

A Fair Fight

Achieving Indigent Defense Resource Parity

By Bryan Furst PUBLISHED SEPTEMBER 9, 2019

Shondel Church spent over 40 days in a Missouri jail — accused of stealing a generator and toolbox — before even seeing his public defender. His lawyer thought they could win the case but explained that his high caseload would prevent them from going to trial for four to six months. Church sat in jail for 125 days, for which Missouri charged him \$2,600, before pleading guilty in order to return to his life and family.¹ While Missouri is among the worst examples, indigent defense systems across the country have been chronically under-resourced for decades.

Spending tax dollars on indigent defense has long been unpopular. Shortly after the Supreme Court ruled in 1963 in *Gideon v. Wainwright* that indigent people accused of crimes are entitled to a lawyer, public sentiment for being “tough on crime” skyrocketed and persisted well into the 1990s.² As a result, today’s systems of indigent defense developed in an era of mass incarceration that is historically unprecedented.³ It is not surprising that many of these systems remain in crisis today.

Indeed, a half century after the Supreme Court’s landmark ruling, the Brennan Center posited in a report, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, that the right to counsel has never been broadly realized in this country.⁴ This remains just as true today, with one key difference: criminal justice reform is now seeing broader public support than ever before.⁵

Many of the issues that affect our criminal justice system today — overly long sentences, racial bias, wrongful convictions — are exacerbated by overwhelmed indigent defense systems. In this moment of bipartisan support for reform, creating resource parity between

prosecutors and indigent defenders could help achieve transformative change and lend needed credibility to our criminal justice system.

The Supreme Court has observed that the “very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”⁶ Whenever adequate defense counsel is lacking, however, “a serious risk of injustice infects the trial itself.”⁷

And the infection appears widespread. Until recently in New Orleans, single public defenders were forced to handle upward of 19,000 misdemeanor cases in a year — translating into seven minutes per client.⁸ Research has shown that only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads.⁹

A functioning adversarial legal system requires two adequately resourced opposing sides. But American prosecutors, while sometimes under-resourced themselves, are the most powerful actors in the U.S. legal system.¹⁰ In addition to better funding,¹¹ there are numerous structural advantages a prosecutor holds that worsen the resource disparity. For example, harsh mandatory minimums and widespread pretrial incarceration create conditions in which people have essentially no choice but to accept whatever plea deal the prosecutor offers.¹²

Historically, improving the resource disparity for defenders has been politically difficult because of the cost and the fear of looking “soft on crime.”¹³ This might not be as true today, when 71 percent of voters think it is important to reduce the prison population¹⁴ and 66 percent support

the use of government tax dollars to provide indigent defense.¹⁵

In addition, the fiscal costs of indigent defense reform are not nearly as high when one accounts for the savings it can bring. Issues exacerbated by defender resource disparity — pretrial incarceration, overly long sentences, wrongful convictions — are extremely expensive. The Prison Policy Initiative estimates that the United States spends \$80.7 billion on corrections each year, while pretrial detention alone costs \$13.6 billion.¹⁶ From 1991 to 2016, Texas paid out over \$93 million to wrongfully convicted people.¹⁷

Providing better indigent defense does not always mean spending more money. State indigent defense systems are often structured in extremely inefficient ways that cost states more than necessary and lead to worse outcomes for people accused of crimes.¹⁸ Restructuring for those jurisdictions may require an up-front investment but can lead to savings in the long term.

At the heart of defender resource disparity is the chronic underfunding of indigent defense — a phenomenon that is widespread and well-documented.¹⁹ But fixing the problem will require more than simply increasing funding, and the question demands thinking broadly about the many issues that drive it. This report identifies five key challenges that contribute to defender resource disparity:

- Improperly structured indigent defense systems
- Unsustainable workloads
- Defender-prosecutor salary disparity
- Insufficient support staff
- Disparate federal funding as compared to law enforcement

Many of the solutions presented in this analysis will improve resource parity, requiring increased up-front spending. Some will produce savings in the long term through cost sharing between indigent defense offices or reduced levels of incarceration, while others, such as mandating open discovery, will cost almost nothing to implement.²⁰

This analysis identifies various characteristics of the justice systems that contribute to defender resource disparity and presents solutions to move toward parity. It seeks to build upon and elevate the work of many others in the multi-decade effort to realize the right to counsel in this country — one of many necessary reforms required to dismantle the systems of mass incarceration.

Consequences of Indigent Defense Resource Disparity

Adequately funding indigent defense will require a large public investment — one that lawmakers have long been loath to make. But focusing only on this price tag misses costs borne by both the accused and society at large due to inadequate public defense.

Public defender resource disparity means defense lawyers are overworked, underpaid, undertrained, and lack adequate support resources. This leads to numerous injustices for those accused of crimes, such as increased incarceration and wrongful convictions. Additionally, chronic resource disparity causes harmful effects to the culture of indigent defense systems, perpetuates the often all-too-accurate characterization of “assembly line justice,” and ultimately erodes trust in our criminal justice system. And while the entire nation is impacted, these consequences are disproportionately shouldered by people of color.²¹

A. Impact on Those Accused of Crimes

Under-resourcing indigent defense contributes to unnecessary incarceration in myriad ways. Early in a case, public defenders with crushing caseloads are unable to zealously advocate for their clients to be released pending trial.²² Pretrial detention leads to numerous downstream consequences, such as higher conviction rates, longer sentences, and increased recidivism.²³ Of course, improving pretrial representation alone will not overcome the many injustices of bail systems across the country, but there is evidence that it can help. A 2018 policy brief by the California Policy Lab found that by providing access to counsel prior to arraignment (generally a person’s first appearance before a judge), the San Francisco Public Defender’s Pretrial Release Unit was able to double a person’s chance of release from 14 to 28 percent.²⁴

Public defenders in Kansas City, Missouri, on the other hand, are so severely backlogged that a man there was recently arrested for a robbery and held in jail pretrial for thirteen months before his public defender had an opportunity to investigate his case. Video footage from a nearby convenience store’s security camera clearly showed the man was not at the scene of the crime when it was committed. The charges were quickly dropped, but the man had already lost a year of his life.²⁵ Unfortunately, stories like this are not uncommon.²⁶

Studies also show that the quality of defense has a direct impact not just on conviction rates but on sentence length following conviction. One study found that people in Philadelphia who were represented by full-time public

defenders, as opposed to private attorneys appointed by the court, received on average a 24 percent decrease in sentence length and were 62 percent less likely to receive a life sentence.²⁷ The authors suggest the differences were partly due to “extremely low compensation” of appointed counsel that “makes extensive preparation economically undesirable.”²⁸

Wrongful convictions are also more likely when public defenders are under-resourced. Since 1989, the University of Michigan National Registry of Exonerations has documented 2,468 exonerations to date amounting to 21,726 years of wrongful incarceration,²⁹ though the actual number of wrongful convictions is surely much higher.³⁰ As the National Right to Counsel Committee reported in 2009, “The causes of wrongful conviction, such as mistaken eyewitness identifications, faulty scientific evidence, and police perjury, are all matters that competent defense lawyers can address.”³¹

B. Impact on the Culture Among Indigent Defense Attorneys

Decades of under-resourcing has created cultures within many indigent defense systems that value efficient case processing above zealous representation.³² Defenders are forced to work with a complete lack of resources, inadequate institutional support, and perverse financial incentives, all of which, as Michigan Law Professor Eve Primus has said, “beat the fight out of them.”³³ As a result, harmful practices — such as failing to conduct investigations or perform legal research and pushing clients to plead guilty prior to learning the facts of a case — become normalized and entrenched.

