

# **Gideon Undone**

## **The Crisis in Indigent Defense Funding**

Transcript of a Hearing on the Crisis in Indigent Defense Funding held during the Annual Conference of the National Legal Aid and Defender Association

November, 1982

American Bar Association  
in cooperation with the  
National Legal Aid and Defender Association

John Thomas Moran, Editor

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## Summary & Overview

Sheldon Portman  
Chair, Advisory Committee  
Bar Information Program

The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, in cooperation with the Criminal Justice Section and the General Practice Section of the ABA, and with the National Legal Aid and Defender Association, conducted a hearing at the 1982 Annual Conference of NLADA in Boston on the subject of funding of indigent defense services. A panel, including representatives of the participating organizations, heard from a variety of witnesses whose testimony was transcribed and edited for publication in this report.

In summary, these witnesses presented the following facts:

1. *The financing of criminal defense services for indigents is generally inadequate, constituting only 1.5% of total expenditures for criminal justice matters by state and local governments.*
2. *Nationally, public defenders have too many cases and lack support personnel.*
3. *Compensation for private, appointed counsel is insufficient, and payments are administered in an arbitrary and capricious manner.*
4. *On the misdemeanor level, defendants are often not advised of their right to counsel, and their waiver of counsel often fails to meet constitutional standards.*
5. *Indigent defense caseloads are increasing. The rate of felony defendants requiring appointment of counsel has gone from 48% in the recent past to a current rate of 55% to 60%.*
6. *County officials, concerned about rising costs and shrinking budgets, are considering various alternatives, such as a second public defenders' office, or contract systems in lieu of a public defender. In the latter situations, there have been some serious abuses.*
7. *State financing, rather than county funding, is a more viable option: counties are generally underfunded.*
8. *Adequate funding of defense services is very unpopular in this era of Proposition 13 and demands for tougher sentencing.*
9. *Inadequate compensation puts pressure on appointed private lawyers to plead their cases out as quickly as possible.*

In addition, witnesses who appeared before the panel reported on specific problems and systems in various states, including Massachusetts, Washington, Ohio, Connecticut, New York, and Michigan.

It is clear that unless positive steps are taken to address these problems, the promise of *Gideon v. Wainwright* will indeed be undone.

## **Preface**

During the 1982 Annual Conference of the National Legal Aid and Defender Association, the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association held a hearing to examine the effects of inadequate funding on indigent defense services. This booklet contains the edited transcript of that hearing.

Converting tapes of a hearing into a document that is to be read rather than listened to is not easy. During the editing of the transcript, we cut some of the questions and all of the concluding remarks of the hearing panel, and much of the material in the presentations which dealt with issues other than the effects of inadequate funding. Our goal was to prepare a booklet which contained a brief overview of the problems created by the crisis in defense funding, rather than a literal record of the hearing itself.

We would like to express our thanks to the members of the hearing panel: William W. Greenhalgh, Chair of the ABA Criminal Justice Section, and Director of the Pretty-man Fellowship Program and Professor of Law at the Georgetown University Law Center; Al B. Conant, Chair of the ABA General Practice Section and a partner in a law firm in Dallas, Texas; Benjamin Lerner, President-Elect of NLADA, and Director of the public defender program in Philadelphia; and Robert D. Raven, Chair of the Standing Committee and a partner in a law firm in San Francisco. Our thanks also to those who so eloquently testified to the crisis in indigent defense services, and to NLADA.

## Introduction

Robert D. Raven  
Chairman

American Bar Association Standing Committee on Legal Aid and Indigent Defendants

Twenty years last March, the United States Supreme Court, in the historic decision on *Gideon v. Wainwright*, held that the states were obligated under the due process clause to provide competent counsel to indigent felony defendants. Later, in *Argersinger v. Hamlin*, the high court expanded this requirement to misdemeanor charges which could result in the loss of liberty.

During the intervening years, state and local governments have attempted to comply with the mandate of those decisions. In some areas of the country, effective assistance of counsel is being provided. However, in many other areas, as documented by recent studies and attested to by the witnesses whose testimony is set forth in the following transcript, indigent defendants are not being provided competent counsel due to lack of adequate funding for such services.

Inadequate funding of defense services for the indigent accused has resulted in many courts pressuring misdemeanants into waiving their right to counsel. In most states, lawyers defending the poor must prepare their client cases without sufficient support from investigators, forensic laboratories or expert witnesses. Typically, in public defender systems, public defenders receive salaries that are lower than prosecutor's salaries. And in many parts of the country, appointed lawyers are paid so little that their compensation fails to cover even their office overhead, and their fee bills are cut arbitrarily by judges and court administrators or not paid at all. Inevitably, these situations have resulted in injustices for many defendants simply because of their poverty.

This bleak picture, twenty years after the *Gideon* decision, is a severe blot upon the fabric of the nation's constitutional and historic commitment to a free society with *justice and liberty for all*. In the words of that great jurist, Learned Hand, it manifests a violation of the fundamental commandment *Thou Shalt Not Ration Justice*. We who are fortunate enough to live in the United States often scorn the elaborate constitutional safeguards for the individual against the state which are sometimes found in the written laws of *banana republics* and eastern bloc countries. Our scorn is directed at the fact that these *safeguards* are nothing but *paper promises* which become totally illusory in practice. However, we must recognize that in defaulting on the constitutional mandate to furnish legal services to all indigent accused in criminal cases in this country, we are on a dangerous, slippery slope headed towards the same sorry state that exists in many of the countries we ridicule for having excellent law *on the books* but nowhere else. We must be willing to *put our money where our mouth is*; we must be willing to make the constitutional mandate a reality.

The American Bar Association has resolved to address this problem. In addition to its past commitment to the establishment of a National Center for Defense Services, the American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants (SCLAID), in cooperation with the Criminal Justice Section and the General Practice Section, is currently engaged in a project entitled, *The Bar Information Program (BIP)*, which is designed to mobilize the organized bar on the state and local level to support measures to improve indigent defense legal services.

