Monopsony Problems with Court-Appointed Counsel

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INTRODUCTION

Gideon v. Wainwright altered the legal landscape by mandating state-funded defense counsel for indigent defendants.[1] The benefits of this approach are obvious—strengthening of Sixth Amendment protections, increased fairness in criminal proceedings, greater accuracy in determinations of guilt or innocence, and more orderly trials and appeals. Yet persistent failures beset the system, including the surprisingly low fees paid to appointed counsel, uneven and unpredictable quality of representation, unrealistic workloads for counsel, and perverse incentives for quick capitulation during plea bargaining.[2]

Underlying these problems is the fact that the government is the purchaser for nearly all indigent-defense counsel services; it is a monopsony (single payer) scenario, from the standpoint of economic analysis.[3] In economic theory, certain problems typically attend monopsony arrangements. As the monopsonist buyer dictates below-market prices, it sets off a cascade of perverse effects. Sellers[4] have high incentive to cut corners or cheat to accept the low rates. Screening effects polarize the quality of sellers—the best are super-efficient and can accept the low rates, while others are disproportionately unsuccessful and desperate enough to accept any price the monopsonist offers. Sellers become pathologically dependent on the monopsonist and are therefore prone to getting in a rut. A monopsonist can eventually bankrupt many of the providers, leading to shortages of the service in question. Finally, monopsony arrangements are prone to become bilateral monopolies, as buyers can get lazy about monitoring the quality of the service provider and neglect switching to better providers.

Many of these stereotypical monopsony problems plague the defense bar, especially in locales that use appointed-counsel lists.[5] Expected consequences of the monopsony problem include uneven quality of representation, excessive plea-bargaining, shortage of available defense

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1. Gideon v. Wainwright, 372 U.S. 335 (1963).

2. *See* Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421 (2012); Laura I. Appleman, *The Ethics of Indigent Criminal Representation: Has New York Failed the Promise of* Gideon*?* 16 PROF. LAW., no. 4, 2005, at 2; Tracey L. Meares, *What's Wrong With* Gideon, 70 U. CHI. L. REV. 215 (2003); Panel, Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135 (2004).

3. *See generally* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (Cambridge 2010); ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003); J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353.

4. This Essay uses the terms "seller" and "service provider" to refer to indigent defense attorneys. Seller refers to the more general class of victims in a monopsony. "Service providers" are a subset of that category—namely, people selling services.

5. The problem is less acute in locales with public defenders' offices, as the lawyers can engage in collective bargaining to mitigate the monopsony problem.

lawyers, trial delays, and more. Commentators often attribute such problems merely to the low fees paid to appointed counsel, but the deeply discounted rates are a symptom of the larger problem: the monopsony purchaser of indigent-defense services. Monopsony analysis also explains—would predict, in fact—that eventually a few lawyers in a locale would tend to capture the majority of the appointments list, leading to inadequate market competition between lawyers, lack of innovation or professional growth, and disproportionate focus on certain types of cases.

In addition to being a useful analytical tool for assessing the problem, economic theory helps categorize current suggestions for improving monopsony problems in indigent criminal defense and clarifies the strengths and weaknesses of each approach. Some proposed solutions essentially capitulate to the existence of the monopsony but offset it with *post hoc* mitigation measures, such as mandating higher pay, removing caps on hours worked for appointed counsel, or mandating discovery before pleas are permissible. Other proposals, such as providing defendants with vouchers for legal services, dedicating more IOLTA funds[6] to criminal defense, or fostering pro bono programs, primarily serve to dilute the monopsony power *ex ante*. Monopsony analysis provides an argument in favor of certain proposals, while also clarifying the mechanism by which each would bring improvement and the limitations on each approach.

Part I introduces the concept of monopsony and briefly summarizes its features. Part II focuses on the problems with provision of indigent defense and previously proposed solutions. Generally, proposals fall into two categories: *ex ante* remedies that attempt to dilute the state's monopsony power by providing alternative purchasers, and *ex post* solutions that acquiesce to the underlying monopsony but try to mitigate or offset its unhealthy effects. Part III looks at the three models for indigent defense that emerged in the wake of *Gideon v. Wainwright*.[7] Many areas use court-appointed counsel selected from a list of attorneys seeking appointments; this system has the most acute monopsony features. In contrast, some rural locales have a single lawyer or firm handling all appointed-defense cases for a particular court. The third, and probably most popular model among academics, is the public defender system, by which the state brings indigent defense in-house. Part III discusses the respective advantages and

6. "IOLTA" is the commonplace acronym for Interest On Lawyers' Trust Accounts, the system in almost every state whereby banks surrender a portion of the interest generated by client funds placed in client trust accounts to a state agency, the state bar, or a charitable foundation, to fund legal services for the poor. Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 7–9 (2001); Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455, 456–59 (2011). IOLTA programs help fund legal aid clinics, law school clinics, and similar programs, and are the second largest source of funding for the provision of legal services to the poor, after the Legal Services Corporation (LSC), which does not allow recipients to use its grants for criminal-defense work. *See generally* Stevenson, *A Million Little Takings*, *supra*; Stevenson, *Rethinking IOLTA*, *supra*.

7. Gideon v. Wainwright, 372 U.S. 335 (1963).

disadvantages of each system and explains how the public defender system best combats monopsony problems. Part IV is a brief summary and conclusion.

I. MONOPSONY

A. *THE MIRROR OF MONOPOLY*

The right to court-appointed counsel for indigent defendants means that the state is the sole purchaser for nearly all indigent-defense-counsel services. Given most criminal defendants' low socioeconomic status, the state ends up being the dominant purchaser for criminal-defense services overall. Single-payer scenarios, including the court-appointed counsel system, constitute what economists call a "monopsony."[8]

Most readers are familiar with the term "monopoly"—a single seller or manufacturer that dominates a given market.[9] Monopsony is very similar, except that it refers to a single purchaser in a market. Monopsony is "the flip side of monopoly,"[10] a "mirror image"[11] of the single seller problem, forcing suppliers to sell at below-market prices. A traditional example is the old-fashioned rural town with one main employer,[12] such as a coalmine or factory, where the workers are in a dependent position and the employer can exploit employees by paying low wages. A more modern example is Wal-Mart, both as a primary employer,[13] and as the dominant buyer-retailer of

8. A monopsony is a situation where there is only one purchaser or funder for particular services, such as legal services for the poor. *See generally* BLAIR & HARRISON, *supra* note 3; MANNING, *supra*, note 3. Economics literature demonstrates that monopsony tends to lower the wages of those working, and it lowers the availability of the purchased service or good to below-optimal levels. *See* R. Baldwin et al., *Regulating Legal Services: Time for the Big Bang?*, 67 MOD. L. REV. 787, 792 (2004) (discussing the monopsony problem with legal services in Great Britain); Robert L. Bish & Patrick D. O'Donoghue, *A Neglected Issue in Public-Goods Theory: The Monopsony Problem*, 78 J. POL. ECON. 1367 (1970) [hereinafter *The Monopsony Problem*]; *see also* Robert L. Bish & Patrick D. O'Donoghue, *Public Goods, Increasing Cost, and Monopsony: Reply*, 81 J. POL. ECON. 231 (1973) [hereinafter *Public Goods*]; Michael Cooke & Daniel Lang, *The Effects of Monopsony in Higher Education*, 57 HIGHER EDUC. 623 (2009); Josse Delfgaauw & Robert Dur, *From Public Monopsony to Competitive Market: More Efficiency but Higher Prices*, 61 OXFORD ECON. PAPERS 586 (2009).

9. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 39 (2d ed. 2006).

10. *Id.* at 155.

11. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 14 (3d ed. 2005).

12. *See, e.g.*, John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 55 (2001) (discussing "circumstances where a 'company town' employer has sufficient labor monopsony power to underpay his workers").

13. *See, e.g.*, Michael J. Hicks, *Estimating Wal-Mart's Impacts in Maryland: A Test of Identification Strategies and Endogeneity Tests*, 34 E. ECON. J. 56 (2008) (estimating the impact of Wal-Mart on labor markets in Maryland); Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95 (2011) (discussing Wal-Mart's share of gender discrimination in employment); Stephanie Wagner, Note, *Big Box Living Wage Ordinances: Upholding Our Constitutive Commitment*

certain goods.[14] Just as a monopolist can charge exorbitant prices, a monopsonist can demand cut-rate prices on the good or service for which it is the main buyer. Monopsony leads to a contraction of the input market in one of two ways: either the monopsonist buyer pays such low prices that many producers must leave the market, or the monopsonist intentionally reduces its purchases to a level where the low demand forces down prices.

A special type of monopsony occurs when a governmental entity functions as the sole purchaser of a product or service. The armed forces, for example, may be the sole purchaser for certain privately-manufactured weapon systems or fighter jets,[15] and in some rural municipalities, the school district may be the sole employer for teachers.[16] Governmental monopsonies are distinct in several ways. As the sole purchaser or single payer in a given market, the government has "extensive leverage."[17] The governmental buyer determines the amount of its purchases and dictates the prices and profits of the contractors, the terms of the contracts, and the eligibility or preferences of bidders[18]—in this case, the attorneys offering to take appointed cases. On top of the power of this market position as the sole buyer, the state controls the market indirectly through regulation.[19] In the case of indigent-defense counsel, the same state that pays for indigent-defense counsel also regulates licensing of attorneys, discipline for attorney misconduct, attorney advertising, and so on—all factors that further influence the supply of lawyers and the market rates for fees and salaries. As one commentator put it, "the government normally purchases defense goods as a monopsonist, a sole buyer, and singlehandedly determines the demand curve."[20] Governmental monopsonists can also affect and distort markets for other

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to a Remunerative Job, 15 GEO. J. ON POVERTY L. & POL'Y 359, 368–69 (2008) (discussing Wal-Mart's control over wages paid to workers who manufacture their goods).

14. *See, e.g.*, John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1493–94 (2012) (discussing Wal-Mart's monopsony power); Wagner, *supra* note 13, at 368–69 (discussing Wal-Mart's control over wages paid to workers who manufacture their goods); Seth Korman, Note, *International Management of a High Seas Fishery: Political and Property-Rights Solutions and the Atlantic Bluefin*, 51 VA. J. INT'L L. 697, 733–34 (2011) (using Wal-Mart as an analogy to explain the monopsony power of the Japanese government).

15. *See* Amit Bindra, *The Application of Antitrust Logic to Military Procurement Policies Would Enhance America's National Security*, 10 DEPAUL BUS. & COM. L.J. 405, 419 (2012).

16. *See* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 320 (1994) (providing examples of government monopsonies).

17. *See* Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist*, 51 ANTITRUST L.J. 689, 700 (1982).

18. *See id.* at 700–01.

19. *See id.* at 701.

20. Steven L. Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUB. CONT. L.J. 229, 262 (1986).

industries.[21] With respect to indigent defense, this would apply to criminal-defense lawyers for paying clients.

One anticipated objection to the application here is that the state is *not* the sole purchaser of criminal-defense services—there are many private defense attorneys who represent only (or at least mostly) paying clients. Some even specialize in representing wealthier defendants, such as those accused of white-collar crimes. The answer to this objection is twofold. First, indigent defense is arguably a distinct service—or market—from the representation of wealthier defendants; the poor tend to face charges for a different set of crimes, have a different relationship with police, prosecutors, and their own lawyers, and approach plea bargaining negotiations with less confidence compared to their wealthier counterparts. As Donald Dripps recently wrote, "[t]he mainstream bar wants nothing to do with indigent defense and is content to consign this disagreeable work to contract lawyers with marginal practices or to public defenders willing to work full time for modest pay under demoralizing conditions."[22]

Second, indigent defense constitutes the vast majority of criminal-defense work overall; even if criminal-defense work were a single market, indigent defense would be a large enough share that its sole purchaser (the state) would still have significant monopsony power. Joshua Dressler has long observed that, as of 1989, "court-appointed attorneys represented eighty-two percent of state defendants in the seventy-five largest counties, and in 1998, two-thirds of federal defendants were represented by court-appointed counsel."[23] As Thomas Cohen's impressive new empirical study observes, "about 80% of defendants charged with a felony in the nation's 75 most populous counties reported having public defenders or assigned counsel, while 20% hired an attorney . . . . Among the estimated 69,000 felony defendants using publicly-financed defense services, approximately three-fourths were represented by public defenders."[24]

Because the indigent-defense system is a monopsony, we can expect a cascade of consequences for the suppliers of the service or goods. First, suppliers have high incentive to find ways to cut corners or cheat to accept the low rates. The monopsonist does not allow prices to rise, so the only way

21. *See* SULLIVAN & GRIMES, *supra* note 9, at 288–89.

22. Donald A. Dripps, *Up From* Gideon, 45 TEX. TECH L. REV. 113, 127 (2012).

23. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATIONS § 28.03[B][5] at 599 (4th ed. 2010). Robert Mosteller recently echoed this estimate. "With over 80% of those charged with felonies being indigent, most defendants do not have the financial resources to retain their own lawyer." Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 6 (2012) (citing Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 748).

24. Thomas H. Cohen, Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes 14 (2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1876474.

for the supplier to increase—or even maintain—its net revenue is to reduce its own costs by reducing the time or resources it puts into production. This, in turn, reduces quality. A second effect, closely related to the first, is that cut-rate contracts by the monopsonist (the state, for purposes of our discussion) would further polarize sellers' quality: the best lawyers would be super-efficient sellers who are effective even at the low rates (can still provide high quality),[25] while the remainder would be disproportionately unsuccessful and desperate enough to accept any price the monopsonist offers—generally, those on their way out of the market. The mid-range sellers would tend to be more mobile and able to exit the monopsony market earlier.

Third, sellers' dependency on the monopsonist purchaser creates a professional rut for service providers, where there is neither opportunity nor motivation to develop new skills, to move up in the profession, or to move on to new types of work. Worse, the monopsonist can eventually drive many providers out of the market, leading to shortages of the service in question; this is particularly problematic when it occurs with public services, such as representation for indigent defendants. Finally, monopsony arrangements are prone to become bilateral monopolies: monopsonists may drive too many sellers from the market and eliminate competition among them, and monopsonist purchasers can eventually grow complacent and lazy about monitoring the quality of the service provider and neglect switching to better providers, relying instead on price controls. The following Subparts consider each of these effects, with a focus on their impact on indigent-defense systems.

