

## LOS ANGELES COUNTY PUBLIC DEFENDER OFFICE IN PERSPECTIVE

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### I. INTRODUCTION

This article offers some preliminary insights into the structure and operations of the Los Angeles County Public Defender agency (LACPD). The research began with several on-site interviews and in-court observations by the author in November 2006 and August 2007. The Public Defender and his Chief Deputy were gracious in providing statistical reports produced for their budgetary requests to the county board. They also provided useful auxiliary materials such as the agency's Policies and Procedures Manual and the California State Bar Association's *Guidelines on Indigent Defense Services Delivery Systems*.<sup>1</sup> In addition, the agency made a senior trial attorney available to walk the author through the court system and answer specific questions.

The author also examined the LACPD's website,<sup>2</sup> speeches delivered by the Public Defender, and media coverage of the agency.<sup>3</sup>

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1. THE STATE BAR OF CAL., GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006) [hereinafter CALIFORNIA STATE BAR STANDARDS].

2. Welcome to the Los Angeles County Public Defender, <http://pd.co.la.ca.us/> (last visited Feb. 9, 2009).

Subsequently, Professor Laurence Benner, who directed the 2006-2007 statistical survey of California public defense agencies, supplied the author with statistical data collected from some of the L.A. County defender offices.<sup>4</sup>

The article pinpoints some key features germane to public defender agencies and to the LACPD system in particular. Part II delves into the public's perceptions, or misperceptions, of lawyers who are paid by the government while serving the indigent accused. Part III is a statistical overview of the agency, including: total cases handled, size of staffing, number of offices, salaries, and so forth. Part IV describes the significance of LACPD's role as an "institutional agency" and the ways in which that role enhances and/or detracts from its ability to provide zealous, effective representation for the accused. Part V examines the methods used by LACPD's attorneys to dispose of cases, including the high rate of plea bargains and alternative dispositional approaches such as pretrial diversion. Part VI looks at an issue that some believe to be the crux of the problem—the inability of public defenders to begin representation early enough in the process. Others believe that the principal failing of public defender agencies is the problem addressed in Part VII—the lack of sufficient staffing to devote enough time to each defendant. Part VIII highlights an issue often overlooked in establishing defender agencies—the lack of adequate training for lawyers emerging from law school with little or no previous experience in the specialized practice of defending criminal cases. The article concludes with some general observations that highlight the strengths and weaknesses of the nation's largest public defender agency, the LACPD office.<sup>5</sup>

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3. *See infra* notes 51, 53, and 55.

4. *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009).

5. This "case study" is based on short-term observations and limited data; therefore, the conclusions and recommendations contained in this report are tentative. A formal evaluation conducted by a research team would allow more definitive conclusions to be reached. For example, a Justice Department-funded research team led by a Ph.D. social scientist prepared an evaluation design, which has since been employed in a number of defender agency evaluations. *See* ROBERTA ROVNER-PIECZENIK ET AL., EVALUATION DESIGN FOR THE OFFICES OF THE PUBLIC DEFENDER (National Legal Aid and Defender Association 1976).

## II. THE IMAGE QUESTION

Public defenders in L.A. County are caught in a familiar dilemma. They recognize that they have an “image problem.” The Chief Public Defender highlights it on the agency’s website,<sup>6</sup> alluding to the frequently asked question: “Are Deputy Public Defenders real lawyers?” To which he replies with a resounding, “Absolutely!”<sup>7</sup>

While seeking to portray the program as a “law office” for the poor, the Public Defender promotes the advantages of the agency’s role as an “institutional” program.<sup>8</sup> The LACPD constantly grapples with the conundrum of serving two seemingly opposing constituencies—indigent clients accused of crime and a county government that finances both prosecution and defense of the accused.

The LACPD agency operates in the midst of a sharply divided community of haves and have-nots, of Beverly Hills mansions inhabited by the super-rich and humble East L.A. ghetto abodes where residents are besieged by rampant gangland assassinations. There is a public perception, whether warranted or not, that privileged individuals like O.J. Simpson with the means to hire their own “dream team”<sup>9</sup> of private lawyers can get away with murder while the poor may be railroaded off to prison, guilty or not, due to substandard legal assistance.

Is there a two-tiered, unequal, criminal justice system in L.A. County, one for the poor and another for the wealthy? It is a complicated question.

The structure that houses the agency’s main suite of offices is, in itself, somewhat off-putting. The massive L.A. County criminal courts building sits in the heart of downtown Los Angeles. Half-a-dozen

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6. Welcome to the Los Angeles County Public Defender, *supra* note 2.

7. Los Angeles County Public Defender, Frequently Asked Questions—Getting a Lawyer, [http://pd.co.la.ca.us/F\\_getlawyer.html](http://pd.co.la.ca.us/F_getlawyer.html) (last visited Jan. 16, 2009).

8. See CALIFORNIA STATE BAR STANDARDS, *supra* note 1, at 7-8.

9. See Joel Achenbach, *O.J. Simpson’s Defensive Lineman*, WASH. POST, Jan. 21, 1995, at D1, available at <http://www.washingtonpost.com/wp-dyn/articles/A99139-1995Jan21.html> (“If this was anyone other than Mr. Simpson, represented by Johnnie Cochran, you could say, gee, this seems like a slam dunk,” says Peter Arenella, a UCLA law professor who has followed the case closely.”).

homeless people occupy benches on the sidewalks surrounding it. The early 1970s edifice is an unadorned, box-like structure.

Carved into the side of a hill, the building's three entrances present visitors with disparate introductions to the Los Angeles criminal justice system. Public defender clients and others who find themselves at the southern facade are obliged to enter at their own risk. A sign announcing "Public Entrance" stands at the base of a steep set of rusting iron and concrete riser-less staircases that are as formidable and precarious as the criminal justice system itself. Fortunately, entrances on the north and west sides are considerably more accessible, although the public's awareness of their existence is left to chance.

Inside, the lobby is devoid of benches. Visitors are herded along by armed security guards manning conveyor belts where the belongings of all save police personnel are examined and x-rayed. Upstairs, the LACPD agency's headquarters provides a more welcoming atmosphere. The LACPD's waiting room is equipped with comfortable seating and staffed by a friendly, helpful bilingual receptionist.

The LACPD's downtown offices are situated directly above the District Attorneys' suite. Likewise, outside Los Angeles city limits, most L.A. County public defender offices are housed inside courthouses. Their proximity to judges and prosecutors compounds the public defender's image problem. Clients of the agency tend to identify defender office lawyers with those actors who hold sway over the premises. They view public defenders with an understandable skepticism—could someone who is part of the "system" be trusted to safeguard their right to a fair trial? The clients' concerns are unlikely to be assuaged were they to learn that the Chief Public Defender for L.A. County is, like public defenders in many U.S. jurisdictions, selected and hired by the county government.<sup>10</sup> The program's current

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10. A survey of indigent defense programs that are financed with state funds was conducted by the U.S. Department of Justice, Bureau of Justice Statistics, in 1999. Of the programs surveyed, nineteen of the twenty-one were public defender programs as opposed to programs involving the appointment of private counsel to represent indigent defendants. According to the report:

Unlike their chief prosecutor counterparts who are primarily elected, the chief public defenders were appointed in all 19 States. In eight States the

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director was selected by five members of the County Board of Supervisors.<sup>11</sup> Future chief defenders will be selected by the county's Chief Executive Officer.<sup>12</sup>

When asked by the author whether the agency might be better served by a location outside the confines of the courthouse, Chief Deputy Public Defender Robert Kalunian reasoned, "The location presents an image problem because our clients must be subjected to

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governor appointed the chief public defender; in seven States, an independent board or commission made the appointment; and in the remaining four States, judges, the program advisory-board, the board of trustees, or the corporate board of directors [made the appointment].

