

When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory To Become Effective Political Actors

*Brandon Buskey**

I. INTRODUCTION

Our public defense systems are slowly rotting away. Since the Supreme Court's 1963 decision in *Gideon v. Wainwright*,¹ which required the states to provide counsel for indigent defendants, organizations like the National Legal Aid and Defender Association and the American Bar Association have issued major independent reports about once every five years, each concluding that systematic deficiencies plague public defense.²

The clear theme of all of these studies is that the problems of indigent defense are primarily problems of money. Indeed, grossly insufficient funding is the most fundamental factor keeping indigent defense in shambles.³ Unfortunately, state policy makers tend to believe they can get away with such negligence, since few citizens are likely to shed a tear over the travails of criminal defendants.

Chief defenders, then, find themselves in a remarkable bind. Their position charges them with ensuring that their offices represent clients competently; yet legislative neglect has crippled their ability to do so. According to the guidelines promulgated by the American Bar Association, public defenders should only handle 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health cases, or 25 appeals per year.⁴ However, in the nation's largest 100 counties, indigent defenders handle an average of 530 cases annually.⁵

* Law Clerk, Hon. Janet C. Hall, United States District Court, District of Connecticut; J.D., New York University Law School, 2006.

¹ 372 U.S. 335 (1963).

² See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64, 95 n.2 (1999). See also Penny J. White, *Mourning and Celebrating Gideon's Fortieth*, 72 UMKC L. REV. 515, 516 (2003).

³ See Mary Sue Backus & Paul Markus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1045-53 (2006).

⁴ STANDARDS FOR THE DEFENSE 13.12 (1973), available at http://www.nasams.org/Defender_Standards/Standards_For_The_Defense#thirteentwelve.

⁵ SCOTT WALLACE & DAVID CARROLL, THE IMPLEMENTATION AND IMPACT OF DEFENSE STANDARDS 4-5 (2003).

Undoubtedly more discouraging for public defenders than legislative apathy is the widely held notion that this apathy is intractable. Public choice scholarship has been the most prominent source of this concern. Conventional wisdom from this school counsels public defenders to abandon politics because aiding criminal defendants will never serve the interests of those at the helm of the political system. Believing that effective political activism lies beyond their grasp, many defenders have resorted to questionable measures for relief.

This Essay attempts to reverse the decline of public defenders by reimagining the role of public choice in criminal justice. Recent successes by public defenders unwilling to accept the conclusions of public choice naysayers suggest that the time is ripe for such an exercise. As this Essay seeks to demonstrate, these achievements are not mere accidents, but the results of a nuanced operation of public choice in the criminal justice context.

First, the Essay examines how public choice scholars have traditionally described the criminal justice realm. It then discusses two offices that went on strike when discouraged by overload and the conviction that they could not turn to the public. Next, the Essay extracts a more complete view of public choice from defenders that have proactively engaged their political environments. Armed with this fuller appreciation of public choice, the Essay proposes viable avenues public defenders should pursue to improve their political cache.

II. THE PLIGHT OF PUBLIC DEFENDERS: THROUGH THE OLD LENS OF PUBLIC CHOICE THEORY

Indigent defenders face a grim situation. Politicians jump at the opportunity to supply law enforcement with broad criminal laws in order to ease the burden of prosecution.⁶ To complicate matters, the mainstream media poisons the public's attitude toward suspected criminals by spinning crime coverage to the liking of police and prosecutors.⁷ As the interests of crime control have come to dominate the criminal justice debate, society has adopted a decidedly hostile attitude towards public defenders. The public's concern seems to be that the better public defenders perform, the more criminals they release onto the streets.

Assailed by those who equate public defense with "coddling criminals," a substantial and growing number of public defender offices have surrendered the political sphere.⁸ Most responsible for this capitulation is

⁶ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 550–51 (2001).

⁷ See Jenny R. Yampolsky, Case Comment, *Wanted Posters on the Internet: United States v. Carmichael and New Criminal Defense Tools to Level the Playing Field*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 300–02 (2006).

⁸ See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Vi-*

the fact that legislatures have corralled the directors of public defense offices in an effort “to guide and limit the discretion of public managers by restricting them to specified goals.”⁹ These defenders must perform their duties under perpetual fear that legislators will cut their budgets if legislators conclude that an innovative defense office has too much money on its hands.¹⁰

These developments have been disastrous for the quality of indigent defense. Rising caseloads severely hamper public defenders’ ability to communicate with their clients, one of the bedrock requirements of competent representation.¹¹ For clients, having a court-appointed defender with no time to hear their side of the story only deepens the fear that public defenders are simply another cog in a judicial system bent on their imprisonment.¹² Much as public defenders may lament the deteriorating state of public defense, they are immobilized by the belief that their hands are ultimately tied by political reality.

