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Leveling the Playing Field: Addressing the Crisis in Indigent Defense Through Resource Parity

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LEVELING THE PLAYING FIELD: ADDRESSING THE CRISIS IN INDIGENT DEFENSE THROUGH RESOURCE PARITY

I. Introduction

This paper will begin by analyzing the history of the right to counsel.[1] Then, it will detail how the 6th amendment's promise has gone unfulfilled because the overworking of public defenders and appointed counsel has led to defendants receiving less than what most would consider "counsel for their defence and analyze how and why this has happened.[2] It then posits that it's mostly due to funding and resource disparities between prosecutor and defender's offices, and the fracturing of state systems on how they handle the right to counsel.[3] Finally, it offers possible solutions on how to bring defendants more equal justice.[4]

II. History of the Constitutional right to counsel

A. Like most American constitutional law, the right to counsel arose out of English common and statutory law.

The English law regarding a litigant having the right to assistance of counsel began as being limited to minor cases or civil proceedings.[5] Counsel for misdemeanor cases was required but in cases of treason or other felony (serious) crimes, the accused was not permitted to have counsel.[6] At least this was so when the question was one of law, but it was probably unlikely that a layman, facing prosecution for treason or other serious crime would even know the difference

[1] *See infra* Part II.
[2] *See infra* Part III.
[3] *See infra* Part IV.
[4] *See infra* Part V.
[5] Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WILLIAM & MARY QUARTERLY (1954).
[6] JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (1819), at 276 ("It seems to be universally agreed, that at common law, a prisoner was not entitled to defend by counsel, upon the general issue not guilty, on any indictment for treason or felony.")

between a question of law or fact.[7] The main reasoning behind this distinction was that had an indictment for such serious crime been returned, the accused was very likely to be guilty and the evidence abundant.[8] It was also justified on the belief that the trial judge would be the defendant's counsel, had the aforementioned assumption not been true.[9] Many people, beginning with Blackstone as early as 1758, can see that allowing counsel for minor crimes, but not major ones with more severe punishments does not make much sense.[10] Even if such a distinction did make sense, it was certainly not helpful to the average defendant, whom probably did not even know if or when an error of law occurred on which he could raise an objection.[11] However, it is not surprising this was the state of the law at the time, as modern jurisprudence has become vastly different from the days of protecting the power of the crown.

Eventually, the assistance of counsel was also granted for defendants facing charges of treason in the Treason Act of 1695 but it was not without qualifications.[12] There was also evidence that, despite the Treason Act, some defendants were still forced to cross examine their witnesses or even examine their own witnesses when their defense was based on insanity.[13] In

[7] *See* Rackow, *supra* note 5, at 8 ("It is also not likely that a layman would be able to recognize a question of law and thus ask for the assistance of counsel on the particular point, the only time he was entitled to counsel as a right.")
[8] LORD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1644), at 137 ("...in case[s] of life, the evidence to convince him would be so manifest, as it could not be contradicted").
[9] *See id.* ("Secondly, the court ought to see that the Indictment, Trial[], and other proceedings be good and sufficient in law, otherwise they would by their erroneous judgment attain the prisoner unjustly.")
[10] 4 BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 355 ("For upon what face of reason, can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?")
[11] THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (1868) ("This is but a poor privilege to one who is himself unlearned in the law, and who, as he cannot fail to perceive the monstrous injustice of the whole proceeding, will be quite likely to accept any perversion of the law that occurs in the course of it as quite regular, because entirely in the spirit that denies him a defence").
[12] *See* Rackow, *supra* note 5, at 9. For example, the act still did not apply to defendants accused of treason via counterfeiting money or the seal of the King. *Id.*
[13] *See id.* at 11.

1836, long after the American Constitution was ratified, litigants in all cases were permitted counsel.[14]

B. In almost every American Colony, the English common law was rejected in favor of providing counsel for any accused faced with a crime.

Even though American law is based largely on the laws of England, the lack of counsel for the most serious cases, felony and treason, as discussed above was something flatly rejected when the founding fathers began America. Lack of counsel was one of "the most horrible features" of the English criminal law.[15] As perhaps "the most important privilege of the person accused" of crime, many states in their constitutions or statutes expressly included the right to counsel in *all* cases.[16]

For example, New Hampshire's second constitution in 1784 provided that any defendant "shall have a right to be fully heard in his defence by himself, and counsel."[17] Connecticut did it in its first constitution.[18] In New York, records as early as 1686 indicate that in misdemeanor cases the defendant appeared through counsel.[19] By 1777, New York rejected the old English common law expressly, including in its constitution that "in every trial… or indictment for crimes or misdemeanor, part[ies] shall be allowed counsel, as in civil actions."[20] Pennsylvania was an early rejecter of the English common law in its charter, which preceded its constitution.[21] It provided not only that the defendant should have counsel, but that the defendant "shall have

[14] *See id.* at 12.
[15] *See* COOLEY, *supra* note 11, at 331.
[16] *See id.* at 330.
[17] N.H. CONST. of 1784, pt. I, art. XV.
[18] *See* Rackow, *supra* note 5, at 15.
[19] *See id.* at 16; *see also* JULIUS GOEBEL & RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 558 (1994).
[20] N.Y. CONST. of 1777, art. 34; s*ee also* Rackow, *supra* note 5, at 17.
[21] CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES, art. V (1701).