As a first step in this effort, we are working with state and local bar leaders, the majority of whom are civil lawyers, to assure that they are aware of the magnitude of this problem. Last year, SCLAID published and distributed Professor Norman Lefstein's survey and report entitled, *Criminal Defense Services for the Poor*. During the 1982 Annual Conference of the National Legal Aid and Defender Association, SCLAID also conducted a hearing before a distinguished panel of experts on the subject. The testimony was impressive and in the opinion of SCLAID and the Advisory Committee for the BIP Project, deserves the attention of bar leaders throughout the country. Hopefully this information will

encourage state and local assistance in this vital effort to insure that the fundamental constitutional guarantee of competent counsel may at last become a reality.

## Remarks

NORMAN LEFSTEIN

Past Member of the Board of Directors of NLADA

Reporter, Second Edition, ABA Criminal Justice Standards on Providing Defense Services, Task Force on Providing Defense Services;

Professor of Law, University of North Carolina School of Law

The focus of my recent study was the right to counsel in criminal, juvenile and misdemeanor cases.<sup>1</sup> As you know, counsel must be provided (absent an intelligent and knowing waiver) in felony, juvenile and misdemeanor cases that could lead to a loss of liberty. The data for my study was compiled partly from site visits to selected jurisdictions and partly from information (gathered in cooperation with Abt Associates of Cambridge, Massachusetts) on the amount of money spent on criminal defense services in each state.

The major finding of the study was not surprising to anyone who knows the criminal justice system: financing of defense services for indigents is inadequate. This leads to inadequate representation itself, especially in misdemeanor cases; often, indigent misdemeanants are not represented at all. Inadequate financing is a problem for public defenders and assigned counsel, the two major systems developed in this country for delivery of criminal defense services for the poor.

The financial problems in these programs have been heightened by problems in the economy of the United States as a whole. Further, funds that were once provided by the federal Law Enforcement Assistance Administration (LEAA) are no longer available. LEAA hit a high water mark of nearly \$10,000,000 for indigent defense services in 1973. Today, no funds are available at the federal level to assist in the provision of such services.

One study by the federal government showed that indigent criminal defense expenditures constitute only 1.5% of the total spent for criminal justice matters by state and local governments. This compares to 5.9% for the prosecution and 13.1% for the judiciary. The balance is spent on corrections and police.

The states spend widely differing amounts for criminal defense services. California spends nearly \$4.00 per person; Alabama spends \$0.45 per capita.<sup>2</sup> But even California does not spend enough for the defense of indigents.<sup>3</sup> For example, the Public Defender's office in San Francisco has a space problem so acute that six or seven lawyers try to work out of one office with only two or three telephones.

I think it is fair to state that nationally, public defenders have too many cases; lack adequate investigator, clerical, and paralegal support; and are often inadequately trained for their assigned tasks. Even skilled lawyers, given too large a caseload, cannot perform in an adequate fashion.

The situation is equally difficult for private attorneys. The compensation typically available for private

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<sup>1</sup> Professor Norman Lefstein, *Criminal Defense Services for the Poor* (For the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, May, 1982). Copies of the report are available from American Bar Association Publication Orders, P.O. Box 10892, Chicago, Illinois, 60610-0892, 1-800-285-2221.

<sup>2</sup> See the Appendix for information on per capita expenditures for each state.

<sup>3</sup> Indeed, the Legal Services Section of the State Bar of California is presently conducting statewide symposia on the "fiscal crisis in defender services," having held hearings in San Diego, Sacramento and Los Angeles.

counsel – usually no more than \$20 to \$30 an hour – is insufficient to cover even the cost of running a law office. Vouchers submitted for payment are frequently reduced, often in an arbitrary and capricious manner. As a result, many lawyers are simply refusing to be part of an indigent defense system.

Regrettably, though understandably, the level of compensation also has an effect on what lawyers are willing to do for their clients. Possibly the saddest manifestation of inadequate funding occurs at the misdemeanor level. Often, defendants are not adequately advised of their right to counsel; their waiver of counsel would certainly not meet the standards required by the Constitution.

There are undoubtedly many reasons why judges proceed in a fashion that encourages defendants to relinquish their right to counsel. One is to move their criminal docket. Another is that they know that there are not enough lawyers to appoint to the misdemeanor cases that require representation.

In a healthy adversary system of criminal justice, both the prosecution and defense are well represented, so that the guilty are convicted and punished and the innocent protected. When the adversary system does not function effectively -- when criminal defendants are not adequately represented -- the risk of wrongful conviction is increased enormously.

A case in point is that of William Bernard Jackson, a poor Black convicted of rape in the State of Ohio. He was sentenced to 14 to 50 years in prison and served 5 years. It was then discovered that the wrong person had been convicted. A person who looked like Jackson was in reality the person the system should have convicted.<sup>4</sup> One way to insure that there are fewer such miscarriages of justice is to provide an effective defense for all persons accused of crime in this country.

## Questions & Answers

Mr. Greenhalgh: What can the Standing Committee, the ABA, and the National Legal Aid and Defender Association do about this problem?

Mr. Lefstein: In the recent past, the ABA promoted the establishment of a national Center for Defense Services to augment the finances of state and local defender programs through a federal matching-grant system. The current national administration is obviously unsympathetic to such a program; but I think the concept is still sound, and deserves continuing ABA support. Beyond that, a coalition of the ABA and NLADA, and other interested groups as well, could make sure that legislative bodies understand what the needs are in area of indigent defense.

Mr. Lerner: There is tremendous diversity in the organization and structure of defense services. On the basis of your study, can you make any generalizations about which of those structures are most effective in making the case for adequate funding?

Mr. Lefstein: Regardless of structure, my own view is that both the private bar and public defenders have got to work together to increase funds. This is what the ABA recommends in its Standards for Criminal Justice. Neither group, public defenders or private counsel, is really sufficient on its own.

Mr. Lerner: What do you recommend as an antidote to lack of cooperation on the local level between the private bar and public defenders?

Mr. Lefstein: I do not have a solution to suggest to you. I do have a feeling that a process of education is going on that will lead to more cooperation. We are not where we were in the early 60's. I well

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<sup>4</sup> This case was strikingly portrayed on CBS Television's 60 Minutes on February 27, 1983.

recognize that this kind of slow change may not be a wonderful answer for a jurisdiction that is now having a significant problem.

Mr. Conant: I gather from what you have said that your study does not tell whether public defender or assigned counsel systems deliver more "bang for the buck"?

