part II of this comment will lay out the background information regarding indigent defense systems and how they function. This will include demographic information for the differing counties, as well as a description of each type of defense system. Part III will compare the new “client choice” system of defense used in Comal County to public defender systems used across the country. This will ultimately culminate in Part IV: an examination of whether the system in Comal County would be possible in more populated areas that rely heavily on public defender systems, such as the cities of Chicago and Los Angeles. This comment proposes that although this system may function well in smaller counties, like Comal County, it is not plausible to run in larger sections of the United States, like Chicago and Los Angeles.

II. BACKGROUND

A. *The Right to Assistance of Counsel*

The Sixth Amendment guarantees the right for an individual to have the assistance of counsel in all federal criminal prosecutions.¹⁶ For many years, the Supreme Court of the United

10. *Id.*

11. Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 512–13 (2015).

12. *Id.* at 520.

13. *Id.* at 513.

14. *Id.* at 517.

15. *Id.*

16. U.S. CONST. amend. VI. The full text of the Sixth Amendment reads, “In *all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to *have the assistance of counsel for his defense.*” *Id.* (emphasis added).

States held that indigent defendants did not have a right to counsel in all criminal prosecutions,¹⁷ but then *Gideon v. Wainwright* established an enforceable right.¹⁸ *Gideon v. Wainwright* established that the Sixth Amendment should be selectively incorporated and applied to the states through the Fourteenth Amendment and require the assistance of counsel for indigent defendants in all criminal prosecutions.¹⁹

B. Types of Appointed Defense

There are three main systems of appointed indigent defense in the United States: (1) appointment by contract, (2) appointment by the court, and (3) public defender systems. For the first time in the United States, there has emerged a fourth method. This method, known as “client choice,” is where an indigent client is permitted to select their attorney.²⁰

1. Appointment by Contracting

Approximately 10% of indigent defense cases rely on the contract method.²¹ Traditionally, all or part of indigent defense cases are contracted out to either an individual attorney or a law firm.²² Jurisdictions often settle on a fee arrangement and then contract out to find a firm or individual attorney willing to accept the contract for the entire case, part of the case, or a certain type of

17. *Betts*, 316 U.S. 455. In this case, the state alleged defendant of robbery in a state court and did not have the money to hire counsel. *Id.* at 456–57. Due to this, he requested appointed counsel under the Sixth Amendment, but the judge denied his request because counsel was not appointed for the crime of robbery. *Id.* at 457. The defendant was found guilty of robbery and sentenced to eight years. *Id.* The defendant appealed his conviction on grounds he should have been appointed counsel. *Id.* The United States Supreme Court held that the Sixth Amendment did not apply against the states so there was no right to the assistance of counsel in all criminal proceedings at the state court level. *Id.* at 461–62.

18. *Gideon*, 372 U.S. at 339–40.

19. *Id.* (overruling *Brady* and applying the Sixth Amendment against the states, whereas *Brady* held that incorporation was not appropriate).

20. Liptak, *supra* note 1.

21. Schulhofer, *supra* note 11, at 521.

22. *Id.*

case in that jurisdiction.²³ Due to the dynamics of this system, it tends to be more popular in smaller counties and states.²⁴

A major concern involving the contract approach is the bidding process and the incentive to maximize profit through spending as little time on cases as possible.²⁵ The issue with the bidding process is that competitors low-bid to ensure they get the contract and then clear cases as quickly as possible to ensure they make a profit.²⁶ This, in turn, leads the lawyers to try to convince the defendants to plead the cases quickly to avoid time spent on cases.²⁷

By clearing cases quickly, the attorney may be able to make significantly more than they would by giving each case the attention that it deserves. As Stephen Schulhofer states:

The contract defender . . . is in business for a profit. Money saved on defending one case need not be spent on another; it may simply enhance the financial bottom line. Perhaps worse, the attorney has a concrete incentive to minimize the time spent on indigent cases, in order to free up time for handling more lucrative business. Worst of all, an attorney too busy to take on more work can nonetheless avoid the need to turn away a paying client; instead she can simply cut some corners in her indigent case assignments.²⁸

Due to attorneys' desire to maintain their contract agreements, there is an inherent requirement for the attorneys to serve their

23. See U.S. Department of Justice, *Contracting for Indigent Defense Services: A Special Report*, 3 Indigent Defense Series 4 (2000) (discussing the various types of fee arrangements that are used when setting up contracts for indigent defense). The report mentions six different types of fee arrangements. *Id.* The first is a "fixed-fee, all cases" method that states the total amount the firm/individual will be given no matter how many cases come in that year. *Id.* The second is a "fixed-fee, specific type of case" method that allows a specific fee to be given for that firm/individual to handle all the cases of a specific type. *Id.* The third is a "flat fee, specific number of cases" method that pays a flat fee based on the number of cases the individual/firm handles during the period of the contract. *Id.* The fourth is a "flat fee per case" method that allows the individual/firm to accept all cases of a certain type for a specific fee for each case. *Id.* The fifth is an "hourly fee with caps" method that allows individuals to make an hourly fee for the time they spend on the cases, but with a cap, so once that cap is reached, the attorney must continue to work for no payment. *Id.* The sixth method is an "hourly fee without caps," which is the same as the fifth, only there is no cap, so the attorney will make the hourly fee for all the work they put in on the cases. *Id.*

24. Schulhofer, *supra* note 11, at 521.

25. *Id.* at 522.

26. Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 731 (2013).

27. *Id.* (stating that although clearing cases may look good "to the untrained eye," this rush will cause the lawyer to try to find the weak spot in the case without examining the defendant's guilt to convince them to end the case short of trial). In addition, Anthony Thompson points out that large caseloads for these contracted attorneys will lead to a lack of solid attorney-client relationships. *Id.* This lack of relationship will lead to distrust between the lawyer and client, leading to more problems than resolutions. *Id.*

28. Schulhofer, *supra* note 11, at 522–23.

indigent defendants at a high level.²⁹ However, if a jurisdiction chooses to simply renew the contract without examining what is best for the indigent clients who are served by the contracts, this inherent focus on the indigent defendant's best interests will be severely depleted.³⁰

2. Appointment by the Court

Appointment by the court occurs when the court assigns a case with an indigent defendant to a specific attorney for representation.³¹ Usually, the judge will rotationally appoint counsel based on a list the court keeps of attorneys willing to take indigent cases.³² Several issues arise, however, when the court has total control over appointments of cases. If the judge is more interested in a smoothly run courtroom rather than the interests of the defendant, they have the ability to select an attorney more willing to do his best to secure a plea bargain, rather than ensure the best interests of the defendant.³³ This puts the attorney in a difficult situation. The attorney must decide between aggressively advocating on behalf of the defendant or gaining more appointments from the court.

3. Public Defender Systems

In 2007, public defender offices handled almost 5.6 million cases across 49 states and the District of Columbia.³⁴ Most public defender organizations are branches or agencies of the state or county government for the jurisdiction they represent.³⁵ The amount of government funding given to a public defender's office will vary based on the size and population of the area that specific office represents.³⁶

29. *Id.* at 523.

30. *Id.* (stating that the jurisdiction often wants to have cases solved quickly and out of court to save money, so the attorney is conflicted between pleasing the jurisdiction and doing their best work for the defendant).

31. Robert Spangenberg and Marea Beeman, *Toward a More Effective Right to Assistance of Counsel*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

32. See Schulhofer, *supra* note 11, at 513 (stating that although court appointment is the most common way for the court to assign cases to individual attorneys, there is more than one way). The uncommon appointment method is the judge selects an attorney on a case-by-case basis by selecting an attorney who is in the courtroom at that time. *Id.* Also, the court does not have to appoint an attorney on a set list, the court has the power to require an attorney to accept appointment, even if they are unwilling to serve as representation in that case. *Id.*

33. *Id.* at 515.

34. *Pub. Defender Offices Nationwide Received Nearly 5.6 Million Indigent Def. Cases in 2007*, BUREAU OF JUSTICE STATISTICS (Sept. 16, 2010), www.bjs.gov/content/pub/press/spdpclpdo07pr.cfm.