the same privileges of Witnesses and Council as their prosecutors."[22] New Jersey's constitution echoed that language, seemingly declaring that defendants and prosecutors should be placed on a level playing field in terms of attorney competence.[23] Importantly, Pennsylvania went further and was the first, by statute in 1718, to declare that "learned counsel [shall be] *appointed* to the prisoners."[24] This act was aptly described as one "for the advancement of justice and more certain administration thereof."[25] These laws are just a few examples and every colony provided counsel in more situations than the common law of England.[26]

So, not only were the colonies more liberal in their provision of counsel to defendants, some thought "justice" required defendants be provided counsel by the court if they could not afford their own. Also, some of the constitutions suggested that defendants and prosecutors be provided "the same privileges" when it came to legal representation.[27] These state advancements, in turn, led to the adoption in the United States Constitution of a 6th amendment right to counsel.[28]

C. Early cases of the Supreme Court granted a right to counsel, but states were effectively left to decide in which kinds of cases.

Powell v. Alabama[29] was the first case to hold that not providing counsel was violative of the constitution but did so under 14th Amendment Due Process. It was 1931 and a group of black men were on a freight train traveling through Alabama. Also aboard the train were a group of

[22] *See id.*
[23] *See* Rackow, *supra* note 5, at 18.
[24] *See id.* (emphasis added).
[25] *See id.* at 15.
[26] *See generally id.* at 12-21.
[27] *See id.* at 17.
[28] U.S. CONST. amend. VI; *see also* ELLIS C. STEVENS, SOURCES OF THE CONSTITUTION 203 ("From these State provisions the amendment to the national Constitution came.")
[29] 287 U.S. 45 (1932).

white girls and men. Allegedly, a fight broke out between the groups of men and the sheriff was alerted before the train reached its destination.[30] The black men were arrested, taken into custody, and identified by the two girls in the group.[31] Word had gotten out of the arrests, and by the time they reached the sheriff's station, a "large crowd" had formed in the town, and, due to the potential for mob violence, the sheriff called the militia to help safeguard the prisoners.[32] The military accompanied the group of prisoners back and forth from the courthouse to the police station, and closely confined them over the next several days. It was "perfectly apparent" that the atmosphere throughout the prisoners' case was one of "tense, hostile and excited public sentiment."[33]

The boys could not read or write, they were not citizens of Alabama, and had no family in Alabama.[34] No opportunity was given to communicate with their families, although ample time existed to do so.[35] The boys were arraigned the next day and taken to trial less than a week after that, all separately.[36] The judge, in a mere "expansive gesture," appointed "all the members of the bar" of Alabama to represent the boys during their indictment.[37] After that, from the time of indictment up until the day of the trials – "perhaps the most critical period of the proceedings" – the boys received no counsel, and did not prepare in any real sense for the case.[38] On the day of trial, a lawyer had appeared but only because people were "interested" in the defendants and clearly represented to the court that

[30] *See id.* at 51.
[31] *See id.* at 51.
[32] *See id.*
[33] *Id.*
[34] *See id.* at 52.
[35] *See id.*
[36] *Powell*, 287 U.S. at 52.
[37] *Id.* at 51.
[38] *Id.* at 57.

> He did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case.

287 U.S. 45, 57.

Despite these representations, and despite the fact no investigation as to the facts or law was made, and no opportunity to investigate was given, the trials continued as scheduled.[39] All 3 trials ended in one day, the boys were convicted, and from the jury received the maximum sentence of death.[40]

The opinion is littered with examples where the right to counsel was given in almost every American colony in every case, and in a few colonies only for capital cases.[41] The court, in no uncertain terms, described the right to counsel as "fundamental" to the administration of American justice.[42] As such, the court applied it to the state court of Alabama, finding that the proceedings against the boys could not have been a fair trial because they lacked "the guiding hand of counsel."[43] This, the court went on, was a "clear" violation of their 14th amendment due process rights.[44] In addition, the court held that if the defendants were unable to secure their own counsel (as was assumed), the state court's failure to appoint counsel was also a violation of the defendants' due process rights.[45]

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[39] *See id.* at 58.
[40] *See id.* at 50.
[41] *See id.* at 61 (New Hampshire, Pennsylvania (including the Penn charter), Delaware, SC, Connecticut, among others).
[42] *See id.* at 67-71 (calling the right to counsel fundamental at least 4 times).
[43] *Powell,* 287 U.S. at 68-69 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.")
[44] *See id.* at 71.
[45] *See id.*

Roughly a decade later, In *Betts v. Brady*,[46] the court seemed to backtrack on its *Powell* decision and held that the right to counsel was *not* fundamental and so did not apply in all state court criminal proceedings. The court upheld a conviction for robbery after the lower court had held that in Carroll County, Maryland, where the case was tried, it was not customary to provide free counsel for cases other than rape and murder.[47] The court did a survey of how each state had treated the provision of counsel at the founding and at the time of the passage of the Bill of Rights. It found that the matter was left mostly to statute and each states' legislature had their own view on what kinds of defendants and cases were required to be provided free counsel.[48] Thus ignoring the fact that shortly after the passage of the Bill of Rights, many states codified the right to counsel in their respective constitutions.[49] It also acknowledged, and summarily dismissed, the fact that "the constitutions of all the states… contain provisions with respect to the assistance of counsel in criminal trials."[50] Somehow, thought the court, the fact that mere statutes granted the right to counsel rendered it not fundamental to the American system.[51] Absent the lack of counsel rendering the trial "offensive to the common and fundamental ideas of fairness and right," no due process violation occurred.[52]

