CHAPTER ONE

"WHAT'S A DEFENSE?"

"I didn't know I was going to jail," I heard a defendant say as she stood before the judge in Greene County, Georgia. Of course she didn't. No one had told her the consequences of pleading guilty. Most people, educated or not, often have no idea what a guilty plea actually means: the conviction of a crime that subjects them to incarceration, fines, probation, a criminal record with unforeseen future consequences. Many do not even know that a guilty plea is not mandatory or that an appeal after conviction at trial is possible, even though a judge is required to correctly advise defendants before any plea.

I had first come to Greene County in 2001 after hearing about the chaos in its court system which seemed representative of a statewide problem; and I continued to visit for weeks at a time over the next five years. As required by the U.S. Supreme Court precedent, the county was fulfilling the obligation to provide attorneys to those who couldn't afford them. With little state oversight, court-appointed lawyers, for a

variety of reasons, were sacrificing the interests of their most vulnerable and malleable constituency—the defendants they were supposed to be protecting. In this process, the defense lawyer, the judge, and prosecutor formed a kind of a tag team—charge the accused, assign a lawyer, prosecute, plead, sentence—with slight regard for the distinctions and complexities of each case.

Robert E. Surrency was under contract with Greene County to represent poor people accused of crime. He was not employed by the county full-time; he continued to represent a number of paying clients as well. Even so, his private work was not lucrative enough, so he needed the indigent defense contract to support himself. On an annual basis, his caseload was double the national recommendation for a full-time attorney.[1]

Surrency was raised in Media, Pennsylvania, where his father, Erwin C. Surrency, had worked as the law librarian and assistant dean for Temple Law School. "I grew up in the stacks," he said of his upbringing. Surrency's father, whom he admired greatly, had been born and married in Georgia. In turn, Surrency attended Mercer University in Macon, where he had kin. Afterward, he headed back to Temple for law, passed the Pennsylvania Bar, and landed a clerkship with a state court judge for whom he helped write opinions. He then hung out a shingle as a solo practitioner and established a civil-law practice. In the mid-1980s his father decided to return to Georgia to become the director of the library at the University of Georgia Law School. Surrency, in his thirties, chose to move as well. He opened a law practice on Main Street in Watkinsville, Georgia, conveniently located near several other towns, Madison and Greensboro, and near his father in Athens. But he found it hard to make a living. Surrency seemed to lack the relationships those who had grown up there enjoyed. An old-time attorney explained that Georgians born and bred "kind of rule around here" and that Surrency constantly had to prove himself. "He was a stranger," the attorney said. Surrency's practice foundered.

One afternoon in 1987, he drove the thirty-five-minute trip to Greene County's courthouse and ran into Chip Atkins, a longtime local

lawyer. Atkins had been the public defender but no longer wanted the job. He said that the contract to represent poor people was up for "bid," and urged him to apply. Surrency won the contract by offering to handle all the routine cases for fifteen thousand dollars, plus seventy-five dollars an hour for serious cases like murder; his bid, which came in at about twenty thousand dollars total, was slightly lower than anyone else's, he explained. In his first year, he represented forty defendants while maintaining a private practice. "It was a good side job," Surrency said.

In the fourteen years that followed, his public caseload multiplied tenfold, while the amount of time he devoted to each case inevitably shrank. In 2001, the year I first met him, 1,359 people were arrested and held in the Greene County jail. Because the vast majority of criminal defendants nationwide are too poor to afford a lawyer, many of those arrested in Greene County would become his clients.[2] During the same fourteen years, Surrency's pay rose only to $42,150.

Nonetheless, Surrency claimed to have achieved good results. He settled a large number of cases through plea-bargaining, which he called "a uniquely productive way to do business." It got his clients in and out of the system quickly, which, he maintained, was what they wanted; and it saved him from having to defend clients whose cases he did not have time to try. Holding onto his contract depended on, among other things, expediting the process. If he got stuck on one client, he couldn't push the rest through. The judges expected him to perform—one had a motto, "Slow justice is no justice"—and could complain to the county commissioners, who had a lot of influence with the committee that awarded Surrency's contract.

Outsiders and a few insiders, such as the head clerk and Surrency's former paralegal, saw him as the quintessential "meet 'em, greet 'em, and plead 'em lawyer" who met his defendants minutes before they would face the judge and who, by then, had few options but to plead guilty. Even so, Surrency insisted he was helping people. He saw himself as a man of experience who was defending the poor. He helped extract the innocent from the system and shepherd the guilty through an imperfect and unjust world.

When I arrived at the Greene County courthouse just before nine in the morning to watch Surrency in action, he was trudging up the stairs to the courtroom. He had red tousled hair and wore a loose grey suit. The old courtroom, with its ceiling fans and creaky floors, was packed. Those who didn't have a seat overflowed into the hallways outside. Surrency looked distracted and then defeated as he saw the crowd that awaited him. Some, waving papers, laid into him with frustrated questions. Many had phoned him about their cases but had not heard back, or had spoken with him briefly and been told to meet with him before court. They were swarming around him like gnats. "Everybody back up. Back up," he said. "I'll try to get to talk to all of you before you go to the judge."

I had come on the first day of "trial week," the term of court when this rural court attempts to resolve cases that have built up over the previous quarter with jury trials. The label is a misnomer. In four years, Surrency had taken only fourteen cases to trial out of 1,493; he won five. The rest of the cases he managed during that period—more than 99 percent—he plea-bargained. In this particular session no cases went to trial. People either pleaded guilty or had their cases rescheduled, a drill that took only two days. There were 142 defendants on the court calendar and 89 were Surrency's. In a flash, it seemed, forty-eight of his clients rose from the rickety dark wooden benches, one after the other, to plead guilty. After the first day I spent in court observing him, he announced, "We have successfully done a ten-page calendar in one day!" For Surrency, speed meant success.

In court, he would yell out a client's name, like the hostess at a restaurant clearing the wait list. "Mr. Jones, are you here?" Then he would peruse the list of plea offers the prosecutor had given him and tell his defendant how much he or she would have to pay in fines or serve in jail time. If the defendant didn't want to plead, the matter was held over until the next trial week. Surrency theorized that the longer a case dragged on, the more likely it was that incriminating witnesses might forget what had happened. His job had devolved into this: Plead guilty or come back another day.

Can a defense lawyer plead virtually all his cases and still be doing a decent job? In assessing the quality of a lawyer's work, the number of cases he pleads out is less significant than the amount of attention he gives to each one. What is required of him is not necessarily research in law books, but investigation and client contact: initial interviews about what led to the arrest or the charge; discussions, for example, with the prosecutor's witnesses to assess their strength, or with the arresting police officer; perhaps a review of any forensic reports or psychiatric evaluations. What's needed is a range of basic inquiries involving phone calls or brief meetings that go toward deciding strategy for everything from bail setting to finding evidence.

Surrency had little time to talk in detail to his clients, and so he often had limited information to use in their favor. It was thus difficult for him to bargain with prosecutors to secure a more lenient sentence, nor could he produce the ultimate trump card: a willingness to go to trial when his clients claimed innocence. Many of them risked losing their homes, children, and livelihoods if they pleaded guilty, and yet his actions remained the same: His caseload often made it hard for him to clarify the facts—for example, whether his client had been the ringleader or had acted without intent or was guilty of a lesser crime—which is the kind of information that can mitigate the severity of a sentence or get charges dropped in negotiation.

Part of Surrency's problem was that his contract did not fund investigations or expert witnesses. For these, Surrency would have to ask the judge to provide funds or just lay out the money and then ask for reimbursement, which he didn't like to do. He didn't want to get people riled up about spending the county's money. Moreover, he claimed not to need these resources, anyway, because most of his cases were "pretty open and shut." Under the weight of too many clients to represent, he seemed to have lost the ability both to decide which cases required attention and to care one way or the other.

Defendants, of course, didn't like Surrency's way of doing things. The then-clerk of the court, Marie Boswell, had received many complaints, but none had been formally filed. Instead, those accused of crimes

banded together as if they were on one team and their lawyer on another, at times passing around advice, and a few proclaiming that the best solution was to represent themselves. I spoke with one woman, in her mid-twenties, smoking with her friends outside court, who was there on charges of selling cocaine. She dug into her savings to hire her own lawyer. "He meets with me. He talks with me about the case," she said, as if this were exceptional.

H,[5] another defendant, twenty-eight years old, a heavily built black man with a shaved head, was sitting in the back row of the courtroom, charged with aggravated assault and battery of his boyfriend. He said he had never been in trouble with the law before. The crime, which he did not dispute, involved hitting his lover with his car after he learned that the victim had knowingly exposed him to HIV and now H had tested positive. "I guess I panicked," H says. "A lot of emotions were going through me."

H's explanation constituted a defense. But Surrency never returned H's phone calls. "I bet if [his clients] all lined up in a lineup he couldn't pick a person out," H said.

Surrency, I found, was resolute in his defense of himself. He did not allow for the prospect of having ill-treated his clients. "Nobody was treated bad," he said. "Nobody could say that they didn't have their day in court." But in his mind, it hardly mattered since most defendants wanted to plead guilty from the outset, whether they had or had not committed the exact crime with which they were charged. And if he went to trial rather than taking the plea, he risked a judge giving the maximum sentence. Plus, pragmatically, he said, people wanted to move on. The employed wanted to avoid missing work (which could mean days if the case was postponed over and over), while the unemployed found coming to court burdensome. Many didn't have cars, and there was no public transportation in Greene County. "A car don't run by itself," said one woman I met, who had been charged with committing aggravated assault with a heavy meat grinder. She had paid a friend ten dollars for a ride.

[5] "H" asked to be called by a single initial to maintain his privacy.

More often than not, what a defendant really wants is what Harvard Law School professor Charles Fried calls "a special-purpose friend," an attorney who, perhaps with a hand on the client's shoulder, "acts in your interests, not his own; or rather he adopts your interests as his own," guiding a client through the process and defending him against injury.[3]

This was not Surrency. Witness a conversation between him and a client, a woman in an orange prison jumpsuit.

"I know I'm pleading guilty," she said. "But I don't know why."

"Well, we talked about that," he said.

She shook her head. No, they hadn't.

"Don't you remember when we talked?" said Surrency, as he flipped through a file.

"We *never* talked," she said, calm and resigned, mocking her lawyer as if she knew she would get nothing from him and just wanted him to admit as much.

Rejecting this complaint, Surrency told me that he talked to all his clients at some point, but that the average defendant would usually protest that he or she didn't get enough time. Clients seemed bottomless in their need for attention. "You have to draw the line somewhere," he said.

It seemed that after seventeen years, he was exhausted—by the job and the system. As Surrency put it, the local governing agency that hired him, the Greene County Board of Commissioners, "didn't want these people"—indigent defendants—"to get an even break just to start with. 'They are guilty anyway, what do they need a lawyer for?'—that is their attitude today. There is really a consensus among the local people paying their taxes that these people don't need any defense, much less a quality legal defense."

And so it went. Frequently, Surrency was not even in court when his defendants pled. He'd stand in the hallway talking to other clients. Another lawyer, Rick Weaver, who knew even less about the cases, would often take his place. Surrency regularly paid Weaver, a former prosecutor, six hundred dollars for one day of work, which allowed Surrency the freedom to communicate plea deals to his clients while

Weaver stood before the judge. Surrency would talk to the prosecutor to receive the plea offer, then he would pass it on to the client, often on the day of court. The next step was sending the client, with his file, to see Weaver, who would accompany the accused as the plea occurred before the judge.

An attorney who is present in court and armed with specific information about a case stands a good chance of influencing the outcome for his client. Nevertheless, Surrency, in a letter that recapped his workload to the local government budget committee, wrote that there were times "when an attorney needs to be in two places at one time and Mr. Weaver has solved that problem." He maintained that "the trial judge and the District Attorney were very pleased with the addition of Mr. Weaver to the business of the day."[4]

Weaver stood up awkwardly beside Terrical Lashay Porter, who was in court on drug charges. Porter, in her early twenties, came from a family in which two of her uncles, as well as her brother and her mother, had served time for drug crimes, including trafficking or selling. On a search warrant based on her brother's conduct, the police had found a bag of marijuana that Porter admitted was hers. "It was in my bedroom," she told me; a friend had given it to her after a party. She was charged with possessing more than an ounce of marijuana with intent to sell—a felony for which the law mandates a maximum of ten years in prison. Porter had never been arrested for a crime before.

After the charge, she had heard nothing about her case for two years until the day before her appearance in court, when a neighbor brought her a subpoena sent to an old address. Porter raced to court early, but Surrency had too many people around him to talk to her. When their turn came to meet, she learned that the prosecution was offering her five years of probation on "conditional discharge"—a special, one-time deal for people charged with drug possession as a first offense that resembles the "first offender" law in which a felony record is dismissed and discharged—with no conviction, if the "terms or conditions" of probation, such as paying a fine and seeing a probation officer once a month, are met. If, however, Porter got convicted of another crime—*any* crime—during the probation period, a judge could nail her with the maximum sentence for her original offense. Given that her family was clearly on the police radar, Porter might well get arrested, even for something as minor as driving without a license and she could conceivably end up getting sentenced to a full ten years. The risk seemed not worth it to Porter. She said she told Surrency she would rather accept the five years of probation, but without the conditional discharge, even if it meant a permanent record instead.

Soon after the meeting with him, Porter stood before the judge. She looked nervous. Her foot was twitching. She was sweating. Rick Weaver, a lawyer she had never met, stood at her side. Surrency wasn't there.

The prosecutor described Porter to the judge. "We believe she is much less involved in all of that than her mother and her brother and her uncles," he said, though he described her home briefly as "a place to buy drugs" and her mother as "the main one operating out of there." He then explained the offer of conditional discharge he was making to Porter. After, Judge Hulane George began a "colloquy" to explain to Porter her rights. She asked if Porter understood that she had the right to plead not guilty and demand a jury trial.

"Yes, ma'am," Porter said.

Did she understand that she was waiving her rights, including the presumption of innocence, the right to subpoena any witnesses, the right to a lawyer at trial?

"Yes, ma'am."

Despite Porter having told Surrency that she didn't want to take the conditional discharge gamble, the judge informed her that she was pleading under the conditional-discharge provision. "Do you understand that under this particular provision of the law, in five years, you will have no felony record? Do you understand that?"

"Yes, ma'am," Porter said.

"But if you get into trouble I could come back and sentence you to what is left of your five years. Do you understand that?"

"Yes, ma'am."

"All right, do you want to plead under conditional discharge?"

"Yes, ma'am."

"Do you freely and voluntarily enter your plea of guilty to the charge against you?"

"Yes, ma'am."

"You are represented here by Mr. Weaver, who is with you. Have you been talking to Mr. Surrency or Mr. Weaver?

"Mr. Surrency."

She then asked Porter if she had any problems with Mr. Weaver and if there was anything else she wanted Surrency or Weaver to do.

"No, ma'am," Porter said.

"Anything you want to say to me before I rule?"

"No, ma'am."

"All right. Mr. Weaver, is the sentence recommendation the State made the same one to which you and your client agreed?"

"It is, Your Honor."

"Have you had enough time to discuss this case with her?" Judge George asked Weaver.

"I would like about thirty seconds, if I could, just to make sure," Weaver said.

He and Porter conferred. And then he stepped forward: "I do not believe she is interested in the conditional discharge," Weaver said. "I don't think she fully understood."

