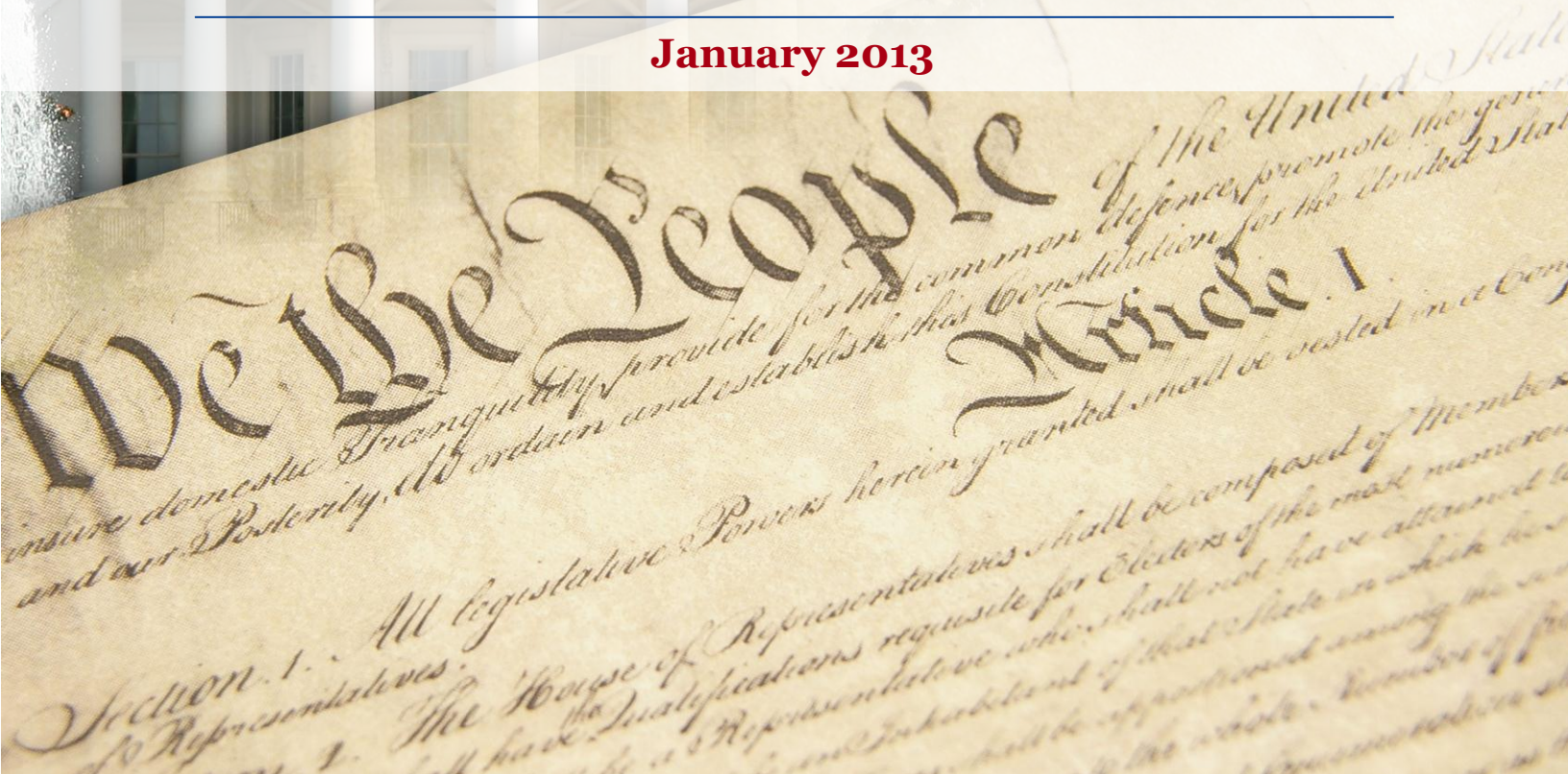




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“Assessing the Indigent Defense System”

by Erica J. Hashimoto

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

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Assessing the Indigent Defense System

*Erica J. Hashimoto**

I. Introduction

Since 1963, indigent felony defendants prosecuted in state courts have had a constitutional right to counsel,¹ and many misdemeanor defendants prosecuted in state courts have had a constitutional right to counsel since 1973.² Decades later, and in spite of the fact that we live in an era preoccupied with data, we still lack data on the most basic questions related to the indigent defense system. For instance, we have no idea how many defendants are represented by the indigent defense systems in this country, how many misdemeanor defendants have a right to counsel, or what percentage of defendants who are entitled to court-appointed representation go unrepresented. The limited data we do have certainly suggest that many jurisdictions are violating defendants' constitutional right to counsel, but those data are incomplete. Without more complete data, it is impossible to assess adequately this fundamental constitutional right and know the extent of any violations around the country.

Data, of course, will not solve the indigent defense crisis. Policymakers and advocates must use the data. If properly analyzed, however, the data will give us a much better idea both of where in the system the problems lie and of what solutions will alleviate those problems. Perhaps just as importantly, data can serve as a wake-up call for those who have been disengaged from the indigent defense crisis and can provide a baseline so that we can begin to measure progress.

The Bureau of Justice Statistics in the U.S. Department of Justice (BJS) is the agency in the best position to collect nationwide data on the indigent defense system. BJS currently collects numerous categories of data on cases in the criminal justice systems in both state and federal courts. For instance, the State Court Processing Statistics project for years has collected information on felony cases in a sample of the 75 largest counties. As a result of that data collection, researchers have extensive data on felony cases in the 75 largest counties, including the types of charges against defendants,

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

² See *Argersinger v. Hamlin*, 407 U.S. 25 (1973).

trial and plea rates, type of counsel, dispositions, and the length of time it took to resolve the charges. While these data have been incredibly helpful, we have no comparable data on misdemeanor defendants or on felony defendants in smaller counties. This gap in the data is significant because anecdotal evidence demonstrates that many misdemeanor defendants who have a right to counsel are not represented. We therefore need better data so that we can examine representation rates for these groups.