All of the above explanations of the criminal justice system’s failure to carve out a meaningful role for public defense offices sound in traditional public choice theory. Public choice attempts to explain legislative behavior by applying economic principles to political science.¹³ Its base assumption is that all stakeholders in the legislative process generally act according to their own self-interest.¹⁴

Professor Donald Dripps has formulated the predominant view concerning the role of public choice theory in criminal justice.¹⁵ He postulates that legislatures will consistently decline to uphold the rights of the accused.¹⁶ The frustratingly simple reason is that “a far larger number of persons, of much greater political influence, rationally adopt the perspec-

sions of the Public Defender, 84 GEO. L.J. 2419, 2448–49 (1996) (referencing THE SPAN-GENBERG GROUP, OVERVIEW OF THE FULTON COUNTY, GEORGIA INDIGENT DEFENSE SYSTEM (1990)).

⁹ Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199, 213 (1999).

¹⁰ See Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 455 (2001).

¹¹ See David L. Wilson, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota’s Public Defender System: Kennedy v. Carlson*, 544 N.W.2D 1 (Minn. 1996), 22 WM. MITCHELL L. REV. 1117, 1139 (1996).

¹² 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, 663–64 (1986).

¹³ See DENNIS C. MUELLER, PUBLIC CHOICE II, at 1 (1989).

¹⁴ See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983). See also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

¹⁵ See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079–80 (1993).

¹⁶ See *id.* at 1089.

tive of a potential crime victim rather than the perspective of a suspect or defendant.”¹⁷

From this, Professor Dripps predicts that prosecutors and police will monopolize the criminal justice debate, as legislatures cater to the requests of the law enforcement lobby for greater powers.¹⁸ Of course, it may very well be the case that law enforcement groups honestly reflect the public’s interest in detecting and solving crimes.¹⁹ The problem, according to Professor Dripps, is that there is no viable limit on the freedom the public is willing to grant the law enforcement lobby.

III. TRADITIONAL RESPONSES IN LIGHT OF PROFESSOR DRIPPS’S VIEW ON PUBLIC CHOICE THEORY

Taken at face value, Professor Dripps’s version of public choice theory places defenders who covet increased support in a precarious position. Professor Dripps essentially tells these defenders that help is not on the way. A remarkable practice to which defenders have resorted in order to overcome Professor Dripps’s dim assessment is refusing additional cases.

One such instance occurred in Springfield, Massachusetts. The Committee for Public Council Services (“CPCS”) administers the Massachusetts system of public defense.²⁰ Since the mid-1990s, the budget for bar advocates faced continual cuts, resulting in their compensation rates being among the lowest in the nation.²¹ In 2003, the situation became more perilous when, in reaction to a budget shortfall,²² the Governor Mitt Romney cut CPCS’s bar advocate fees by \$13 million.²³ Many feared this move would bankrupt the program by the end of fiscal year 2004.²⁴ In response, bar advocate groups protested the cuts by refusing new assignments.²⁵

Immediately thereafter, nineteen indigent criminal defendants detained in a Hampden County jail without counsel filed legal petitions seeking relief.²⁶ As a result, the Supreme Judicial Court initiated the nuclear option, declaring that defendants who qualified for court-appointed coun-

¹⁷ *Id.*

¹⁸ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 886 (2004).

¹⁹ See *id.*

²⁰ MASS. GEN. LAWS ch. 211D, § 1 (2006).

²¹ See THE SPANGENBERG GROUP, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONIES AT TRIAL: A STATE-BY-STATE OVERVIEW (2002) [hereinafter OVERVIEW].

²² See *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 900 (Mass. 2004).

²³ See Kathleen Burge, *Lawyers for Poor Feel Slap from Us*, BOSTON GLOBE, Oct. 17, 2003, at B1.

²⁴ See *id.*

²⁵ See Thanassis Cambanis, *Legal Strike Ends in Essex County*, BOSTON GLOBE, Nov. 26, 2003, at B4.

²⁶ See *Lavallee*, 812 N.E.2d at 900–01.

sel could wait no longer than forty-five days for an attorney.²⁷ If no lawyer was appointed during this time, the defendant's criminal case would be dismissed without prejudice.²⁸ Additionally, the court stated that those indigent defendants held in lieu of bail under preventive detention could not be held more than seven days without receiving counsel.²⁹

Lavallee's aftershocks were felt twelve days later when a court ordered the release of three men being held in the Hampden County jail on drug charges.³⁰ The fallout from releasing three suspected drug dealers was jarring. Governor Romney attempted to place CPCS under his control in order to force bar advocates to either accept cases or be banned from public defense work.³¹ Governor Romney then went public, accusing bar advocates of betraying their duty to support indigent defense for the public interest, rather than for profit.³²

As Governor Romney attempted to seize control of the CPCS, the Supreme Judicial Court issued an order appointing bar advocates to new cases without the attorneys' consent.³³ According to the order, attorneys who refused appointments without a valid excuse would be reported to the state Board of Bar Overseers for disciplinary action.³⁴

Put mildly, CPCS's decision to strike proved catastrophic. Judging from the *Boston Globe's* coverage of the debacle, CPCS's actions are entirely consistent with a view anchored by traditional public choice theory. Rather than pursuing proactive political strategies to secure funding, the bar advocates appear to have waited until they became completely beset by legislative failure before finally deciding that a strike was the appropriate response. Considering what followed, one can only wonder how much damage the reputation of public defense in Massachusetts suffered as a result of this choice.