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[46] 316 U.S. 455 (1942). It is important to note that, at this time, "the due process clause of the fourteenth amendment does not incorporate, as such, the specific guarantees found in the sixth amendment." *Id.* at 462-463.
[47] *See id.* at 456.
[48] *See id.* at 467, n.20. Interestingly, the Court noted that the New York Constitution contained a right to counsel in 1777 but used the fact that New York "had no *statute* on the subject" to support its conclusion. *Id.*
[49] *See supra* Part II.B.
[50] *Betts*, 316 U.S. at 467-468.
[51] *See id.* at 473 ("In the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy").
[52] *Id.*

D. The *Gideon* case and its progeny applied the right to counsel to the states and seriously expanded the 6th Amendment's protection by mandating that counsel be competent in order for the Constitution to be satisfied.

Reviewing a set of facts "strikingly like" the ones present in *Betts*, the court in *Gideon v. Wainwright*[53] expressly overruled *Betts*, describing it as "an anachronism when handed down."[54] The court recognized that though provision of counsel "may not be deemed fundamental and essential to fair trials in some countries, it is in ours."[55] Therefore, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[56] Such a holding, said the court, "seems to [be] an obvious truth."[57] Describing the right as fundamental opened the door for the court to incorporate the 6th amendment against the states, and hold that its denial was a denial of due process under the law.

About 20 years later, in *Strickland v. Washington*,[58] the Court set out to resolve conflicting standards among the lower courts regarding just how effective counsel in a given case must be before a reviewing court overturns the defendant's sentence. Defendant Strickland was convicted of multiple first degree murders and robberies and sentenced to death in a Florida state court.[59] The evidence against him was overwhelming, and he had admitted to a number of things which constituted aggravating circumstances under Florida law.[60] Defendant alleged, *inter alia*, that his counsel

> [W]as ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present

[53] 372 U.S. 335 (1963).
[54] *See id.* at 345.
[55] *See id.* at 344. The court reiterated the thrust of *Powell* and agreed that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 344-345.
[56] *Id.* at 344.
[57] *Id.*
[58] 466 U.S. 668 (1984).
[59] *See id.* at 673.
[60] *See id.* at 674.

> character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so.[61]

The court reviewed the many standards applied by lower courts in such ineffective assistance of counsel claims, overruling some and holding that others were in accord with its newly-pronounced standards.[62] The court broke the ineffective assistance of counsel inquiry into two prongs, the first being that the defendant must show that counsel's representation "fell below an objective standard of reasonableness."[63] In making this determination, defense counsel is entitled to "a strong presumption" that their conduct fell within the "range of reasonable professional assistance."[64] Next, the specifically alleged failures must evince a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[65] These tests, in the court's view, adequately protected the purpose behind the 6th amendment and *Gideon* – to ensure the defendant receive "a fair trial."[66] The court applied these new standards and found the defendant in Strickland failed under both prongs.[67]

[61] *Id.* at 675.
[62] *See generally id.* at 696-697.
[63] *Id.* at 688.
[64] *Id.* at 689.
[65] *Strickland*, 466 U.S. 694. The court further defined a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.*
[66] *Id.* at 689.
[67] *See id.* at 701.

III. Crisis Facing Indigent Defendants

A. Overburdened public defenders and heavy caseloads

An overwhelming majority of defendants cannot afford a lawyer and thus rely on the constitutional right to counsel to be appointed to them.[68] The American Bar Association ("ABA") estimated that 60 to 90 percent of defendants require a free lawyer.[69] At the time Gideon was decided, such a problem could not have been envisioned, as the amount of people incarcerated then has increased ten times.[70] Part of the problem stems from the proliferation of misdemeanor cases and the criminalization of conduct previously considered legal.[71] This sheer demand for assistance leads to public defenders having way too many cases, well over the amount recommended by the ABA itself.[72]

For example, in Louisiana, it was reported that part-time defenders handle "the equivalent of almost 19,000 cases per year per attorney."[73] This means that defenders in Louisiana had the opportunity to spend only "seven minutes per case."[74] In Minnesota, defenders apparently

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[68] Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 7 ("With public defenders representing 80 percent of criminal defendants nationwide, the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.")

[69] BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 3 (2000)

[70] *See* Thomas Giovanni & Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CTR. FOR JUST. (Apr. 9, 2013), https://www.brennancenter.org/our-work/research-reports/gideon-50-three-reforms-revive-right-counsel ("In 1963, when *Gideon* was decided, there were approximately 217,000 people in prison. Today, the incarcerated population has expanded to approximately 2.3 million people.")