Once we have basic data on representation rates for all categories of defendants, we need to understand why representation rates for certain groups lag. In particular, we need to examine the indigence standards used to qualify defendants for appointed counsel, the recent trend toward charging application fees in order to qualify for appointed counsel, and waivers of counsel by defendants in order to determine whether any of these practices result in an unconstitutional denial of the right to counsel. Collecting data on representation rates and on these issues will not be easy or costless. We cannot, however, continue to ignore the fact that we lack even the most basic information about whether states are meeting their constitutional obligation to provide indigent defendants with counsel.

In addition to collecting data on these basic questions, BJS also can play a critical role in collecting data on the operation of the system itself, particularly in helping us assess the quality of counsel appointed by the system. In this area, BJS already has collected a significant amount of useful data. The Department of Justice (DOJ) now needs to commit to taking the next steps: analyzing that data with an eye toward identifying problems in the indigent defense system along with potential solutions, publicizing the analysis, and, most critically, using that analysis to solve the problems it documents. For instance, BJS now has comprehensive data on caseloads of public defender offices and the mechanisms offices use to control their caseloads. Those data need to be analyzed in order to determine which mechanisms work to keep caseloads manageable. Once that analysis has been completed, DOJ needs to publish the results, and provide incentives for jurisdictions to adopt those mechanisms. The timing of appointment of counsel and extent of contact between lawyer and client is another area in which BJS has already collected significant data, and BJS now needs to use that data to improve the indigent defense system. These are only two examples of areas in which BJS and DOJ could provide useful analysis and promote long-term change, and there certainly are many others. The key point, however, is that DOJ needs not only to undertake analysis of data on these issues in order to determine which solutions work, but also to promote those solutions.

The next section of this Issue Brief discusses the importance of collecting data on representation rates in misdemeanor and felony cases, and it highlights the current dearth of data on that issue. This section also considers potential barriers that are preventing indigent defendants from being represented and methods for assessing whether those barriers in fact are preventing representation. The third section examines the ways in

which we can use data to measure the quality of representation being provided to indigent defendants so that we can improve upon that representation. The Issue Brief concludes with a specific recommendation that BJS collect and analyze additional data that can be used to assess and improve the indigent defense system.

II. Access to Counsel

At the most basic level, the first question we need to be able to answer is whether states are appointing counsel for indigent defendants as required by the Constitution. Unfortunately, although we have known for years that many defendants who have a right to counsel are being denied representation,³ we simply do not have sufficient data to assess the extent of the problem. Perhaps more than any other category of data, collection of these data—which would allow us to assess not only whether defendants who have a right to counsel are receiving counsel but also the number of cases the indigent defense system is handling on a yearly basis—is critical for assessing the state of the indigent defense system. BJS therefore should begin to collect the data necessary to answer this basic question.

A. Collecting Representation Rates for Misdemeanor and Rural Felony Defendants

Data currently collected by BJS demonstrate that in felony cases in the 75 largest counties, virtually all defendants are represented by counsel.⁴ We have, however, no such assurances either for misdemeanor defendants⁵ or for felony defendants in less populous jurisdictions. Indeed, as discussed below, the only data we do have on misdemeanor defendants establish that many misdemeanor defendants who have a constitutional right to counsel are not represented by counsel. Data on representation rates are critically important, both to gain a better sense of the scale of indigent defense representation and to assess whether and to what extent defendants are unconstitutionally being deprived of their right to counsel.

Beginning with misdemeanor defendants, scholars and defense advocates have expressed concern that states are unconstitutionally failing to appoint counsel for many

³ See, e.g., A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 22–23 (2004) [hereinafter *GIDEON'S BROKEN PROMISE*].

⁴ See, e.g., CAROLINE WOLFE HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (reporting that in 1996, 99.6% of felony defendants in the 75 largest counties were represented by counsel), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

⁵ The term “misdemeanor defendants” as used in this Issue Brief encompasses all criminal defendants charged in non-felony cases. States use different terms for these offenses, including misdemeanors and petty offenses, and I intend to include all non-felony criminal defendants.

misdemeanor defendants who have a right to counsel.⁶ This concern arises for several reasons. First, the vast majority of cases processed through state and local criminal justice systems are misdemeanors.⁷ Because of the volume of misdemeanor cases, there is a significant financial incentive for states to infringe on the right to counsel in those cases.⁸

Second, although the Supreme Court has recognized a right to counsel for at least some misdemeanor defendants since 1973,⁹ states have not only resisted the right to counsel in misdemeanor cases much more than in felony cases,¹⁰ but also faced few consequences for that resistance. The lack of consequences stems, at least in part, from the fact that it is difficult to ascertain which misdemeanor defendants have a right to counsel. In 1973, the Court held that indigent defendants who are sentenced to any term of imprisonment—even one day—have a right to court-appointed representation.¹¹ In 2002, the Court held in *Alabama v. Shelton* that the right to counsel also applies to defendants sentenced to suspended terms of imprisonment, at least so long as they are not permitted to re-litigate their guilt at a later probation revocation hearing.¹² But not all defendants charged with misdemeanors have a right to counsel.¹³ And because the right depends on the sentence actually imposed, if states deny counsel to misdemeanor defendants, it is very difficult to ascertain until after the proceeding is finished whether the defendants' constitutional rights have been violated. States therefore have been able to violate the right to counsel without much risk of reversal.