Underfunding public defenders can also exacerbate the problems of implicit bias that are entrenched at every stage of the criminal process. Well-documented racial bias of police, prosecutors, and judges leads to unjust outcomes every day, and public defenders are often the first and last line of defense against it.³⁴ But public defenders are susceptible to implicit racial bias like everyone else, which can lead to worse outcomes for clients unintentionally perceived as more guilty. Academics and practitioners have long warned that the conditions public defenders

work under (that is, tired people under high stress with a large amount of discretion) make them more vulnerable to implicit bias.³⁵

These cultural norms among indigent defense providers then become obstacles to reform as attorney assumptions and beliefs become embedded. Jonathan Rapping, the founder and president of Gideon's Promise, argues that "if we do not change the underlying assumptions that evolve from an underfunded, structurally corrupt system, reform cannot be achieved."³⁶ But changing culture in any organization is difficult and will require a deep commitment internally, as well as support from state and local governments.

Along with the widely reported injustices to individual people accused of crimes, the cultural status quo of indigent defense justifiably causes the public to question the legitimacy of criminal justice systems. This is just one reason why 91 percent of Americans say the criminal justice system has problems that need fixing.³⁷

Structural Contributors to Indigent Defense Resource Disparity

Policy decisions that states make regarding the structure of indigent defense administration and delivery have enormous implications for the quality of representation received. The relatively short and uncertain history of indigent defense in the United States has resulted in a patchwork of systems that has failed to deliver on the rights established in *Gideon*. This is especially true in light of the unique powers of American prosecutors' offices.

The jumble that has evolved offers defense services through various combinations of three different models. One model, the fully state-funded public defender office, has generally proved to be the most effective. Despite this recognition by experts, most indigent defense systems are not structured this way, lowering the quality of indigent defense nationwide. In addition, the challenges presented by improperly structured defense systems are compounded by unsustainable public defender workloads, a salary disparity between defenders and prosecutors, insufficient support resources, and a lack of federal funding.

A. Improperly Structured Indigent Defense Systems

While the origins of the American prosecutor can be traced back to the 17th century, the idea of the public defender was not proposed until 1893 by Clara Foltz, one of the nation's first female lawyers.³⁸ The first colony-wide system of public prosecution predates the first public defender office on American soil by 210 years.³⁹ In fact, by 1914, when Los Angeles County opened the first public defender office, all but five states in the nation had county level public prosecutor offices closely resembling those of today.⁴⁰ As a result, while modern prosecutor offices had centuries to develop, indigent defense providers did so more rapidly.

In 1960, three years before the Supreme Court announced the right to a court-appointed attorney in *Gideon*, only 96 public defender offices existed.⁴¹ In the wake of *Gideon*, states scrambled to comply with this unfunded federal mandate with no instruction from the court on how to do so. To make matters worse, the development of most indigent defense programs in the United States coincided with the unprecedented 40-year growth of mass incarceration and "tough on crime" culture.⁴² In these reluctant "laboratories of democracy," many experiments were tried, most were failures.

Today, an indigent person accused of a felony in Washington, D.C., will likely receive the highest quality legal representation available — but that is far from the norm.⁴³

Accused of the same crime in Kansas City, Missouri, or New Orleans, Louisiana, a defendant may be one of a hundred active cases on an attorney's docket, resulting in sitting in jail for months before the attorney has time to meet.⁴⁴

1. Indigent Defense Delivery

Across the United States, there are three main forms of indigent defense delivery: public defender offices, assigned counsel, and contract counsel. The method a state chooses has wide implications for the quality of representation:

- **Public defender office:** Salaried attorneys perform indigent defense in a jurisdiction on a full-time or part-time basis. They generally work together in an office setting akin to a law firm and share support staff. The public defender model has been shown by some studies to be the most effective form of indigent defense, as measured by conviction rates, sentence length, and likelihood of receiving a life sentence.⁴⁵ While public defender offices require a larger up-front investment to establish, they can lower costs by sharing expenses and pooling resources in the long run. A study in Texas, for example, revealed that misdemeanor cases handled by public defender offices in the state cost 23 to 32 percent less than those handled by other indigent defense models while felony cases cost 8 to 22 percent less.⁴⁶ The authors calculated that switching to a statewide public defender system could lead to savings of \$13.7 million per year.⁴⁷ A similar study in New York found that cases handled by public defender offices in the state cost about \$77 less per case than assigned counsel, while yet another study in Iowa found a difference of \$200.⁴⁸
- **Assigned counsel:** Private attorneys are appointed by the court to represent indigent persons accused of crimes on a case-by-case basis. They are generally paid an hourly rate or a predetermined amount that corresponds to the type of case being tried. Some counties rely primarily on assigned counsel while others only use them to supplement public defender

offices when there is a conflict of interest. Assigned counsel are often paid very low hourly rates. In about half of the states, they are subject to fee caps that dictate the maximum amount an attorney can earn on a given case, which incentivizes attorneys to do less work on a case once they reach the maximum threshold. A 2013 survey by the National Association of Criminal Defense Lawyers (NACDL) found that, of the 30 states that had established statewide compensation rates, the average was \$65 an hour but the rate was as low as \$40 an hour in some states.⁴⁹ These rates do not consider attorney overhead costs, which can be over 50 percent of an attorney's revenue.⁵⁰

- **Contract counsel:** Private attorneys contract with a jurisdiction to provide all or a portion of indigent defense representation. States often award contracts to the lowest bidder. The Sixth Amendment Center reports that by far the most prevalent form of indigent defense in the nation is the flat-fee contract system.⁵¹ Under a flat-fee contract, a private attorney represents an unlimited number of clients for a set fee. Flat-fee contracts financially incentivize attorneys to do as little work as possible on each case. This is because all costs for a case, such as investigation or consulting expert witnesses, come out of the same fee and thus directly eat away at whatever profit the attorney makes. For this reason, the American Bar Association (ABA), along with many others, recommends banning flat-fee contracts in its *Ten Principles of a Public Defense Delivery System*.⁵² While the practice remains pervasive throughout the country, many state and local jurisdictions have taken steps to bar its use.⁵³

2. Administration and Funding of Indigent Defense

Like methods of delivery, the methods of administering and funding indigent defense vary widely among the states. This, too, directly impacts the quality of representation provided in a given jurisdiction. Across the United States, there are differing approaches to how indigent defense oversight is divided between state and county governments. Expert bodies that have studied indigent defense, such as the National Right to Counsel Committee, have observed that large urban counties can be overwhelmed by high case volumes, while rural counties may not have adequate resources to handle even a single serious homicide case.⁵⁴ They conclude that, in general, the more authority and responsibility a statewide commis-

sion or agency has for administering and funding indigent defense, the better and more consistent the level of representation is throughout the state.⁵⁵ The following section describes how the administration and funding of indigent defense is divided between county and state governments.

- **Administration of indigent defense:** The administration of indigent defense includes oversight duties such as setting standards of practice, limiting workloads, and appointing chief public defenders. The structure of administration ranges from total control in a statewide commission or agency to either partial state control or purely county control. Consolidating control of indigent defense in a single statewide authority or public defender office allows for the formulation of consistent standards, training of attorneys, and sharing of resources, such as paralegals and investigators.

While public defender offices require a larger up-front investment to establish, they can lower costs by sharing expenses and pooling resources in the long run.

