The Challenge of Providing "Legal Representation" in the United States, South Africa, and China

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INTRODUCTION

Taking into account the number of lawyers alone, one might conclude that the United States has no problem providing adequate legal representation to the indigent accused. With a population of about 278,000,000,[1] there are about 1,000,000 lawyers in the United States today, a ratio of about one lawyer for every 269 people.[2] This number is, beyond a doubt, outstanding. It also represents a steady and significant increase over the past half-century. For example, in 1960 there was one lawyer for every 627 people.[3] Twenty-eight years

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1. Central Intelligence Agency, The World Factbook 2000, *at* http://www.cia.gov/cia/publications/factbook/geos/us.html (last visited Dec. 15, 2001).

2. *See Report from the A.B.A. Commission on multidisciplinary Practice, at* http://www.abanet.org/cpr/ mdpstats.html (last visited Sept. 23, 2001). This statistic was compiled by the American Bar Association. Individual state bar associations were asked to provide the number of resident, active attorneys as of the end of their most current membership year.

It is important to note that it was projected as far back as 1994 that the number of lawyers in the United States would reach the 1,000,000 mark. *See* BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S 1 (1994) (estimating that by the year 2000, there would be 1,005,842 lawyers, or 1 lawyer for 267 people in the United States). The current number of attorneys reflects an increase of almost 60,000 from 1999. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, 47 EMPLOYMENT & EARNINGS 179 (2000) (citing the number of lawyers and judges in the United States at 964,000).

3. *See* Dean Robert C. Clark, *Why So Many Lawyers? Are they Good or Bad?*, 61 FORDHAM L. REV. 275, 275 (1992).

later, in 1988, the ratio was one lawyer for every 339 people.[4]

Unfortunately, even with this remarkable density of legal expertise, the United States is far from solving the problems inherent in meeting the legal needs of the indigent accused. Imagine, then, how much more difficult it is for countries with fewer lawyers to address these problems. South Africa, with a population of about 43,500,000,[5] currently has approximately 1,678 advocates and 15,000 practicing attorneys,[6] a ratio of one lawyer for every 2,602 people. China, with the world's largest population of over 1.2 billion,[7] has only about 101,220 lawyers,[8] a ratio of one lawyer for every *11,855* people.

Of course, there are numerous other differences among the challenges facing American, Chinese, and South African attempts to provide legal representation for indigent defendants. These range from differences in political and legal systems to differences in culture, reflecting both the nature of each country's respective crime problems and their alternative fiscal and moral priorities. This Article explores some of these differences and discerns what insights each of these systems may hold for the others. Specifically, this Article evaluates which of the models and methods employed in the United States could be effectively implemented in China and South Africa.

THE RIGHT TO COUNSEL IN THE UNITED STATES

Surprisingly, the United States refused to recognize the importance of the right to counsel. In the 1942 case, *Betts v. Brady*,[9] the Supreme Court explicitly held that the Due Process Clause of the Fourteenth Amendment did not incorporate the Sixth Amendment guarantee of the right to counsel against the states and concluded that counsel for indigent defendants was not a fundamental right essential

4. Clark, *supra* note 3.

5. Central Intelligence Agency, The World Factbook 2000, *at* http://www.cia.gov/cia/publications/factbook/geos/sf.html (last visited Dec. 15, 2001).

6. *See infra* text accompanying note 14.

7. Central Intelligence Agency, The World Factbook 2000, *at* http://www.cia.gov/cia/publications/factbook/geos/ch.html (last visited Dec. 15, 2001).

8. *See infra* text accompanying note 50.

9. 316 U.S. 455 (1942).

to a fair trial.[10] Instead, the Court adopted a special circumstances test that weighed against the necessity of providing counsel to every defendant in every case. In 1963, the Supreme Court finally implemented the right to counsel in *Gideon v. Wainwright*,[11] but limited the right to defendants charged with felonies.[12] It was not until nine years after *Gideon* that the Supreme Court extended the right to counsel to alleged misdemeanants in *Argersinger v. Hamlin*.[13] As a result, more expansive treatment of the right to counsel was realized. The Supreme Court's recognition of the right, however, did not itself translate into the provision of legal representation for every desirous defendant. Nevertheless, state and local governments, the legal profession, and institutions of legal education have answered the call to assist in the fulfillment of the constitutional obligation to provide the indigent accused with competent counsel. The models and methods employed, and the advantages and disadvantages of each, will be examined below.

LAWYERS, LEGAL AID, AND THE RIGHT TO COUNSEL IN SOUTH AFRICA

The United States is not the only country facing what seems, at times, to be the insurmountable goal of providing legal representation for the indigent accused. South Africa, still a transitional democracy, also recognizes the importance of affording its indigent accused with legal counsel. Presently, it is wrestling with the difficulty of implementing this right. South Africa is confronted in this endeavor with such challenges as an extraordinarily high crime rate, racial tensions, and disparities resulting from years of apartheid, limited financial resources, and a limited number of attorneys. An examination of the various challenges that plague South African efforts to provide a right to counsel to its citizenry may provide guidance to other nations as to the feasibility of establishing a functioning legal aid system.

10. *Id.* at 471-72.
11. 372 U.S. 335 (1963).
12. *Id*. at 339.
13. 407 U.S. 25 (1972).

South Africa faces an enormous task in providing legal representation to the poor. The ability to provide adequate legal representation is inextricably linked to the number of lawyers available. The South African legal profession is divided into attorneys and advocates. In 1994, there were 1,021 advocates and 7,763 practicing attorneys.[14] As of June 26, 2001, there are approximately 1,678 advocates and 15,000 practicing attorneys.[15] Hence, increasing the number of attorneys is a formidable obstacle, one that will not be easily overcome.[16]

Thirteen years ago, in the landmark opinion *S v. Khanyile and Another*,[17] Judge Didcott held that an accused has a right to legal representation.[18] Noting the limited financial resources available, Judge Didcott explicitly based his decision on *Betts v. Brady*[19] rather than *Gideon*, and held that the right extended only to those cases in which "the call for representation is most demanding and the lack of it most debilitating."[20] Unfortunately, even *Khanyile* was short lived.

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14. *See* Sharon Meadows, *Implementing the Right to Counsel in Post-Apartheid South Africa*, 29 GEO. WASH. J. INT'L. L. & ECON. 453, 476 (1995) (citing South African Legal Defence Fund, The Desirability and Feasibility of Establishing a Nationwide Public Defender Service, EXEC. REP., at 102 (1994) [hereinafter SALDEF] (on file with The George Washington Journal of International Law and Economics)). "Broadly speaking, attorneys solicit clients and prepare or 'brief' cases, whereas advocates actually argue in court . . . . Advocates are the only members of the legal profession permitted to argue before the Supreme Court." Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa***,** 75 B.U. L. REV. 1, 15 (1995) (citations omitted).

15. E-mail from Bongani Mujola, Esq., Executive Director, Legal Resources Center, Johannes, South Africa, to Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, Harvard Law School (June 26, 2001) (on file with author).