⁶ See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (April 2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) [hereinafter NACDL REPORT]; *GIDEON'S BROKEN PROMISE*, supra n.3, at 23–25.

⁷ See NAT'L CTR. FOR STATE COURT STATISTICS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS (reporting that misdemeanors outnumber felonies four to one in thirteen states), available at http://www.ncsconline.org/D_Research/csp/2007B_files/EWSC-2007-v21-online.pdf; *GIDEON'S BROKEN PROMISE*, supra n.3, at 22.

⁸ For instance, the Chief Justice of the South Carolina Supreme Court acknowledged that South Carolina magistrates are not appointing counsel for some misdemeanor defendants who have a right to counsel because of the volume of cases. See NACDL REPORT, supra n.6, at 15.

⁹ See *Argersinger v. Hamlin*, 407 U.S. 25 (1973).

¹⁰ This may be attributable to the fact that, when *Gideon* was decided, all but five states provided a right to counsel in all felony cases. By contrast, when *Argersinger* was decided, 19 states did not provide counsel to any misdemeanor defendants. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 477 (2007).

¹¹ See *Argersinger*, 407 U.S. at 36–37. Defendants convicted of misdemeanors or petty offenses who are sentenced only to pay a fine, by contrast, have no constitutional right to representation even if the offense carries with it the potential for imprisonment. See *Scott v. Illinois*, 440 U.S. 367 (1979).

¹² See *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

¹³ See *Scott*, 440 U.S. at 373–74 (holding that misdemeanor defendants sentenced only to a fine do not have a right to counsel).

Third, and perhaps most importantly, all evidence we currently have indicates that a significant percentage of misdemeanor defendants who have a right to counsel are not represented. The National Association of Criminal Defense Lawyers compiled a comprehensive report on the misdemeanor court system, including the appointment of counsel.¹⁴ The authors of the report undertook site visits to misdemeanor courts in seven states and reported that counsel was not appointed in many cases. For instance, in North Dakota, “counsel was not appointed or present at arraignment for misdemeanor cases, despite the fact that most defendants pled guilty at the hearing and many were sentenced to jail time.”¹⁵

Data currently collected by BJS in a survey of inmates confined in local jails confirm that a significant percentage of misdemeanor defendants who have a right to counsel are not represented.¹⁶ As set forth in Table 1, in 2002, 30% of misdemeanor defendants who were incarcerated as a result of their convictions—and who therefore had a right to court-appointed counsel under *Argersinger*—reported that they were not represented by counsel.

Table 1: Representation for Inmates Charged with Misdemeanors and Sentenced to Incarceration

	Percentage ¹⁷
Represented by counsel	69.4
Not represented by counsel	30.0
Do not know	0.5

While this dataset confirms that a significant percentage of misdemeanor defendants who had a right to counsel under *Argersinger* were unrepresented, it has several significant limitations. First, it contains a relatively small sample of misdemeanor defendants, so it is difficult to draw any firm conclusions from these data.¹⁸ Second, this dataset provides no data on misdemeanor defendants sentenced to suspended terms of

¹⁴ See NACDL REPORT, *supra* n.6. See also Alisa Smith & Sean Madden, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. (July 2011) at 18–19 Table 6, available at <http://www.nacdl.org/News.aspx?id=23653&terms=three+minute+justice>.

¹⁵ *Id.* at 15.

¹⁶ See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN LOCAL JAILS (2002), available at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/04359.xml> [hereinafter SURVEY OF INMATES IN LOCAL JAILS].

¹⁷ Percentages do not add up to 100% because of rounding.

¹⁸ There were only 559 inmates who were convicted of misdemeanors and sentenced to imprisonment for that conviction, and who responded to the question regarding representation.

incarceration who had a right to counsel under *Shelton*. The *Shelton* defendants pose an especially high risk for unconstitutional denial of the right to counsel both because at least some state court judges appear to believe that *Shelton* was wrongly decided,¹⁹ and because most defendants (and at least some judges and lawyers) do not appear to be familiar with the Court's holding. Unfortunately, we have no data to assess, on a nationwide basis, whether *Shelton* defendants are receiving counsel. Indeed, we do not even have any idea how many *Shelton* and *Argersinger* defendants there are, since there is no nationwide database with information on misdemeanor cases.

In order to fill this crucial gap in the data, BJS should begin collecting data on misdemeanor defendants—including data on the charges, the type of representation, the method of adjudication, the outcome, and the sentence—just as it collects these data on felony defendants in the 75 largest counties. The data BJS currently collects on felony defendants in the 75 largest counties would give us all the information we need in order to determine representation rates for misdemeanor defendants and whether those who were unrepresented had a Sixth Amendment right to counsel.²⁰ Moreover, that data would tell us what percentage of misdemeanor defendants use court-appointed, as opposed to retained, counsel. Of course, collecting complete data on misdemeanor defendants in all state and local courts would be a significant undertaking, and BJS almost certainly will have to identify a representative sample of counties and collect data from those counties rather than trying to collect data from all counties.²¹ BJS has, however, developed a good model with its data collection on felony defendants in the 75 largest urban counties. BJS has been able to obtain data from a sufficient number of counties (primarily through pretrial services agencies) to provide a relatively representative sample of the 75 large counties. Most of these counties already keep these data in some form, and providing the data to BJS primarily requires converting it into a standard format. It is likely that many (although certainly not all) jurisdictions also keep at least some data on misdemeanor cases. Although collecting a representative sample of misdemeanor data from these jurisdictions will be time consuming, these data will provide valuable information not only about the indigent defense system but also about criminal justice systems across the states.

Like data on representation rates for misdemeanor defendants, data on felony defendants in counties other than the 75 largest counties are sparse. The only available nationwide data on felony representation rates comes from a survey of state prison

¹⁹ See NACDL REPORT, *supra* n.6, at 15.