In reality, government control of part of a market can dramatically affect the entire regulated industry, including those outside the state's regulation.[26] The Department of Justice analyzes market shares for monopoly enforcement in terms of a five percent benchmark—a price increase of that amount in an industry triggers suspicion of collusion by oligopolists or monopoly control of markets.[27] Commentators have suggested that entrenched monopsony power would mirror that benchmark—that is, the ability to force prices down by five percent or more.[28]

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25. *See, e.g.*, Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 593 (2005); Peter P. Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Systems*, 42 HOUS. L. REV. 1333, 1376 (2006) (noting that monopsonists operate in the same environment as super-efficient computer virus hunters); Susan E. Stenger, Note, *Most-Favored-Nation Clauses and Monopsonistic Power: An Unhealthy Mix?*, 15 AM. J.L. & MED. 111, 119 (1989).

26. Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CALIF. L. REV. 13, 15–16 (1992).

27. *Id.* at 31 n.58.

28. *Id.*

B. POTENTIAL EFFECTS OF MONOPSONY

In a monopsony environment, prices drop, forcing sellers to cut their own costs in producing the good or providing the service, as the monopsonist buyer will not permit an increase in price. If a seller wants to increase profits, or even maintain its current net revenues, it must cut corners or cheat to work within the low rates. In the case of goods or products, this could mean reducing quality; in the case of providing services, this would mean reducing the time or effort spent on an assignment, doing careless or slipshod work (that is, being less attentive or conscientious), overbilling, or double-billing—practices which often times lead to a decrease in the quality of the service.

The indigent-defense system, as a monopsony, is suffering from this problem. In an impressive study done in the United Kingdom, researchers found that government-contracted lawyers responded to low (monopsony) pay rates by reducing either the quality or quantity of representation.[29] Commentators have also observed monopsony effects in the United States legal services market, including the private sector.[30] In the context of a governmental monopsonist purchasing legal representation for indigent defendants, the expected consequence would be lawyers rushing through cases, pushing their clients to accept quick plea agreements, and minimal time investment in case research, factual investigation, and trial preparation. Recent commentators have raised similar concerns about public defender caseloads and incentives "to cut corners."[31]

C. POLARIZATION IN QUALITY

Monopsony can produce a screening effect that yields a highly polarized quality of sellers or service providers. Not all service providers are the same. Price/wage cuts can function as a perverse sorting mechanism, grouping service providers roughly according to their efficiency. Monopsony forces many service providers from the market, as potential profits evaporate in the wake of price cuts. Those sellers who remain in the market long-term would tend to be the most efficient ones—those who can provide adequate-quality work for the low rates, whether they achieve this efficiency legitimately (through superior ability, innovation, etc.), or illegitimately (through cutting corners, covering up their reduction in quality, overbilling and double billing, and so forth). In other words, those who can survive as

29. *See* Baldwin et al., *supra* note 8, at 792; *see also* Laura A. Wilkinson & Steven K. Bernstein, *Mergers in the Defense Industry: Application of the 1992 Horizontal Merger Guidelines*, 23 PUB. CONT. L.J. 1, 2 (1993) (discussing competition in the military defense industry and the Department of Defense's control as a monopsonist purchaser within it).

30. *See, e.g.*, John C. Coates et al., *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999, 1002 (2011).

31. Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 779 (2010).

service providers in a monopsony market will tend to be either the best-of-the-best or near-frauds. The consumer of the service may not be able to select, or even identify, which type of provider serves her; this seems especially true with governmental monopsonies,[32] where the recipients of the service often have no alternatives.

In addition, monopsony markets have some short-lived sellers, either in the form of new, non-enduring, market entrants or exiting market participants. These are service providers desperate enough to accept any price, even below their own costs. For example, a new market entrant may be trying to build a career and base of experience, and may already be operating at such a deficit that there is a diminishing marginal value for new debt, thus making acceptance of some assignments at a loss seemingly more attractive and reasonable. On the other hand, a failing market participant—one barely able to stay in business at the monopsonist's rates and facing failure—may take assignments at a loss in a desperate attempt to stay in the field. Monopsony can also result from information failures; perhaps the seller is not fully aware of her operating costs or of how many debts she can afford to accrue. In the new-market-entrant scenario, the quality problem is that the service provider is inexperienced and is possibly on the verge of complete failure, although a few of the below-cost sellers in this scenario may be talented enough to offset their inexperience, survive, and thrive within the monopsony market. In the case of the failing market participant—the individual soon to retire involuntarily—the seller is probably experienced, but likely not very illustrious or talented, and the looming failure of her business could easily cloud her judgment and downgrade the quality of her work.

D. DEPENDENCE AND CAREER RUTS

Sellers in a monopsony environment become dependent on the monopsonist and are therefore prone to getting in a career rut. As one leading antitrust treatise puts it, "Monopsony is thought to be more likely when there are buyers of specialized products or services or when the seller of the product or service has substantial sunk costs that make it more difficult for the seller to abandon its business."[33] This phenomenon is observable in professional sports monopsonies[34] and in military procurement monopsonies.[35] Economists have also noted the cycle of dependency and career stagnation in the case of physicians who work in a

32. For more discussion of governmental monopsony, see McGowan & Lemley, *supra* note 16, at 320 n.140.

33. SULLIVAN & GRIMES, *supra* note 9, at 155.

34. *See* Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 298 n.89 (2009).

35. *See* Bindra, *supra* note 15, at 418–21.

monopsony environment.[36] The study mentioned above regarding law firm hiring practices in the United States also mentions dependency as a primary downside of exclusive (monopsonist) arrangements.[37]

When it comes to the provision of professional services, such as medical care or lawyering, we should not assume that a monopsonist employer would necessarily want its captive service providers to have the highest possible skills or qualifications. Instead, a monopsonist employer may actually prefer suppliers of labor or services that only have the minimum skills necessary to perform the work required, so that the workers remain dependent on the employer and wages remain as low as possible. This point has direct relevance to the notoriously low quality that sadly characterizes the representation of indigent defendants in many cases.[38] While some may impute truly sinister motives to the State—the conspiracy theory that the State wants criminal defendants to have mediocre lawyers so that the State can win cases more easily and incarcerate more citizens—monopsony offers a more banal, economic explanation for the same phenomenon. Apart from winning or losing cases, the State, as a monopsonist, has a financial disincentive to encourage the criminal-defense lawyers to obtain more training or improve their skills because that would make those lawyers less dependent on court appointments to make their living. Lawyers who remain relatively unmarketable, at least compared to other lawyers, are cheaper for the State to hire.

E. MONOPSONY REDUCES THE NUMBER OF SERVICE PROVIDERS, LEADING TO SHORTAGES

A monopsonist can eventually drive many providers out of the market, leading to shortages of the service in question. This is particularly problematic when it occurs with public goods, such as representation for indigent defendants. This reduction of service providers and resulting shortage can occur either directly or indirectly.