16. Judge Didcott discussed the critical nature of this problem and how difficult its solution will be for a new South Africa:

> Yet, funds alone, no matter how generous, will not suffice. Any major expansion of the scheme requires . . . lawyers galore. And here at once a difficulty is struck. It is that, while the country has enough lawyers to look after many more people accused of crimes than those defended at present, they remain too few by far to cope with all the cases in which representation should ideally be provided. Nor is a shortage of lawyers remedied as readily or rapidly as a shortfall in money.

S v. Khanyile and Another, 1988 (3) SA 795, 814 (N.P.D.).

17. *Id*.

18. *Id*.

19. 316 U.S. 455 (1942).

20. *See* Jeremy Sarkin, *The Constitutional Court's Decision on Legal Representation*, 12 S. AFR. J. HUMAN RTS. 55, 57 (1996) (quoting *Khanyile*, at 815D). It is important to note that the *Khanyile* decision did not cover indigent defendants in the most serious class of cases, as

In 1992, in *S v Rudman*,[21] the South African Appellate Division overruled the *Khanyile* rule.[22] The *Rudman* court based its decision on the fact that no principle in South African law had ever guaranteed representation to the indigent accused and on the same lack of financial resources described in *Khanyile*.[23]

It was not until the new South African Constitution was enacted in January 1994 that the accused was granted an absolute right to consult with a legal practitioner. The pertinent provision in the Bill of Rights states that:

> Every accused person shall have the right to a fair trial, which shall include the right . . .
>
> (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights . . . .[24]

Unfortunately, the constitution itself did little to change the status quo. The Legal Aid Board (LAB), established in 1969, still handled indigent criminal defense and provided representation largely through a judicare referral system.[25] LAB also set up a pilot public defender program in Johannesburg in 1992.[26]

The initial optimism spurred by the new constitution soon collapsed under the weight of several problems, most specifically the tremendous rise in crime, the unavailability of funds to pay for a more expansive right to counsel, and a rash of administrative difficulties. From 1994 to 1996, the budget of LAB almost tripled as the number of applications granted for criminal representation almost doubled.[27]

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those defendants were already furnished counsel by the South African bar. *See* Ogletree, *supra* note 14, at 22.

21. 1992(1) SALR 343 (A.D.).
22. *Id*.; *see also* Ogletree, *supra* note 14, at 25-28.
23. 1992(1) SALR 343 (A.D.); *see also* Ogletree, *supra* note 14, at 25-28.
24. *See* Sarkin, *supra* note 20, at 56 (citing South Africa's Bill of Rights § 25(3)).
25. *See* Meadows, *supra* note 14, at 469-73.
26. *See id.* at 473-75.
27. *See* David McQuoid-Mason, *Access to Justice in South Africa*, 17 WINDSOR Y.B. ACCESS JUST. 230, 240-42 (1999).

Under this financial weight, a national consensus emerged that the successful public defender pilot system represented the best path to follow. The government's idea included setting up legal services clinics based on the Johannesburg model across the country.[28] A Legal Aid Forum held in 1998 symbolized this consensus,[29] but there has been little progress in the three years since this Forum. In mid-2001, LAB and indigent criminal representation were reported to be in a greater shambles than ever.[30]

A large part of the problem has been the explosion of the crime rate across South Africa. The murder rate, seven times that of the United States, is the highest in the world.[31] Hundreds of police officers are killed each year, and the crime rates, an issue prominent in President Mbeki's campaign and his later speeches,[32] have been blamed for scaring away both financial capital and the most talented members of South Africa's next generation.[33]

A second major problem is that chronic mismanagement and financial difficulties have hampered LAB. As recently as 1999, LAB's financial records were reported to be in shocking "disarray."[34] Basically broke, LAB tried everything from slashing pay to suspending top management, but it still had trouble paying its debts to the lawyers who made up the bulk of the judicare referrals.[35] These financial problems hurt both the lawyers themselves (many of whom rely on the system for income) and defendants, whose lawyers pulled out of cases already in progress and refused to accept new ones. The financial problems especially harmed the new and less financially

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28. *See* Peter Wilhelm, *New AG Czar to Oversee the Principalities*, FINANCIAL MAIL (S.A.), Nov. 28, 1997, at 42.

29. *See* Barry Streek, *Gillwald: Legal Aid Hasn't Delivered*, MAIL AND GUARDIAN (Johannesburg), Sept. 23, 1999, *available at* http://www.sn.apc.org/wmail/issues/990923/news55.html.

30. *See, e.g.*, *Legal Aid Board Officials Told Off*, BUS. DAY (S. Afr.), June 5, 2001, *at* http://www.bday.co.za/bday/content/direct/1,3523,863232-6078-0,00.html (last visited Dec. 17, 2001).

31. *See The End of the Miracle?*, ECONOMIST, Dec. 13, 1997, at 17.

32. *See* Suzanne Daley, *Distinctive and Exhaustive, Mandela's Successor Speaks*, N.Y. TIMES, June 26, 1999, at A4.

33. Peter Hawthorne, *The Beleaguered Country*, TIME, Jan. 11, 1999, at 36.

34. Linda Ensor, *Legal Aid Board in State of Disarray*, BUS. DAY (Johannesburg), Mar. 11, 1999, *available at* LEXIS, Nexis Library, News Group File.

35. *See Surviving the Collapse of Legal Aid*, THE LAWYER, Sept. 6, 1999, at 20.

secure black lawyers and law firms, which were therefore among the first to start refusing cases.[36] At the time of an emergency cash infusion at the end of 1999, LAB insisted that its financial woes were caused by its attempts to live up to the new constitutional guarantee.[37]

Housecleaning began when the director of the LAB was forced out in December 1999.[38] Nonetheless, well into the year 2000, judicare lawyers complained of undelivered fees, and continued to shy away from the system, contributing to judicial backlogs and unrepresented defendants. In February 2000, LAB proposed cutting fees in half in exchange for expediting payment; instead they cut fees in half, but still failed to pay the fees on time.[39] In this situation, some proposed greater reliance on other sources of representation, for example, requiring law school graduates to perform certain work. Unfortunately, in the current setting, there was not even enough money available to train the prospective defenders.[40]

Over the past five years, the Justice Department has freely conceded that the vision of legal aid centers has not been achieved.[41] Critics complain that "[h]eel-dragging by the [J]ustice [D]epartment and the Legal Aid Board has delayed implementation of laws passed by Parliament more than four years ago and kept in place an apartheid-era legal aid guide."[42] The Parliamentary Justice Committee severely criticized LAB for not implementing the government's policies efficiently and for not having drafted a new Legal Aid Guide to replace the one in use[43] dating from the apartheid era.[44] Despite these criticisms, it is agreed that the new management

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36. *Id*.

37. *See R170-m Injection for Legal Aid Board*, CAPE ARGUS (Cape Town), Nov. 4, 1999, *available at* 1999 WL 10583998.

38. *See* WOZA, *Legal Aid Board Director Resigns*, AFR. NEWS, Dec. 3, 1999, *available at* LEXIS, Nexis Library, News Group File.