A more difficult-to-decipher public defender strike occurred in St. Louis, Missouri. In July of 2005, the St. Louis Public Defender's Office refused to represent individuals in cases involving misdemeanor charges or failure to pay fines or court costs.³⁵ Calling their prior practice "meet 'em and greet 'em and plead 'em,"³⁶ public defenders protested that their

²⁷ *See id.* at 911.

²⁸ *See id.*

²⁹ *See id.*

³⁰ Jonathan Saltzman, *Wages Faulted in Lawyer Dispute: Leader Denies Driving Protest*, BOSTON GLOBE, Aug. 24, 2004, at B1.

³¹ *See* Raphael Lewis & Jonathan Saltzman, *Romney Eyes Reins on Public Defenders: Would Tell Lawyers, Accept Pay or Face Ban*, BOSTON GLOBE, Aug. 12, 2004, at A1.

³² *See id.*

³³ Raphael Lewis & Jonathan Saltzman, *SJC Orders Lawyers Appointed*, BOSTON GLOBE, Aug. 18, 2004, at A1.

³⁴ *Id.*

³⁵ *See* Robert Patrick, *Public Defender Rules are Set to Change*, ST. LOUIS POST-DISPATCH, July 3, 2005, at E1.

³⁶ *Id.*

high rates of plea acceptance inexcusably endangered the liberty interests of their clients.³⁷

Compared to Hampden County, the political reaction in St. Louis has been more positive. The week after the strike, the Missouri private bar recruited lawyers to accept minor misdemeanor cases and appointed a task force to suggest improvements.³⁸ In addition, the Bar commissioned an independent study by the Spangenburg Group. The study criticized the public defenders for not educating the public on the need for increased support, engaging the media, or collaborating with potential allies to garner more funds.³⁹

The strikes in St. Louis reveal a public defense office that felt betrayed by the representative system. In defending the strikes, J. Marty Robinson, director of the Missouri State Public Defender Commission, explained, “the commission has engaged the bar and the legislature. We didn’t get here overnight . . . We have been slow to get a response from the legislature.”⁴⁰ Robinson’s frustration with the legislature’s five year blindness towards the sorry state of Missouri public defense is understandable. Still, the Spangenburg Group’s evaluation suggests that Robinson’s pre-strike efforts were unduly truncated.

It seems plausible that Robinson limited his options because he felt the public would not listen to the pleas of public defenders. Instead, he went to the legislature, perhaps hoping for sympathetic ears among those directly controlling his budget. Robinson’s anticipation of such an attitude by the public would clearly echo traditional public choice theory. Ironically, so would the fact that his failure to approach the public first virtually assured the legislature’s prolonged disregard.

Refusing cases raises two vexing questions. First, considering the potential effects refusing cases can have on a client, is refusing cases ethical? Second, given the political environment in which indigent defense offices operate, is refusing cases an effective strategy?

On the question of ethics, one of the first principles of lawyering is that attorneys should not allow their caseloads to compromise their ability to represent individual clients competently.⁴¹ The generally accepted approach is that “if [the staff defender] determines that to take additional cases would interfere with the rights of his current clients as well as his new clients, he must be allowed to refuse to accept the additional cases.”⁴²

³⁷ *Id.*

³⁸ See Editorial, *Meet 'em, Plead 'em*, ST. LOUIS POST-DISPATCH, July 11, 2005, at B6.

³⁹ See Meghan Maskery, *Public Defender System “In Crisis,” Report Finds*, MISSOURIAN, Nov. 28, 2005, available at <http://columbiamissourian.com/news/story.php?ID=1702>.

⁴⁰ *Id.*

⁴¹ See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 347 (1981) (“[a legal services lawyer] who attempts to continue responsibility for substantially more matters than the lawyer can competently handle thereby violates DR 6-101(A)(2) and (3) [of the Model Code of Professional Responsibility]”).