CAROL J. DEFRANCES, U.S. DEPT. OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES (2001), *available at* <http://www.ojp.gov/bjs/pub/ascii/sfids99.txt>. A 1982 national survey of criminal defense systems reported that "in Florida, *elected* public defenders operate separately in each of the 20 judicial circuits in the State." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, A NATIONAL SURVEY: CRIMINAL DEFENSE SYSTEMS (1984) (emphasis added). However, election of public defenders is the exception rather than the norm. While the 1999 survey was limited to defender systems that are state-funded, the 1982 survey was more comprehensive in that it included defender systems financed by all levels of government. The final report for the 1982 survey concluded: "Most States organize indigent defense services on a county level." ROBERT L. SPANGENBERG ET AL., NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY: FINAL REPORT 9 (Abt Associates Inc. ed. 1986).

11. Interview with Robert Kalunian, Chief Deputy Pub. Defender, Office of the L.A. County Pub. Defender, in L.A., Cal. (Aug. 21, 2007) [hereinafter Kalunian, Aug. 21, 2007 Interview].

12. *Id.*; see also THE NAT'L STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, FINAL REPORT (National Legal Aid & Defender Association 1976) [hereinafter NATIONAL STUDY COMMISSION] (recommending that chief defenders be selected by a nonpartisan Public Defender Commission with no single branch of government having a majority of votes). The National Study Commission's Guideline 2.10 provides: "A special Defender Commission should be established for every defender system, whether public or private." *Id.* at 506. According to the L.A. County Charter, the Public Defender is an "appointive county officer." L.A. County Charter art. IV, sec. 14. In addition, California Government Code section 27702 provides: "At the time of establishing the office the board of supervisors shall determine whether the public defender is to be appointed or elected." CAL. GOV'T CODE § 27702 (West 2008). The District Attorney, on the other hand, is an elective officer. L.A. County Charter art. IV, sec. 12. There are serious drawbacks to election of public defenders. See Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 260-61, n.27 (2004).

weapons screening, but that is offset by the convenience of our being so accessible to the courtrooms. Convenience outweighs the other factors.”<sup>13</sup>

The most positive thing one can say about the courthouse is that it was renamed in 2002 after a remarkable woman, Clara Shortridge Foltz. Born in 1849, Foltz moved to California in the early 1870s, several decades before California women gained the right to vote.<sup>14</sup> When she decided to pursue a career in the law, the State of California did not yet require law school attendance as a prerequisite to becoming a lawyer, but it did require applicants to be white males.<sup>15</sup> She successfully shepherded an amendment through the California legislature to replace “white male” with “person,” and in 1878 became the first woman admitted to the California bar.<sup>16</sup>

Later, after becoming the first female Deputy District Attorney in Los Angeles, she recognized the need for an organized program devoted to the specialized practice of representing indigent suspects in criminal cases.<sup>17</sup> Due to her persistent efforts over a period of years, L.A. County established a public defender office in 1913.<sup>18</sup> It was the

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13. Interview with Robert Kalunian, Chief Deputy Pub. Defender, Office of the L.A. County Pub. Defender, in L.A., Cal. (Nov. 21, 2006) [hereinafter Kalunian, Nov. 21, 2006 Interview]. The National Study Commission’s Guideline 2.7 provides: “Local defender offices should be located near the appropriate courthouses, but never in such proximity that the defender offices become identified with the judicial and law enforcement components of the criminal justice system. Defender offices should maintain interview and waiting rooms in the courthouse.” NATIONAL STUDY COMMISSION, *supra* note 12, at 506.

14. Women’s suffrage in California was approved by male voters in 1911. See Women of the West Museum, California Women Work for Wages, Votes, and Visibility, [http://www.astrynationalcenter.org/explore/exhibits/suffrage/suffrage\\_ca.html](http://www.astrynationalcenter.org/explore/exhibits/suffrage/suffrage_ca.html) (last visited Mar. 31, 2009); see also Barbara Allen Babcock, *Clara Shortridge Foltz: “First Woman,”* 28 VAL. U. L. REV. 1231, 1234-40 (1994).

15. See, e.g., CAL. CIV. PRO. CODE § 275 (Deering 1871) (originally passed in 1851); see also Babcock, *supra* note 14, at 1246.

16. Babcock, *supra* note 14, at 1246, 1261.

17. See Susan L. Brandt, Patience Milrod, & Mortimer D. Schwartz, *Clara Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 556-58 (1976).

18. See *id.*; Los Angeles County Public Defender, History of the Office, <http://pd.co.la.ca.us/History.html> (last visited Feb. 5, 2009).

very first public defender organization, both for California and for the nation as a whole.<sup>19</sup>

### III. DESCRIPTION OF THE AGENCY: FACTS AND FIGURES

The LACPD system, which serves the nation's most populous county, is the largest defender agency in the United States.<sup>20</sup> The county itself contains over ten million individuals residing in eighty-eight cities as well as many unincorporated areas.<sup>21</sup> Forty-four U.S. states each contain populations smaller than this single county.<sup>22</sup>

LACPD handles approximately 70% of felony and 55% of misdemeanor cases prosecuted in the county.<sup>23</sup> Its caseload includes roughly 90,000 felony, 400,000 misdemeanor, and 40,000 juvenile cases each year.<sup>24</sup> It also provides representation for some 12,000 persons in mental health commitment proceedings as well as a variety of other matters. Over half of the LACPD's misdemeanor caseload consists of traffic charges prosecuted by the City Attorney rather than the District Attorney. These charges range from simple matters such as driving on a suspended license to DUI and serious hit and run violations. The LACPD office does not provide representation in non-jailable charges classified as "infractions."<sup>25</sup>

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19. See Los Angeles County Public Defender, History of the Office, *supra* note 18.

20. PUB. POLICY INSTITUTE OF CAL., JUST THE FACTS: LOS ANGELES COUNTY (2005), [http://www.ppic.org/content/pubs/jtf/JTF\\_LACountyJTF.pdf](http://www.ppic.org/content/pubs/jtf/JTF_LACountyJTF.pdf).

21. *Id.*

22. *Id.*

23. The Office of the Pub. Defender, County of L.A., Public Defender Internal Statistics (Jan. 2007) (unpublished internal memorandum on file with author) [hereinafter Internal Statistics Memo].

24. *Id.*

25. See Kalunian, Nov. 21, 2006 Interview, *supra* note 13 (noting that his office is obligated to provide representation for the indigent accused in all misdemeanors, including traffic cases where the law does not provide for a jail sentence, unless the law classifies the traffic offense as an "infraction"); Internal Statistics Memo, *supra* note 23. An infraction is "[a] violation, usu. of a rule or local ordinance, and usu. not punishable by incarceration." BLACK'S LAW DICTIONARY 796 (8th ed. 2004).

The majority of LACPD's approximately \$165 million budget comes directly from the county.<sup>26</sup> In addition, the county funds a separate agency, the L.A. County Alternate Public Defender's office, to represent individuals whom the Public Defender's office is barred from defending due to a conflict of interest.<sup>27</sup> Due to California court rulings, office policy prevents L.A. County defenders from representing more than one defendant in a multiple defendant case.<sup>28</sup> The Alternate Public Defender office handles a relatively small portion—about 15%—of the county's indigent felony cases.<sup>29</sup>

Over 700 courtroom lawyers are employed by LACPD, which has offices in thirty-nine locations scattered throughout the county.<sup>30</sup> By law, none of these attorneys are permitted to engage in private legal practice.<sup>31</sup> This prohibition eliminates the possibility of misperception by clients that their lawyer's private clients might be receiving preferential treatment. Moreover, Deputy Public Defenders are strictly prohibited from accepting any funds from their indigent clients.<sup>32</sup>

In 2007, salaries of Deputy Public Defenders ranged from \$58,000 for beginning attorneys, to \$141,000 for trial attorneys

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26. Internal Statistics Memo, *supra* note 23.