35. Schulhofer, *supra* note 11, at 517.

36. *Id.*

The close ties between the government and the public defender's offices create concerns that the defense attorneys cannot be independent and act in the best interests of their clients.³⁷ As such, defenders are balancing providing their clients with the best possible defense while also relying on the government for their funding.³⁸ Stephen J. Schulhofer addresses the issue:

Nearly all defenders are philosophically committed to protecting the indigent. Some have aggressively challenged defective arrangements by declining to accept new cases or suing the court system for inadequate financial support. Defender staffs have sometimes gone on strike to protest excessive caseloads, which the lawyers felt were forcing them to render inadequate service. Still, most chief defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs. Thus, for most defenders, most of the time, accommodation to the case management and budgetary priorities of the court and county government is a fact of life.³⁹

The relationship between the government and the public defender's office has a tendency to cause issues for indigent defendants.⁴⁰ There simply is not enough money, nor is there enough staff to handle the caseloads adequately enough to ensure the best defense possible for each client.⁴¹

Of the issues that occur within the public defender system, the lack of funding and the large caseloads are the biggest concerns.⁴² Also, the disparities between prosecutors and public defenders regarding resources, salaries, and specialized assistance is concerning.⁴³ Not only do prosecutors tend to make more in salary, but they also have better access to trial assistance in the form of

37. Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, 666 Policy Analysis, 1, 6–7 (Sept. 1, 2010).

38. *Id.*

39. *Id.*

40. *Id.* at 6.

41. *Id.* at 7.

42. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221–22 (2004) (stating, “[y]ear after year, in study after study, observers find remarkably poor defense lawyering that remains unchanged . . . and they point to the lack of funding as the major obstacle to quality defense lawyering. The power of money, rather than the constitutional standards of quality, must drive any large-scale changes for indigent defense in the future.”); AMERICAN COUNCIL OF CHIEF DEFENDERS, AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS 2 (Aug. 24, 2007) (discussing the problems that large caseloads are placing on indigent defense lawyers).

43. Wright, *supra* note 42, at 222. Although a goal of indigent defense should be parity in the resources to each; this is not the case right now. *Id.* Public defenders often make less in salary than prosecutors do. *Id.* He continues by stating that the prosecution also tends to have more access to “staff investigators, expert witnesses, and other resources.” *Id.*

better experts and investigators.⁴⁴ Although states may provide for indigent defense in different ways,⁴⁵ one concern is consistent: “[B]y every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”⁴⁶ Funding for public defenders is severely lacking and puts pressure on public defenders to attempt to represent their clients with less funding than not only the prosecution, but also what would be required to try the case to the best of their abilities.⁴⁷

In addition, the caseloads that public defenders have are often higher than an attorney reasonably could be expected to handle successfully.⁴⁸ In 2007 the American Council of Chief Defenders (“ACCD”) commented, “[E]xcessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that person[s] who are not dangerous and who need treatment, languish in prison at great cost to society.”⁴⁹ Due to these concerns, the ACCD suggested that public defenders should not be assigned more than “150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year.”⁵⁰ In the year 2008, these limits were routinely exceeded. The public defender’s office in Florida’s Miami-Dade County was handling almost 500 felony cases and 2,225 misdemeanor cases per year.⁵¹ Missouri has seen the average number of cases the system

44. *Id.*

45. See Mary S. Backus, Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J., 1031, 1046 (2006) (discussing the methods that states use to provide for their indigent defense systems). This leads to a wide disparity in the types of funding that are seen across different states. *Id.* Twenty-three states provide all of the funding for the indigent defense in their states. *Id.* Whereas, Pennsylvania and Utah leave the funding up to the individual counties and do not provide any funding from the state level. *Id.* The rest of the states, excluding the District of Columbia, fall somewhere in the middle by striking a balance between the counties and state taking full responsibility for the funding. *Id.*

46. *Id.* at 1045.

47. See Backus, *supra* note 45, at 1054 (stating, “. . . no matter how dedicated or idealistic, a public defender carrying a caseload of as many as 700 cases a year, with no investigator, no secretary, no paralegal, no law library, no computer, none of the resources that the police and prosecutors take for granted—that lawyer cannot effectively represent his clients.”). Further, although an ABA-adopted standard states that prosecutors and public defenders should be paid “comparable” rates, there is a disparity between the two sides. *Id.* at 1062; see *contra* Phyllis Mann, *Understanding the Comparison of Budgets for Prosecutors and Budgets for Public Defense*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION (Feb. 9, 2011) (stating the ABA rule requires parity in funds and resources between prosecution and defense rather than equality). The requirement of parity rather than equality is due to the interplay between the two sides. *Id.*

48. AMERICAN COUNCIL OF CHIEF DEFENDERS, AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS 1, 2 (Aug. 24, 2007).

49. *Id.* at 1.

50. *Id.*

51. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y.

handles rise by over 12,000 per year.⁵² In addition, New York has seen an uptick in cases of 16,000 from 2006 to 2008.⁵³ These are a few examples of a nationwide problem of large caseloads that are becoming debilitating for public defenders.⁵⁴

These large caseloads have become major problems for public defenders. The time dedicated to each case will decrease with the more cases an attorney has. This leads to less time spent on the client's case, working with the client, discussing legal options, or investigating and interviewing potential witnesses.⁵⁵

4. *Comal County's Client-Choice System*

The fourth and newest method of defense is the client-choice method currently used in Comal County, Texas.⁵⁶ Under this system, clients select their attorneys from a court created list of attorneys who accept indigent clients and have passed the court's requirements.⁵⁷ The goal of this system is to allow defendants more control over their defense, while simultaneously allowing the defense to be more independent of the judge and the state.⁵⁸

The client-choice system begins with a hearing to inform the defendant of their rights and to appoint counsel to assist with the case.⁵⁹ During this hearing, a magistrate judge (1) informs the defendant of their rights prior to, and during trial, (2) the judge ensures the defendant qualifies as indigent, and (3) if the defendant is, in fact, indigent, the judge informs them that they can select their counsel from a court list or have their counsel appointed to them.⁶⁰ If the defendant chooses to select their counsel, the magistrate will inform the district judge within 24 hours.⁶¹

TIMES (Nov. 9, 2008) www.nytimes.com/2008/11/09/us/09defender.html?mcubz=3.

52. *Id.*

53. *Id.*

54. See Donald J. Farole, Jr. & Lynn Langton, *U.S. Dep't of Justice, Bureau of Justice Statistics: Special Report, County-Based and Local Public Defender Offices*, 2007 1 (2010) (stating the Department of Justice found that in 2007, 73% of public defender offices at the county level exceeded the level of cases that was recommended) (on file with author). They also found that county-level public defender offices had four million cases assigned to them in 2007. *Id.*

55. Schulhofer, *supra* note 11, at 521.

56. Liptak, *supra* note 1.

57. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

58. Texas Indigent Defense Commission, *Improving Indigent Defense in Appointed Counsel Systems through Client Choice and Professional Development: A Demonstration Project for Comal County, Texas* 1 (on file with author).

59. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

60. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

61. *Id.* In addition to these items that must be accomplished during the magistrate hearing, the magistrate must: ensure all rights, including Miranda warnings and the right to representation, are known by defendant; inquire whether the defendant is indigent and what form of counsel he or she needs; discuss the indigence standards and assist in the paperwork; and finally file the applications in the correct location. *Id.*

An attorney who wishes to be considered for indigent defense selection will fill out an application and fulfill all the requirements laid out within the applications requirements.⁶² After filling out and submitting the application, the attorney must be approved by the district court judges.⁶³ The district court judges also set standards that the attorneys must fulfill to remain on the list, and the judges will remove attorneys who fail to fulfill these standards.⁶⁴

A significant concern is whether this system would place even more pressure on the criminal justice system than there already is. This pressure would be caused by defendants flocking to a small number of lawyers. In turn, those few lawyers would be overburdened and the court system would slow down. The result would be a crippled public defense system.⁶⁵ As to the concern over defendants flocking to a few lawyers, Judge Richard Posner stated, “[t]he services of the criminal defense bar cannot be auctioned to the highest bidder among the indigent accused—by definition, indigents are not bidders. But these services must be allocated somehow; indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer.”⁶⁶

Another concern about the client-choice system involves conflicts of interest. Although this system does remove much of the concern over conflict of interest due to the attorney pandering to the court rather than the client, it does not remove all of it.⁶⁷ The court pays the attorneys, but the defendants make the decision as to who they will select off the court-appointed list. This means that the attorneys have much more interest in ensuring they spend an adequate amount of time on the case.⁶⁸ This may open the door for defendants to talk to one another about whom they select as their attorney and how well that attorney performed on their case.⁶⁹

62. *Id.*

63. *Id.*

64. *Id.* Laid out in section X are the standards that attorneys must strive to fulfill. *Id.* These standards include (1) counsel must make “reasonable effort” to contact the defendant within one working day after appointment, (2) counsel must keep to a “high standard of ethical conduct,” (3) counsel must keep their client informed on matters that affect their case, (4) court may replace the attorney if they do not fulfill their duties, (5) counsel will be appointed within three days for those defendants who are incarcerated and by the first appearance for those not incarcerated, (6) counsel will provide a statement of the attorneys’ time spent on appointed cases. *Id.*

65. Liptak, *supra* note 1.

66. *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983). *Contra* Schulhofer *supra* note 11, at 525 (discussing how Judge Posner states this but then overlooks many of the other concerns such as the conflict of interest that the current system involves).