Mr. Lefstein: If you want "bang for the buck," you can probably get it through either system. Inadequate funding can make either system look wonderful to budgetary authorities. One of the manifestations of the drive to cut costs regardless of the effect on quality of services is the movement toward contract defense services. Under these programs, a private law firm or a group of defenders from private law firms band together to submit a bid for a contract to represent a certain number of cases for a fixed dollar amount. This is not a way to assure effective defense representation.

With adequate funding, either a public defender or a private bar system can provide effective representation. In fact, I think it is valuable to have both systems in the same jurisdiction. All expertise does not reside in the defender's office. Much of it is out in the private bar. When both systems are present, they complement one another.

Mr. Conant: It is certainly true that in Texas, compensation for assigned counsel does not cover even overhead for representation of the indigent. Are there any organizations which remove the overhead problem by providing secretarial help, investigative help and so forth to assigned counsel?

Mr. Lefstein: Some public defender programs make their staff available to the private bar, but most simply do not have enough support for their own cases, let alone for the private bar.

Mr. Raven: Did you find any place where the contract defense delivery system was working?

Mr. Lefstein: I really did not. There was one jurisdiction I looked at in some depth in the State of Washington where a contract program -- in which the work went to the lowest bidder -- had replaced the public defender's office. What I found was that the quality of representation, measured by an objective standard, was clearly suffering. For example, two lawyers who had been providing representation in misdemeanor cases had been replaced by one who had so many cases that he did not even know how many he had. Cases were not going to trial, motions were not being filed. The effectiveness of representation was clearly suffering.

ROBERT SPANGENBERG  
Director, Criminal Defense  
Technical Assistance Project  
Abt Associates, Inc., Cambridge, Massachusetts

I have spent the last three years working on this problem in 42 states. My comments are based on visits by myself and my staff to more than 100 programs of all kinds - public defender, assigned counsel, contract, and so forth.

I want to elaborate on a couple of the subjects that Professor Lefstein raised. First, crime is going up and filings are increasing. In today's economy, more people require the appointment of counsel. In the recent past, 48% of all felony defendants required the appointment of counsel. Today, that figure has been going towards 55% to 60%.

The increase in the number of cases is also due to public defenders' unwillingness to represent co-defendants. More and more offices are saying that each defendant must be handled by independent counsel. This means that costs to the county or state are increasing.

One possible solution to the problem of *conflict cases* is the creation of a second public defender system in each jurisdiction to handle all of those cases which the first public defender cannot take.

The serious county or state official is concerned about quality representation but wants cost efficiency. It is possible to show that a second public defender system can save thousands of dollars. The projection for Los Angeles County, for example, is that they can save \$6,000,000 by using a second public defender, rather than private counsel, for *conflict cases*.

I realize that a second public defender may conflict with the ABA standard which requires private bar involvement. But what do you tell the county official who says that quality representation is best provided by public defenders?

To my knowledge no jurisdiction has yet created a second public defender system; but the issue is on the horizon, and it deserves thought.

One final comment: I co-authored an article on contract systems,<sup>5</sup> which I suggest you read for an in-depth discussion of the subject. I would here like to discuss programs which illustrate some of the problems in contract systems.

The first is a program in Greenville, South Carolina which replaced a public defender. Simply put, a group of ten private lawyers came to the county and said, "Look. The county is paying \$260,000 a year for representation of criminal cases. We'll do the whole job for \$110,000, we'll take all the cases, no lid, we'll do all the work." The county said, "Great." Each lawyer agreed in the contract to take 200 felonies and 150 misdemeanors. Each continued his private practice in the very courtroom in which they represented indigents. At the end of the first year, four of them dropped out and said, "We will have nothing further to do with this under any set of circumstances." The others (with four replacement attorneys) renewed the contract, but at \$154,000, an increase of 40%.

The second situation is in the State of Washington. One private experienced criminal lawyer contracted to handle all of the juvenile work in the county for \$50,000. He then turned around and hired a person directly out of law school for \$13,000 or \$14,000 and told that person to do all the cases. At the time

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<sup>5</sup> R. Spangenberg, A. D. Davis, P. A. Smith, Contract Defense Systems Under Attack: Balancing Cost and Quality, 39 NLADA Briefcase 5 (Fall, 1982).

of the visit the experienced attorney had not made an appearance either to talk to the judge or to provide any level of supervision at all. Those are real dangers that you must keep in mind.

Finally, I would like to read you excerpts from two letters I received from South Carolina which illustrate the effect of inadequate funding in small counties. The first is from a public defender:

*Other than the population-based state allocation, the only source of funding for the public defender is from county funds. We have only one public defender, no assistants, no deputies, no staff, no office, no phone, nothing. We tried having an assistant, but the county would not fund the position and having to pay an assistant out of my meager funding was not practical. At present, I have approximately 26 circuit court cases (court of general jurisdiction) on trial status, and have been appointed to seven more before a general sessions court. In addition, I was just appointed on a capital murder case and I have approximately 20 juvenile cases on the active list. I believe that that would constitute a full case load in any lawyer's opinion. The obvious solution to my problem is to resign and let someone else do it. However, I happen to prefer the public defender's job and will continue with it until they fire me or I go bankrupt. I know that everyone claims to be underpaid and overworked. I am not afraid of hard work. I enjoy it. I enjoy representing the indigent. I believe that you will find that I do the best possible job under the circumstances and go above and beyond the call of duty. However, something must be done to assist me both in funding and staff.*

The letter from an adjoining county illustrates the problems of private counsel:

... as a practicing attorney, I am subject to appointment as counsel for criminal defendants, adults as well as juvenile; as counsel for incompetents and probate court hearings; as a guardian ad litem for child victims with the department of Social Service proceedings; and occasionally, as an attorney for a party in domestic relations cases, if that party is in jail or suffers from disability. Before the appointment of the county public defender late last year, I worked at least 300 hours in 1981 alone on appointed cases and was paid the total of \$800.00. The majority of my vouchers remain un-paid because the allocated funds for the county were exhausted sometime in May. Stated differently, those 200 unpaid hours are the equivalent of five standard work weeks, each forty hours long, with no pay at all. Please remember that during that time, I continued paying my secretary, office rent and telephone bill, not to mention dozens of sixty mile round trips to the local jail. I will never be able to collect the unpaid vouchers. The state cannot be sued for money damages. I cannot claim the unpaid vouchers as a bad debt on my income tax and I cannot claim my time and services as a charitable contribution. In short, I have been personally paying for the indigents' right to counsel, as have other members of the local bar. While all lawyers are officers of the court and engaged in public service, it is unjust to expect the private bar to financially support the criminal system.