27. Kalunian, Aug. 21, 2007 Interview, *supra* note 11; *see also* CAL. PENAL CODE § 987.2(d)-(e) (West 2008).

28. *See* People v. Mroczko, 672 P.2d 835, 836-37 (Cal. 1983); *see also* CAL. RULES OF PROF'L CONDUCT R. 3-310 (2008); LAW OFFICES OF THE PUB. DEFENDER, COUNTY OF L.A., POLICIES AND PROCEDURES No. A-5 (2002) [hereinafter LACPD POLICIES AND PROCEDURES].

29. Telephone Interview with Robert Kalunian, Chief Deputy Pub. Defender, Office of the L.A. County Pub. Defender (Aug. 2, 2007) [hereinafter Kalunian, Aug. 2, 2007 Telephone Interview].

30. Los Angeles County Public Defender, Services, <http://pd.co.la.ca.us/Service.html> (last visited Feb. 5, 2009).

31. L.A. County Charter art. XII, sec. 55; *see also* CAL. GOV'T CODE § 27705 (West 2008).

32. *See* LACPD POLICIES AND PROCEDURES, *supra* note 28, No. A-2 ("No attorney employed by this Department shall charge, request or receive for his own use any fee, reward or payment of any kind from any person . . . other than the County of Los Angeles for any services rendered by him . . . . Employees of the Public Defender found to be in violation of this policy will be subject [to] discharge from County service.").

qualified to handle death penalty cases.<sup>33</sup> Young lawyers joining the LACPD become Civil Service employees who can expect to climb a four-step career ladder if they meet expectations for quality performance.<sup>34</sup>

LACPD is under-budgeted when it comes to investigative staff. There are only eighty-four investigators serving more than 700 courtroom lawyers.<sup>35</sup> LACPD staff also includes twenty-seven psychiatric social workers who work primarily on juvenile matters.<sup>36</sup> A portion of the eighty-four investigators works exclusively on juvenile cases.<sup>37</sup> In addition, the agency employs paralegals to assist in preparing sentencing and mitigation recommendations.<sup>38</sup>

Some innovative programs have been established through the use of grants and other pools of separate funds. For example, the LACPD started a program whereby social workers locate services for homeless persons.<sup>39</sup> The LACPD is also involved in a variety of special projects geared to the needs of mentally ill adults, juveniles with various mental disorders, individuals suffering from drug or alcohol addiction, victims of domestic violence, and the developmentally disabled.<sup>40</sup>

LACPD has the use of over 1,100 networked computers.<sup>41</sup> However, due to funding limitations, the agency has experienced hardware and software problems that remain unresolved.

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33. Internal Statistics Memo, *supra* note 23.

34. *Id.*; *see also* Kalunian, Aug. 21, 2007 Interview, *supra* note 11 (discussing the pros and cons of the civil service system).

35. Internal Statistics Memo, *supra* note 23; *see also* NATIONAL STUDY COMMISSION, *supra* note 12, at 513 (recommending a ratio of one investigator for every three staff attorneys in the National Study Commission's Guideline 4.1).

36. Internal Statistics Memo, *supra* note 23.

37. Kalunian, Aug. 21, 2007 Interview, *supra* note 11.

38. *Id.*

39. *See* The Office of the Public Defender, County of L.A., Special Projects of the Public Defender (unpublished report on file with author) [hereinafter Special Projects].

40. One such grant received in 1999-2000, *Client Assessment Recommendation Evaluation* (CARE), employed social workers in gang violence cases to assess whether certain juvenile offenders represent a risk to the community. The social workers identified needed services and made recommendations for dispositional plans. Special Projects, *supra* note 39, at 8.

41. Internal Statistics Memo, *supra* note 23.

The Civil Service status of defender office employees has its advantages—employees gain a certain amount of insulation from improper political influences in hiring and promotion. On the flip side, the system slows the process of firing employees for poor performance. Employees cited as needing improvement gain a six-month window of time to upgrade their skills, and then, if rated unsatisfactory afterwards, can request a hearing before the Civil Service Commission.<sup>42</sup> Chief Deputy Public Defender Robert Kalunian believes that, on balance, civil service protection is beneficial, despite the fact that it limits his authority as an administrator.<sup>43</sup> Attorneys whose performance does not measure up are “placed where they can do the least harm,” according to Kalunian.<sup>44</sup>

#### IV. ROLE AS AN “INSTITUTIONAL AGENCY”

The central question is, given the fact that the Public Defender Office is accountable to county government, have the lawyers working in the agency surmounted that obstacle by becoming effective, independent advocates for the indigent accused as required by constitutional and state bar mandates? Further, what are the pros and cons of the agency’s position as an “institutional” defender office?

The agency is currently headed by Michael Judge, a well-seasoned lawyer with strong leadership and administrative skills.<sup>45</sup> His mission statement for the agency focuses on providing the highest quality legal representation to its clients and facilitating improvements in the criminal justice system that offer long-term benefits to those clients.<sup>46</sup>

While recognizing the need to provide services at the lowest possible cost to taxpayers, Judge has spoken out in instances where the cards appear to be stacked against the poor in criminal cases. He

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42. Kalunian, Nov. 21, 2006 Interview, *supra* note 13.

43. *Id.*

44. *Id.*

45. Los Angeles County Public Defender, History of the Office, *supra* note 18.

46. Los Angeles County Public Defender, Mission Statement, <http://pd.co.la.ca.us/Mission.html> (last visited Feb. 5, 2009).

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complained publicly about the fact that court approval is required to obtain experts on behalf of indigent clients while the District Attorney's Office has an internal budget to hire outside experts as well as access to a vast array of forensic and law enforcement resources.<sup>47</sup> His conclusion: "This . . . method of providing criminal defendants with expert assistance too often fails to deliver the quality of expertise actually needed," leaving the case with "little more than window dressing."<sup>48</sup>

One of the advantages of an "institutional" public defender agency is its ability to effect system-wide change by correcting abuses in the criminal justice system. For example, in 2006-2007, the agency began to address the prosecution's failure to turn over exculpatory evidence to the defense in a number of cases. The LACPD office launched a strategy that promises to result in court rulings forcing the District Attorney's office to comply with *Brady v. Maryland*, a landmark U.S. Supreme Court decision establishing a constitutional duty on the part of the prosecution to disclose exculpatory evidence to the defense that is material to questions of guilt, innocence, or sentencing.<sup>49</sup>

In October 2007, the LACPD launched an investigation into a series of arrests allegedly resulting from a five city competition among sheriff's deputies to book as many suspects as possible during a twenty-four hour period.<sup>50</sup> According to the Chief Public Defender, the arrests may not have been prompted by what the deputies saw, but

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47. See Michael P. Judge, L.A. County Pub. Defender, *Expert Access: Without Appropriate Resources, Lawyers Cannot Provide an Adequate Defense* (on file with author). National standards recommend separate defender office budgets for hiring experts. See, e.g., NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON THE COURTS Standard 13.14 (1973) [hereinafter NAC]; NATIONAL STUDY COMMISSION, *supra* note 12; see also CALIFORNIA STATE BAR STANDARDS, *supra* note 1, Part VIII (recommending that indigent defense providers should enjoy parity with prosecutors in access to experts and forensic labs).

48. Judge, *supra* note 47.

49. *Brady v. Maryland*, 373 U.S. 83, 89 (1963).