Porter looked panicked. "I told Mr. Surrency that I didn't want to be under that," she said. "The first offender."

"But this isn't first offender," the judge said.

"But it operates exactly the same way, Your Honor," Weaver said.

The judge turned to the prosecutor. "It's my understanding, I could only sentence her to what's left on five years rather than the first offender up to ten," she said.

The prosecutor had to correct her. "I think you could sentence her up to the total amount she could have received."

The judge said, "Well, she said she doesn't want it."

"Well, it'll take us a minute to redraw the sentence."

Porter, nervous and disoriented before the judge, said later that she didn't understand what she was agreeing to. "I had never been up there before and everything was kind of moving together," she said of the panic.

The judge seemed confused and began to go on in a way that had little to do with Porter's case: "But this is not the time to impress me! It's the time to be honest. You know, if you don't think you can be successful on it, you're the one who'll have to go to prison! Not me!"

Maybe the judge was trying to be tough or thought Porter was intentionally playing games. Later, she explained that she had been especially irritable because she had a horrible cold, and because she had been forced to backtrack when she had a large number of cases to get through.

In court, Weaver tried to take control. "Your Honor, what I advised her is that if she is in a position where she is around drugs, whether they're hers or not, she can face a very real possibility of taking a hit for that."

But the judge was not listening. "Do you have children?" she asked Porter.

"No, ma'am."

"Do you work?"

"Yes," she said.

"Well, you need to get out of the environment or you're going to end up in prison . . . What color are the women's prison uniforms anymore?"

Porter stood there while a lawyer shouted out the answer.

"Brown? Are they brown? Not a pretty color!" said Judge George. "I don't think you want to go. But that is your decision."

In the end, Porter got what she wanted: She pleaded guilty and received five years of probation—not under conditional discharge.

Outside the courthouse, she bawled. She had no idea that her lawyer could have made the experience easier for her. A lawyer in a different position might have presented arguments to ameliorate the punishment

or advance Porter's cause. She would have gotten considerably more than a five-minute conversation before court and would not have been exposed to a nuts-and-bolts consultation in court. But Porter wasn't angry at her lawyer; she seemed hurt by Judge George. "The judge told me to get out of the environment but I have no place to go," she said. "I don't want to leave my sister. I am the only one taking care of her." Another lawyer might have conveyed these concerns to a judge, as well as the plea Porter had wanted, not let her panic and nearly plead to something different.

In her hand, Porter had a pink slip that listed the costs she had agreed to as part of the plea: a $500 fine; $50 for the police officers and prosecutors training fund; $50 to the jail fund; $25 to the victims assistance program; $250 to the drug fund; $50 crime lab fee; $23 per month for the probation supervision fee; and one hundred hours of community service. Somehow, it amounted to $75 a month for the next year, which she could pay off if her boss at Wendy's, where she worked as a cook and cashier, gave her additional hours. "I got to find me another job," she said.

Back in the courtroom, another case was breaking down. This time a young woman in a leather blazer was talking in muffled sobs with the judge. While Weaver was looking for the file, Tasha McDonald stood before the judge alone. She was asking for her case to be continued.

"How many times has he talked to you?" Judge George asked about Surrency.

"Once," said the woman. The judge wearily announced that her case would be rescheduled to a different day.

In the hallway, McDonald was crying hard. When she calmed down she told her story. A single mother of three young girls, she freely admitted to having applied for a Sears credit card in the name of a colleague with whom she worked at a luxury vacation community. McDonald had the card sent to her own address, made herself a secondary user, and then bought $1,895.35 worth of merchandise: beds, sheets and pillowcases, a CD player, a microwave, a toaster oven—"everything for the house." She also bought a small trampoline for her eldest daughter, a ten-year old, who had just been diagnosed with scleroderma, a hardening of the skin that can weaken limbs. The trampoline, she said, was therapeutic, to help her daughter regain muscle control and mobility.

McDonald had been charged with financial identity fraud. She knew she had to be punished, but had only found out from Surrency in the hallway that the prosecutor wanted her to serve 90 to 120 days in a detention center or jail. If incarcerated, she feared she would lose her job, her mobile home and car, both of which she was still paying off, and become a burden to the state. "If I do four months in boot camp you know where my home is going," she said. She had already repaid Sears for the goods.

There were alternatives. Instead of jail, she could be sentenced to do community service or to attend one of various halfway houses or work release programs designed so people convicted of minor felonies can keep their jobs if they have them. She could also have been sent to a diversion center, which collaborates with minimum-wage employers like processing plants or fast-food restaurants. Inmates work during the day to pay for room and board, and then, if there is money left over, to pay fines, a mortgage, or to support family members.

Surrency contends that the results would have been the same, no matter how much investigation he did. However, if he had argued that McDonald shouldn't be taken away from her children, due to her circumstances, she might not have ended up facing any jail time at all. Certainly prosecutors and judges are likely to be more sympathetic to a defendant whose motive comes down to poverty or an ill child. Yet the odds that the judge or prosecutor knew about McDonald's particular situation were slim. You could hardly blame them.

On the other hand, maybe you could. Weren't there questions a decent prosecutor could ask if he suspected defense counsel was asleep on the job? Wasn't it apparent that Surrency was overloaded to the point of neglecting his clients? I started to get curious about the prosecutor and just how complicit he was when it came to pushing defendants through the system. It seemed like most everyone who appeared before

the judge was confused and uninformed. What was the prosecutor's role in all this?

Wilson B. Mitcham Jr., had been the assistant district attorney in charge of Greene County since 1993 and had appeared in court with Surrency hundreds of times. They seemed on good terms with each other and with the judge. Often the courtroom felt like a private party, with the lawyers and judge huddled around the bench, preventing anyone else from hearing. It looked like they were teammates rather than opposing advocates duking it out before a neutral arbiter.

In an interview, Mitcham was surprised to learn of McDonald's situation. "I am shocked," he said, "because no one told me she has a disabled child." He was essentially admitting that he knew Surrency was doing a disservice to his clients by not discussing their cases with them. Still, he seemed defensive of their convivial rapport in court, noting that "even though we are cordial . . . we do have certain disagreements." But these were not enough to change the way Surrency conducted business. While Mitcham knew Surrency waited until the last minute to talk to his clients, he still maintained that cases were getting the attention they needed.

As for McDonald, Mitcham said he would look into it and possibly change his plea offer, which he eventually did. It turned out this was not her first crime of deception. A decade earlier she had received probation for using a bad check knowing it wouldn't be honored by the bank. For her identity theft she could have received a maximum of ten years in prison, but given his knowledge about her family, Mitcham asked the judge that she serve only the mandatory minimum of one year on probation and some time at a diversion center "until released by the center director." The center would allow her to leave on weekends to visit her daughters, who would be cared for by her mother.

For McDonald's subsequent court appearances, she fired Surrency and hired a private lawyer. Her case went before a new judge who seemed annoyed by how light Mitcham's negotiated plea was. Judge John Lee Parrott criticized McDonald for her premeditation—that she "went through too many steps" to commit the crime. "[I]'ve got some

doubts about whether I ought to let her off even this light," said Parrott before agreeing to the plea. "To be honest with you, most of the time I put people straight in jail," he said. "I'm giving you a chance to get your ducks in a row with your kids." Since he understood McDonald's circumstances, he made an exception. McDonald apologized to the coworker whose identity she stole. "[I] was desperate. I knew that she had good credit," she said. "That's why I used her."

McDonald said she ended up serving only two months in the Macon Diversion Center. There, she worked in a factory pressing shirts, which helped her pay off her mortgage on her trailer. She left on weekends to see her family, and also took care of all the various penalties and of her one hundred hours of community service. Most important, she wasn't whisked away to jail. McDonald is still incredulous at the way Surrency told her that she was going to jail. She wanted to ask him, "How could you be for me when you have never talked to me?"

In the case of H, when Mitcham was informed about the boyfriend who might have intentionally given him HIV, he recognized that H's crime might have been done "in the heat of passion." "I wish I had known," he said; he would have thought about it differently. Still, H had gotten a good deal. When Surrency hadn't returned his calls, H pulled some strings: He called a prosecutor friend in a different county who vouched for H as a good citizen. As a result, Mitcham had changed his original offer from five years in prison to five months in a detention center plus ten years' probation.

It is not explicitly the prosecutor's job to ask for more information than the defense has provided, though nothing precludes him from doing so, either. The ethics are murky. Codes of professional responsibility require a prosecutor only to "do justice" but provide little guidance about what this means.[5] In theory, a prosecutor who realizes that a defense attorney isn't performing aggressively could ask him to improve his performance or else withdraw from the trial. If that doesn't work, he could tell the judge or make a motion to disqualify counsel, though this is unlikely as lawyers view "most reporting obligations with distaste."[6] In reality, many prosecutors consider defense attorneys a nuisance and

don't think they need to know anything besides the crime and a defendant's prior record to assess sentencing recommendations.

But Mitcham was not a stereotypical, aggressive prosecutor who invoked protection of the community as his top priority. He sometimes helped defendants, as he saw it. Like Surrency, Mitcham had hundreds of cases piled up in his office; he seemed to think that by putting them off he was showing compassion to those charged and, in a complicated way, doing God's work. But he admitted that he couldn't keep up with his workload and had a problem with procrastination. "I am an administrative nightmare walking," he said. Mitcham had a rather unusual view of how and why he did things. "I was raised to be a good Christian," he said over lunch at Subway, as tears welled in his eyes and he stopped eating his turkey sandwich. He had begun his career as a defense lawyer then left to become a minister. But he found this path didn't suit him, either; the politics of the church bothered him. In the end, being a prosecutor was the best way he could find to show his forgiveness. "You can mete out a lot more mercy as a prosecutor than as a defense attorney," he said.

At the same time, he was cautious about appearing too compassionate on the job. "I have a bleeding heart, but I try to disguise it. I don't want anyone to think that I have a hair-trigger to dismiss a case." With good reason: If he showed his mercy openly, he could seem soft on crime and get fired. Prosecutors are supposed to be strict and aggressive. To solve his quandary, Mitcham found a silver lining in his procrastination problem. By delaying cases and letting things slide, he compensated for the defense attorney's failure to defend his clients—no one defends, no one prosecutes, and, as it turns out, no one benefits.[7]

Surrency and Mitcham had created a stable but dysfunctional relationship; and Judge George, who had presided over the two lawyers for years, seemed to compound it. A former schoolteacher, she wanted to keep things orderly. "I like to clean things up," she said. At the same time, under her authority, the lawyers had been permitted to treat the dizzying disarray of the courtroom as if it were the norm. She claimed that the day I visited had been one of the worst, insisting that in other

trial weeks she took more care of the defendants. However, the other Greene County judges I observed during trial week seemed to have similarly bad days. They all blamed the problems on sheer volume, a lack of funding for public defense, and on the community's reluctance to spend money on the town's poorest and least law abiding. They also seemed resigned to an unwritten obligation to put the court on auto pilot—to make justice quick and easy and to dispense with the complications that accompany a true exploration of the facts. Judge George conceded to acting out of pressure. The jails were overflowing, so she needed to move cases forward. "Part of it is that you're standing up above everyone, in front of hundreds of people, all of whom want their cases to be number one," she said.

Besides its ease, auto pilot has certain advantages for the judge. If, for instance, a defense lawyer actually put forth arguments, the judge might have to make difficult calls about issues like admitting questionable evidence. Some decisions might be unpopular. Defendants considered guilty in the public's eye might have to go free. Doing justice would become much harder—both in and outside the courtroom—and messier. It was easier to take pride in maintaining the routine and the schedule. "[Too] many judges, consciously or subliminally, prefer the less aggressive advocate who cooperates in disposing of cases and helping to clear the judge's docket," writes Vanessa Merton, a professor at Pace Law School.[8]

In Greene County, there were additional incentives for judges to preserve the status quo. There, the opinion of the Board of Commissioners (the five citizens who control the county budget) carries a lot of clout. While judges are elected and often run uncontested, they are mindful of the influence of the commission and the sheriff, and of the possibility that these powerful bodies might support an opponent in the next election. Judges throughout the state are sensitive to the costs of a trial. Judges do not want to seem wasteful. "I'm a politician," said Judge James Cline, who also sat in Greene County. "Every four years I want fifty-one percent of the people to vote for me."

Like Surrency and Mitcham, Judge George denied rushing cases

forward against the defendants' interests. When asked if being elected to her position every four years had anything to do with her need to please, she said no. She emphasized that what I saw was unusual. "It was just a god-awful day." She did, however, feel badly about the impression she had made. "The whole thing was hurry up and get it done. I fault myself for allowing myself to get pushed around and I am better about it."

With Surrency, Mitcham, and Judge George faulting the system, each other, and occasionally themselves, the court began to seem like a runaway train. It was hard to tell who was at the controls and if anyone there was awake.

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Of course, Greene County is not unique. The real issue here is the poor quality of defense representation throughout the nation. There are three basic systems for providing attorneys. It is difficult to rank them comparatively by quality since all three are flawed and tend to come apart when underfunded, poorly staffed, or subject to the whimsy of judges and prosecutors.[9] Still, one can quantify the differences among them. The arguably best system is called the "public defender" structure, in which full-time defense lawyers, employed by the state, are provided with central offices, secretaries, computers, investigators, and legal research tools.* A public defender system aims to put the defense on equal, or near-equal, footing with the prosecution. In the more bountiful programs, public defenders are overseen by a statewide agency that sets uniform standards and expectations for counties or circuits. A variation on this program contracts with a non-profit program funded by public money and other sources.[10]

The second system is a panel program, in which private attorneys

* In this chapter, a public defender system refers to the ideal form where the public defender works full-time with equal or near-equal resources as the prosecutor. At other times in this book, people use the term "public defender" to refer to an attorney or an office that represents the poor part-time in addition to their private practices.

on a pre-approved list are appointed and paid to represent indigent defendants as needed. The idea, in theory, is for an independent agency or clerk to select lawyers from a list who want and are qualified to do the work. In many jurisdictions, however, a judge makes the assignments, which may affect the independence of the attorney, who depends on future assignments from the judge for his or her income. Lawyers who line up for assignments are paid by the case or by the hour (for which there is usually a fee cap) and can become accustomed to the quick disposal of cases. And in some places an attorney who is totally unqualified to do criminal work—an expert in real estate or matrimonial law—will be appointed unpaid as part of community service to the local bar association.

Further, private lawyers with paying clients may not want to make time for poorly funded cases. For years Virginia had the lowest fee caps in the nation for indigent representation.[11] In March of 2007, the legislature, under threat of a class-action lawsuit led by the Virginia Fair Trial Project, increased the fee cap for appointed attorneys and authorized judges to waive the caps, subject to a higher court's approval. However, the amounts are still meager and judges are unlikely to intervene. In 2007, the caps were as follows: $2,085 for clients charged with felonies that carry a sentence of twenty years to life, $600 for lesser felonies, and $240 for misdemeanors and juvenile felonies.[12] A lawyer who wants to prove his client's innocence could easily spend those amounts on the investigation alone. Prior to the fee hike, one Richmond attorney admitted that the fees were so low he reserved nearly all his time and labor for paying clients: Looking for witnesses, considering discovery, or using outside experts were impossible with so little funding. He tells court-appointed clients, who accounted for about 20 percent of his income, "to investigate the case themselves, look for witnesses and if they find them bring them to the office or to court."[13]

The third option for indigent defense is the contract system, in which one attorney or several contract with a county or circuit (group of counties) to represent a fixed or maximum number of cases for a

fee, as with Robert Surrency in Georgia. Many counties prefer this method because it allows them to budget public defense for the entire year. It's also easier to administer than a panel program, which requires keeping track of many different lawyers and a complicated payroll.