The direct reduction comes about by the monopsonist's intentional choice, based on the fundamental theory of supply and demand; any increase in demand causes a marginal increase in price. Every time the monopsonist purchases a good or service, it forces an incremental increase in demand for that item; an incremental increase in price of the good or service follows. The monopsonist, therefore, reverses the sequence: as the primary (or even only) buyer in the market, when the monopsonist reduces its purchases of the good or service in question, it diminishes the overall demand for the service incrementally, and the price drops in response to the (slightly) falling demand. Eventually, the monopsonist can constrict its

36. *See* Noll, *supra* note 25, at 601.

37. *See* Coates et al., *supra* note 30, at 1002–03.

38. *See infra* notes 135–38 and accompanying text.

purchases to a level that yields the rock-bottom price it desires. "A monopsonist exercises its market power by reducing its purchases of an input, thereby decreasing its input price below competitive levels."[39]

The indirect method of contracting the market merely follows a different sequence: the monopsonist buyer announces that it will pay no more than "X" amount for a good or service—a deep discount for the buyer that it forces on the sellers. In response, some sellers give up and leave the market, as the prices are too low to realize any profits.[40] Even if the monopsonist did not intend at the outset to reduce the number of sellers, mandating a lower price naturally produces this result, at least eventually. Sellers reduce output to levels equaling their marginal costs, so that output levels tend to fall in a single-buyer market.[41]

In the context of a governmental monopsony purchasing legal services for poor defendants, we would therefore expect to see a shortage of lawyers willing to take court appointments, or a shortage of lawyers working in a public defender's office. Moreover, an analysis based on monopsony effects would predict that the few lawyers who do represent indigent defendants would carry an overwhelming caseload and therefore have to spread their time thinly between clients. We would also expect the state to announce periodically some upcoming reductions in court-appointed lawyers' fees or the salaries of public defenders, even if these turn out to be idle threats in the long term.[42]

Of course, no monopsonist wants *all* sellers to leave the market. "The monopsonist, however, would prefer to pay the lower price without reducing the quantity purchased."[43] In order to keep numerous sellers in the market, monopsonists will try to force sellers onto what economists call the "all-or-none supply curve," which is the maximum quantity sellers can make available at a given price when the alternative is to sell nothing at all.[44] In other words, a monopsonist—including a governmental monopsonist—wants to keep costs down, and contracting the market is merely a means to that end. If too many sellers leave the market, the monopsonist will be unable to acquire the goods or services it needs, and if only one seller is left, the result is a bilateral monopoly, trapping both the monopsonist buyer and

39. Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 403–04 (2008); *see also* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005).

40. *See* Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 GEO. L.J. 39, 50 (1992).

41. HOVENKAMP, *supra* note 11, at 14.

42. *See generally* Johannes Hörner & Morton I. Kamien, *Coase and Hotelling: A Meeting of the Minds*, 112 J. POL. ECON. 718 (2004).

43. BLAIR & HARRISON, *supra* note 3, at 316.

44. *See id.* at 316–17.

the seller in an interdependent relationship.[45] If the state acts rationally with a long-term view—perhaps an unrealistic assumption—it would attempt to pay enough to keep sufficient service providers in the market while maintaining terribly low prices, but also would not mind shortages, especially if the social costs of the shortages were externalized onto consumers.[46]

F. BILATERAL MONOPOLY

Monopsony arrangements sometimes become bilateral monopolies[47]—that is, the buyer and seller become mutually dependent, with no competition on either side.[48] Bilateral monopolies occur when monopsony buyers get lazy about monitoring the quality of the service provider and neglect switching to a better provider.[49]

Governmental monopsony can generate special bilateral monopoly problems. Government outsourcing often "incentivizes service providers to manipulate state officials into funding unnecessary services and continu[ing to] utilize" entrenched providers rather than newcomers.[50] As a result, monopsony triggers regular monopoly/oligopoly problems in that it narrows the field of providers.[51] When the government contracts out on an ongoing basis, Professor Rubin observes that "government monopsony breeds contractor monopoly," and the monopsony and monopoly effects "reinforce each other."[52] In the context of indigent defense, this is most likely to occur in rural areas, where a complex interdependency develops between the local courts and the local lawyers who take most of the court appointments.

G. INEVITABLE CONSEQUENCES

Unfortunately, the claim here will strike many readers as extremely pessimistic: monopsony effects will be present regardless of the amount of the monopsonist's expendable funds. In other words, even if states

45. *See infra* Part F.

46. *See* BLAIR & HARRISON, *supra* note 3, at 317–20.

47. *See id.* at 123–43 (providing a technical discussion of the tendency toward bilateral monopolies). For more discussion of bilateral monopolies in a variety of contexts, see ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 62–64 (1979).

48. Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 964 (2004).

49. *See* Litwinski, *supra* note 12, at 68–69.

50. Stevenson, *Rethinking IOLTA*, *supra* note 6, at 482; *see* Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 920–21 (2010) (reviewing GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minnow eds., 2009)).

51. *See* Stevenson, *Rethinking IOLTA*, *supra* note 6, at 481–84; Rubin, *supra* note 50, at 921–22.

52. Rubin, *supra* note 50, at 921.

quadrupled their indigent-defense expenditures, we would still expect to see below-market fees,[53] uneven and unpredictable quality of representation,[54] and unrealistic workloads.[55] There would still be perverse incentives for quick capitulation during plea bargaining,[56] excessive plea bargaining in some cases,[57] a shortage of available defense lawyers,[58] and trial delays in criminal cases.[59] Even with ample public funding for indigent defense, basic economic theory also predicts that we would continue to see surprisingly few lawyers capturing the majority of the appointments list,[60] inadequate market competition between lawyers,[61] lack of innovation or professional growth among defense lawyers,[62] and disproportionate focus on certain types of cases.[63] Commentators may attribute such problems merely to the low fees paid to appointed counsel, but these deeply discounted rates are a symptom

53. *See* Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 908–09 (Mass. 2004). Courts are not alone in lamenting this problem. Numerous academic writers have highlighted the persistent lack of funding for indigent defense. *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972–74 (2012).

54. *See* Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 552–53 (2009).

55. *See* Joy, *supra* note 31, at 777–83 (describing impossible workloads in the indigent-defense system and the prejudicial impact on defendants); *see also* Zachary L. Heiden, *Too Low a Price: Waiver and the Right to Counsel*, 62 ME. L. REV. 487, 491–93 (2010).

56. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006); Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 93 (2007).

57. *See* Gershowitz, *supra* note 56, at 95–97; Justin Daraie, Note, *Criminal Law—The Road Not Taken: Parameters of the Speedy Trial Right and How Due Process Can Limit Prosecutorial Delay;* Humphrey v. State*, 185 P.3d 1236 (Wyo. 2008).*, 9 WYO. L. REV. 171, 174 (2009).

58. *See* Backus & Marcus, *supra* note 56, at 1051–52; Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB POL'Y 571, 575 (2011) ("[I]n many U.S. jurisdictions the number of public defenders or other lawyers available to represent poor persons charged with crimes is inadequate.").

59. Adam Gershowitz notes that delays can result directly from fee caps for appointed counsel. *See* Gershowitz, *supra* note 56, at 94–95; *see also* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 613–14 (1990); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 469–79 (1992) (discussing empirical research on trial delays and the causes).