⁴² Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Ren-*

The difficulty with deriving guidance from these ethical standards is that they were drafted to apply to individual defenders. Hampden County and St. Louis, by contrast, involved collective refusals to represent clients. The difference is far from formalistic. A collective decision to refuse cases inevitably results in systematic delay. A host of cases must necessarily languish until the strike ends. As discussed above, any delay can destroy a defendant's chances of adequate representation.⁴³ Collective strikes exponentially worsen this problem. Indeed, the fact that potential clients must remain incarcerated until a lawyer files an appearance should weigh heavily on the conscience of public defenders that refuse cases *en masse*. Arrestees left in jail face obvious physical dangers, as well as the less appreciated risks of losing their jobs, homes, and the custody of their children.⁴⁴

As to the political efficacy of refusing cases, media coverage presents a sticky issue. Walking away from cases can quickly become a disaster for public defenders' credibility. These dangers were evident in the media's coverage of Hampden County. Despite the bar advocates and their clients having suffered through years of inadequate legislative support, the public barely noticed the controversy until local newspapers reported that, due to a "pay issue,"⁴⁵ the courts were putting three alleged drug dealers back on the street.⁴⁶ Governor Romney immediately took advantage of this portrayal by impugning the protesting lawyers' character. In stark contrast to the negative characterization of the public defenders' actions, Romney's efforts were framed on the *Boston Globe's* front page as an attempt to "rein in" the public defenders' demands for more pay.⁴⁷ The clear implication was that public defenders who pursue more money are out of control.

Taken together, the ethical and practical pitfalls of strikes, coupled with the limited benefits they normally reap, warrant reserving the tactic to be used as a means of last resort. However, defenders cannot completely rule the option out, since, as the Hampden County strike illustrates, strikes can serve as a useful "wake-up" mechanism when a defender finds herself truly out of options. Whether public choice leaves defenders with options other than striking becomes the pivotal question.

der the Ineffective Assistance of Counsel, 68 IND. L.J. 363, 393 (1993).

⁴³ See *supra* text accompanying notes 11–12.

⁴⁴ See Vi Landry, *Defenseless*, GAMBIT WEEKLY, Sept. 5, 2006, available at http://www.bestofneworleans.com/dispatch/2006-09-05/cover_story.php.

⁴⁵ See Saltzman, *supra* note 30.

⁴⁶ See Conor W. Daly, *Avoiding a New Willie Horton Problem: Creating a Better Public Counsel System in Massachusetts*, 18 GEO. J. LEGAL ETHICS 679, 684 (2005).

⁴⁷ Lewis & Saltzman, *supra* note 31.

IV. A BREAK FROM THE TRADITIONAL: PUBLIC CHOICE THEORY REDUX

If Professor Dripps's views on public choice underlie public defenders' pursuit of strikes, defenders may have conceded the fight prematurely. An alternative view of public choice theory could give the directors of public defense offices a forceful basis for engaging in criminal justice reform.

As a preliminary matter, one glaring weakness of Professor Dripps's approach is the assumption that groups like the ACLU are the only representatives of the civil rights side of the debate.⁴⁸ Professor Dripps's theory completely overlooks what role, if any, public defenders play in securing the rights of criminal defendants.⁴⁹ The key consideration is that public defenders are uniquely situated to connect with the neglected voices of a community.⁵⁰ After all, "the boundary between victim and accused is fluid. Economically and racially-subordinated communities . . . often have greater interaction with law enforcement, increasing the likelihood that many of the same individuals will be stopped, detained or arrested in their lifetimes."⁵¹ The fact that a defender's job requires him to work with defendants gives him a decided advantage in carving out a meaningful community role.⁵²

One should also be wary of Professor Dripps's pessimism given the evidence that the criminal justice environment may not be as bleak as portrayed. The public mood is gradually beginning to tilt away from harsh criminal penalties.⁵³ Because of efforts by police and prosecutors to interact in non-punitive ways with high-crime communities, the public appears to be focusing less on retribution and more on "attempt[s] to restore relationships between victims of crime, offenders, and the larger community."⁵⁴

⁴⁸ See Dripps, *supra* note 15, at 1092.

⁴⁹ See generally, Donald Dripps, *Criminal Law, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997).

⁵⁰ See Clarke, *supra* note 10, at 414–15.

⁵¹ Taylor-Thompson, *supra* note 9, at 212.

⁵² As a practical matter, public choice theory seems to predict that public defenders cannot rely on this connection alone, as the poor communities from which clients normally come have also been marginalized by the political process. See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV 2045, 2068 (2006).

⁵³ See Clarke, *supra* note 10, at 412.

⁵⁴ See *id.*; see also Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 414 (2004) (citing findings from a Wall Street Journal survey, David Bank, *Poll Shows Support for Crime Prevention as Tough Approach Loses Favor*, WALL ST. J., Feb. 13, 2002, at B8, showing that "65 percent favor dealing with crime through job training, counseling, and youth activities, with only 29 percent supporting stricter sentences, more capital punishment, and fewer paroles. In contrast, only 48 percent in 1994 favored addressing the causes of crime and 42 percent, a tough-on-crime approach."); Mark H. Moore et al., *The Best Defense is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L & SOC. CHANGE 57, 77 (2004) (citing THE SENTENCING PROJECT, CRIME,

Each of these factors has substantially impacted the thinking of numerous public defense organizations that, in the face of traditional public choice theory, “have become active in community activities and engaged in their own public policy initiatives . . . [r]ather than seeing themselves as ‘the punching bags of the criminal justice system.’”⁵⁵ The issue now becomes whether these defenders can ground their actions in sound theory.