There is much debate about which system is preferable, especially among county officials, who want to save money. Houston County in Georgia, for example, has employed full-time public defenders for decades. Three superior court judges, in a letter to their county commissioners, explained why the county shouldn't change to a less expensive contract system.

> Having a public defender system means having a group of lawyers who are obligated to handle the county's indigent defense work full time. . . . [P]rivate attorneys under a contract system . . . would simply be operating with a lot of competing interests which a public defender does not have. . . . It is naïve to think that any private attorney in this area would, or could, completely close their private practice and handle only the indigent contract cases. Expecting that attorney to neglect "paying" clients, or to make them a lower priority so that he or she may give first priority to indigent cases is equally implausible. . . .[14]

Another problem with the contract system is the implicit power it gives judges over lawyers. In a report by a commission convened by the Georgia State Bar to assess the state's indigent defense practice, the findings were that "[s]everal court-appointed and contract attorneys expressed concern that if they were viewed by some judges as zealous advocates—e.g., if they filed several motions in one case or demanded trials—they ran the risk of being removed from the *ad hoc* counsel appointment list or denied a future contract."[15]

So for the panel and contract systems, the problem is one of incentives. If these defense attorneys are going to be paid poorly and if, for

what little effort they make, the consequence might be dismissal, they have little reason to work hard on an indigent client's behalf.

The better contract systems insist on quality controls, like limited caseloads and reviews of lawyers before awarding contracts. In San Mateo County, California, a contract attorney's fee will go up in a particular case that requires more work than is covered by a lump sum or flat fee. Also, lawyers have caps on numbers of cases based on a "weighted" study of how difficult they are; additional work is paid by the hour, with a higher rate for jury trials. For example, in a misdemeanor, a lawyer is paid a case fee of $190 plus $80 for a pretrial conference; if an attorney goes to trial he receives $125 per hour plus a per diem of $260 for preparation work. "By the time you add it up you're getting pretty much what retained lawyers get," said John S. Digiacinto, the county's chief defender. "We are able to keep our staff."

The worst contract systems, like Greene County's, feature a part-time lawyer who is hired based solely on how cheaply he is prepared to do the work. By 1985, even before Surrency took over the job, such "low bid" or "fixed fee" contracts had been condemned by the American Bar Association (ABA) House of Delegates, the policy-making body of the organization, for compromising the integrity of the justice system.[16] Unfortunately, local governments are often unaware of what the ABA says or consider its rulings advisory. In 2000, a report on the status of the country's contract defense practice by the Department of Justice's Bureau of Justice Statistics "noted a decline in the number of cases taken to jury trial, an increase in guilty pleas at first-appearance hearings, a decline in the filing of motions to suppress evidence, a decline in requests for expert assistance, and an increase in complaints received by the court from defendants"—virtually all of which described what was happening in Greene County.[17] Further, the county spent only $75.38 per case, the fifth lowest cost-per-case in the state.

Beginning in 1969, when adopting a plan for Georgia, the state legislature left it up to each county to determine which of the three systems to use. A decade later the legislature created the Georgia Indigent Defense Council (GIDC), which was based in Atlanta to oversee

the different systems. The GIDC issued 11 percent of the total monies used to run 152 of 159 counties statewide. Of the 152 counties, only 20 decided on full-time public defenders, seventy-three employed a panel system, and 59 used contracts as their primary method.[18]

In exchange for the money, the GIDC asked counties to adhere to a detailed set of guidelines. These guidelines fixed standards for how to determine indigence and mandated appointment of counsel within seventy-two hours of arrest or detention, among other things. The GIDC also required that a tripartite committee of three volunteers be responsible for enforcing the standards. The tripartite committee, however, lacked a staff and often included nonlawyers or local businesspeople who had no interest in meaningfully supervising the indigent defense program, other than approving vouchers. The GIDC might admonish a county based on an anecdotal complaint, but a county could ignore a reprimand at will. A report in 2002 by the Spangenberg Group, a research and consulting firm in West Newton, Massachusetts, which specializes in improving justice programs, found that in recent years, the GIDC had not refused to provide funding for any county "in part because it fears political fallout or possible complaints from judges and other local people" to the state legislature. The GIDC "has no teeth," the report stated.[19]

■ ■ ■

Traditionally, the country's legal apparatus favors the office of the district attorney. The states instinctively supported the creation of prosecutors' offices because of a political will to solve crime and punish those who commit it. By contrast, the need to provide counsel for poor people accused of crimes is a burden that the U.S. Supreme Court thrust on the states in the sixties. Thus with a more popular mandate, prosecutors tend to receive more money and resources. For instance, Congress spent $26 million building the National Advocacy Center in Columbia, South Carolina, to train prosecutors. There is a similar school in Reno, Nevada, for training state and local judges. No federally funded counterpart exists for defense lawyers. Also, the Bureau of Justice Assistance gives federal aid to state and local law-enforcement agencies (e.g. $170,433,000 through the Edward Byrne Memorial Justice Assistance Grant Program in 2008) with no equivalent moneys for the defense.[20]

Nationwide, prosecutors also receive more funding because they have a higher caseload. District attorneys (sometimes called state's attorneys or county prosecutors or county attorneys) represent the state in virtually all prosecutions, so the state foots the entire bill. But when it comes to defendants, the state pays only when they are poor and only for minimum defense. In California, for example, reports show discrepant funding between prosecutors and public defenders—for every $100 the prosecution receives, indigent defense receives an average of $60.90, which is on the high end of what most states provide.[21] A report by the Spangenberg Group in 2002 estimated that states and counties nationwide spent $3.3 billion on indigent defense;[22] whereas in 2001, the ABA reported that $5 billion was spent in prosecuting criminal cases in state and local jurisdictions—a $1.7 billion gap.[23] (Both of these statistics are dated and experts say the discrepancy is probably greater, but an absence of nationwide statistics exists.)

With such a difference in resources, even the "best" public defender offices, which have full-time professional lawyers, cannot protect attorneys from problems like high caseloads. Instead, the overload has prompted new oversight measures in several states. Broward County, Florida, for instance, with a $15 million budget, has a prestigious public defender's office, but in 2005 the head of the office announced, to the dismay of some judges, that attorneys could not plead defendants guilty at arraignment without first having some "meaningful contact" with them. "We will make every effort to meet with clients prior to any court hearings," a memo to judges stated from public defender Howard Finkelstein, according to the *Broward Daily Business Review*. "However, if such a meeting has not taken place, we are legally and ethically constrained from recommending any plea to a client."[24] What should be a baseline standard has become so hard to reach that special requirements are needed to enforce it.

If the GIDC was failing to notice the problems in Greene County,

others were not. Stephen B. Bright, the president and senior counsel of the Southern Center for Human Rights in Atlanta, had decided in the mid-1990s that Georgia's indigent defense system was so bad that his organization was going to keep challenging it until it was brought into line with the ideals of American justice. Bright, in his fifties, has made a career of championing unpopular causes. He became the director of the struggling Southern Center in 1982 and has often worked without pay in defense of people facing the death penalty and on litigation to improve prison and jail conditions throughout the South. The organization has eleven attorneys, an equal number of investigators, and a stream of student interns and volunteers.

The center is fueled by a profound sense of purpose and by Bright's inspiration. One staffer wondered when Bright ate, and then, one night at around three a.m., saw him downing an energy drink at his computer. For years, Bright had set his sights on creating a state-wide public defender system in Georgia with full-time lawyers. He toured clubs and community halls to arouse the public's interest, making speeches wherever possible. He told it like it is: People charged with crimes, no matter how small, whether they are guilty or not, are treated "like hamburgers in a fast-food restaurant." He discussed the defense attorney's need for independence from the prosecutor and judiciary "so that judges would not use lawyers for the poor as clerks to process their cases." He wanted to get rid of the hodgepodge system that contracted out defense for the poor and ended up with the likes of Surrency or worse. He sought more resources from the state and counties to train both new lawyers and existing public defenders.

Until the state made proper changes, Bright planned to expose and root out bad defense systems, one by one, by observing various courts in action and filing a series of lawsuits claiming violations of the state and federal Constitutions. I had learned about Greene County's problems from a series of phone calls with advocates in Atlanta, and when I told Bright it was one of the courts I was considering looking at, he said he had never been. I asked him to join me so I could get his perspective

on how this court matched up to others he had seen. Even though he had appeared on *Nightline*, on the radio, and in various newspaper articles, legal professionals knew him by name but not always by face. In Greene County, Bright slipped into Judge Hulane George's courtroom unnoticed. He sat with a yellow legal pad in his lap, at the end of the first row, near a few other lawyers who had cases that day.

Bright believes that change begins on the ground, in the courtroom, and he doesn't hesitate to speak his mind, much to the annoyance of judges, who feel like he lectures them when it should be the other way around. As the day went on, the proceedings in Greene County became harder to hear. The less people could understand, the more frustrated, bored, and restless the audience became. Spectators shifted loudly in their seats. They whispered. I sat a few people away from Bright, attempting to take notes. The people couldn't hear a thing, and Bright sensed their frustration.

He leaned over and whispered, "Why don't you go and ask the judge to speak up?" I laughed. I considered myself an observer and wanted to be as inconspicuous as possible. I was also embarrassed to make a ruckus. This was court, after all.

I went back to straining to follow.

Suddenly Bright was on his feet. "Your Honor," he said in a deep, loud voice. "This is a public hearing and there are people here who want to listen to what is going on. So if you wouldn't mind speaking up that would be much appreciated."

Judge George looked like she had been slapped. Bright didn't seem like a commanding man, more like the lanky Kentucky farm boy he had been growing up. He had a wholesome face and full red hair parted to the side. His clothes didn't match his pedigree—he teaches at Harvard and Yale law schools in his free time but prides himself on buying eighty-dollar suits on the road. A deadening, somber silence followed his interruption.

"Excuse me, could you please come before me? I would like to talk to you," Judge George said.

"No, ma'am, that's fine. I don't need to appear before you. I will stay right here. I am just an observer. And I would just appreciate it if you would speak up. Thank you, ma'am."

Bright sat down, refusing to budge.

"Sir, I order you to come stand before me," Judge George said.

Bright climbed his way over the packed row. With gravitational force, whipping himself around to play to the audience, he took control of the courtroom.

"Your Honor, my name is Steve Bright and I am a lawyer visiting court today from Atlanta. I am here to listen to this public hearing. People have a right to hear what is going on. We're all here, missing work, having left our children in the care of others. And we want to hear what is going on in court today. You are denying us our right to listen to a public hearing. So if you wouldn't mind, please speak up."

The exhausted, twitchy crowd was now focused. Someone started to clap, and soon the entire courtroom was applauding with cries of "Amen" and "That's right," and "We can't hear anything," and "Thank you, sir."

"I have this viral junk in my throat," Judge George said. She did seem tired. Alarmed, too.

For the rest of the day the judge used a microphone and would tap it regularly asking, "Can everyone hear? I just want to make sure. There seems to be a lot of interest here today."

In a court where people had grown accustomed to being ignored, merely asking the judge to speak louder was blasphemously glorious. It shook things up so that someone in the audience shouted out, "We can't hear you," at Surrency, who was now also taking the heat. Surrency, tensely flipping through his notes, had to respond to the audience, most of whom were his clients. "Can you hear me now?" he said, facing the crowd.

"No!" people shouted.

Judge George clapped her hands together. She used to teach school, she told the crowd, and couldn't stand noise.

Bright had become a celebrity. In the breaks, people patted him on the shoulder and shook his hand in gratitude.

"I got something to tell you," said a man in denim overalls, and then he launched into the complexities of his case.

"Come talk to me next," said a woman hitting Bright on the arm.

■ ■ ■

Bright was not the only one trying to accomplish reform on the ground. There were courageous whistle-blowers in Greene County, but unlike Bright, they could not simply return to Atlanta unscathed; they had to stay put, where they didn't fare so well.

Cathy Crawford, who was in her forties, had started working for Surrency right after obtaining a degree in paralegal studies. She found his papers were "just thrown in a box. I remember looking at this system, or lack thereof, and wondering: Is this man a complete idiot or is he just so brilliant that he can get away with this and still do his job?"

Yet she liked Surrency. He had an easygoing manner. When they carpooled to court they sang, "We're off to see the wizard." She would laugh.

In court, when the line to see Surrency sometimes snaked down the hallway stairs, he would announce that clients could conference with either him or Crawford, as if they were both lawyers. Crawford began to listen to their stories. She advertised office hours when people could come talk about their cases. "I had a tremendous turnout three days a week," Crawford said. "I would pull reports and look at them. We had people sitting in the hallways to see me." When she tried to talk to Surrency about the cases, however, he often didn't return her calls. She didn't see him in person because she didn't work out of his office. "You could never find him," she said.

Crawford also noticed that Surrency rarely filed motions to ask the court for certain pre-trial hearings. These usually involve requesting that evidence, a statement, or identification be excluded. Judges don't grant them very often, but that's not the point. Motion practice is a way

of discovering information about the prosecutor's case. For example, a police officer might testify at arraignment and then the defense is entitled to his reports and has the chance to cross-examine the officer about his practices. "Any investigative leads unearthed in this manner are most useful if they come sufficiently early so that the defense has ample time to follow them up thoroughly," reads a seminal treatise on how to defend a criminal case.[25]

Sometimes, when other lawyers' motions were being heard, Surrency would ask Crawford to come to court and sit in with him because the county commissioners might come by. "I said to him," Crawford recounted, "You're willing to sit there for a whole day just so someone will think you're working?" The answer was, apparently, yes. Crawford advised him to start filing some motions of his own and turned to the codebooks. She drafted up some documents based on sample forms she found and had Surrency sign them. Then she filed them with the court.

Crawford's next "assignment" was to begin visiting with the prosecutor alone. "Don't bother calling Surrency," she'd tell Mitcham, explaining, presumably on Surrency's behalf, that he would rather see ten than fifteen years on probation, or, for example, that he was considering a motion to suppress evidence.

Mitcham, who sat on the board of governors for the state bar, the governing body that recommends changes to ethical standards to the state supreme court, claimed that he "didn't feel comfortable negotiating with Cathy." The Georgia Code of Professional Responsibility prohibits a lawyer from assisting a non-lawyer in the unauthorized practice of law.[26] An advisory opinion by the state disciplinary board explains, "competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment." Among those duties that the board specified should not be delegated to paralegals are "negotiation with opposing parties or their counsel on substantive issues in expected or pending litigation."[27]

Yet Mitcham negotiated with Crawford anyway, risking sanction or disbarment. "She was very zealous on behalf of her clients," he said.

Mitcham claims Crawford was simply a messenger in a negotiation with Surrency, but it is unclear how often Surrency was involved. After some back-and-forth, a plea deal would emerge and Mitcham would write it down. Then, according to Crawford, she would put the terms in a folder, which Surrency would open in court. Surrency would stand in court with Crawford while she related the facts in a defendant's case.

"I was actually asking her to come close to the line in order to handle caseloads," Surrency said of an ethical boundary he knew existed. "There were only so many hours in a day. . . . I was working sixty hours a week. A lot of it was homework—I was talking to the families."