39. *See* Murray Williams, *Crisis Looms in Court Pay Fiasco*, CAPE ARGUS (Cape Town), Feb. 14, 2000, *available at* 2000 WL 7241578.

40. *See* Taryn Lamberti, *Legal Profession Agrees on Community Service*, BUS. DAY (Johannesburg), Nov. 29, 1999, *available at* LEXIS, Nexis Library, Bus. Day (S. Afr.) File.

41. *See* Streek, *supra* note 29.

42. *Apartheid Legal Aid Is Still in Place*, BUS. DAY (S. Afr.), Feb. 19, 2001, *available at* http://www.bday.co.az/bday/ content/direct/1,3523,794679-6078-0,oo.html.

43. *See Legal Aid Board Officials Told Off*, *supra* note 30.

44. *See Apartheid Legal Aid Is Still in Place*, *supra* note 42.

is better than the old and some optimism has returned.[45]

Although much of the problem resulted from sheer lack of resources and lawyers to deal with an exploding crime problem and indigent defendant population, problems may also be attributable to other sources. A recent study indicates that the South African Justice Department relies on an "everything but the kitchen sink" approach, trying through more than 70 laws passed since 1994 to accomplish everything at once—thereby failing to set reachable priorities.[46]

The crime issue, however, also has some people setting priorities that specifically exclude criminal defense. One editorial published in late 1999 labeled South Africa as "one of the most frightening places on earth," and stated that "[t]here is a gun at the temple of civilisation, by any definition, in [South Africa]" before urging the director of prosecutions to pursue criminals before their "fancy lawyers" could stop him.[47] Another editorial noted the irony in the government's decision to provide defense lawyers free of charge to those accused of atrocities at and seeking amnesty from the Truth and Reconciliation Commission, while denying representation to their often impoverished victims.[48] In a larger sense, experts on crime in South Africa argue that because the government failed to protect its citizens adequately, "[s]ome citizens came to regard the new Constitution as favoring the criminal instead of the victim."[49]

CURRENT LEGAL AID PROGRAMS IN CHINA

Although implementing a legal aid system in China has, not surprisingly, been met with challenges unique to its social and political system, China has also faced many of the same challenges as

45. *See Legal Aid Board Officials Told Off*, *supra* note 30.

46. *See* Louis Stack and Paula Soggot, *Report Reveals Justice System Faults*, MAIL AND GUARDIAN (Johannesburg), May 11, 2001, *available at* http://www.sn.apc.org/wmail/issues/010511/ others57.html.

47. *Crime: A New Team and the Same Nightmare*, FINANCIAL MAIL (S. Afr.), Sept. 17, 1999, at 14.

48. *See* Ivor Powell, *State Attorney Ditches TRC Victims*, MAIL AND GUARDIAN (Johannesburg), May 5, 2000, *available at* http://www.sn.apc.org/wmail/issues/000505/NEWS43.html.

49. *See* Peter Gastrow & Mark Shaw, *In Search of Safety: Police Transformation and Public Response in South Africa*, 130 DAEDALUS: J. AM. ACAD. ARTS SCIENCES 259, 267 (2001).

South Africa. For example, an insufficient number of lawyers, a rise in crime rates, and shifting national priorities have all placed obstacles in the path of China's effort to provide the indigent accused with counsel.

According to government statistics, China had 101,220 lawyers in 1998.[50] While this number represents a significant increase in the legal population over past decades, a desperate need for legal representation among the poor remains. China addressed this problem with the passage of the Lawyers Law[51] and the Revised Criminal Procedure Law, in 1996.[52] In passing these laws, China formalized its commitment to expanding legal aid. The Revised Criminal Procedure Law, for example, served two functions. First this law widened the class of defendants entitled to state-sponsored representation to include the blind and those charged with a crime punishable by death.[53] Second, this law allowed courts to consider economic hardship when determining whether to appoint counsel.[54] The Lawyers Law went further, containing mandatory *pro bono* directives.[55] Previous regulations had already precluded lawyers from refusing legal aid cases,[56] but the Lawyers Law actually imposed an affirmative obligation upon lawyers to engage in legal aid work.[57] Finally, in December 1996, the central government established the Ministry of Justice's Legal Aid Center to oversee the nationwide development of legal aid programs.[58]

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50. CHINA STATISTICAL YEARBOOK 745 (1999).

51. *See* Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 220 (1999) (citing Zhonghua Renmin Gongheguo Lüshi Fa [People's Republic of China Lawyers Law] [hereinafater Lawyers Law], *in* 1996 ZHONGHUA RENMIN GONGHEGUO XIN FAGUI HUIBIAN [COLLECTED NEW LAWS AND REGULATIONS OF THE PEOPLE'S RUPUBLIC OF CHINA] No. 2, at 39).

52. *See* Liebman, *supra* note 51 (citing ZHONGHUA RENMIN GONGHEGUO XINGSHI SUSON FA [CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] Mar. 17, 1996 [hereinafter 1996 Criminal Procedure Law] 1996 FAGUI HUIBIAN 55).

53. *Id*. (citing 1996 Criminal Procedure Law, art. 34).

54. *See id*.

55. *Id*. (citing Lawyers Law, art. 41).

56. *Id*.

57. *Id*.

58. *See* Liebman, *supra* note 51, at 222 n.85. The Center performs a variety of functions within its five departments which are:

> an administrative office, which is responsible for finances, personnel, and other administrative matters; an office of professional work, which is responsible for policy,

China adopted several models in its rapid expansion of legal aid. One such example was China's creation of the Guangzhou Legal Aid Center (the Center) in 1995.[59] The Center employs twelve full-time lawyers who handle a variety of legal aid cases and the Center is responsible for managing and overseeing the development of legal aid work by Guangzhou's law firms.[60] Most of the work performed by the Center involves criminal cases. In its first year, the Center handled 364 cases and responded to more than 1,000 inquiries.[61] As a result of the large volume of cases it handles, the Center is seen as very effective.

Other cities in China created alternatives to the Guangzhou Model.[62] These cities provide legal services to the poor through the assistance of centers staffed by local lawyers or by assigning cases to local law firms.[63] Beijing, for example, maintains a well-developed program. While Beijing was the first city to require lawyers to engage in legal aid work, it was slow to develop a centralized legal aid system. In 1997, however, the Beijing Justice Bureau established a legal aid center to coordinate legal aid work contributed by law firms.[64] Handling mostly civil matters, the Beijing program mandates that a designated law firm staff the center for one week approximately every four years.[65] Each firm must send two lawyers to the center to answer legal inquiries. Difficult cases are passed on to the local law firm.[66] Two characteristics set the Beijing program

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regulations, and supervising local legal aid organizations; a research office; a training office; and a public relations office.

See id. (citing *Sifa Bu Falu Yuanzhu Zhongxin Neibu Jigou Shezhi Ji Qi Zhineng Jianjie* [*An Introduction into the Establishment and Functioning of the Internal Organization of the Ministry of Justice Legal Aid Center*] [hereinafter Organization of the Ministry of Justice Legal Aid Center] 1997).

59. *Id*. at 225-26.

