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.

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. As a result, today’s systems of indigent defense developed in an era of mass incarceration that is historically unprecedented. 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. This remains just as true today, with one key difference: criminal justice reform is now seeing broader public support than ever before.

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.” Whenever adequate defense counsel is lacking, however, “a serious risk of injustice infects the trial itself.”

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. 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.

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. In addition to better funding, 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.

Historically, improving the resource disparity for defenders has been politically difficult because of the cost and the fear of looking “soft on crime.” This might not be as true today, when 71 percent of voters think it is important to reduce the prison population and 66 percent support
the use of government tax dollars to provide indigent defense.20

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.26 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.

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. Pretrial detention leads to numerous downstream consequences, such as higher conviction rates, longer sentences, and increased recidivism. 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.

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. Unfortunately, stories like this are not uncommon.

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. The authors suggest the differences were partly due to “extremely low compensation” of appointed counsel that “makes extensive preparation economically undesirable.”

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, though the actual number of wrongful convictions is surely much higher. 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.”

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. 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.” 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. 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
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. The first colony-wide system of public prosecution predates the first public defender office on American soil by 210 years. 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. 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. 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. 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. 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.

### I. 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. 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. The authors calculated that switching to a statewide public defender system could lead to savings of $13.7 million per year.

- **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. These rates do not consider attorney overhead costs, which can be over 50 percent of an attorney’s revenue.

- **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. 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.* While the practice remains pervasive throughout the country, many state and local jurisdictions have taken steps to bar its use.

### 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. They conclude that, in general, the more authority and responsibility a statewide commission or agency has for administering and funding indigent defense, the better and more consistent the level of representation is throughout the state. 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. Multiple studies have shown that when counties are left to fund indigent defense, there is wide disparity in the quality of representation between them. 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. But statewide funding is no guarantee of adequate funding, as evidenced by Missouri, which fully funds indigent defense statewide but at grossly inadequate levels. 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.

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. Louisiana infamously funds its public defense system through...
a $45 court fee assessed on every person convicted of so much as violating a local ordinance. This means that indigent defense funding relies on inconsistent revenues, such as traffic tickets, leading to regular budget cuts and hiring freezes.

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. 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.” This underlying belief is the genesis of the current progressive prosecutor movement as a vehicle for criminal justice reform. 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.

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. 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.” 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. 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.”

Adding to this power, the Supreme Court has repeatedly refused to submit prosecutorial discretion to judicial review. 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. 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.

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. 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.

As the NAC itself forewarned, the entire concept of national caseload standards is fraught, 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.

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. The studies utilize the Delphi method 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 workloads — 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. 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.

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, and only Massachusetts has workload limits that are significantly lower than the NAC standards.

### C. Defender-Prosecutor Salary Disparity

Unsurprisingly, studies show that years of experience are directly correlated to success in defending criminal cases. 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. 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

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

<table>
<thead>
<tr>
<th>Category</th>
<th>Missouri</th>
<th>Louisiana</th>
<th>Colorado</th>
<th>Rhode Island</th>
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<td>201</td>
<td>427</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>12</td>
<td>8–12(^2)</td>
<td>11–16(^3)</td>
<td>13</td>
</tr>
<tr>
<td>Probation revocation</td>
<td>10</td>
<td>8</td>
<td>7</td>
<td>17</td>
</tr>
</tbody>
</table>

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1. \(^{1}\) Table includes average hours per case required for reasonably effective representation.
2. \(^{2}\) Range of hours.
3. \(^{3}\) Range of hours.
less than their prosecutor counterparts. 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.

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. 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. More recently, New York City public defenders and prosecutors joined forces to advocate for pay parity with other city attorneys. 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.

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.

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. 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. 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.

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. 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. 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. 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. 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. Other jurisdictions have had to resort to legislation to mandate open discovery.

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.
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. 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.” A federal survey found that only half of public defender offices were even aware they were eligible for these grants.

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. 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. 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.\textsuperscript{102} Meaningful probation and parole reform can also reduce caseloads for indigent defense providers.\textsuperscript{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.\textsuperscript{112} As a result, public defenders spend an inordinate amount of time handling these types of cases.\textsuperscript{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.\textsuperscript{114} Of course, prosecutor offices do not have to wait for legislation to force their hand and should proactively adopt such policies.\textsuperscript{115}

- Elect prosecutors that will advocate for increased resource parity: 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. 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.

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.


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.


12 See infra text accompanying notes 22–26, 71.


14 American Civil Liberties Union, “91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds,” news release, November 16, 2017, www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds (finding 87 percent of democrats, 57 percent of independents, and 57 percent of Republicans believe it is important to reduce the prison population in America).


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/dcccc.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”).


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_FN1.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).


28 Anderson and Heaton, “How Much Difference.” 188.


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.


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 (Farwnorth 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 (Piel and Bushway, 2007:116; Wooldridge and Griffin, 2005).”


37 American Civil Liberties Union, “91 Percent of Americans.”


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.”)


42 See Enns, “The Public’s Increasing Punitiveness.”


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

those with federal public defenders).


53 National Right to Counsel Committee, Justice Denied, 55.


56 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).


61 “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).


66 For a comprehensive argument questioning prosecutorial reform as a theory of change, see Jeffrey Bellin, “The Power of Prosecutors,” NYU Law Review 94 (2019), www.nylawreview.org/issues/volume-94-number-2/nyulawreview-94-2-bellin/ (challenging the notion that prosecutors are the most powerful actors in the criminal justice system and arguing that blind acceptance of this fact “overlooks the powerful forces that can and do constrain prosecutors, and diverts attention from the most promising sources of reform”); see also Andrew Cohen, “Reformist Prosecutors Face Unprecedented Resistance From Within,” Brennan Center for Justice, June 19, 2019, www.brennancenter.org/blog/reformist-prosecutors-face-unprecedented-resistance-within (describing reactionary forces that are stymieing reform in jurisdictions that have elected reformist prosecutors).

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.”)


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 overcrowded 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.


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, Louisiana 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).


89 Cain and Porter, 2017 Budget/Salary Comparison.

90 Gross, Gideon at 50: Part I.


95 See American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, The Missouri Project, 12.


96 Langton and Farole, County-Based and Local Public Defender Offices, 12.

97 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).


102 Fair and Just Prosecution et al., 21 Principles, 18.


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).


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.


115 Many head prosecutors have taken it upon themselves to do this. For specific discovery policies that district attorneys can imple-ment, 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


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


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.