

## **DIRECTING THE WINDS OF CHANGE: USING ORGANIZATIONAL CULTURE TO REFORM INDIGENT DEFENSE**

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If you want to make enemies, try to change something.

- Woodrow Wilson

*The single-most important factor to an organization's success is the cultural environment that defines it. Business schools have taught future business leaders this lesson for twenty-five years. While business leaders have worked to manage the culture of their corporations, leaders in the indigent defense arena have often failed to understand the concept of culture. As a result, rather than public defenders defining the culture of indigent defense, the culture of indigent defense has defined the public defender, most often to the detriment of the client. In few places was this more apparent than in Pre-Katrina New Orleans.*

*This article looks at indigent defense in Pre-Katrina New Orleans and argues that cultural factors were largely responsible for an exceedingly low standard of representation provided to indigent defendants there. It then looks to lessons that can be gleaned from business, sociology, and anthropology regarding the importance of culture to the success of an organization and explores a theory of cultural transformation. Finally, using hypothetical scenarios based on the Pre-Katrina experience, this article applies organizational culture theory to suggest methods to overcome the cultural crisis facing indigent defense nationally.*

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1. Orleans Parish is the Parish in Louisiana where the city of New Orleans is located. Because Orleans Parish consists of only New Orleans, the two are used interchangeably throughout this article.

## I. INTRODUCTION

*Imagine being arrested for a crime you did not commit. You have never been in trouble before and are naïve to the workings of the criminal justice system. After hours of processing, you are taken to a cell block at the local jail where you await the opportunity to see a judge. Although you have spent nearly a full day subjected to the dehumanizing experience of being coldly and callously processed for your initial court appearance, you are confident this ordeal will end when you finally get an opportunity to go to court. As you wait, shackled, dirty, and dressed in an ill-fitting orange jump-suit, the anticipation of your impending release allows you to forget the hunger pangs that have kept you from sleeping. The thought of tucking your infant child into bed before curling up with your wife for a well-deserved sleep helps curb the anger that has been eating at you since you were taken into custody. You know you will be given a lawyer, and the judge will surely be more reasonable than the arresting officers with whom you tried in vain to plead your case. It's only a matter of time . . . so you think.*

*As you are herded to the magistrate's courtroom along with the rest of yesterday's arrestees, your hope increases. A judge takes a seat behind the bench . . . it's only a matter of time. Then a member of the courtroom staff begins calling out the names of the recent arrestees. Your hope begins to fade as you realize that the processing is continuing. There are a couple of lawyers in the courtroom whom you learn are public defenders, but neither attempts to speak to you or any of the others whose fate you share. They appear to be window dressing as the prosecutor and judge alone discuss the appropriate bond for each of the human widgets dressed in orange. In less than thirty minutes, two dozen of you have been processed, bonds have been set, and you are being ushered back to the jail. None of you received more than a few seconds of attention. Most of your fellow widgets, presumably the ones for whom this is not their first arrest, seem resigned to the process.*

*Your bond has been set at a figure you can't possibly afford. You begin to worry about your family. You become concerned about the work you will miss. You start to consider the possibility that you will miss your daughter's third birthday the day after tomorrow. But you can't imagine you won't be home within a few days. A lawyer will come to see you soon. Your bond will be reduced. This whole mess will begin to clear.*

*As you wait in the jail, hours turn into days. No lawyer comes to see you. You don't understand what is going on. Your family can't come up with the bond money. As days turn into weeks, your supervisor can't continue to hold your job for you. Your family can't make the rent payments. Your life is unraveling.*

*It's been over two months. You are finally brought back to court for a hearing called an arraignment. For the first time you are informed that you have been provided a public defender. When you meet him, he explains the grand jury has charged you with a crime. He tells you how much time you are facing. Ten years. He tells you that you can take a plea and be home in a year. He advises you to take the plea. He doesn't have time to answer the many questions you have. He has been assigned to represent the other ten to fifteen inmates brought to court with you that morning. You explain you are innocent. He explains that you can have a trial. He again advises against it. You are given a date to return to court in two months.*

*For the next sixty days you sit at the jail. You don't see your lawyer during this time. The only legal visit you get is from a man who tells you he is an investigator for the public defender's office. He explains that he has been a police officer and detective for the last twenty-five years. He has locked up a lot of people just like you. They insist they are innocent. They insist on a trial. They spend a long time in prison regretting that choice. He too advises you to reconsider the plea offer.*

*As the days pass by, your faith that "the system" will achieve the just outcome in your case dissipates. As you approach the eve of your next court date your rebelliousness morphs into terror. Ten years is a long time. Four months has cost you your job. It has cost your family its apartment. On the night before you are to be brought back to court you pen a letter to your wife and daughter. It is a goodbye letter. With no confidence in the system and virtually no professional guidance upon which to rely, you have decided to take the plea.*

The above scenario may seem like an excerpt from a Franz Kafka<sup>2</sup> novel. However, this Kafkaesque world describes pre-reform New Orleans.<sup>3</sup> When reading this account, it would be easy to jump to the

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2. A 20<sup>th</sup> century German-language fiction writer whose stories concerned troubled individuals and consisted of repeated themes emphasizing alienation and persecution.

3. In the wake of Hurricane Katrina's devastation in August 2005, efforts to reform indigent defense in New Orleans led to the creation of the Orleans Public Defenders (OPD). In 2006, this new public defender's office replaced the existing Orleans Indigent Defender Program (OIDP), the agency that was previously responsible for providing representation to indigent defendants. Throughout the article OPD will be referred to as "the new office" to avoid confusion with acronyms.

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conclusion that the problem lies in uncaring lawyers employed by the public defender's office. Another response from the reader who understands the structural and financial troubles that plague indigent defense in New Orleans might be that this can all be fixed with the right legislation. Both of these reactions fail to appreciate the importance of culture; a concept critical to understanding how organizations function, yet often unappreciated by reformers charged with changing them.

As the Director of Recruitment and Training, and a member of the management team, for the new office from October 2006 through June 2007, I gained first hand insight into the indigent defense experience in that city. I worked with lawyers who toiled in the dysfunction of the public defender system. I experienced how financial shortcomings severely hampered these lawyers' efforts to effectively represent their clients. I witnessed the structural factors that presented such significant obstacles to reform. But the greatest challenge facing the reform effort was an organizational culture that had infected every aspect of the public defender's office.

Scholars of organizational development have long understood the importance of culture to both understanding and changing organizations. Those of us committed to indigent defense reform would do well to learn from them. While reform efforts have largely focused on restructuring and funding through the legislative process, successful transformation can only be achieved once we understand the culture of indigent defense that exists, and learn strategies to effectuate a change in that culture.

The need to transform the culture of indigent defense is not unique to New Orleans. Culture plays a critical role in defining every public defender system in need of reform. The issues raised in this article are relevant to reform efforts nationwide. However, New Orleans provides a useful example of how structural obstacles and financial shortcomings over years have helped to shape a culture that now presents an incredible challenge to reformers. The aim of this article is to analyze the culture of indigent defense that has evolved in New Orleans, and thus begin a discussion about how to affect cultural change. Part II will describe how the culture of indigent defense in New Orleans evolved.<sup>4</sup> The article argues that while financial and structural forces largely shaped the culture, legislative efforts targeting these factors will not be sufficient to transform it. Part III examines the concept of organizational culture, and its relationship to

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4. This is akin to what anthropologists refer to as a "thick description," a term coined by Clifford Gertz. A "thick description" is a description of human behavior that explains its context so that the behavior can be understood by an outside observer. CLIFFORD GERTZ, *THE INTERPRETATION OF CULTURE* 3-29 (Basic Books 1973).

successful change, as studied by organization development theorists. It further explores a theory for bringing about cultural change and considers strategies for doing so.

It should be noted that while Part II examines the neglectful practices that evolved in the pre-reform New Orleans indigent defense system, the attack is meant to be aimed at the factors that shaped that system and not the individual lawyers who practiced in it. As this paper argues, those lawyers were simply practicing in accordance with the lessons taught in this dysfunctional system, and the anecdotes are meant as examples of how when organizational culture is left unmanaged, it will define those who work in it. It must be further noted that, while Part III uses the features of the pre-reform public defender's office to illustrate theoretical concepts, those illustrations are purely hypothetical. To the extent that any of these scenarios appear critical of staff or suggest approaches taken by leadership, the reader must keep in mind that they are not intended to reflect the current office. The staff that has helped to reform the public defender's office in New Orleans have been nothing short of heroic.

## II. THE CULTURE OF INDIGENT DEFENSE IN NEW ORLEANS: HOW IT CAME TO BE

March 18, 1963 was a monumental day in the history of American criminal procedure. On that day, the Supreme Court declared that the Constitutional right to counsel<sup>5</sup> applied to Clarence Earl Gideon<sup>6</sup> and any other person facing felony charges.<sup>7</sup> Never again could the State prosecute a person without that person having "the guiding hand of counsel"<sup>8</sup> to assist him in his defense. Gideon was prosecuted in Florida, but the Supreme Court said the Sixth Amendment right to counsel applied to all state prosecutions. However, when one looks at the state of indigent defense across the country, the guiding hand of counsel can be difficult to find.<sup>9</sup>

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5. U.S. Const. amend. VI.

6. *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963).

7. *See Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (extended right to counsel to misdemeanants).

8. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (while this language came from *Powell* it was not until *Gideon* that the right to the "guiding hand of counsel" was afforded to anyone charged with a felony).

9. Perhaps the reason is, as some scholars suggest, because the Supreme Court let States off the hook twenty years later in *Strickland*, by creating a nearly impossible standard for a defendant to meet when trying to establish that his trial counsel was ineffective. In doing so, the Court sent a not-so-subtle message to the states: while you must provide counsel to your poorest citizens, you don't need to provide much counsel. The Louisiana legislature apparently heard the Supreme Court's message loud and clear. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686 (1984); DAVID COLE, *GIDEON V. WAINWRIGHT AND STRICKLAND V. WASHINGTON: BROKEN PROMISES*,

New Orleans provides an unfortunate example.

There, perennial under-funding coupled with soaring caseloads, made it almost impossible for public defenders to provide clients with the service demanded by the constitution.<sup>10</sup> Add the structural challenges, and the stage was set for the birth of one of the most dysfunctional public defender's offices in the nation.<sup>11</sup> Less obvious are the assumptions<sup>12</sup> public defenders held about their jobs and their clients that were shaped, in part, from the financial and structural factors. By viewing the OIDP against this backdrop, we can begin to understand the culture that has shaped the current system and the people who work in it.

#### A. THE FINANCIAL CHARACTERISTICS OF INDIGENT DEFENSE IN ORLEANS PARISH

For the nearly half a century since *Gideon* was decided, Louisiana has failed to live up to its Sixth Amendment obligations to its poorest citizens.<sup>13</sup> The State has failed to commit sufficient money to indigent defense, and instead chose to finance indigent defense through "court costs collected on state, local, or municipal violations."<sup>14</sup> In Orleans Parish, the primary

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CRIMINAL PROCEDURE STORIES, 103-104 (Carol S. Steiker ed., Found. Press) (2006); *see also* Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461 (2003).

10. *See* *State v. Peart*, 621 So. 2d 780, 784 (La. 1993) (in response to an Orleans Parish public defender's claim that a crushing caseload prevented him from rendering effective assistance of counsel, the Louisiana Supreme Court noted that due to a "general pattern" of "chronic underfunding in indigent defense" service to poor defendants is "so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel that the constitution guarantees").

11. In a 1997 study of indigent defense in New Orleans, the Spangenberg Group, a nationally renowned research and consulting group specializing in criminal justice programs, concludes that conditions in the OIDP "are often significantly below the standards of almost all of the public defender programs across the country we have visited in the past five years." CATHERINE L. SCHAEFER & ROBERT L. SPANGENBERG, *THE ORLEANS INDIGENT DEFENDER PROGRAM: AN OVERVIEW* 3 (1997).

12. In organizational culture theory, these assumptions "about how the world is and ought to be" determine one's "perceptions, thoughts, feelings, and to some degree, their overt behavior." When shared by members of an organization, these assumptions give rise to the organizational culture. *See* Edgar H. Schein, *Three Cultures of Management: The Key to Organizational Learning*, *MIT SLOAN MGMT. REV.* 11 (1996) (what Schein refers to as assumptions might also be considered "attitudes").