A. *A New View on Public Choice*

Professor Ronald Wright presents a new perspective on the challenge of advocating for increased criminal defense support.⁵⁶ Wright asserts that the predictive ability of public choice theory, at least as traditionally articulated, only accurately describes the process of creating substantive criminal law and the policing and detection of crimes.⁵⁷ Legislation involving the adjudication of criminal charges or punishment for crimes requires a more nuanced understanding of public choice theory.⁵⁸

Professor Wright focuses on evidence suggesting that the influence of prosecutors can be offset by other criminal justice interest groups.⁵⁹ For example, the influence of prosecutors who argue for longer sentencing ranges tends to decrease when “[s]tate corrections officials who operate prisons and other programs, along with local government officials who operate jails, remind the legislators that increased use of punishment resources is costly for taxpayers.”⁶⁰ Indeed, it appears legislators are keeping close watch over the budgetary costs of longer punishments.⁶¹

B. *New Approaches*

Professor Wright’s new take on the operation of public choice theory in criminal justice points the way to a reexamination of the political theory behind pushing for increased defense resources. In fact, a number of scholars, while not explicitly relying on public choice theory, have suggested that public defenders have failed to win broader support in the

PUNISHMENT AND PUBLIC OPINION: A SUMMARY OF RECENT STUDIES AND THEIR IMPLICATIONS FOR SENTENCING POLICY 2 nn.11–13, n.17 (2000)).

⁵⁵ Clarke, *supra* note 10, at 425–26 (quoting David E. Rovella, *The Best Defense, Rebuilding Clients’ Lives to Keep Them from Coming Back*, NAT’L L.J., Jan. 31, 2000, at A1).

⁵⁶ See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 224 (2004) (offering resource parity between prosecutors and public defenders as a potential guiding principle for legislative change).

⁵⁷ See *id.* See also Stuntz, *supra* note 6, at 510.

⁵⁸ See Wright, *supra* note 56, at 256.

⁵⁹ See *id.* at 258.

⁶⁰ *Id.*

⁶¹ See *id.* at 258–59 (citing generally Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005)).

political arena, not because such victory is impossible, but because they have made decisively weak arguments in pursuit of that end.⁶²

For example, public defenders often invoke the constitutional right to counsel to persuade outsiders.⁶³ One typical appeal asserts that realizing the promise of *Gideon* obligates legislatures to maintain adequate indigent defense funding. As familiar as these constitutional arguments may be to defenders, they rarely inspire the public beyond placid agreement that indigent defense is an abstract good.⁶⁴

Underpinning the public's tepid reaction to invocations of constitutional imperatives is its growing resentment to the perceived preeminence of the federal courts on civil rights issues. The absence of any concerted effort to garner political legitimacy for these rights only exacerbates this resentment.⁶⁵ Thus, what a federal court has to say about the right to counsel carries little weight in the political arena, even if that court happens to be the Supreme Court. It should come as no surprise, then, that "[a]rguing lofty constitutional principles has rarely moved politicians who base their careers on popular polls."⁶⁶ Shifting the advocacy focus, rather than abandoning advocacy, may be more appropriate.

Before defenders test the limits of public choice theory, they must establish a proper framework. Public choice cannot avail a defender unclear of her aims. Thus, the onus rests with chief defenders to define the political role their offices will assume. Advocacy goals that a public defense office might pursue include elevating public support for criminal defense, lobbying for the legal rights of the accused, or pushing for more humane sentencing alternatives.⁶⁷ How an office determines its mission will depend on, among other things, its needs, its resources, and its environment.⁶⁸

⁶² See, e.g., Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 94 (2004). Professor Moore outlines and discusses the futility of seven arguments that summarize the common attempts of public defenders to marshal support. They include the necessity of public defenders to the court system, the need for accurate determinations of guilt and innocence, protecting citizens from overreaching government, the benefit of a level playing ground for indigent defendants relative to the wealthy, and the need for parity between prosecutors and public defenders. See *id.* at 94–99.

⁶³ See *id.* at 94. See also BELDEN RUSSONELLO & STEWART RESEARCH & COMMUNICATIONS, *THE PRICE OF JUSTICE: MONEY, FAIRNESS AND THE RIGHT TO COUNSEL* 5 (2000), available at http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent. Focus groups agreed that the right to counsel was a fundamental requirement. See *id.* at 18. They also wanted to restrict such resources as access to expert witnesses or forensic testing. See *id.* at 33. Focus group participants seemed to fear that defenders will use additional resources to stall or get defendants off on technicalities, conflicting with "ensuring punishment and public safety." *Id.*

⁶⁴ See Lee, *supra* note 54, at 403.

⁶⁵ See Moore, *supra* note 62, at 94.

⁶⁶ Taylor-Thompson, *supra* note 9, at 203.

⁶⁷ See Moore, *supra* note 62, at 100–01.

⁶⁸ See *id.* at 101–02.