Surrency believed he was overworked. But it was hard to establish whether he actually had the time to spend on cases or not, whether he was overloaded, lazy, or something else. Mitcham felt that Surrency's competence was not an issue. "He is a bright young fellow and operates well on his feet, but his discipline and preparation may have been lacking." And in truth, Surrency's performance kept with the environment in which he worked, where just getting by, making do, pushing cases through was considered acceptable. Mitcham recalled that at one point Surrency didn't even bring files with him—relying on his memory for loads of cases, a hard if not impossible task for anyone, given the enormous number of dates and legal charges. Yet he was allowed to get away with it.

Cathy Crawford complained about Surrency's disservice to his clients to Marie Boswell, clerk of the court. Boswell had watched Surrency for hundreds of hours, and concluded that too many people were being railroaded into pleading guilty. "I can't get in touch with him! I can't get in touch with him!" she said, imitating the calls she received from his clients.

Boswell wrote to Michael Shapiro, then the executive director of the GIDC, and went to a county commission session as well as to the tripartite committee, which was supposed to ensure the competence of indigent defense attorneys. Boswell expressed her concern that Surrency was not meeting with his clients before court and rarely visited the jail. She said that judges expected little unless Cathy Crawford was

in court.[28] According to a letter from Shapiro to Boswell, the tripartite committee agreed to "re-energize the current defender" or hire someone to replace him to improve services.[29] Despite this, no action was taken.

Walter "Bud" Sanders, vice-chair of the Greene County Board of Commissioners, also served on the tripartite committee. Sanders didn't recall a need to overhaul the office. "The only complaints I used to hear about were from the attorneys who said that the inmates were having trouble getting in touch with [Surrency]," he said, which he felt the committee had addressed by setting up a local phone at the jail. Sanders didn't hear of "real problems . . . Judges never complained. Many judges never complained," he said.

Crawford confirmed that no one complained. The only reason she was allowed to do the lawyer's work that she did is because "the system allowed it—the judge, the DA, the probation officer, nobody cared." So she took her complaints elsewhere, to the local indigent defense committee—"and they listened to me rant." Not that it made a difference, she noted. Crawford left her job soon after she complained; though the circumstances of her departure are unclear, there appear to have been financial issues. "It got to the point where I had to beg for my check," she said.

Boswell quit, too. She wanted no part of what was happening in Greene County's courts. "The commission thinks that if you don't talk about it, it is going to go away. But this is not going to go away. It's only going to get worse."

What was happening was routine injustice. Before she took a new job as a clerk for a judge, Boswell predicted that Greene County would "get hit with a lawsuit that is going to rock the world."

* * *

To its credit, the State Bar of Georgia did appear to recognize something of the problem that existed in Greene County and elsewhere. In 1988, the bar had established an Indigent Defense Committee, a group of volunteer attorneys who were supposed to coordinate lawyers and

other agencies to help provide better representation and equal justice. Unfortunately, the committee had not done anything for years. But then in 1998, the president of the bar asked C. Wilson DuBose to take over.[30] DuBose worked in the picturesque town of Madison, Georgia, about a half hour from Greensboro, and didn't seem like the sort of man to champion the rights of the poor. He had almost no experience with criminal law. He did corporate work and civil litigation and had a conciliatory nature. However, DuBose wanted to be more involved with the state bar and agreed to become chair of the committee with no real idea of what he was getting himself into.

Over the next year, his committee interviewed various legal professionals and realized that the system was not what it should be. DuBose was extremely moved by what he heard. He discovered that people were being treated in a way that violated "common decency," and which put the integrity of the state bar at stake. Moreover, as he saw it, the current system of providing lawyers for the poor surely violated the U.S. Constitution. "I am a Republican and Republicans care about the Constitution," he said. "The Constitution clearly says you have a right [to a lawyer] which was becoming meaningless if you can't afford it."

In the fall of 1999, the committee passed a resolution to ask the state governor and the chief justice of the Georgia Supreme Court to appoint a commission to investigate Georgia's indigent defense and make recommendations for its improvement. "We believed that people of good will would listen and take action and respond," DuBose said. However, the Democratic governor at the time, Roy E. Barnes, didn't do anything with the resolution for twelve months. Ultimately, he deferred to then Georgia Supreme Court Chief Justice Robert Benham who by December 2000 had taken up the issue and decided to appoint his own commission.[31]

Meanwhile, the members of the state bar's committee had drafted what they hoped would be a simple resolution of twelve principles for the bar to endorse. Among the proposals were that the state rather than the individual counties absorb all indigent defense costs; that a single statewide body be established to administer a public defender

system; that the contract system be abolished; that resources be meted out equally between prosecutors and defenders; and that defenders be independent from local governing and judicial authorities.[32]

The principles went through various upper-level committees and took two years to be endorsed, a "dreadfully laborious process," said Emmet Bondurant, a civil attorney who was also on the committee. Bondurant, named one of the top ten lawyers in the U.S. by the *National Law Journal* in 2001, had been working for over forty years to improve indigent defense systems in Georgia, but was still surprised by how much resistance the committee encountered. He blamed a group of "recalcitrant judges" who had input as members of the bar and felt unjustly accused of being more interested in moving cases along than in caring about poor people accused of crime. The general feeling among judges was, "we are doing things just fine down here and don't need Atlanta," Bondurant said.

Superior Court Judge Lawton E. Stephens of the Western Judicial Circuit in Athens, Georgia, wrote a letter summing up the judges' concerns. He said that more state funding would improve indigent defense but that eliminating judges from appointing defenders and deciding their compensation would not. The bar commitee proposals, Stephens wrote, "removes the judge from the process to the detriment of the indigent defendant and counsel."[33] Stephens wanted control of assigning which defender got which case, since he knew better than most which attorneys were competent to handle serious charges, like murder, for example; he feared that attorneys would be randomly assigned. He took issue with the insinuation that judges did not care about competent attorneys. "That was a myth," he said.

While the bar commitee did its work, Steve Bright of the Southern Center was pursuing reforms of his own. For him, being aggressive was the only way to amend the system, and it often seemed like public-interest litigation—e.g., the federal lawsuits of the 1950s, '60s and '70s that forced state schools to integrate—was the only way to make it happen. At a symposium on indigent defense in 2002, just as the state was

considering essential reform, Governor Barnes noted in videotaped remarks that Georgia's indigent defense problems would not be solved overnight and called on conference participants to stay in the reform movement "for the long run."[34] Bright responded that while the governor took his time, new litigation would be "coming to a courthouse near you."[35] In fact, litigation was nothing new. The Southern Center had, since 1996, filed a number of lawsuits alleging that the state had defaulted on its responsibility to provide effective assistance of counsel to the poor.

Legal challenges, however, had to be precise and strategic to work. A 1986 federal lawsuit *Luckey v. Harris*, in which Bright was not involved, had tried to make changes too sweepingly. The class-action suit, which failed, claimed that Georgia's entire indigent defense system was "inherently incapable of providing constitutionally adequate services," and asked the federal court to implement standards and then monitor them throughout the state. But it was unlikely that any federal judge would find proof that all of Georgia's 159 counties had the same problem. Plus, the idea that federal courts would take over state courts entirely was unprecedented and improbable. *Luckey* was dismissed six years later.[36]

Bright's approach was to deal with each county's individual problems. He had put together a team of investigators, mostly recent college and law-school graduates who could build a civil class-action lawsuit against a specific county and the state. His employees sat in courts and watched, visited jails to interview defendants, and requested files from the clerks' offices. They were trying to see if a pattern existed—judges not assigning lawyers or defense attorneys not talking to their clients before court, or anything else that violated the law. It was tiresome work. The investigators thumbed through thousands of files to find individuals who had received excessive jail time, and they read reams of trial transcripts to uncover revealing moments. Bright often advised his team to go to court and "count the Constitutional violations," in part because he found that law school professors didn't inspire this kind of work. "They prefer to write about legal theory from the safety of

their offices," he said, adding that, "unfortunately, as a general matter, no one wants to go into the courts and see what is happening." In fact, what people find so disturbing about Bright's lawsuits is that they name names of individual judges, prosecutors, and defense attorneys and specify what they do on a daily basis, thus taking people deep inside the actual courtrooms.

Some places were an easy mark, like Sumter County, Georgia, where former president Jimmy Carter had a home. There, a judge would immediately ask defendants to sign a form waiving their right to a lawyer without having informed them of that right or of the dangers and disadvantages of proceeding without representation. The judges "give the impression that . . . if you don't sign the form and return it to the clerk, your case won't be called," Bright explained. His suit against the county, filed in federal court, alleged systemic denial of constitutional rights and was settled in 1998 with the county's consent to implement improvements, including the distribution of a new form titled, "Constitutional and Legal Rights of People Accused of Crimes in the State Court of Sumter."

The Southern Center had similar success in Coweta County in a class-action suit it filed in state court. There, the center charged that over a two-and-a-half-year period, more than half of the poor people found guilty in felony cases had pleaded to crimes without a lawyer present. The complaint named two part-time defense attorneys who let their clients languish in jail without a visit for months, as well as a judge who had a habit of encouraging uncounseled defendants to speak to the prosecutor and then plead guilty without a lawyer. The suit was settled in 2003 after the county set up a public defender's office with three full-time attorneys.[37]

In Fulton County, Bright convinced a federal judge that poor representation had caused overcrowding in the jails, which had overwhelmed their health-care services. When Bright made clear that many inmates had spent more time in jail on misdemeanor charges than if they'd been convicted, a judge ordered the prisoners released. "Streaming out of the jail, the inmates clutched brown paper bags containing

their few personal belongings, and the $1.75 bus tokens that jail officials had given them to get home," the *New York Times* reported.[38]

In Spring 2003, I caught up with Bright's team in Crisp County in the Cordele Circuit in south Georgia, where the Southern Center was researching a lawsuit. As the day was getting underway, loads of people were rustling nervously and crowding into court. Inside the courtroom, the prosecutor, Denise Fachini, a former president of the Georgia District Attorneys Association, stood on a chair and proclaimed that she was going to read out a list of names, and that defendants needed to stand up and announce whether they wanted to apply for a public defender—a tired-looking defense lawyer sitting at a table with his back to the crowd—or talk to someone from the prosecutor's office first. "When you stand up we want to know what your announcement is," she said smiling—as if it were equally acceptable for a defendant to talk to the prosecutor without a lawyer as with his or her own attorney. When asked why she did this, Fachini explained that "the last thing [she wants] is for someone to be treated unfairly" and that it was "not a constitutional violation for them to talk" to her so long as defendants understood that they had a right to talk to a lawyer. "People often know that they are guilty and want to hear what the offer is" from the source itself, she said, adding that "a lot of people know" her and her credible reputation. Also, at every juncture before someone pleaded guilty she would ask, "Are you sure this is what you are going to do?" Whether it was a credit to her or a rebuke to the public defender, almost half of the people picked the peppy, wide-eyed Fachini over the uninviting defense attorney. Many ended up pleading guilty without a lawyer.

One milky-skinned woman with small round glasses and jet black–dyed hair was sitting behind me, repeating to herself, "I'm just going to lose it, I am just going to lose it." This woman, twenty, had tried to contact her lawyer twice but had been told to talk to him in court. She wanted to meet with Fachini alone. "I did it," she said, as if her fate was sealed. "I am going to plead guilty."

She was charged with giving false statements to the police. Her husband, she said, a manic-depressive with a temper, had broken her

baby's leg. On the state report she had lied and said that her husband had had nothing to do with it. "My husband threatened me that if I didn't write that, he would beat me."

At issue was her ability to get her baby back from the state. Marion Chartoff, a lawyer with the Southern Center, was observing court and sitting in my row. She leaned back to talk to this woman. Just because she lied on the report didn't mean that she was guilty of the crime. She could have a defense.

"What's a defense?" she asked.

"You acted under duress," Chartoff explained. "You could have been forced to do something."

"Well, that's me, that is me," the woman said. "I thought he was going to beat me up if I didn't sign the form like he said."

The woman stopped talking. Then she tapped Chartoff on the shoulder. "I need to plead not guilty right?"

"Yes, plead not guilty," Chartoff said. "You have a defense."

In Crisp County, the Southern Center found people without lawyers languishing in jail. Investigator Atteeyah Hollie came across Samuel Moore, who had been in jail for thirteen months on a loitering charge. He had never seen his court-appointed lawyer. He soon found out that he was being held in jail because there was an arrest warrant for him for selling drugs on a different occasion. The warrant was a year old.[39]

When Hollie was doing research she saw that Moore's drug charges had actually been dismissed four months earlier, but no one had told the people at the jail or him. When I spoke to Moore he produced letters he had written while in jail to five different organizations as well as to a lawyer appointed by the court, begging for help. But no one had answered him. "You feel like a castaway," he said. "Nobody knows you exist."

After the Southern Center looked into Moore's case, the jail let him out immediately. As Moore emerged into the bright sunshine in the same shoes he had worn more than a year earlier, he felt distrustful. "I am constantly looking back to see if they are going to lock me up again," he said as he walked the eight miles back to the town. His family, with whom he now lives, would never have intervened. "They think if they say the wrong things they are going to be locked up."

People like Moore made perfect examples for Bright. He would tell reporters about them, use them in his speeches, and feature them in his lawsuits.

■ ■ ■

Bright's efforts to ensure that every defendant be provided a lawyer should have been redundant. The U.S. Supreme Court has ruled that every person in state court charged with a crime who is subject to imprisonment has a right to a lawyer. Even if the person is put on probation and has his or her jail time suspended, this individual has a right to a lawyer; he cannot go to jail, otherwise.

The court based its rulings on the Sixth Amendment, which says: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."[40] It may seem obvious today that this amendment means everyone, rich or poor. After all, the adversarial system is based on a concept of symmetry: two somewhat equal sides going head to head to produce the truth. If one side can't properly challenge the accusations because of poverty, something has to be done to rectify the imbalance. The history behind the amendment, however, explains why the states enforce it so unsuccessfully.

To begin with, the colonial courts of eighteenth-century America did not permit the accused even the presence of a lawyer. Like the English courts, they permitted counsel for "petty offenses" but not for important cases like felonies and treason.[41] As Yale Law School professor John H. Langbein writes, the rationalization for having no lawyers in the big cases was that "if falsely charged, the accused would clear himself through the 'Simplicity and Innocence' of his responses, whereas the responses of guilty defendants would 'help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them.' "[42] In general, though, the British system was not palatable to the American settlers; judges appointed by

the Crown oversaw venomous prosecutions that resulted in the conviction and execution of innocent people,[43] and so, inevitably, the Americans sought to protect themselves against this kind of injustice.[44]

By 1791 when the framers adopted the Bill of Rights (containing the first ten amendments of the Constitution), virtually all of the colonies had written into their own state constitutions that defendants could use lawyers.[45] In his book *The Bill of Rights*, Akhil Reed Amar notes that the new Americans wanted "notions of basic fairness and symmetry" to exist in a criminal court. "If the prosecuting government could have a lawyer, why not the defendant?"[46] The Sixth Amendment, which provided a right to counsel in federal court, merely kept the federal government in step with what the states had already sanctioned.