13. A 2005 report by the American Press, grading Louisiana's indigent defense system in the ten categories mirroring the American Bar Association's Ten Principles of a Public Defense Delivery System, gave the state an "F" in eight of the ten categories. *La.'s Indigent Defense Record Woeful*, *AMERICAN PRESS* (La.), May 10, 2005, at 4.

14. *THE NAT'L LEGAL AID & DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE AN ASSESSMENT OF TRIAL LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER GIDEON* 2 (2004).

source of indigent defense funding has been through traffic tickets.<sup>15</sup> Without a meaningful legislative commitment from the state, Orleans Parish has been unable to support anything close to the kind of system reformers hoped for in the wake of *Gideon*.

While I had studied the financial situation that plagued ODP in the years preceding Hurricane Katrina, the reality of the funding crisis smacked me in the face immediately upon my first trip to the Orleans District Court. When I walked into the room in the courthouse that housed ODP, I was able to better understand the picture described in the Spangenberg report.<sup>16</sup> The main room, which measured approximately 2000 square feet in size, was used as work space for almost the entire staff.<sup>17</sup> There were several cubicles shared by the legal staff and limited computer access. There was nowhere to conduct legal research as “the library [was] little more than a broom closet.”<sup>18</sup> The fact that the office did not have access to Westlaw or Lexis, and had a collection of outdated books, was not a function of post-Katrina hardship. These limitations were part of life for the ODP lawyer before the storm.<sup>19</sup> In addition to the space and resource limitations, the area was filthy. As described by the Spangenberg Group, the office was “a disgrace, and create[d] a disincentive for orderly work.”<sup>20</sup>

The dearth of financial resources was apparent not only in the inadequacies of the workspace, but also in the caseloads for which ODP lawyers were responsible. Take, for example, the case of Leonard Peart.<sup>21</sup> Mr. Peart, charged with several serious crimes, was appointed a public defender named Rick Teissier.<sup>22</sup> At the time of his appointment, Mr. Teissier was handling 70 active felony cases. In the period between

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15. SCHAEFER & SPANGENBERG, *supra* note 12, at 5.

16. *Id.*

17. The entire office measured approximately 3000 square feet. One-third of that space included the Director’s office, the finance office, the library, the kitchen, the file and conference room, and a kitchen. The remaining two-thirds was the open space devoted to the staff, which numbered 43 at the time of the Spangenberg Report. *Id.* at 11.

18. *Id.* at 12.

19. *Id.*; see also Peart, 621 So. 2d at 784 (in discussing the inadequate representation afforded ODP clients, the Court notes the inadequate library at ODP).

20. In the Spangenberg Report the file and conference room is described as “another dirty, disorganized space in desperate need of cleaning, a fresh coat of paint and reorganization.” The Report says, “[t]hings are even worse in the kitchen and bathroom, neither of which looks as though it’s been cleaned in years.” “[S]erious health concerns” were raised by reports that “a rat had been recently seen in the kitchen” and that “the smell of corpses” from the morgue next door “often wafts into [the office].” SCHAEFER & SPANGENBERG, *supra* note 12, at 12.

21. See Peart, 621 So. 2d at 784.

22. Mr. Peart was charged with armed robbery, aggravated rape, aggravated burglary, attempted armed robbery, and first degree murder. The court appointed the public defender, Rick Teissier, to represent Mr. Peart on all charges except the first degree murder charge.

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January 1 and August 1, 1991, he represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period. Each of his clients was routinely incarcerated 30 to 70 days before he met with them.

OIDP had only three investigators on staff when Mr. Peart was charged. They were responsible for rendering assistance in more than 7,000 cases per year in the ten sections of Criminal District Court, plus cases in Juvenile Court, Traffic Court, and Magistrates' Court. It was routine for Mr. Teissier to receive no investigative support at all. There were no funds for expert witnesses, and due to the inadequacies of the library, it was impossible to conduct any meaningful research. The challenges facing Mr. Teissier also plagued all of his colleagues.

In response to Mr. Teissier's claim that he could not render effective assistance of counsel to Mr. Peart, the Louisiana Supreme Court asserted that the representation provided the affected clients was "so lacking that defendant's who must depend on it are not likely to be receiving the reasonably effective assistance of counsel that the constitution guarantees."<sup>23</sup> Despite this clear warning from the Supreme Court, conditions did not improve.

A decade and a half later, the resource problem was still unchanged, as highlighted in the case of *Louisiana v. Kenneth Edwards*.<sup>24</sup> In that case, the new office alleged that it could not constitutionally and ethically provide counsel to 42 defendants in the courtroom of Judge Arthur Hunter. At a hearing on that motion, testimony revealed that the public defender assigned to Judge Hunter's courtroom was handling twenty cases in which his clients were faced with potential sentences of more than fifty years in prison and one hundred cases in which his clients were facing at least five-year sentences.<sup>25</sup> The lawyer acknowledged that he had conducted almost no investigation in his cases, met with very few clients outside of court, and filed virtually no motions other than boilerplate pleadings.<sup>26</sup>

In study after study, outside experts pointed out the shortcomings that continued to exist in post-Peart OIDP. The lawyers carried caseloads of 60-90 at a time,<sup>27</sup> an extraordinary number given that they were part-time public defenders whose starting salaries were \$29,000 per year.<sup>28</sup> They did

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23. Peart, 621 So. 2d at 789.

24. See *State of Louisiana v. Edwards*, No. 463-200 (Mar. 30, 2007).

25. *Id.* at 2.

26. *Id.* at 2-8.

27. SCHAEFER & SPANGENBERG, *supra* note 12, at 13.

28. NICHOLAS CHIARKIS, D. ALAN HENRY, & RANDOLPH N. STONE, AN ASSESSMENT OF THE

not have access to ODP computers, there were no paralegals on staff, secretarial support was very limited, and investigators were rarely, if ever, used.<sup>29</sup> The part-time public defenders responsible for capital cases each handled approximately twenty cases per year, and few used experts in their representation.<sup>30</sup> In addition, despite the central role that training plays in the quality of an indigent defense delivery system,<sup>31</sup> “[t]he public defender’s office in Orleans Parish had no money for a formal training program of any kind.”<sup>32</sup> In the wake of Hurricane Katrina, experts estimated that the cost of running an effective public defender’s office in New Orleans would be approximately \$8.2 million per year.<sup>33</sup> The total indigent defense budget in Orleans Parish for 2005 was only \$2.2 million.<sup>34</sup>

### B. THE STRUCTURAL CHARACTERISTICS OF INDIGENT DEFENSE IN ORLEANS PARISH

As if the dire financial situation confronting public defenders in Orleans Parish was not enough to deprive poor arrestees of New Orleans effective representation, structural features also contributed to the development of a system that failed the people it was designed to serve. Structural components ensured that lawyers would remain beholden to the judges before whom they appeared rather than their clients, would spend as little time and energy as possible on their public defender cases, and would function as independent agents rather than to see themselves as part of a larger public defender community. The factors most responsible for this environment include: 1) judicial control of the Orleans Indigent Defender Board (the Board), 2) the assignment of ODP lawyers to judges/courtrooms, 3) the assignment of counsel only after a formal charging decision has been made by the district attorney, and 4) the part-time status of ODP attorneys.

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INTERMEDIATE AND LONGER-TERM NEEDS OF THE NEW ORLEANS PUBLIC DEFENDER SYSTEM 8 (2006); Vesna Jaksic, *New Orleans' Legal System Still Feeling Pain of Hurricane Katrina*, THE NAT'L LAW J. (Feb. 13, 2007).

29. SCHAEFER & SPANGENBERG, *supra* note 12, at 13.

30. *Id.* at 14.

31. THE AMERICAN BAR ASS'N., TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, 3 (2002) (“[c]ounsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors”).

32. THE NAT'L LEGAL AID AND DEFENDER ASS'N., A STRATEGIC PLAN TO ENSURE ACCOUNTABILITY & PROTECT FAIRNESS IN LOUISIANA'S CRIMINAL COURTS, 66 n.10 (2006).

33. CHIARKIS, HENRY, & STONE, *supra* note 29, at 26 (estimating that it would cost approximately \$10.7 million to set up a new public defender’s office in Orleans Parish during the first year and \$8.2 million to run it annually thereafter).

34. Richard A. Webster, *Public Defense to Be Sieve for Louisiana Criminals*, NEW ORLEANS CITY BUSINESS, April 16, 2007.

Of primary concern was legislation that gave local judges control of the Board, charged with overseeing the delivery of indigent defense services.<sup>35</sup> In Orleans Parish, the District Court judges used unfettered discretion in appointing Board members of their choosing to serve limitless terms at the judges' pleasure.<sup>36</sup> Although independence from judicial control is central to any indigent defense delivery system,<sup>37</sup> the judges effectively controlled the public defender's office in Orleans Parish through the Board they selected.

The priority of the judges, when selecting the Board members, was not always fidelity to the interests of clients. At the time Katrina struck, Board member Frank DeSalvo served simultaneously as counsel for the Police Association of New Orleans, making him the representative of both indigent defendants and the police officers who arrested them.<sup>38</sup> In addition, while DeSalvo served on the Board, his son and law partner ran for Orleans Parish criminal sheriff.<sup>39</sup> Moreover, he admittedly allowed his law partners to "'moonlight' . . . as contract attorneys with the public defender's office he supervise[d] to supplement their salar[ies]."<sup>40</sup>

More important to the bench than the zealous representation of OI DP clients was a Board that would cater to the judges' demands. Through the Board, a judge could ensure that the public defenders worked with the court to process poor defendants of New Orleans quickly, efficiently, and without conflict. Attorneys agreed that "when a judge disliked a particularly active public defender, the Board members would have that defender reassigned or terminated."<sup>41</sup>

To further facilitate lawyers behaving consistently with judicial

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35. La. R.S. §§15:144, 145, 145.1 & 151.2 (this legislation was repealed *see* La. R.S. §§15:141-43, 149.2, and 152-84 (La. 2007)).

36. James Gill, *Fight Looms for Control of Indigent Defense*, THE TIMES-PICAYUNE, April 25, 2007, ("[s]tate law gives the judges the power to appoint indigent board members from candidates recommended by local bar associations. But long before Katrina, the judges of New Orleans quit asking for nominations and made appointments off their own bat. The statutes impose no term limits, and appointees remained in place as long as they wished. State law requires the judges to 'adopt rules and regulations to establish policy regarding the appointment of members to the indigent defender board,' but they haven't done so").

37. Independence is the first of the ABA's ten principles of a public defense delivery system. THE AMERICAN BAR ASS'N, *supra* note 32.

38. THE NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 33, at 66 n.10; HEATHER HALL, NAT'L LEGAL AID AND DEFENDER ASS'N., HURRICANE BRINGS ATTENTION TO LONG BROKEN PUBLIC DEFENSE SYSTEM, 16 (Summer 2006).

39. HALL, *supra* note 39, at 16.

40. *Id.*

41. THE NAT'L LEGAL AID & DEFENDER ASS'N, , *supra* note 33, at 66 n.10; *see also* Fox Butterfield, *Few Options or Safeguards in a City's Juvenile Courts*, N.Y. TIMES, July 22, 1997.

desires, public defenders were each assigned to “a particular court with a particular judge.”<sup>42</sup> Tethered to a courtroom, “the public defender’s workload and time devoted to [that] work is driven primarily by the judge in their [courtroom] . . . they come in when the judge does and leave when court is finished for the day.”<sup>43</sup> Thus, the public defender in essence becomes part of the judge’s courtroom team. In this way, the Board minimized the likelihood that a lawyer would practice in a manner inconsistent with the judge’s wishes.

Because the lawyers’ workloads were a function of judicial, rather than client, needs, an arrested poor person would not be assigned an attorney until after the state made a charging decision; only then was the case assigned to a courtroom. Before that time, indigent defendants had no contact with counsel at all.