These are the kind of problems and testimony I hear in my travels. They say a great deal more than I, or any of us, can say.

What are some possible solutions to these problems? First, eliminate county funding. Require states to finance indigent defense systems. That is not all that is needed. But, in my view, the counties are hopelessly underfunded and are not going to be able to deal with the problem. The states have got to be involved.

Second, I do not think there is any one system that this organization or any organization should advocate as the best. Choice of system is a local decision related to geography, where the bar associations are, the number of lawyers available, the fee schedule and so forth. I, myself, favor a dual system in which what I call the public and private bars join together to provide services.

Finally, I support Professor Lefstein's suggestion that the ABA, NLADA and other groups form a coalition to testify before state legislatures and city and county governments. There is no lack of good bills to improve the system. The bills are there, but they are not supported. Some of them never get out of committee.

JOSEPH M. SHORTALL  
Chief Public Defender, State of Connecticut  
Hartford, Connecticut

Let me give you some background about Connecticut before talking about our funding problems. The system is unusual, if not unique, in that it is a unified statewide system providing both trial and appellate representation with funding from a single state source and statewide administration out of the central office.

The policy-making body and appointing authority in public defender services is the Public Defender Services Commission. The Commission appoints all attorneys (including the Chief Public Defender) serving as public defenders and all other employees of the division. The Commission is part of the judicial branch of state government, but is independent within that branch for purposes of determining its budgetary needs.

Direct public defender services are provided to indigent accused persons by attorneys in 30 offices located throughout the state. Assigned counsel, which we call *Special Public Defenders*, are appointed by the court only to represent co-accuseds in conflict of interest and other extraordinary situations.

Despite the advances made since we reorganized services in 1975, there are still significant problems in providing defense services. The most glaring and widespread shortcomings exist in the area of investigative and other support services. I will not quote to this group the American Bar Association standards on investigation, but you all know they require independent investigation in all cases regardless of whether the accused is guilty of the offense.

Furthermore, the Connecticut Supreme Court, in overturning a sexual assault conviction last year, specifically held that adequate assistance of counsel requires full pre-trial investigation. Many defender offices in our state do not have sufficient staff to conduct these independent investigations. The need for such investigations is pointed out over and over again as missing witnesses are uncovered, positive identifications by state witnesses are challenged, and overlooked evidence is brought to the attention of the police and prosecutors.

At a time when prison overcrowding is said to be a major concern of government policy, it is important that public defender offices, who represent the vast majority of those who stand a real chance of going to jail, be adequately staffed to aggressively seek out alternatives to incarceration. Yet there is not an office in our state that has the kind of full-time social worker and paralegal personnel necessary to prepare fully developed alternatives to incarceration.

Fees for Special Public Defenders (assigned counsel) have not been raised for 20 years. After seven years of requests by the Commission and lobbying by my office and the Connecticut Bar Association, modest increases in fees for the most serious cases were made this year. At present, we pay lawyers in serious felony cases \$12.50 an hour up to a maximum of \$75 a day. It is a credit to the bar that it has members who are still willing to take difficult cases with such fee schedules. But it is not fair to take advantage of their sense of public obligation and it is not fair to have accused persons rely on that sensitivity for the effective assistance of counsel.<sup>6</sup>

Finally, I would like to discuss the problems of our appellate and post-conviction caseload. With the aid of a federal grant, we set up a central office for appeals about five years ago. The office is staffed by five attorneys whose expertise is known throughout the state. This was a great step forward for us as it would be for any public defender system.

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<sup>6</sup> See the statement of Chester Fairlie, a private practitioner in New London, Connecticut, below.

At present, the office has 113 pending appeals. About half are appeals of cases tried by private counsel; the client ran out of money and we were appointed to take over. But although our state Supreme Court and Appeals Court have come to rely on our office more heavily than ever, no additional funding has been forthcoming. Earlier this year, we had to cease representing prisoners in *condition of confinement* habeas petitions. These cases are not within our statutory mandate, but we were handling them nevertheless. We dropped them because the caseload of our one habeas corpus specialist simply precluded him from continuing to represent these petitioners without giving short shrift to petitioners in other cases.

I want to make it clear that the problems that I have cited do not spring from a mean spirited approach to defense services on the part of either our executive or legislative branch. I believe our efforts to educate and cultivate our funding source have been received with an open mind and a receptive ear. Our work with the state bar association has also borne fruit. The bar represents the public defenders' only natural support group and I have found them most helpful, not surprisingly, in the area of Special Public Defender fees.

Federal assistance for indigent defense will fill a real need. I hope that part of the American Bar Association's efforts in the coming years will be devoted to that goal. I also think that the ABA's liaison with the Conference of Chief Justices and other national judicial organizations can be of great help in sensitizing the judiciary to the problems of public defenders.

JOHN H. MILLER, JR.  
Private Practitioner  
West Roxbury, Massachusetts

I would like to thank you for allowing me to speak here on behalf of all my brothers and sisters in the Boston area who are members of the private bar providing representation to indigent defendants.

Well, after listening to the tales of woe from throughout the nation on problems of funding, here in Massachusetts we really don't have that much of a problem on funding for the private bar. They just don't pay us, that's it. The past three years the Commonwealth of Massachusetts has run out of money. Last year they ran out of money five months after the fiscal year started. So there's no real problem; you go up to the office of the trial court and tell them you represented this indigent and you'd like to get paid for it sometime. They just tell you, *Hey listen. We acknowledge the debt. That's right, we owe it to you, but pay you? Listen, look at the account; it's empty. What do you want us to do? Speak to the legislature.*

Im the plaintiff in a suit we've been bringing for a couple of years here in Suffolk Superior Court, trying to compel the Commonwealth to pay for these services. Our theory is that it has been determined that our court-appointed counsel does have the right to be paid for its services; that such services are necessary for the judiciary to function, and that the judiciary, as a separate and equal branch of government, has a right to these services so they can function as a separate and equal branch of government. Currently, these cases are before the courts and it's hoped that sometime in this millennium they'll be acted upon.