Once defenders have articulated an institutional mission, they must develop performance measures.⁶⁹ To date, there is a dearth of data on the effectiveness of community-focused models of criminal defense.⁷⁰ Among those offices that have opted for nontraditional models of public defense, one is hard-pressed to find empirical measures of success.⁷¹ To overcome this, “problem-solving defenders . . . must document their successes and open their doors to social science researchers or others who will assist in measuring outcomes”⁷² Such data could prove invaluable to the office’s efforts to hone its public image, as well as ensure that the office appropriately allocates its finite resources.

Having begun to resurrect the debate over public choice theory in the criminal justice context, it is useful to explore how defenders may begin making an impact. First and foremost, public defenders must continue to network with each other for guidance and support. Groups such as the American Council of Chief Defenders,⁷³ the National Symposia on Indigent Defense,⁷⁴ and the Community Oriented Defender Network of the Brennan Center for Justice have already begun this effort.⁷⁵ Through networking, public defender offices can begin looking less like isolated collections of lawyers and more like the focused interest group necessary to operate under public choice theory.⁷⁶

Another indispensable step for public defenders is to begin forming meaningful collaborations with other criminal justice actors.⁷⁷ Assuming that entities like the police, prosecutors, and prison officials will consis-

⁶⁹ See Clarke, *supra* note 10, at 456 (quoting James Neuhard, Director of Michigan’s State Appellate Defender’s Office: “The biggest problem is the lack of data and our ability to provide a litmus test . . . to show that all these defender activities are working, and therefore should be supported.” Telephone interview by Clarke with Neuhard (Oct. 16, 2000)).

⁷⁰ See Clarke, *supra* note 10, at 456.

⁷¹ See, e.g., Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006) (discussing the potential of the type of holistic representation practiced by the Bronx Defenders without referencing any standards of success).

⁷² Clarke, *supra* note 10, at 456.

⁷³ The goals of ACCD are “1) To support leaders of all types of indigent defense systems through the exchange of information and ideas, training and networking; and 2) [t]o increase our impact on criminal justice policies and practices nationally and locally.” Nat’l Legal Aid & Defender Ass’n, Defender Resources, American Council of Chief Defenders, http://www.nlada.org/Defender/Defender_ACCD/Defender_ACCD_Home.

⁷⁴ OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE xiii (2000), available at <http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf>.

⁷⁵ The Community Oriented Defender Network attempts to unify and support public defender organizations engaged in systematic reform. See Community Oriented Defender Network, Post Conviction Penalties, http://www.brennancenter.org/subpage.asp?key=42&proj_key=35685 (last visited Mar. 23, 2007).

⁷⁶ See Lee, *supra* note 54, at 390.

⁷⁷ See Taylor-Thompson, *supra* note 9, at 203–06.

tently have the ear of legislators, public defenders must exploit situations where their interests converge with the interests of these actors.⁷⁸

C. *Dealing with Law Enforcement*

As described above, it is no secret that the police and prosecutors often pursue interests inimical to criminal defendants.⁷⁹ Deft maneuvering with law enforcement officials, however, may still benefit indigent defenders. An often-cited example of this comes from Professor Kim Taylor-Thompson's tenure as director of the Public Defender Services for the District of Columbia ("PDS").⁸⁰ When the city sought to increase police budgets, Taylor-Thompson negotiated a corresponding increase for PDS's budget. To achieve this, Taylor-Thompson:

chose to ride the tide rather than struggle futilely against it. Not only did [she] support the efforts to place more police officers on the force, but [she] then also [successfully] argued that greater enforcement would necessitate corresponding supplements to the defender office's budget to handle the new cases that would enter the system.⁸¹

Taylor-Thompson's "unexpected alliance"⁸² with city police reveals tantalizing possibilities for public defenders. The D.C. Council may have concluded that increasing the police budget risked public disapproval of the inequitable burden the increase would place on indigent defense.⁸³ Such a motivation would argue for a broader conception of the constraints that considerations of fairness impose on legislatures with regards to criminal defense funding.⁸⁴ Elected officials, if confronted by a vocal chief defender, may be sensitive to goals such as parity between indigent defense and law enforcement after all.⁸⁵

Defenders should also keep in mind that they sometimes share significant interests with their natural adversaries in the prosecutor's office. Most prominent among these potentially shared goals is the desire of both institutions to resolve cases efficiently.⁸⁶ Defenders could frame their de-

⁷⁸ See JOHN STUART, COMMON (DOLLARS AND) SENSE: SEVENTEEN STRATEGIES FOR GOOD RELATIONS WITH INDIGENT DEFENSE FUNDERS, <http://www.nlada.org/DMS/Documents/1028646129.89/Stuart.doc> (last visited Feb. 28, 2007) (proposing "build[ing] a non-hostile atmosphere with other criminal justice agencies that need resources:").

⁷⁹ See *supra* text accompanying notes 6–10.