Still, the Sixth Amendment was originally thought to mean that the defendant couldn't be *barred* from having a lawyer in federal court, where a minority of criminal cases were tried in revolutionary times. The framers could not have imagined that criminal procedure would become so complicated that a defendant would need a lawyer just to understand what was happening, much less that the U.S. Supreme Court would impose a burden on the states to provide lawyers. States had the authority, as they still do, to decide the rights of men and women put on trial; so long as the treatment was fair and decent, the U.S. Supreme Court or the federal government wouldn't intrude. The lack of federal involvement in state matters began to change after the Civil War with the ratification of the Fourteenth Amendment in 1868 to protect the newly freed slaves in the South from oppression by local governments. The amendment, which declared that no state would deny any person due process and equal protection of the laws, would have an enormous impact in the century to come; but few gains occurred immediately in terms of the rights of poor people accused of crime.

The status quo prevailed until 1931 when the much-publicized trial of the so-called Scottsboro Boys became a symbol of American racism and Southern injustice. Nine young black men, ages thirteen to twenty, were charged with raping two white women on a train traveling through Alabama. At the time, local citizens were incensed and threatening a lynch mob. All nine were tried in Scottsboro, the county seat. When the judge inquired whether the parties were ready for trial, the prosecutor answered yes, but no one answered for the defense. Originally, each of the members of the Scottsboro bar had been appointed as defense counsel, but each had found a reason to get out of it—except for one lawyer, Milo Moody, described as a "doddering, extremely unreliable, senile individual who is losing whatever ability he once had,"[47] and Stephen R. Roddy, from Chattanooga, Tennessee, who was unsure if he had agreed to take on the case or not. Roddy had not been employed by the boys but had come to court as an observer at the request of a black doctor, P. A. Stephens, who presided over a Tennessee church. Roddy, apparently drunk, would not clarify whether he had agreed to represent the defendants.[48] "If I was paid and employed it would be a different thing," he told the judge, "but I have not prepared this case for trial . . ." He also said he wasn't familiar with Alabama law. If he had to take the case alone, "the boys would be better off if I step entirely out of the case," he told the court.[49]

Nevertheless, the nine black youths went on trial with these two attorneys who had spent barely half an hour talking to them, had not investigated the crime or prepared a defense, and who did not seek a continuance to do so or file a motion for a change of venue despite the enormous pre-trial publicity. The trials began immediately in three separate groups; each trial took one day. Three all-white juries found eight of the nine defendants guilty and imposed the death penalty (the exception was a mistrial for the thirteen-year-old, Roy Wright).[50]

The case was appealed to the U.S. Supreme Court, which reversed the lower court's decision on grounds that the lawyers did not have a chance to work on their clients' behalf. The majority opinion in *Powell v. Alabama* said that, "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that

period as at the trial itself."[51] The court referred to the Fourteenth Amendment's due process clause, citing a defendant's right to "the guiding hand of counsel at every step in the proceedings" and the "fundamental nature of that right." However, the court limited the right to "a capital case" and to a situation where the defendant is indigent and "incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like."[52] (After the decision, the case became a cause célèbre for the Communist Party and many appeals and re-trials followed. Eventually, one of the women later admitted that she had invented the story of the rape.[53])

Powell was groundbreaking. It recognized a right to counsel for the poor and that the representation had to be meaningful. Equally important was the court's decision to apply the Fourteenth Amendment's due process clause to the states on an issue of fundamental fairness: the trial court's failure to make an effective appointment of counsel. As Justice Pierce Butler wrote in dissent, it was "a field hitherto occupied exclusively by the several States," adding that "Nothing before the Court calls for a consideration of the point. It was not suggested below [by the lower court judges] and petitioners do not ask for its decision here."[54] So why did the Supreme Court choose to intervene when it had not been called upon even to consider the issue of effective counsel under the Fourteenth Amendment?

Perhaps the justices read the papers and wanted to step in to correct this notorious case.[55] Or maybe they felt a need to acknowledge the new unchecked power of the prosecutor. In the nineteenth century, a major power shift in courts across the country favored full-time prosecutors who were marshaled in to deal with increasing levels of crime presented by industrialization and migration to cities.[56] Before this, the public prosecutor had been a minor actor in the criminal process, more of an adjunct to the judge, presenting cases to grand juries or trial juries, or simply expediting prosecution on behalf of victims or their families, who at times hired private lawyers to act as prosecutors.[57] As a bureaucracy of police arose to manage an increasing number of arrests, prosecutors began, somewhat by necessity, to take on the role of

deciding which cases made it to court.[58] By the early twentieth century, writers were expressing outrage at the steep increase in prosecutorial power: prosecutors were dismissing cases, pleading a high portion of them guilty, and holding fewer jury trials.[59]

No matter what the cause, the court found the Scottsboro case so disturbing that it decided to federalize the issue of representation for indigent defendants. But it did so with half-measures, leaving the states to decide whether to appoint counsel except when the defendant was poor, uneducated to the point of illiteracy, and charged with a capital case. Only under these circumstances was denial of counsel considered a violation of due process. The states still had the right, within this limit, to decide the rest.

In the years that followed, the U.S. Supreme Court struggled to find the perimeters of the right to counsel within the context of a fair trial. First, the Supreme Court expanded the right, finding that a lawyer must be provided when the defendant could not afford one, regardless of his education or the nature of the crime—but still only in criminal cases in federal court. In *Johnson v. Zerbst*, the court quoted *Powell* to recognize that "without the assistance of counsel even the intelligent layman usually lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one."[60] The right applied unless an accused affirmatively waived it.[61] But four years later, the court, while still recognizing the validity of *Johnson v. Zerbst*, explicitly refused to apply the full right to counsel to the states. In *Betts v. Brady*, it ruled that due process required the appointment of a lawyer in state court only when the issues were difficult and the defendant inexperienced—basically broadening the due process protection of *Powell* to other complex criminal cases where the accused could not defend himself, case-by-case, but still maintaining a distinction between what was mandated in federal and state court.[62] As a result, under *Zerbst*, a defendant who was poor could always get a lawyer in federal court; but in state courts, under *Betts*, a defendant could only get one if the trial would be "fundamentally unfair" otherwise (depending on the circumstances) and violated due process.

All that was needed, then, to apply the rule across the United States, was a Supreme Court majority that regarded the right to counsel as fundamental under any circumstance. Why did the court take such incremental steps toward establishing this right? In general, our Constitution does not frame rights in affirmative terms. It says what the government cannot do—e.g., it cannot prohibit publication of offensive statements, or prevent a religious group from practicing its faith.[63] The idea of forcing the states to give the indigent lawyers was not only unprecedented but unique in terms of the Constitution's reach.

In 1953, President Dwight D. Eisenhower appointed Earl Warren as the chief justice of the U.S. Supreme Court. Warren, the former governor of California, had spent many years as a prosecutor in Alameda County, where he had a reputation for fair-mindedness. "It was said that the DA's office in Alameda County in the years Earl Warren ran it never extracted an involuntary confession from a defendant," writes historian Richard Kluger in the classic work *Simple Justice*. "Anyone who wanted to see his lawyer before submitting to police interrogation was permitted to do so. No conviction ever won by Warren's office was thrown out on appeal by a higher court."[64] Warren and several of his associate justices, such as Hugo Black and William J. Brennan, Jr., were the driving forces in developing a body of case law that has been called a mini code of criminal procedure to prevent coerced confessions, warrantless wiretapping, and interrogation conducted in the absence of a lawyer.[65]

In 1956 in *Griffin v. Illinois*, the Supreme Court tackled the issue of poverty and inequality in the state courts. Judson Griffin, an indigent man, argued he was denied his right to appeal his conviction of armed robbery because he couldn't afford a trial transcript. The court found Griffin had been denied his right to equal protection under the Fourteenth Amendment. In a famous opinion, Justice Hugo Black wrote: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[66] In dissent, Justice John Harlan compared the right to counsel to a college education, commenting that it was tantamount to demanding that states provide fee waivers to

students who couldn't afford a state university. "[I] think it is beyond the province of this Court to tell Illinois that it must provide such procedures," he wrote in conclusion.[67] Nevertheless, the ruling furthered protection for poor people accused of crimes.

In 1962, the Court received a letter in scrawled pencil from a prisoner named Clarence Earl Gideon who claimed he had been tried without a lawyer in Florida for breaking and entering and petty larceny. He had seemed fairly intelligent in conducting his own defense, going so far as to call a character witness and attack the credibility of the main witness against him. Still, he had been found guilty and sentenced to five years in prison.[68]

Gideon filed his hand-written petition for habeas corpus to the U.S. Supreme Court, arguing that he had a right to counsel under the Sixth Amendment. The court appointed Abe Fortas, then a partner at Arnold, Fortas & Porter and a distinguished member of the bar, to represent him. (Fortas later became a U.S. Supreme Court justice and his name was dropped from the firm, which became Arnold & Porter.) Fortas argued that the right to counsel was indispensable for a fair hearing. In 1963, the Court found in *Gideon v. Wainwright* that what had been an "obvious truth" for federal criminal trials now applied to the states as well: "Reason and reflection require that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[69] *Gideon* overruled *Betts v. Brady* and put the burden on the states to provide the indigent with lawyers in felony cases.

Ultimately, Gideon was retried with a lawyer at his side and acquitted. But the battle to enforce the Court's ruling continues to this day, in part because *Gideon* did not prescribe standards for what passed for an effective lawyer, and many states do not want to pay for lawyers to defend the poor—a resistance that has given way to token representation.

In the decades which followed *Gideon*, the U.S. Supreme Court went to great lengths to limit the right to counsel.[70] *Strickland v. Washington* set a very low bar for what constituted effective counsel in 1984. The *Strickland* court held that "[n]o particular set of detailed rules for

counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[71] The Court said only that a lawyer's representation must meet an "objective standard of reasonableness."[72] However, it granted counsel tremendous leeway by presuming a lawyer is competent unless a defendant can prove there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."[73] Justice Thurgood Marshall dissented. He found the standard adopted by the Court so malleable as to be meaningless. He wrote, "To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like a reasonably competent attorney, is to tell them almost nothing."[74]

The benchmark for what constitutes adequate assistance is so low that in 2001 in the infamous Calvin Burdine trial, the Fifth Circuit Court of Appeals openly debated whether to affirm a death-penalty decision where the lawyer, Joe Frank Cannon, had slept through significant parts of his client's case (a three-judge panel of the Fifth Circuit had initially upheld the conviction and death sentence, 2–1). Nine judges of the Fifth Circuit Court agreed to overturn the death penalty decision and grant Burdine a new trial, but not without five dissenters, two of whom took issue with how much of the trial it was permissible to sleep through and still be adversarial: "[O]f utmost importance . . . there is no state-finding that Cannon was 'repeatedly unconscious' during 'substantial' portions of the trial." The dissenters said information was missing about:

> When Cannon "dozed" as opposed to "slept"; How long he slept, individually and collectively; How many times he slept; How deeply he slept; What happened while he slept, including which witness(es) was (were) testifying or other evidence was being presented; and When the sleeping occurred—which day(s), or whether during the morning or afternoon.[75]

To this day it remains debatable whether a lawyer can sleep during his client's death-penalty trial.[76] So we can only imagine what is tolerated in ordinary cases that fail to attract scrutiny from the public or appellate courts.

According to an ABA report published in 2004 apropos *Gideon*'s fortieth anniversary, "Indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[77] And while this is true at the state level, the federal system is much improved, beginning with the Criminal Justice Act of 1964 that compensated counsel at an hourly rate on a case-by-case basis; several years later Congress authorized the federal courts to establish federal defender organizations (FDOs), which today represent approximately 64 percent of the federal indigent cases and have a very good reputation. The organizations have resources similar to those of prosecutors—reasonable salaries for its staff, funds for expert services, investigators and paralegals—and they also provide regular training and supervision to full-time staff so that they develop the expertise that results from practicing federal criminal law full-time.

If it is true that the federal system is considerably better than what is in place state by state, it is still difficult actually to assess whether an indigent defense system is effective because there is no single barometer of success. The *ABA Standards for Criminal Justice* outlines how a lawyer should defend a criminal case so that an office can assess whether it has the personnel, time, and resources to do the basics to meet with clients and investigate. The guidelines are better than other attempts to set out principles, but still lack an ongoing methodology to ascertain how well an office is serving the nation's poorest defendants.[78]

When North Carolina's Indigent Defense Services (IDS) sought in 2001 to develop a set of indicators that would measure the quality and cost effectiveness of the system, it could not find a model to emulate. "There is so little objective measurement in this business, it is astonishing," said Malcolm Ray Hunter Jr., IDS executive director until December 2008. Instead, Margaret A. Gressens, IDS research director, had to

begin from scratch to establish indicators of system performance. The plan was for North Carolina's one hundred counties to report data: if a county shows below average performance on one of many indicators, IDS will be able to get involved. The percentage of defendants who are released from jail pretrial, for example, or who promptly see their attorney, say within forty-eight hours of arrest, are both indicators of what Gressens called the "cornerstone" of good criminal defense. "It costs a state a lot of money to have people in jail who don't need to be," she said. While in jail, people can lose their jobs and homes, become welfare recipients, and have their lives ruined—considerations of vital importance to an individual, which, from a policy perspective, also entail significant costs for the state.

IDS hopes eventually to take the indicators a step further and do what no state has come close to doing: to look at the impact of indigent defense services on the criminal justice system and the community. Gressens says that governments quantify hard-to-measure things all the time, like quality of life. But the health of our courts has been left virtually unchecked. According to Gressens, part of the problem is that each entity in the adversarial system works independently, and rarely, if ever, sits down with the others to solve problems or inefficiencies. "No one steps back and says we are really one system, how is this system working." The project is still in its initial stages but IDS hopes to have an evaluation tool in place by 2010.

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As had happened in North Carolina, the Georgia Supreme Court Chief Justice's Commission on Indigent Defense had to figure out a basis for evaluating the system when it finally convened. Chief Justice Robert Benham, the first African-American to lead the court, appointed twenty-four professionals to the commission. Many were impressive members of the legal and business establishment but knew almost nothing about indigent defense except that it was an embarrassment. Some, like legislators, judges, prosecutors, and county commission

members, had interests in funding priorities for their own programs and other concerns that came ahead of representation for indigents.

The commission eventually hired the Spangenberg Group to produce a report involving data collection analysis and on-site assessments and to give a macro sense of how the state's system matched up against others nationally. Robert Spangenberg has been assessing indigent defense systems for decades in more than forty states across the country. His work focuses more on comparing the ways different states fund and provide representation (e.g., whether funding is at the state or local level, if a contract or public defender system is in place, and how the cost per case compares in different locales). The analysis puts the state's representation into a broader context than Bright's reports or North Carolina's IDS assessment tools.

Notably, the commission did not invite Bright and the Southern Center to join its members, even though his was one of the few organizations involved in monitoring Georgia's services for the indigent. Bright was too combative, too outspoken and blunt. He openly criticized prosecutors and judges and got into arguments with them. His absence from the commission has been called a politically savvy move on the part of Chief Justice Benham.[79] It allowed the members to come to a consensus and Bright to push his agenda without compromise. He went to almost every commission meeting and told stories about the people his researchers had found; he even brought video tape of defendants and their families. When the commission considered testimony, Bright made sure they did so under the watch of former defendants or family members of those still in jail, whom he asked to fill the audience.[80] Bright also pushed the commission to drop in unannounced on a court, watch proceedings, and see the process in its raw form, but this never happened. "The only visits to courts were carefully controlled ones, where the judge was called in advance, gave a tour, and let the commissioners sit in on one or two minor hearings, after which the DA and defense lawyer waxed eloquent about how fair the judge was," said Bright.