60. *See* Liebman, *supra* note 51, at 225 n.109.

61. *Id*. at 226 n.115 (citing Sun Jibin, *Shixiang Pinruouzhe De Nuoya Fangzhou–Zhongguo Falu Yuanzhu Zai Xingdong (Er)*, [*The Noah's Ark that is Sailing to the Poor and Weak–China's Legal Aid in Action (Part Two)*], ZHONGGUO LUSHI BAO [CHINA LAWYER NEWS], July 3, 1996, at 1 [hereinafter Sun, Part Two]).

62. *Id*.

63. *Id*. at 228-29.

64. *Id*. at 229.

65. *Id*. at 229-30 (citing Wu Wenyan, Beijing Bureau Report on the Development of Legal Aid in Beijing, July 10, 1997 [hereinafter BJB 1997 Report]).

66. *Id*. at 230 (citing BJB 1997 Report).

apart. First, the city compensates lawyers for performing legal aid work through a legal aid fund.[67] Second, local firms may opt out of the program by making a payment to the legal aid fund.[68]

Other local and national government departments have also established legal aid programs.[69] One such program is the Qianxi Women's Law Center (Qianxi Center), established in 1995 by the local branch of the All-China Women's Federation.[70] This program employs five full-time lawyers and four other workers who provide legal aid to poor women from rural areas.[71] Though this Center focuses on representing women, it also handles cases on behalf of children and the elderly.[72] Further, the Qianxi Center educates lawyers on women's issues through a variety of seminars with judges and other court officials.[73]

Despite its isolated rural location, a network of service stations across the country's seventeen townships refers cases to the Qianxi Center.[74] Representatives of the county's women's association, the police, and one non-lawyer legal worker staff each station. The stations answer basic legal questions and refer women with more complex questions to the Qianxi Center.[75]

Additionally, several independent legal aid organizations were established in China. These organizations function independently from the government. These organizations are, however, attached to state institutions, such as universities or research institutes.[76] For example, Wuhan University established a Center for the Protection of the Rights of Disadvantaged Citizens in 1992 with financial support from the Ford Foundation.[77] Known as China's first modern legal aid

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67. *Id*. (citing BJB 1997 Report).
68. *Id*. at 229-30 (citing BJB 1997 Report).
69. *Id*. at 231.
70. *Id*. (citing Matt Forney, *Serve the People: The Rural Poor Get a Taste of Legal Aid*, FAR. E. ECON. REV., Mar. 7, 1996, at 28).
71. *Id*.
72. *Id*. (citing Forney, *supra* note 70).
73. *Id*. (citing Forney, *supra* note 70).
74. *Id*. at 231-32.
75. *Id.* at 229-30. Aside from established legal aid programs, some stations provide information and informal consultations for the poor.
76. *Id*. at 232-33.
77. *Id*.

center, this Center is divided into six departments: women's rights; administrative litigation; juvenile rights; environmental protection; elders' rights; and rights of the disabled.[78] It responds to written and on-site inquiries and represents clients in a variety of legal matters.[79]

As demonstrated, China maintains a strong commitment towards establishing a national legal aid system. Yet, several obstacles, both systemic and practical, prevent substantial success.

One problem is that the right to counsel plays a very different role in China than it does in countries such as the United States and South Africa. First, until recently lawyers were officially government workers,[80] and even now, their interests may not align perfectly with those of their clients. Second, the role of the criminal trial in China focuses more on the admission of guilt and less on truth-seeking. Low acquittal rates demonstrate this phenomenon.[81] Not surprisingly, this focus circumscribes the role of defense counsel.[82]

Another problem is that rise in the rate of crime, especially drug-related and organized crime, shadowed the recent expansion of legal aid services.[83] In response, the Chinese government has instituted various incarnations of its so-called "Strike Hard" anti-crime campaign, which was first unveiled in the early 1980s. As recently as April 2001, the Minister of Justice remarked on the "grim public security situation" and urged a redoubling of efforts in the "Strike Hard" war on crime.[84] As if anticipating fears that such remarks spelled limitations on the role of defense attorneys, he included in his

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78. *Id*. (citing Liu Xiquan, *Weile Ruozhe De Quanyi, [On Behalf of the Rights and Interests of the Weak*], GUANGMING RIBAO [GUANGMING DAILY], June 11, 1997, at 4).

79. *See* Liebman, *supra* note 51, at 233-34.

80. *Id*. at 217.

81. According to the official Xinhua News Agency, "more than 40,000" people have been acquitted since 1983, even though, at least in recent years, over a half a million people are prosecuted per year. *China's White Paper on Human Rights*, XINHUA NEWS AGENCY, Feb. 17, 2000, *available at* LEXIS, Nexis Library, BBC Worldwide Monitoring File.

82. Liebman, *supra* note 51, at 217.

83. *See, e.g*., Patrick E. Tyler, *China Battles a Spreading Scourge of Illicit Drugs*, N.Y. TIMES, Nov. 15, 1995; Patrick E. Tyler, *Crime (and Punishment) Rages Anew in China*, N.Y. TIMES, July 11, 1996; George Wehrfritz, *Crime: 'You Die, I Live,'* NEWSWEEK, July 22, 1996, at 67.

84. *China: Justice Minister Urges Steps To Resolve "Grim" Public Security Situation*, XINHUA NEWS AGENCY, Apr. 10, 2001, *available at* LEXIS, Nexis Library, BBC Worldwide Monitoring File.

remarks that "[c]riminal defence [sic] is an important duty of lawyers entrusted by laws and an important part of a criminal procedure activity."[85]

A current description of the most recent Chinese "Strike Hard" criminal justice system portrays a frightening picture not only of a nation where procedural safeguards associated with trials in the United States are routinely discarded, but also of a nation where such practices receive widespread popular support.[86] In only the first few months of China's "frenzied national effort to purge the land of lawbreakers," literally thousands were executed, often within weeks of arrest and on the basis of confessions extracted through torture.[87] In this context, effective legal representation is generally available only to those with comparatively "enormous" wealth or connections—leaving the great mass of others at the mercy of police trying to please their political superiors and largely incompetent judges who secured their jobs through patronage appointments.[88] Nonetheless, and presumably due at least in part to government control over the media, ordinary Chinese citizens appear to support their government's use of such Draconian measures.[89]

According to the government report *China's Human Rights Progress in 2000*, "[i]n 2000, attorneys nationwide provided criminal defense services in over 310,000 cases. . . . China has achieved outstanding results in protecting the legitimate rights of criminals in accordance with the law and in rehabilitating them."[90] This number of cases is misleading because government-supplied attorneys view their role as assisting law enforcement as much as trying to get their clients acquitted.[91] Finally, China has indicated that it gives "top

85. *Id.*

86. *See* Craig S. Smith, *Chinese Fight Crime With Torture and Executions*, N.Y. TIMES, Sept. 9, 2001, at 1:1.

87. *Id.*

88. *Id*.

89. *See id*.