The arrested would have a First Appearance Hearing before a magistrate to determine bail. For those who relied on public defenders, a “stand-in” attorney was available to help the magistrate “process” the arrestees whose cases would be heard that day. The stand-in lawyer would not talk to the lawyerless arrestees, had no personal information about the accused, and had only a brief account provided by the arresting officer regarding the facts of the case. The public defender’s role was *pro forma* - to routinely stand silent as the prosecutor’s bond request was automatically granted.<sup>44</sup>

The case would then be continued pending a charging decision by the District Attorney’s Office and the accused would be taken to the jail. “[The defendant would then be] held in jail for a minimum of 45 days (misdemeanor) or 60 days (felony charges). . . . During this period of detention, the defendant [had] no contact with any attorney unless s/he [had] been able to hire one.”<sup>45</sup> At the end of this period, either charges would be dismissed or the State would formally charge the arrestee. In the latter case, it was only then that the accused would be assigned to a courtroom and provided with counsel. The practice of assigning counsel only when the state formally charges the defendant ignores the importance of continuous representation.<sup>46</sup> This “Alice in Wonderland” process fails to provide any counsel during that critical period between arrest and

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42. CHIARKIS, HENRY, & STONE, *supra* note 29, at 26.

43. SCHAEFER & SPANGENBERG, *supra* note 12, at 24.

44. CHIARKIS, HENRY, & STONE, *supra* note 29, at 7.

45. *Id.*; see La. C. Cr. P. Art. 701.

46. THE AMERICAN BAR ASS’N, *supra* note 32, at 3 (“[o]ften referred to as ‘vertical representation,’ the same attorney should continuously represent the client from initial assignment through the trial and sentencing”).

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arraignment when the attorney-client relationship is most effectively nurtured and developed, when investigative leads are most fruitful, and when early lawyering can lead to bond-reduction and dismissed charges.

A final disturbing feature of pre-reform indigent defense was the part-time status of public defenders. “OIDP attorneys [were] allowed to have a private practice – including criminal cases – as long as the cases [were] not before the judges to whom they [were] assigned in their OIDP capacity.”<sup>47</sup> This facet of the system predictably created a conflict between a lawyer’s responsibility to his or her indigent versus private clients,<sup>48</sup> and caused public defenders to “devot[e] the minimum amount of time to fulfilling their public defender duties.”<sup>49</sup> Understandably, when a lawyer is paid only \$29,000 annually, s/he will have to supplement his or her income through private practice. It is the part-time feature of the system that forces the lawyer to be less than fully dedicated to his or her public defender clients.<sup>50</sup>

**C. PUBLIC DEFENDER ASSUMPTIONS SHAPED BY THE FINANCIAL AND  
STRUCTURAL CHARACTERISTICS OF INDIGENT DEFENSE IN ORLEANS  
PARISH**

It is easy to recognize the correlation between the State’s lack of financial commitment to indigent defense in New Orleans and the resource and caseload problems plaguing public defenders in that Parish. Also fairly obvious is the impact of the structural features discussed above on a public defender’s ability to provide each client effective representation. What is less obvious is how these financial and structural elements influence public defender assumptions towards the work they do and the clients they serve, which, as we will discuss below, defines the agency’s culture.

I was introduced to an example of these assumptions the first time I walked into a courtroom in Orleans Parish District Court. On a morning in October 2007, soon after I agreed to work with the new office to coordinate the agency’s training and recruitment efforts, I observed what I would soon learn was fairly typical at Tulane and Broad.<sup>51</sup> The scene was fairly chaotic. People, primarily men, in suits wandered about the well of the court chatting to one another. I assumed they were attorneys, although one could not discern the defenders from the prosecutors. The only players who could be readily identified were the judge, who sat on the bench in a robe,

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47. CHIARKIS, HENRY, & STONE, *supra* note 29, at 8.

48. SCHAEFER & SPANGENBERG, *supra* note 12, at 20.

49. *Id.* at 24.

50. See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 33, at 66 n.10.

51. This is the moniker given the Orleans Parish District Courthouse due to its location at the corner of these two streets.

and the prisoners, who were lined up in a row, wearing orange jumpsuits, off to the left side of the courtroom. The suited men had no contact with the defendants. It was not clear that any of the lawyers had ever met any of the defendants before.

When a case was called, one of the suited men would speak for the man whose name was connected to the case. However, none of the men in jumpsuits would be brought to his spokesman's side and the lawyer often barely acknowledged his client. Then, the judge called a case with no suited spokesman. When it was clear that there was no lawyer claiming this particular client, the judge turned to the row of men in orange and asked the one whose case it was to stand. One of the prisoners rose. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," said the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case.

While it was obviously troubling that a man had spent seventy days in jail without seeing a lawyer, the response in the courtroom was equally dismaying. Not a single person was fazed by this exchange, including the defenders. I would come to learn that this was par for the course for poor defendants in New Orleans, and that public defenders themselves had come to accept it as part of the system within which they were forced to operate. The assumptions that the defenders in the courtroom had regarding acceptable treatment of indigent defendants and the role, or lack thereof, that they should play in addressing this treatment, while foreign to me, was obvious.

Having been shaped by my experience as a staff attorney with one of the most highly-regarded public defenders offices in the country,<sup>52</sup> the importance of the same lawyer representing a client from arrest through sentencing, known as vertical representation, was obvious. The idea of a client going a week without counsel, let alone 70 days, simply amazed me. Standing in a courtroom to advocate for a client with that client being anywhere other than by my side was equally shocking. What I came to understand since leaving PDS is that lawyers who are not sensitive to these components of injustice are not bad people, nor are they uncaring lawyers. They had simply adapted to a system that defines "representation"

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52. I was a staff attorney and, later, Training Director from 1995-2004 for the Public Defender Service for the District of Columbia (PDS). PDS is nationally regarded as one of the best public defender agencies in the country. See Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1493 (April 2005) (describing PDS as "a model agency"); see also Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities* 104 Mich. L. Rev. 1269, 1273 (May 2006) (describing PDS as "nationally prominent").

differently from what I was used to.<sup>53</sup>

There are three forces that most shaped and reinforced the assumptions that developed among Orleans public defenders. The first is the lack of resources that gave birth to a “shoot from the hip” attitude that allows lawyers to accept an approach to representation that is foreign to my experience. The second is the impact the structure has on lawyer assumptions about judges and clients. The third is the pressure that judges exert on lawyers to accept and maintain the status quo.

### 1. A “SHOOT FROM THE HIP” ATTITUDE

One glaring example of how budgetary constraints and structural impediments shaped the assumptions of public defenders is a kind of “shoot from the hip” attitude that many developed. Out of necessity, these lawyers learned to practice without the assistance of investigators or paralegals. Without the means to conduct legal research and a strong disincentive to spend the time required to do so, lawyers resorted to filing only boilerplate motions and raising the most obvious and routine legal issues. Given the low priority placed on client communication, lawyers never learned the value of using the client to assist with case preparation.<sup>54</sup> Furthermore, the absence of staff meetings,<sup>55</sup> formal training opportunities, and an office environment that encourages communication and brainstorming, made it difficult for lawyers to consult with each other about their cases or to learn new approaches to litigation. OIDP attorneys learned their practice through a pervasive “‘sink or swim’ culture.”<sup>56</sup> Those who survived in this environment were heralded as the best trial lawyers. A willingness to try cases with minimal preparation was seen as a qualification for a good public defender rather than as a sign of irresponsibility and dereliction to one’s client.<sup>57</sup>

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53. I am reminded of a conversation I had with an OPD lawyer who had been a public defender for approximately one year. I had just finished conducting a training session on the importance of developing client relations and how the relationship can benefit case preparation when he approached me to tell me that he had never thought of the issues raised. He went on to say that he felt like he had been ineffective for not considering these lessons previously. In conclusion he said that it is easy for a new lawyer to simply adapt to the way things are being done and to consider whatever is being done as the standard of representation that s/he should strive to achieve.

54. During 87 interviews with pre-trial detainees represented by OIDP attorneys, “only 3 reported *ever* being visited by their attorney while they were locked up in the New Orleans jail.” While this study was conducted post-Katrina, the interviewees were locked up on average for five months before Katrina hit. SOUTHERN CENTER FOR HUMAN RIGHTS, A REPORT ON PRE- AND POST-KATRINA INDIGENT DEFENSE IN NEW ORLEANS, 9-10 (Mar. 2006).

55. SCHAEFER & SPANGENBERG, *supra* note 12, at 21.

56. THE NAT’L LEGAL AID AND DEFENDER ASS’N, *supra* note 33, at 66 n.10.

57. See SOUTHERN CENTER FOR HUMAN RIGHTS, *supra* note 55, at 9: after appointment, the

These factors help to explain why, in response to a new public defender who balked at a judge's suggestion that he try a drug case to which he was appointed that same day, a former ODP lawyer mused that "no one should need more than four hours to get ready to try a basic drug case."<sup>58</sup> While triage may be an unfortunate reality of so many cash-strapped indigent defense systems, one long-term danger of learning to be a lawyer in such a system is that it is easy to come to mistake triage for representation.<sup>59</sup>

## 2. LAWYERS' ASSUMPTIONS ABOUT JUDGES AND CLIENTS

The risk of believing that meaningful representation can be devoid of investigation, legal research, personal client/attorney relations, and pre-trial preparation is enhanced in a system that teaches the lawyer that fidelity to the judge is paramount. As we saw above, the indigent defense system in New Orleans sent this message to its lawyers in several ways: 1) by hiring and retaining staff who were predisposed to accept a court-controlled system; 2) by assigning lawyers to specific judges, thus further discouraging dissent from court desires; and 3) by structuring the system in such a way as to minimize the lawyer's ability to develop a meaningful working relationship with his or her clients. As one might predict, these features helped shape public defender assumptions regarding the relationships they should have with their judges and their clients. These assumptions perpetuated the problems reformers would later seek to address, as confirmed in numerous studies showing that the structural features designed to give judges control over public defenders indeed led to lawyers feeling allegiance to judges over their own clients.<sup>60</sup>

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OID Program's attorneys – as a general matter – did not visit the crime scene, did not interview witnesses, did not check out alibis, did not procure expert assistance, did not review evidence, did not know the facts of the case even on the eve of trial, did not do any legal research, and did not otherwise prepare for trial. One interviewee described talking to his attorney for the first time while sitting at counsel table waiting for his trial to begin and, to his dismay, discovering that his attorney could not remember his name and apparently had not talked to his alibi witnesses.

58. I owe this anecdote to Professor Ronald S. Sullivan, Jr. who related it to me when he was the Counsel to the Orleans Public Defender Board.

59. Loyola New Orleans College of Law Professor Stephen Singer, who has volunteered to serve as the OPD's Chief of Trials and help to spearhead the reform effort, describes the system OPD inherited as, "currently like a meat-processing plant -- cases get processed, but they don't get represented." Vesna Jaksic, *New Orleans Legal System Still Feeling Pain of Hurricane Katrina*, NAT'L L. J. (Feb. 13, 2007).

60. See SCHAEFER & SPANGENBERG, *supra* note 12, at 24 (concluding that "an underlying philosophy among the staff is that satisfying the judges is extremely important," and that when pitting the desires of the judges against "defense counsel's obligation to be vigilant in protecting the rights of each client . . . the balance has shifted inappropriately towards the judge and the court."); see also THE NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 33, at 66 n.11 (concluding that "[b]eing assigned to a specific judge heightens the desire of public defenders to

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The “shoot from the hip” attitude shared by public defenders, coupled with a viewpoint that values judicial economy over client interest, helps explain the harrowing experience of a twelve-year-old boy charged with driving a stolen car:

Clarence Richardson . . . met his client for the first time only a few minutes before the trial began. They talked in the packed waiting area outside the courtroom because Mr. Richardson, like other public defenders here, has no office. Nor does he have a file cabinet, a telephone to contact defendants or a clerk or secretary to help him draw up motions or conduct investigations. As Judge Lawrence Lagarde Jr. recited the evidence against his client and swiftly pronounced a two-year sentence in juvenile prison, Mr. Richardson sat largely silent. His defense table was conspicuously bare: no case files, law books or even the police report on the defendant, to use to challenge the prosecutor.<sup>61</sup>

The interaction between attorney and client before the twelve-year-old boy had to make a life-impacting decision was also described:

“The judge wants to know what you are going to do,” Mr. Richardson told the boy. . . . “Are you going to plead guilty? You have to make up your mind.” Mr. Richardson did not outline any defense strategy, or suggest checking the police report of the arrest or ask if there were witnesses he might call. The boy’s initial response was, “I didn’t think driving a car was such a big deal.” But, with little hope of a defense and no alternative, he reluctantly agreed to plead guilty, saving the court precious time and money.<sup>62</sup>

The lack of fight put up by Mr. Richardson was learned behavior. It reflects his assumptions about his role as that of “processor;” a cog in the judge’s machinery that functions to move cases through court quickly. It reflects his assumptions about his view that the minimal attention he afforded his client is all that an indigent defendant deserves.<sup>63</sup> It reflects his

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keep the judge happy by keeping the dockets moving, rather than keeping the client happy by zealously advocating on his/her behalf,” and that public defenders strive to “placate and please the judges, even when this approach might harm clients.”); *see also* CHIARKIS, HENRY, & STONE, *supra* note 29, at 8 (concluding that the first recommended goal of a new management team should be to “[c]hange the public defender program from court-and-process-centered to a client-centered public defender program”).