There is no popular solution to this question of indigent defense funding. It comes down to the fact that if you're going to have effective representation for members of our society who can't afford it, it's a very expensive proposition. Here in Massachusetts we're hearing the constant call for reduced government spending. This has manifested itself in a proposition here similar to *Proposition 13* in California. People are sick and tired of paying for programs they don't believe in. They're sick and tired of paying for programs that don't benefit them. There's considerable support for mandatory sentencing, there's support for building bigger and better prisons, but there is no support whatsoever for the type of program that's going to provide representation for the man accused of crime.

Today, the indigent defendant in Massachusetts faces a system that's determined to arrange for his arrest, provide for his prosecution and require his incarceration if convicted. There is less determination to pay any money for his effective representation in court.

The legislature is faced with a shortage of funds. It's a question of priority as to which programs are going to get funded. A program for funding the representation of a man that's accused of breaking into your house is not going to go through.

There is one lawyer here in Suffolk County who provided representation to over 50 defendants in fiscal year 1981. As of this date, he has never received compensation for any of the work that he has done. Those of us who do these cases aren't independently wealthy; it's not enough to say that this is public service.

When we go to the office of the trial court looking for funding, we're told that there is a cure-all: the contract defense system. This is the system that's going to solve all the budgetary problems, the great cost-cutter. It's a system whereby (here in Massachusetts) the county bar association, through its bar advocate program, agrees to provide representation at a fixed cost, regardless of the amount of cases involved, regardless of the amount of time and work involved. The state loves this program. Listen, no more problem with the funding, here's 500,000 bucks, do it. We don't want to hear about unemployment and poverty and the crime rate going up and mandatory sentencing requiring incarceration if convicted. We don't want to hear that. Here's your money, you just handle all the cases coming down the pipe.

So far, the lawyers in Suffolk County have rejected that system of representation, because we recognize it for what it is: a system to discourage effective representation. They want you to plead this case out at the earliest possible opportunity.

Let me give you some specifics on how you're compensated if you belong to a county bar program here. In one county an attorney is paid \$150 for being in court on his duty day. There might be two trials scheduled for that date or there might be six. There is no additional compensation for interviews with the defendant. Unfortunately, in many situations, there is considerable pressure on the lawyers to dispose of these cases as quickly as possible. Though you might want to think that as an attorney you are somehow a superior human being and not subject to financial pressures, most of us here have professional and family expenses that must be met. At the end of the fiscal year when I go into a case and I've got my office and family expenses to be met and I know that there is no way that I will be paid that year, I feel the pressure to get out of there; I have to make my expenses; I have to make some money. There is tremendous pressure just to plead these cases out.

What I'm asking you all here today as members of the bar is to realize this is a very very unpopular subject. There is no public support whatsoever. If we had to put it on a referendum, how much money are the people of Massachusetts willing to pay for people accused of crime, what would we get? \$100? \$200? Do you think we'd hit four figures? I doubt it. Legislators in a democracy have to be elected. We can't expect much support from them. The last line of defense rests with the bar. We are going to have to have the courage to stand up and be counted for a very unpopular cause. If we are not willing to stand up for our indigent clients, then we have to stand up for the Constitutional guarantees of the right to counsel and equal protection of the law.

In *Gideon v. Wainwright*, in 1963, the Supreme Court held that the right to counsel may not be deemed fundamental to a fair trial in some countries, but it is in ours. From the very beginning, state and national constitutions and law have placed great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial juries in which every defendant stands equal before the law. Ladies and gentlemen, those are becoming empty words.

## **Questions & Answers**

Mr. Raven: What kind of support are you getting in this lawsuit? Are the bar associations involved?

Mr. Miller: Currently, the only organization bringing the suit is Advocates for Indigent Defendants. We have discussed the possibility of support from the Massachusetts Bar and the Boston Bar but there has been no formal request. This is the second time we've brought this type of suit. The first time, after about a year in court, the legislature finally funded a deficiency budget, mooting the test case. The bar does seem supportive; and it does seem the only place to go to for support. But the bar has yet to take a clear-cut position on contract defense systems.

ROBERT C. BORUCHOWITZ  
Public Defender Seattle-King County Defenders' Association  
Seattle, Washington

My task is to bring you a front-line impression of what happening in public defense. I have been in the Public Defender's office for nearly nine years. As chairperson of our state bar association's Criminal Law Section, I have had a chance to study what has been going on in our state.

There is a crisis in public defense funding. In Washington, funding for appellate work, which has always been haphazard at best, is now, as of the middle of a two-year funding period, completely exhausted, leaving a year to go and no money at all. The program was bailed out by a temporary, inadequate grant from the governor which will expire in January leaving another five months to go with no funding.

At the trial level there are several different types of systems in the various counties of our state. Almost all are inadequately funded, including panels of private counsel, county defenders, contractors, and non-profit corporations, such as my own.

We were the first and largest of what are now four separate defender organizations in King County (Seattle). When we began in 1969 we were the only organized defender association and did approximately 75% of the work. We now do about 50% of the work with 45 lawyers handling some 10,000 cases a year.

Our system of several organizations is becoming popular around the country. In King County, it was begun in part because our organization had trouble covering a large county with a number of separate district courts located 50 to 60 miles apart. As a result, other organizations were established. With the increase in case volume, these other offices grew. But the total budget for defense did not grow in proportion to the growth in cases and programs; and local governments have played one program off against another. Someone always says that a lawyer could handle a greater number of cases than what we said was the limit, or, *you really don't need investigators*. We have tried to maintain an experienced supervisory staff carrying a limited caseload, but it has been difficult to overcome the argument of others that you really do not need supervisors. As a result, while inflation has gone up more than 40%, our fees have gone down by 30%. We have had to reduce staff and salaries. Our salaries are now 30% to 40% lower than those in the prosecutor's office, and roughly one-tenth of the going rate for private counsel.

We now have a county administration which is sensitive to the needs of public defense. But the effects of years of underfunding cannot be corrected overnight.

I suggest that NLADA, the ABA, and local bar associations work together to help local defenders. The intervention of such groups can often help support the claims we make on behalf of poor people. For example, the King County Bar Association recently headed a task force convened by the Mayor to look into the misdemeanor arraignment call in King County. The task force produced 36 pages of guidelines for defenders and for the arraignment process. The standards include caseload maximums, training and experience minimums, supervision and training requirements, support staff ratios (that is, so many investigators and social workers for so many attorneys), salary parity with prosecutors, etc. If followed, these standards would go a long way toward guaranteeing the effective assistance of counsel.