²⁰ The data collected on felony cases in the 75 largest counties includes data on sentence imposed and on type of counsel.

²¹ Indeed, the database for felony defendants in the 75 largest counties uses data from a representative sample of 40 of the largest 75 counties rather than from all 75 counties.

inmates.²² The problem with this dataset, however, is that it represents a sample of defendants in all state prison facilities across the country, so it includes felony defendants from large urban counties. It is important to be able to isolate data on representation rates for felony defendants in less populous jurisdictions because defendants in those jurisdictions may be at a higher risk of not receiving counsel than felony defendants in large urban counties. At this point, almost 50 years after *Gideon*, most of the more populous counties have developed indigent defense systems and have an active indigent defense bar. Lawyers in that bar provide at least some assurance that felony defendants are being appointed counsel as required by the Constitution. In smaller jurisdictions, however, there may not be an experienced indigent defense bar, and other bar members may not view it as their obligation to ensure that all felony defendants are represented. BJS therefore should collect data on felony representation rates in less populous jurisdictions.

One potential source of data is the National Judicial Reporting Program, which provides BJS with data on convicted felons from a nationally representative sample of 300 counties.²³ This database already includes a variable on the population of the county from which the data originate. It does not currently include any data on type of representation, but those data should be relatively easy to collect since the study already includes a number of case and defendant variables, such as the nature of conviction, the types of charges, the sentence, and the age, sex, and race of the defendant. In short, we need these data in order to assure, at the most basic level, that states are providing counsel to defendants who have a constitutional right to be represented.

B. Barriers to Access to Counsel

As noted above, the representation rate for felony defendants in large, urban counties is almost 100%, and there is no reason that the representation rates for more rural felony defendants or for misdemeanor defendants with a constitutional right to counsel *should* be any lower. We already know, however, that representation rates for misdemeanor defendants lag significantly behind those of felony defendants in large counties, and, as discussed above, we may well discover that the representation rates for felony defendants in less populous counties also lag. The challenge, then, is to assess why there are lower representation rates for these groups.

There are several potential explanations for lower representation rates, and we need to collect additional data so that we can try to determine which, if any, are

²² See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN FEDERAL AND STATE CORR. FACILITIES (2004), available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4572?q=survey+state+inmates> [hereinafter SURVEY OF INMATES IN FEDERAL AND STATE CORR. FACILITIES].

²³ See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL JUDICIAL REPORTING PROGRAM (2004), available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/20760?archive=ICPSR&q=national+judicial+reporting>.

responsible. First, criminal defendants, whether charged with misdemeanors or with felonies, have a constitutional right to court-appointed counsel only if they are deemed indigent. Standards for determining indigence, however, vary widely depending on the jurisdiction. It therefore is possible that some defendants are unrepresented because they lack resources to hire counsel, but a court nonetheless concludes that they are not indigent.²⁴ Second, defendants in many jurisdictions now are required to pay application fees for court-appointed counsel.²⁵ Most of the fee statutes specify that courts can waive payment of fees for defendants who are unable to pay it,²⁶ but it is not clear whether courts actually are waiving the fees or whether these fee statutes instead are preventing indigent defendants from being represented.²⁷ Finally, defendants may be waiving the right to representation, either voluntarily or because they feel coerced into doing so.

Attempting to ascertain the degree to which each of these factors results in unrepresented defendants is critically important because that information can help us determine whether or not states are fulfilling their constitutional obligation. If standards used to determine indigence, for instance, are set so restrictively that defendants who cannot afford counsel are denied appointment, the constitutional rights of those defendants are violated. Unfortunately, indigence standards vary widely from state to state, and occasionally even from county to county within a state.²⁸ In some jurisdictions like Georgia, for instance, there is a presumption that felony defendants are entitled to appointment of counsel only if they earn less than 150% of the federal poverty

²⁴ It is also conceivable that misdemeanor defendants and felony defendants in less populous jurisdictions are wealthier than felony defendants in urban areas and therefore are less likely to have a right to court-appointed counsel. There is no way of testing this since our data are so limited. From the data collected in the 2002 SURVEY OF INMATES IN LOCAL JAILS, *supra* n.16, however, we do know that approximately 50% of the inmates in Table 1 who reported that they were sentenced to incarceration but were not represented earned less than the federal poverty guidelines (\$738 per month in 2002 for a single person) in the month before they were arrested, and between 60% and 70% of them earned less than 150% of the federal poverty guidelines. Suffice it to say, then, that the majority of the misdemeanor defendants who were not represented were indigent and therefore had a right to court-appointed counsel.

²⁵ See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052–53 (2006) (noting that laws in 25 states and two counties authorize or compel fees from indigent defendants).

²⁶ See, e.g., GA. CODE ANN. § 15-21A-6 (allowing waiver of fee for defendants whom the court deems are unable to pay). Of the states that authorize collection of fees, only Florida does not include a specific fee waiver provision. See Wright & Logan, *supra* n.25, at 2053. However, it does specify that “a person found to be indigent may not be refused counsel or other required due process services for failure to pay the fee.” FLA. STAT. § 27.52(1)(c).

²⁷ See Wright & Logan, *supra* n.25, at 2077–84 (noting the dearth of empirical evidence on whether application fees affect defendants’ decisions to waive counsel).