50. See Scott Glover & Matt Lait, *Sheriff's Arrests to be Investigated—Public Defender's Office Plans Challenges to Cases Stemming From a Contest Aug. 15 at the Lakewood Station Geared to Boost Deputies' Productivity*, L.A. TIMES, Oct. 5, 2007, at B1.

rather by the pressure of producing greater arrest numbers for the competition.<sup>51</sup>

The LACPD office also played a proactive role when it spearheaded an investigation of corrupt police practices, in what came to be known as the “Rampart Scandal.” The Scandal was so named because the corrupt police officers belonged to an anti-gang unit attached to the Police Department’s Rampart Division located just west of downtown Los Angeles.<sup>52</sup>

Deputy public defenders were reporting a pattern of client complaints of police planting evidence and/or using excessive force. When defenders demanded information regarding witnesses to the alleged misconduct, police responded with protective orders preventing disclosure of witness information, falsely claiming that the protective orders had been issued by the court.<sup>53</sup>

Revelations of the falsified protective orders necessitated a review of an estimated 20,000 to 30,000 cases to determine whether defendants might have been convicted based on trumped-up evidence.<sup>54</sup> The LACPD’s office created a special unit, Public Integrity Assurance Section (PIAS), to investigate cases involving alleged police misconduct.<sup>55</sup>

At first, the District Attorney’s office resisted cooperating in the investigation. As evidence of police involvement in framing suspects mounted, prosecutors joined the LACPD’s office in seeking to set aside wrongful convictions. The prosecution eventually filed criminal charges against the crooked officers. The LACPD’s effectiveness in correcting the injustices discovered in the Rampart debacle is a prime example of an “institutional” defender office’s ability to serve as a counterweight to abuse in the criminal justice system.

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51. *Id.*

52. *See NewsHour with Jim Lehrer: Law & Order* (PBS broadcast Feb. 9, 2000) (report by Jeffery Kaye of KCET, Los Angeles), online transcript available at [http://www.pbs.org/newshour/bb/law/jan-june00/lapd\\_2-9.html](http://www.pbs.org/newshour/bb/law/jan-june00/lapd_2-9.html).

53. *Id.*

54. *See Jarrett Murphy, L.A. Must Review 20,000 Cases*, CBS NEWS, Aug. 10, 2000, [http://www.cbsnews.com/stories/2000/08/10/national/main223748.shtml?source=search\\_story](http://www.cbsnews.com/stories/2000/08/10/national/main223748.shtml?source=search_story).

55. *See Kalunian*, Nov. 21, 2006 Interview, *supra* note 13.

## V. HOW DEFENDERS DISPOSE OF CASES

Many lawyers seeking to pursue a career in criminal defense work see public defender service as the purest form of practice, since it allows them to focus on legal issues rather than monetary issues. When asked why he chose to become a public defender, a level three attorney in the L.A. office replied, “I knew I wanted to become a criminal defense lawyer while I was still in law school. I like standing up for the little guy. Trials are the most interesting part of the job—you get an adrenaline rush.”<sup>56</sup>

Despite the typical public defender’s love of trial work, the vast majority of cases are settled through plea-bargaining. Because there are so few trials, LACPD office administrators estimate the average cost per case for handling a felony, including death penalty cases, to be less than \$722.<sup>57</sup> Misdemeanors cost the public far less—about \$150 per defendant. Additionally, juvenile services cost the LACPD roughly \$403 apiece, while mental health matters were somewhat more expensive, running about \$460 each.<sup>58</sup> Only about 5% of LACPD felony cases and 3% of its misdemeanor cases result in a trial.<sup>59</sup>

The reasons for the high rate of plea bargains vary. In general, prosecutors offer incentives to the accused that make pleading guilty very attractive, while simultaneously wielding the weapon of a more severe penalty should the defendant lose at trial.<sup>60</sup> Defendants may also feel pressured to plead in cases where the prosecution has charged them with a felony offense when a misdemeanor charge would have been more appropriate.

California’s bail bond system places additional pressure on defendants to plead guilty. Unless a defendant is able to post 10% of the bail amount, arrestees must pay bondsmen non-refundable fees to

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56. Interview with Level III Attorney, Office of the L.A. County Pub. Defender, in L.A., Cal. (Nov. 21, 2006) (interviewer promised confidentiality to interviewee).

57. Internal Statistics Memo, *supra* note 23.

58. *Id.*

59. Kalunian, Aug. 21, 2007 Interview, *supra* note 11; Internal Statistics Memo, *supra* note 23.

60. *See People v. Segura*, 188 P.3d 649, 655 (Cal. 2008).

gain their release.<sup>61</sup> Incentives to plead guilty are increased in minor charges because arrestees often gain immediate release by pleading guilty at arraignment.

The LACPD makes an effort to provide “vertical representation” in felony cases.<sup>62</sup> Their goal is to have a single attorney assigned to represent a given defendant throughout every stage of the proceedings, commencing with the preliminary hearing. However, in practice, the objective is not always carried out. For example, if the main attorney is on trial in another case, a pool of lawyers assigned to the preliminary hearing calendar handles that stage of the proceedings. The rationale for providing vertical representation is that it helps to establish a rapport between attorney and client, and the continuity of counsel assures better coordination of all aspects of the case.<sup>63</sup>

In November 2000, California voters decided it was cheaper to provide short-term treatment for nonviolent drug offenders than to maintain them in the prison system.<sup>64</sup> They approved Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, a law that became effective in mid-2001.<sup>65</sup> Between 2001 and 2006, 140,000 drug offenders received treatment instead of incarceration, and over 40% of them successfully completed their treatment.<sup>66</sup> Researchers estimated that the law reduced the number of people in state prison for drug possession by 32%, saved taxpayers the cost of building a new state prison, and resulted in the closing of a women’s prison.<sup>67</sup>

The Public Defender’s Office is part of an effort to cast a still wider net in the effort to rehabilitate addicts and return them to

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61. See Kalunian, Nov. 21, 2006 Interview, *supra* note 13.

62. *Id.*

63. The Public Defender agency received a \$72,000 grant from the State Office of Criminal Justice Planning for the year July 1999 through June 2000, titled “Vertical Defense of Indigents,” that aided LACPD in its effort to provide vertical representation. See Kalunian, Nov. 21, 2006 Interview, *supra* note 13; Kalunian, Aug. 21, 2007 Interview, *supra* note 11.

64. *Feature: Five Years On, California’s Proposition 36 Claims Success, But Faces New Struggles*, DRUG WAR CHRONICLE, Mar. 10, 2006, <http://stopthedrugwar.org/chronicle-old/426/prop36.shtml>.

65. *Id.*

66. *Id.*

67. *Id.*

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productive membership in society. A trial court judge, using his authority as a sentencing judge, organized a program in his courtroom with the help of the Public Defender and District Attorney.<sup>68</sup> The Sentenced Offender Drug Court program (SODC) takes drug offenders convicted of serious non-drug offenses, such as nonviolent thefts and commercial burglaries committed to feed their drug habit, and funnels them into an eighteen-month treatment and rehabilitation program.<sup>69</sup>

At the time of the author's visit, a Deputy Public Defender, who was also a credentialed nurse, conducted preliminary screenings of defendants to assess the likelihood that they could succeed in drug rehabilitation.<sup>70</sup> A Deputy District Attorney made his own assessment, and the judge made the final determination of a defendant's eligibility for SODC. Participants are required to spend three-and-a-half months in a jail-based treatment program and then graduate, in three stages, with the help of the IMPACT drug treatment facility.<sup>71</sup> Participants report back to court monthly while in custody.<sup>72</sup>

The SODC program has reportedly produced dramatic results, with up to three-quarters of the participants succeeding in drug

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68. Judge Michael Tynan, in Department 113 of the Los Angeles Superior Court, organized this program, which uses the facilities of the IMPACT Drug and Alcohol Treatment Center. *See* Interview with Level III Attorney, *supra* note 56.

69. A Deputy Public Defender, who is also a nurse, stated that defendants accepted to the program are facing prison time. Her criteria for admitting defendants to the program are: no weapons; defendant is charged with nonviolent theft or commercial burglary; and defendant must agree to spend three and a half months in jail. She accepts defendants who have failed in Proposition 36 drug diversion programs, but does not accept drug dealers. She does accept defendants who are on parole; in such cases, she works with the Parole Department. Defendants are ultimately released to a residential facility that is not locked down. In phase three, men go to "sober living" at night and attend sessions during the day. Phase four entails independent living, but they are still tested for drugs three times a week. After eighteen months, they graduate. Interview with Attorney-Nurse, Office of the L.A. County Pub. Defender, in L.A., Cal. (Nov. 22, 2006) (interviewer promised confidentiality).