90. *Full Text of China's White Paper on Human Rights*, XINHUA NEWS AGENCY, Apr. 23, 2001, *available at* LEXIS, Nexis Library, BBC Worldwide Monitoring File. Official statistics for 1998 had reported that defense services were provided for 296,668 criminal cases, which if accurate would indicated a modest gain in two years. *See China's White Paper on Human Rights*, *supra* note 81.

91. *See* Liebman, *supra* note 51, at 259.

priority to protecting and promoting the people's rights to existence and development," rather than their legal rights.[92]

LEGAL AID MODELS FOR PROVIDING LEGAL REPRESENTATION TO INDIGENT ACCUSED

The Super-Judiciary Model

In the super-judiciary model, the judge acts as a neutral referee of the proceedings and as an advocate for the accused. Defense counsel is unnecessary because the judge strives to mitigate the possible unfairness of prosecuting an unrepresented criminal defendant. Upon entering a courtroom, every defendant is protected under this system. One of the benefits of this model is that it is inexpensive, because the state has already anticipated, and provided for, the salaries of the judges.

A deficiency of this model, however, is that it shortchanges defendants with respect to legal representation. It is impractical to assume that judges alone will be able to adequately protect the interests of defendants for several reasons. First, restrictions on *ex parte* communications with the accused virtually preclude confidential conferences between the defendant and the judge. Second, given the limitations on the time, energy, and resources, the judiciary may be systematically incapable of devoting the sort of attention to developing and refining the defenses that an accused person deserves.

Finally, a defense attorney's function in the judicial system differs from the function of the judge and prosecutor. The defense attorney balances the zeal of the prosecutor and the neutrality of the judge, thereby ensuring equitable results. To obtain balance, defense counsel's role extends beyond the scope of trial and encompasses specific duties that must be performed both before and after trial.

For example, prior to the start of trial, the defense attorney must interview the accused and determine the relevant issues in the case. Defense counsel must then interview the available witnesses, examine the physical evidence, and arrange for expert opinions. A

92. *See China's White Paper on Human Rights*, *supra* note 90.

defense attorney must also prepare for jury selection. Additionally, a defense attorney must keep the accused informed of developments in the case, including the results of any plea discussions with the prosecution. Finally, a defense attorney should consider all procedural steps, including relevant motions that will protect the rights of the accused prior to and during trial.

After trial, the defense attorney should present all appropriate post-trial motions necessary to protect the defendant's rights. Counsel should also be familiar with the scope of sentencing discretion, the practical effects of different sentences, and the normal pattern of sentences for the particular offense. Counsel should present any information helpful in reaching a favorable disposition and explain the process to his client. On appeal, the defense attorney should advise the client regarding the results and take all necessary steps to protect the client's rights.

The super-judiciary model may be particularly inappropriate for China where judges are often appointed more for whom they know than for their independence and expertise.[93] These judges, who are inclined to see themselves as part of the government, may have particular difficulty aligning their interests with those of the defendant. If the judge views the trial as a vehicle not for fact-finding but for encouraging the defendant to confess, it is unreasonable to entrust the defendant's rights to the judge. The super-judiciary model may have more appeal in South Africa, where a legacy combining some civil law features in a common law system already requires the judge "to take a more active part" in protecting the interests of the defendant, "thereby, in some measure, redressing the disadvantage the undefended accused may suffer from the lack of legal representation."[94] It is, however, questionable whether South Africa's system is in fact less accusatorial than that of the United States.[95] South Africa's all-too recent history of racial apartheid and use of the criminal justice system as a weapon against blacks suggests that a super-judiciary model would lack legitimacy in the eyes of most

93. *See China's White Paper on Human Rights*, *supra* note 81.

94. Ogletree, *supra* note 14, at 31, 32 (quoting S. v. Rudman, 1989(3) SA 368, 374 (E.C.D.)).

95. *See id.* at 32-34.

defendants and that the nearly all-white judiciary is a particularly poor choice to restore that legitimacy.[96]

In short, the range of protection that defense counsel provides, before, during, and after trial cannot be achieved by judges serving as impartial fact-finders, thus judges should not play such a role. The super-judiciary model does not further the objective of adequately protecting the rights of the indigent accused. While it is inexpensive and offers wide coverage during trial in an ideal inquisitorial system, judges are incapable of protecting the interests of defendants in the ways that a defense counsel does, particularly before and after trial. As a result, the super-judiciary model is an inadequate substitute for actual representation of indigent clients.

The Counsel-on-Demand Model

The principal advantage of the counsel-on-demand model is that every person accused of a crime, irrespective of personal wealth, receives legal representation and all the benefits that accompany legal counsel. This model enhances the credibility of the criminal justice system to defendants. In addition, the model provides a bright-line rule and thus relieves courts from engaging in difficult balancing tests which could otherwise lead to inconsistent results in determining which cases merit representation.

While the counsel-on-demand model seems ideal, it has its drawbacks. Its problems are illustrated by the painful experience of attempting to provide competent counsel for all indigent defendants in the United States. The American public defender system suffers from a lack of financial resources, an inability to find a sufficient number of lawyers willing to handle the cases[97] and an inability to develop and maintain minimal standards of competence for counsel in criminal cases. There are, unfortunately, no obvious solutions to these problems.

These challenges suggest that it is not currently feasible to

96. *See id.* at 36.

97. *See* Richard Klein, *The Eleventh Commandment: Thou Shall Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L. J. 363, 365-68 (1993) (noting that the lack of experienced attorneys willing to represent indigent defendants is an increasingly severe problem).

implement the counsel-on-demand model in either China or South Africa. Given the number of Chinese indigent defendants per annum and competing budgetary demands, even the most cost-effective means of implementing the model will be prohibitively expensive for China. Apart from financial constraints, China must increase the number of lawyers in the country to implement the counsel-on-demand model effectively. Corrective measures aimed at increasing the number of lawyers and delivering legal representation more effectively will not, however, immediately extend legal counsel to all indigents accused of crimes in China. Indeed, the counsel-on-demand model would have to endure significant compromise, and ultimately a choice will have to be made between high case loads and effective representation. Finally, judging at least from their reported enthusiasm for the death penalty,[98] many Chinese may not currently support the notion of spending such extensive resources on criminal defendants at the expense of other social priorities.

Similarly, in South Africa, both independent financial problems and the extraordinarily high crime rate have meant that the number of defendants demanding representation far outstrips the ability of the government to pay without compromising other essential priorities. In addition, there is concern about provoking resentment in citizens who feel that resources would be better applied toward fighting crime. Similarly, the number of lawyers and advocates is currently too low to provide representation to all accused.

Although the counsel-on-demand model may be the preferable long-term goal in all nations, its full implementation is currently unrealistic for both China and South Africa.

The Critical Cases Model

The critical cases model may best address the problems of the shortage of defense counsel in both China and South Africa. Recognizing both nations' resource constraints, this model proposes a more limited right to counsel, assuring that those who have the greatest need for the assistance of counsel receive it. To a limited extent, it is consistent with the permissive nature of the appointment

98. *See* Smith, *supra* note 86, at 1:1.

of counsel for indigent accused under the Revised Criminal Procedure Law,[99] as well as the guarantee of counsel in the South African Constitution "where substantial injustice would otherwise result."[100] Legal representation would be mandatory only in cases of special circumstances, based upon the following criteria: the complexity of the case, the seriousness of the charge, and the ability of the accused to represent himself.