61. Fox Butterfield, *Few Options or Safeguards in a City’s Juvenile Courts*, THE NEW YORK TIMES, July 22, 1997.

62. *Id.*

63. This could be for any number of reasons including: the lawyer’s assumption that the client is guilty anyway and therefore not deserving of more of a defense; that regardless of guilt or innocence there is nothing the public defender can do for the client to achieve a better outcome; or

assumptions about whose priorities in the system are most important. As Fox Butterfield of the New York Times came to learn during his investigation, judges' concerns control, clients' concerns are disregarded, and "[i]n the tradition-bound world of New Orleans, public defenders are expected to play a subservient role."<sup>64</sup>

### 3. PRESSURE FROM JUDGES TO ACCEPT AND MAINTAIN THE STATUS QUO

While reformers need to appreciate how public defenders came to accept practicing in the manner exemplified in the above anecdote, they also must understand the role that beneficiaries of the status quo played in reinforcing this mindset in these lawyers. By examining judicial attitudes in New Orleans, one can get a sense of just how difficult it can be to combat external forces that seek to reinforce the organizational mindset that so impedes reform. While reformers certainly need to consider how to change the perspectives of external players who are invested in maintaining the status quo, in this article I examine the attitudes of Orleans Parish judges as an example of another factor that helped to shape and maintain the mindset of public defenders.<sup>65</sup>

In New Orleans, judges were clearly the beneficiaries of the pre-reform system,<sup>66</sup> and the degree to which some of the judges were invested in maintaining the status-quo became apparent once reform efforts were initiated. After Katrina struck, and many of the deficiencies in the system were brought to light, reformers pushed to take advantage of the devastation and rebuild the public defender's office. Several studies, which were highly critical of the existing system, were conducted and recommendations were set forth.<sup>67</sup> The old Board was replaced with a new, "reform-minded" Board. The new Board began implementing many of the changes that were

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that the client is to blame for the overworked state in which the public defender finds himself.

64. Butterfield, *supra* note 62.

65. Eight months into my OPD tenure, I witnessed an exchange that helped me understand the degree to which many judges had very different expectations from private counsel and public defenders. I was waiting to observe evening First Appearance Hearings when the magistrate took the bench at 6:35 p.m. There were approximately forty arrestees whose cases needed to be heard that evening. A private attorney represented one of the defendants. The rest were left to a team of two public defenders. As a professional courtesy, the judge called the private attorney's case first. After about ten minutes of discussion, the judge granted the requested bond. Then, at 6:45, the judge turned to the public defender in the courtroom and said, "You better talk fast because we are going to finish the rest of these by seven o'clock."

66. See James Gill, *Judges' Order Defies Law, Reality*, THE TIMES-PICAYUNE, Nov. 24, 2006 ("the system was evidently designed to serve the convenience of judges, many of whom like to quit work early in the day, at the expense of indigent defendants' constitutional rights.")

67. CHIARKIS, HENRY, & STONE, *supra* note 29, at 8; THE NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 33; SOUTHERN CENTER FOR HUMAN RIGHTS, *supra* note 55.

called for by national experts. But the new Board's vision of "representing clients without political or judicial interference, as both state law and American Bar Association standards require, . . . [came] as quite a shock to the judges, who under the old system called all the shots, with predictable consequences for the constitutional rights of poor defendants."<sup>68</sup>

One of the Board's first acts was to move from a system of part-time lawyers to one of full-time defenders.<sup>69</sup> This move caused a number of the more experienced lawyers to leave the defenders office, as these were the lawyers who benefited most from the system that allowed them to engage in private practice. While some of the judges complained about how a move that cost indigent defense its most seasoned lawyers would negatively impact the representation that OPD clients received,<sup>70</sup> this newfound "concern" was transparent coming from judges who applauded the existing quality of representation. What seems more likely is that they hoped to retain a staff of public defenders more than willing to work within the system that had been in place for so long.

A second point of contention was the Board's decision to move to a system of vertical representation, where indigent defendants were appointed counsel at first appearance. Recognized by the ABA as an essential element of an indigent defense delivery system,<sup>71</sup> under this model the lawyer follows the client instead of being bound to a particular judge. While this move helps to ensure that poor defendants receive services more in-line with what private counsel provides, many judges also protested a move that would take "their" public defender out of their courtroom.<sup>72</sup>

While these moves by the OPD Board were clearly designed to address some of the most pervasive problems with the "old" system, many judges could not tolerate even the slightest loss of control of the public defender's office. In an effort to regain that control, the judges repeatedly tried to hold the head of the Trial Division in contempt, attempted to hold

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68. James Gill, *supra* note 66.

69. *Id.*

70. See Laura Maggi, *Judge Blasts Public Defender For Delay: Crack Cocaine Case Not Ready For Trial*, TIMES-PICAYUNE, Sept. 12, 2006.

71. THE AMERICAN BAR ASS'N, *supra* note 32.

72. While some judges have complained about delays caused by lawyers who have to report to multiple courtrooms, few have been willing to accommodate public defender schedules to mitigate their concerns. I was recently in an Orleans District courtroom when a judge assigned a public defender a new case. The judge set a date that was inconvenient for the lawyer. When the public defender explained that he had a trial in another courtroom that day and asked for a date when he was already to be before the assigning judge, the judge refused to change the date and suggested the lawyer talk to OPD management, who insisted on vertical representation. I doubt that private counsel would receive such minimal accommodation.

the entire Board in contempt, moved to disallow out-of-state lawyers recruited by OPD to help with the reform effort, and finally, sought to remove the Board.

On at least three occasions, judges have moved to hold Stephen Singer, the OPD Chief of Trials in contempt for what they saw as overly zealous advocacy. In one case, when Singer informed a judge that he did not have counsel to appoint to three capital cases on his docket, the judge scheduled a contempt hearing.<sup>73</sup> Singer's crime, it appears, was an unwillingness to simply find a warm pair of hands in which to place these three lives. His insistence on finding qualified counsel did not jibe with the judge's expectations. While the judge claimed to be interested in the defendant's Sixth Amendment rights,<sup>74</sup> it was obvious that his real goal was to clear these cases from his calendar as quickly as possible.

On another occasion, a judge ordered Singer locked up, and threatened to hold Singer in contempt, when the judge grew impatient waiting for a public defender to arrive in court.<sup>75</sup> The lawyer assigned to the courtroom was on her honeymoon and her replacement was handling cases in several courtrooms.<sup>76</sup> Feeling slighted that "his" public defender was not available when he demanded, the judge drove to the public defender's office with a deputy sheriff, and brought Mr. Singer to the courtroom before citing him for contempt.<sup>77</sup> This power play was clearly meant to send a message to Singer and the management team.

On a third occasion, a judge<sup>78</sup> accused Singer of having an OPD lawyer represent a man arrested for copper theft who the judge claimed was not technically indigent.<sup>79</sup> The judge's assessment was based on his finding that "[the man] owns a house, vehicles and dressed very nicely."<sup>80</sup>

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73. See Laura Maggi, *Public Defender Faces Contempt: Lawyers Not Picked Fast Enough For Judge*, THE TIMES-PICAYUNE, Sept. 14, 2006.

74. *Id.*

75. Christopher Drew, *Judge Sends Public Defender to Jail*, THE NEW YORK TIMES, Jan. 10, 2007.

76. *Id.*

77. *Id.*

78. This was the same judge, Judge Frank Marullo, who threatened to hold Singer in contempt over the capital cases.

79. One of the battles in the larger struggle for control of the public defender's office is over who determines indigency. Some judges believe they should determine when a person is indigent. The fewer indigency determinations that are made, the greater number of defendants who must hire private counsel. Some judges have accused OPD of taking cases from private counsel. A counter argument is that judges sometimes disqualify truly indigent defendants in order to ensure private lawyers have business, as these lawyers contribute to the judge's election campaigns.

80. Mary Foster, *Public Defender Head Found in Contempt of Court*, THE JOURNAL GAZETTE (Indiana), Nov. 15, 2007.

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However, OPD's indigency determination revealed that "[t]he house he owns was destroyed by Hurricane Katrina, his car is a 1994 Buick, and he earns \$9,600 a year. That's half the annual income that presumptively entitles someone to an indigent defender."<sup>81</sup>

Nevertheless, in an effort to both comply with the judge's order and to fulfill their obligation to their client, OPD withdrew from the case and Singer referred the client to a private lawyer.<sup>82</sup> The lawyer agreed to handle the case *pro bono*.<sup>83</sup> After finding that an OPD investigator worked on the case after the office was ordered to withdraw, the judge found Singer in contempt.<sup>84</sup> The Court of Appeals reversed the contempt conviction,<sup>85</sup> and Singer maintains that the contempt finding was meant as punishment for his efforts to reform OPD.<sup>86</sup>

Not only did some judges express their dissatisfaction with the reform efforts by seeking to hold Singer in contempt, but the judges also collectively sought to hold the entire OPD Board in contempt if they did not reverse their efforts. In an order issued soon after the new management decisions took effect, the judges stated, "[i]t is the collective opinion of the undersigned judges that the failure of the Orleans Indigent Defender Program/Orleans Public Defender's Office to deliver effective assistance of counsel to their clients is in large part due to the policies and practices that it has recently implemented."<sup>87</sup> The judges threatened to hold the Board in contempt if they did not hire more lawyers within 10 days.

James Gill, a reporter for *The Times Picayune*, concluded that the judges were motivated by a desire to continue "to participate in specific management decisions:"

Judges have been sticking their noses in for so long that the habit must be hard to break. But break it they must, for their interference has made a mockery of indigent defense in New Orleans and denied justice to generations of defendants. This time they are interfering not only in defiance of the law and the facts but of economic reality.

Right now one indigent defender is assigned to each of the court's 12 sections, but the judges are ordering two. There is no money to pay the

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81. *Id.*

82. *Id.*

83. *Id.*

84. Gwen Filosa, *Conviction Reversed: No Jail Time For Public Defender*, *The Times-Picayune*, Dec. 4, 2007.

85. *State of Louisiana v. Singer*, No. 2007-K-1542 (La. 4<sup>th</sup> Cir. 2007).

86. Filosa, *supra* note 85.

87. Gill, *supra* note 66.

extra salaries and the judges do not deign to suggest where it might be found.

It is impossible to avoid the conclusion that the judges want to bring back the system as it was before Katrina forced its inadequacies to the forefront.<sup>88</sup>

Another effort by some judges to frustrate reform efforts was to seek to deprive experienced out-of-state public defenders from helping to fulfill OPD's obligations to their clients. In 2006, the Supreme Court of Louisiana issued a Temporary Emergency *Pro Bono* Criminal Legal Assistance Rule For Orleans Parish to "permit non-admitted lawyers to render temporary *pro bono* criminal legal services to indigent persons arrested or charged with a crime or crimes in Orleans Parish."<sup>89</sup> The Order further required that a "licensed lawyer... provide oversight and supervision."<sup>90</sup> Through this rule, OPD was able to attract experienced public defenders to assist with reform efforts.

While these experienced lawyers were incredibly valuable to OPD's efforts, some judges decided to interpret the Rule to require that lawyers practicing pursuant to it must have a barred Louisiana lawyer in court with him or her at all times.<sup>91</sup> The out-of-state lawyers were being used to fill the void left when OPD lawyers were assigned to represent their clients at First Appearance Hearings. One can assume the objecting judges lamented a perceived loss of control over lawyers from other jurisdictions who did not plan to remain in Orleans Parish for their careers, and thus were more immune to judicial pressure.