70. *Id.*

71. *Id.*

72. *Id.*

rehabilitation.<sup>73</sup> While this small experiment reaches but a fraction of L.A. County's convicted drug offenders, it is noteworthy that such a hands-on effort can flourish in a major metropolitan area.

#### VI. TIMELY ACCESS TO COUNSEL

California law provides that public defenders need not await formal appointment by a judge in order to commence representation of a client. The public defender has statutory authority to undertake representation upon the request of an indigent defendant despite the lack of a court appointment.<sup>74</sup>

However, at the men's jail in downtown Los Angeles, one can search in vain for placards providing information on how to contact the public defender in advance of court appointment. While attorneys may be called at their homes by police should a defendant request counsel upon receiving *Miranda* warnings,<sup>75</sup> this rarely happens.<sup>76</sup> There are no regularly scheduled "duty days" in the office on weekends or in the evenings.<sup>77</sup> Nor does it appear that LACPD staff reaches out to arrestees by conducting jail screenings to identify situations requiring immediate attention.<sup>78</sup>

The LACPD's website does advise the public that it is possible to speak to a Deputy Public Defender before the first court appearance

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73. *Id.*

74. CAL. GOV'T CODE § 27706 (West 2003); *see also* L.A. County Charter art. VI, sec. 23; CALIFORNIA STATE BAR STANDARDS, *supra* note 1, at 8.

75. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."); *see* Los Angeles County Public Defender, Frequently Asked Questions—Can I Get Advice from a Deputy Public Defender Before I Appear in Court?, [http://pd.co.la.ca.us/F\\_getlawyer.html](http://pd.co.la.ca.us/F_getlawyer.html) (last visited Feb. 5, 2009) ("If the person does not waive the right to an attorney, the police must arrange for the presence of an attorney before questioning can take place. . . . The Public Defender has attorneys on call to serve [this] function[.]").

76. The Office of the Pub. Defender, County of L.A., Commonly Asked Questions and Answers (internal memorandum on file with author) [hereinafter Commonly Asked Questions].

77. Interview with Level III Attorney, *supra* note 56.

78. *Id.*

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by calling the public defender office at the nearest courthouse or by coming to the office in person.<sup>79</sup> However, according to a list of *Commonly Asked Questions and Answers* prepared by the LACPD, “less than 200 arrestees a year are assisted by the Public Defender before the initial appearance.”<sup>80</sup>

In practice, the vast majority of initial contacts with arrestees do not take place until after arraignment. California law requires that arrestees be arraigned within forty-eight hours, but the law makes exceptions for days when court is not in session such as Sundays and holidays.<sup>81</sup> As a result, some individuals may languish in jail for close to a week before appearing before a judge and having counsel appointed.

Deputy defenders are required to interview arrestees before the next court hearing. In a felony matter, the next court hearing is a preliminary hearing that takes place about two weeks after arraignment.<sup>82</sup> Deputy defenders generally visit the jail to conduct an initial interview with a defendant sometime between arraignment and preliminary hearing.<sup>83</sup>

It should be noted that the logistical hurdles of serving such a large land mass as L.A. County are daunting, even with thirty-nine office locations. However, the net effect of postponing initial contact with counsel is that, especially in misdemeanor matters, many arrestees are unable to mount any defense at all. As described in Part VII below, in misdemeanor courts the accused often plead guilty at their first appearance simply to get out of jail, regardless of whether a legal defense exists.<sup>84</sup> Delays in access to counsel may result in loss of both employment and perishable evidence necessary for one’s defense.<sup>85</sup>

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79. See Los Angeles County Public Defender, Frequently Asked Questions—Can I Get Advice from a Deputy Public Defender Before I Appear in Court?, [http://pd.co.la.ca.us/F\\_getlawyer.html](http://pd.co.la.ca.us/F_getlawyer.html) (last visited Feb. 5, 2009) (providing office locations and telephone numbers).

80. Commonly Asked Questions, *supra* note 76.

81. CAL. PENAL CODE § 825(a)(1) (West 2009).

82. Interview with Level III Attorney, *supra* note 56.

83. *Id.*

84. See *infra* notes 105 and 106 and accompanying text.

85. The Commentary to NAC Standard 13.3 recommends that “all applicants

Over forty years ago, the President's Commission on Law Enforcement and Administration of Justice observed:

Early provision of counsel is equally important for discovering facts bearing upon the ultimate disposition of the case . . . . In many cases investigation can be effective only if it is begun very soon after the criminal event. Persons at the scene may then recall the presence of other persons and characteristics identifying them which might otherwise soon be forgotten. Locating witnesses requires an immediate beginning, particularly in areas where the population is highly mobile. A defense attorney who enters the case early can make that beginning himself, or he can direct the police or investigating authorities toward exculpatory information.<sup>86</sup>

The fact that the LACPD offices are generally located inside courthouses rather than out in the community means that clients are probably less apt to reach out for assistance prior to court appointment of a public defender.

#### VII. THE WORKLOAD ISSUE

The LACPD system benefits from an advantage not shared by big city indigent defense programs in most other states—it is empowered to deploy an escape valve when its workload grows to the point where

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for defender services, whether in or out of custody, should be able to apply directly to the public defender . . . for representation. They also should have the right to an immediate interview, at which time all necessary legal, investigative and other assistance should be furnished." NAC, *supra* note 47, at 259. In addition, Standard 13.4 provides: "An attorney also should be provided to represent: an indigent inmate of any detention facility at any proceeding affecting his detention or early release . . ." *Id.* at 261. The National Study Commission's Guideline 1.2 recommends the following:

Effective representation should be available for every eligible person as soon as: (a) the person is arrested or detained, or (b) the person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

NATIONAL STUDY COMMISSION, *supra* note 12, at 501.

86. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS, TASK FORCE ON ADMINISTRATION OF JUSTICE 53 (1967).

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effective representation becomes impossible. California law provides that a public defender agency may declare that the agency is “unavailable.”<sup>87</sup> By statute, cases where “unavailability” is declared must be assigned to another public defender agency or to a panel of attorneys.<sup>88</sup>

Rather than assign excess cases to the Alternate Public Defender agency that handles conflict-of-interest cases, L.A. County superior court judges typically assign them to the L.A. County Bar Association’s Indigent Criminal Defense Association.<sup>89</sup> This group, which consists of attorneys in private practice, ultimately winds up handling approximately 10% of the county’s indigent criminal caseload.<sup>90</sup>

Despite the statutory escape valve, the LACPD’s ability to manage workloads by declaring unavailability is limited. In response to budgetary cutbacks in 1995 through 1996 that occurred simultaneously with an increase in workload due to a new “three strikes” law,<sup>91</sup> LACPD issued a written “Protocol for Declaration of Unavailability”<sup>92</sup> to formalize its procedures for declaring unavailability. The LACPD then provided copies of the Protocol to members of the judiciary. According to the Protocol, it is the

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87. CAL. PENAL CODE § 987.2(e) (West 2008).