The court visits may not have been necessary. The commission

held seventeen public sessions over two years, in which sixty-five individuals testified about how the various different public defense systems worked in Georgia and elsewhere. Many of those who testified came from Bright's research, and virtually all parts of the criminal justice system and civil rights community in Georgia were represented, including judges, sheriffs, prosecutors, defendants, and their families.

The commission's chair, Charles R. Morgan, then executive vice president and general counsel to BellSouth, said that after a while the testimony became so repetitive that members wanted to stop the hearings because they had heard enough. A recurring theme seemed to be defense lawyers who felt themselves to be victims of the system, whether because of excessive caseloads or the nature of their clients. They didn't seem to think from their clients' point of view, nor did they notice their own deficiencies. "A small lie" that lawyers had told themselves became "a big lie and the next thing you know you believe it," Morgan said of the process by which the attorneys had lost sight of their purpose.

Take Mark Straughan. A lawyer at a private family firm, Straughan had won the contract to do indigent defense work in the Oconee Circuit for less money than anyone in the state of Georgia: fifty dollars per case. He had represented defendants for the five-county area for twenty years. "I have absolutely no complaints from the people that I work with," he claimed. His testimony was astounding in its disregard for his clients. "I remind many of you that guilt is what it's all about," he said on one occasion. "If he's guilty and he admits it why jerk everybody around with a trial?" He admitted that he didn't keep records about his cases, saying that "too many records just give things for people to come back at you, anyway." And then, as if he knew how shocking his words were, he warned, "don't take me wrong and rewrite my words to saying that I don't represent my client totally."[81]

And yet listeners were left with the impression that he did not. Indeed, he seemed not to understand counsel's role, which is, quite obviously, to test the prosecution's case and mount a defense. Instead, he mused that the true role of the defense lawyer was to assume his client's guilt. The panelists could not believe their ears. When one member

pressed Straughan about whether the defense attorney or the judge should decide a defendant's guilt, Straughan said, "It's an error to go in there and assume your client is innocent," adding that, "the vast majority of the time if you're going to go to trial, the client has been lying to you the whole time."

Straughan's testimony clinched the issue for most members of the commission. "Jaws dropped while he was talking," said Marion Chartoff, who was watching. Straughan sounded more like a lawyer from a totalitarian country.[82] In the American court system, innocent until proven guilty is a precept; if this was not clear to a defense attorney then the entire system needed help. "Everybody on the commission would remember that day," said Charles Morgan. "I don't care how liberal or how conservative you are. This is America. Not Bolivia."

Bill Rankin, a reporter for the *Atlanta Journal-Constitution* who wrote a startling set of articles putting indigent defense on the front page, picked up on the story.[83] Straughan was fired by the county soon after Rankin's article was published.[84]

Robert Surrency was also asked to testify. He spoke against instituting a statewide public defender's office and warned that by recommending improvements, the commission would be insulting the very best of lawyers. "If you think that I am incompetent just because I handle . . . more than the Supreme Court says [I should], then you had better be willing to take that statement and apply it to some of the best lawyers in the state of Georgia who routinely do the same thing," he said.[85]

Surrency had a point. Exceptional lawyers could handle a substantial number of cases, especially if they had the right investigation and support staff. No one element ensured that a lawyer was effective. A well-funded system could be corrupted by shoddy lawyers, while a poorly funded one could succeed now and then because of outstanding efforts by some dedicated yet overworked people. Nonetheless, Surrency's caseload would likely prove impossible for even the greatest lawyer in the world. No amount of leadership can make a hopelessly underfunded system work. Surrency wanted to suggest that any effort

to improve matters would be futile. "I hasten to add there is no one villain you can go after," he said.[86]

He asked the commission to protect those who currently worked in the system. "I hope [you] will have some consideration for the people . . . who are willing to do this job in the first place."[87]

After Surrency's statement, Rankin interviewed him for the *Atlanta Journal-Constitution*. The paper ran a short profile that included the following scene from an afternoon with Surrency in court:

> "Mr. Chester?" Surrency asks one of the prisoners, thinking he's Eric Chester, who is charged with receiving stolen property.
>
> "Mr. Surrency, that's Mr. Smith," Superior Court Judge James Cline says impatiently, referring to Chester's co-defendant, Marcus Smith. "Get your client."
>
> Minutes later, Surrency solves the mystery, but then two co-defendants facing armed robbery and aggravated assault charges approach the bench, the old courtroom's wooden floors squeaking beneath them.
>
> "Are you Waddell?" asks Surrency, looking over his wire-rimmed glasses at a short, unshaven man.
>
> "No, that's Eric Penn," the judge barks, this time rolling his eyes in exasperation. The judge points out Surrency's client, Darren Waddell, a tall, gangly man standing off to the side.

In the profile, Surrency speaks of himself in the third person, which he had a tendency to do, as if his conduct belonged to someone else. "It doesn't matter how Robert does it. If the system doesn't can him, he must be doing it right," he said, for the entire state of Georgia to read.[88]

■ ■ ■

In its seventy-page report, the commission severely criticized the system that allowed lawyers like Surrency to handle such crushing case-

loads. Their solution was twofold. First, Georgia needed to put up some money. The state and federal constitutions mandated that all citizens get effective assistance of counsel, but Georgia hadn't been providing the funds to meet the order. The state funding added up to a little more than one-tenth of the total expenditures, which pales next to what other states provide; twenty-four states in the United States provide total state funding.[89] Spangenberg concluded that none of the nineteen counties he visited (representing approximately 45 percent of the state population) provided sufficient funds to assure quality representation to all indigent defendants.[90]

Second, the commission recommended that the extant structure be replaced by a uniform public defender system in which lawyers would be accountable to a higher authority. The commission suggested bumping the responsibility for indigent defense to the circuit level, rather than the county, so that forty-nine circuit public defenders would serve 159 counties. Overseeing the entire system would be a new organization, which would have the power to hire and fire the circuit public defenders. They would work full-time under specific guidelines and performance standards, and if additional panel or contract lawyers needed to be hired, these too would be supervised by the board. Further, the commission acknowledged the need for "a comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in Georgia."[91] Finally, the commission instructed the legislature to make the changes within two years, noting, ominously, that if the state of Georgia didn't take over and face this problem openly, "Further litigation is being contemplated and likely will occur."[92]

The commission released its report weeks before the 2003 legislature convened in January. Costly legislation intended to help unpopular people who commit crimes might have seemed like a futile effort, but the timing was right. The bill had the support of the new Republican governor, George E. "Sonny" Perdue III.[93] "The governor is kind of open-minded about those kinds of issues," said Terry Coleman, the Democratic house speaker from Eastman, Georgia. "It was an easy

deal." Chief Justice Norman Fletcher, who had replaced Benham as new head of the state's Supreme Court, also played a crucial role in lobbying legislators and encouraging the court to endorse unanimously the commission's report.[94]

But the real incentive for legislators to get the bill passed was the ongoing and prospective litigation against the state. In the midst of the commission's study, the Southern Center had filed its suit against Coweta County, which brought press attention to the issue of defendants pleading guilty without the protection of a lawyer. And as the debate rose over the bill in the state senate, the Southern Center filed a lawsuit in Cordele Circuit alleging that defendants often went months without seeing a lawyer, met their lawyers for the first time in court, and were urged to plead guilty after only a brief conversation. The complaint was filed against individual judges, prosecutors, County Commissioners, and other local officials, as well as the governor of Georgia, and the Georgia Indigent Defense Council.[95]

Few politicians, however, gave Bright any credit. "I don't think the [lawsuits] were the major impetus on getting things done," said Charles C. Clay, a Republican senator who served on the commission and introduced the bill. He credited the bill's passing to "a quiet bipartisan groundswell to do something," which had been informed by articles and editorials in the *Atlanta Journal-Constitution* and other newspapers.

On the final day of the 2003 session, the legislature unanimously passed the Georgia Indigent Defense Act. Shortly thereafter, the *Fulton County Daily Report*, the local legal periodical, named Bright "Newsmaker of the Year: Angry Man of Indigent Defense," and featured a cover image of him looking grave. "Sometimes with lectures, other times with pleas, threats or impassioned speeches, Bright was the most implacable and visible crusader for better legal defense for the poor," the article read.[96]

Under the new legislation, the circuits would still contribute funds toward public defense (about $67 million), but obtain state supplements ($38.5 million up from $8.3 million). This new money would be used to create the Georgia Public Defender Standards Council, based in Atlanta, to monitor the quality of legal services, formally lobby legislators, and advocate for individual lawyers when they needed support. The Standards Council would oversee forty-nine judicial circuits, staffed by full-time lawyers, investigators, and a networked statewide computer system to track cases. It would also have the sole power to remove defenders who failed to meet the formal standards set by the Standards Council, thus protecting them from prosecutors, judges, and county commission members.

The only counties allowed to opt out of the new system were fourteen "single-county" judicial circuits that could prove to the council that they exceeded the new performance standards.

* * *

Robert Surrency was not around to see the new system installed in Greene County. Shortly after Bill Rankin's interview with him ran in the *Atlanta Journal-Constitution*, a large firm in Washington, D.C., began to prepare a suit with the Southern Center against Greene County, alleging systemic violations of the Sixth Amendment. By accident, the firm sent the county a draft of the lawsuit it planned to file, which focused the county commissioners' attention on Surrency. The county then asked Surrency for the number of cases he was working on and responded that the caseload seemed inflated. In answer, Surrency said he wanted his budget more than doubled from $40,000 to almost $90,000, and to prove that he needed the funding, he handed over his numerous case files. He wanted to hire a lawyer to help him, "and not pretend anymore," he said. "So I presented them with a real bill. And the commission didn't like that."

He quit shortly thereafter, and as a result, the firm did not bring the suit.

After seventeen years working as the contract defender in Greene County, Surrency suddenly had time to reflect on his experience: How had he managed to process thousands of cases to the approval of judges and prosecutors and yet still become a notoriously disreputable lawyer? He seemed angry that Bright had singled him out, that the

commission had chosen him to testify, and that the press had covered him extensively. "Not a lot of people get tested like that," he said. He thought Bright's expectations were excessive. "He wants a private investigator! He wants witnesses talked to! He wants the defendant talked to multiple times and the police taken through every single legal loophole they are going through in every single case. And if they [the lawyers] don't do that, you are not doing your job!"

In contrast, he appeared proud of his ability to forgo investigating his cases. "That is the fun part," he said, "when you finally have enough experience to be able to make a long drawn-out practice into something pretty straightforward. That is when it really gets fun. Instead of having to spend sixteen hours investigating something or looking up some piece of the law. Just to be able to get right down to it. Just to be able to talk to these people—whoever these people are—and answer [them]." He could weigh what a case was "worth" based on a combination of experience and intuition.

"Surrency could give results," he said. "If I bought a Ouija board and every case is done by Ouija board, my decision as a lawyer is to do that. And you can test me by my results." He seemed to be saying that every case is not distinct but that there is an ineffable formula to determine how best to proceed with each one. At the same time, he could trot out some reasonable platitudes: "The main thing is don't judge the book by its cover! Look into the case before you make your decisions of who is doing what to whom!" Paradoxically, he also argued that he was doing his clients a service by ignoring them. As he put it, had he taken the time to research their cases, they would have languished in jail. "I think my clients are much happier because I didn't do that."

■ ■ ■

In 2006, a year and a half into the state's new public defender system, Michael Mears, a longtime advocate for the poor, was appointed director of the Standards Council. Before that, he was the director of the Georgia Multi-County Public Defender's Office, which represented de-

fendants in death penalty cases. Robert Spangenberg seemed excited about Mears, exclaiming that "Georgia in three years is going to have the best system in the south."

When Mears was appointed, the Standards Council was still in the initial stages of trying to figure out how to monitor its new lawyers. For example, the council wanted them to record how their time was spent so that cases could be "weighted" according to effort. A murder trial should count for more than a simple drug possession plea because it would take more work. Public defenders, however, were not esp willing to comply. They had enjoyed their freedom from authori because they took less money than private lawyers, didn't see a to account for their time. Consequently, the data accrued by the Standards Council "just sucks," said Gerald P. Word, who chaired a committee that dealt with the information and is also a circuit defender in Coweta. "Over two thirds of it had to be thrown out."

Next, the council borrowed a new computer system from California that enabled lawyers to log data about their cases. For Greene County, Mears could see how well lawyers were complying with the rule that they meet their clients within seventy-two hours of arrest. The new circuit public defender there had an 88 percent compliance rate. "I don't get a lot of complaints," about Greene County, Mears said.

Was there really a solid turnaround? According to Ben Mitcham, the county's assistant district attorney, the system was improved because now the public defender didn't have a private practice competing for his attention. "It's a lot easier to get a hold of him," he said. Still, Mitcham refused to say that the new public defender was actually doing a better job than Surrency. "I wouldn't say anybody has approached it more conscientiously," he said. He had a great deal of sympathy for Surrency. "He's a good guy, I like him. We are possessed by the same demons, disorganization and what not."

Mitcham admitted that he himself was performing at an all-time low. He was really behind, with a stack of cases on his desk as high as two hundred to three hundred felonies and two hundred to four hundred

misdemeanors. When asked why the pile had accumulated his answer was lamentable and human: "Because I put things off." His boss, Fredric D. Bright, the district attorney who oversees all eight counties in the circuit, thought the numbers might be higher but wasn't sure by how much. Greene County has the "worst backlog," he said. He was trying to get the county to hire an assistant district attorney to help Mitcham, which he eventually did.[97]

I checked in at the courtroom to see if the new system really was an improvement. That day, a twenty-six-year-old man had been charged with "criminal damage to property second degree" and "family violence battery." He told me he wanted to move to Kansas to start a new life, and, after a few whispered exchanges with the public defender, pleaded guilty to a lesser crime and agreed to one thousand dollars in fines. ("You mean I could say I couldn't pay?" he asked, when I inquired why he had agreed to that.) Darel C. Mitchell, the assistant public defender, said his exchange with his client had made him feel "dirty." He used the word a lot to describe compromises he felt he was making in his new position. "I'm not being all that I can be," he said over a beer at the Yesterday Café across from the courthouse.

Mitchell had been on the job for a year and a half. In his fifties, he had taken the work in Greene County after twelve years as a private lawyer in Gwinnett County, a suburban area near Atlanta. In Gwinnett, he had taken on so many court-appointed cases that he "had evolved into a de facto public defender," though he still had a base of paying clients as well.

Even with such good experience, he was sorely unprepared for what his new job entailed. As it turned out, Mitchell had an equal if not greater caseload than Surrency. He and another attorney shared the responsibility for 436 cases, but he still had 1,034 others left over from previous years. Mitchell was also the public defender in nearby Morgan County, which had 249 new cases and 543 pending from years before. With this enormous load, he was constantly making the forty-five-minute drive between the two places to make sure he interviewed defendants within seventy-two hours of their arrest. He seemed to feel that

the function of the initial meeting with clients amounted to checking a box when his time could have been better spent doing legal work. "I should not have to go to jail to do seventy-two-hour interviews," he said, even though a paid lawyer would probably want to have this initial meeting when a client's story and argument were most fresh.