As Singer pointed out:

[The objecting judges do not ] seem to have a problem allowing Louisiana civil lawyers - divorce or bankruptcy specialists - to represent poor people facing lengthy jail time for serious felonies. These civil attorneys from Louisiana are far less able to provide effective representation than experienced criminal defense attorneys from outside Louisiana. If you needed brain surgery, would you rather have a foot doctor from Louisiana perform it or a neurosurgeon from

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88. Gill, *supra* note 66.

89. Supreme Court of Louisiana Order, Temporary Emergency *Pro Bono* Criminal Legal Assistance Rule for Orleans Parish, at 1 (June 23, 2006).

90. *Id.* at 2.

91. Other judges did not read the rule to require in-court supervision. See Laura Maggi, *Volunteer Attorney Told to Get Assist: State-Licensed Lawyer Needed Judge Rules*, THE TIMES-PICAYUNE, Feb. 23, 2007; see also Laura Maggi, *Judges Differ on Rules for Lawyers: Appeal is Planned on Role of Volunteers*, THE TIMES-PICAYUNE, Mar. 9, 2007.

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A final example of some of the judges' animosity towards reform came in an attempt to remove some of the most reform-minded Board members. After a year of unsuccessfully trying to control the Board, "the judges wrote to board members to ask if they wish to be considered for reappointment when their one-year terms expire Friday. Board members were somewhat taken aback, since there was no mention of one-year terms when they were appointed."<sup>93</sup> As Herb Larson, counsel for OPD expressed, "[t]he attempted removal of four members of the present board and [their replacement] with other people is nothing more than an attempt to interfere with the management decisions by what is, by any measure, an outstanding indigent defender board."<sup>94</sup>

These examples of the vociferous attempts with which judges sought to reassert control after reform efforts were underway gives an idea of the pressure judges in New Orleans have been willing to exert on lawyers to force them to practice in accordance with judicial desires. Certainly judicial pressure is an important factor in determining the assumptions that a public defender holds towards his or her job.

To sum up, the assumptions the public defender holds about his or her role are as important to defining the office as are the financial and structural features of the system. We cannot understand the culture of an organization without understanding the assumptions shared by the people who make it up. While legislative reform efforts can target financial and structural concerns, they will be far less effective at influencing the assumptions held by public defenders. Meaningful reform must address the mindset of lawyers that prevents them from providing effective representation by not only targeting financial and structural challenges, but looking to change organizational culture itself.

### **III. ORGANIZATIONAL CULTURE: THE KEY TO INDIGENT DEFENSE REFORM**

Before proceeding with this section, in which I examine the concept of organizational culture and its relationship to successful change, it is important to reemphasize that the challenges described in Section II are not unique to New Orleans. New Orleans provides a useful example of how both financial and structural factors, as well as the assumptions held by

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92. Stephen Singer, Chief of Trials, Orleans Public Defenders (unpublished).

93. Gill, *supra* note 37.

94. Laura Maggi, Suit Filed Over Indigent Defense: Judges Vote to Pull 4 Members Off Panel, THE TIMES-PICAYUNE, May 5, 2007.

public defenders, are each critical to appreciating the landscape confronting reformers. Efforts to reform any indigent defense system will obviously need to address financial shortcomings and structural impediments. But if we do not change the underlying assumptions that evolve from an underfunded, structurally corrupt system, reform can not be achieved. While reformers have traditionally used legislative reform to target financial and structural problems,<sup>95</sup> this avenue is incapable of addressing the cultural factors we will examine below. Because the assumptions that hinder reform ultimately map into the existing organizational culture, as we will discuss below, changing culture involves changing assumptions. The discussion below is relevant to reform efforts in New Orleans as well as to those nationwide.

No concept is more crucial to a leader's transformation efforts than culture, the phenomenon that shapes the organization and the mindset and actions of the people who make it up. Experts specializing in teaching corporate leaders how to build effective organizations, and transform those proven to be ineffective, stress the critical degree to which such efforts are linked to managing, and changing, culture.<sup>96</sup> Unfortunately, leaders in the indigent defense arena are often blind to the profound link between organizational culture and effective leadership. Chief defenders are not to blame for this as circumstances pressure them to narrowly define their role as finding a way to survive in a world in which their lawyers carry overwhelming caseloads, are constantly dealing with profound budget shortages, and must tend to more immediate political firestorms.<sup>97</sup> Unlike the potential for short-term gains by tending to these emergencies, changing culture is a long and often difficult process. The fruits are not immediately recognized and the process can be painful. In a world where the chief defender has far more immediate fires to put out, stepping back to see the forest for the trees can seem an unavailable luxury.

Furthermore, many defender leaders come from the ranks of the staff attorneys. They are products of a dysfunctional culture that pre-existed

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95. Louisiana recently enacted the Louisiana Public Defender Act; La. R.S. 15:141-184. This Act, does away with the judicial district indigent defender board, thereby removing the local control of the judges. It also establishes a more reliable funding stream for indigent defense services. See La. R.S. §§167-168.

96. In an article examining "[h]ow leaders at Sears, Shell, and the U.S. Army transformed attitudes, and behavior – and made change stick," the authors note that "[i]n all three organizations . . . the 800-pound gorilla that impaired performance and stifled change was culture." Richard Pascale, Mark Millemann, & Linda Gioja, *Changing the Way We Change*, HARVARD BUS. REV. 127-28 (Nov.-Dec. 1997).

97. Kim Taylor-Thompson, *Legal Ethics: Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEG. ETH. 199 (Hofstra University School of Law) (1999).

them. They are never groomed to be managers nor trained on the new skill sets necessary for the job. Only recently has national public defender management and leadership training even been available.<sup>98</sup> Even then, far too many chiefs who come from a world in which on-the-job training is the norm fail to recognize that they badly need this education.

It is my contention that leaders will never successfully usher in reform until they begin to understand the vital role organizational culture plays in their work. In a world in which structural and funding issues so obviously plague our clients, it is easy to overlook the powerful way in which misunderstanding organizational culture stymies our ability to effectively represent defendants.

In this section we will examine the concept of organizational culture and argue strongly that unless leaders are able to change their culture, meaningful reform may prove impossible. First, we will define organizational culture and discuss why it matters. Next we will examine a theoretical process to bring about organizational culture change. Finally, we will explore strategic considerations related to efforts to bring about change and to overcome resistance.

#### A. WHAT IS ORGANIZATIONAL CULTURE AND WHY SHOULD WE CARE?

In the previous section we looked at some of the assumptions New Orleans public defenders developed about the system within which they worked and their relationships with the people in that system. Understanding these assumptions is vital because they are the underpinnings of culture; “[that] set of basic tacit assumptions about how the world is and ought to be that a group of people share and that determines their perceptions, thoughts, feelings, and to some degree, their overt behavior.”<sup>99</sup> Because organizational culture dictates how members

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98. “The Bureau of Justice Assistance (“BJA”) [funded] a multi-year Executive Session on Public Defense Systems (“ESPD”) at Harvard’s Kennedy School of Government with the goal of improving the effectiveness of the defense function in state systems.” Cait Clarke, *Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 n.95 (Winter 2001). As a result of those meetings, in 2002 the National Legal Aid and Defender Association developed the National Defender Leadership Institute to train public defender managers and leaders. See *The Executive Session on Public Defense*, 21 NYURLSC 1 (2004). To date a handful of states conduct management and leadership training for their chief public defenders.

99. Edgar H. Schein, *Three Cultures of Management: The Key to Organizational Learning*, MIT SLOAN MGMT. REV. 11 (Fall 1996). Edgar Schein is one of the leading experts in Organizational Culture. In the Foreword to *The Corporate Culture Survival Guide* by Edgar Schein, Warren Bennis, Professor at the University of Southern California’s Marshall School of Business, tells us that “Ed Schein probably knows more about corporate culture and its relevance

respond to change, a thorough understanding of it empowers a leader to engineer the transformation that will produce the desired response. By studying organizational culture, I strongly believe a leader can produce significant change. If oblivious to the concept of organizational culture and the “forces that derive from it” the leader will be rendered powerless to do anything but adapt to the status quo.<sup>100</sup>

Pre-reform New Orleans provides a stunning example of this. The assumptions held by the public defenders there were products of the system within which they worked, and the forces that shaped that system such as the financial and structural elements discussed. As these forces shaped and maintained the culture of ODP, its managers,<sup>101</sup> as we’ve seen, simply adapted to a world they felt powerless to change. They never appreciated that organizational change was possible. Such change, I would argue, is indeed more than possible.

In order to effect such change, leaders must understand the three basic levels of culture.<sup>102</sup> The first and most obvious deals with observable characteristics, or what Schein terms “artifacts.” Artifacts include everything a person sees and hears when they first encounter a group. In the context of a public defender organization this would include such things as how the staff dresses; the décor of the office; the way the attorneys treat their clients; the way the attorneys interact with judges and prosecutors; its observable rituals, etc. The second level includes the organization’s beliefs and values - its sense of what ought to be. Values in a public defender office might include things such as the quality of representation staff members believe a client should receive; the degree of support we think colleagues should provide one another; the degree to which staff members should receive training; or how we should interact with other players in the criminal justice system. The deepest and most engrained level is in the tacit assumptions shared by the members of the group. At this level, the members’ world view is so taken for granted that there is little variation among them. Indeed, members would have trouble articulating what their world view is. When asked why they behave a certain way the response might simply be, “that’s how things are done around here.”

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for organizational transformation that just about anybody writing about these issues today.”

100. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 3 (Jossey-Bass 3d ed. 2004).

101. Schein suggests that the distinction between leadership and management is “that leadership creates and changes cultures, while management and administration act within a culture.” *Id.* at 11.

102. *Id.* at 25 (defining the term level as the degree to which the cultural phenomenon is visible to the observer).

We can better understand the distinction between these levels by looking at indigent defense in pre-reform New Orleans. Among the most egregious characteristics of OI DP were: the unprofessional, dirty, and under-resourced environment; the fact that lawyers almost never saw their clients outside of court and had minimal interaction with them in court; the fact that lawyers engaged in minimal pre-trial preparation; and that they were assigned to judges to whom they were very accommodating. These artifacts would be obvious to an outside observer, but without deeper exploration, one cannot truly understand them.

At the next level we can understand some of the values, identified in Part II, that account for the artifacts described above, such as: the significance placed on pleasing judges; the low importance placed on interaction with colleagues; and the desire to minimize time spent on public defender cases and maximize the time they could spend accommodating paying clients. These priorities reflect a value system in which the role of the public defender is to help judges work through their court dockets as quickly as possible; in which it is acceptable for a public defender to do as little work as possible for the small salary provided; and in which there is no return to investing additional time to developing relationships with clients or colleagues.

At the third and most complex level, there exist the deep-seated, often sub-conscious, assumptions held by the lawyers that shape their system of values. In pre-reform New Orleans they included a world-view in which: judges are the most important element and lawyers should strive to fulfill their wishes; clients who can't afford to hire counsel deserve less service than those who can; and public defense ranks low as a profession in terms of prestige and importance.

While this example helps to illustrate the three levels of culture, it should be obvious that each of these represents only a sub-set of the system of artifacts, values, and assumptions that existed in pre-reform New Orleans. Because "artifacts are manifestations of values, and values are manifestations of assumptions,"<sup>103</sup> the culture of an organization can be understood when one is able to identify the shared assumptions of its members. It follows that reformers have in their power the ability to transform culture by changing the shared assumptions.<sup>104</sup> In the next

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103. MARY JO HATCH, DYNAMICS IN ORGANIZATIONAL CULTURE, HANDBOOK OF ORGANIZATIONAL CHANGE AND INNOVATION, 203 (Marshall Scott Poole & Andrew H. Van de Ven, eds., Oxford Univ. Press) (2004).

104. Reformers must also understand that, just as shared assumptions shape culture, culture also shapes a member's assumptions. While striving to change shared assumptions, the reformer need be mindful of the force that the existing culture will exert to keep assumptions stable. Mindful of

section we will consider a compelling theory about how reform-minded leaders can significantly produce cultural change.