88. *Id.*

89. Kalunian, Aug. 21, 2007 Interview, *supra* note 11.

90. *Id.*; see also Los Angeles County Bar Association, Indigent Criminal Defense Appointments Program, <http://www.lacba.org/showpage.cfm?pageid=24> (last visited Feb. 5, 2009). This panel of L.A. County Bar Association members contracts with the L.A. County Board of Supervisors to represent indigent criminal defendants in the superior courts when the Public Defender is unavailable. Participating attorneys are designated as misdemeanor and felony grades I through V, depending on their qualifications and experience. *Id.*

91. CAL. PENAL CODE § 1170.12(a)(6)(7) (West 2004).

92. Memorandum from Michael P. Judge to All Staff, Protocol for Declaration of Unavailability of Public Defender (Aug. 29, 1995) (on file with author). The Protocol states that, at the end of the year, LACPD calculates the “Cost of Unavailables” and requests additional staff positions, showing a potential cost savings to the County for the proposed additional deputies in comparison to delegation of assignments to the Indigent Criminal Defense Association. *Id.*

responsibility of Department Heads to determine when lawyers in a given department are overloaded.<sup>93</sup>

The Protocol contains the proviso that unavailability will not be declared in felony cases unless unusual circumstances exist.<sup>94</sup> Where Department Heads determine that excessive workloads exist in felony cases, they generally shift attorneys from misdemeanor to felony calendars.<sup>95</sup> In that way, the LACPD's declarations of unavailability most often occur in misdemeanor calendars. The Protocol has limited utility for controlling the caseloads of attorneys handling misdemeanor cases, however, because it defines unavailability in misdemeanors based on caseloads that far exceed nationally recommended levels.<sup>96</sup>

Various external events may trigger the rare use of the Protocol in felony matters. For example, a surge in the defenders' workload occurred as a result of a 2006 initiative, "Jessica's Law,"<sup>97</sup> which tightened the criteria for indefinite commitment of sexually violent predators. Due to the added burden on the LACPD office, the Chief Public Defender declared unavailability of some felony attorneys.<sup>98</sup>

National policy-making bodies have struggled to define appropriate maximum caseload levels for public defenders. One such body, the "Peterson Commission," also known as the National Advisory Commission on Criminal Justice Standards and Goals, recommended that a single attorney handle no more than 150 felony cases or 400 misdemeanor cases per annum.<sup>99</sup> These workload

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93. *Id.* at 2.

94. *Id.* at 1.

95. *Id.* The Protocol provides: "Each attorney position deficit will result in no more than 1,500 declarations of unavailability in new misdemeanor case filings, calculated on an annual basis." In other words, the Protocol assumes that an individual lawyer is capable of handling up to 1,500 misdemeanors per annum. *Id.* at 2.

96. *Id.*

97. Jessica's Law was passed by California voters in the November 2006 election as Proposition 83. See Proposed Text of Proposition 83, reprinted in Cal. Sec'y of State, Official Voter Information Guide 127-38 (2006), available at <http://vote2006.sos.ca.gov/voterguide/pdf/English.pdf>.

98. Kalunian, Aug. 2, 2007 Telephone Interview, *supra* note 27.

99. NAC, *supra* note 47, at 276.

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standards were recently reaffirmed, with some refinements, by the American Council of Chief Defenders (ACCD).<sup>100</sup>

The L.A. County system exceeds the recommended maximum in felony cases.<sup>101</sup> Felony attorneys average 180 cases annually, which is moderately higher than national standards.<sup>102</sup>

Of greater concern are the LACPD's figures for misdemeanor cases. LACPD misdemeanor attorneys dispose of 1,200 cases per attorney per year, about three times the recommended national maximum.<sup>103</sup> It should be noted that the 1,200 figure includes traffic cases, but does not include non-jailable infractions. The ACCD recommends that traffic misdemeanors punishable by incarceration be included in the 400-case limit, while non-jailable traffic misdemeanors should be excluded.<sup>104</sup>

In-court observation supports the conclusion that LACPD's misdemeanor caseload is grossly excessive, although some of the problems witnessed appear to reside in the larger criminal justice system. For example, while approximately twenty cities in L.A. County have their own arraignment court, those arrested elsewhere in the county must be bussed to Los Angeles for arraignment from lock-ups in outlying areas. As a result, sheriff's and courtroom personnel in the L.A. misdemeanor arraignment court expend seemingly endless hours sitting by idly waiting for court sessions to begin.

Only after their arrival at misdemeanor arraignment court do detainees have the opportunity to speak with counsel for the first time. Police reports are transported along with detainees, so that public defenders must await the arrival of their prospective clients before viewing the evidence. Court sessions do not commence until after prosecutors file their complaints and confer with defense counsel.

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100. AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (2007), [http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD\\_CASELOAD\\_STATEMENTsept6.pdf](http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD_CASELOAD_STATEMENTsept6.pdf).

101. See Internal Statistics Memo, *supra* note 23 (comparing the cost of legal representation between the public defender and Indigent Criminal Defense Appointments (ICDA) for 2005-2006).

102. *Id.*

103. *Id.*

104. AMERICAN COUNCIL OF CHIEF DEFENDERS, *supra* note 100, at 1 n.1.

The majority of misdemeanor cases are disposed of by guilty pleas at arraignment.<sup>105</sup> Since detainees generally meet their public defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview.<sup>106</sup> Courtroom proceedings, for the most part, consist of a judge's reading from a plea agreement discussed between the public defender and the defendant in the back room, and signed by the defendant. Terms of the plea agreement generally include a fee representing recoupment of a portion of the cost of providing public defender services.

One possible justification for tolerating the existing system is that defendants can ask for their record of conviction to be expunged.<sup>107</sup> However, with the exception of juvenile cases, the expungement system in California is largely illusory. While a defendant may, under certain circumstances, subsequently withdraw the guilty plea and ask to have it set aside, arrest records and police reports remain in the system. The conviction resulting from the guilty plea may still be used to increase the defendant's sentence in the event of any future conviction.

The processing of L.A. citizens in misdemeanor arraignment court is nothing short of Orwellian.<sup>108</sup> Detainees are brought into the courtroom in groups, shackled together in pairs at the wrist, and held in a cage-like enclosure off to one side of the courtroom during the proceedings. Unlike persons accused of felonies, who are allowed to sit at counsel tables next to their attorneys in proximity to the judge, misdemeanor detainees are kept in the "box," and must communicate

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105. Kalunian, Aug. 21, 2007 Interview, *supra* note 11.

106. Under California law, when defendants represented by public defenders wish to plead guilty, defenders are required to fully investigate all defenses of fact and law, and then discuss these defenses with clients before allowing them to plead guilty. *People v. Mattson*, 336 P.2d 937, 947-48 (Cal. Ct. App. 1959).

107. See CAL. PENAL CODE §§ 1203.4-1203.4a. (West 2004 & Supp. 2009).

108. See Geoffrey Nunberg, *Simpler Terms; If It's 'Orwellian,' It's Probably Not*, N.Y. TIMES, June 23, 2003, § 4, at 5, available at <http://www.nytimes.com/2003/06/22/weekinreview/simpler-terms-if-it-s-orwellian-it-s-probablynot.html?scp=1&sq=Nunberg%20Orwellian&st=cse> (describing how the adjective "Orwellian" is perceived); Joseph B. Frazier, *Animal Law Still in its Infancy, but Growing: Experts*, CHI. DAILY L. BULL., Feb. 17, 2009, at 24 (describing an "Orwellian" situation).

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with the judge through slats. The author witnessed a group of African American women paraded into the box in groups of six, each shackled to a partner. In order to rise and approach the slats when her case was called, each woman was dependent upon the willingness, or unwillingness, of her partner to rise and take a few steps. Each woman signed a plea agreement, clumsily juggling papers between her free hand and her shackled hand. Those whose right hands were shackled had to sign with their left hands.