²⁸ See Adam Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. REV. 571 (2005). The Supreme Court has never provided any guidance regarding how states should determine whether a person is indigent for purposes of the constitutional right to counsel, and jurisdictions therefore have adopted very different standards governing the inquiry. See *id.* at 572 (“In the forty years since *Gideon* was decided, there has not been a single Supreme Court case defining what makes a criminal defendant poor enough to be entitled to appointed counsel.”).

guidelines.²⁹ In other states, however, courts (or in some cases public defender offices) examine a variety of factors in making the indigence assessment.³⁰ Because the practices vary, we currently do not know exactly how those standards are being implemented in individual jurisdictions, nor do we know whether and to what extent the standards are causing indigent defendants to be denied counsel.³¹

Similarly, we have no data from which we can determine whether states appoint counsel for indigent defendants who cannot afford application fees and whether indigent defendants understand that the fee will be waived if they cannot afford it. If states are denying representation based on an inability to pay a fee or if indigent defendants are deterred from accepting the appointment of counsel because they think they are required to pay the fee, then the poorest defendants may not be receiving counsel when they should.

Waiver of the right to counsel is the most likely explanation for lower representation rates,³² and in some ways, the constitutional implications of waiver are the most difficult to assess. Just as defendants have a right to counsel, they also have a constitutional right of self-representation.³³ If defendants knowingly, voluntarily, and intelligently waive the right to counsel because they wish to represent themselves, their constitutional rights have not been violated.³⁴ If, on the other hand, defendants are not informed that they have the right to counsel before they waive that right,³⁵ or if they are coerced into an involuntary waiver,³⁶ their constitutional rights have been violated. It is critically important to be able to ascertain whether and to what extent defendants are

²⁹ See GA. CODE ANN. § 17-12-8(b) (2009).

³⁰ See, e.g., ALA. CODE § 15-12-1 (2009) (directing courts to examine factors including the net income of the defendant, the extent and liquidity of assets, and the projected length and complexity of the legal proceedings in order to determine whether the defendant is financially unable to pay for his or her defense).

³¹ For instance, approximately a third of the county-based public defender offices report that they consider the defendant's ability to post bail or bond in determining whether a defendant is indigent. See LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: CENSUS OF PUBLIC DEFENDER OFFICES 2007, Table 3b (2009) [hereinafter LANGTON & FAROLE]. Depending on how courts use that factor, however, it could result in denial of counsel to otherwise indigent defendants because the ability of an indigent defendant to post bond through a bail bondsman does not provide any indication whether that defendant can afford to pay a lawyer to represent him, particularly since lawyers often require defendants to pay most (or all) of the fee at the outset of the representation.

³² See *GIDEON'S BROKEN PROMISE*, *supra* n.3, at 23–25 (documenting numerous instances of invalid waivers of counsel).

³³ See *Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that criminal defendants have a Sixth Amendment right to represent themselves).

³⁴ See, e.g., *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (observing that waiver of the right to counsel must be “knowing and voluntary”).

³⁵ See *Iowa v. Tovar*, 541 U.S. 77, 91 (2004).

³⁶ The site observers for the NACDL Report document numerous instances of uninformed or coerced waivers of counsel in misdemeanor cases. See NACDL REPORT, *supra* n.6, at 15–16.

being subjected to involuntary or uninformed waivers of counsel, but as with indigence standards and application fees, we simply have no nationwide data on the issue.³⁷

Thus, we need data on these three issues. The difficulty is that unlike data on representation of defendants, which are already recorded in some way in most court systems and therefore just need compilation, we cannot determine why defendants are unrepresented from data that courts currently collect.³⁸ In fact, the only sources of data on this issue are defendants themselves or court observers. With respect to collecting data from defendants, BJS already collects data from surveys of inmates in local jails and in state correctional facilities, and the questions in those surveys certainly could be expanded to ask defendants who report that they were unrepresented why they did not have counsel.³⁹ Since those surveys already are undertaken every five or six years, it should be relatively costless to add a couple of questions to help ascertain whether any of the factors discussed above play a part in defendants' decisions to proceed pro se.

Information collected through these surveys is, however, somewhat limited. First, both surveys collect information from inmates, and they therefore provide no information on defendants who are not sentenced to incarceration. Particularly for misdemeanor defendants, the limitation of these databases to incarcerated inmates significantly undermines the usefulness of the data because many misdemeanor defendants are not sentenced to incarceration. Second, the questions in the surveys related to waivers of counsel would have to be very carefully worded in order to assess whether the waivers were voluntary. Defendants who were not adequately informed of their right to counsel, for instance, may respond that they did not have a lawyer because they could not afford one, not realizing that they had a right to have counsel appointed.⁴⁰

³⁷ The NACDL REPORT provides the most comprehensive data on waivers in misdemeanor cases. While these data are incredibly useful, they are limited to observations from site visits in select counties in seven states. See NACDL REPORT, *supra* n.6, at 7.

³⁸ BJS has compiled data from a census of indigent defense systems operated either on a statewide or on a county level, and it has recently made those data available for analysis. See, e.g., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES: COUNTY-BASED AND LOCAL OFFICES (2007), available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/29502> [hereinafter COUNTY-BASED AND LOCAL OFFICES CENSUS]. The data specify the extent to which jurisdictions collect fees and the factors considered in determining indigence, but they provide no indication regarding the operation of these potential barriers.

³⁹ These surveys already collect socioeconomic data on inmates, including the inmates' monthly income in the month before arrest. So once we know the reasons inmates report that they were unrepresented, we can examine that data in light of the inmate's economic status.

⁴⁰ In addition to those two limitations, the databases from the surveys do not currently include data on the jurisdictions in which the inmates were convicted. Without this information, we cannot assess the fee structure to which the defendant was subject or the standard the jurisdiction uses to ascertain indigence. Information on the jurisdiction of conviction therefore would need to be collected and made available for analysis.

Because of these limitations with the correctional facility surveys, in addition to collecting data in those surveys, BJS should undertake more targeted inquiries in jurisdictions where the data on representation indicate high rates of non-representation. For instance, BJS could undertake site visits in a representative sample of counties in those jurisdictions to document indigence determinations, fee waivers, and waivers of counsel, including what type of notice is provided to defendants of their constitutional right to counsel and the inadvisability of proceeding pro se. The combination of the correctional facility survey data and more targeted data collection efforts in jurisdictions with high rates of non-representation should provide us with valuable data regarding why defendants who have a right to counsel are not represented.