60. *See* Backus & Marcus, *supra* note 56, at 1035 (discussing illustrative cases where certain attorneys are assigned several hundred cases per year in a jurisdiction).

61. *See* BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 35–40 (1998); Andrew P. Morriss, *Returning Justice to Its Private Roots*, 68 U. CHI. L. REV. 551, 556 (2001).

62. Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 300–02 (2002).

63. Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 288 (1991).

of the larger problem: the monopsony purchaser of indigent-defense services.

II. *GIDEON* PROBLEMS AND PROPOSALS

In recent years, academic commentary addressing appointed counsel has focused on the chronic problems with providing indigent defense: pervasive lack of funding, lack of quality representation, case overload, and so on. As Professor David Cole summarizes the situation, "indigent defense counsel are generally underpaid, overworked, and given insufficient resources to conduct an adequate investigation and defense."[64] The caseloads sound truly impossible—some public defenders in New York handle 1600 cases per year.[65] More than half of states impose caps on fees available for indigent defense—around $1000–1200 for serious felonies.[66] Cases routinely appear to be under-investigated and under-researched, and assignments often go to unqualified, inexperienced lawyers, even for capital cases.[67]

Many have decided that the indigent defense funding problem is an unavoidable result of political pressure; namely, the competing demands on the public and the unpopularity of criminal defendants.[68] As one of the most recent articles put it, "[t]he root of the problem is that indigent defense competes for public funds with other urgent priorities."[69] Robert Mosteller attributes the exponential growth in plea bargaining (ninety-seven percent in federal cases and ninety-four percent in state cases) almost entirely to lack of funding for indigent defense,[70] and blames persistent budgetary problems for appointed counsels' case overload.[71]

Numerous proposed solutions to the problems with indigent defense permeate academic literature. Some suggest the answer is simply to require higher-quality work from appointed counsel, perhaps using a system of

64. David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101, 103 (Carol S. Steiker ed., 2006).

65. *Id.* at 103–04.

66. *See id.* at 118–19.

67. *Id.* at 121.

68. *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590 (2005) (alleging that political actors underfund court-appointed defense counsel "in order to constrain their effectiveness"); Mosteller, *supra* note 23, at 7–9 (describing the difficulties resulting from "[t]he failure of states and localities to fund indigent defense adequately").

69. Dripps, *supra* note 22, at 121.

70. *See* Mosteller, *supra* note 23, at 9–10.

71. *See id.* at 7 (noting that underfunded attorneys with excessive caseloads had to triage, minimizing client contact and investigation before plea bargaining); *see also* Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691 (2010) (discussing situations in which attorneys meet their clients in the courtroom en masse and briefly explain the plea bargain terms).

official benchmarks for comparison.[72] Others suggest that the state get out of the business of providing lawyers and instead give defendants vouchers to pay their own lawyers.[73] Requiring pro bono indigent-defense work by all licensed attorneys also has some supporters.[74] Still others have suggested using federal habeas litigation to target defense-provision systems that do not work well,[75] or perhaps having the Supreme Court declare that pretrial investigation is a "critical stage" that requires in-person representation by counsel.[76]

Proposals to solve the indigent-defense-monopsony problem generally fall into two categories: *ex ante* and *ex post*. *Ex ante* remedies attempt to dilute the state's monopsony power by providing alternative purchasers, such as increasing the number of lawyers available through pro bono requirements, funding for more appointed counsel, or providing defendants with vouchers. *Ex post* solutions acquiesce to the underlying monopsony, but try to mitigate or offset its unhealthy effects by, for example, imposing quality controls or standards on lawyers already providing indigent representation. The following Subparts further expand on these *ex ante* and *ex post* solutions.

A. EX ANTE *REMEDIES*

Ex ante remedies attempt to dilute the state's monopsony power by providing alternative purchasers, mostly by increasing the number of lawyers available for indigent defense. Mitigating a monopsony *ex ante* requires reducing the monopsonist to a minor player in the market. The most simplistic proposals merely call for increased funding to hire more attorneys, regardless of the recruiting system used (public defenders, court appointments from lists of area lawyers, or ongoing contracts with particular firms). The problem with this rainmaking approach is that monopsony operates independently of the cash reserves of the monopsonist. The single payer/purchaser of the service will still have an incentive to force contractors to work for as little pay as possible.

More nuanced *ex ante* approaches look beyond a budget and seek other ways to dilute the monopsony effect. Some suggest increasing the number of lawyers available through more aggressive recruitment efforts or even coercion, creating an alternative, parallel system without a monopsonist

72. *See* Dripps, *supra* note 22, at 120 (citing William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 165–67 (1995)).

73. *See* Dripps, *supra* note 22, at 120 (citing Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 112–17 (1993)).

74. *See* Paul Calvin Drecksel, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 383–84 (1991).

75. *See* Dripps, *supra* note 22, at 120.

76. *See id.* at 121.

payer (such as volunteer work by lawyers), or artificially multiplying the number of purchasers (as by providing defendants with vouchers or releasing their impounded assets). This Subpart discusses two examples of *ex ante* approaches—volunteer work by lawyers and a voucher system. Each of these sounds promising superficially, but the effectiveness of these solutions depends upon their impact on the existing monopsony market—a benchmark no one is measuring.

One proposed *ex ante* solution is to require attorneys to represent indigent defendants on a pro bono basis.[77] Some commentators believe pro bono work is an "ethical duty"—an obligation of the legal profession as a whole[78]—while others believe that everyone, not only the indigent, is entitled to free criminal-defense counsel.[79] This approach is really an attempt to dilute the monopsony characteristic of the appointment system because it provides alternative counsel not hired by the monopsonist purchaser (the state), thus diluting the monopsony effects.

Apart from the perennial unpopularity of this idea with the practicing bar, there are problems with this proposal as an anti-monopsony measure. First, the pro bono program is likely to be mostly symbolic, providing a token effort that leaves the state still needing to hire lawyers for thousands of cases per year. Even if lawyers were under pressure to do some pro bono work every year, it is not clear how many would choose criminal cases, or what percentage of indigent defendants would receive a pro bono lawyer. In theory, each state has tens of thousands of practicing attorneys, and if each attorney took one or two indigent-defense cases per year, that could take a large bite out of the state's indigent-defense monopsony. Yet the question remains whether it would be enough—if the state were still a dominant purchaser for the service, the monopsony effects would probably continue. Furthermore, mandatory pro bono service could easily turn into a monopsonist's dream—free labor in a market where sellers have zero bargaining power to seek adequate compensation. The results would tend to be the same—lawyers would have a subconscious tendency to cut corners or minimize the time they invest in a token pro bono case, would have an incentive to nudge their pro bono clients to accept plea agreements quickly, and would be on unfamiliar turf in the criminal courtroom.

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77. *See* Drecksel, *supra* note 74, at 383–86.

78. *Id.* at 383–84; *cf.* Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. REV. 887, 890 (1994) (describing the idea of mandatory pro bono services as having an "oxymoronic quality").

79. Jim Neuhard, *Free Counsel: A Right, Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 109, 109 (1986). In fact, in pre-*Gideon* times, a court would appoint an attorney to the defendant without pay when it found that due process required appointment of counsel. Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. Rev. L. & SOC. CHANGE 193, 197–98 (1986).