[71] *See generally* Robert Boruchowitz et al., *Minor Crimes, Massive Waste The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N OF CRIM. DEF. LAWYERS (2009), https://www.opensocietyfoundations.org/publications/minor-crimes-massive-waste

[72] Giovanni & Patel, *supra* note 70, at 4 ("The ABA recommends that individual public defenders have a maximum of 150 felony cases or 400 misdemeanor cases per year."); A review of the current Ten Principles reveals that such a qualitative recommendation has been foregone. ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3. It has been replaced with only a standard that "Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations." *Id.*

[73] *See* Boruchowitz, *supra* note 71, at 21.

[74] *See* Giovanni & Patel, *supra* note 70, at 4.

devoted just "12 minutes per case, not including court time."[75] This is certainly a breach of ethical standards requiring competent and zealous representation.[76] Misdemeanor defense attorneys in Tennessee "report[ed] handling 3,000 misdemeanor cases in one year… 7.5 times the national standards."[77] In "at least three major cities;" Chicago, Atlanta, and Miami, defenders "carry more than 2,000 misdemeanor cases each per year."[78] New York, which relies more heavily on private attorneys taking court appointments, sees similar issues with attorneys representing at times 300-400 indigent clients per year.[79]

B. Budget disparities between prosecutor's offices and public defender offices leads to an imbalance in legal training and professional development opportunities and less access to investigative resources or support staff for indigent defendants.

Unfortunately, even though in grave need, defender offices suffer from a lack of funding, especially when compared to prosecutors' offices. Studies done in 2007 and 2010 reveal that while public defense offices expenditures totaled just $2.3 billion, budgets for state prosecutors were over double that, $5.8 billion.[80] Lack of money, in turn, leads to understaffing in defense offices, further increasing caseloads. The studies further revealed that while prosecutors' offices contain over 25,000 lawyers, just 15,000 exist in defender offices.[81]

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[75] *Id.*
[76] See MODEL RULES OF PRO. CONDUCT r. 1.1 (competency); MODEL RULES OF PRO. CONDUCT r. 1.3 (zealous advocacy).
[77] Boruchowitz, *supra* note 71, at 21.
[78] *Id.*
[79] *See* Jane Fritsch & David Rohde, *For the Poor, a Lawyer with 1,600 Clients*, N.Y. TIMES (Apr. 9, 2001), https://www.nytimes.com/2001/04/09/nyregion/for-the-poor-a-lawyer-with-1600-clients.html.
[80] Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables*, BUREAU OF JUST. STAT. (2011), https://bjs.ojp.gov/library/publications/prosecutors-state-courts-2007-statistical-tables; Donald J. Farole, Jr. & Lynn Langton, *County-Based and Local Public Defender Offices, 2007*, BUREAU OF JUST. STAT. (2010), https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf.
[81] See Perry & Banks, *supra* note 80.

Not only do public defense attorneys suffer from having too many cases to handle than is possible, they also must complete these cases with inadequate training.[82] Due to the congested nature of their caseloads, they need adequate training on how to deal with defendants on a high volume scale – the type of training that the ABA and the National Legal and Defender Associations say is "lack[ing.]"[83] Even if such training is available, it is often "too expensive" for "cash-strapped defender offices" and do not happen frequently enough to fulfill "the great demand" for it.[84]

The type of training needed is not merely legal, but psychological. On top of a large caseload of alleged crimes, public defenders also have a slew of mental health and substance abuse issues to deal with in over half of their clients.[85] Unfortunately, public defenders offices have also been cited as not having enough social worker support to deal with these compounding issues.[86] Dealing with these issues can pull defenders from their legal work and result in inadequate investigation and preparation dedicated to the criminal issues facing their clients.

[82] *See* Giovanni & Patel, *supra* note 70, at 1 ("Many public defenders lack the staff, time, training, and resources to investigate each case adequately or prepare a robust legal defense."); *see also* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 297 (2009) ("Defenders [in California] reported a need for training in basic trial skills, motion practice, jury selection, DNA and forensic evidence, handling expert testimony, mental defenses, and immigration consequences…").
[83] *See* Giovanni & Patel, *supra* note 70, at 5; *Defender Training and Development Standards (1997)*, NAT'L LEGAL AID & DEF. ASS'N., https://www.nlada.org/defender-standards/training/black-letter.
[84] *See* Giovanni & Patel, *supra* note 70, at 9.
[85] *See* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, DEP'T OF JUST. (Dec. 14, 2006), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf (establishing that over half of state prisoners and local jail inmates have mental health problems).
[86] *See* Farole & Langton, *supra* note 80, at 11, Table 12.

C. Defenders having too many cases and not nearly enough resources to deal with them has a negative impact on the defendants most in need of legal counsel.

This synergism leads to detrimental effects on defendants, their families, society, and the defender themselves. The defendant, assigned to an overworked defender, can suffer delays in seeing justice in their case.[87] Defenders are just not able to promptly render legal advice and investigate each case they receive. To quote Martin Luther King, "justice too long delayed is justice denied,"[88] and many defendants thus face a de facto denial of justice without ever having a chance.