67. *See* Schulhofer, *supra* note 8, at 529–30 (stating that, although the state is paying the attorney’s fees for the case, because the defendant chooses the attorney, the state has less control over the decisions of the attorney).

68. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

69. *See* Schulhofer, *supra* note 11, at 521 (discussing the possibility that defendants will talk to each other about the attorneys they have seen or used in the past. Also, discusses that this would harm some defendants because they are less

Although the defendant selects their attorney based on the court created list, the district court judges ultimately decide which attorneys are placed on the list. Due to this two-prong design, this potential conflict is lessened.⁷⁰

III. ANALYSIS

This comment examines the system of indigent defense that will be put into place in Comal County, Texas and compares this system to the public defender systems in Cook County, Illinois, and Los Angeles County, California.⁷¹ To accomplish this, an examination and comparison of each county will be laid out, and then they will be compared to one another. This comparison will be the basis for determining the design of the indigent defense systems to gain a better understanding of why that system is used and how it is functioning. The major reason behind this is the drastic population differences and demographic breakdowns.

The most important demographics within this analysis are ethnic backgrounds, total population base, education level,⁷² income per capita, median household income, and the percentage of the population that resides below the poverty level. These statistics are important in understanding the differences between these counties and why the system being explored in Comal County would not be as successful in major population areas such as Cook County and Los Angeles County.

A. *Demographic Comparisons*

1. *Los Angeles County, California, Demographics*

Los Angeles County in California is the largest county in the United States, with a population of 10,116,705 people.⁷³ This

informed about the various lawyers and that could lead to them select a bad attorney).

70. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

71. The reason for the comparison between Comal County and these two cities is that Chicago and Los Angeles have the largest public defender systems in the United States. Drawing the comparison between these three will go to the proposal that the system of client choice in Comal County, Texas, would not work in these major metropolitan areas. These statistics are important for the comparisons that come into play later.

72. Enrico Moretti, *Does Education Reduce Participation in Criminal Activities?*, ECONOMICS DEPARTMENT – UC BERKELEY, 9 (2005). In particular, the percentage that has graduated from high school is vital. Although with more education, crime rates will drop, the line between crimes committed by those with and without a high school diploma is the most pronounced. *Id.*

73. Emily Alpert Reyes, *L.A. County Population Pushes Past 10 Million, Highest in Nation*, L.A. TIMES, (Mar. 27, 2014), <http://articles.latimes.com/2014/mar/27/local/la-me-ln-la-county-population-10-million-20140327>; United States Census Bureau, *State and County QuickFacts: Los Angeles County, California*, (Oct. 14, 2015), <http://>

population is relatively diverse, with Latino/Hispanic ethnicity accounting for the largest portion at 48.4%.⁷⁴ Caucasian follows at 26.8%, then Asian at 14.8%, and African-American at 9.2% to round out the top four ethnicities in Los Angeles County.⁷⁵ In addition, 76.6% of the total population graduated from high school and 29.7% obtained a bachelor's degree or higher.⁷⁶ Further, the per capita income is \$27,749, while the median household income is \$55,909, with a total home ownership rate of 46.9%.⁷⁷

The most concerning statistic seen in the demographics of Los Angeles County is the percentage of the population that falls below the poverty line, which is 17.8%.⁷⁸

The percentage of the population that is below the poverty line is higher in Los Angeles County than the United States national average by 2.4%.⁷⁹ In addition, the high school graduate percentage, the homeownership percentage, and the income per capita levels are lower in Los Angeles County than in the United States as a whole.⁸⁰

Figure 1: Demographics Comparison Between Los Angeles County and the United States⁸¹

	Los Angeles County	United States
Population	10,116,705	318,857,056
% Caucasian	26.8%	62.1%
% African-American	9.2%	13.2%
% Latino/Hispanic	48.4%	17.4%
% High School Graduates	76.6%	86.0%
% Bachelor's or Higher	29.7%	28.8%
% Homeownership	46.9%	64.9%
Per Capita Income	\$27,749	\$28,155
Median Household Income	\$55,909	\$53,046
% Below Poverty Level	17.8%	15.4%

quickfacts.census.gov/qfd/states/06/06037.html.

74. United States Census Bureau, *State and County QuickFacts: Los Angeles County, California*, CENSUS.GOV (Oct. 14, 2015), <http://quickfacts.census.gov/qfd/states/06/06037.html>.

75. *Id.* In addition, the other common ethnicities were American Indian at 1.5%, Pacific Islander at 0.4%, and two or more races at 2.9%. *Id.*

76. *Id.* This statistic only includes those individuals in the population who are 25 years of age or older. *Id.*

77. *Id.*

78. *Id.*

79. United States Census Bureau, *State and County QuickFacts: USA*, CENSUS.GOV (Sept. 30, 2015), <http://quickfacts.census.gov/qfd/states/00000.html>. The United States below-poverty level is 15.4%. *Id.*

80. *Id.*; Los Angeles Census, *supra* note 74. The United States percentage of high school graduates is 86.0%, the per capita income is \$28,155, and home ownership rate is 65.9%. *Id.*

81. Los Angeles Census, *supra* note 74; United States Census Bureau, *State and County QuickFacts: Cook County, Illinois*, CENSUS.GOV (Oct. 14, 2015), <http://quickfacts.census.gov/qfd/states/17/17031.html>; United States Census Bureau, *State and County QuickFacts: Comal County, Texas*, CENSUS.GOV (Oct.14, 2015), <http://quickfacts.census.gov/qfd/states/48/48091.html>.

2. Cook County, Illinois, Demographics

Cook County, Illinois, is the second largest county in the United States.⁸² Cook County has a population of 5,246,456.⁸³ There are three major ethnicities in Cook County. First, Caucasian accounts for 43% of the population, and then Latino/Hispanic accounts for 25%, followed by African-American at 24.4%.⁸⁴ In addition, Cook County's high school graduation rates are slightly lower than the national average, at 84.5%.⁸⁵ On the other hand, 34.7% of Cook County's population possesses a bachelor's degree or higher, whereas the national average is 28.8%.⁸⁶ In addition, the rate of homeownership is 58.3%, with a median household income of \$54,548 per year.⁸⁷ Lastly, the percentage of the population that is below the poverty line sits at 16.9%, slightly higher than the national average at 15.4%.⁸⁸

Figure 2: Demographics Comparison Between Cook County and the United States⁸⁹

	Cook County	United States
Population	5,246,456	318,857,056
% Caucasian	43.0%	62.1%
% African-American	24.4%	13.2%
% Latino/Hispanic	25.0%	17.4%
% High School Graduates	84.5%	86.0%
% Bachelor's or Higher	34.7%	28.8%
% Homeownership	58.3%	64.9%
Per Capita Income	\$30,183	\$28,155
Median Household Income	\$54,548	\$53,046
% Below Poverty Level	16.9%	15.4%

82. Matt Rosenberg, *Largest Counties by Population*, ABOUT: EDUCATION, <http://geography.about.com/od/lists/a/countypop.htm> (last visited Aug. 30, 2017).