⁸⁰ See Taylor-Thompson, *supra* note 8, at 2449.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Cf. Dripps, *supra* note 15, at 1095 (suggesting that fairness only constrains legislative actions to the extent that the innocent might suffer as a result).

⁸⁵ See generally Wright, *supra* note 56.

⁸⁶ See Taylor-Thompson, *supra* note 9, at 210.

sire for additional funding as a means of investigating cases more thoroughly, allowing defenders to advise clients on the advisability of a plea in a more timely manner.⁸⁷

How sensitive a particular legislature becomes to an alliance between law enforcement and defenders will vary with context, as will the ability of defenders to even forge these unions. The key lesson is that public defenders need not assume that law enforcement interests are mutually exclusive with their own. Considering law enforcement's increased attention to community involvement,⁸⁸ public defenders might begin developing a common vocabulary with law enforcement officials.⁸⁹

D. Working with Prison Officials

Like public defenders, prison officials are often resistant to the tendency of legislatures to overuse prisons.⁹⁰ Primarily responsible for this resistance is the skyrocketing number of individuals requiring social services in American prisons.⁹¹ In fact, prisons have long clamored for increased support for treatment programs.⁹² It seems that at least some prison officials, like public defenders, are being stretched beyond their means.

Public defenders may be able to address this crisis by advocating alongside prison officials for increased funding for treatment programs. State legislators have recently shown themselves receptive to such proposals. For example, a group of state legislators convened in February 2003 by the Vera Institute to discuss the influence of high correctional costs on state budget crises ended with the participants adopting an "across-the-board trend toward rehabilitative policies."⁹³ Given how influential the corrections lobby has become,⁹⁴ it behooves defenders to ride the tide of this political force whenever feasible.

Still, despite the tremendous potential benefits of aligning with prison officials, defenders should approach these collaborations with an abundance of caution. Prison officials clearly have an interest in increased funding and manageable prison populations. However, they have an equally

⁸⁷ See *id.*

⁸⁸ See Samuel Walker, *Too Many Sticks, Not Enough Carrots: Limits and New Opportunities in American Crime Policy*, U. ST. THOMAS L.J. 430, 447–48 (2006).

⁸⁹ See Nancy Gist, *The Executive Session on Public Defense: Foreword*, 29 N.Y.U. REV. L. & SOC. CHANGE 1, 1–2 (2004) (describing in general terms a productive executive session among public defenders, police chiefs, and prosecutors, and others).

⁹⁰ See Wright, *supra* note 56, at 258.

⁹¹ See Press Release, Human Rights Watch, United States: Mentally Ill Mistreated in Prison, (Oct. 22, 2003), available at <http://hrw.org/english/docs/2003/10/22/usdom6472.htm>.

⁹² See Walker, *supra* note 88, at 440–41.

⁹³ ROBIN CAMPBELL, VERA INST. OF JUSTICE, DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 4–5 (2003), available at http://www.vera.org/publication_pdf/204_398.pdf.

⁹⁴ See *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1872–73 (2002) (describing how the efforts of the prison lobby have "captured" their regulatory agencies).

clear interest in opposing initiatives that threaten prison closings and favoring those that promise prison expansion.⁹⁵ As a result, prison officials may be inclined to argue for longer sentences.⁹⁶

Because of this tendency, finding common cause with prison officials will prove complex. One option is to approach prison officials proactively with proposals narrowly tailored to support rehabilitation, rather than passively wait for prison officials to advance an attractive idea. This would allow defenders to define in advance the scope of their collaboration with prison officials. Defenders could then more readily identify if and when their interests begin to diverge from prison officials, and abandon ship if necessary.

E. Winning Over the Public

If Professor Dripps is right that “[t]he first duty of a politician is to get elected, and the second is to get re-elected,”⁹⁷ then public defenders also need to take their political agenda directly to the people.⁹⁸ Developing media savvy is a must. Public defenders often play a passive role in cultivating their image in the media, deferring to political allies or vigilant members of the press to champion their cause.⁹⁹

J. Marty Robinson’s efforts in the St. Louis strikes provide a useful model for how a public defender can construct a forceful media campaign. In his media comments, Robinson portrayed the strike as an effort to end “meet ‘em and greet ‘em and plead ‘em” practices. The very first headline covering the crisis declared that “Public Defender Rules are Set to Change,”¹⁰⁰ language with a transformational character. One week later, the *St. Louis Post-Dispatch* ran an editorial entitled “Meet ‘em, Plead ‘em,”¹⁰¹ adopting Robinson’s language. The article was unequivocally supportive of reform. Even though Robinson has since met criticism for failing to engage the Missouri legislature before striking, his cause now has at least one state representative advocating on its behalf.¹⁰² One can only wonder what could have been if Robinson’s media efforts were more aggressive from the beginning.

⁹⁵ See Editorial, *A Battle Over Prisons*, N.Y. TIMES, Feb. 12, 2007, at A20 (describing potential impact of New York state correction officers’ union resistance to Governor Eliot Spitzer’s proposal to close a number of underused prisons); Rachel E. Barkow & Kathleen O’Neil, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1982 (2006).