The confusion apparent in the L.A. misdemeanor arraignment court is illustrative of an assembly line type of justice. On one occasion, a male defendant stood in the box, straining to hear the judge, who spoke in a soft voice. The defendant called out, "I can't hear you. I don't know what's going on!" A second defendant, a female, was informed that her bail would be \$10,000, whereupon she changed her plea to guilty so that she could be released. In the latter case, California's bail bond system and the defendant's poverty determined the outcome.<sup>109</sup> Under California's bail bondsman system, if a bondsman posts a \$10,000 bond, the defendant must pay the bondsman a \$1,000 nonrefundable fee.<sup>110</sup>

On another occasion, a Hispanic male complained to the author about public defender services delivered in defending him on a ten-count DUI case heard in an L.A. traffic court. At the first court appearance, a Deputy Public Defender promised to investigate his case. Thereafter, the LACPD lost his file. He was obliged to return to court repeatedly, about a dozen times over the course of a year, because the public defenders were unable to locate his file. Each time,

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109. The *New York Times* reported that "four states—Illinois, Kentucky, Oregon and Wisconsin—have abolished commercial bail bonds, relying instead on systems that require deposits to courts instead of payments to private businesses, or that simply trust defendants to return for trial." Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, <http://www.nytimes.com/2008/01/29/us/29bail.html>. The report concluded that: "The flaw in the system most often cited by critics is that defendants who have not been convicted of a crime and who turn up for every court appearance are nonetheless required to pay a nonrefundable fee to a private business, assuming they do not want to remain in jail." *Id.* The ABA has stated that the bail bondsman system discriminates against poor and middle-class defendants, does nothing for public safety, and usurps decisions that ought to be made by the justice system. *Id.*

110. See Kalunian, Nov. 21, 2006 Interview, *supra* note 11.

a different lawyer appeared on his behalf, and his case was never investigated. The amount of time spent in attending repeated court appearances cost him his job. He was highly dissatisfied with the public defenders who had represented him in court, and believed he would have fared better without their assistance. While this may be an isolated case, the fact that it occurred at all raises questions about the adequacy of representation by the LACPD in misdemeanor cases.

Returning to the discussion of LACPD's declaration of "unavailability," a controversy rages at the national level regarding the procedures that should be followed when defenders find themselves handling excessive caseloads. The ABA Model Rules of Professional Conduct require that attorneys "provide competent representation."<sup>111</sup> Addressing the subject of case overload in defender offices, the ABA's Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion<sup>112</sup> interpreting the Model Rules. The Opinion stated, "[t]he [Model] Rules [of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes."<sup>113</sup>

The Standing Committee's Opinion goes on to address an individual lawyer's responsibility in a large defender office where supervisors allocate the cases. The Opinion has engendered controversy among defender offices because it recommends a two-step process for individual staff attorneys who believe that their caseload has become excessive. First, the attorney must consult with

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111. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006). In addition, the ABA House of Delegates adopted a set of *Ten Principles of a Public Defense Delivery System* in 2002. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf>. One such principle provides, "Defense counsel's workload is controlled to permit the rendering of quality representation." *Id.* at 2. The Commentary to this principle states: "Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded . . . ." *Id.*

112. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

113. *Id.* at 3.

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an immediate supervisor and advance up the chain of command within the office to seek a “reasonable resolution” of the problem.<sup>114</sup> If that fails, step two recommends going over the head of the Chief Defender to the agency’s governing board or filing a motion to withdraw in the trial court.<sup>115</sup>

Chief Defender Michael Judge believes that giving an individual Deputy Defender the right to decline additional cases would be a mistake. He complained in a letter to the ABA that such a policy “could easily make Public Defender offices unmanageable . . . [by substituting] the judgment of a rookie lawyer, lacking experience and perspective, for the discretion exercised by my attorney managers and me.”<sup>116</sup>

Five of the thirty-eight branch offices of the LACPD replied to the survey conducted by the California Criminal Defense Study in 2006-2007.<sup>117</sup> Four of the five replied that excessive attorney workloads in the office were a significant or serious problem.<sup>118</sup> A related problem emphasized by respondents was judicial pressure to expedite cases.<sup>119</sup> Other obstacles to providing effective representation cited by respondents included withholding of *Brady* evidence<sup>120</sup> and lack of prompt discovery by the District Attorney, difficulty in securing court approval to retain the assistance of experts, and excessive workloads for investigative staff members.<sup>121</sup>

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114. *Id.* at 5-6.

115. *Id.* at 6.

116. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, THE CHAMPION, Dec. 2006, at 14, available at [http://www.abanet.org/legalservices/sclaid/defender/downloads/ABA\\_ethicsp10-22.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/ABA_ethicsp10-22.pdf); see also Michael P. Judge, *A Different View of Excessive Defender Caseload Issues* (Informal Opinion), THE CHAMPION, Mar. 2007, at 50, available at [http://www.nacdl.org/\\_852566CF0070A126.nsf/0/5D2BD4551DF33CD4852572B90069BC40?Open](http://www.nacdl.org/_852566CF0070A126.nsf/0/5D2BD4551DF33CD4852572B90069BC40?Open).

117. See generally Benner, *supra* note 4 (results to survey on file with Laurence A. Benner).

118. *Id.*

119. *Id.*

120. See text accompanying note 49.

121. See generally Benner, *supra* note 4.

Unfortunately, chief defenders are often faced with a no-win situation. During the past thirty-five years, a number of large public defender programs have sued their governmental funding agencies, seeking to force them to provide additional funding.<sup>122</sup> The lawsuits

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122. See, e.g., NATIONAL STUDY COMMISSION, *supra* note 12, at 419-23. Part VI discusses such cases as *Ligda v. Superior Court of Solano County*, 85 Cal. Rptr. 744 (Ct. App. 1970); *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973) (citing the District Court Order including Preliminary Injunction); *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974); and *Noe v. County of Lake*, 468 F. Supp. 50 (N.D. Ind. 1978) (citing the District Court order). *Id.*

A civil rights action was filed by a Public Defender of Santa Clara County, California, who was dismissed from his position in December 1986 after complaining in a public budget hearing that his office was so understaffed that it could not fulfill its constitutional obligation to defend indigent defendants, and therefore was at risk of being sued for legal malpractice. See National Equal Justice Library, Sheldon Portman Finding Aid, <http://www.equaljusticelibrary.org/library/findPortman.asp> (last visited Mar. 31, 2009).

More recently, a series of lawsuits have been filed by or on behalf of public defenders in other jurisdictions, with varying results. Two California counties are among them. In Orange County, a Public Defender sued his own agency claiming excessive caseloads. See Rachanee Srisavasdi, *Deputy Defender Sues Own Office: A County Lawyer Alleges Reprisal for Remarks About Caseloads and Discrimination*, ORANGE COUNTY REGISTER, Jan. 10, 2007, [http://www.ocregister.com/ocregister/homepage/abox/article\\_1541233.php](http://www.ocregister.com/ocregister/homepage/abox/article_1541233.php). A former Santa Barbara County Public Defender wound up suing the County CEO in the wake of a series of confrontations. The Public Defender claimed that he was "constructively terminated" after unsuccessfully pushing for better working conditions for himself and his employees. See Tom Schultz, *Former Public Defender Sues County CEO, Firestone Responds*, SANTA BARBARA NEWSROOM, May 25, 2007, <http://www.santabarbaranewsroom.com/news/govenment--politics/former-public-defender-sues-county-ceo-firestone-responds.html>.

In Baton Rouge, Louisiana, a class-action lawsuit filed against Governor Kathleen Blanco in 2004 claimed that the Calcasieu Parish Public Defender's office was drastically underfinanced and that the accused were being denied their constitutional right to counsel. See Laura Maggi, *Public Defenders Swamped, Suit Says*, THE TIMES-PICAYUNE, Sept. 24, 2004, <http://www.nacdl.org/public.nsf/DefenseUpdates/Louisiana034>.

Excessive caseloads led to a lawsuit by the Miami, Florida-Dade County Public Defender, and other Florida public defenders have been considering filing suit. See Liza Park, *Public Defender's Plight*, WCTV, Nov. 13, 2008, <http://www.wctv.tv/home/headlines/34377639.html>.

A lawsuit filed by the statewide Kentucky defender agency against the State of Kentucky in 2008 achieved some positive results. After the agency claimed that it

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alleged that the agencies' excessive caseloads violated constitutional mandates to provide effective assistance of counsel.<sup>123</sup> In most of these instances, the chief defenders were summarily fired as a result of their advocacy. The case overload escape valve contained in California law is a positive development, but due to numerical constraints, it fails to resolve the problems presented by huge numbers of arrests flooding the system. As we have seen in L.A. County, the problems posed by excessive caseloads are most evident in misdemeanor cases.