The NLADA, the ABA and the local bar associations should also educate the public on the long-range cost, both direct and indirect, of inadequately funded and ineffective public defense. One argument of some impact is that ineffective defenders produce more people in prison which costs even more money than effective defenders. Effective sentencing alternatives reduce the cost of incarceration and reduce recidivism; an ex-offender who has some schooling, a job, a place to live and necessary mental health and drug treatment is less likely to re-offend and cost money again. Of course, badly tried cases can also result in new trials which are expensive.

Somehow, we have to get across to the citizenry that the criminal justice system has to work well. When lawyers do not have the time to prepare and present an effective defense, they are not even providing mandated service. Judges know what is going on when lawyers provide the facade and not the substance of effective assistance of counsel. Yet, the judges almost never act on that knowledge. Even the best judges often are resistant to claims of ineffective assistance of counsel and they are reluctant to reverse convictions or order new trials. The Bar, NLADA and the ABA can help with the judges as well, by urging them to recognize their obligations to insure the provision of effective legal assistance.

Some specific suggestions for NLADA and the ABA: defenders in various jurisdictions need help with research, lobbying and litigation strategies, and support when the ever-present funding crises become extreme and life threatening. Hard facts and figures documenting the increased cost of prisons and jails and the benefits of sentencing alternatives will be helpful in convincing local funding authorities of the value of short-term investment in public defense for long-term benefit.

The Amicus Committee of NLADA and the ABA Criminal Justice Section could combine on selected cases to support the concept of effective assistance of counsel in the context of overwhelming caseloads and underpaid lawyers. An objective caseload standard along the lines of those we have developed in Seattle, adapted to local needs and practices by local people, could be developed with bar support. Adversity breeds imagination and cooperation as well as frustration. We simply need to redouble our efforts for equal justice.

RANDALL M. DANA  
State Public Defender Columbus, Ohio

Basically, the Ohio defense system is a compromise between state control and local control over public defender systems. The counties determine the type of program to be provided within that county: strictly assigned counsel, strictly public defender, a mixed system, or, in some cases, contract systems. Whatever the system, the funding is determined by the county commissioners within that county.

The Ohio Public Defender Commission and the State Public Defender set standards and rules for public defenders and assigned counsel throughout the state, including qualifications for appointments, caseloads for public defenders, standards for indigency, etc. We also provide 50% of the funding for county indigent defense systems. Therein lies one of the biggest problems with the Ohio system: namely, the ability to accurately predict how much money will be needed for the indigent defense system two years in advance. (Ohio uses a two-year budget.)

Further, the State Public Defender establishes the maximum fees which will be paid to assigned counsel throughout the state. Currently, the maximum fees are \$30 an hour for out-of-court time and \$40 an hour for in-court time up to a total of \$1,000 for felonies and \$500 for misdemeanors.<sup>7</sup> But only 25 of the 88 counties in Ohio pay the maximum. The rest pay substantially lower amounts, usually \$20 to \$30 an hour.

Unfortunately, the only power the State Public Defender has to enforce its standards is to withdraw reimbursement from the counties. This has never been done.

This system has only one advantage. It permits local decision makers to decide how services will be provided. One disadvantage is that some county commissioners who select the type of system and determine the funding for that system are not experienced in legal matters, and do not express an interest in providing quality representation. And if the private bar is interested in taking appointments at all, I feel that in some cases its members are more interested in the amount of money they are going to be paid than in the quality of service to be provided. If they know the maximum amount that they will be paid is \$300, they put \$300 worth of work into it and that's it.

Additionally, in Ohio we are looking at some new problems. We have just had a mandatory sentencing act passed which I think is going to result in quite a few more trials than we have had in the past. The federal district courts and courts of appeal have ruled that we must provide representation in non-criminal domestic contempt cases in which there is a potential loss of liberty. In some counties there are as many as 300 of these cases a month. But, by far, the most serious problem facing us is the enactment of the death penalty in Ohio.

Ohio has always been a state where the death penalty has been popular. At the time of the *Lockett* decision [*Lockett v. Ohio*],<sup>8</sup> we had over 100 people on death row. The new law calls for bifurcated trials. The Supreme Court, and the new Ohio death penalty law, have established extensive steps and procedures for death sentence appeals. We have to insure that funds are not only provided for this type of representation but that they are segregated from funds that have been provided for day-to-day felony and misdemeanor cases.

In about one year, we have had 75 indictments in death potential cases; my estimate is that at least 25 of these will go to trial. It has taken at least 800 man hours per public defender office to prepare for each trial.

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<sup>7</sup> Maximums for death penalty cases are \$12,500 for one attorney and \$25,000 for two or more attorneys.

<sup>8</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978).

My office, which has a pool of investigators that are used by private attorneys and public defenders around the state, spent over 536 hours, at a cost of about \$10,000, investigating one case. For the trial level alone, I have received bills from two counties for two separate cases. In one case the bill was for \$44,000; for the other, \$36,000.

The implications of these figures led us to seek a significant increase in funding. We actually managed to get an increase by persuading the state legislature to levy a \$3.00 fee on all criminal convictions in the state, including traffic convictions. It is predicted this will generate \$5,000,000 this year, of which \$2,000,000 will go to public defense. This will give us the money we need to do our job.

Please consider the wisdom of this type of funding. It is temporary, but in Ohio we are probably going to ask that it become permanent. I do not suggest that the entire budget be funded this way. I think it is the responsibility of the public as a whole, but it is something to consider when extra funds are needed and funding sources are unable or unwilling to provide them.

CHESTER FAIRLIE

Private Practitioner New London, Connecticut

Connecticut can be proud of many of its legal traditions. It was the first state to be governed by a written constitution. Throughout the state's history, the rights of citizens have been considered fundamental to justice under the law. Unfortunately, there is an area of current policy in which citizen's rights are in jeopardy.