Another *ex ante* alternative would be a voucher system. In this system, the state would give a criminal defendant some funds to hire his or her own lawyer.[80] This is a more sophisticated solution than simply increasing funding or forcing lawyers to enter the market uncompensated, because it addresses the root problem—the single-payer system. A voucher system undermines the single payer by introducing more purchasers in the monopsonist market. To the extent that vouchers increase the pool of defense lawyers by giving defendants more choice (and thus lawyers more competition and opportunities for market entry), it could counteract the seller-side reduction that typically attends monopsony arrangements.

Vouchers, however, present an inflationary problem. This kind of subsidy for legal costs would trigger a commensurate jump in prices in the relevant market. That is, if lawyers know that many defendants now have $2000 in redeemable coupons for legal defense work, they can simply charge more than they did before for the same services. This problem has occurred with other types of government vouchers for the poor (housing vouchers, medical care, university tuition, etc.).[81]

B. EX POST *SOLUTIONS*

A number of proposals for remedying the broken indigent-defense system are *ex post* solutions from a monopsony standpoint. Rather than trying to undermine or dilute the monopsony position of the state in hiring defense lawyers, *ex post* approaches try to mitigate specific monopsony symptoms while conceding the single-payer system. Probably the best solution, from the standpoint of mitigating monopsony effects, is to bring more indigent-defense work in-house through public defender offices, but the strengths of this approach are more in the *ex post* category, to which we will return later.

Governmental monopsony tends to lower the quality of the state-purchased goods or services. One way to counteract this effect is through command-and-control regulation of the quality of representation—that is, forcing providers to meet minimum guidelines. "Without competent attorneys, no system of public representation of poor defendants will be successful."[82] Commentators therefore suggest that a statewide commission, or the American Bar Association ("ABA"), could help mitigate the effects of

80. *See* Frankel, *supra* note 78, at 894 (proposing a type of voucher system with a sliding scale to give the largest vouchers to defendants with the least resources). Note that a national system for indigent defense would merely trade a single nationwide monopsony for fifty separate state monopsonsies.

81. *E.g.*, Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of A Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 131 (1995) ("Presuming a limited number of competitors in the market, lower cost schools will tend to raise tuition to the amount of the voucher, causing price inflation.").

82. Backus & Marcus, *supra* note 56, at 1124.

the monopsony if it could set guidelines and serve as an indigent-defense system oversight commission. Similarly, other commentators have suggested that a "special master" could be appointed to oversee the guidelines during their implementation and ensure their sustainability.[83] This special master could have "the power to order expenditures, to review budgets and caseloads for indigent criminal-defense lawyers in the relevant jurisdiction, and to order appropriate corrections . . . ."[84] Of course, such an oversight system requires yet more funding, more labor, and if it became heavy-handed, would further deter good lawyers from taking indigent-defense cases.

One writer suggests that states should also "establish and enforce appropriate workload limits."[85] A workload limit could be effective if it implemented caseload standards limiting the caseload a single attorney could take on,[86] decriminalized certain misdemeanors to civil infractions,[87] and offered "alternative justice programs."[88] Other *ex post* approaches involve changing the criminal-justice system to mitigate monopsony effects, such as "raising the standard of proof in all criminal cases against indigent defendants,"[89] or "[r]eclassifying drug possession as a nonjailable offense.[90]

III. RELATIVE MERITS OF INDIGENT-DEFENSE SYSTEMS

The Supreme Court has never specified how states should provide attorneys for indigent criminal defendants,[91] so there is variation across the country as to whether states, counties, or some mix of the two assume responsibility for funding such programs.[92] States choose how to allocate the responsibility in terms of funding and oversight.[93] Apart from the funding source, systems for providing indigent defense fall into three basic categories:[94] in-house public defender offices[95] (in which the lawyers are

83. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1750 (2005).

84. *Id.*

85. Backus & Marcus, *supra* note 56, at 1125.

86. *See id.* ("Factors such as the availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition.").

87. *Id.*

88. *Id.*

89. Gershowitz, *supra* note 56, at 89.

90. Kaitlin C. Gratton, Note, *Desperate Times Call for Desperate Measures: Reclassifying Drug Possession Offenses in Response to the Indigent Defense Crisis*, 53 WM. & MARY L. REV. 1039, 1067 (2012).

91. *See* DRESSLER & MICHAELS, *supra* note 23, at 599.

92. *See id* at 599–601.

93. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 37–44 (1995).

94. *See* Amanda Myra Hornung, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 525 (2005).

government employees), court-appointment lists[96] (case-by-case, hourly-rate outsourcing to individual lawyers), and ongoing contracts with specific local firms to provide representation as needed on a flat-fee, per-case basis[97] (the retained firm or bilateral monopoly model). Many states use combinations of these three systems,[98] though in an individual defendant's case, the lawyer's selection will come through one of the three approaches. The federal courts use only appointment lists or public defenders.[99]

It appears that the court-appointment-list system is the most commonly used system, followed by public defender offices, with the ongoing-contract firm a distant third.[100] Even in areas with a public defender's office, appointment lists serve as backup when public defenders have overloads or when conflicts of interest between defendants disqualify the public defenders from representing certain individuals.[101] The most important point for monopsony analysis, however, is that the government, whether federal, state, or county, pays for indigent representation; even where there is collaborative funding between states and counties, the funds pass through a single payer.

The Subparts below briefly explain the three main systems for providing indigent defense, followed by a discussion of the recent empirical work comparing their merits or results.

A. THREE APPROACHES

Assigned-attorney programs allow the court to select attorneys from a list of private attorneys and appoint them to represent indigent defendants.[102] Courts maintain the list and select attorneys "on a judge-by-judge, case-by-case, or court-by-court basis."[103] Typically, the compensation is on a per-hour basis, with rates significantly lower than the current hourly billing rates for private attorneys in that locale.[104] Underqualified lawyers often get on the list.[105] Relatively recent studies show that defendants represented under an appointment list system are more likely to lose at trial (trial results in conviction) and tend to receive longer sentences compared

95. *See* DRESSLER & MICHAELS, *supra* note 23, at 600.

96. *See id.*

97. *See id.*

98. *See id.*; Hornung, *supra* note 94, at 525–27.

99. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), *available at* http://ssrn.com/abstract=994235.

100. *See* DRESSLER & MICHAELS, *supra* note 23, at 600–01. For somewhat contrary results from a much more limited and somewhat outdated survey, see Hornung, *supra* note 94, at 526–27.

101. *See* Cohen, *supra* note 24, at 3.

102. Hornung, *supra* note 93, at 525.

103. *Id.* at 525–26.

104. *See* DRESSLER & MICHAELS, *supra* note 23, at 600–01.

105. *Id.*

to those represented by public defenders, at least in the federal system.[106] Appointment list programs are particularly pervasive outside major urban areas, as smaller towns and counties are less likely to establish a public defender's office. Professor Iyengar observes that panel lawyers generally have less experience and attended less prestigious law schools.