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did not have enough money to adequately represent its clients, Kentucky's General Assembly approved a new funding bill. See Sarah Kelley, *Broke Justice*, LEO WEEKLY, Mar. 11, 2009, <http://www.leoweekly.com/news/broke-justice>.

A satisfactory settlement agreement was achieved as a result of a class action lawsuit filed by the ACLU and Columbia, Washington, Legal Services in 2004. The agreement led to significantly lower caseload assignments for Grant County's public defender system. The county agreed to assign no more than 150 felony cases per year to each of its six contracted public defenders in superior court as a result of the lawsuit. See David Cole, *Public Defense System Improving, Report Says*, COLUMBIA BASIN HERALD, Jul. 21, 2006, <http://www.columbiabasinherald.com/articles/2006/07/21/news/news02.txt>.

In 1998, the ACLU achieved a stunningly successful settlement in a class action lawsuit against Allegheny County, Pennsylvania, for failing to provide adequate counsel to its indigent defendants. Under the historic settlement, the public defender's office was slated to double in size over a three-and-a-half-year period. See Press Release, ACLU, Settlement in Class-Action Lawsuit Against Pittsburgh Public Defender for Failing to Counsel the Poor (May 13, 1998), <http://clearinghouse.wustl.edu/chDocs/public/PD-PA-0001-0004.pdf>.

The following year, the ACLU also reached a successful settlement in a class-action lawsuit against the State of Connecticut for failing to provide the public defender system with adequate funding. See Press Release, ACLU, Settlement Reached in ACLU's Class-Action Lawsuit Alleging Inadequacy of CT Public Defender System, (Jul. 7, 1999), [http://www.aclu.org/crimjustice/gen/10138prs1999\\_0707.html](http://www.aclu.org/crimjustice/gen/10138prs1999_0707.html).

In 2007, the National Law Journal reported that the Michigan Coalition for Justice had filed a lawsuit against the state alleging that it had not spent enough money to allow defendants their constitutional right to counsel. A spokesperson for the National Association of Criminal Defense Lawyers commented that she was hopeful that this and other lawsuits "may finally lead to some results." See Vesna Jaksic, *Public Defenders, Prosecutors Face a Crisis in Funding*, NAT'L L. J., Mar. 27, 2007, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1174912590486>. These are but a sample of instances where chief defenders have sought aid from the courts in controlling excessive caseloads.

123. *Id.*

## VIII. TRAINING OF NEW ATTORNEYS

The administration of the LACPD reported that most new recruits to the public defender office are hired right out of law school.<sup>124</sup> Yet, the agency provides no formal training programs for new attorneys outside of an orientation lasting two to three days.<sup>125</sup> The State Bar's standards mandate entry-level training for all public defenders unless an attorney's prior experience merits an exception. The standards specify a minimum of twenty-one hours of classes for indigent defense providers in their first year of practice.<sup>126</sup>

New recruits are plunged into courtroom duty almost immediately. According to the Chief Deputy Defender, "We start them out in preliminary hearing court [for felonies] because they can do the least harm there, since the standard of proof is so low, most people will be bound over, regardless."<sup>127</sup> Next, the new lawyers

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124. Kalunian, Nov. 21, 2006 Interview, *supra* note 13 ("Most of our lawyers are hired right after graduation. We like to get them right out of law school before they can develop any bad habits and train them ourselves.").

125. *Id.*

126. CALIFORNIA STATE BAR STANDARDS, *supra* note 1, at 18. The Commentary to NAC Standard 13.16 states: "Systematic and intensive basic training programs for new defenders are imperative in order to provide even the minimum degree of specialized skill necessary to adequate criminal defense representation." NAC, *supra* note 47, at 285. The Commentary to the National Study Commission's Guideline 5.7 states:

An ideal entry-level training program consists of a four-to-six week curriculum during which time trainees are not assigned to courts or to cases. Instruction should include lectures, seminars and reading assignments covering statutory and case law materials on practice and procedures . . . . New attorneys should be involved in simulated client and witness interviews and simulated trial situations. Role playing exercises should be videotaped and discussed.

NATIONAL STUDY COMMISSION, *supra* note 12.

127. Kalunian, Nov. 21, 2006 Interview, *supra* note 13; *see also* Michael P. Judge, Pub. Defender, L.A. County, Presentation Before the Citizens' Economy Efficiency Commission: State of the Public Defender's Office (Feb. 7, 2002), *available at* [http://eec.co.la.ca.us/monthly\\_activities/presentations/html/pres0202.a.asp](http://eec.co.la.ca.us/monthly_activities/presentations/html/pres0202.a.asp) ("'Rookies' move through felony preliminary hearings, general misdemeanor trials, and 'driving under the influence' trials." According to Judge, the "trainee" during that time period "has accessibility to a trainer, a lawyer, and a mentor.").

progress to handling misdemeanor arraignments. Afterwards, they will be assigned to a misdemeanor calendar. The primary concession accorded to inexperienced lawyers is a somewhat reduced caseload. Some direct supervision of attorney performance is provided by supervisory attorneys, who may observe new recruits in the courtroom. Surprisingly, the agency has no training division, although the head of appeals supervises whatever training is provided.<sup>128</sup>

## IX. CONCLUSION

The benefits of employing a large institutional public defender agency such as the LACPD, with its highly experienced, full-time criminal law specialists, are substantial. An organized defender system that is comparable in scope to the District Attorney's office keeps the criminal justice system in balance by providing the necessary counterweight to overzealous prosecution tactics. In addition, the LACPD's special projects provide an invaluable societal service by funneling the mentally ill and others with medical needs into treatment programs that protect society while providing rehabilitation for the criminally accused.

On the other hand, the low priority placed by the LACPD agency on the handling of misdemeanor matters has serious adverse effects. First and foremost, some inadequately counseled, but innocent defendants, may acquire a criminal record by pleading guilty to a minor charge simply to gain release from custody. It appears that LACPD's misdemeanor clients fail to receive the benefit of investigation into defenses of fact and law promised to them under California court decisions. Secondly, as the President's Commission recognized so long ago, the public's perception of fairness in the criminal justice system is damaged by "assembly line justice" in the lower courts where millions of citizens have their first encounter with

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128. Kalunian, Nov. 21, 2006 Interview, *supra* note 13. Kalunian stated that new attorneys are "under close supervision," and that the head of appeals is in charge of training. *Id.* However, no supervisors were present in the courtroom when the author observed a preliminary hearing courtroom handled by "pool" attorneys on November 21, 2006. The LACPD's Internal Statistical Memo for 2007 describes "new lawyer training" as "on the job training." Internal Statistics Memo, *supra* note 23.

a system that affords inadequate attention to the individual defendant.<sup>129</sup> It is misdemeanor cases that are most visible to the public, yet that is where the Public Defender places the agency's weakest lawyers.

Additional resources are needed to remedy this problem. Consideration might be given to offering defendants in misdemeanor cases a "choice of counsel" by allowing them to opt for representation by a member of the Indigent Criminal Defense Association or by establishing private, non-profit neighborhood legal defense offices. This change may require a legislative amendment.

Finally, the lack of adequate training for lawyers without trial experience is a significant gap in the L.A. defender program. A large system like the LACPD requires an in-house formal training program for new recruits as well as continuing legal education for experienced lawyers. The National Institute for Trial Advocacy offers a comprehensive training program that could serve as a model for the agency. Establishing a dedicated "Director of Training" position in the agency would facilitate this goal. The need to organize and maintain a systematic training program calls for additional sources of funding. A four-to-six week, in-house, entry-level curriculum<sup>130</sup> would go a long way toward ensuring that new hires at LACPD meet constitutional mandates.

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129. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (U.S. Government Printing Office 1967).

130. See discussion *supra* note 126.