The capacity of court appointed lawyers to provide effective assistance in the criminal trial courts is impaired by inadequate funding. While such a situation creates financial hardship for the defense attorneys, there exists a second and far more serious problem. If the financial and investigative resources provided by the state are insufficient, then the defendants themselves will be denied their right to effective representation. That right is fundamental to our system of justice and evolves from both the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Connecticut Constitution. Any situation which impairs a Constitutional right should be quickly addressed and remedied. Unfortunately, this has not been the case.

In 1981 Connecticut ranked third highest among all the states in terms of statewide per capita income. In the area of per capita expenditures for defense services, the state fell to 28th place. Still worse, the rate paid to private court assigned counsel has remained \$12.50 per hour for 14 years. That rate places Connecticut fourth lowest among the 50 states. In the lower division of the Superior Courts, where defendants can receive sentences of up to five years in prison, assigned counsel are paid a maximum of \$35.00 per day. That rate distinguishes Connecticut as the lowest paying of any state in the country.

In Connecticut, appointed counsel are compensated by the Public Defenders Services Commission. The Commission is funded through annual allocations by the legislature and administers two categories of attorneys. One category includes full time, salaried public defenders. The other category includes panels of private attorneys in each county who can be designated by a trial judge to serve as court assigned counsel. In New London County, where I practice, the panel of available private attorneys has been diminished by resignations. One trial judge tried to stimulate membership on the assigned counsel panel by speaking of *a lawyer's duty to serve*. Compulsory service by private attorneys creates an interesting dichotomy. The state spends vast sums to build courthouses, to staff police departments and to maintain judges and prosecutors. In an assigned counsel case, it is only the defense attorney who is expected to serve under financial hardship.

The full consequences of the low hourly rates are not immediately apparent to non-lawyers. From the paltry rates, private attorneys must pay their own office expenses and overhead, including rent and secretarial salaries. In 1981 my expenses as a sole practitioner were about \$21.00 for each billable hour, without any draw for myself. If I were to spend hundreds of hours on an assigned counsel case, the result would be financial ruin. That is exactly what happened to me beginning in September of 1980.

The assignment which caused me difficulty involved representing a defendant charged with murder, attempted murder and possession of a pistol without a permit. When I accepted the case, I anticipated that investigation would be necessary. Administrators of the Public Defenders Commission assured me that investigative assistance would be available. Those assurances were little more than wishful thinking. The Commission did not even employ a full time investigator in the county where the case was tried. That situation created a serious imbalance of resources. The State's attorneys who prosecuted the case were assisted by full time experienced investigators and individual state and local police officers. The defense investigation was handled for the most part by my secretary and myself.

Throughout the investigation, the trial itself, and post verdict motions, I devoted 550 hours to the case. One of the post verdict motions was unusually successful. After four days of testimony, the trial judge set aside guilty verdicts upon a precedent setting finding that the jury foreman intentionally withheld information at *voir dire* questioning prior to the eleven week trial. I then devoted more than 100 hours to defending the

new trial decision upon the prosecution's appeal to the Connecticut Supreme Court.

For the more than 650 hours which I devoted to the case, an amount of time which equals one-half a full year's billable hours, I did not earn enough from the Commission to cover even half my annual expenses. I earned nothing to help support my children. Without my wife Joan's assistance through her full time job, we would have been financially ruined. In addition, Joan's emotional support was indispensable. If the new trial decision is upheld on appeal, we will face a dilemma. The client will still need a defense, but we could not survive financial ruin a second time.

The low rates paid to assigned counsel and the lack of investigative resources have discouraged experienced attorneys from serving on the assigned counsel panels. There are still a few experienced lawyers in Connecticut who accept appointments. They deserve commendation. Their sacrifices supplement the inadequate resources provided by the legislature and the Commission. Very often appointments go to young lawyers. One consequence of an inexperienced attorney facing a skilled prosecutor can be post verdict *habeas corpus* writs claiming ineffective representation. Such writs are becoming more common in Connecticut.

The lack of investigative resources is also becoming a focus of post verdict motions. The American Bar Association Standards for Criminal Justice provide that defense attorneys should investigate all factual defenses. If the resources are inadequate and the investigation insufficient, a defendant's Sixth Amendment right to effective representation is impaired. A Connecticut new trial decision on a *habeas corpus* petition upon a finding of failure to investigate by a court appointed lawyer confirms this problem.

The trumpeting of equal justice in the criminal courts which sounded so clearly from *Gideon vs. Wainwright* in 1963 has been muted by insufficient funding and inadequate resources. Ironically, Connecticut filed an amicus brief in *Gideon vs. Wainwright* supporting the right to counsel in felony cases. Evidently, there is a difference between advocating equal justice and paying the cost.

Relief of the crisis in Connecticut by raising the hourly rates and funding investigators must come from the Connecticut legislature. I would like to tell this committee that pending appropriations will cure years of neglect. Unfortunately, no such appropriations are pending. I would like to say that private attorneys and public defenders have joined together to lobby for funds, but that is not the case. In the meantime, it is self-deceiving to expect that private attorneys will jeopardize their offices and families to discharge the obligation which the state has to provide counsel. The distinguished history of Connecticut in recognizing and protecting citizens' rights is tarnished by the crisis in the criminal courts.

Mr. Fairlie was unable to attend the hearing. His remarks are an excerpt from a written statement submitted prior to the hearing.

JACK SCHMERLING  
Deputy Director, Defender Division  
National Legal Aid and Defender Association

I would like to report on two recent events. The Criminal Justice Act allows attorneys who provide defense representation to indigents in federal criminal cases to be paid up to \$30 an hour in court and \$20 an hour for out-of-court expenses. This rate structure was adopted in 1970. In December of 1981, the Judicial Council of the United States Court of Appeals for the Seventh Circuit, acting on a recommendation of the Seventh Circuit Bar Association, raised the maximum fee to \$55 an hour in-court and \$40 an hour out-of-court. Martha Mills, a Chicago attorney, filed for compensation based on the new rate structure with the Administrative Office of the United States Courts. It refused to pay. District Court Judge Joel Flaum, after examining the Act, ruled that the Judicial Council lacked the authority to raise compensation beyond the statutory limit; it is Congress, not the courts, which should set higher fees. We at least know now that we will not get relief on the federal judicial level and must rely on Congress.