83. United States Census Bureau, *State and County QuickFacts: Cook County, Illinois*, CENSUS.GOV (Oct. 14, 2015), <http://quickfacts.census.gov/qfd/states/17/17031.html>.

84. *Id.* Other ethnicities go as follows: Asian at 7.2%, American Indian at 0.8%, Pacific Islander at 0.1%, and two or more races accounts for 1.8% of the population. *Id.*

85. *Id.*; U.S. Census, *supra* note 79 (stating that the national average for the United States is 86.0%).

86. Cook County Census, *supra* note 83; U.S. Census, *supra* note 79.

87. Cook County Census, *supra* note 83.

88. *Id.*

89. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; United States Census Bureau, *State and County QuickFacts: Comal County, Texas*, CENSUS.GOV (Oct. 14, 2015), <http://quickfacts.census.gov/qfd/states/48/48091.html>.

3. Comal County, Texas, Demographics

As compared Los Angeles County and Cook County, Comal County, Texas, is very small. Comal County has a population of 123,694.⁹⁰ The ethnic background leans heavily toward Caucasian at 69.0%, then Latino/Hispanic at 26.6%, and finally African-American at 2.3%.⁹¹ As to education level, 89.4% are high school graduates and 33.3% possess a bachelor's degree or higher.⁹² Both of these statistics are higher than the national average of 86.0% and 28.8% respectively.⁹³ Further, homeownership percentage (76.1%), per capita income (\$32,980), and median household income (\$65,839) exceed the national average in Comal County.⁹⁴ Lastly, the percentage of the population that sits below the poverty line is significantly less than the national average; this percentage in Comal County is 10.2%, whereas, it is 15.4% nationally.⁹⁵

Figure 3: Demographics Comparison Between Comal County and the United States⁹⁶

	Comal County	United States
Population	123,694	318,857,056
% Caucasian	69.0%	62.1%
% African-American	2.3%	13.2%
% Latino/Hispanic	26.6%	17.4%
% High School Graduates	89.4%	86.0%
% Bachelor's or Higher	33.3%	28.8%
% Homeownership	76.1%	64.9%
Per Capita Income	\$32,980	\$28,155
Median Household Income	\$65,839	\$53,046
% Below Poverty Level	10.2%	15.4%

90. United States Census Bureau, *State and County QuickFacts: Comal County, Texas*, CENSUS.GOV (Oct. 14, 2015), <http://quickfacts.census.gov/qfd/states/48/48091.html>.

91. *Id.* Also, the other major ethnic backgrounds include Asian at 1.0%, American Indian at 0.8%, Pacific Islander at 0.1%, and two or more races at 1.7%. *Id.*

92. *Id.*

93. Cook County Census, *supra* note 83.

94. *Id.*

95. *Id.*

96. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

4. *Comparison of Counties and the Implications of the County Demographics*⁹⁷

The demographics discussed above play an important role in the indigent defense systems for each county. Due to the importance of each demographic, each will be independently examined for the effect it has in each location. Then, following the independent analysis, all three counties will be compared based on each demographic.

a. County Population Comparisons and Analysis

These three counties differ from one another in a variety of categories.⁹⁸ The biggest difference is the populations of the three counties, with Los Angeles County at 10,116,705, Cook County at 5,246,456, and Comal County at 123,694.⁹⁹ Due to the population size of both Cook and Los Angeles Counties, it is apparent why these public defender systems are the two largest in country: with a higher population, there tends to be more crime.¹⁰⁰ This is due to a positive correlation between the jurisdiction's population and the crime rates.¹⁰¹ In the year 1998, a Department of Justice study determined that court-appointed attorneys at the state court level for the United States handled 82% of felony cases within their

97. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91. The following is a table that breaks down each important demographic with its location and its value:

Figure 4: Comparative County and United States Demographics

	Los Angeles County	Cook County	Comal County	United States
Population	10,116,705	5,246,456	123,694	318,857,056
% Caucasian	26.8%	43.0%	69.0%	62.1%
% African-American	9.2%	24.4%	2.3%	13.2%
% Latino/Hispanic	48.4%	25.0%	26.6%	17.4%
% High School Graduates	76.6%	84.5%	89.4%	86.0%
% Bachelor's or Higher	29.7%	34.7%	33.3%	28.8%
% Homeownership	46.9%	58.3%	76.1%	64.9%
Per Capita Income	\$27,749	\$30,183	\$32,980	\$28,155
Median Household Income	\$55,909	\$54,548	\$65,839	\$53,046
% Below Poverty Level	17.8%	16.9%	10.2%	15.4%

98. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

99. Los Angeles Census, *supra* note 74; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

100. James J. Nolan III, *Establishing the Statistical Relationship Between Population Size and UCR Crime Rate: Its Impact and Implications*, 32 J. CRIM. 547, 552 (2004) (stating, "[t]he analysis of the 2000 UCR crime data for 1,294 cities with populations over 25,000 revealed a significant positive relationship between crime rate and population size, indicating that the higher populated cities reported the higher crime rates.").

101. *Id.*

jurisdiction.¹⁰² Of that 82%, a public defender office handled 68.3% while 13.7% were appointed counsel by the court.¹⁰³ The higher populations, coupled with demographic breakdowns and the percentage of cases that are handled by the indigent defense systems means the indigent defense systems must be capable of handling significantly more pressure in Los Angeles and Cook Counties than the system in Comal County.

b. County Racial and Ethnic Backgrounds Comparisons and Analysis

In addition to population, the racial and ethnic backgrounds composing each county are vitally important to better understand the current systems of indigent defense. As noted by a Justice Department Special Report in 2000, 76.6% of African-Americans and 73.1% of Latinos/Hispanics required appointed counsel for their criminal case.¹⁰⁴ The percentage of Caucasians that require the use of court-appointed counsel is also high at 69.0%. However, in a large population 4% to 7% variation is a large number of defendants that the counties indigent defense systems must be able to account for.¹⁰⁵ In Los Angeles and Cook Counties, the percentage of minorities, such as African-American and Latino/Hispanic, is substantially higher than the percentage of Caucasian within these counties'

102. Caroline Wolf Harlow, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (on file with author). This report also found that 66% of defendants at the federal-court level had appointed counsel as well. *Id.* In addition, while it is not relevant here, this report found those defendants who were appointed counsel (either by the court or through a public defender office) had a similar conviction rate to those that had private counsel. *Id.* The report found the acquittal percentage for private counsel was 1.6% versus 1.3% for publicly provided counsel. *Id.* In addition, the guilty plea percentage was higher for private counsel versus publicly provided counsel (72.8% versus 71.0%). *Id.* Lastly, the public counsel had a better percentage of having the case dismissed entirely than private counsel as well (23.0% for publicly provided counsel versus 21.2% for private). *Id.*

The comparisons provided by this study when comparing private counsel against court-provided counsel further extend to how much time a convicted defendant will receive. *Id.* At the state level, public counsel, on average, received better and shorter sentences for their clients than private counsel did. *Id.* In fact, the average sentence for all offenses for defendants with public counsel was 155 months, while the average sentence for those with private counsel was 179 months. *Id.* Although appointed counsel tended to achieve lighter sentences at the state level than their private counterparts did, the numbers are much closer at the federal level. At the federal level, both private and appointed counsel averaged 126 months for their clients. *Id.*

103. *Id.*

104. Harlow, *supra* note 103, at 9.

105. *Id.* This report states the percentages for the federal court system. For Caucasians the percentage requiring the assistance of court-appointed counsel is 56.5%, for African-Americans the percentage is 64.7%, for Latinos/Hispanics the percentage is 56.0%, and finally "Other" is 73.2% in the federal system. *Id.* Also of note, the report breaks the percentages down further into citizenship. *Id.* United States citizens required the assistance of a court-appointed attorney 73.6% of the time, while non-United States citizens required this assistance 69.7% of the time. *Id.*

populations. The percentage of the population that is Caucasian in Los Angeles County is 26.8% versus that in Comal County of 69.0%, with Cook County falling in the middle at 43.0%.¹⁰⁶