- **Indigent defense funding sources:** The source of funding for indigent defense is intimately linked to control over its delivery. Of all the states that have a statewide indigent defense system, only Louisiana relies primarily on local sources of revenue for funding.⁵⁶ Multiple studies have shown that when counties are left to fund indigent defense, there is wide disparity in the quality of representation between them.⁵⁷ An encouraging trend from the mid-1980s to the early 2000s showed systems moving away from county funding and toward increased state funding. However, as the table below illustrates, this trend seems to have stagnated. Currently, 17 states rely primarily or fully on county funding for indigent defense, often leading to inconsistent representation and severely under-resourced indigent defenders.⁵⁸ But statewide funding is no guarantee of *adequate* funding, as evidenced by Missouri, which fully funds indigent defense statewide but at grossly inadequate levels.⁵⁹ The latest available data on nationwide indigent defense spending at the state level showed that, from 2008 to 2012, 18 states increased spending on indigent defense while 26 decreased it.⁶⁰

Some states rely on erratic funding sources that are inconsistent relative to government general revenue. A 2010 Brennan Center report found that, of the 15 states with the highest prison populations, 13 charged defendants fees to recuperate the costs of public defense.⁶¹ Louisiana infamously funds its public defense system through

Table 1: Indigent Defense Funding Source by Number of States

	1986 ¹	2005 ²	2019 ³
Full state funding (over 95%)	19	26	26
Primarily state funded	8	5	5
Even state/county split	1	1	2
Primarily county funded	10	13	13
Full county funding (over 95%)	12	5	4

As the table above indicates, the encouraging national trend toward increased state funding seems to have stagnated in recent years.

a \$45 court fee assessed on every person convicted of so much as violating a local ordinance.⁶² This means that indigent defense funding relies on inconsistent revenues, such as traffic tickets, leading to regular budget cuts and hiring freezes.⁶³

3. The Unique Powers of the American Prosecutor

The role of the indigent defender cannot be properly understood without some comparison with the extraordinarily broad powers of their courtroom adversaries. Prosecutors — and district attorneys in particular — are often described as the most powerful legal actors in criminal systems across the United States.⁶⁴ As far back as 1931, scholars noted that “the prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power.”⁶⁵ This underlying belief is the genesis of the current progressive prosecutor movement as a vehicle for criminal justice reform.⁶⁶ Whether electing reform-minded district attorneys alone will lead to lasting transformational change is an open question, but the fact remains that prosecutors wield immense courtroom power that defense attorneys and their clients must confront every day.⁶⁷

The power of prosecutors stems primarily from their largely unfettered and unreviewable discretion to bring charges and conduct plea bargaining. In an era of mandatory minimums and enhanced sentences, the power to charge is ultimately the power to dictate the sentence.⁶⁸ Prosecutors can use the threat of large mandatory minimums to leverage a plea deal with a lower sentence, making the term “plea bargaining” somewhat of a misnomer. In general, the prosecutor will present a take-it-or-leave-it deal that raises a familiar dilemma to anyone involved in the criminal justice system: accept a plea for a reduced number of years or risk losing at trial and be sent to prison under an excessive mandatory minimum.

To make matters worse, the accused person is often forced to make this decision while incarcerated in a jail that threatens their health and safety.

Despite the potential for abuse inherent in prosecutorial discretion, even reform advocates such as American University Professor Angela Jordan Davis acknowledge that it “is essential to the operation of our criminal justice system.”⁶⁹ In her book *Arbitrary Justice: The Power of the American Prosecutor*, Davis explains that this discretion is necessary due to the proliferation of criminal statutes across the country, the limited resources in prosecutor offices, and the need for individualized justice.⁷⁰ The problem, she explains, is that prosecutors generally exercise this discretion “without meaningful guidance, standards, or supervision,” leading to decisions that are “more arbitrary than individualized, and deep-seated, unconscious views about race and class are more likely to affect the decision-making process.”⁷¹

Adding to this power, the Supreme Court has repeatedly refused to submit prosecutorial discretion to judicial review.⁷² Because their broad discretion is ultimately unreviewable, prosecutors face very little accountability outside the will of the voters, and, until recently, voters were not paying much attention.

B. Unsustainable Workloads

Establishing reasonable workload standards is essential to ensuring that attorneys deliver effective representation and to informing budget decisions. However, *national* caseload standards are of limited utility. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) recommended the following annual maximum caseloads for single attorneys in a public defender office: 150 felonies, 400 misdemeanors,

200 juvenile court cases, 200 Mental Health Act cases, and 25 criminal appeals.⁷³

These are the only national caseload recommendations ever proffered and were widely promulgated — not just as maximums but as norms in many jurisdictions — by leading government and advocacy groups for decades.⁷⁴ However, as Indiana University School of Law Professor Norman Lefstein points out in his seminal book on public defender caseloads, these standards were never based on any empirical research and were set too high.⁷⁵ Even at the most well-resourced public defender offices in the country, a single attorney with 150 felonies on her docket in a single year is unable to effectively represent clients.⁷⁶

As the NAC itself forewarned, the entire concept of national caseload standards is fraught,⁷⁷ because the number of required hours to effectively handle a given case can vary widely from one jurisdiction to the next. Tellingly, no national caseload standards for prosecutors exist. After a three-year effort to set accurate national workload standards, the National District Attorneys Association “found that it was impossible for such standards to be developed” while controlling for changing case factors between jurisdictions.⁷⁸

Continuing to use the NAC standards as benchmarks undermines efforts to achieve more reasonable workloads. Today, there is movement toward developing more localized workload standards. Since 2014, the ABA has commissioned studies to determine state-specific workload standards in Missouri, Louisiana, Colorado, and Rhode Island.⁷⁹ The studies utilize the Delphi method⁸⁰ to determine the average number of hours it takes an attorney to provide “reasonably effective assistance of counsel pursuant to prevailing professional norms,” and they include a national blueprint for other states to use in determining reasonable workloads⁸¹ — in other words, how many hours it should take an attorney to handle a case on average while providing effective assistance of counsel.

While a direct comparison of workload standards is

difficult because case types are organized differently among jurisdictions, the following table gives an idea of the wide variation in workload standards between states.

The studies further revealed the extent of underfunding in these systems. In Rhode Island, for example, the study determined that the Rhode Island public defender system only has capacity to handle 36 percent of its current caseload while still providing reasonably effective representation.⁸² In Louisiana, the system has capacity to handle only 21 percent of its current caseload and is understaffed by an astounding 1,406 full-time attorneys.⁸³

Rather than relying on uninformed misconceptions about the respective roles and importance of defenders and prosecutors, these studies provide an evidence-based rationale for setting necessary funding levels. But determining what is a reasonable workload standard is far easier than enforcing it in jurisdictions that are reticent to increase indigent defense funding. As of 2013, only five states in the nation had any binding statewide workload standards,⁸⁴ and only Massachusetts has workload limits that are significantly lower than the NAC standards.⁸⁵

C. Defender-Prosecutor Salary Disparity

Unsurprisingly, studies show that years of experience are directly correlated to success in defending criminal cases.⁸⁶ In order to ensure that indigent defense providers are comparably experienced to their prosecutor counterparts, it is essential to have salary parity at every staff level, from line attorneys to chief public defenders and district attorneys. Recent surveys suggest that pay parity between prosecutors and full-time attorneys at major public defender offices may be becoming the norm.⁸⁷ But in many places, the disparity still exists. Take the Fourth Judicial District in Florida, for example, where public defenders with zero to three years of experience earn about \$10,000

Table 2: Average Hours per Case Required for Reasonably Effective Representation by State¹

	Missouri	Louisiana	Colorado	Rhode Island
Highest-level felony category	107	201	427	182
Misdemeanor	12	8–12 ²	11–16 ³	13
Probation revocation	10	8	7	17

less than their prosecutor counterparts.⁸⁸ Or Colorado's First Judicial District (Denver), where the average salary of the most junior defenders is \$15,000 less than the most junior prosecutors.⁸⁹

The situation is even more bleak for contract-based indigent defense providers and appointed counsel, for which parity is harder to measure. A 50-state survey conducted by the NACDL in 2013 found that these attorneys were consistently underpaid due to unreasonably low hourly rates and maximum fees and the use of flat-fee contracts.⁹⁰ Attempts to achieve parity must go beyond the salaries of full-time public defenders and ensure that all indigent defense providers are being paid a reasonable wage.