This lack of proper case management in turn leads to defendants being convicted or pleading guilty at a high clip, sometimes taking pleas quickly because their defense lawyer is uninformed or underprepared.[89] This "assembly line" system of justice is a serious issue and leads to worse outcomes for defendants.[90] Even if the lawyer is prepared and ready, the considerable power prosecutors hold over defendants by way of mandatory minimums and superior access to information and resources puts the fairness of the plea system in question.[91] Such guilty pleas, even ones that come with no incarceration, comes with collateral

[87] *See* Benner, *supra* note 82, at 309 ("Significant disparities between staffing and resources allocated to the prosecution and the defense result in excessive workloads in defender offices, which in turn lead to delays in justice for both victims and defendants.")
[88] Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963).
[89] Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to do with It?*, 23 CRIM. JUST. 28, 28 (2008) ("The power balance - particularly under mandatory minimum sentences and sentencing guideline regimes - results in a system where the prosecutor 'can effectively dictate the terms of the deal.'")
[90] *See* Giovanni & Patel, *supra* note 70, at 6 ("Prosecutors may use [their] discretion to pressure defendants into entering plea deals quickly… Prosecutors also may 'overcharge' a defendant… to supply greater leverage in plea bargaining… [taking advantage of] public defenders [who] do not have sufficient time to review the evidence, conduct an investigation, or interview their clients to assess whether the offer is fair.")
[91] *See* Yaroshefsky, *supra* note 89, at 28 (raising "the most fundamental of ethics issues-" does the "'negotiation process,' where the defense wields minimal bargaining power, provide for a system to achieve reliable results?").

consequences further burdening the justice system and public defenders.[92] For example, being guilty of a crime or serving time in prison or jail can lower the earning power of a defendant, placing economic pressure on them and their families.[93] This causes a higher recidivism rate as defendants are unable to readjust to public life and resort to committing crimes again.[94] This may doom not only the defendant, but the defendant's children and family as well.[95] Dependent children of people convicted of crimes are "more likely to struggle" in school and experience "turmoil" in their families, compared to other children not so situated.[96] Other collateral consequences include ineligibility for student loan programs, exclusion from educational opportunities, and loss of a right to vote for an indefinite period of time.[97]

Increased recidivism and diminished earning potential come with costs to the nation and its economy as a whole as well.[98] The high amount of ex-offenders in America led to an estimated 1.7 percent increase in the male unemployment rate, in turn leading to an estimated loss to the American economy over $50 billion.[99] These economic costs are likely to continue as the children of defendants are more likely to suffer negative outcomes in school and work,[100] and incarceration rates are rising.

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[92] *See generally Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRUSTS, (2010), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [hereinafter "*Collateral Costs*"].
[93] *Id.* at 4 ("Serving time reduces hourly wages… and annual earnings by 40 percent.")
[94] *See id.* at 16-28.
[95] *Id.* at 27 ("The findings presented here foreshadow a disconcerting trend for the economic mobility prospects of the 2.7 million children who currently have an incarcerated parent. If previous mobility patterns of 'stickiness' at the bottom of the income ladder continue, children of incarcerated parents… will find themselves in a similar economic position as adults.")
[96] *Id.*
[97] *See id.* at 21-22.
[98] *See generally* John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, CTR. FOR ECON. AND POL'Y RSCH. (Nov. 2010), https://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.
[99] *See id.* at 13.
[100] *See Collateral Costs*, *supra* note 92, at 4-5. "Children with fathers who have been incarcerated are significantly more likely than other children to be expelled or suspended from school." *Id.* "Both education and parental income are strong indicators of children's future economic mobility." *Id.*

IV. Funding Mechanisms for Public Defense

With no uniform national legal standards for the right to counsel as envisioned by *Gideon* and its progeny, states are mostly left to run their public defense systems as they see fit. While state autonomy is an important feature of regulating the practice of law, some states do better than others in terms of funding, providing other support for lawyers, and outcomes for defendants. This variation causes a disparity of treatment between defendants in each state.

A. Variation in models across different states and jurisdictions

Some states provide funding for indigent defense wholly through the state budget. Others have incorporated a county wide system that works in tandem with the state. The last group has delegated oversight and funding of the right to counsel wholly to counties.

Twenty-seven states "relieve [their] local government of all responsibility for funding" right to counsel services.[101] Eleven states operate with "mixed funding" systems where local governments are forced to share the costs of providing right to counsel.[102] The last twelve states provide "minimal funding" for indigent defense.[103]

Those states which provide for a majority, if not all, of the indigent defense funding are the most stable.[104] This is so because local governments are usually hampered in their ability to raise revenue, ironically, by the state government.[105] Also, many local governments are prohibited from deficit spending, further restricting their revenue-raising ability.[106] A second

[101] *See* David Carroll, *Right to Counsel Services in the 50 States – An Indigent Defense Reference Guide for Policymakers*, 6TH AMEND. CTR. at 100 (Mar. 2017), https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf.
[102] *See id.*
[103] *See id.*
[104] *See id.* at 101.
[105] *See id.*
[106] *See id.*

reason is that counties very widely in their need and ability to fund things, whether right to counsel services or otherwise.[107] The population, its density, and their income affect how many defendants are in need and how much money the county has to provide for such defendants.[108] Poorer counties have less revenue, and statistically usually more crime, meaning their ability to provide adequate counsel in each case is diminished not just because their lack of money, but also because of a large number of defendants.[109] The less stability provided by other systems leads to less certainty for defendants and outcomes in their cases.[110]