Due to the national trend of minority populations requiring the assistance of public defense at a higher rate than Caucasian populations do, areas with a higher minority population will require a larger system of public defense than areas with a higher Caucasian population.¹⁰⁷ Because Comal County's population contains a significantly higher percentage of Caucasians rather than minorities, Comal County's public defense system will have less burden than Cook and Los Angeles Counties will.¹⁰⁸

c. The Impacts of the Levels of Education and Income on the Counties

Both Los Angeles County's and Cook County's percentage of the population that graduated from high school is lower than the level in both Comal County and the United States in general.¹⁰⁹ This is a concerning statistic due to the correlation that exists between the level of education obtained and its effect on crime rates.¹¹⁰ There are multiple possible reasons that education would reduce crime, but all three data sources examined consistently point to the same outcome: when the level of education is increased, the amount of crimes committed decreases.¹¹¹

106. Los Angeles Census, *supra* note 74; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

107. See Harlow, *supra* note 103, at 9 (showing statistics regarding racial background and the requirements of court-appointed counsel). Caucasians require court-appointed counsel 69.0% of the time, African-Americans 76.6%, and Latinos/Hispanics 73.1%. *Id.* Although these percentage variations are between 4% and 7%, this is a United States study, meaning that that percentage difference could be a large amount of cases. *Id.* As such, the inference can be drawn that counties with a higher population of Latino/Hispanic and African-American racial backgrounds will likely have a higher need for indigent defense attorneys.

108. See Comal County Census, *supra* note 91 (showing Comal County is 69.0% Caucasian, 2.3% African-American, and 26.6% Latino/Hispanic).

109. Los Angeles Census, *supra* note 74 (Los Angeles County's high school graduation rate is 76.6%); Cook County Census, *supra* note 83 (Cook County's high school graduation rate is 84.5%); Comal County Census, *supra* note 91 (Comal County's high school graduation rate is 89.4%); U.S. Census, *supra* note 79 (the national average for high school graduation is 86%).

110. Enrico Moretti, *Does Education Reduce Participation in Criminal Activities?*, ECONOMICS DEPARTMENT – UC BERKELEY 9 (Sept. 2005) www.equitycampaign.org/events-page/equity-symposia/2005-the-social-costs-of-inadequate-education/papers/74_Moretti_Symp.pdf.

111. *Id.* "By raising earnings, education raises the opportunity cost of crime and the cost of time spent in prison. Education may also make individuals less impatient or more risk averse, further reducing the propensity to commit crimes." *Id.* Further, there is likely a correlation between the increase in income that comes with an increase in education leading to a decrease in the need or desire to commit crimes. *Id.*

In addition, the three sources the author used to come to this conclusion were the individual-level data from the census on incarceration, state-level data on arrests

This connection between crime and education leads to the conclusion that Los Angeles County and Cook County are more likely to have more cases and more crime than Comal County. According to the Justice Department, 78% of defendants who possess less than a high school diploma will require the assistance of court-provided counsel.¹¹² As United States Census data shows, the percentage of high school graduates in Comal County is significantly higher than that in both Cook and Los Angeles County.¹¹³

Defendants who possess a high school diploma or GED require the assistance of court-provided counsel in 73.2% of cases at the state level.¹¹⁴ However, for defendants who obtain more than a high school diploma, that percentage drops to 61.1%.¹¹⁵ Although there is no information regarding levels of education past this level, it is reasonable to assume that the more education a defendant possesses, the less likely that defendant is going to require the assistance of court-appointed counsel.

For these reasons, Comal County simply does not handle the same number of cases at the same pace as the larger, denser metropolitan areas. This is due to a higher population, combined with the lower levels of high school graduates.¹¹⁶ The correlation between high school graduation and crime rate provides an ability to determine that when there are more people in an area,¹¹⁷ with less education, that crime rate and thus, the number of cases handled, is likely to be higher than an area where the population is lower and the education levels higher.¹¹⁸

from the Uniform Crime Reports, and self-report data on crime and incarceration from the National Longitudinal Survey of Youth. *Id.* All three of these sources led to the same conclusion: more education leads to less crime. *Id.*

Lastly, the author continues by discussing a “social return to schooling” that is often overlooked. *Id.* He notes, if there was a “1% increase in the high school completion rate of all men ages 20–60” the United States could save upwards of \$1.4 billion per year. *Id.*

112. Harlow, *supra* note 103, at 9.

113. See Los Angeles Census, *supra* note 74 (76% of Los Angeles County residents graduated high school, while 29.7% of the population possess a bachelor’s degree or higher); Cook County Census, *supra* note 83 (84.5% of the Cook County population graduated high school, while 34.7% of the population possess a bachelor’s degree or higher); Comal County Census, *supra* note 91 (89.4% of the population graduated high school, while 33.3% of the population possess a bachelor’s degree or higher).

114. Los Angeles Census, *supra* note 74; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

115. Harlow, *supra* note 103. Defendants with less than a high school diploma required the assistance of an attorney 70.2% of the time. *Id.* When the defendant had graduated from high school or received a GED, that percentage dropped to 65.3%. *Id.* Lastly, the percentage takes a serious decline once education goes behind high school. The percentage with any education behind high school is 49.6%. *Id.*

116. Harlow, *supra* note 103, at 9.

117. *Id.*

118. *Id.*

d. County Poverty Level Impact and Comparison

Besides overall population, the other metric that significantly varies between Comal County and Los Angeles and Cook Counties, is the percentage of the population that resides below the poverty line. Comal County, unlike both Los Angeles and Cook Counties, has a percentage of the population that falls below the poverty line which is below the national average. Only 10.2% of Comal County's population resides below the poverty line. Whereas, Cook County is above the national average, with 16.9% of its population below the poverty line. Los Angeles County is even higher than Cook County at 17.8%.¹¹⁹

Although researchers disagree on the cause of the correlation between poverty and crime, it is clear that there is a correlation.¹²⁰

119. Los Angeles Census, *supra* note 74; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91. U.S. Census, *supra* note 79 (stating the nationwide average for the United States population that rests below the poverty line is 15.4%).

120. See Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 707 (1995) (discussing the various links between poverty and crime). Long discusses the importance of under and unemployment in producing crime because “[i]f there were more advantages to honest labor, dishonest labor would be less attractive to the individual involved.” *Id.* Further, Long discusses how poverty contributes to the occurrence of violent crime and is usually a precursor to the occurrence of violent crime. *Id.* But, after further examining this link, Long continues:

. . . in the American inner city, the relationship is exactly reverse. Poverty doesn't cause crime. Crime causes poverty—or more precisely, crime makes it harder to break out of poverty. The vast majority of poor people are honest, law-abiding citizens whose opportunities for advancement are stunted by the drug dealers, muggers, thieves, rapists, and murders who terrorize their neighborhoods. These predators are not Robin Hoods of some 1960s ideal; they are career criminals who are destroying the labor and hopes of the poor and they are as oppressive as the most avaricious totalitarian regime . . . *Id.* at 708–09.

Long states there is a correlation between crime and poverty, but the exact cause of crime and poverty is more complex than just a simple straight line. *Id.* Many contributing factors could lead to the correlation seen. *Id.*; See William C. Bailey, *Poverty, Inequality, and City Homicide Rates: Some Not So Unexpected Findings*, SOCIOLOGY & CRIMINOLOGY FACULTY PUBLICATIONS, paper 31, page 537 (1984) (on file with author) (concluding that there “. . . is a moderate and positive relation between murder rates and relative deprivation, low income, and percentage of poverty for the two years for which poverty data are available.”).

Recently, a study conducted in Sweden concluded that there was a link between “childhood family income” and “significantly higher hazard rates of being convicted for violent criminality and substance abuse versus those in the highest income quintile.” John Grgurich, *Questioning the Connection Between Poverty and Crime*, THE FISCAL TIMES (Aug. 31, 2014), www.thefiscaltimes.com/Articles/2014/08/31/Questioning-Connection-Between-Poverty-and-Crime. However, the study continued to examine the subjects and “factored in the behavior of cousins and siblings into those hazard rates” to discover the role that genetics and culture played in the likelihood to commit crimes and discovered a “strong correlation between low socioeconomic

Due to the significantly higher percentage of people below the poverty line in Cook and Los Angeles Counties, and the correlation between crime and poverty, there is likely to be more crime and more cases in these larger population bases.¹²¹ For these reasons, the system of indigent defense within this county must be better designed to handle significantly larger caseloads.