One powerful way to achieve pay parity and advocate for higher pay in general is through formal or informal collective bargaining partnerships between defenders and prosecutors. In 1994, public defenders and prosecutors in Ventura County, California, formed a union and successfully bargained for pay parity with other counties.⁹¹ More recently, New York City public defenders and prosecutors joined forces to advocate for pay parity with other city attorneys.⁹² The unlikely alliance made for a powerful force at city council meetings and also captured media headlines, furthering the attorneys' message and ultimately winning a gradual shift to pay parity by 2024.⁹³

D. Insufficient Support Staff

Providing effective representation requires adequate support resources, such as investigators, paralegals, and access to expert witnesses. This is particularly true for indigent defense providers who do not have the same access to government resources as their prosecutor counterparts. This includes police investigation, forensic labs, and employees who can testify as expert witnesses.⁹⁴

A survey of 29 statewide indigent defense programs in 2013 found that six states had fewer than 10 full-time investigators on staff in the entire state and 19 states had fewer than 10 paralegals.⁹⁵ As to be expected, things are even worse in county-based systems. A 2007 survey found that 40 percent of all county-based offices and 87 percent of small offices (those receiving less than 1,000 cases per year) employed no investigators whatsoever.⁹⁶ Only 7 percent of county-based offices nationwide met the accepted professional guidelines for investigator-to-attorney ratio — a statistic that understates the scope of the problem given the widespread understaffing of attorneys.⁹⁷

A comparison to prosecutorial investigatory resources

highlights the disparity. A nationwide Bureau of Justice Statistics survey of prosecutor's offices found a total of 7,311 full-time investigators, compared with just 2,473 full-time investigators in state-administered indigent defense systems and county-based public defender offices.⁹⁸ While it is true that prosecutors carry the burden of proof and must investigate certain cases that are ultimately never charged, they also have the enormous benefit of police resources to conduct investigations, greater access to police records, and government-funded forensic labs.

The only way to truly remedy this disparity is to hire more full-time indigent defense investigators. However, one low-cost step that jurisdictions can take toward investigative resource parity is to ensure prosecutors follow expansive discovery policies, also known as open discovery.⁹⁹ Discovery is the process in which the defense and prosecution exchange files that are relevant to the case. Expansive discovery policies allow defense counsel to have early access to all or most of the unprivileged information in a prosecutor's file.

Early and open discovery allows defense counsel to assess the strength of a case to inform plea bargaining, the method by which over 94 percent of cases are closed.¹⁰⁰ Restrictive discovery can leave people accused of crimes at an enormous disadvantage. Take New York for example: Until 2019, discovery was not required until the day before trial was set to start.¹⁰¹ While the prosecution had access to police records, forensic testing results, and potential witnesses, defense counsel was largely left in the dark. Often this obstacle was insurmountable and put accused people in the impossible position of negotiating a plea without knowing the strength of the government's case.

The ABA has long recommended expansive and early discovery, and it has become the norm in many jurisdictions. Some district attorneys have proactively instituted open discovery practices with the understanding that it is essential for the fair administration of justice.¹⁰² Other jurisdictions have had to resort to legislation to mandate open discovery.¹⁰³

E. Disparate Federal Funding as Compared to Law Enforcement

Gideon has always been and remains an unfunded federal mandate. The federal government plays a miniscule role in funding indigent defense at the state level, despite historically playing a far larger role in funding state and local law enforcement.¹⁰⁴

Flat-fee contracts financially incentivize attorneys to do as little work as possible on each case.

It is worth noting that grants from the Department of Justice, known as Byrne-JAG funding, can be used to support public defense, and several states make good use of those federal dollars.¹⁰⁵ But only a few states choose to spend the grants that way. In 2016, states allocated just \$1.8 million of Byrne-JAG funding to indigent defense, less than 1 percent of available funds, compared to \$17 million categorized as “prosecution and court initiatives.”¹⁰⁶ A federal survey found that only half of public defender offices were even aware they were eligible for these grants.¹⁰⁷

The federal government should earmark funds specifically for indigent defense to ensure the money is spent that way. One current proposal to do just that is the Equal Defense Act, introduced by Senator Kamala Harris (D-CA) in 2019.¹⁰⁸ If passed, the legislation would provide grant funding to states that improve data collection, set reasonable workload limits based on statewide data, and institute pay parity between public defenders and prosecutors.¹⁰⁹ This model could be used to incentivize states to adopt a range of best practices in indigent defense delivery, including those required by the Equal Defense Act as well as other needed reforms, such as implementing a state-administered system of indigent defense delivery and requiring open and expansive discovery.

Recommendations

The following changes will help deliver on *Gideon's* promise to provide the quality of indigent defense needed in our adversarial system:

Structuring Indigent Defense Systems

- **Establish statewide indigent defense providers:** Indigent defense should be overseen by a statewide public defender agency or commission with the power to set practice standards across the state. The public defender office should be the primary delivery model whenever possible. Not only will this help protect peoples' Sixth Amendment rights, but it can lower justice system costs by increasing efficiency, lowering the number of wrongful convictions, and reducing the incarcerated population.
- **Fund indigent defense at the state level from general revenue:** This will ensure higher quality and more consistent representation statewide. Choosing a stable funding stream, such as state general revenue, would increase budget predictability and the independence of indigent defense providers.
- **Ban flat-fee contracts:** Flat-fee contracts create a direct conflict between an attorney's financial interests and their duty to provide zealous representation. In addition, attorneys operating under such contract models are generally under-resourced and are thus unable to provide adequate representation to their clients.
- **Conduct training to improve indigent defense culture:** As reforms are achieved, they must be accompanied by regular training in order to ensure that embedded harmful practices do not continue once more resources are available. The training should encourage indigent defense providers to use their unique positions to elevate the voices of the accused and push for further reform.

Workload Standards

- **Set state-specific workload standards:** States should set defender workload standards based on the number of hours required to reasonably defend a person for a particular class of crime in the state. To do so, states can utilize the blueprint from ABA-commissioned studies in Louisiana, Missouri, Rhode Island, and Colorado. These studies should be repeated at regular intervals to account for changing conditions, and they should act as the cornerstone for setting maximum workload limits and funding levels. When state or county governments fail to fund indigent defender and prosecutor offices based on calculated workload standards, public defenders and prosecutors should receive proportional funding equal to their respective workloads.

Defender-Prosecutor Salary Disparity

- **Create salary parity between indigent defense providers and prosecutors:** Salary parity ensures that the adversarial offices will have equal opportunity to develop and retain experienced attorneys. In jurisdictions without pay parity, indigent defense providers and prosecutor offices should consider forms of collective bargaining, as seen in New York City and Ventura County, California. Where assigned counsel and contract counsel systems are in place, those attorneys must be compensated at a rate based on prevailing professional norms, and caps on the amount an attorney can earn on a given case should be removed.

Increase Federal Funding

- **Pass federal legislation to supplement indigent defense costs:** The federal government should pass legislation, such as the Equal Defense Act, that establishes grant programs for indigent defense providers that certify they have implemented best practices. Comparable grants have been provided to law enforcement for billions of dollars per year for decades without a corresponding commitment to funding indigent defense.

Broader Criminal Justice Reforms to Reduce Resource Disparity

- **Reduce the number of people entering the system who require public defenders:** Local, state, and federal governments must find ways to shrink the number of people entering the justice system requiring public defenders. One way to do this is to reduce the number of offenses for which a person can be jailed. Some prominent advocates have suggested eliminating incarceration as a penalty for all crimes that are currently subject to a maximum of one year or less jail time.¹¹⁰ Meaningful probation and parole reform can also reduce caseloads for indigent defense providers.¹¹¹ A recent report by the Council of State Governments Justice Center found that 45 percent of state prison admissions were due to violations of probation or parole.¹¹² As a result, public defenders spend an inordinate amount of time handling these types of cases.¹¹³
- **Pass legislation that requires prosecutor offices to adopt open discovery:** This is a relatively inexpensive way to begin to reduce a disparity that is enormous in some jurisdictions.¹¹⁴ Of course, prosecutor offices do not have to wait for legislation to force their hand and should proactively adopt such policies.¹¹⁵
- **Elect prosecutors that will advocate for increased resource parity:**¹¹⁶ As administrators of justice, prosecutors hold a duty to ensure the adversarial process is functioning correctly. The growing movement to elect reform-minded prosecutors should incorporate demands for increased funding for indigent defense. Head prosecutors can leverage their political positions to advocate for increased funding and require line prosecutors to flag when defense counsel appears inadequate.