A public-defender system consists of offices whose purpose is to provide indigent-defense services. A public defender's office is established and staffed with full and part-time lawyers who are prepared to handle all indigent-defense counsel cases. These organizations can be either public or private, but usually include government employees. These programs typically serve metropolitan areas. If a state public defender is unattainable, a state may empanel a commission or board, which provides direction and develops standards governing local programs.[107] A 2007 Department of Justice survey found that twenty-two states have statewide public defender systems.[108] For the states using a public defender type of program, ninety percent of their funding came from the state level.[109] Due to a dearth of federal aid, the budget to provide such services becomes a product of politics, as there are no federal mandates regarding state budgets for protecting the legal rights of indigent defendants.[110] Inadequate funding for public-defender programs leads to low staffing, little time for lawyers to work on individual cases, excessive caseloads, and limited resources.[111]

The third system for providing indigent legal services involves a state or county contracting with one or more organizations to provide representation to indigent defendants.[112] These ongoing contracts give most or all of the court-appointed assignments in a locale to certain lawyers or firms.[113] Contract programs typically serve less populous regions. Some view contract programs as having the financial benefit of providing counsel at a fixed or

106. *See id.* (citing Iyengar, *supra* note 99, at 4) ("This difference in experience and law school quality, combined with the effect of wages and caseload explain over half of the overall difference in expected sentence.").

107. *Id.* at 38 (describing the purpose of the state commission to be that of a central and uniform policy across the state in order to ensure accountability and quality).

108. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-569, INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE 7 (2012) (citing LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, STATE PUBLIC DEFENDER PROGRAMS, 2007 1 (2010)).

109. Hornung, *supra* note 94, at 527.

110. *Id.* at 528 (explaining that it becomes a state decision on the importance of and how much to allot for indigent-defense counsel services, which results in underfunding of services because the poor man does not have a strong voice or influence in said legislative processes).

111. Bruce A. Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1180 (2003) (explaining that often the lawyers have other cases separate from the indigent-defense cases which they have to balance keeping up with as well thus resulting in less time to devote to the indigent criminals in need).

112. *See* Hornung, *supra* note 94, at 526.

113. *See* DRESSLER & MICHAELS, *supra* note 23, at 600; Green, *supra* note 111, at 1179.

predictable rate, rather than on an hourly basis.[114] In the last fifteen years, more locales have begun incorporating contract systems into their already-existing programs.[115]

B. COMPARISON AND ANALYSIS

The public defender system is likely the best solution to the monopsony problem. While the public defender system still has some monopsony effects, it mitigates the effects from several angles. Public defender systems allow for collective bargaining by the lawyers and reduce many of the individual transactions in which the monopsony would manifest itself. The public defender's office also has efficiency advantages in terms of economies of scale. In addition, government employment for lawyers via a public defender's office mitigates monopsony issues through a screening effect. Lawyers working full-time for the public defender's office tend to have more public-service motivation and higher levels of relevant skills, compared to their counterparts on lists of court-appointed independent contractors.

All recent empirical studies agree that appointment list programs provide lower quality service to indigent defendants compared to full-time public defenders (government employees).[116] This disparity is exactly what monopsony theory would predict. The pernicious effects of monopsony are most acute where you have a single payer and multiple service providers/sellers who do not collude with each other.

In 2007, Radha Iyengar provided empirical evidence that salaried public defenders perform significantly better than their counterpart Criminal Justice Act ("CJA") attorneys—the hourly-rate, appointed-from-a-list lawyers in the federal system.[117] She concluded that public defenders appeared to "outperform CJA panel attorneys in all outcomes that were

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114. DRESSLER & MICHAELS, *supra* note 23, at 600.

115. SPANGENBERG ET AL., U.S. DEP'T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 (2000), *available at* www.ncjrs.gov/pdffiles1/bja/181160.pdf (noting that some have even entirely replaced their assigned attorney systems with contract systems; though few have replaced public defender offices with contract systems). It is helpful to remember that many researchers group ongoing-contract counsel together with appointment-list counsel for purposes of empirical studies or determining percentages of aggregate representation. *See, e.g.*, Iyengar, *supra* note 99; James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes* (RAND Corp., Working Paper No. WR-870-NIJ, 2011) *available at* www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf; Michael Roach, *Explaining the Outcome Gap Between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects* (Oct. 30, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1839651.

116. *See* Anderson & Heaton, *supra* note 115, at 3–4; Cohen, *supra* note 24, at 23; Iyengar, *supra* note 99, at 3; Roach, *supra* note 115, at 3, 32; *see also* Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 49–50 (2008).

117. *See* Iyengar, *supra* note 99, at 2.

considered."[118] Federal defendants with court-appointed counsel were more likely to receive convictions and tended to receive longer sentences.[119] The skill disparity between court-appointed counsel and public defenders was apparent both in the courtroom and in plea-bargaining.[120] Iyengar attributes the disparity in performance to endogenous factors—the traits of the attorneys who select (or are selected) into each group, rather than to exogenous factors such as the payment systems and consequent incentives.[121] Federal public defenders had more experience and had attended higher-ranked law schools compared to court-appointed CJA lawyers.[122] More disturbing was Iyengar's finding that African Americans are disproportionately more likely to have court-appointed CJA representation instead of a public defender; the disparity in skill or performance affects minorities more heavily than non-minorities.[123]

Michael Roach's 2011 study extends Iyengar's work[124] on comparative outcomes by focusing on state, rather than federal courts, agency costs that contribute to disparate outcomes between the different systems of indigent defense, and how fee structures affect attorney incentives (accounting for adverse selection problems in the data).[125] Most importantly, Roach found that "assigned counsel generate significantly less favorable outcomes for defendants than do public defenders."[126] Convictions are significantly more likely with appointed counsel, and those convictions are significantly more likely to be for the most serious offenses; defendants represented by appointed counsel in state court—like their federal counterparts—receive longer sentences and have a longer wait from arrest to adjudication.[127] Assigned-counsel guilty pleas are much less favorable to their clients.[128]

Importantly, at least for our discussion of monopsony effects, Roach found significant evidence of adverse selection in the court-appointed counsel system.[129] Roach also found that court-appointed attorneys

118. *Id.* at 28.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.* at 29.
124. *See* Roach, *supra* note 115, at 7–10. *See generally* Iyengar, *supra* note 99.
125. Roach, *supra* note 115, at 8–9.
126. *Id.* at 1.
127. *Id.* at 32.
128. *Id.* at 35.
129. *Id.* at 36 (finding that adverse selection—due to lawyers deciding whether to sign up for court appointments—has yielded disproportionate numbers of low-quality attorneys on the rosters). "Adverse selection is commonly described as the tendency of persons with relatively greater exposure to risk to seek insurance protection. But the problem is broader." George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1540–41 (1987). *See generally* Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE

disproportionately have degrees from the lowest-ranked law schools.[130] As discussed in previous Parts, we would expect a monopsony scenario to result in lower quality service providers for various reasons, which generally fall into the categories of moral hazard[131] or adverse selection.[132] The expected adverse selection effect is exactly what Roach describes, that is, that the low rates paid by governmental monopsonists have a deleterious selection effect, where the lowest quality, least successful attorneys are disproportionately likely to sign up to take assigned cases. Similarly, Roach found strong evidence that the fees paid for indigent defense create moral hazard or agency cost problems, including cost-cutting measures by the lawyers, delays, reduced effort, and so on.[133] Even so, the adverse selection appears to have a much more profound effect on attorney performance than the moral hazard problem,[134] as one would expect in a profession with ethical rules and discipline for willful misconduct.