B. *Design of the Indigent Defense Systems and the Effect on the Accused*

1. *Los Angeles County Public Defender Office*

Due to the size of the county, the Los Angeles County Public Defender's Office ("LACPD") is the largest defender office in the United States.¹²² In 2013, the district attorney of Los Angeles filed approximately 63,000 felony cases and 145,000 misdemeanor cases.¹²³ LACPD handles roughly 70% of the felony cases and 55% of the misdemeanor cases in the county.¹²⁴ To provide for this, the LACPD employs over 700 attorneys that spread throughout the county at 39 different locations.¹²⁵ Although the LACPD fills a large need for Los Angeles County, it is actually understaffed, underfunded, and is plagued with issues related to their budget.¹²⁶ For example, the ABA recommends one investigator for every three attorneys.¹²⁷ However, all offices that responded stated their investigators have excessive caseloads.¹²⁸ This compounds the problems the public defenders face because it makes it more difficult

status and drug abuse" which essentially vanished when these other factors were introduced. *Id.* The researchers admit that this is a new discovery and will need more research to determine what it means and the impact it will have when considering the link between poverty and crime.

121. Long, *supra* note 122.

122. Nancy Albert-Goldberg, *Los Angeles County Public Defender Office in Perspective*, 45 CAL. W. L. REV. 445, 451 (2009) (noting that Los Angeles County contains over ten million people within eighty-eight cities). *Id.* She then states, "[F]orty-four U.S. states each contain populations smaller than this single county." *Id.*

123. Walter Katz, *The Criminal Justice World Is Brutal for Young Public Defenders*, BUSINESS INSIDER (July 24, 2013), www.businessinsider.com/what-life-is-like-for-public-defenders-2013-7.

124. Albert-Goldberg, *supra* note 124; LOS ANGELES COUNTY PUBLIC DEFENDER'S OFFICE, AGENCY REPORT (2012) (on file with author).

125. Albert-Goldberg, *supra* note 124; LOS ANGELES COUNTY PUBLIC DEFENDER'S OFFICE, AGENCY REPORT (2012) (on file with author) (stating that "[i]n Fiscal Year 2011-2012, the Public Defender represented clients in approximately 121,611 felony-related proceedings; 299,549 misdemeanor-related proceedings; and 64,815 clients in juvenile delinquency proceedings, respectively.").

126. Albert-Goldberg, *supra* note 124.

127. Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 2 (2011) (on file with author).

128. *Id.*

to adequately investigate the cases and build a trial strategy around those findings.

To combat the large number of cases handled by the LACPD, the public defenders can refuse to take on more felony cases when their workloads become so large that they cannot provide “effective representation.”¹²⁹ Although this is a benefit of the system for LACPD that most systems do not have,¹³⁰ it is used infrequently because it is only allowed when “unusual circumstances” require it.¹³¹ The term “unusual circumstances” does not have a set limit, but in 2006, the chief public defender declared some felony level attorneys unavailable at the LACPD due to excessive caseloads.¹³² However, this rarely occurs because once the caseloads start to overburden the department, the chief public defender will pull attorneys from the misdemeanor courts to the felony courts to keep the caseloads below the maximum.¹³³ For these reasons, the

129. American Council of Chief Defenders, *Statement on Caseloads and Workloads*, 1 (2007) (on file with author) (recommending that public defender caseloads should “not exceed 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases or 25 non-capital appeals per attorney, per year.”); Albert-Goldberg, *supra* note 124, at 462–63. When this situation occurs, the cases must be assigned to a panel of attorneys or another agency. *Id.* Often these cases are assigned to the “Alternate Public Defender agency” that normally covers only the conflict of interest cases. *Id.* at 463.

130. AMERICAN BAR ASSOCIATION, *Eight Guidelines of Public Defense Related to Excessive Workloads*, (Aug. 2009) (on file with author). The ABA released a list of what a public defender should look for when determining if their workload is too large to manage. *Id.* In addition, the guide also provides guidelines for public defense providers to ensure that the attorneys have manageable caseloads. *Id.*

131. See Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, AMERICAN BAR ASSOCIATION, 1, 41 (2011) (on file with author) (discussing how unavailability has occasionally been used successfully by arguing that the government that allows the funds for public defense did not intend for the lawyers to be forced to violate the professional conduct rules to successfully represent the defendants); Albert-Goldberg, *supra* note 124, at 464. Frequently the department heads will move attorneys from the misdemeanor courts to the felony courts to ensure there are enough attorneys to handle the workload. *Id.* Thus, the problems with excessive workloads tend to occur in the misdemeanor courts. *Id.* However, unavailability in the misdemeanor courts is “based on caseloads that far exceed nationally recommended levels.” *Id.* The Peterson Commission recommended 400 misdemeanor cases per year, but the attorneys at the misdemeanor level at LACPD handle approximately 1,200 cases per attorney, per year. *Id.* at 464–65.

132. Albert-Goldberg, *supra* note 124, at 464; Lefstein, *supra* note 133, at 42. Eight states (Arkansas, Iowa, Massachusetts, Montana, New Hampshire, North Dakota, Virginia, and Wyoming) indicated that they allow the attorneys to declare themselves “unavailable” due to excessive caseloads. *Id.* The Iowa statute that allows for this declaring of unavailability states, “[T]he local public defender shall handle every case to which the local public defender is appointed if the local public defender can reasonably handle the case [I]f the local public defender is unable to handle a case because of temporary overload of cases, the local public defender shall return the case to the court.” *Id.* In addition, it is unclear what would occur if the defense in one of the states that allow unavailability informed the court they would not be taking any more cases for this reason. *Id.* at 256–60.

133. *Id.*

caseloads tend to be maintainable at the felony level; however, this leads to dire circumstances for the misdemeanor courts.¹³⁴ The LACPD handles approximately 1,200 cases per attorney, per year at the misdemeanor courts.¹³⁵ The recommended limit is 400 cases per attorney, putting the LACPD at approximately three times the recommended limit.¹³⁶

The large public defender system in place in Los Angeles County is beneficial because it is relatively efficient for the large population it serves. It allows “highly experienced, full-time criminal law specialists” to practice and ensure that the rights of the indigent defendants are protected.¹³⁷ It also allows for great protection of the rights of those who are charged at the felony level, but there is a major drawback at the misdemeanor level.¹³⁸ Due to the emphasis on the protection of those charged with felonies, those charged with misdemeanors are often funneled into a guilty plea.¹³⁹ Another concern expressed is the tendency of “assembly line justice” that does not allow a lot of investigation or individual attention to be given to each case.¹⁴⁰

The design of the Los Angeles Public Defenders Office allows it to handle large caseloads while protecting the rights of the indigent defendants in the county.¹⁴¹ Although it does have flaws, it does well at ensuring the best possible defense for those charged with felony level offenses even at the expense of those charged with lesser crimes.¹⁴² However, this system appears to be well suited to handle the large population base in Los Angeles County.

134. *Id.*

135. *Id.* at 465. See American Council of Chief Defenders, *Statement on Caseloads and Workloads*, 1 (2007) (on file with author) (stating misdemeanor caseloads should not exceed 400 cases per attorney, per year). The 400-case recommendation is severely exceeded by the 1,200 cases seen in the misdemeanor courts within Los Angeles County.

136. Albert-Goldberg, *supra* note 124, at 465; American Council of Chief Defenders, *Statement on Caseloads and Workloads*, 1 (2007) (on file with author).

137. *Id.* at 473.

138. *Id.*

139. *Id.*

140. *Id.* at 473–74.