### B. HOW CAN REFORM-MINDED LEADERS BRING ABOUT CULTURAL CHANGE IN PUBLIC DEFENDER'S OFFICES?

Once the leader understands what culture is and the three levels at which it operates, s/he can begin the process of cultural transformation. According to Pasquale Gagliardi, there is a four-phase process through which a leader introduces a new system of values into an organization, ultimately transforming shared assumptions.<sup>105</sup> The change process begins with the leader using a vision, or specific set of beliefs, to guide his or her efforts. During this first phase the leader presents<sup>106</sup> his set of beliefs, which will now guide the group and orients the members' behavior in a direction consistent with his vision. As Schein reminds us, while this step produces compliance, it does not automatically change culture.<sup>107</sup> The second stage occurs when the behavior introduced by the leader begins to achieve the desired results. During this phase, the members come to appreciate the new results and recognize that their behavior change, albeit mandated, is responsible for it. They continue to behave this way because they appreciate the results; in this sense they are result-focused. The third phase is achieved when the members become less focused on the result and begin to embrace the greater cause. The behavior initiated in the first phase is now continued, not primarily to achieve the result but because it is fundamental to the cause now embraced by the members as a group. Once we reach this phase, a positive transformation of values has been achieved and the lawyers adopt the value system initially envisioned by the leader. In the final phase, "the value, now shared unquestionably by all concerned,

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cultural stability, organizational development theorists have noted, "[b]ecause of its deeply embedded nature any culture, societal, institutional, or organizational, is resistant to change." JOHN HENDRY, CULTURAL THEORY AND CONTEMPORARY MANAGEMENT ORGANIZATION. HUMAN RELATIONS, 52: 557-577, 563 (1999).

105. PASQUALE GAGLIARDI, THE CREATION AND CHANGE OF ORGANIZATIONAL CULTURES: A CONCEPTUAL FRAMEWORK, ORGANIZATION STUDIES, 117-34 (1986); Gagliardi borrows heavily from Schein's work in this area.

106. While Schein uses the term "impose," the leader should not be dictatorial in going about accomplishing this first phase. As a matter of fact, such an approach is ill-advised. Literature in organizational development provides strategies for introducing vision and modifying behavior in accordance thereto. For example, John Kotter counsels the change-oriented leader to initially develop a "sense of urgency" around a particular dilemma that needs to be resolved and to then develop a "guiding team" to help create and communicate the vision. John P. Kotter, *Leading Change*, HARVARD BUSINESS SCHOOL PRESS (1996). Alternatively, T.J. and Sandar Larkin advise leaders to communicate change through frontline supervisors who have already earned staff trust. T.J. Larkin and Sandar Larkin, *Reaching and Changing Frontline Employees*, HARVARD BUSINESS REVIEW, 95-104 (May-June 1996).

107. SCHEIN, *supra* note 94, at 16.

is taken more and more for granted, to the point where members of the organization are no longer consciously aware of it.”<sup>108</sup> It is during this phase that the value becomes an assumption and, because it is shared, culture change is achieved.

In order to better understand how this theory might apply to a public defender’s office, let us return to the example from New Orleans used above. For sake of illustration, assume a new leader joined ODP intent on changing the existing culture. Further assume the new leader has a vision of the office that includes the lawyers practicing in a client-centered manner. To this end the leader believes that indigent defendants deserve the same respect and treatment as the best-paying clients and that, as is the case with retained counsel, public defenders work for their clients and should act accordingly. S/he further envisions an office in which the lawyers work together to improve the overall representation provided by the office and a staff who feel part of a community, bound together by the common mission of providing clients the best representation in the city. To achieve this transformation, the leader begins by seeking to change the lawyers’ behavior towards their clients. S/he mandates that every lawyer meet with each client within the first forty-eight hours of arrest. S/he further requires that the attorneys consult with his or her clients before making any decision in the case. The leader distributes a list of pre-trial tasks required to be completed in every case. S/he cleans the office and decorates to make it look more professional. Finally the leader holds mandatory, weekly staff meetings at which the lawyers brainstorm each other’s cases. During this first phase, the lawyers act in accordance with the new rules. To an outsider, the lawyers’ appear to be more involved with their clients and their cases and the organization seems more professional. However, these artifacts are superficial; cultural transformation has not occurred.

As a result of improved client communication and involvement, the increased degree of case preparation, and assistance from colleagues, lawyers begin to be more successful.<sup>109</sup> During the second phase of the process, the lawyers become more receptive to the changes as they enjoy the improved results. At this point in the process, the lawyers have not adopted the leader’s values, as reflected in the vision, but are motivated to continue their new behavior due to the success attributed to it. As the success continues, the lawyers begin to express increasing pride in their role as public defenders, develop respect and affection for their clients, and

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108. GAGLIARDI, *supra* note 99, at 122.

109. Assume success is measured by more victories at trial, greater success at pre-trial litigation, increased number of dismissals, better plea offers, and more satisfied clients.

appreciate their colleagues and the community that has evolved.

This marks the beginning of the third phase, when the behavior is less explained by the results and more driven by a commitment to the clients, the office, and the profession. At this juncture in the process the lawyers begin to embrace the values of the leader.<sup>110</sup> In the final phase, these shared values become part of the fabric of the organization. As the public defenders internalize these values, and as the values subconsciously shape the way the group members see the world, they become assumptions. It is at this point that cultural transformation has been achieved. Unlike during the first phase, where the behavior modification was dependent on the leader, during the final phase, the leader is no longer necessary for the cultural transformation to continue. While the leader “initiate[d] the [transformation] process by imposing his or her beliefs, values and assumptions at the outset,” the culture is now defined by the shared assumptions of the group.<sup>111</sup>

### **C. WHAT CONSIDERATIONS SHOULD REFORM-MINDED LEADERS BE AWARE OF WHEN SEEKING TO IMPLEMENT CHANGE IN CULTURE?**

We now have an understanding of what culture is and the role it plays in defining an organization. We have examined a compelling theoretical model for ushering in cultural transformation. In this subsection we will discuss a couple of the considerations that leaders must address before even beginning the process of transformations. One such consideration is the degree to which the leader will seek to transform the culture. A second is how the leader should deal with resistance to the change s/he envisions. The answer to these questions will help the leader devise a strategy to effectively usher in reform.

#### **1. HOW MUCH CHANGE DOES THE LEADER ENVISION AND IS THIS VISION COMPATIBLE WITH THE EXISTING ORGANIZATION?**

When a leader decides to confront a problem through cultural change, the transformative impact of his or her strategy will be met with the powerful force of the existing culture. Because culture is so deeply embedded in the fabric of an organization, any effort to change it will be

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110. Gagliardi contends that at this point “the group will defend and assert the validity of its faith in innovation even when faced with threats and criticisms from the external environment or from new members of the group. Critics will be treated as heretics and doctrine will be codified and elaborated, so that the ideal becomes part of an organic ideology.” GAGLIARDI, *supra* note 99, at 122. For our example, it is during this phase when the lawyers will begin to significantly resist the judicial desires that discouraged change in the past.

111. SCHEIN, *supra* note 94, at 225.

met with some resistance.<sup>112</sup> There will be pressures to maintain the status quo. We borrow from Gagliardi the idea that when the leader initiates a change strategy, there are three possible outcomes: 1) apparent change; 2) incremental change, and 3) revolutionary change.<sup>113</sup> The outcome achieved will depend, in large part, on which of these three strategies the leader chooses, and the compatibility of his or her vision with the existing culture.

Apparent change occurs when the leader initiates changes that are wholly consistent with existing assumptions and values. In such cases, “new problems are confronted by choosing from the range of strategies permitted by existing assumptions and values.”<sup>114</sup> Because the organization’s existing set of assumptions and values support the change, they will remain unaffected. Therefore, while apparent change “may produce change at the level of artifacts,”<sup>115</sup> it will not bring about a change in organizational culture.

Incremental change involves a strategy in which the leader identifies existing values and assumptions that are consistent with the new vision and seeks to foster the adoption of additional values and assumptions that will exist in harmony with the old ones. In this case the leader is building on that portion of the culture that is already compatible with the organization’s new vision. The result will be new assumptions, values, and artifacts existing alongside older ones.

Revolutionary change occurs when the assumptions and values of the leader, necessary to support the new vision, are clearly antagonistic to the existing ones. Because the existing assumptions and values can not survive within the culture envisioned, they must be destroyed and replaced with the new.

In Gagliardi’s view, incremental change is the only outcome that involves cultural transformation in the sense that the new culture is the result of building upon, modifying, or changing the old. As we described, apparent change does not actually affect culture at all, as it leaves the existing assumptions and values intact. Revolutionary change, on the other hand, destroys the old culture completely and builds a wholly new culture. Gagliardi suggests that under this approach “the old [organization dies] and

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112. Resistance can be both internal and external, as we saw in Part II. In the next subsection we will discuss strategies for dealing with internal resistance. While these efforts will indirectly affect external pressure to some extent, strategies for dealing with resistant forces external to the organization will not be addressed directly in this paper.

113. GAGLIARDI, *supra* note 99, at 126-132.

114. HATCH, *supra* note 97, at 203-4.

115. *Id.* at 204.

that a new [one], which has little in common with the first, [is] born.”<sup>116</sup> In this sense, “culture is not changed so much as it is displaced.”<sup>117</sup>

Again, by taking an example from the situation in New Orleans, we can illustrate how various strategies might be responsible for one of the three outcomes.<sup>118</sup> Let us go back to 2005 and assume that the problem leadership seeks to address is the process whereby arrestees are brought to a First Appearance Hearing where a “stand-in” attorney from OIDP is present while the prosecutor and the judge go about the business of setting bond for all of the accused. The OIDP lawyer does not speak to any of the arrestees, nor does s/he participate in the bond discussion. The arrestee is then held on the bond for weeks without having assigned counsel before a formal charging decision is made and an OIDP lawyer is appointed.

In the wake of Hurricane Katrina, the nation’s eyes zero in on New Orleans and injustices like this one garner national attention. Amid criticism for routinely allowing poor arrestees to rot in jail for more than two months without access to counsel, the OIDP faces tremendous pressure to address this problem. Taking into account the assumptions and values of the organization relevant to the problem, leadership must devise a strategy.

The values in play include a desire to ensure that the judges are accommodated, which means committing OIDP lawyers to courtrooms where they can assist with the tasks immediately before the judges, and an interest in spending as little time as possible on public defender clients in order to maximize time available for retained cases. Using lawyer hours to individually represent arrestees at First Appearance Hearings, to visit them in jail, and to spend time working on their cases, is inconsistent with these values, particularly since some will have their cases dismissed after sixty days. These tasks pull the lawyers from the judge’s courtrooms and from their private clients.

The assumptions underlying these values include the following: that judges are the most important people in the system and accommodating them is a top priority; that indigent defendants are not deserving of the quality of representation to which paying clients are entitled; and that there is little value in exerting effort in a case before the formal charging decision is made.

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116. GAGLIARDI, *supra* note 99, at 130.

117. HATCH, *supra* note 97, at 205.

118. While this example stems from an actual problem that faced OIDP, the values and assumptions associated with the example, and the strategies discussed, are hypothetical, and used for the sake of illustration. They are not meant to reflect any values, assumptions or strategies of the OPD.

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In order to illustrate the three outcomes discussed, we will consider three approaches to this problem. In the first approach, assume that the leader agrees with the values and assumptions as stated above. S/he does not want to change the organizational assumptions or values but does feel the pressure to address the growing public concern over the perceived failures of the public defender's office. The leader decides on a strategy that will allow him or her to espouse the fact that arrestees are appointed counsel at First Appearance Hearings, while leaving relatively unaffected his or her lawyers' ability to accommodate the judges and their private clients at the same level as before the change. In this vein, the leader requires that the lawyer assigned to First Appearance Hearings is no longer referred to as "stand-in" counsel. Instead s/he holds him or herself out as counsel for all indigent arrestees. The First Appearance attorney enters his or her appearance as counsel of record for each indigent arrestee and furnishes each with his or her business card. The lawyer also provides each arrestee with a one page memorandum explaining that while s/he is the assigned lawyer, there is nothing that s/he can do until an official charging decision is made. The memo explains that this will be in approximately two months. The memo further explains that if charged, the accused will be assigned another OIDP lawyer at that time. The lawyer then has no further contact with the arrestee. This outcome is an example of apparent change. While there are superficial changes at the level of cultural artifacts (i.e. the lawyer now announced that s/he represents each arrestee and has given each defendant a business card and a memorandum) there is no potential to change the organizational assumptions and values.