Similarly, a 2011 study by Thomas Cohen found that private attorneys and public defenders secure similar adjudication and sentencing outcomes for their clients, but that defendants with assigned counsel fared worse than both.[135] Few studies compare public defenders to assigned attorneys or

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L.J. 1223 (2004) (discussing the theoretical overlap between adverse selection and moral hazard).

130. *See* Roach *supra* note 115, at 46–49.

131. Moral hazard is "the extraneous risk taken on by parties as a result of insurance insulating that party from loss from the risk." Abraham Bell & Gideon Parchomovsky, *The Case for Imperfect Enforcement of Property Rights*, 160 U. PA. L. REV. 1927, 1929–30 (2012) ("When a person buys full insurance for her losses, she no longer has an incentive to invest in private precautions to prevent the relevant harm from materializing."); *see also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996) (defining moral hazard as "the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss"); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1463 n.257 (2009) ("Moral hazard has been defined as the phenomenon by which injury and activity rates increase as a response to a decrease in the expected costs of injury.").

132. For a more thorough discussion of the effect of adverse selection on employment markets, wages, and the quality of services, see Bruce C. Greenwald, *Adverse Selection in the Labour Market*, 53 REV. ECON. STUD. 325, 325 (1986) (arguing that "adverse selection in the labour market may seriously impair a worker's freedom to change jobs"); Jean-Jacques Laffont & Jean Tirole, *Adverse Selection and Renegotiation in Procurement*, 57 REV. ECON. STUD. 597 (1990) (discussing adverse selection effects on length of employment contracts and contract renewals); James D. Montgomery, *Adverse Selection and Employment Cycles*, 17 J. LAB. ECON. 281 (1999) (discussing the effects of adverse selection and "lemons effects" on employer incentives and hiring cycles); Anthony A. Sampson & Robert Simmons, *The Minimum Wage in an Adverse Selection Economy*, 54 OXFORD ECON. PAPERS 150 (2002) (arguing that fixed wages create adverse selection problems resulting in unproductive workers filling jobs in the marketplace); Jay Stewart, *Adverse Selection and Pay Compression*, 65 S. ECON. J. 885 (1999) (arguing that when workers are heterogeneous and labor contracts are contests, the link between pay and performance is weaker than would be the case if firms could observe workers' productivity before contracting).

133. *See* Roach, *supra* note 115, at 50–57.

134. *See id.* at 57.

135. *See* Cohen, *supra* note 24, at 1.

ongoing-contract counsel in this way. Cohen, like Iyengar and Roach, expresses concern over the recent evidence that "defendants represented by assigned counsel received the least favorable outcomes in that they were convicted and sentenced to state prison at higher rates compared to defendants with public defenders."[136] Their sentences were higher as well.[137] The same pattern emerged in a study by James Anderson and Paul Heaton in 2011—"Compared to appointed counsel, public defenders in Philadelphia reduce [their clients'] murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%."[138]

This disparity is not due merely to different funding levels; it would happen even if the funding tripled. A governmental monopsony with multiple service providers, like appointment-list programs, will *always* lead to worse adverse selection and moral hazard problems than would be the case with salaried government employees performing the same work. Regardless of funding, any system or market with a single payer (like the state or county) and numerous service providers will tend toward below-market rates, lack devices for limiting the number of assignments (such as ever-stricter eligibility requirements for the defendants seeking free court-appointed lawyers), and have little or no screening for quality.

Public defender systems alleviate these concerns because they can be selective in hiring permanent employees, choosing individuals with the strongest ideological commitment to serving the poor and who have the best credentials or most experience. The government employer hires seldom enough that it can screen applicants for skill level and commitment to public service, neither of which is very feasible when contracting with lawyers for every individual case. Lists for court-appointed lawyers (contractors), in contrast, tend to self-select for lawyers who cannot find enough of their own clients otherwise, perhaps due to inexperience or reputation

The prospect of full-time, long-term government service also creates a self-selection effect, drawing those with the strongest commitment to public service and systemic justice. The lawyers most committed to indigent defense (for ideological reasons) or whose skills seem particularly specialized for that kind of work are most likely to seek and obtain long-term employment in a public defender's office. Like ideological commitment, screening for specialized skills, training, and relevant experience is much less likely to factor into the court appointments from lists of private attorneys. Public defender offices can also provide supervision and quality control more easily than the appointment list system, and the employees in public defenders' offices have more opportunity to engage in collective bargaining (or, at

136. *Id.* at 45.

137. *See id.*

138. *See* Anderson & Heaton, *supra* note 115, at 3; *see also* Weinstein, *supra* note 116, at 49–50.

least, to free ride on collective bargaining efforts of other government employees) compared to the solo practitioners who dominate the appointment lists.

IV. CONCLUSION

There is nothing new about decrying the deficiencies of the current system. The typical explanation, however, is to say that politics are to blame—to reiterate the truism that criminals are unpopular, and therefore indigent defense is not a budgetary priority. The underlying assumption in the literature has been that money is the answer—that more funding would mean more lawyers and better representation. Even the newer, non-fiscal proposals, such as increasing the supply of volunteer lawyers or reducing the number of prosecutions, have the tone of a second-best solution, a workaround to the presumed problem, which is the political constraint on funding.

This Essay advanced the discussion beyond the money question.[139] The problems in the indigent-defense system are inherent in the state provision of legal services, as the single-payer system is an unavoidable governmental monopsony. Given what we know about monopsonies, the nature of what *Gideon* required meant that *all* the current problems were both predictable and inevitable. The root cause is not merely the lack of funding—even wealthy monopsonists still behave as monopsonists, following well-known, typical patterns. The etiology of our systemic problems is inherent in governmental monopsony; the state as sole purchaser will nearly always seek the lowest prices for labor, and will have enough market power that downward price pressures will be inevitable (not necessarily a well-deliberated public policy choice). This is not to say that the situation is hopeless—recognizing the monopsony problem at the root of the crisis can help identify the most effective measures to mitigate harms. By far the most effective mitigation measure is to bring more of the indigent-defense work in-house, that is, into public defenders' offices. Some of the benefits of bringing indigent defense in-house are actually features of the more general make-or-buy decision for the government,[140] but some are specific to lawyering. The fact that a public endeavor—such as providing legal services to the poor—will be fraught with problems is not a reason to abandon the effort. Rather, it is an occasion that invites us to predict and plan around the issues to provide the best public services possible.

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139. This is not to say that money is completely irrelevant. Obviously, more funding could purchase more and better legal services. We would expect to see better representation of indigent defendants, relatively speaking, in locales that pay higher fees. As a systemic solution, however, money is a woefully incomplete answer, because monopsony pressures will eventually push the fees and limits (eligibility requirements, etc.) to revert to monopsony levels.

140. *See* William M. Dugger, *Transaction Cost Economics and the State*, *in* TRANSACTION COSTS, MARKETS AND HIERARCHIES 188, 202–06 (Christos Pitelis ed., 1993).