The advantages of this model are both moral and practical. The critical cases model most benefits vulnerable defendants facing the most serious charges. The vast majority of indigent accused facing serious charges would probably seek representation. Under the special circumstances criteria, many who currently are unrepresented would likely qualify for appointed counsel because of their inability to conduct an adequate defense. Moreover, enactment of the critical cases model would be an important beginning in the process of providing counsel to indigent criminal defendants who are incapable of effectively representing themselves.

This model would also provide savings in terms of money and personnel. As it dramatically reduces the class of people covered, it would, presumably, cost much less than the counsel-on-demand model. In addition, this model would require fewer trained legal personnel than a more comprehensive model, an important advantage in light of the shortage of lawyers in China and South Africa. Finally, the critical cases model stands a reasonable chance of practical implementation given both the political will and present resources of Chinese and South African society.

The difficulties with the approach, however, nearly parallel its advantages in that this approach suffers from both normative and practical deficiencies. There are two reasons for arguing that no lay

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99. The 1979 Criminal Procedure Law provided that all defendants had the right to obtain a defense, however, appointment was only required where the defendant was deaf, dumb, or a minor. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 35 (1996). The 1996 NPC retains these provisions largely intact, though it adds language specifying the defendant's "economic difficulties" as a ground for the optional appointment of a defender and broadens the category of defendants entitled to mandatory appointment to include blind persons and defendants who may be sentenced to the death penalty. *See id.* at 36.

100. SOUTH AFRICA CONSTITUTION § 23(3) (1996).

person, no matter how intellectually gifted or how apparently simple the legal issue involved, should be left to her own resources simply because she lacks the money to hire a lawyer. First, given the way in which legal discourse has evolved, any criminal charge is sufficiently complex to warrant the assistance of counsel. Second, any imprisonment, even for a day, is "serious" deprivation of liberty such that no person ought to be convicted without having had the opportunity to receive legal representation at the state's expense.

As the critical cases model requires limitations on the availability of counsel, the opportunity to receive representation is likely to be highly discretionary and ultimately unfair to classes of indigents with meritorious claims. This factor may be particularly pernicious in South Africa, where the criminal justice system is already associated with discriminatory policies. Further, retroactive judicial assessments of whether an accused qualifies for appointed counsel will undoubtedly lead to inconsistent results. It is also questioned whether judges, by reviewing transcripts of convictions, are capable of equitably applying the special circumstances criteria. There is no formula concerning the weight judges should attribute to each of the three elements: the severity of the charge; the ability of the accused to represent herself; and the complexity of the case.

The critical cases model, requires a constant process of evaluation and balancing, a process that has no internal guidance from the model itself and is, therefore, open to either gross underinclusion or overbredth. Indeed, the conflicting and inconsistent judgements by the U.S. Supreme Court during the *Betts* era,[101] as well as the nearly universal consensus that the *Betts* rule was unwise from the beginning,[102] strongly suggest that this model should be considered with some notable reservations.

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101. *See, e.g.*, Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 230 (1959) ("The cases decided by the Court under the *Betts* formula are distinguished neither by the consistency of their results nor by the cogency of their argument.").

102. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (noting that twenty-two states argued as amici curiae that *Betts* was "an anachronism when handed down" and should be overruled); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. CHI. L. REV. 1, 53-67 (1962) (arguing that the "special circumstances" test of *Betts* was virtually impossible to apply).

Finally, there is the concern that embracing the critical cases model now will doom China and South Africa to this system perpetually. Perhaps policy makers will grow comfortable with this second-class system and, despite sufficient resources, will decide not to expend the resources and political capital necessary to implement a system with greater coverage and quality.

Overall, despite its drawbacks, the critical cases model is the most appropriate to pursue at this time given the current level of resources in both China and South Africa. The model recognizes the constraints posed by the shortage of lawyers in both countries, and therefore, limits the right to counsel to those indigent defendants who are in greatest need of assistance. Yet to implement this model, the Chinese and South African governments will have to call upon their legal professionals to provide greater assistance than in the past. The South African Legal Aid Board needs greater financial support and managerial competence, while China should immediately establish a centralized office committed to providing high-quality, high-impact representation. Non-lawyers will also play a crucial role in meeting the objectives of the critical cases model.

METHODS OF IMPLEMENTING THE CRITICAL CASES MODEL

In this Article, the term "model" is used to embrace a system for handling the defense of unrepresented accused. In the following discussion, the term "method" is used as a practical means of effectuating a particular model. Methods available to implement the critical cases model include supplementing the current system with public defenders, law graduates, law students, various subprofessions, such as paralegals, client advisors, and lay assistants, and requiring mandatory *pro bono* service. Each possibility will be considered in turn. They are not exclusive and some reliance on each will be required to maximize legal representation for indigent criminal defendants.

The High Impact Public Defender Method

The high-impact public defender method could play a significant role in protecting defendants' rights, even though the actual number of cases it could handle would be small. High-impact public

defenders would represent a limited number of indigents facing particularly serious charges.

To derive maximum benefit, this method requires zealous representation, institutional independence, and sufficient funding. Zealous representation will take several forms. For example, rather than waiting for official arraignments, public defenders would appear at police stations to aid suspects during the initial questioning period. They would also fight vigorously during bail hearings, fully aware that a client released prior to trial is likely to receive a lighter sanction at the time of disposition. The central office would generate a group of individuals and agencies in the community as third-party custodians for indigents released before trial. Additionally, the defenders would appeal bail denials, interview witnesses before trial, seek to suppress evidence wrongfully seized by the state, present affirmative defenses, call expert witnesses, and vigorously challenge the state's case.

In addition to the litigation strategy, some structural arrangements would be necessary to ensure the office's independence, vitality, and success. A public defender's office should be established by statute as a government department, funded by parliamentary appropriations. The director of the office should have the power to appoint and to pay reasonable professional fees to private practitioners to oversee some of the caseload. In an ideal system, public defenders would be drawn from a formalized government department of public defenders. Indigents charged with serious offenses, or facing complicated charges, would be assigned to the office, which would analyze each case, relieving the courts of the time-consuming task of applying the "special circumstances" test on a case-by-case basis.

The high-impact public defender method is based, in some respects, on the Public Defender Service (PDS) in the District of Columbia. Renowned for its uncommonly skilled attorneys who are able to devote sufficient time to their cases, PDS was the first public defender system to receive an "exemplary project" designation from the Law Enforcement Assistance Administration for its efficiency.[103] PDS earned its reputation by following a few firmly established

103. *See* ROBERT HERMANN ET AL., COUNSEL FOR THE POOR 124 (1977).

policies. First, it is highly selective in hiring staff attorneys and requires each lawyer to participate in an intensive and extensive training program. Second, it is independent of the judiciary and has an independent Board of Trustees who set policy. Third, PDS handles a limited number of cases, primarily the most serious offenses in the District of Columbia. Fourth, PDS has a full-time staff of professional investigators and trains hundreds of volunteer college and law students each year to serve as supplemental investigators and law clerks. Fifth, PDS statutorily established caseload limits, considerably smaller than most other public defender offices, to ensure maximum attention to each client's case.[104] PDS serves as a "public interest" advocate for all, despite typically representing only ten to fifteen percent of Washington's indigent defendants.