Conclusion

Indigent defense in the United States largely developed in an era that was far more concerned with locking people up than ensuring their Sixth Amendment rights were respected. Chronic underfunding has led to drastic resource disparities between prosecutors and defenders, undermining the very basis of our criminal legal system.

Achieving resource parity does not necessarily mean that prosecutors and indigent defense providers should be granted the exact same amount of funding — a policy that has been resisted because they perform significantly different duties.¹¹⁷ Nor does it mean that prosecutors should always receive greater funding based on prevailing societal views of their respective importance. Rather, it means that both the defense and the prosecution are adequately resourced to participate as equals in the adversarial system of U.S. criminal justice.¹¹⁸

To move past this shameful era of mass incarceration, state, local, and federal governments must implement the above solutions as part of critically needed criminal justice reforms.

Endnotes

- 1** Church is the lead plaintiff in an ongoing ACLU lawsuit against the state of Missouri for failing to provide the indigent with adequate legal representation. Complaint for Injunctive Relief at 3, *Church v. Missouri*, No.17-CV-04057-NKL (W.D. Mo. 2017), www.aclu.org/sites/default/files/field_document/aclu_missouri_petition_-_170308_ohs_file.pdf.
- 2** Peter K. Enns, "The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States," *American Journal of Political Science* 58 (2014): 857–872, figure 2, <https://ecommons.cornell.edu/bitstream/handle/1813/57116/Enns-2014-American-Journal-of-Political-Science.pdf?sequence=2&isAllowed=y>.
- 3** See generally, *Fact Sheet: Trends in U.S. Corrections* (Washington, D.C.: Sentencing Project, 2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.
- 4** Thomas Giovanni and Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel* (New York: Brennan Center for Justice, 2013), www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.
- 5** See, for example, U.S. Senate Committee on the Judiciary, "Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms," press release, August 23, 2018, <https://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms>.
- 6** *Herrin v. New York*, 422 U.S. 853, 862 (1984).
- 7** *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).
- 8** Underfunding of the New Orleans public defense system led to a million-dollar budget deficit in 2015, prompting the desperate office to run a crowdfunding campaign to raise an additional \$50,000. Dylan Walsh, "On the Defensive," *Atlantic*, June 2, 2016, www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/.
- 9** See Lynn Langton and Donald Farole Jr., *County Based and Local Public Defender Offices, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010), 8, <https://www.bjs.gov/content/pub/pdf/clpdp07.pdf> (finding that 27 percent of county-based public defender offices had a sufficient number of full-time litigating attorneys required to meet maximum caseload guidelines); Lynn Langton and Donald Farole Jr., *State Public Defender Programs, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010), 12, www.bjs.gov/content/pub/pdf/spdp07.pdf (finding that 15 of 19 reporting state public defender programs "exceeded the maximum recommended limit of felony or misdemeanor cases per attorney"); see also *System Overload: The Costs of Under-Resourcing Public Defense* (Washington, D.C.: Justice Policy Institute, 2011), 10–11, www.justicepolicy.org/uploads/justice-policy/documents/system_overload_final.pdf.
- It** should be noted that even these estimates underrepresent the degree to which indigent defense workloads are too high, because they rely on the National Advisory Commission's maximum caseload standards, which are far too high. For further explanation on this point see *infra* text accompanying notes 76–91.
- 10** See *infra* text accompanying notes 67–75.
- 11** See, for example, Maureen Cain and Karen Porter, *2017 Budget/Salary Comparison for District Attorney Trial Offices/Office of State Public Defender Trial Offices* (Denver: Office of the Colorado State Public Defender, 2018), 1, www.coloradodefenders.us/wp-content/uploads/2018/02/2017-DA-OSPD-Survey.pdf (showing Colorado spends \$156,574,431 on prosecution and \$78,542,342 on defense); *System Overload*, 9 (showing Tennessee prosecutors had a budget of \$130–139 million compared to \$56.4 million for public defense in 2005).
- 12** See *infra* text accompanying notes 22–26, 71.
- 13** For an in-depth examination of this argument and why it may not be universally true see Ronald Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory," *Iowa Law Review* 90, no. 219 (2004).
- 14** American Civil Liberties Union, "91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds," news release, November 16, 2017, www.aclunc.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds (finding 87 percent of democrats, 67 percent of independents, and 57 percent of Republicans believe it is important to reduce the prison population in America).
- 15** Belden Russonello Strategists, *American's Views on Public Defenders and the Right to Counsel* (Washington, D.C.: American University School of Public Affairs, Justice Programs Office, 2017), 12, https://static1.squarespace.com/static/55f72cc9e4b0af7449da1543/t/5a0225139140b76ff9027de7/1510090007542/Americans%27+Views_11-7-17.pdf.
- 16** Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy Initiative, January 25, 2017, www.prisonpolicy.org/reports/money.html.
- 17** Johnathan Silver and Lindsay Carbonell, "Wrongful Convictions Have Cost Texans More Than \$93 Million," *Texas Tribune*, June 24, 2016, www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/.
- 18** See Eve Brensike Primus, "Defense Counsel and Public Defense," in *Reforming Criminal Justice*, vol. 3, *Pretrial and Trial Processes*, ed. Erik Luna (Phoenix, AZ: Academy for Justice, 2017), 131–132, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1113&context=book_chapters.
- 19** See, for example, *System Overload*, 6–15; National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (Washington, D.C.: Constitution Project, 2009), 52–64, <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>; American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Chicago: ABA, 2004), 7–14, www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.
- 20** See *Expanded Discovery in Criminal Cases: A Policy Review* (Washington, D.C.: Justice Project, 2007), 9 ("Initial expenses to implement expanded discovery would be minimal" and would be "offset by overall cost savings of improved efficiency of the courts").
- 21** While the data shows black and Latino people are more likely to be assigned a public defender, the majority of all racial groups required one. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Washington, D.C.: Bureau of Justice Statistics, 2000), 9, www.bjs.gov/content/pub/pdf/dccc.pdf (finding that in state criminal cases "69 percent of white inmates reported they had lawyers appointed by the court, 77 percent of blacks and 73 percent of Hispanics had public defenders or assigned counsel").
- 22** See for example, John Yang and Frank Carlson, "Missouri Public Defenders Are Overloaded With Hundreds of Cases While Defendants Wait in Jail," *PBS NewsHour*, May 2, 2018, www.pbs.org/newshour/show/missouri-public-defenders-are-overloaded-with-hundreds-of-cases-while-defendants-wait-in-jail.
- 23** Will Dobbie et al., "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review*, 108 (2018), 224–226, <https://pubs.aeaweb.org/doi/pdf/10.1257/aer.20161503>; Christopher Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, The Laura and John Arnold Foundation, 2013, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf (finding those held pretrial

were over four times more likely to receive a jail sentence and received jail sentences almost three times as long and prison sentences more than twice as long as those not held pretrial); Christopher Lowenkamp et al., *The Hidden Cost of Pretrial Detention*, The Laura and John Arnold Foundation, 2013, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (finding those held for two to three days were 40 percent more likely to be rearrested pretrial and those held for eight to 14 days were 51 percent more likely to recidivate within two years after their cases closed than those held for less than 24 hours).

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25 Editorial Board, "Innocent Kansas City Man Spent a Year in Jail Because of the Public Defender's Crushing Caseload," *Kansas City Star*, October 22, 2017, www.kansascity.com/opinion/editorials/article180100306.html.