⁹⁶ See Barkow and O’Neil, *supra* note 95, at 1982.

⁹⁷ Dripps, *supra* note 15, at 1080.

⁹⁸ See Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004).

⁹⁹ See White, *supra* note 2, at 542–43.

¹⁰⁰ Patrick, *supra* note 35.

¹⁰¹ Editorial, *supra* note 38.

¹⁰² See generally Maskery, *supra* note 39.

Of course, not every chief will find herself in an environment immediately hospitable to defense reform. However, the experience of the Equal Justice Initiative¹⁰³ (“EJI”) in Alabama indicates that an office committed to persuading the media can achieve tremendous success in any environment.¹⁰⁴

With the sixth largest number of death row inmates of any state in the nation,¹⁰⁵ Alabama’s position as one of the most pro-death-penalty states in the nation is beyond challenge. Undeterred, staff attorneys at EJI, lead by director Bryan Stevenson, initiated an extensive series of discussions with *The Birmingham News*, the state’s largest newspaper and an unabashed supporter of capital punishment.¹⁰⁶ EJI’s seemingly preposterous aim was to convince the paper to condemn the death penalty publicly. Driving Stevenson and company was the conviction that “defender programs . . . that don’t actively integrate public education and advocacy as part of their mandate are undermining their effectiveness and facilitating the environmental conditions that make indigent defense work harder.”¹⁰⁷

EJI’s efforts involved providing the paper with “data, case materials, analysis and information for months leading up to their series.”¹⁰⁸ The interaction forced the editorial board to confront the inconsistency inherent in its simultaneous support of “the culture of life” and a death penalty system wrought with injustice.¹⁰⁹ Eventually, the board chose to abandon its decades-long support of the death penalty, announcing on November 6, 2005, that “we can no longer in good conscience continue to advocate the death penalty in Alabama.”¹¹⁰

Both Robinson and EJI prevailed in soliciting favorable media coverage, in part, by providing the press with an irresistible “hook.” For Robinson, the hook was a catch phrase that made for instant headlines. For EJI, the hook was an undeniable conflict in an editorial board’s vested opinions. What ultimately attracts the press’s attention is difficult to predict, but the benefits of deft and persistent media relations could not be clearer.

¹⁰³ “The Equal Justice Initiative of Alabama is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system.” Equal Justice Initiative of Alabama, <http://www.eji.org> (last visited on Feb. 28, 2007).

¹⁰⁴ However, the high visibility of capital punishment may predict that such results cannot be easily generalized to the issues that public defenders may want to bring to the public.

¹⁰⁵ DEATH PENALTY INFORMATION CENTER, *THE DEATH PENALTY IN 2006: YEAR END REPORT 5* (2006).

¹⁰⁶ See E-mail from Bryan Stevenson to author (Apr. 14, 2006) (on file with author).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005, at 2B.

¹¹⁰ *Id.*

F. Potential Hazards

In assessing the ability of public defenders to operate under public choice theory, chief defenders must consider whether the effort is sustainable. One major question concerns capacity. In order to reach out to other criminal justice stakeholders, defender offices must equip themselves with individuals skilled in lobbying, media relations, etc.¹¹¹ Capacity building presents daunting start-up costs that cannot be avoided. Defenders can begin evaluating whether their desired gains are worth the anticipated start-up costs by seeking guidance from groups like the Criminal Justice Institute or other defender offices that have managed the transition.

A more vexing problem than office capacity may be office willingness. The political alliances suggested here involve groups that public defenders often consider nemeses, so defenders may balk at collaboration.¹¹² One wholly justifiable fear may be that, in attempting to win political support, defenders risk being co-opted and thus abandoning their function as zealous advocates.¹¹³

Drug courts present a highly salient example of this risk. Aimed at rehabilitating nonviolent drug offenders, these courts may entice police and prosecutors to pursue cases they would otherwise abandon.¹¹⁴ There is also a very real risk that defense attorneys will force their clients into plea bargains in order to get them into treatment, even when doing so would be inconsistent with zealous advocacy.¹¹⁵ Even if defenders plainly define their institutional mission, they must always be on the alert for such consequences.

V. CONCLUSION

This Essay will hopefully encourage public defenders to reconsider concerted political activity. Public choice theory, with its focus on rational decision-making, offers a promising beginning. Prosecutors and the police will always play a central role in shaping criminal justice policy, but the opportunity for change comes when public defenders realize that these groups need not always be their enemies. With public choice no longer an inherent barrier, achieving political salience seems imminently achievable.

¹¹¹ See Moore et al., *supra* note 54, at 78.

¹¹² See Taylor-Thompson, *supra* note 9, at 220.

¹¹³ See Clarke, *supra* note 10, at 457.

¹¹⁴ See Cait Clarke & James Neuhard, "From Day One": *Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 29 (2004).

¹¹⁵ See *id.* at 29–30.