III. Effective Assistance of Counsel

Ensuring that appointed counsel meet a constitutional minimum standard of competence has proven to be even more challenging than ensuring that defendants have access to counsel. Defendants, of course, have a right not only to representation by a lawyer but also to the effective assistance of counsel.⁴¹ Whether a particular defendant has received constitutionally effective assistance is an individual matter.⁴² There are, however, certain ways in which we can measure indigent defense systems to assess whether they are providing effective assistance. DOJ can play a critical role in assessing what indigent defense system mechanisms contribute to effective assistance and then promoting those mechanisms.

Although there are a number of ways we could assess an indigent defense system, this section will focus on two: (1) attorney caseloads; and (2) timing of appointment and contact between indigent defense counsel and clients. These factors are relatively non-controversial in the sense that nobody really disputes that lawyers with excessive caseloads and lawyers who have no (or only very minimal) contact with their clients cannot provide effective assistance, and BJS already has collected significant data on these issues. As a result, they provide an illustration of the role DOJ can play in promoting a functional indigent defense system first by analyzing the data in order to both document problems and identify solutions, and then by providing incentives for jurisdictions to adopt effective solutions.

A. Caseload Limitations

There is a plethora of evidence that defenders with excessive caseloads cannot provide effective assistance to all of their clients.⁴³ There also is extensive evidence—

⁴¹ See *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴² See generally *id.*

⁴³ See, e.g., Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 391–92 (1993) (identifying problems caused by excessive caseloads); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461,

both from data collected in particular jurisdictions⁴⁴ and from more comprehensive data collected by BJS—that caseloads of indigent defense providers in many jurisdictions are excessive by any definition.⁴⁵ In 1999, according to data collected by BJS in a program survey of indigent defense systems in the 100 largest counties, public defender offices in those jurisdictions had a total of 7,148 litigating attorneys (including supervisory attorneys and chief defenders). In that same year, those offices *received*: 719,660 non-capital felony cases; 1,612,046 misdemeanors; 13,053 appeals; and 277,000 juvenile cases.⁴⁶ This means that in 1999, each attorney *received* (in addition to any cases they had on their caseload at the beginning of the year) an average of 100 felonies, 225 misdemeanors, 2 appeals, and 39 juvenile cases, in addition to a slew of probation revocations and other types of cases. The most commonly used caseload standards limit attorneys to 150 felonies, *or* 400 misdemeanors, *or* 200 juvenile cases, *or* 25 appeals per year.⁴⁷ To put it in terms of percentages, each attorney received 67% (100/150) of a year’s maximum caseload in felonies; 56% (225/400) of a year’s caseload in misdemeanors; 8% (2/25) of a year’s caseload in appeals; and 20% (39/200) of a year’s caseload in juvenile cases. Totaling that caseload, each defender received approximately 50% more cases than he or she was supposed to be carrying.⁴⁸

1509 (2003) (recognizing that caseload caps are critical to quality representation); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 236–37 (2004) (advocating for parity of resources between prosecutors and defense attorneys and for caseload parity); *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1054–57 (2006) (detailing the problem of crushing caseloads for indigent defense counsel); Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 908 (2004) (identifying excessive caseloads as one of the problems confronting indigent defense systems in this country); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240–41 (1993) (noting that “staggering caseloads” lead to “burnout” among public defenders).

⁴⁴ *See* GIDEON’S BROKEN PROMISE, *supra* n.3, at 17–18.

⁴⁵ There is some dispute among experts in the field regarding optimal caseload sizes, with some arguing for flat numerical limitations and others advocating for workload limitations tailored to the work involved with particular kinds of cases in particular jurisdictions. *See, e.g.*, SPANGENBERG GRP., U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 8 (2001) (recommending that workload limits be set, rather than caseload caps).

⁴⁶ *See* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL SURVEY OF INDIGENT DEFENSE SYSTEMS, 1999, *available at* <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/03081.xml>.

⁴⁷ *See* NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, GUIDELINES FOR LEGAL DEFENSE SERVICES, Standard 13.12 (1976). In 2002, the ABA adopted a resolution recommending that indigent defense systems comply with the NAC standards. *See* A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, princ. 5 (2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> [hereinafter A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS] (providing, as part of Principle 5, that “[n]ational caseload standards should in no event be exceeded” and citing to the numerical caseload limits contained in the NAC standards).

⁴⁸ As noted above, these figures include only cases received during the year and do not include cases that counsel was carrying at the start of the year.

More recent data demonstrate that excessive caseloads have not abated. In 2007, BJS conducted a census of public defender offices across the country. According to the analysis of that data, in public defender offices funded by both the county and the state that received at least 5,000 cases, each attorney received 169 felonies, 174 misdemeanors, and 3 appeals.⁴⁹ Thus, each attorney received 127% of the maximum caseload in felonies; 44% of a caseload in misdemeanors; and 12% of a maximum caseload in appeals. This means that each attorney received 80% more cases than they were supposed to carry under caseload standards.

At this point, then, we certainly have sufficient data to establish that defenders in some jurisdictions have unmanageable caseloads, and there appears to be no dispute that lawyers with those types of caseloads cannot provide effective assistance. The critical questions now are: (1) in which jurisdictions and types of defender systems are caseloads the most problematic; and (2) how can we more effectively control caseloads in those jurisdictions and systems?