As Mitchell spoke, he became increasingly angry. He sputtered with frustration about his struggle to get furniture for his office, much less a printer and stamps. "I will bust a gut before I walk three blocks to buy postage stamps in this ninety-eight degree heat!" he said when asked if he communicated with his clients by mail. Mitchell had originally taken the job because he wanted benefits and a steady income. "I thought it would be like semiretirement, but no one told me it would be five hundred to six hundred cases," he said.

The lack of resources was making the basics unmanageable. Mitchell was supposed to have access to investigators, but the circuit had only one whom he never used because the investigator was too busy.

Though Mitchell met his clients within seventy-two hours, he rarely saw them after that. "Our office isn't staffed, we don't know when people are coming," he said, though he recently received an office assistant three times a week. With little knowledge of the cases, "you shoot from the hip" in court, he said, drawing his fingers into a gun position. His card, he joked, should be a handshake with the words "meet 'em and plead 'em" underneath.

For the first time in his career, Mitchell said, he had been the subject of a rash of grievances sent to the state bar, which suggests that Mears and the Standards Council were not as in touch with what was happening in Greene County as they thought. Eleven defendants had complained. The content of the accusations aren't public, but in essence, Mitchell said, they came down to, "My lawyer won't see me, he's not doing anything on my case." In short, more of same. Mitchell didn't appreciate the complaints. "I just get ticked off. A guy with no education, and no job skills . . . It's like being called ugly by a possum."

One complaint, he said, involved a defendant charged with felony obstruction for kicking an officer. Mitchell took the case to trial but lost.

Then he did not file an appeal or seek a new trial within the thirty-day deadline, which he is obliged to do by law if his client wishes. But Mitchell didn't have time to talk to him before the state swept him away and a visit to prison was impossible given his hectic schedule. He could have drawn up the necessary pleadings, little more than a fill-in-the-blanks sheet of paper, and sent it in, but he "had no computer and no desk," he said. "Looking back I should have filed something to protect his right to appeal," he conceded. His client lost his chance. He would have to seek new relief by himself, without a lawyer, from a distant prison.[98]

Mitchell's failure to appeal his client's conviction is odd. It wasn't as if he had so many trials to finish up; he had taken only three cases to trial in Greene County (and one more in Morgan County, a robbery case that he won) in a year and a half. Surrency in some years actually took more. Mitchell also didn't put motions (aside from standard discovery motions) on the calendar. Instead, he would go to the prosecutor with the threat of a motion, which was usually enough to get him or her to reduce the charges. "My DAs are lazy," he said. Finally, Mitchell often was not prepared in court. He'd ask for continuances on a lot of old cases, which prosecutor Mitcham accepted, rarely opposing the continuances or announcing ready for trial, probably because he, too, was behind on all his cases. In a year and a half, Mitchell had only filed one demand for a speedy trial, which requires that a case be tried within two terms of court from indictment or be dismissed.

While it might have been too soon to assess the effect of the Georgia Indigent Defense Act on the ground, Mitchell seemed to be having as hard a time as Surrency. But why? Unlike Surrency, he did not have a private practice to attend to, and in theory, he had a larger operating budget. But his caseload was still monstrous. And the courtroom culture that grandfathered in bad habits year after year persisted. Every court has a set of values and attitudes that standardize expectations. Groups as well as individuals can sense it. For example, Mitchell said of his old job in Gwinnett County that the prosecutors there made him a better lawyer. "The harder they worked, we got better," he said. "It's a back-and-forth

volley." By contrast, in Greene County he felt certain forces had made him soft. He wasn't expected to nail cases so he didn't. He could have announced that he was ready for trial or have filed a speedy-trial demand in several cases, but he didn't. "Life is too short to go around getting people mad at you," he offered as an explanation. "My dad"—who had been a judge and lawyer—"said there are two ways to practice law. An easy way and a hard way. There's no need to file a demand for a trial if you get everybody mad at you. My daddy said, 'You don't kick a horse in the ass when you got your hand in his mouth.' " When asked what he meant, he said, "It's like animals in the wild that travel in packs. You have a pecking order of superiority and ranking." Defense lawyers, however, are not supposed to be part of the pack. Their job is to fight for the lone man against the state—not join the state. Mitchell clearly knew this and felt exhausted by his compromises. "Sometimes I just think, 'why am I doing this?' When I run out of ammunition I am going to throw down my gun."

At the end of the day, Mitchell seemed well on his way to surrender.

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To see how a system could work successfully in Georgia, I decided to look at what is widely considered one of the best, if not the best, in the state. The public defender's office in Houston County, just a few hundred miles away from Greene, was exempt from having to participate in the Standard Council's new system because its performance surpassed the minimum required. I wanted to know whether the chief public defender there, Terry Everett, deserved all the credit. She had won numerous awards for excellence and was the first public defender to head the Georgia Association of Criminal Defense Lawyers.

The Houston County office was widely hailed as "the model," though as I found out later, the designation drove Everett crazy. She maintained that her office was only "better than average," and that they had a long way to go and a very big job to handle. She saw her role as a protector of the underdog. "A public defender is really . . . biblical, David out there with Goliath. I don't have much but I am taking what I've got and using it. I have these little rocks. I've got to make them

work and hopefully the giant is going to tumble." The "giant" was her caseload, which was too high, and her schedule, which was overbooked. She often didn't have enough time to prepare for a trial. "Sometimes I have to say I am just not ready." The office only had one investigator, who couldn't do everything, so Everett has been known to get up at two in the morning to wait for a witness to change work shifts so that she might talk to him.

Her office's caseload averaged 228 cases per attorney for felonies, she said, which is well over the 150 that the ABA recommends as the absolute maximum an attorney can perform competently. But her staff, paid by the county, received equal pay as the district attorney.[99] Plus, they were committed. "We have a whole lot of people who are really concerned about people charged with crimes who are not guilty," she said, referring to her eleven lawyers, four secretaries, and one full-time investigator. Since she took over the office in 1989, Everett had been aided by the same assistant, Angie Coggins, a fellow "true believer," she said, who is also known for her aggressive advocacy in court and who wins more cases than she loses.

Not that Everett kept a win-loss record. What her lawyers have to do to be successful is to meet clients soon after arrest, advocate for a reasonable bail amount, and investigate. In almost every drug case, she said, her assistant public defenders request a motion to suppress the evidence so that her client can have a hearing to test whether the evidence was rightfully seized; doing so also preserves the right to appeal the issue at a later time. Her lawyers routinely ask prosecutors to knock a few hundred dollars off of fines, and Coggins offhandedly mentioned sparring with the prosecutor to "expunge" an unprosecuted arrest so that the defendant wouldn't have to worry about having a record when he sought a job. This could help a client get back on his feet. "A public defender is more than a lawyer," said Everett.

She herself maintained a full caseload, which she said kept her in the courtroom so she could see how her assistant public defenders were performing. She also required her lawyers to go out and check the

crime scenes at the time of the incident. "You have to know what the lighting is like," she said.

Everett came to the public defender's office with experience as a county attorney, a private lawyer, and a city-court judge in Alabama before she moved to Houston County. She worked as a legal aid lawyer doing civil cases before taking the position of public defender. When she came in, the office was filled with lawyers who did the job for a few months until another one came along. Everett aimed for long-term hires. "I did this because it was something I wanted to do," she said, "and I convinced everyone else it was something they wanted to do, too." Because of her prior experience in county government, she knew how to fight for resources. She requested an investigator for ten years before she received funding for one from the county commission; she fought for networked computers and the office space she resides in today, complaining that the design of the new courthouse wasn't sufficient until it included a workable place for her lawyers.

In court, Everett wants to make all her points for the record for her client's appeal. "Just one more thing," she would continue even after a judge had decided against her and wanted to move on. Judges would threaten her with being in contempt of court but she just kept on talking. "I have never had a fear of going to jail," she said.

One court reporter, who travels all over the state to make legal records, claimed that Everett's office was by far the best. "I had never heard a lawyer talk to a judge like that," she said, having witnessed Everett's refusal to back down. Once, a judge tried to fire Everett. "He wouldn't give me a reason why," Everett said. So she went to the county commission and said she was going to sue for age and sex discrimination. "I am over forty and I am a woman," Everett said, "which was not at all the reason that he was doing it, but tell that to the federal courts." She seemed to find the entire incident amusing. Judge L. A. "Buster" McConnell Jr. said when Everett first came in he tried to fire her several times a week adding that, "she wouldn't shut up sometimes," as she fought even the smallest objection or adverse objection unrelentingly. Since then he has

come to admire her. "She is probably as good a trial lawyer that you can find. If you pay one hundred fifty thousand dollars you can't do better. She is quick-witted and does her homework."

Hard-charging District Attorney Kelly Burke complained for years that Everett received too much funding, certain that she was manipulating her costs per case. "She has more cases per year than I have. How is that possible?"

In a widely chronicled tempest-in-a-teapot, Burke advised a special grand jury, which meets regularly to study the budget, that the county could replace Everett with contract defenders to save money. The grand jury issued a report stating that "the county is spending almost one million dollars for indigent defense, which seems excessive. . . . In this day of privatization of government services, this seems to be one area that the county should study to determine if the county is getting the best use of its dollars."[100]

Everett, at the time, was taking leave to be with her son who was ill with cancer. She was sitting with him in his room where he was strapped to an IV when she received a call that the county commission was considering abolishing her office. At first, she told the commissioners to take their job and shove it. "Put my things in a box," she said. Then she fought back. She called judges for help. "I said, 'Are you going to let them tell you how to run the court?' " Three judges wrote letters supporting her. One private attorney remarked in the local newspaper, "If [the district attorney] was whipping Terry more in court, he wouldn't be trying to abolish her job."[101] Burke, in an interview, claimed no such animosity. "I don't want to give the impression that it's war down here. It's not," he said, adding, "there's not a private attorney who does a better job than the public defenders." Maybe too good a job. Everett said the key to her survival is to keep making alliances, even with former enemies like judges.[102]

The irony is that the county commissioners who were asked to abolish Everett's position were the same people who then later opted her office out of the Standards Council precisely because of the good job it was doing. However, this was a mixed blessing. The Standards Council

offices offered better pay, and Everett's senior lawyers, who had been with her for years, would receive a twenty-thousand-dollar raise if they went to work for the state under the new public defender system. Some did, which left Everett with five rather inadequately compensated openings. "We couldn't fill them initially," she said. So the new legislation, designed to improve the system, had inadvertently weakened one of the better representatives of that system.

As a result, Everett was forced to look for castoffs. "I am sort of a rehab place," she said. She hired a former judge who had left the bench after being charged with shoplifting, and eventually welcomed back one former employee, Carolyn Hall, who had left for a new job with the Standards Council. According to a formal grievance Hall filed to the council in May 2005, she was terminated by the head public defender in the Dublin Circuit after conducting a meeting to discuss the staff's failure to meet the seventy-two-hour interview obligations.[103] Hall said lawyers in her office weren't doing the basics and they hated her for insisting on them. "The worst thing was feeling I was there alone," she said. In fact, the chief of that office stepped down after an official audit found that public defenders were not seeing jailed indigent defendants in a timely fashion and cases had been left unassigned.[104]

One of the job applications Everett received was from Robert Surrency, whom she had known previously from state defense-lawyer meetings. He had plenty of experience and, by his own admission, nowhere to go. Given his bad reputation, the Standards Council itself had been unwilling to hire him. But Everett didn't care: "Sometimes people like that need some structure." So she hired him and watched him carefully. "We started him out slow," she said. "And he has done very well." He used an investigator more than most lawyers, she said, and seemed to have a good courtroom presence.

By all accounts, Surrency was a man transformed. "I love to watch him in court," said Angie Coggins, Everett's assistant. "He knows the law. He's a very good trial attorney." She didn't accept Surrency's former reputation. "I have no doubt he did the best he could for his clients," she said. "He is motivated. He volunteers to go on jail visits."

I went to visit Surrency several months into his new job. We met in his immaculate office, where his degrees hung on the wall and his color-coded files were lined up on his shiny modern desk. He looked more at ease than during his days in Greene County, less burdened, almost vibrant. Everett had created the type of office Surrency wished he had run at his old job. He could order an investigator and not have to worry about running up a bill that would bother the county commissioners. Everett's lawyers had trained judges to expect a healthy fight. "Terry is good at making it clear that if [the judge] is going to ignore [the law], it's going to hurt," Surrency said. Judges in Greene County would never think of granting a motion to suppress evidence—they behaved as if such a thing were unthinkable. In Houston County, Everett filed them regularly, even though she usually lost. In Greene County, Surrency had stopped trying to push cases to trial when he thought judges would consider them unimportant; in Houston County, "they empanel juries constantly."

Real change, it seemed, had been best effected by good, tenacious lawyers who, over a period of time, had created high expectations for themselves and each other. Clearly, the people who work in the system have to take a stand. If Surrency had any regrets about Greene County, it was that he didn't realize he "had a good negotiating position to get better resources." In his mind, he had been doing the best he could. The court reporter, who had seen Surrency at work in both jobs, noted how much he had changed. The old Surrency had gone downhill as his caseload had increased; he simply couldn't keep up. "It wasn't Surrency that got worse—the system got worse because of the overload of cases." Now, she was impressed. "If I hadn't seen him, I would have thought... he couldn't do it."

Miraculously, the conditions in Everett's office suited Surrency's temperament: once slipshod and ineffective, he'd become competent and successful. Plenty of social science evidence proves that systems often shape the individual. In what psychologists call a "strong" situation of controlling structures and norms, an individual has almost no chance of changing a system. J. Richard Hackman, an organizational

psychologist at Harvard University, has given much thought to the individual's capacity to oppose the cultural current of a group or organization. "The power of the situation is like the current," he said. "To try and swim against it is a losing proposition." Extraordinary individuals are "extremely rare," Hackman says.

Terry Everett may have been that atypical, major force, but there are two caveats here. While she is somewhat of a missionary who has fought hard for her office, Everett started out, seventeen years earlier, in a better place than Surrency. She operated from the sound structure of a public defender's office, which gave her a foothold in the courthouse (Surrency never even had an office in Greene County), a full-time job, and the basic platform from which to push for more resources. She had worked numerous jobs as an attorney and didn't seem to mind the possibility of getting fired—she would land another job.

Second, she had a partner in Angie Coggins. At different times, when one of the women threatened to quit, the other convinced her to stay. They were a team. In Houston County, "every single lawyer would help every other lawyer if they had to," said Surrency. "My compatriots have achieved wonders." In Greene County, Surrency had no colleagues. He was a solo practitioner, which made him potentially more skittish about going up against judges—he had an incentive to perform for his paying clients. Plus, he had no one at his back to oppose the prosecutor, or the judge, if necessary. To keep his job, he behaved in ways that undermined his role in the adversarial system. Over the years, he adjusted to the demands of the very colleagues he was supposed to keep in check.

Surrency really only had two good alternatives: find a way to alter the situation or get out. To alert the system of its failings was not something he would do; he never saw himself as a problem in the first place. He was also helpless to change it. Further, someone would have to feel pretty self-confident to say publicly that his job was unmanageable. For instance, in 2006 an ABA ethics committee said that attorneys who represent the indigent and are overburdened must, if no other alternatives are available, file motions to withdraw from a case or to ask a

judge to stop new appointments when they have too many.[105] In the two years since the rule passed, only five public defender's offices have stepped up to admit they couldn't do their jobs properly.[106] Given how rampant the caseload problem is, this is a modest response at best.