In the second approach, the leader respects some of the organizational values and assumptions. S/he agrees that the judge is very important and should be accommodated, and that the public defenders need to supplement their low salaries and should be provided enough time to work on their private cases. S/he also agrees that it is inefficient to use valuable lawyer time handling First Appearance Hearings and visiting clients. However, the leader also believes that the clients should not only have representation by name pending the formal charging decision. S/he believes that someone should visit each client in jail in order to explain the legal landscape, file bond review motions, and investigate their cases. The leader further believes that indigent defendants deserve the same quality of representation as wealthy defendants, but is resigned to the view that this is not possible. In the world of this hypothetical leader, judges' interests are still paramount, followed by those of the lawyers, and then by those of the clients. However, this leader does value client interests far more than the hypothetical leader in the first approach.

This leader decides on a strategy that will maintain the current OIDP

lawyers in their existing assignments. Life will remain unchanged for those lawyers and the judges they serve. However, the leader does apply for grant money to hire two new attorneys and begins a volunteer program to make use of local law students. The two new attorneys are assigned to First Appearance Hearings. They not only enter their appearance as counsel of record for all indigent arrestees, but they also visit them within the first week of their arrests. Along with a staff of law student volunteers, these two lawyers draft bond review motions and conduct basic investigation. Through this strategy the leader seeks to introduce some new values, which are compatible with existing ones. In this sense, this strategy works to expand the organizational culture to include the new values without destroying the old.

In the third approach, the leader has a vision that cannot accommodate the existing set of assumptions and values. In his or her worldview, the most important person in the system is the client and everyone else's concerns, including the judge's, are subordinate to those of the representee. The leader further believes that handling a private caseload necessarily leaves the public defender conflicted between his obligation to his indigent client and his interest in increasing his base of paying clients, and causes the indigent client to suffer. The leader also believes that immediate and meaningful representation is crucial to the lawyer's ability to effectively represent the client because it allows him or her to develop a strong relationship with the representee, identify legal issues early, and pursue critical investigative leads that may evaporate over time. In an effort to impose these values, the leader immediately does away with the practice of assigning lawyers to judges. Instead, they are assigned to clients with cases throughout the courthouse. By appearing before all the judges, they will not be beholden to any one. The leader also requires all lawyers to be "full-time" public defenders and prohibits them from engaging in private representation. Finally, the new leader immediately implements a system of vertical representation, wherein every lawyer is scheduled to periodically cover First Appearance Hearings where s/he will be assigned to new clients. The lawyer will represent that client regardless of the courtroom to which the case is assigned. Furthermore, through required training and supervision, lawyers will learn to engage in meaningful pre-trial representation and be monitored to ensure they are complying with this mandate. It should be obvious that this third strategy, aimed at bringing about revolutionary change, seeks to displace the existing organizational culture and give birth to a new one.

Which strategy the leader chooses is a function of both the degree to which s/he seeks to transform culture and the extent to which s/he perceives s/he will be able to counteract the powerful force of existing culture.

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Obviously, the more intense the resistance to change, the greater the risk of failure. Equally obvious is the fact that resistance to change increases as the strategy employed moves along the spectrum from apparent to incremental to revolutionary change. Therefore, when the leader is choosing among various change strategies, s/he must take into account the amount of resistance accompanying each. Under any circumstance there will be some resistance, so the conscientious leader will not only contemplate the resistance associated with a given strategy, but will also consider strategies for minimizing and managing resistance. This will be the focus of the next section.

**2. HOW DOES THE LEADER DEAL WITH RESISTANCE TO CHANGE?**

Change invariably creates conflict. It spawns a hotly contested tug-of-war to determine winners and losers. Some individuals and groups support the change; others are dead set in opposition. Too, often conflicts submerge and smolder beneath the surface. Occasionally, they burst back into the open as outbreaks of unregulated warfare.<sup>119</sup>

As discussed, efforts to change culture will almost invariably be met with resistance. The amount will depend, in part, on the extent to which the leader envisions transforming the culture. However, opposition to change is also a function of how invested in the current culture the existing staff members are, and the degree to which they feel threatened by the change. The extent to which the leader can alter the composition of his or her staff to include a greater number who are less invested in the “old way of doing things” and less threatened by change, the easier it will be for him or her to achieve it. This can be accomplished in two ways: by bringing in new staff members who share the leader’s vision; and by helping existing staff overcome their fear of change and feel less dependent on their existing assumptions. Because the leader will not be able to eliminate resistance altogether, it is essential that s/he comes equipped with tools to manage it once the reform effort begins. In this section, we will look at strategies leaders can use to minimize resistance before the process begins, and manage it once reform efforts are underway. To do this, we will explore the role of three groups within the organization – existing staff receptive to change (reformers), and existing staff resistant to change (resistors), and new staff (newbies) – and the leader’s interaction with these groups.

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119. LEE G. BOLMAN & TERRENCE E. DEAL, REFRAMING CHANGE: TRAINING, REALIGNING, NEGOTIATING, GRIEVING, AND MOVING ON, ORGANIZATION DEVELOPMENT 447-69, 453-54 (Joan V. Gallos ed., Jossey-Bass) (2006).

**a. New Staff (Newbies)**

In the struggle to build an organization that is receptive to and supportive of a new vision, the most obvious strategy is to hire new staff members who are neither invested in the old culture nor threatened by the prospect of change.<sup>120</sup> This focus has obvious benefits; new employees will not come in with the assumptions that hamper change. But there are also risks here. While I would argue that recruiting new staff is a critical component of any change movement, we must consider the pros and cons of this approach.

Bringing in new personnel who do not share the existing assumptions will certainly reduce the resistant proportion of the workforce. However, while helpful, this will not be enough. The leader must find and bring on board new team members who embrace the new vision and either share, or are receptive to adopting, its underlying assumptions. Two approaches might be considered: first, the office chief might target seasoned lawyers from organizations already grounded in his or her assumptions; and second, he or she might hire less experienced lawyers who are excited by the new vision and are thus most likely to adopt its assumptions. In the field of indigent defense, each of these approaches present challenges.

With respect to enlisting seasoned lawyers who share the leader's assumptions, there are characteristics about the practice of law in general, and public defense specifically, that will present challenges. Because the values the reform-minded leader hopes to instill are so often molded through one's work as a public defender, the leader will need to target attorneys with experience in offices that model the desired culture. When an opportunity for reform presents itself, it will often be the case that other nearby offices are products of the same dysfunction the leader seeks to redress. Such offices have often been shaped by the same corrupting forces. It can therefore be difficult to find area lawyers who are already the product of model public defender systems. While many local attorneys are excellent lawyers, they may not have had the opportunity to internalize the assumptions about public defense necessary to transform culture.

On the other hand, recruiting seasoned lawyers who have come of age in a model system may be difficult. These lawyers already have professional and personal roots where they are. Because public defense is

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120. In an article addressing the movement to transform traditional public defender offices into models of holistic representation, Robin Steinberg, the Executive Director of the Bronx Defenders, and David Feige, the former Supervising Trial Attorney of that office, address the importance of hiring employees who share the new vision. Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 130 (2004).

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not a lucrative profession, the financial burden of changing jobs may not be worth it. Furthermore, lawyers must maintain a bar license in the jurisdiction where they practice and the impediments to obtaining one can be great.<sup>121</sup> Therefore, it will obviously be hard to attract seasoned lawyers who already possess the requisite assumptions, both locally and from outside the jurisdiction.

The second approach is to hire less experienced attorneys who do not yet share the desired assumptions but are ideal candidates to adopt them. While this group may not come into the organization with the same experience as their seasoned counterparts, they will be much easier to attract. Law schools all over the country graduate legions of new lawyers who are eager to embark on meaningful careers. They are far more likely to relocate for the promise of career fulfillment. They have fewer obligations than their experienced counterparts, demand less salary, and are filled with idealism. Identifying inexperienced lawyers who will embrace the leader's vision will thus not be difficult. Through an investment in recruitment, the leader will be able to identify candidates most likely to internalize his or her assumptions.<sup>122</sup> Recruitment efforts are thus crucial, but they must be complemented with intensive training and supervision during the formative stage of the new lawyer's career in order to ensure the internalization of the desired values.<sup>123</sup> When done effectively, this approach will enable the leader to build a core staff capable of creating a new culture.

To see how bringing in new staff can be useful, let us return to the third hypothetical scenario in section (C)(1) above, in which the leader envisions revolutionary change. This scenario is the most likely to produce resistance as it threatens existing values and assumptions upon which the lawyers have come to rely. In this case, lawyers will be most resistant to

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121. Generally in order to practice in a state one must take, and pass, an intensive examination that is both costly and time consuming to prepare for. Some states, recognizing the value of attracting experienced and capable lawyers, ease this burden by providing seasoned lawyers admitted in another jurisdiction with the ability to "waive in" to bar membership.

122. EDWARD E. LAWLER, *WHAT MAKES PEOPLE EFFECTIVE, ORGANIZATION DEVELOPMENT*, 634-55 (2006) ("[t]o be successful, [organizations] must commit themselves to attracting, retaining, and motivating the best and the brightest." He speaks to the limitations of training as a means to influence a persons assumptions (Lawler uses the term "personality") and highlights the need to recruit, or select, the right people).

123. It should be apparent to the reader how the process of bringing in these two categories of new staff, seasoned attorneys who embrace the assumptions and new attorneys who share the vision and are receptive to internalizing the assumptions, fit into Gagliardi's four phase process of achieving organizational shared assumptions. By targeting seasoned lawyers, the leader incorporates employees who have already reached Gagliardi's fourth phase. Through the recruitment of new lawyers, the leader seeks to bring in members who are at Gagliardi's third phase and primed to move to phase four. This movement is facilitated through training and supervision.

the mandate that they give up their private practice, the directive that they begin meaningful representation at the time of arrest, and the requirement that they handle cases in several courtrooms. Because these changes are so disruptive, existing staff will not immediately embrace them. Some may leave; others will vocally criticize the changes; and still others may reluctantly go through the motions of the new mandates without really committing to their success. Bringing in seasoned public defenders, who have already practiced this way, will give existing staff examples of how such changes can work. They will thus co-advocate for this change and keep the leader from being isolated. While new lawyers will not start with the same credentials, they will add to the number of staff supportive of the leader's goals. Furthermore, incorporating these new lawyers into the organizational fabric will bring about more rapid change than bringing resistant staff through Gagliardi's four phases, thereby facilitating the leader's efforts to build a reform-minded team.

In addition to the challenges already identified with hiring new staff, there are other potential problems. Bringing in new staff will almost always engender resistance.<sup>124</sup> However, the leader must be careful not to send the unintended message to existing staff that he or she has little faith in them. The leader must convey to existing employees that his or her strategy is meant to complement the organization and does not imply a lack of confidence in them. Since there is a natural tendency for members of a group to be threatened by outsiders, anything that increases the level of threat will increase the level of resistance. A strategy that introduces outside lawyers into the community must be approached thoughtfully.

#### **b. Existing Staff Receptive to Change (Reformers)**

While bringing on new staff will be a valuable strategy for reform, working with existing staff is critical to success. While existing staff will initially be resistant to change, with the right strategies, some will embrace reform efforts. Therefore, turning resisters into reformers should be a priority of the reform minded leader.

Before we consider approaches to minimizing resistance, we must understand why change is so threatening. In an article analyzing resistance

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124. As illustrated above, this resistance can be external as well as internal. Recall the account in section II(C)(3) in which some judges sought to prevent seasoned public defenders from other jurisdiction from assisting OPD under the Temporary Emergency *Pro Bono* Criminal Legal Assistance Rule For Orleans Parish. A common refrain we heard from opponents of reform was that these lawyers did not have the experience to practice at Tulane and Broad. I am reminded of an op-ed piece written by the Reverend Joseph E. Lowery regarding the Democratic Primary race. In addressing the viewpoint that favored the candidate who had the "better grasp of official Washington," Lowery countered that "official Washington has a better grasp of [that candidate]."