26 See, for example, Mario Koran, "Wisconsin's 'Constitutional Crisis' Is Forcing People to Sit in Jail Without a Lawyer," *Appeal*, May 20, 2019 <https://theappeal.org/wisconsin-public-defense-constitutional-crisis-is-forcing-people-to-sit-in-jail/> (reporting on two people that killed themselves after waiting for more than a week to be appointed a lawyer); Larry Hannan, "Ineffective Public Defense Nullifies 10-Year Sentences for Jacksonville Man," *Florida Times-Union*, August 4, 2016, <https://www.jacksonville.com/news/crime/2016-08-04/story/ineffective-public-defense-nullifies-10-year-sentence-jacksonville-man> (reporting on the case of Gregory Green, whose attorneys failed to speak with Green before his plea deal expired, leading to an enhanced 10-year sentence).

27 See James M. Anderson and Paul Heaton, "How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes," *Yale Law Journal* 122 (2012): 154, www.yalelawjournal.org/pdf/1105_8izvsf8m.pdf; see also Morris B. Hoffman, Paul H. Rubin, and Joanna Shepherd, "An Empirical Study of Public Defender Effectiveness: Self-Selection by the 'Marginally Indigent,'" *Ohio State Journal of Criminal Law* 3 (2005): 242 (finding that private lawyers received sentences that were on average nearly five years shorter than public defenders).

28 Anderson and Heaton, "How Much Difference," 188.

29 "Exonerations by State" and "Exonerations Total by Year," National Registry of Exonerations, last accessed July 7, 2019, www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

30 See Samuel R. Gross et al., "Exonerations in the United States 1989 Through 2003," *Journal of Criminal Law and Criminology* 95 (2005): 527 ("It is certain — this is the clearest implication of our study — that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated").

31 National Right to Counsel Committee, *Justice Denied*, 47.

32 See Jonathan Rapping, "Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense," *Loyola Journal of Public Interest Law* 9 (2008): 192–193, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349358; Eve Brensike Primus, "Culture as a Structural Problem in Indigent Defense," *Minnesota Law Review* 100 (2016), 1756, www.minnesotalawreview.org/wp-content/uploads/2016/06/Primus_Online.pdf (connecting indigent defense providers' culture of "meet-and-plead" to structural problems in the indigent defense system).

33 Primus, "Culture as a Structural Problem," 1770.

34 See, for example, Lindsey Devers, *Plea and Charge Bargaining* (Washington, D.C.: Bureau of Justice Assistance, 2011), 3, www.bja.gov/Publications/PleaBargainingResearchSummary.pdf. "Studies that assess the effects of race find that blacks are less likely to receive a reduced charge compared with whites (Farnworth and Teske,

1995; Johnson, 2003; Kellough and Wortley, 2002; Ulmer and Bradley, 2006). Additionally, one study found that blacks are also less likely to receive the benefits of shorter or reduced sentences as a result of the exercise of prosecutorial discretion during plea bargaining (Johnson, 2003). Studies have generally found a relationship between race and whether or not a defendant receives a reduced charge (Piehl and Bushway, 2007:116; Wooldredge and Griffin, 2005)"; Center for Policing Equity, "The Science of Justice: Race, Arrests, and Police Use of Force," July, 2016, https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf; Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, Christ Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" *Notre Dame Law Review* 84 (2009): 1195, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>.

35 See L. S. Richardson & Phillip A. Goff, Implicit Racial Bias in Public Defender Triage, *Yale Law Journal* 122 (2013), 2628, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5597&context=yjl>; Chris Chambers Goodman, "Shadowing the Bar: Attorneys' Own Implicit Bias," *Berkeley La Raza Law Journal*, 28 (2018): 18, 32, <https://scholarship.law.berkeley.edu/blrlj/vol28/iss1/2/>; Jessica Blakemore, "Implicit Racial Bias and Public Defenders," *Georgetown Journal of Legal Ethics* 29 (2016): 833, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojlege29&div=33&id=&page=&t=1560976738>; see also Jeff Adachi, "Public Defenders Can Be Biased, Too, and It Hurts Their Non-white Clients," *Washington Post*, June 7, 2016, www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/?noredirect=on&utm_term=.2b6cf8f49707.

36 Rapping, "Winds of Change," 200.

37 American Civil Liberties Union, "91 Percent of Americans"

38 See Joan E. Jacoby, "The American Prosecutor in Historical Context," *Prosecutor* 30 (1997), https://cdn.ymaws.com/mcaa-mn.org/resource/resmgr/Files/About_Us/AmericanProsecutorHistorical.pdf; Laurence A. Benner, "The California Public Defender: Its Origins, Evolution and Decline," *California Legal History* 5 (2010): 175, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1148&context=fs>.

39 See John L. Worrall and M. Elaine Nugent-Borakove, eds., *The Changing Role of the American Prosecutor* (Albany: State University of New York Press, 2008), 7, www.sunypress.edu/pdf/61690.pdf (explaining that Connecticut became the first colony to abandon private prosecution in lieu of a public prosecution system in 1704); Benner, "California Public Defender," 179 (explaining that Los Angeles County adopted the first public defender office in 1914).

40 Jacoby, "American Prosecutor"; Benner, "California Public Defender" ("By 1912...the process of consolidating prosecutorial power and discretion in the local prosecuting attorneys was essentially complete. The local prosecutor was the primary representative of the public in the area of criminal law").

41 Emery A. Brownell, "A Decade of Progress: Legal Aid and Defender Services," *American Bar Association Journal* 47, no. 9 (1961): 867, https://www.jstor.org/stable/pdf/25721718.pdf?seq=1#page_scan_tab_contents.

42 See Enns, "The Public's Increasing Punitiveness."

43 For a full analysis on the model of representation at the Public Defender Service for the District of Columbia, see *Halting Assembly Line Justice: PDS: A Model of Client-Centered Representation* (Washington, D.C.: National Legal Aid & Defender Association, 2008), www.nlada.net/sites/default/files/dc_haltingassemblylinejustice-iseri08-2008_report.pdf.

44 See notes 8 and 25–26 and accompanying text.

45 See Anderson and Heaton, "How Much Difference"; Radha Iyengar, "An Analysis of the Performance of Federal Indigent Defense Counsel," (working paper 13187, National Bureau of Economic Research, Washington, D.C., 2007) (finding that sentences for defendants with appointed counsel were on average 8 months longer than

those with federal public defenders).

46 Texas Task Force on Indigent Defense, *Evidence for the Feasibility of Public Defender Offices in Texas*, 2011, 4, http://www.tidc.texas.gov/media/31124/pd-feasibility_final.pdf.

47 Texas Task Force on Indigent Defense, *Evidence for the Feasibility of Public Defender Offices in Texas*, at 5.

48 New York State Office of Indigent Legal Services, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York — 2015 Update*, 2016, 11, <https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202015%20Update.pdf> (finding that public defenders spent on average \$306.27 per case while assigned counsel spent \$383.44); Office of the Iowa State Public Defender, State Public Defender's Efficiency Report, 2007, <https://www.legis.iowa.gov/docs/publications/DF/7519.pdf> (finding public defenders spent \$227 per case compared to \$427 for court-appointed attorneys).

49 John P. Gross, *Gideon at 50: Part 1, Rationing Justice: The Underfunding of Assigned Counsel Systems* (Washington, D.C.: NACDL, 2013), <https://www.nacdl.org/Document/GideonI-RationingJusticeUnderfundedAssignedCounsel>.

50 ALM Legal Intelligence, *Survey of Law Firm Economics* (Atlanta, GA: Managing Partner Forum, 2012), 4, www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%202012%20Survey%20of%20LF%20Economics%20-%20Exec%20Summary%20-%209-20-12.pdf.

51 "Abolishing Flat Fee Contracts for Public Defense Services — ABA Principle 8," Sixth Amendment Center, accessed July 2019, <http://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/>.

52 See *Ten Principles of a Public Defense Delivery System* (Chicago: ABA, 2002), 3, www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciples-booklet.authcheckdam.pdf; see also *Contracting for Indigent Defense Services: A Special Report* (Washington, D.C.: Bureau of Justice Assistance, 2000), www.ncjrs.gov/pdffiles1/bja/181160.pdf.