The second matter I want to call to your attention is the situation in Wayne County (Detroit) Michigan. A complaint for a *superintending and control* order was filed with the state Supreme Court to order Wayne County Court and the Recorder's Court in Detroit to raise fees paid to assigned counsel. Fees were set in 1967 and have not since been raised, though the state statute requires *reasonable fees*. The petition requests that the fees be tripled.

Both the trial courts and county officials oppose this. However, after meeting with the state supreme court justices, the chief trial judges supported the higher fees and tried to convince the county officials to support the higher fees. The officials agreed that higher fees were in order, but offered only to double the fees. This fee structure was accepted by the local bar and the attorneys who had filed the case. But the county has refused to appropriate the money needed to pay the higher fees.

JONATHAN E. GRADESS Executive Director  
New York State Defenders Association  
Albany, New York

The New York State Defenders Association is a not-for-profit corporation which provides back-up and support to public defense attorneys, legal aid lawyers, and assigned counsel throughout New York State.

The prospects for improving representation for those unable to afford counsel are good – if we concentrate on organizing our efforts. We must create a public constituency for high quality defense services. Police and corrections officials have had such entities for years – and have had much more success with Congress and state legislatures than unorganized public defense attorneys.

Our Association is on record in support of state financing of the public defense function. The deepest pocket ought to pay, which means state and federal, rather than county financing. At a minimum, the current mix of state and county financing must change radically.

Every speaker on this platform has spoken about the indirect cost of poor quality defense services. We need to do more than discuss this problem among ourselves. I hope that the Standing Committee will develop materials that will help county governments understand that inadequate funding is itself expensive.

We also support the creation of a federal Center for Defense Services. Such a Center could encourage local jurisdictions to experiment with different systems before selecting their permanent model. From my point of view, it does not matter what you call the system: assigned counsel, public defender or *my office*. If it had early entry and routine investigative services and if the lawyers were trained and if they responded in a timely fashion with a wide scope of services and did so in a way that reflected to the community the importance of representation of the poor, you would soon see the debate about models diminish.

We need to focus more public attention on the hidden costs of prosecution services. We analyzed our state budget and found that the bulk of prosecutors' budgets is placed in other categories, such as the state police budget. When a defender needs a forensic laboratory or an expert such as a chemist or a toxicologist, he has to pay for it. Prosecutors simply call the forensic laboratory and tell the police chemists that they are needed, and they are there. When all the costs of prosecution, in various budgets, are added together, the enormous disparity in prosecutor and defender resources is plainly evident. Government, by intent or by neglect, has chosen to overfund law enforcement to the point that defense in most jurisdictions is clogged and unable to function.

I suggest to this Committee, on behalf of the poor and defense attorneys in New York, that a similar examination of prosecutor budgets in every state be done by the ABA. Once the results of such a study reach the public and Congress, we can begin a dialogue around the real disparities in funding and fees.

I suggest that the wave of the future, for defenders and this committee, is in analyzing disparities, and helping officials and the public understand that enormously disproportionate investments in prosecutor and defense functions simply lead to an inefficient and ineffective criminal justice system. We need to join together to build a permanent constituency for high quality public defense, and for our clients.

## APPENDIX

### Per Capita Costs of Indigent Defense systems Nationwide

State	Total Cost of Indigent Defense Services *	Total State Population **	Total Per Capita Expense	Ranking by Per Capita Cost
Alabama	1,731,527	3,890,061	.45	51
Alaska	3,274,000	440,481	8.18	2
Arizona	6,093,852	2,717,866	2.46	11
Arkansas	1,367,489	2,285,513	.60	48
California	93,290,267	23,668,562	3.94	3
Colorado	6,987,221	2,888,834	2.11	15
Connecticut	4,184,453	3,107,576	1.35	28
Delaware	1,295,728	595,225	2.18	13
Dist. of Columbia	6,552,246	637,651	10.28	1
Florida	31,971,457	9,739,992	3.28	6
Georgia	3,100,000	5,464,265	.57	49
Hawaii	1,471,415	965,000	1.52	25
Idaho	1,844,082	943,935	1.95	17
Illinois	17,000,000	11,418,461	1.49	26
Indiana	5,800,000	5,490,179	1.06	38
Iowa	4,483,693	2,913,387	1.54	24
Kansas	2,700,416	2,363,208	1.14	36
Kentucky	4,737,700	3,661,433	1.29	30
Louisiana	4,121,531	4,203,972	.98	41
Maine	929,126	1,124,660	.83	45
Maryland	7,777,674	4,216,446	1.84	20
Massachusetts	10,600,000	5,737,037	1.85	19
Michigan	19,105,400	9,258,344	2.06	16
Minnesota	6,827,424	4,077,148	1.67	22
Mississippi	1,209,137	2,520,638	.48	50
Missouri	3,891,597	4,917,444	.79	46
Montana	1,100,000	786,690	1.40	27
Nebraska	1,500,000	1,570,006	.96	42
Nevada	3,097,052	799,184	3.88	4
New Hampshire	1,715,000	920,610	1.86	18
New Jersey	16,225,334	7,364,158	2.20	12
New York	48,313,968	17,557,288	2.75	8
New Mexico	3,798,620	1,299,968	2.92	7
North Carolina	7,861,724	5,874,429	1.34	29
North Dakota	464,114	652,695	.71	47
Ohio	12,458,810	10,797,419	1.15	35
Oklahoma	2,888,429	3,025,266	.95	43
Oregon	9,779,234	2,632,663	3.71	5
Pennsylvania	14,541,427	11,866,728	1.23	33
Rhode Island	1,115,587	947,154	1.18	34
South Carolina	3,269,901	3,119,208	1.05	39
South Dakota	770,000	690,178	1.12	37
Tennessee	4,549,810	4,590,750	.99	40
Texas	18,000,000	14,228,383	1.27	31
Utah	1,381,113	1,461,037	.95	44
Vermont	1,370,567	511,456	2.68	10
Virginia	6,636,706	5,346,279	1.24	32
Washington	11,150,000	4,130,163	2.70	9
West Virginia	3,050,000	1,949,644	1.56	23
Wisconsin	10,229,933	4,705,335	2.17	14
Wyoming	840,382	470,816	1.78	21
Puerto Rico	1,371,102	3,187,570	.43	52

\* For most states these figures are FY 1980 figures, however some states were able to provide FY 1981 data.

\*\* Based on 1980 Census Reports.