To complicate matters further, within each funding approach there are still more subcategories depending on how a state oversees the provision of services to defendants.[111] For example, some states establish commissions which can meet the national standards for "independence" or not, the commissions also may oversee all counties and case types or just some. Additionally, some states "may pay all costs of representing the indigent accused" but leave local governments and courts to determine "the manner in which those services are delivered."[112] For example, the local government may use its state (or mixed, or its own) funding to pay public or private attorneys, and they may operate on "a court-by-court basis" or on a

[107] *See id.* ("the same indicators of limited revenues – low property values, high unemployment, high poverty rates, limited house-hold incomes, limited higher education, etc. – are often the exact same indicators of high crime.")
[108] *Justice Denied America's Continuing Neglect of Our Constitutional Right to Counsel*, CONST. PROJECT 53-54 (Apr. 2009) ("Inevitably, urban counties have far more cases than rural counties and are often overburdened. At the same time, a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case.")
[109] Carroll, *supra* note 101, at 101 ("Those same counties have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money dedicated to upholding the [right to counsel] is further depleted.")
[110] Giovanni & Patel, *supra* note 70, at 4 ("18 states have either completely or primarily shifted the responsibility of funding public defender offices to counties, which have created variable and unpredictable funding mechanisms.")
[111] *See* Carroll, *supra* note 101, at 97-99.
[112] *See id.* at 102.

"multi-county, regional basis" or each county and court may operate alone.[113] Funding and whether state commissions enforce quality standards on their local counterparts, however, seems to be the most accurate predictor of a state system's quality.[114]

B. Challenges of funding public defense through state and local budgets

Even when funding is available for public defense, political and other forces place such funding at risk. A recent example is New York's governor Kathy Hochul's attempt to defund New York's already suffering indigent defense systems.[115] It was only after public backlash from law firms, bar associations, and public defense offices did she rescind the proposal and restore the money.[116] It is great to know some organizations have the backs of indigent defendants, but that is not deterring governor Hochul. Evincing a fundamental misunderstanding of the public defense crisis and the role quality representation plays in ending perpetual mass incarceration and systemic racism issues, she has attempted to divert the funds once more, much to the chagrin of the same constituencies that objected just two months ago.[117] This time, $55 million will be

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[113] *See id.*

[114] *See id.* at 103 ("Whether indigent defense trial-level services are organized at the state or local level, or a combination of both, has less of an impact on the quality of services as either state-funding or state oversight of services [through commissions.]"

[115] *Diversion of IOLA Funds Will Degrade Access to Justice,* N.Y. CITY BAR ASS'N (Feb. 12, 2024), https://www.nycbar.org/press-releases/diversion-of-iola-funds-will-degrade-access-to-justice.

[116] Jacob Kaye, *Gov reverses cut to Indigent Defense Fund Following Outcry*, QUEENS EAGLE (Feb. 20, 2024), https://queenseagle.com/all/2024/2/18/gov-reverses-cut-to-indigent-defense-fund-following-outcry ("The initial proposal was almost unanimously decried by the state's legal community and sparked outrage in particular among the state's public defense attorneys and organizations who said the stripping of the fund would greatly impact their already strained ability to deliver indigent legal services to New Yorkers in need.")

[117] Robert Abruzzese, *Gov. Hochul's Plan to Divert Escrow Funds Risks Essential Legal Aid for Needy New Yorkers*, BROOKLYN EAGLE (Apr. 19, 2024), https://brooklyneagle.com/articles/2024/04/19/hochuls-plan-for-escrow-funds-risks-legal-aid-for-the-needy (quoting New York State Bar Association President Richard Lewis: "When Kathy Hochul originally proposed… to remove $100 million from the IOLA fund… we and many other legal advocates protested. When the governor withdrew the proposal, we commended her. We are now distressed that this ill-conceived plan has been resurrected, and strongly urge the governor and legislature to reconsider.")

diverted. When the leader of such a diverse and progressive state like New York takes such a grotesque and flawed view of this problem, it is extremely disturbing to think about what thoughts may be brewing in other leaders' minds as they govern over other comparatively not so diverse, and not so progressive states.

The executive branch is not the only one threatening the expanded protection for indigent defendants provided by *Gideon* and its progeny. Members of the Supreme Court have also voiced concerns as well.[118] Justice Thomas expressed doubts about the constitutionality of demanding the appointment of counsel in all cases where a defendant could not afford their own.[119] Constitutional matters aside, Justice Thomas, importantly, cited concerns about "imposing additional costs on the taxpayers and the Judiciary."[120] With Justice Gorsuch and to a limited extent Justice Alito (who did not join this part of Thomas's opinion) agreeing with Justice Thomas,[121] there is no telling if future justices may come around to the idea that free counsel imposes too high a cost for its benefit. There is also no telling how many judges in the lower courts may agree currently. With powerful government leaders attempting to defund already underfunded indigent defense or expressing a desire to do so, the concerns outlined in this paper (and so many others) may fall on deaf ears and the problem might get worse before it gets better. Unfortunately, the cost of any such measures will fall squarely on the heads of America's most vulnerable – indigent defendants.