53 For example, the Washington State Supreme Court largely banned their use in 2008 ("Such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer"); Washington State Rules of Professional Conduct, Comment 27, www.courts.wa.gov/court_rules/?fa=court_rules_display&group=ga&set=RPC&ruleid=garpc1.08. See also Sixth Amendment Center, "Abolishing Flat Fee Contracts for Public Defense Services—ABA Principle 8," <https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/> (describing Idaho and Michigan's legislative efforts to bar flat fee contracts).

54 National Right to Counsel Committee, *Justice Denied*, 55.

55 National Right to Counsel Committee, *Justice Denied*, 166; see also Miriam S. Gohara, James S. Hardy, and Damon Todd Hewitt, "The Disparate Impact of an Underfunded, Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System," *Howard Law Journal* 49 (2005), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6199&context=fss_papers.

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the right to counsel").

57 See *infra* note 66; see also National Right to Counsel Committee, *Justice Denied*, 54-55, n. 32 (compiling studies from New York, Nebraska, and Georgia that demonstrate that leaving funding to the counties results in disparate quality of indigent defense).

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62 "Know Your State: Louisiana," Sixth Amendment Center; see also Giovanni and Patel, *Gideon at 50*, 4 (noting that at least 13 other states have similar fee systems).

63 For a description of the latest round of budget shortfalls and hiring freezes at the New Orleans' public defender office, see Matt Sledge, "Orleans Public Defenders to Cut Services, Freeze Hiring in Face of Revenue Shortfall," *New Orleans Advocate*, May 5, 2019, [www.theadvocate.com/new_orleans/news/courts/article_ab56f4f0-6f72-11e9-85ae-2f6df23f566f.html](http://theadvocate.com/new_orleans/news/courts/article_ab56f4f0-6f72-11e9-85ae-2f6df23f566f.html).

64 See, for example, Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," *Fordham Law Review* 67 (1998); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2007).

65 National Commission on Law Observance and Enforcement, *Report on Prosecution* (Washington, D.C.: U.S. Government Printing Office, 1931), 11, www.ncjrs.gov/pdffiles1/Digitization/44542NCJRS.pdf.

66 See, for example, Fair and Just Prosecution et al., *21 Principles for the 21st Century Prosecutor* (New York: Brennan Center for Justice, 2019), www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf; "The Power of Prosecutors," ACLU, last accessed July 8, 2019, www.aclu.org/issues/smart-justice/power-prosecutors; Angela J. Davis, "The American Prosecutor: Independence, Power, and the Threat of Tyranny," *Iowa Law Review* 86 (2001), https://digitalcommons.wcl.american.edu/facsch_lawrev/156/.

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- 69** Davis, *Arbitrary Justice*, 12.
- 70** Davis, *Arbitrary Justice*, 13–14.
- 71** Davis, *Arbitrary Justice*, 17.
- 72** See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review....Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”)
- 73** National Advisory Commission, *The Criminal Justice Standards and Goals*, 1973, Standard 13.12, Workload of Public Defenders (Washington, D.C.: National Legal Aid & Defender Association, 1973), www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf.
- 74** Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (Chicago: ABA, 2011), 45–47, www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.pdf#page=17 (explaining various ways in which the American Bar Association, the American Council of Chief Defenders, and individual leaders of the National Association of Criminal Defense Lawyers have endorsed the NAC standards). Government agencies rely upon the NAC standards as well. For example, using the NAC standards, a 2007 Bureau of Justice Statistics report determined that 15 of 19 public defenders were over the “nationally accepted caseload guideline.” While this helped illustrate how overburdened many systems were, the report also illustrates the extent to which these standards have been accepted and suggests far more systems have unrealistic workloads. Langton and Farole, *State Public Defender Programs*, 2007, 12–13.
- 75** Lefstein, *Securing Reasonable Caseloads*, 44–45 (“It is clear that no empirical study in support of its recommended caseload limits was ever undertaken. In fact, it appears that the NAC did not actually do any work of its own in order to come up with the caseload standards attributed to it for so many years.”).
- 76** Lefstein, *Securing Reasonable Caseloads*, 48 (“The lawyers employed by the District of Columbia Public Defender Service in its felony division could not do so in the 1970s, when I served as the agency’s director, and they cannot do it today, despite having outstanding support services. Nor can the full-time public defense lawyers employed by the Massachusetts Committee on Public Counsel Services represent as many as 150 felony defendants annually.”); see also *Halting Assembly Line Justice*, 13 (“The 1973 DOJ/LEAA report assessing PDS as ‘exemplary’ noted that a caseload of 20 active felony cases suggests that a lawyer handling adult felony cases would close ‘between 110-120 [cases] annually’”).
- 77** NAC, *Criminal Justice Standards*, commentary for Standard 13.12 (“Acknowledging the dangers of proposing any national guidelines, the committee arrived at the cases per attorney per year adopted by the standard. The Commission has accepted these, with the caveat that particular local conditions — such as travel time — may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction”).
- 78** *How Many Cases Should a Prosecutor Handle? Results of the National Workload Assessment Project* (Alexandria, VA: American Prosecutors Research Institute, 2002), 27.
- 79** American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf; American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf; American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf; American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf.
- 80** For a full description of the Delphi method, see Committee on Legal Aid and Indigent Defendants, *Rhode Island Project*, 12.
- 81** Committee on Legal Aid and Indigent Defendants, *Louisiana Project*, 1.
- 82** Committee on Legal Aid and Indigent Defendants, *Rhode Island Project*, 26.
- 83** Committee on Legal Aid and Indigent Defendants, *Louisiana Project*, 2.
- 84** “In Your State,” Gideon at 50, last accessed July 11, 2019, <http://gideonat50.org/in-your-state/#workload-standards> (under the “Select a Map” heading, choose “Workload Standards” for a map showing the various level of workload standards across the country).
- 85** “Massachusetts,” Gideon at 50, last accessed July 11, 2019, <http://gideonat50.org/in-your-state/massachusetts/#workload-standards> (Massachusetts adheres to the following workload limits expressed as case type per year: 125 felony, 250 misdemeanor, 165 juvenile, and 125 youthful offender).
- 86** See Iyengar, “Analysis of the Performance,” 23 (finding that among the defense lawyers studied in the federal system, just one additional year of experience led to sentences that were five months shorter).
- 87** See *2018 Public Service Attorney Salary Report* (Washington, D.C.: National Association for Law Placement, 2019), 13–21, www.psjd.org/salary-report-2018-pdf (national survey with 44 public defender organizations and 60 prosecutor offices reporting finding slightly higher salaries for public defender offices); see also Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, *Doing Right by Those Who Labor for Justice* (Boston: Massachusetts Bar Association, 2014), www.massbar.org/docs/default-source/mba-reports/massbar-blue-ribbon-commission-report-doing-right-by-those-who-labor-for-justice-2014-may-09.pdf?sfvrsn=2 (finding that entry-level defenders made slightly more than entry-level prosecutors in Massachusetts but that both were underpaid relative to other states).
- 88** Max Marbut, “Public Defenders Fight Pay Disparity,” *Jacksonville Daily Record*, November 13, 2017, www.jaxdailyrecord.com/article/public-defenders-fight-pay-disparity.
- 89** Cain and Porter, *2017 Budget/Salary Comparison*.
- 90** Gross, *Gideon at 50: Part 1*.
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- 94** See Stephen A. Saltzburg, “The Duty to Investigate and the Availability of Expert Witnesses,” *Fordham Law Review* 86 (2018): 11. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5482&context=flr> (showing less frequent use of expert witnesses among indigent-defense lawyers).
- 95** Strong, *State-Administered Systems*, 13.
- 96** Langton and Farole, *County-Based and Local Public Defender Offices*, 12.
- 97** Langton and Farole, *County-Based and Local Public Defender Offices*, 12.
- 98** For the total number of investigators in prosecutor offices see Steven W. Perry and Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables* (Washington, D.C.: Bureau of Justice Statistics, 2011), table 2, www.bjs.gov/content/pub/pdf/psc07st.pdf. For the total number of investigators in state and county systems see Strong, *State-Administered Systems*, 9, and Langton and Farole, *County-Based and Local Public Defender Offices*, 12.
- 99** See *Expanded Discovery in Criminal Cases*, 9 (explaining that the burden is minimal because most states have systems in place for expansive discovery in civil cases).
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- 101** Beth Schwartzapfel, “Defendants Kept in the Dark About Evidence, Until It’s Too Late,” *New York Times*, August 7, 2017, www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?r=0 (“New York is one of 10 states where prosecutors can wait until just before trial to share evidence”).
- 102** Fair and Just Prosecution et al., *21 Principles*, 18.
- 103** For a description of recent legislative reforms to state discovery practices in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina, “Discovery Reform Legislative Victories,” see National Association of Criminal Defense Lawyers, www.nacdl.org/criminaldefense.aspx?id=31324&libID=31293.
- 104** See Inimai Chettiar et al., *Reforming Funding to Reduce Mass Incarceration* (New York: Brennan Center for Justice, 2013), www.scribd.com/fullscreen/186309074?access_key=key-.
- 105** See Jennifer Burnett, “Justice in Jeopardy: Budget Cuts Put State Public Defense Systems Under Stress,” Council of State Governments, July 1, 2010, <https://knowledgecenter.csg.org/kc/content/justice-jeopardy-budget-cuts-put-state-public-defense-systems-under-stress>.
- 106** See *How States Invest Byrne JAG in Public Defense* (Washington, D.C.: National Criminal Justice Association), https://higherlogicdownload.s3.amazonaws.com/NCJA/8d0b2ead-b5b8-47ef-96d0-9aca227fcb2/UploadedImages/Byrne_JAG_Investments/2016_Topical_One-Pagers/Public_Defense.pdf; *Justice Assistance Grant Program: Activity Report, Fiscal Year 2016* (Washington, D.C.: Bureau of Justice Assistance, 2018), www.bja.gov/Programs/JAG/JAG-FY2016-Activity-Report_508.pdf.
- 107** *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, U.S. Government Accountability Office, GAO-12-560, 28-29, May 2012, www.gao.gov/assets/600/590736.pdf.
- 108** S. 1377, EQUAL Defense Act, Sess. 116, (2019).
- 109** S. 1377, EQUAL Defense Act, Sess. 116, (2019).
- 110** Paul Butler, *Chokehold: Policing Black Men* (New York: New Press, 2017), 233–234 (recommending that we eliminate prison as a sanction for any crime that is currently punished by less than one year and instead imposing fines that are based on a person’s ability to pay).
- 111** Studies show that probation and parole policies are leading drivers of recidivism and mass incarceration. See Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States, 2016* (Washington, D.C.: Bureau of Justice Statistics, 2018), www.bjs.gov/content/pub/pdf/cpus16.pdf (finding that there were 4.5 million people on community supervision in the United States at the end of 2016); see also Beth Schwartzapfel, “Want to Shrink the Prison Population? Look at Parole,” Marshall Project, February 11, 2019, www.themarshallproject.org/2019/02/11/want-to-shrink-the-prison-population-look-at-parole.
- 112** “Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets,” Council of State Governments, <https://csgjusticecenter.org/confinedandcostly/>.
- 113** For example, according to one study in 2014, parole violations made up 25 percent of the total cases in the Missouri indigent defense system, which translated to 8 percent of the total hours worked by public defenders on cases. Committee on Legal Aid and Indigent Defendants, *Missouri Project*, 16.
- 114** For best discovery practices that offices can readily implement, see, for example, *ABA Standards for Criminal Justice Discovery and Trial by Jury*, 3rd. ed. (Washington, D.C.: ABA, 1996), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trialbyjury.pdf; Douglass Mitchell and Sean Broderick, *Recommended E-Discovery Practices for Federal Criminal Justice Act Cases* (Washington, D.C.: Defender Services Office Training Division), www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf.
- 115** Many head prosecutors have taken it upon themselves to do this. For specific discovery policies that district attorneys can implement, see Fair and Just Prosecution et al., *21 Principles*, 17.
- 116** Prosecutors can also advocate for increased indigent defense funding by joining litigation as amici. In a 2010 lawsuit, the Brennan Center was joined by 62 former state and federal prosecutors as amici in New York’s highest court arguing that the indigent defense systems in five of New York’s counties were deficient and violated defendants’ rights. There, they argued that when defense counsel is inadequate, “prosecutors cannot ensure that justice is done” and the public loses confidence in the justice system. Brief of Amici Curiae Former Prosecutors Michael A. Battle et al., in Support of Plaintiffs, *Hurrell-Harring v. State of New York*, 75 AD4d 667 (N.Y. Ct. App. 2010). District attorneys and federal prosecutors need not wait until their terms are finished, however, to advocate for effective indigent defense. In *Gideon*, 22 state attorneys general famously wrote in support of Clarence Gideon. Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963). Although these instances have been few and far between, the current trend toward “progressive prosecution” should hopefully lead to more support. But see Bruce A. Green, “*Gideon*’s Amici: Why Do Prosecutors So Rarely