BJS's most recent data collection related to the indigent defense system, the 2007 Census of Public Defender Offices, should help us begin to answer those questions.⁵⁰ In particular, the census requested data from public defender offices on whether offices had caseload limitations, the source of any caseload limitations, whether they had the authority to refuse cases if they experienced excessive caseloads, and whether their funding was tied to compliance with caseload limitations. These data should allow us to analyze caseloads of jurisdictions that employ different methods of controlling caseloads and give us a better sense of what methods are (or are not) working.⁵¹

Once we know what types of systems most effectively control caseloads, DOJ should both publicize those findings and provide incentives for jurisdictions (both states and counties) to employ those mechanisms. For instance, if the data establish that the most effective way of controlling caseloads in public defender offices that receive both county and state funding is to condition receipt of state funding on compliance with statutory caseload limits, then DOJ should provide funding to states that adopt these requirements so that those jurisdictions can monitor county compliance and provide additional funding to counties that stay below the maximums. If, on the other hand, the data establish that the most effective way to control caseloads is to provide public defenders with the authority to refuse cases as soon as their caseloads reach a certain limit, then DOJ should encourage the passage of such legislation and should provide

⁴⁹ See LANGTON & FAROLE, *supra* note 31, Table 5b.

⁵⁰ See *id.* at 3 (discussing how the Census collected data from public defender offices principally funded by state or local governments).

⁵¹ The BJS data also allow us to separately analyze jurisdictions with different office sizes and differing funding sources. These data are critical because some jurisdictions may have options for caseload control that other jurisdictions do not have.

training to public defenders on the importance of keeping track of their caseloads and of exercising their right to refuse cases.

In addition to analyzing the data that BJS has recently collected, BJS also needs to collect similar data on indigent defense providers that are not public defender offices, including contract indigent defense providers, private appointed counsel, and conflict counsel appointed when public defender representation presents a conflict of interest. In 1999, at least 90% of the 100 largest counties used private attorneys for at least some indigent defense representation.⁵² There is anecdotal evidence that caseloads for these attorneys may be even higher than the public defender caseloads.⁵³ BJS has indicated that it intends to study these indigent defense providers in the future, and it is critical that they do so.

B. Timing and Extent of Contact Between Counsel and Clients

The quality of indigent defense representation also can be measured by the timing and the frequency of contact between lawyer and client. Like excessive caseloads, there appears to be little debate that lawyers who fail to meet with their clients until plea or trial cannot provide effective assistance of counsel. A lawyer simply cannot have adequately investigated a case to recommend a plea without ever having talked to the client. That fact notwithstanding, the “meet ’em and plead ’em” stories of indigent defense attorneys meeting clients for the first time at plea hearings where they instruct clients to plead guilty run rampant.⁵⁴ As with excessive caseloads, then, we know that in some jurisdictions, lawyers do not have timely meetings with clients, but we do not know precisely how widespread the problem is or what mechanisms can be put in place to alleviate it.

A state’s failure to appoint counsel in a timely manner can lead to constitutional violations in two ways. First, if a defendant is unrepresented at a critical stage of the proceeding after the right to counsel has attached, the state has violated the defendant’s right to counsel. Preliminary hearings,⁵⁵ certain types of arraignments, and guilty pleas⁵⁶ all are critical stages. Second, if counsel is not appointed “within a reasonable time after attachment to allow for adequate representation at any critical stage of the proceeding

⁵² See CAROL J. DEFRANCES & MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 1 (2000).

⁵³ See, e.g., *GIDEON’S BROKEN PROMISE*, *supra* n.3, at 16.

⁵⁴ *Id.*

⁵⁵ See *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁵⁶ See *Iowa v. Tovar*, 541 U.S. 77 (2004).

before trial, as well as at trial itself,” then the state has denied the defendant’s constitutional right to the assistance of counsel.⁵⁷

The first issue—whether indigent defendants have counsel for all critical stages of the proceedings—is somewhat difficult to assess. The difficulty arises in part from the fact that the timing and nature of the first critical stage varies depending on the jurisdiction. We do, however, know that although the ABA recommends that “[c]ounsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter,”⁵⁸ according to data collected in the 2007 Census of Public Defender Offices, only about 28% percent of public defender offices funded in part by counties had formal guidelines requiring attorney appointment within 24 hours of client detention.⁵⁹ As set forth in Table 2, the data from BJS’s survey of state prison inmates confirms that the overwhelming majority of inmates represented by court-appointed counsel reported that they did not meet their attorneys within 24 hours, or even within one week, of arrest.⁶⁰

Table 2: When Inmates with Court-Appointed Counsel First Talked to Lawyer

	Percentage
Within 24 hours of arrest	7.3
Within a week of arrest	26.3
More than a week AFTER arrest	63.7
Do not know	2.7

As set forth in Table 3, moreover, the numbers are approximately the same for inmates represented by court-appointed counsel who were detained pending trial. Thus, it is abundantly clear that many prison inmates with court-appointed counsel, even those detained pending trial, simply did not receive counsel within the 24 hour period prescribed by the ABA.

⁵⁷ See *Rothgery v. Gillespie Cnty.*, 128 S. Ct. 2578, 2591 (2008).

⁵⁸ See A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* n.47, princ. 3.

⁵⁹ See LANGTON & FAROLE, *supra* n.49, Table 4b (2009).

⁶⁰ See SURVEY OF INMATES IN FEDERAL AND STATE CORR. FACILITIES, *supra* n.22.

Table 3: When Inmates Represented by Court-Appointed Counsel and Detained Pending Trial First Talked to Lawyer

	Percentage ⁶¹
Within 24 hours of arrest	7.0
Within a week of arrest	26.8
More than a week AFTER arrest	63.6
Do not know	2.7

Because the databases from these surveys do not currently include the jurisdiction in which the inmate was prosecuted and convicted, however, we cannot determine whether the inmate was denied the constitutional right to counsel at a critical stage. Perhaps more importantly, we cannot determine whether the inmates who report speaking with lawyers within 24 hours are in jurisdictions that have statutory or other mechanisms for ensuring timely appointment of counsel. Thus, we have no way of identifying which mechanisms for ensuring appointment of counsel within 24 hours, if any, actually result in timely appointment of counsel.