[118] *See* Garza v. Idaho, 139 S. Ct. 738 (Thomas, J., dissenting).
[119] *See id.* at 756 ("[The sixth amendment] 'as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.' Yet, this court has read the constitution to require not only a right to counsel at taxpayers' expense, but a right to effective counsel… Little available evidence suggests that this reading is correct as an original matter.")
[120] *See id.* at 759.
[121] *See generally id.*

C. Examples of different funding approaches that could have adverse effects on defendants.

In some places, the ways that either the state or local government gathers funding for indigent defense can have detrimental results on defendants and the public. Though stable funding is important, it is unfortunate that many states look to defendants themselves to pay for indigent defense. Especially in light of data showing the positive correlation between lack of resources and the likelihood someone interacts with the justice system, it is perverse and nonsensical to require these same defendants to shoulder costs associated with providing indigent defense. But that is exactly what happens in many states.

A survey on the 15 U.S. states having the highest rates of incarceration found that almost all of them charge defendants a slew of costs and fees and use them to fund indigent defense or other criminal justice mechanisms.[122] Despite more and more literature detailing the indigent defense crisis, these fees are apparently becoming more ubiquitous as time goes on.[123] These fees can include right to counsel fees for electing to exercise a defendant's constitutional rights, fees after conviction, and even fees for having to enter into a payment plan or take other measures because of inability to pay already existing fees.[124] Making matters worse, these jurisdictions rarely, if ever, consider the effects on defendants and the population resulting from such fee systems – instead focusing solely on revenue.[125]

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[122] *See generally* Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf.
[123] *See id.* at 1 ("Across the board, we found that states are introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution.")
[124] *See id.*
[125] *See id.* at 10.

The most offensive fee discussed in the survey is the right to counsel fee.[126] Though antithetical to the point of *Gideon* and other right to counsel cases, jurisdictions do in fact charge defendants for relying on their right to "free" appointed counsel in criminal cases. This can take the form of charging a defendant to "apply" for appointed counsel, charging them during the case for costs incurred, or (in contravention of clear ABA guidance)[127] charging them at the conclusion of the case for costs incurred by the government.[128] Some states allow for waivers of these fees if the defendant is unable to pay, but others do not.[129] Even if they do allow waivers of these fees, granting them is rare in practice.[130] Not only can such a fee burden a defendant economically directly, it also may discourage them from requesting counsel which they very likely desperately need.[131] The true nonmonetary costs of these fees are never a part of the equation, which only exacerbates the indigent defense crisis.[132] Inability to pay these and other fees subject defendants to further incarceration[133] and loss of other freedoms including the ability

[126] *See id.* at 12.
[127] ABA, TEN GUIDELINES ON COURT FINES AND FEES, GUIDELINE 1 ("Fees imposed in connection with a conviction or criminal offense or civil infraction should be eliminated because the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue.")
[128] *See* Bannon et al., *supra* note 122, at 12.
[129] *See id.* ("Strikingly, Florida, North Carolina, and Virginia all utilize *mandatory* defender fees, providing no opportunity for the court to waive the fee if the defendant lacks the financial resources to afford payment.") (emphasis in original).
[130] *See id.*
[131] *See id.* ("The result is that in many states, defender fees effectively circumvent states' obligation to provide counsel to those who cannot afford it, raising serious constitutional questions..")
[132] *See id.* ("In increasingly relying on public defender fees, states ignore their costs – including the harm to individuals and to public safety from the conviction of the innocent, the financial burden on taxpayers from over-incarceration, and the harm to the integrity of the justice system as a whole when individuals are denied their right to counsel.")
[133] *See id.* at 20 ("All fifteen states [surveyed] make criminal justice debt a condition of probation, parole, or other correctional supervision. In some states, when individuals fail to pay, they may face re-arrest and may ultimately be sent to prison.")

to drive[134] or vote.[135] This can make it impossible to achieve the goals of the criminal justice system; rehabilitation and re-entry into society.

When a government relies on fees to fund indigent defense, detrimental results can follow. For example, take the Louisiana public defense system, which was funded primarily by fees imposed on defendants convicted or plead out.[136] Most of these came as the result of traffic tickets.[137] Such a system creates perverse incentives for law enforcement because directing resources to other issues besides traffic may be the best for public safety, but would be detrimental to defendants because there are less fees collected that fund indigent defense.[138] Such a system "simply makes no sense" in light of the indigent defense crisis.[139] Additionally, this situation presents a clear conflict of interest for defense attorneys as they are in a position to benefit financially the more defendants that are convicted or plead guilty.[140] Perhaps the "most troubling" aspect of this fee-reliance system is that when the fees are no longer collected at the same rate, indigent defense offices lose much of their resources – which is exactly what happened around 2012 in Louisiana – resulting in staff having to be cut.[141]

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[134] *See* Bannon et al., *supra* note 122, at 20 ("In many states, driver's licenses are suspended for missed payments, thereby stripping individuals of a legal means of traveling to work.")
[135] *See id.* at 29 ("All fifteen of the states examined in this report disenfranchise people with criminal convictions for some period of time. In at least seven of these fifteen states, individuals must pay off criminal justice debt before they can regain their eligibility to vote after a conviction.")
[136] *See* Carroll, *supra* note 101, at 113 ("The majority of funding for trial-level services comes from a combination of fines and fees... The single greatest of these... is a special court cost ($45) assessed against every criminal defendant convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or local ordinance...")
[137] *See id.*
[138] *See id.* at 130, n.17 (examining hypothetical where police focus more on drug crimes than traffic crimes, resulting in more defendants in need of free counsel, but less resources available to provide this counsel).
[139] *See id.*
[140] *See* Giovanni & Patel, *supra* note 70, at 4.
[141] *See id.* ("Louisiana's Orleans Public Defender Office was forced to lay off one-third of its staff in 2012 because a major funding stream – traffic tickets – dried up.")