Defend the Rights of the Accused?," *Yale Law Journal* 122 (2013): 8, 10, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5585&context=yli> (noting that prosecutors rarely support the rights of the accused).

117 See Phyllis E. Mann, "Understanding the Comparison of Budgets for Prosecutors and Budgets for Public Defense," National Legal Aid & Defender Association, February 9, 2011, www.nlada.net/library/article/na_understandingbudgetsforprosanddefs.

118 The American Bar Association's *Ten Principles of a Public Defense Delivery System* describes resource parity in its Eighth Principle: "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense." *Ten Principles*, 3.

Endnotes for Table 1

1 *Criminal Defense for the Poor, 1986* (Washington, D.C.: Bureau of Justice Statistics, 1988), table 4, www.bjs.gov/content/pub/pdf/cdp86.pdf.

2 National Right to Counsel Committee, *Justice Denied*, 54.

3 The 2019 data was gathered with assistance from the Sixth Amendment Center, which keeps an online index of state funding breakdowns. "Know Your State," Sixth Amendment Center, last accessed July 10, 2019, <https://sixthamendment.org/know-your-state/>. Through contact with the Sixth Amendment Center, the author learned that information on the website was current except for Michigan and New York, which had undergone recent reform to increase the proportion of state funding. While currently at 40 percent state funding, the proportion of state funding in New York will continue to increase through 2023. See David Carroll, "New York Caseload Standards Announced and Their Importance to Statewide Reform Explained," Sixth Amendment Center, <https://sixthamendment.org/new-york-caseload-standards-announced-in-wake-of-state-funding-agreement/>.

Endnotes for Table 2

1 All data in this table is taken from the Committee on Legal Aid and Indigent Defendant's workload studies. See note 79.

2 The ends of this range reflect the hours per case for each category of misdemeanor. The Louisiana study broke misdemeanors down into two categories: "Misdemeanor or City Parish Ordinance," which are described as "misdemeanor offenses" and averaged 7.94 hours per case and "Enhanceable Misdemeanor," which is described as "misdemeanor offense, which may be increased to a felony with additional offenses" and averaged 12.06 hours per case. Committee on Legal Aid and Indigent Defendants, *Louisiana Project*, appendix F.

3 This range reflects the categories of "Misdemeanor 2 or 3," which averaged 11.4 hours per case and "Misdemeanor 1," which averaged 16.3 hours per case. Not included were DUI, traffic, or sex offense misdemeanors. Committee on Legal Aid and Indigent Defendants, *Colorado Project*, 20.

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The Brennan Center's Justice Program seeks to secure our nation's promise of equal justice for all by creating a rational, effective, and fair justice system. Its priority focus is to reduce mass incarceration while keeping down crime. The program melds law, policy, and economics to produce new empirical analyses and innovative policy solutions to advance this critical goal.

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