With respect to the second issue—whether indigent defendants are receiving ineffective assistance of counsel because of untimely appointments—data collected by BJS in its survey of state prison inmates suggest that this also is a significant problem.⁶² The Supreme Court has recognized that the constitutional right to counsel requires appointment of counsel sufficiently in advance of a trial or plea that the lawyer can prepare for the trial or plea.⁶³ At the very least, this standard contemplates that counsel will meet with the defendant at some point before the plea or trial. As set forth in Table 4, however, 24% of the inmates represented by court-appointed counsel reported that they first spoke to their lawyers at the trial or plea, and an additional 14% said they first spoke to their lawyers less than a week before the trial or plea.

⁶¹ Percentages do not add up to 100% because of rounding.

⁶² See SURVEY OF INMATES IN FEDERAL AND STATE CORR. FACILITIES, *supra* n.22.

⁶³ See *Rothgery v. Gillespie Cnty.*, 128 S. Ct. 2578, 2591 (2008).

Table 4: First Time Talked to Lawyer for Inmates Represented by Court-Appointed Counsel

	Percentage ⁶⁴
More than a week before	48.4
A week before	10.5
Less than a week	13.6
At trial/plea	24.2
Do not know	3.4

Thus, 38% of inmates represented by court-appointed counsel did not see their lawyers until within a week of plea or trial. By comparison, almost 70% of inmates who hired counsel reported speaking to those lawyers more than a week before trial, and only 10% reported speaking to counsel for the first time at trial.

Table 5: First Time Talked to Lawyer for Inmates Represented by Retained Counsel

	Percentage ⁶⁵
More than a week before trial	68.3
A week before	7.5
Less than a week	10.5
At trial/plea	9.8
Do not know	4.0

Perhaps even more disturbing, as set forth in Table 6, although the statistics are better for those inmates who pleaded not guilty (and therefore went to trial) and were represented by court-appointed counsel, 14% of them still reported that they met their attorneys for the first time at trial.

⁶⁴ Percentages do not add up to 100% because of rounding.

⁶⁵ Percentages do not add up to 100% because of rounding.

Table 6: First Time When Inmates Who Pleaded Not Guilty and Were Represented by Court-Appointed Counsel Spoke to Lawyer

	Percentage
More than a week before trial	59.6
A week before	9.4
Less than a week	13.0
At trial	14.5
Do not know	3.5

Data reflecting the number of times inmates spoke to their lawyers prior to the plea or trial reflect a similar pattern. Almost 5% of inmates represented by court-appointed counsel reported that they did not see their lawyer at all prior to plea or trial, and another 24% said that they saw their counsel only once prior to plea or trial.

Table 7: Number of Times Inmates with Court-Appointed Counsel Talked to Lawyer About Charges

	Percentage	Cum. Percentage
None	4.6	4.6
1	24.0	28.6
2	26.1	54.7
3	16.7	71.4
4	7.7	79.1
5	5.0	84.1
6-10	8.3	92.4
More than 10	3.8	96.2
Do not know	3.8	100

The data provide strong evidence that a significant percentage of indigent defendants represented by court-appointed counsel are not receiving effective assistance of counsel. While these data are helpful, however, they still leave critical questions unanswered. Perhaps most importantly, as discussed above, the data do not include the jurisdiction in which inmates were convicted. Thus, we know that many reported that they pleaded guilty or went to trial without having previously met their attorney, but we do not know where those cases occurred. If that information were available, BJS already has data regarding which public defender offices have standards in place governing the appointment of counsel within 24 hours of arrest and the enforcement mechanisms for those standards.⁶⁶ Again, once we have a better idea of which jurisdictions timely appoint counsel (or do not timely appoint), we can assess the most effective mechanisms for ensuring timely appointments.

This leads to a final point. The data BJS has compiled from the surveys of inmates in state correctional facilities are incredibly valuable. They represent the only window we currently have into the perspective of the clients. The data described in Tables 2 through 7, however, have never been analyzed by BJS. As with the data on caseloads, BJS can play a critical role in analyzing this data and publishing reports on it, and the DOJ should use those reports to advocate for and help fund changes to ensure that indigent defense systems have mechanisms in place to prevent defendants from pleading guilty or going to trial with a lawyer they have never met.

IV. Conclusion

The indigent defense system has been at a crisis point for years. Despite that fact, we still lack even the most basic data on the operation of the system, including, most critically, whether states appoint counsel to defendants who have a right to counsel. We cannot continue to ignore this enormous gap in the data, and the sooner we recognize that fact, the more quickly we can begin to collect the data.

DOJ also needs to help the indigent defense system document its most pressing problems and to promote the solutions that alleviate those problems. We know the indigent defense system generally operates under crushing caseloads and that those caseloads detract from effective assistance. BJS needs to use the data it has collected to identify where the caseload crisis is most acute and to identify jurisdictions that have managed the caseload crisis. Most importantly, once effective solutions have been identified, DOJ needs to provide significant incentives for jurisdictions to adopt those solutions. Likewise, BJS needs to identify solutions to the problem of lawyers who meet clients for the first time at pleas, and DOJ needs to help jurisdictions implement those solutions. None of these steps will fix the indigent defense system overnight; the problems run too deeply for easy fixes. But until we have data establishing the nature

⁶⁶ See COUNTY-BASED AND LOCAL OFFICES CENSUS (2007), *supra* n. 38.

and magnitude of the problems and the most effective mechanisms for addressing those problems, we cannot begin the process of systematically solving them.