141. See *id.* at 473 (stating the LACPD’s office provides balance and protection to the indigent defendants within Los Angeles from the “overzealous prosecution tactics.”). Further, the LACPD puts emphasis on protection of the mentally ill, those that need treatment programs, and providing for rehabilitation, rather than simply providing a path to either not guilty or guilty. *Id.*

142. *Id.* The LACPD takes away from the misdemeanor court to give more focus on the felony courts. *Id.* Further, this causes some possibly innocent defendants to be convicted of minor crimes simply because they do not have adequate counsel for their accused crimes. *Id.*

2. Cook County Public Defender Office

The Office of the Cook County Public Defender is the second largest public defender system in the United States, behind only the Los Angeles Public Defender system.¹⁴³ The Cook County criminal courts as a whole handle over 31,000 felony cases per year.¹⁴⁴ Although it is difficult to determine exactly how many of these cases are handled by the Cook County public defenders,¹⁴⁵ the current head of the Office of the Cook County Public Defender's Office, Amy Campanelli, has stated, "[T]he caseloads for some felony attorneys are creeping up toward 100 cases or more."¹⁴⁶ Further, in 2008, the chief public defender for Cook County filed a lawsuit stating that "[t]he caseloads of the Defender's Office now exceed national standards in excess of 60 percent in felony courtrooms and 400 percent in misdemeanor courtrooms."¹⁴⁷ In addition, the Office of the Cook County Public Defender, "represents eighty-five percent of adults and ninety-five percent of juveniles" that are charged with criminal offenses in the Cook County court system.¹⁴⁸

To handle the volume of cases seen by the Office of the Cook County Public Defender, the office employs over 500 attorneys.¹⁴⁹ In addition, the office employs approximately 60 investigators to assist in case preparation and trial.¹⁵⁰ Frequently, plea-bargaining is used

143. Cook County Census, *supra* note 83.

144. Locke E. Bowman, *Book Review: The Emperor Has No Clothes: A Journalist Sees the Criminal Justice System*, 95 J. CRIM. L & CRIMINOLOGY 1411, 1411–12 (2005).

145. In contrast to the Los Angeles County Public Defender system, the Office of the Cook County Public Defender does not keep up-to-date and accurate records regarding the number of attorneys, number of cases, and type of cases in a location that can be obtained generally. For this reason, the information is inferred through other sources, but the information could not come directly from the source.

146. Geoffrey Burkhart, *Content: A Person of Interest: Getting to Know . . . Amy Campanelli*, 29 CBA RECORD 52, 53 (July/Aug. 2015) (on file with author) (interviewing Amy Campanelli to discuss current issues, her agenda for the Cook County Public Defender's Office, and gaining more information about her).

147. Malia Brink, *Column: Indigent Defense*, 32 CHAMPION 43 (2008). Within the author's note of this press release, the author notes that the Arizona and Illinois challenges to excessive caseloads are the first of their kind since the American Bar Association released an opinion stating that ethically a lawyer cannot take on more cases than they can adequately handle. *Id.*

148. See Jeanne Bishop, *Where the Rubber Meets the Road: Injecting Mercy into a System of Justice*, 47 VAL. U.L. REV. 819, 826–27 (2013) (stating that many of the people who are charged with criminal offenses in Cook County are poor and cannot afford an attorney of their own, thus they frequently require the assistance of the public defender system). In addition, this article discusses the "war on drugs" and its impact on the public defender system, as well as those individuals who either are below the poverty line or are members of a minority. *Id.* at 827.

149. Steve Schmadeke, *Public Defender Comes Out Swinging, Bashes Alvarez and Talks of Change*, CHICAGO-TRIBUNE (Oct. 23, 2015), www.chicagotribune.com/news/local/politics/ct-public-defender-amy-campanelli-met-20151023-story.html.

150. *Id.*

in criminal cases heard in Cook County.¹⁵¹ In Cook County, 86% of criminal cases decided are with a guilty plea (this number is close to the national average).¹⁵² This is similar to the system in LACPD, which also frequently results in plea bargains to settle cases more quickly in an attempt to limit the stress on the indigent defense systems.¹⁵³

The overcrowded system of Cook County shows issues in another aspect. Located on the same city block as the Cook County Courthouse is the Cook County Jail, which has rapidly grown over the years to keep up with pretrial detention of those who are set to stand trial for their accused crimes.¹⁵⁴ In 1989 the Cook County Jail held approximately 6,100 inmates.¹⁵⁵ In 2005 the number of inmates held there had grown to 9,700.¹⁵⁶ The growth in prison capacity is an indicator that case numbers in Cook County are growing. The Cook County Public Defender system must expand to fulfill this growing number of cases.

3. *Comal County Client-Choice System*

Comal County recently altered its indigent defense system to allow indigent defendants to have the option to decide between being appointed a defense attorney by the court or selecting their own from a court-provided list.¹⁵⁷ This new system was made possible due to a grant awarded to the county for \$200,000 to fund this new program's cost for two years to see how it would function.¹⁵⁸ The selection of Comal County was due to "its proximity to Austin, its manageable caseload and the willingness of local authorities to participate."¹⁵⁹ The desire is to allow "free-market practices," to remove the attorneys who are not able to live up to the expectations required for representing indigent clients, and to make way for the better ones who are "more efficient at what they're doing."¹⁶⁰ The county is hoping that this will allow for more efficiency in the criminal defense program.

Comal County had budgeted \$430,000 for the public defenders in state district courts and \$125,000 for the indigent cases in the county courts.¹⁶¹ In 2014 Comal County had six murders, seven

151. Bowman, *supra* note 146, at 1412.

152. *Id.*

153. Albert-Goldberg, *supra* note 124.

154. Bowman, *supra* note 146, at 1413–14.

155. *Id.* at 1414.

156. *Id.*

157. Zeke MacCormack, *Comal County to Host National Test of 'Client Choice'*, SAN ANTONIO EXPRESS NEWS (Jan. 25, 2014), www.expressnews.com/news/local/article/Comal-County-to-host-national-test-of-client-5175661.php.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

robberies, 175 assaults, 345 burglaries, 513 cases of larceny, and 49 auto thefts.¹⁶² Although this crime data is available, it is difficult to find accurate and reliable data concerning the number of cases in which the criminal defendant required the assistance of court-appointed counsel in Comal County for their case.

As it stands, there is a lack of information regarding this new system of client choice in Comal County. As the system moves forward, the Justice Management Institute of Virginia will collect the data and determine whether the new system is reaching the goals desired.¹⁶³ It will be interesting to see if this system provides more relief for indigent defendants, as Texas State District Judge Dib Waldrip stated, “[t]heoretically, it should provide a better service at a more effective rate.”¹⁶⁴

C. Comparison of the Counties Based on Demographics and Systems of Defense

An obvious difference between Comal County and Los Angeles or Cook County is simply the population and the number of cases each handles. Due to these differences, it would make sense that they would require different measures to ensure the protection and successful advocacy of their clients. In Comal County, the smaller population base, number of cases handled, the average education level, and income levels indicate that the system can be maintained in a different manner than the other counties discussed. There is simply less pressure on the system in Comal County than the systems in Los Angeles and Cook County. The public defender systems designed in Los Angeles County and Cook County are an attempt to service a large number of people in an organized manner.

The concern that plagues all systems of indigent defense is a lack of adequate funding to represent all the defendants that need representation. A committee reported that there is “overwhelming evidence that, in most of the country, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources.”¹⁶⁵ These issues will persist in all of the

162. Texas Department of Public Safety, *The Texas Crime Report for 2014 Chapter 10b* (2015) (on file with author).

163. Albert-Goldberg, *supra* note 124.

164. *Id.*

165. Thomas, *supra* note 6, at 307, 311. Thomas continues by stating that there may be an underlying reason behind not allowing more funding for indigent defense. *Id.* He states:

Legislatures ignore the many pleas for better funding for indigent defense because they have as much defense as they want If this is correct, then the underfunding for half a century in the face of repeated calls for additional funding is not the result of tight budgets. If this is correct, indigent defense will never be funded to the extent necessary to provide the kind of

systems, including the new system in Comal County. For this reason, something needs to change among the system of indigent defense to ensure the protection of the rights of those defendants unable to afford their defense. The system in Comal County is an experimental idea at this point. This system may work well to solve some of the problems plaguing the indigent defense system; however, an increase in funding would solve most, if not all, the current issues that plague the system of indigent defense.

IV. PROPOSAL

It is too early to have reliable data regarding the new system of indigent defense in Comal County. Although the level of effectiveness of this system will become more apparent in the future, it is difficult to know whether this system will be more or less effective than other current types of indigent defense. However, it would be less effective in a large metropolitan area, such as the cities of Chicago and Los Angeles. This is due to the large population base as well as higher crime rates that lead to more cases and larger criminal dockets.¹⁶⁶ For this reason, the statistical analysis above becomes important to highlight the differences between the counties. Further, the design of the client-choice method would slow down the criminal justice process, leading to larger backlogs in the system and causing the system to be more expensive.