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in corporate culture, Harvard Business School Professors John Kotter and Leonard Schlesinger suggest four primary reasons for resistance. First, the resistant person, more focused on self-interest than the good of the organization, may fear the personal cost of change. Second, due to a lack of trust in leadership or a misunderstanding of the leader's vision, s/he wrongly perceives that the cost of change will outweigh the benefits. Third, s/he may assess the situation differently than the leader and thus conclude that the organizational cost will be greater than the leader realizes. Fourth, s/he may fear s/he "will not be able to develop the new skills and behavior that will be required of [him or her]."<sup>125</sup>

Looking at the hypothetical of the leader who envisions reform-minded change, the potential for all four reasons for resistance among existing staff can be seen. First, current lawyers, for example, will not be able to maintain a private practice. The degree to which this loss is threatening will depend on the extent to which it supplements the lawyer's income. In any event, this will certainly cause the lawyer to lose an option previously available. Second, the potential for distrust of the leader among existing staff is great where, as here, the leader comes in with an agenda that completely overhauls a system in which they have become comfortable. Based on their assumptions, existing staff will not readily understand why such a revamp is necessary and naturally question the leader's motives. Third, given their assumptions, members of the existing staff may differ with the leader on the cost of alienating the judges and working in several courtrooms; and the benefit to providing better service to clients who have not yet been formally charged. Finally, public defenders, who have never developed the skills that will now be required of them, may understandably be concerned about their ability to adapt.

By understanding reasons for resistance, the leader is better able to address them before implementing the transformation process. In this way s/he can convert some of the resistant staff, thus encouraging them to be receptive to reform efforts before they start. These new reformers will be the leader's most valuable asset in the short run since they can help promote change without carrying the stigma of being outsiders. Kotter and Schlesinger suggest strategies for minimizing resistance,<sup>126</sup> which we will examine in the context of our hypothetical scenario. The first tactic is to overcome resistance through "education and communication" about the vision and its logic. This will be particularly useful in dealing with those most threatened because they perceive the cost of alienating judges and

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125. John P. Kotter & Leonard A. Schlesinger, *Choosing Strategies for Change*, HARVARD BUSINESS REVIEW 5-6 (1979).

126. *Id.* at 7-9.

litigating in several courtrooms as greater than the benefit to representing clients who have not yet been formally charged. Part of their assessment is based on a lack of familiarity with public defender systems that have vertical representation. They cannot envision how it could work. The other factor is that they neither consider the cost of this system to themselves nor their indigent clients. By exposing the staff to successful systems that use vertical representation and its accompanying benefits, through presentations or guest speakers, lawyers can begin to understand that the concept is neither foreign nor complicated. Additionally, through communication and education, lawyers can learn that early intervention can greatly increase the number of cases dismissed before being formally changed. Perhaps most powerfully, this technique can inspire the staff to want to do a better job for indigent defendants.

In his book *Leading Change*, John Kotter lays out an eight-step process for transforming an organization.<sup>127</sup> He calls the first step “establishing a sense of urgency,” by which the leader inspires otherwise complacent staff to embrace his or her vision. For example, in our New Orleans hypothetical, the leader might bring the client to whom we were introduced in the article’s opening story to a staff meeting to tell the lawyers his harrowing tale. By introducing staff to powerful stories of injustice that can be corrected with the new vision, the leader uses communication and education to minimize resistance.

A second approach is to address resistance by inviting “participation and involvement.” By bringing potential resistors to the table to seek their input, the leader can encourage them to take ownership of the vision. By listening to existing staff and addressing their concerns within the context of the vision promoted, the leader will promote acceptance.<sup>128</sup> The leader should also search out the most respected lawyers who are receptive to his or her vision, and make them a part of the “guiding team,”<sup>129</sup> or inner circle of advisors. This will not only bring these lawyers’ on board, but help promote acceptance among other staff. Looking at our hypothetical, one can see how this approach can address the second reason for resistance, lack of trust and understanding, as involved lawyers begin to understand the motives behind the vision.

Third, the leader should employ “facilitation and support.” By providing training to lawyers who are concerned that they will not develop the skills necessary to make the transition to the new system, the leader can

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127. Kotter, *supra* note 100.

128. See JAMES KOUZES AND BARRY POSNER, ENLIST OTHERS, ORGANIZATION DEVELOPMENT 518-39 (Joan V. Gallos ed., Jossey-Bass) (2006).

129. See Kotter, *supra* note 100.

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ease some tension and reduce resistance. Through additional financial support in the form of higher salaries, the leader can make the transition out of private practice more palatable. These are examples of how this approach can address the first and fourth reasons for resistance.

Each of these three strategies can potentially convert resisters to reformers prior to the initiation of the reform process. However, invariably there will remain some resisters on staff after the vision has been implemented. If not managed, these individuals can undermine reform efforts. Therefore, the leader must also devise strategies for dealing with the existing staff still resistant to change.

**c. Existing Staff Resistant to Change (Resistors)**

After exhausting all attempts to minimize resistance, there will remain a group of employees who are steadfast in their opposition to the leader's approach. These are the members who most derived meaning, stability, and security from the old culture.<sup>130</sup> It is they who feel most threatened when the leader challenges assumptions upon which they have relied to validate their thinking and behavior. Even when the new strategy begins to bear positive results, these members will "find it easier to [dismiss the results] by denial, projection, rationalization, or various other defense mechanisms than to change the basic assumption[s]."<sup>131</sup> The greatest danger with these resisters is that they may poison the attitudes of others who the leader has been able to delicately bring over to an appreciation of reform. Keeping these lawyers from infecting the positive environment the leader seeks to create will be a challenge.

While the first three strategies for dealing with resistance outlined by Kotter and Schlesinger provide the leader with tools to convert potential resisters to reformers before reform efforts are underway, they set out three additional means which, in my view, are better suited to managing resistance once the vision has been implemented. Once again, turning to our New Orleans hypothetical, let us consider how these three additional strategies might help manage resisters. The fourth method Kotter and Schlesinger provide is "negotiation and agreement." Here, recognizing that an employee is not on board, the leader seeks to strike a deal to stifle resistance. Using our scenario, examples might include giving a resistor a reduced caseload, a better selection of cases, or other perks in exchange for the resistor refraining from attacks on reform efforts. Whether or not the deal need be explicit or implicit will depend on the circumstances.

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130. SCHEIN, *supra* note 94, at 36.

131. *Id.*

A fifth approach is “manipulation and co-optation.” This is a much more Machiavellian<sup>132</sup> approach to managing resistance, in which the leader invites the resistor to play a seemingly important role in the management of the office. This, however, is not done because the leader wants the member’s advice, but merely because s/he is seeking his or her endorsement. In our example, the leader might ask the resistor to help create a schedule to cover First Appearance Hearings, or to serve on the committee that will identify training needs. A final approach is “explicit and implicit coercion.” As the term suggests, this method forces the resistor to comply through the threat of termination or other punishment. As Kotter and Schlesinger explain, these last two approaches are very risky because people resent forced change. To the extent that the resisters impacted by these approaches have allies on the staff, there is significant potential to increase resistance, and thus counteract reform. In deciding whether to use one of the strategies, the leader will need to assess the benefit to managing resistance against the cost of any backlash that might ensue.

#### IV. CONCLUSION

Scholars of organizational development understand the centrality the concept of culture plays in defining an organization and its members’ perceptions, thoughts, feelings, and behavior about the world in which they operate. Leaders who share this understanding can transform culture and reform institutions. Those who do not will have their organizations managed by a culture they do not comprehend. This lesson is critical for indigent defense reformers to understand. Because there are more obvious forces that contribute to the woes of public defender offices across the country, such as budgetary and structural challenges, reformers tend to focus on addressing these concerns. This is often done through attempts at legislative reform. While these efforts are necessary, because they do not address the cultural forces underlying dysfunctional systems, they cannot succeed in isolation. Meaningful reform will only come when these organizations are led by people who understand the role that culture plays and possess strategies for changing it.

In this article, we examined pre-reform New Orleans as an example of how, when left unmanaged, forces beyond the leader’s control will create and maintain an organizational culture that will survive any efforts to deal with those forces. While New Orleans provides a vivid illustration of this

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132. An Italian diplomat and political philosopher who had a view of the relationship between ethics and politics that emphasized results over process and moral code. As a result, Machiavellian has become a pejorative used to describe a person who manipulates others in an opportunistic and deceptive way.

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thesis, we emphasized that the challenges facing reformers in New Orleans plague indigent defense systems nationwide.

We next looked to theories of organizational culture to understand what culture is and how leaders can transform it. It was in this context that we examined considerations of which the leader must be mindful when undertaking reform; namely, the degree to which the reformer wishes to affect change and some strategies for dealing with the inevitable resistance that will accompany these efforts. While we sought to help the reader understand these concepts by using hypothetical scenarios based on the system that developed in pre-reform New Orleans, we emphasized that those illustrations were purely hypothetical and were not meant as a reflection on the people currently struggling so valiantly to reform indigent defense in that city.

So, that leaves the obvious question: what has happened in New Orleans since reform efforts began in 2006? While it is far too early to declare victory, the battle to reform indigent defense in Orleans Parish is off to a promising start. Despite some of the greatest challenges confronting reform, progress has been amazing. This is, I would argue, directly attributable to the fact that leadership in New Orleans understands that organizational culture matters. The scope of this article does not allow me to go into detailed description of what happened in post-reform New Orleans. That would require a whole new paper. However, it is worth pointing out some of the changes made as they relate to concepts discussed above.

First, as must be the case with any effort to change culture, the post-reform New Orleans leadership embraced a vision that reflected central values that have driven the change. Consistent with the studies conducted by outside experts, these values included: creating a professional work environment with sufficient resources for the job; instilling in its staff a perspective that is client, rather than court, centered; providing meaningful representation to clients beginning at the First Appearance Hearing; providing vertical representation; and creating a community of professional public defenders that possesses an institutional knowledge for the benefit of all clients.

In order to promote these values, certain changes were implemented. Professional office space, with a communal meeting area and adequate resources, was secured. All public defenders were required to become full-time employees and were prohibited from representing private clientele. The process of vertical representation was introduced as lawyers were assigned to new clients at First Appearance Hearings. Pre-trial investigation was mandated. Regular staff meetings and brainstorming

sessions were implemented.

Given the incredibly low standard of representation that had come to be accepted in New Orleans, these changes appeared revolutionary. In fact, using Gagliardi's terms, they were incremental in the sense that leadership identified those pre-existing values that were consistent with the new vision and built upon them. A primary example of this is the incremental pace in which vertical representation has been phased in. While new clients were being assigned counsel at First Appearance hearings, some lawyers remained assigned to courtrooms in order to address the backlog of cases, out of respect for the needs of the judges and clients impacted by this change.

While we discuss some of the external resistance leadership faced in Section II, internal resistance was significantly minimized by using some of the approaches discussed above. By requiring a full-time commitment, many of the lawyers who had the most to lose, and were therefore most resistant, decided not to remain with the new office. Almost by definition, the remaining lawyers were at least open to change. Communication and education through regular staff meetings further helped to reduce opposition. Leadership consulted existing staff and sought their input in an effort to help shape the course of reform. Also, in order to make change easier to digest, attorney salaries were increased to help offset the loss of income resulting from the full-time requirement, professional investigators were recruited and trained to compliment the existing staff, and a robust volunteer program was initiated in order to provide administrative, investigative, and legal research support.

While reform efforts in New Orleans still have a long way to go, the progress there has been remarkable. Certainly, an infusion of money has helped to rebuild the office.<sup>133</sup> Legislation that provides the public defender's office with some independence from the local judiciary also helped.<sup>134</sup> But if New Orleans is to succeed in its efforts to reform indigent defense, it will be due to the fact that the leadership understands the relationship between organizational culture and the ability to promote it. Certainly public defender leaders all over the country would benefit from undertaking similar efforts based on these ideas.

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133. OPD received a \$2.8 million federal grant in the summer of 2006. This money, along with other grant money, primarily from the State Bar Association, has provided a significant boost to reform efforts in New Orleans.,

134. In 2007 the Louisiana Public Defender Act did away with the judicially appointed indigent defender boards that interfered with public defender independence. *See* La. R.S. §15:141 et. seq. Local control was removed from the new legislation. La. R.S. §15:146.