On the other hand, maybe a lawyer can never really know how battered he is. After leaving Greene County and joining Terry Everett's office, Surrency behaved in keeping with his character and perhaps human nature. He melded into the system. Without a conversion experience or sudden condemnation of his past performance, Surrency changed—or the system changed his behavior—for the better. He wasn't redeemed. His workplace simply created new expectations that he was capable enough to fulfill. The last time we spoke, I told Surrency that the public defenders of Houston County seemed to be passionate about their work. He agreed and added, "I fit right in."

CONCLUSION

In the corner of my office, there are boxes of files containing police reports and court papers from the time I spent in Quitman County, Mississippi. For me, those files have come to symbolize the particular difficulty of documenting ordinary injustice: the mishandling of a single case can never capture the extent of the problem. Miss Wiggs, Quitman County's court clerk, had taped to her wall a list of cases not pursued by the prosecution. That list served as a roadmap, a guide to a large terrain of system failure, but Miss Wiggs herself could not have said what all the different cases had in common. She had neither the time nor expertise to look at the factual and legal merits of each individual situation and pluck out the common denominator. But she had nonetheless suspected something that many outsiders and the prosecutor had missed: a pattern of nonprosecution in the county's court.

Ordinary injustice often seems like an unfortunate collection of facts until an underlying pattern is revealed. Compounding the difficulty

is the fact that the pattern is frequently invisible. The information in those file boxes, like the situations documented in this book, reveal not just what went on in court in Quitman County but what wasn't going on. Most people are in no position to do the tedious leg work necessary to find the pattern of ordinary injustice and show, for example, that a particular kind of crime is lost to follow up or that the accused is being denied an adequate defense. Proving mistakes, both visible and invisible, is very difficult in the criminal justice system, even for those who are insiders. Clare and Catherine Evans, both court clerks in Chicago, spent half a lifetime running their own covert investigation to prove the innocence of their beloved family member, Michael, who had been wrongfully convicted of rape and murder. Their efforts went nowhere.

For many, any intervention is already too late. Eleanor Johnson, whose daughter's case of sexual molestation had never been properly investigated, chided me in one of our last conversations. "You can write what you want," she said. "The truth isn't going to reverse time." And yet completing the untold stories may be the only way to weave together the patterns of lapses, which could compel the wider community to intervene and take responsibility for local courts. The patterns that emerge here show that American courts have inherent vulnerabilities. Wherever cases are pled, attorneys cut deals, and prosecutors act with unchecked discretion, the ground is fertile for ordinary injustice.

How does a community address ordinary injustice in its courts when the problem is so hard to identify for insiders and outsiders alike? Currently, there is no mechanism in place to keep track of the extent of ordinary injustice. In the adversarial system, professional discretion holds a highly privileged position at the expense of transparency. There is the appellate system, which can overturn individual verdicts, but it can do so only on the record presented; it cannot go beyond that to address the kinds of errors or failures detailed in this book. No office exists to perform routine surveillance of the state of law in the nation's courtrooms. Most academics and independent watchdogs don't methodically analyze the behavior of individual courts. Locally, there's too much deference given to the people who work in the system. Courts are public and anyone can drop in on these taxpayer-funded forums at any time of the day. But citizens rarely do. And when people do observe, as the court monitors did in Troy, they often are impressed with the trappings and ceremonies of justice, like the judge's demeanor and the orderliness of the proceedings, and miss the important problems that are present everywhere.

Those inside the system are generally unable to see their own errors, much less confront them. This blindness is a signature feature of ordinary injustice. The lapses might seem relatively harmless when the sentence is small, like a fine or community service, and so the erosion of rights accumulates unchecked. Proper procedure is worn away until the oversight becomes too egregious to ignore: a defense attorney sleeps through a death penalty trial or a prosecutor pursues a case despite evidentiary weaknesses. The point that is overlooked is that these outrages could not happen without the prior, long-standing, day-to-day erosion of the commitment to justice.

Without outside pressure on lawyers and judges, there is little chance for restoring adversarial vigor. In Chicago, Greene County, and Troy, it took the involvement of outsiders to identify the chronic systemic flaws. But in each context, the intervention was too circumstantial or arbitrary to ensure durable improvement. If in Chicago Tom Breen had not mentioned a troubling case to his friend, Larry Marshall of the Center on Wrongful Conviction, two men would likely still be in prison for a crime they didn't commit. And not every organization has a lawyer like Karen Daniel, who knew how to enlist police to search a warehouse stockpiled with decades-old evidence. Few are the rebel lawyers, like Steve Bright of the Southern Center for Human Rights in Georgia, who move through the courthouses seeking Constitutional violations and are willing to challenge them. And the odds are very slim that a group like the New York State Commission on Judicial Conduct would fish out a prisoner's letter from a pile of mail and decide to launch an investigation that took down a beloved but errant judge.

Furthermore, for all the valiant efforts of reformers, problems are

often misdiagnosed. Removing an individual player (a rogue judge, a slipshod defense attorney, a sluggish or overzealous prosecutor) never ensures a systemic fix. In Greene County, the public defender who replaced Robert Surrency suffered from the same afflictions as his predecessor: too many cases, too little support, and the same players in a malnourished adversarial culture. "I felt like I was being held out as a poster child for all the things wrong in Georgia," said Surrency of the particular attention his performance received. In fact, the assistant district attorney was equally responsible—for hundreds of cases that hadn't been resolved. The defense and prosecution facilitated each other's bad habits, while the judges looked on, asking only for the orderly processing of cases.

On the other hand, what is widely visible are the relatively small number of trials that do take place. Here, there is enormous pressure to convict and a hyper-adversarial culture. These trials are the public's main window onto the courts, other than the mythic due process meted out in an endless succession of television legal dramas. The show trial reinforces this spectacular view of rigorous procedure. It is the arrests and prosecutions in these trials that, in the mind of the public, come to signify the health of the system. Consequently, prosecutors measure their success by the number of convictions they score.

In more routine cases, the absence of public records or laws that would require prosecutors to document their decisions make it easy for a prosecutor to discard cases without providing any legal rationale. The public does not have the means to follow court policies or track the decision-making in district attorneys' offices. Voters know almost nothing of the critical decisions related to plea bargaining and sentencing, and even less about the far more arcane process of charging defendants. Without information at their disposal, citizens are in no position to question the minor or even major lapses of prosecutors.

This lack of transparency is the central obstacle to change and will remain so as long as there is no constituency of users committed to improving the state's criminal trial courts. People in prison may have their families, who form support groups and organizations that try to

challenge unfair treatment. But often they are poor and powerless, with limited time to pursue redress. Victims' rights advocates also lobby for change and have been quite successful in responding to individual acts of crime. But there is no group of citizens who consistently lobbies for the health of the courts as a whole in the way that parents lobby for good schools or the elderly for prescription drug reform. Who will rally for the courts when even those who have been injured by the system have given up or don't have the understanding or means to successfully challenge the system?

In Georgia, the light that Steve Bright and others managed to shine on the state's poor indigent defense practices has flickered off yet again. In 2005, the new statewide Georgia Public Defenders Standards Council went into effect, increasing the potential for quality public defense. But the legislature never fully funded the program. The indigent defense system ran out of money for death penalty defense three years in a row. Now politicians have reopened debate over the very legitimacy of the defense function and legislators are cutting funds. Attorneys have been fired and offices closed. And once again, the Southern Center for Human Rights is filing lawsuits against the state. The new system is crumbling (or has crumbled already depending on whom you ask) as if all the costly studies and time-consuming meetings and heavy media attention had never happened.

Citizens need an ongoing way to assess the performance of the courts so that invisible patterns of injustice can be identified and legislators cannot whimsically withdraw support for a solution once the problem has stopped attracting notice. A court, like a car, requires a warning light to alert the community of a flaw in the system's functioning. Sadly, it is not feasible to have a disinterested lawyer sitting both inside and outside the court, talking to the legal workers, following the defendants and victims through the system, and compiling a detailed survey of procedure. So the question becomes one of how we can devise a way of monitoring the courts that alerts the public when there is a need to take a closer look.

Social scientists, with expertise in measurement, working together

with independent attorneys and court administrators, are in a position to create and implement yardsticks for the many facets of a court's performance.[1] The data they collect should focus on two different zones of interest. The first is the various areas of discretion allowed to legal professionals, such as a judge's decision to assign counsel and set bail, a prosecutor's choice to charge a defendant, and a defense attorney's distribution of time spent with clients and investigating cases. The second is the citizen-user's experience of the system, as in, for example, the timely assignment of court-appointed defense.

The information from such a court monitoring system would be collected and analyzed and the findings distributed to the community by a third party. The data should be presented publicly and in a format accessible to citizens who are not versed in the subtleties of legal procedure. A legislature could mandate that the figures be made widely available through regular updates on the Internet or in pamphlets. The release of the information could be timed to coincide with budget allocations and elections, thus holding court officials to more rigorous standards than simply their image as a crime fighter. Communities would become as accustomed to receiving and assessing data from their courts as they are to monitoring other parts of the infrastructure, like the quality of their schools or the state of their roads and bridges.

Such data would reveal patterns of misconduct similar to what transpired in Judge Bauer's court. His exorbitant bails, for example, would have been exposed in light of the overwhelming numbers of people held in jail as a result of those absurdly disproportionate sums. The percentage of defendants pleading guilty without attorneys—in Troy, throughout Georgia, and nationwide—should be a standard metric in every court, since it reflects the extent to which the abdication of rights is being tolerated. Other key information would reveal the length of a defendant's wait in jail without speaking to an attorney (average, median, longest) and the numbers of meetings a defendant had with counsel. Such a system would establish benchmarks across counties and states. In the end, taxpayers would be in a position to ask hard questions about whether tax dollars spent on indigent defense were

producing a quality service, for example, or whether a court's function should be targeted for improvement based on how it ranked next to similar courts in neighboring counties.

As for prosecutorial discretion, it would be instructive to determine the percentage of cases that get thrown out in each county and to compare the rates to other courts in cities with similar demographics and rates of crime. One might also want to compile information about the ratio of people arrested to cases brought to grand jury. This data could show that a certain type of crime (domestic violence comes to mind) hasn't been prosecuted in a certain number of years, or that hundreds of cases have been left in limbo without a final disposition.

In addition, a prosecutor could be required to check off reasons why he decided to discard cases (such as an uncooperative witness or the defendant's mental health problems). In this way a pattern of defective operating procedures or the good judgment of a professional team would be revealed. Moreover, the guarantee of transparency would encourage prosecutors to question police more rigorously and use their discretion prudently. Similarly, closer scrutiny would predispose judges and lawyers to enforce and protect rights. And any citizen sensing a problem would have the numbers to back up further inquiry.

A public venue for complaints about the courts is another way to resolve problems in the system. The new public defender in Greene County, Georgia, knew that he was failing. He had been the subject of a rash of complaints to the bar. But complaints like these generally remain private. There needs to be a methodology to filter complaints, determine which ones are well informed, depersonalize them, and use them to improve performance. Gathering information in this way would force communities and professionals to begin to pay attention to the "no trials" as well as the "show trials." The principal scorecards would no longer be the quick disposal of a calendar of cases, an attorney's win-loss record, or the verdict in an attention-getting case.[2]

Transparency is not by itself a panacea. It is the starting point from which to drive the allocation of resources toward fixing the deficiencies and replicating excellence. The goal is to create a set of vital signs that

record the vigor or torpor of the adversarial process. Of course, not all aspects of legal procedure can be quantified. In some cases there is no substitute for direct observation by a panel of qualified, disinterested peers. The most important work a defense lawyer does—persuading the prosecutor to make a reasonable plea offer, for example, and persuading the client to accept it—cannot be measured by statistics. It is the same with a prosecutor's decision to bring a case to grand jury. But the question of whether the vast majority of cases are within a minimally acceptable norm can be measured.

Lawyers will certainly fight over these metrics (they are, after all, trained in argument and have an enormous stake in the benchmarks that are chosen). Determining what qualifies as a good outcome (independent of a verdict) will be difficult, as will devising formulas that allow for meaningful comparisons across communities. How will we do this? Well, it's hard to think of another profession that doesn't tackle this challenge. Cardiac surgeons are graded and fight over the system on their report cards; teachers unions debate test scores as measures of their professional worth. Why not attorneys?

Some will argue that disclosure is an impractical first step because it is too costly and because citizens and professionals alike will never overcome their indifference to the state of our criminal justice system. But there is an inherent collective demand for justice, evident in the public's riveted attention on those few trials that do capture the national interest. Also, the exposure of adverse trial outcomes paves the way for change. In Illinois, the governor declared a moratorium on the death penalty in 2000 after thirteen people who had been sentenced to death were released based on findings of innocence. The exonerations in this state and others created a major shift in opinion about the inviolability of the justice system and the death penalty. This change demonstrates that citizens will not stand for deeply flawed courts, even if they themselves have never been victims or convicted of crimes.

Other critics will claim that professional monitoring generally makes little impact. Advocates for the poor will contend that the system is stripped to the bare bones as it is; any surplus money should go to the indigent defense attorney working with heavy caseloads and without the means for investigations. Judges and prosecutors will say that they themselves also lack the necessary resources to do their jobs.

All these criticisms have the power to shut down conversation. Albert O. Hirschman, one of the great thinkers on social change, writes that opponents of progressive reform often argue that attempts at social transformation will have no effect or are inept.[3] Hirschman condemns this "disabused and bitter" stance that does not allow for the possibility of "social learning or for incremental, corrective policy-making."[4] The debate over justice—that we don't have enough money for it and yet justice must be done—needs the opportunity to take hold. As of now, there is not even a starting point for communities to identify the kinds of legal errors that are taking place. Without this, we cannot even begin a discussion about how to create better local adversarial systems. Moreover, greater funding and more radical remedies don't stand a chance of success if there is no means of jump-starting and sustaining the political will.

Also, monitoring is far more practical than other suggestions for remedying the system (like eliminating plea bargaining or jury trials altogether, or making judges more like investigators than neutral arbiters). This book takes the adversarial system as found in our courts as its point of departure. Despite withering academic critiques and calls for dismantling it, adversarialism appears to be as fundamental to our legal culture as competition is to our partisan politics and market economy. Any proposal for reform has to take this into account.

In the absence of metrics, each single flawed case can be put down to he-said/she-said mismanagement. Jody Clifton's boyfriend beat her savagely with a tire iron and was never prosecuted for the crime. Law enforcement said she had lied about going back to live with him; she said they were trying to cover up their neglect of her case. When I last spoke to Jody, she learned that hers was not the only case to have been ignored. The district attorney hadn't prosecuted a single domestic-violence case in Quitman in more than twenty years. "Really?" she said. Her voice, normally flat, sounded astonished. "*Twenty years?*"

It does not have to be this way. Let us imagine a different scenario, one in which Jody Clifton had known that the treatment of her case was not exceptional but part of an epidemic of unprosecuted domestic-violence cases. Maybe she would have tried to confront the prosecutor or sought support for forcing him to act. Maybe law enforcement, knowing they were being watched, could have been shamed into action. Metrics would offer a mirror for people who work in the system, allowing them to see how their roles might have eroded at the expense of rights and public safety. Metrics alone are not an answer, but they could be the beginning of one. They are the tools we need to ask for the courts we deserve.