The high-impact public defender method already achieved a certain success in South Africa, specifically in the Johannesburg pilot public defender program which the government committed to replicating across the country. The Johannesburg program, however, received criticism both for not reaching the vast majority of accused who needed representation and for unclear case-selection methods.[105] This program may also prove worrisome for both the Chinese government and the indigent accused.[106] From the standpoint of the indigent accused, the state would not provide counsel in the vast majority of cases, even though the judiciary would inform defendants of their right to obtain counsel and of the limited availability of legal assistance. From the government's standpoint, the "high-impact" method would create a government institution whose mission, in large part, would be to challenge state policies. Despite these concerns, high-impact representation remains one of the most realistic methods available to implement the critical cases model.

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104. *See* Ogletree, *supra* note 14.

105. *See id.* at 44-46.

106. The "high-impact" approach may also pose potential conflict-of-interest problems. *See, e.g.*, Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. L. REV. & SOC. CHANGE 23, 30-37 (1986) (describing the potential conflicts that may arise if a legal services organization is deemed to constitute a single firm).

The Mandatory Pro Bono Method

Instituting a system of mandatory pro bono work for all members of the bar and side-bar would compliment the high-impact method and would also further secure indigent defendants' right to counsel. Advocates and attorneys would be required to complete a certain amount of *pro bono* work per year, which could be met by representing indigent criminal defendants. The direct benefit of the mandatory *pro bono* method is that thousands of the indigent accused who cannot realistically be represented by the public defender program, will receive representation from the private bar.

The mandatory *pro bono* method, however, is fraught with difficulties. Critics may object to the mandatory *pro bono* method after examining volunteer *pro bono* practice in the United States. Although lawyers in the United States commit a considerable amount of time and money to *pro bono* matters, they do not highly prioritize the representation of indigent defendants. When they do represent indigent defendants, it overwhelmingly occurs in capital cases.

Pro bono representation in South Africa will also present language difficulties, as the vast majority of lawyers speak either English or Afrikaans, languages which the majority of defendants do not speak.[107]

Finally, both Chinese and South African lawyers will raise the objection frequently presented by American lawyers: the lack of competence in the handling of criminal cases effectively. This objection is not without merit but should not be immediately accepted. Any *pro bono* system for the representation of indigents should attempt to provide lawyers who can competently discharge their professional obligations. Inexperienced lawyers could benefit from professional trial advocacy programs to enhance their legal skills.

Indeed, despite these objections, mandating *pro bono* service as a way of meeting an important social need in China and South Africa is not exceedingly burdensome and represents an ideal opportunity for

107. *See* Ogletree, *supra* note 14, at 47.

the legal profession to provide, or alternatively, to finance, an important public service.

Recent Law Graduates

Generally, lawyers in China must pass the national bar examination and obtain a certificate to practice law. There is a one year apprenticeship requirement to obtain a practice certificate. Lawyers in South Africa must similarly perform two to five year "articles" clerkships. These certification requirements provide an opportunity for law graduates to spend their apprenticeship period providing representation for indigent defendants. If law graduates were required to spend one to two years interning at law clinics or public defender offices and devoted three-quarters of their time to criminal work, it would help to increase the number of lawyers working with poor clients and imbue a sense of social awareness and responsibility in the graduates, while simultaneously expanding the size of the profession.

Yet, another proposal to increase the size of the legal profession is to abandon apprenticeships altogether. The United States has no formal apprenticeship program, and although the quality of legal representation is far from perfect, it is adequate and plentiful.

Law Students and Faculty

In addition to public defenders and private attorneys, representation could also be provided by students and academics through law school clinics. Law clinics provide a rich potential source of legal representation. They serve three basic functions: a public service to indigent members of the community; a useful teaching instrument for law faculty; and a potential source of relevant research into legal problems associated with poverty. Clinics also give academics and students a window into the real world of practice and society.

The role of legal academy in the United States is continuously evolving. At the center of the debate is the issue of whether the primary purpose of law school is to prepare law students for legal

practice.[108] Traditional legal educators maintain that their job is to teach and discuss legal theory and that the practical aspects of legal practice are to be delegated to clerkships and jobs during and after law school.[109] Many practitioners and some legal educators, however, argue that law schools should prepare law students to be lawyers.[110] This theory means that law students should not merely engage in doctrinal analysis of appellate court cases, but rather, they should engage in practical legal reasoning and factual analysis in the context of "real life" situations. The representation of indigent clients provides a context within which law students, in legal clinics, can use, sharpen, and develop the skills that will ultimately render them competent practitioners.

In response to law schools' inadequate preparation of law graduates to practice law, the American Bar Association (A.B.A.) created the Task Force on Law Schools and the Profession to conduct an in-depth study of necessary lawyering skills in 1989. In 1994, the Task Force produced the MacCrate Report[111] which adheres aggressively to a practitioner-oriented concept of legal education, echoing the themes presented in its predecessor, the Cramton Report. The MacCrate Report observed that law schools failed to provide competent training required by new attorneys and, responsively, made sixty-four recommendations directed towards increasing law

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108. *See generally* William K. Trial & William D. Underwood; *Essay The Decline of Professional Legal Training and A Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201 (1996) (arguing that law schools should prepare students to practice law competently upon graduation and that cost-effective means are available to achieve this objective).

109. John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 867 n.10 (1975) ("Legal educators in the United States are accustomed to hearing from the practicing bar that law schools are too theoretical, too remote from practice. It all depends on point of view. To a civil law professor, our legal education looks much too pragmatic and professional, sadly weak on theory and 'culture.'").

110. John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendations for Curricular Reform*, 1 CLINICAL L. REV. 363, 370 (1994) (stating that the challenge facing law schools is to "provide students with enough understanding of, and facility in, the basic requisites of practice so that they can utilize their work experiences to become ever more sophisticated practitioners").

111. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, SEC. OF LEGAL EDUC. & ADMISSION TO THE BAR, A.B.A. (1992) [hereinafter MacCrate Report].

schools' proficiency in adequately preparing law graduates for law practice.

Central to the MacCrate Report is its Statement of Fundamental Lawyering Skills and Professional Values, which, *inter alia*, presents the following categories of lawyering skills and professional values: "problem solving"; "legal analysis and reasoning"; "legal research"; "factual investigation"; "communication"; "counseling"; "negotiation"; "litigation and alternative dispute resolution procedures"; "organization and management of legal work"; "recognizing and resolving ethical dilemmas"; "provision of competent representation"; "striving to promote justice, fairness, and morality"; "striving to improve the profession"; and "professional self-development."[112]

The MacCrate report acknowledges law school clinical programs as a means by which law schools can enhance the ability of their graduates to provide competent, effective, and ethical representation to clients.[113] Aside from enhancing the quality of legal education, these clinical programs can also serve to enable the legal profession to fulfill its constitutional obligation to provide competent legal representation to indigent accused.[114] The desire to broaden the availability of legal services to client populations in need prompted clinical programs in law schools to burgeon during the late 1960s and early 1970s. By 1977, about ninety percent of the 127 A.B.A.-accredited law schools offered clinical courses in their curricula.