The client-choice system would give more power to defendants in selecting his or her attorney, thereby allowing the defendant to have more control over his or her defense.¹⁶⁷ Client choice does give an infusion of capitalistic American values to the current defense systems. In allowing the indigent defendants' to select their own attorney, the best lawyers will get the most clients.¹⁶⁸ The attorneys who do good work and value their clients will be the ones that get the most clients requesting their assistance. However, this is a double-edged sword. Allowing the defendant to select an attorney could lead to many criminal defendants flocking to a few lawyers.¹⁶⁹ As Justice Posner discussed in *United States v. Ely*, "indigent

representation envisioned by *Gideon*, and this will be true regardless of a jurisdiction's ability to fund indigent defense.

Id. at 318.

166. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

167. Schulhofer *supra* note 11, at 511 (stating most of the decisions regarding the defendant's case is left to the attorney and the defendant overwhelmingly must rely on the judgement of the attorney). Further, this becomes a much bigger concern when the attorney's goals are not aligned with the goals of the defendant. *Id.* This misalignment of goals most commonly occurs because the attorneys rely on the government for the funding of their organization, whether that be a contract, public defender, or appointment method of indigent defense. *Id.*

168. *Id.* at 508.

169. *Ely*, 719 F.2d at 902, 905.

defendants cannot be allowed to paralyze the system by flocking to one lawyer.”¹⁷⁰

One of the biggest concerns among current indigent defense programs is the overwhelming caseload issue. As Justice Posner elaborated, “[t]he district judge . . . could not, realistically, be required to arbitrate a dispute between [an attorney] and another indigent criminal defendant who wanted to be represented [by the same attorney].”¹⁷¹ At this time, it is unclear whether this will become an issue in Comal County; however, if it becomes an issue Comal County does not appear to have a resolution to this issue. In addition, the issue of defendant’s flocking to a few defense attorneys would become much more pronounced in major metropolitan areas, such as Cook and Los Angeles Counties.

There is also a concern regarding the amount of time this will add to the average criminal case. The Comal County Court Plan states that within 48 hours the defendant will come before a judge to ensure the individual understands their rights and, if they qualify as indigent, they can select their own attorney from a list or one will be appointed by the court.¹⁷² In addition, the plan states this application for indigency will be reviewed within three days by the judge before being sent forward, but this plan does not state how long the defendant has to determine what attorney he or she would like or to conduct an investigation on each attorney.¹⁷³ The right to select one’s own attorney could add significant delay to a criminal case.¹⁷⁴ Compare this system of client choice to the other systems of public defense: an attorney is appointed at the first hearing where the defendant is then informed of their rights. Such cases can proceed much quicker.¹⁷⁵

Thus, Comal County’s smaller population base and light caseload becomes a major factor to consider when determining the efficiency of adopting a client-choice system in major metropolitan areas such as Cook and Los Angeles Counties. Due to the demographics discussed above, Cook and Los Angeles Counties are the two largest public defender networks in the country. As

170. *Id.*

171. *Id.*

172. Comal Cnty., Tex., District Court Plan (2015) (on file with author).

173. *Id.*

174. It is unclear how long would be added to a case. Due to the newness of this system, there is no reliable data yet on how long cases are taking from the beginning to the selection stage. However, if an indigent defendant is allowed time to investigate the possible attorneys; it is reasonable to believe this stage would take days, if not weeks, to determine what attorney is right for their needs. If the indigent defendant is not given time to investigate the listed attorneys, then there is not any significant difference between the court appointing the next attorney in line and the defendant picking an attorney they know nothing about.

175. See Comal Cnty., Tex., District Court Plan (2015) (on file with author) (laying out the path that a defendant will take between being charged and then meeting the attorney in detail in the system of client choice).

discussed, if these large indigent defense systems were to adopt a client-choice model, it could lead to an increase in expenses due to the additional time required with each client and the difficulty in quickly and effectively handling cases.

The factors that lead to this conclusion are the demographic information combined with the total populations. The total population of Comal County is over five million less than Cook County and just under ten million less than Los Angeles County.¹⁷⁶ In addition, the factors discussed in the analysis section play heavily into the crime rates in these regions. The statistics that play an important role in determining the level of crime and the size of indigent defense caseloads benefit Comal County in almost every category as compared to Cook and Los Angeles Counties. Cook and Los Angeles Counties on average perform worst in high school graduation rates, average income, and the percentage of population below the poverty line.¹⁷⁷ For these reasons, the combination of the higher crime rates and thus higher caseloads in Los Angeles and Cook Counties require different systems for their indigent defense than that of Comal County. As such, these counties must form their defense organizations in such a way as to ensure the successful litigation of these cases, while also trying to handle many cases at once and protect the rights of their clients. This is significantly more difficult in the larger counties than that of Comal County.

The time it takes for the defendant to select their attorney, meet with the attorney, and build a defense strategy, all while the attorney is juggling other cases, will force the courts to slow down more than they already are. In addition, the new system does not specially provide for more adequate funding for the system than currently. For these reasons, an increase in funding for these

176. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91.

177. Los Angeles Census, *supra* note 74; U.S. Census, *supra* note 79; Cook County Census, *supra* note 83; Comal County Census, *supra* note 91. The table below lays out the individual statistics for each county, side by side in accordance with the most recent census data:

Figure 5: Comparative County Demographics

	Los Angeles County	Cook County	Comal County
Population	10,116,705	5,246,456	123,694
% Caucasian	26.8%	43.0%	69.0%
% African-American	9.2%	24.4%	2.3%
% Latino/Hispanic	48.4%	25.0%	26.6%
% High School Graduates	76.6%	84.5%	89.4%
% Bachelor's or Higher	29.7%	34.7%	33.3%
% Homeownership	46.9%	58.3%	76.1%
Per Capita Income	\$27,749	\$30,183	\$32,980
Median Household Income	\$55,909	\$54,548	\$65,839
% Below Poverty Level	17.8%	16.9%	10.2%

systems would be significantly more beneficial than any new form of indigent defense would be.

Lastly, this system of client choice may help the defendants and the attorneys, but it is too early to know at this point. However, as it stands, the public defender systems in Cook and Los Angeles Counties are much more capable of handling the caseloads currently present and it is unlikely this new system of defense would fix the issues that plague them. Likely, the only meaningful change that would fix the problems with the indigent defense system would be adequate funding. The public defender systems utilized by many major metropolitan areas are much better suited to handle the caseloads, pressure, and large populations than this newer system of client choice being explored in Comal County, Texas.

V. CONCLUSION

Since *Gideon v. Wainwright* decision in 1963,¹⁷⁸ the task of providing adequate representation to all indigent defendants has been daunting and difficult to accomplish. There are many concerns, spanning from lack of adequate funding to handling large and overwhelming caseloads. Due to these concerns, different jurisdictions have created indigent defense systems that fit the population base the jurisdiction takes in. Although none of these systems is perfect, they have accomplished providing representation to those who need it most and otherwise could not receive it.

Client choice is not a new idea, but Comal County is the first time it will be tried in the United States. Over the coming years, it will be followed closely to determine how successful this system could be in solving the problems that have plagued the indigent criminal defense systems. However, due to the size and demographics of some of the major metropolitan areas, such as Chicago and Los Angeles, it is difficult to see how a system designed as client choice would function to adequately provide representation to a large population.

The size of these sprawling counties is a main concern. With a large population that is many millions of people larger than Comal County, this system would be much more expensive and time consuming than the large public defender networks that are currently in use. Between the large population base and the various demographics, including education level, ethnic backgrounds, education levels, income, and percent below the poverty line, the differences between Cook or Los Angeles County and Comal County

178. *Gideon*, 372 U.S. at 335. The Supreme Court overruled *Brady* in holding that the right to counsel applies to both the federal and state government. *Id.*

are astounding. For these reasons, where the client-choice system may be beneficial for the smaller Comal County, the aforementioned factors show that a public defender's office is the best system possible for the larger counties.