Law school clinics take various forms: (1) in-house clinics where students, supervised by faculty members, provide direct representation of clients; (2) externship placement clinics which are programs outside of the law school where students are placed and do legal work under the supervision of non-faculty members; and 3) skills simulation courses which are performance-based, skills oriented courses where students perform skills in a simulated environment. Most live-client clinics include a classroom component, and most clinical classroom components integrate the use of

112. *Id.* at 138-41.

113. *Id.* at 248-53 (describing the expansion of student enrollment, faculty, and investment in clinical legal education).

114. *See* Sara B. Lewis, *Rite of Professional Passage: A Case For the Liberalization of Student Practice Rules*, 82 MARQ. L. REV. 205, 207 (1998).

simulations.

A mandatory clinical system could require students to devote at least 150 hours to indigent criminal defense during their last year of law school and 300 hours within a reasonable time after graduation. Performance would be monitored and evaluated as a part of the process of admission to the bar. The law students would be capable of handling some of the less serious criminal cases, reserving the more serious cases for practicing attorneys. Clinical programs would also serve the additional benefit of preparing law students for a career of serving as advocates for clients.

Despite the shortage of lawyers available in China and South Africa to provide legal representation to the large number of indigent accused, the rapidly increasing number of lawyers, especially in China, forecasts an increase in law school enrollment. Law school graduates and students could be utilized to alleviate the shortage. Students could be encouraged or required to engage in clinical programs that will prepare them to serve as advocates for clients. If a substantial number of these cases can be assigned to the law students in clinical courses, the more serious cases can be reserved for the proposed public defender system. This proposal is not to suggest that law students will represent their clients as well as experienced practitioners, but rather, with proper supervision, law students are certainly capable of providing adequate legal representation in less serious cases.

Law school faculty would also have an important role in this system. Law school academics would be encouraged to take on cases wherever practicable and would be instrumental in establishing trial advocacy programs at law schools.

The Client Advisor Method

The client advisor method would allow paralegals, criminal practitioners, bail advisors, sentencing advocates, and law students to replace lawyers at various critical stages in magistrate court criminal proceedings, such as bail hearings, arraignments, discovery, plea bargaining, and dispositions. The method calls into question whether lawyers are necessary to assist indigents through many of the criminal justice system proceedings and offers alternative, cost-

efficient methods of assisting indigent clients. For nations committed to the ideal of the right to counsel, but lacking the resources and lawyers, a client advisor method would respond to this commitment by using alternatives to lawyers.

Each subprofession can have its own niche and requirements. For instance, paralegals can act as screening agents for lawyers by providing consultations with clients and referring them to lawyers. Formalizing their training could increase the quality of their work, as well as enhance the prestige and legitimacy of this emerging profession.[115]

The bar should investigate this option and other programs and establish a required curriculum for each subprofession that could be run by public interest law organizations. The subprofessions should allow for incremental advancement through a ladder system, under which they would be given credit for their education, which may include a two year or three year diploma, practical training, and experience as they move up the ladder.

This proposed method is similar to a proposal offered in a speech by former U.S. Attorney General Janet Reno last year.[116] Under Reno's hypothetical "problem solving" model, individuals with four year degrees could undertake specific course work designed to meet specific legal needs, such as landlord/tenant, domestic violence, immigration, and re-entry from prison. After certification by the program, the "problem solvers" would be authorized to provide legal services under the auspices of a law firm or municipality, and charge fees for their services. The additional influx of talent would ensure that legal services are simple and easily accessible;[117] additionally, the "problem solvers" could serve as community advocates with regard to the legal issues facing the poor on a daily basis.

The client advisor method would likely encounter resistance from

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115. In addition, allotting a niche to each subprofession ensures "training focused on that particular field and the maintenance of high standards in that particular field." Van Der Walt, *Access to the Legal Profession, Speech at the Conference on the Future of Legal Education in South Africa* (Oct. 3-5, 1991), *in* J.S. AFR. L. 156, 158 (1992).

116. *See* Speech at the American Bar Association Annual Meeting in London (July 15, 2000) (on file with author).

117. *Id.* Reno cautions that her proposed model does not advocate creating or teaching a two-tiered system, i.e., one for traditional lawyers and another for those within the model.

members of the bar, who would probably want to preserve their professional privilege and will rankle at the notion of unlicensed people performing tasks that are currently in their exclusive province. In response, policy implementers would be well advised to emphasize the benefits realized by attorneys in not having to perform the rudimentary tasks that most of them prefer not to perform anyway. Moreover, policy implementers should emphasize that using subprofessionals will yield "a reasonable opportunity to enter the legal profession, high standards of academic and professional training and access to reasonably priced legal services."[118]

Lay Assistants

Allowing a "friend" or "agent" to appear alongside the litigant is another possible method for implementing the critical cases model. This method compares poorly with the other methods discussed above because there is no way to regulate the quality nor training of the lay assistants. Moreover, complicated procedures and the confusing nature of both law and legal language make the legal system largely inaccessible to lay assistants and accused alike. Neither China nor South Africa, however, currently provides sufficient coverage to all indigent defendants. If the state refuses or is unable to provide legal representation, it seems paternalistic to deny the defendant the choice to seek help from another more educated or experienced friend.

CONCLUSION

The foregoing review of attempts to implement a comprehensive system of legal aid for indigent criminal defendants in South Africa and China indicates that although each nation's experience is shaped by its unique circumstances, similar factors such as competing moral and financial priorities, increasing crime rates and a shortage of lawyers have all combined to prevent the realization of such a system. In contrast, the history of legal aid in both South Africa and China reveals a continuing commitment—by the nation as expressed

118. *See* Van Der Walt, *supra* note 115, at 159.

through its leaders and constitutional values in South Africa and by many members of the legal community in China—to the vision of an effective legal aid system as expressed in *Gideon*.[119]

Additionally, confronting the right to counsel issue provides a frame for both South Africa and China to address such fundamental issues as what constitutes a fair trial and what resources the state should spend on behalf of criminal defendants even as it struggles to assuage the pain of victims and the fears of those who would rather not become victimized. Both nations are struggling with basic human needs such as housing, employment, health care, and education. And both nations are transitioning (albeit at different rates): South Africa away from a system of institutionalized racism and toward values such as democracy and equality, and China toward a market economy and improved civil rights.

Although some argue that in these circumstances the right to counsel can wait, and this Article concedes that China especially has a long way to go, this Article argues that the critical cases model is currently feasible in both nations. This Article also examines several methods for implementing this model, and argues that there are reasonable possibilities, specifically, expanding the role of public defender offices and law school clinical programs, for effectuating a right to counsel even in the current state.

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119. 372 U.S. 339 (1963).