V. Recommendations and Solutions

Although a nuanced issue, fixing the indigent defense crisis mainly requires increased funding for defenders' offices and other appointed attorneys. One recommendation could be mandating pay and resource parity between the prosecutors' offices and defender offices they go against. Failing parity, funding must increase either through existing sources or creating new ones.

A. The federal legislature or individual states should pass laws requiring state-wide administration of public defense and mandate that similarly situated public defender's offices be equally funded with prosecutors offices.

As mentioned above,[142] when states are in charge of funding and oversight of indigent defense, more stable systems result. State-wide administration would reduce the disparate impacts on defendants which vary based on which county their case is handled. Though taking over indigent defense may be costly initially, it can actually save states money by "lower[ing] justice system costs by increasing efficiency, lowering the number of wrongful convictions, and reducing the incarcerated population."[143]

Once state-wide administration and funding is achieved, states should require the provision of equal resources for defense and prosecution offices. Increasing defender salaries to be more in line with prosecutors, or even the same, is a good place to start.[144] One way to

[142] *See supra* Part IV.A.
[143] Bryan Furst, *A Fair Fight Achieving Indigent Defense Resource Parity*, BRENNAN CTR. FOR JUST. 11 (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/fair-fight.
[144] *See id.* ("Salary parity ensures that the adversarial offices will have equal opportunity to develop and retain experienced attorneys."); *see also* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 ("Prosecutors tend to draw larger salaries than publicly-funded defense attorneys. All too often they have lower individual caseloads than full-time public defenders and greater access to staff investigators, expert witnesses, and other resources.")

achieve this would be through collective bargaining partnerships between prosecutor and defense constituencies.[145] But, salary parity is not the only way to level the playing field.[146]

Defense counsel is also in need of other resources including investigators, psychologists,[147] paralegals and expert witness access.[148] Investigatory resources are an extremely important aspect of this, as studies have shown prosecutors offices have as much as three times the amount of investigators.[149] Failing funding parity between prosecutors and defenders, states can implement systems to fund defense offices based on their workloads, which have proven unsustainable in many jurisdictions. Salary parity coupled with resource and caseload parity is important because whether or not the defender is paid well does not matter to an individual defendant whose case does not receive much attention.[150] Without parity in both respects "the prosecution will enjoy a systematic advantage."[151]

B. Criminal justice system reform could end up saving states and the country money.

The second main issue after funding is the sheer amount of defendants and caseloads outpacing the number of defense counsel available.[152] This can be remedied by reducing punishments for existing crimes, turning misdemeanors and other minor crimes into civil

[145] *See* Furst, *supra* note 143, at 9 (detailing efforts in California and New York at collective bargaining and claiming "the unlikely alliance made for a powerful force").
[146] *See* Wright, *supra* note 144, at 234 ("further steps, while more difficult politically and technically, are necessary if the functional equality of prosecution and defense is to become reality.")
[147] *See supra* Part III.B.
[148] *See* Wright, *supra* note 144, at 222.
[149] *See* Furst, *supra* note 143, at 9 ("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... in indigent defense systems.")
[150] *See* Wright, *supra* note 144, at 235 ("If each attorney in a defender's office earns a salary comparable to that of a prosecuting attorney, but each defender carries a dramatically heavier caseload, the equality of salary among the attorneys will mean little to the criminal defendant.")
[151] *See id.*
[152] *See* Boruchowitz, *supra* note 71, at 35 ("One-third of the respondents to the survey fully acknowledged that the caseload of the public defense lawyers in their jurisdiction does not allow them to provide effective assistance of counsel.")

infractions or violations, and reforming parole systems.[153] Reducing the amount of defendants in need altogether reduces the workloads of public defenders as well as saves states and their taxpayers money by having to fund less incarceration.[154]

Some examples of laws that could be reclassified are bans on sleeping in public statutes in New York, which could land an offender in jail for up to ten days.[155] Laws like these squarely punish defendants merely for the fact that they are poor. Turnstile jumping and other lack of money-related offenses should also be examined. Driving with a suspended license can and should also be dealt with civilly, especially when a license is revoked or suspended due to failure to pay fees as discussed previously.[156] This offense "make[s] up a significant part of the caseload" in many places.[157] These are just a few examples of "crimes" which defense attorneys feel "clog" their caseloads and "should [not] be punishable by jail."[158]

VI. Counterarguments and Challenges

While it can be said that there is not enough money to fund defense the way it constitutionally needs to be funded, parity of resources may actually save money in the long run.[159] Additionally, the success of resource parity in some places, as discussed here, undercuts

[153] *See* Furst, *supra* note 143, at 12 (detailing a report by the Council of State Government's Justice Center which found that "45 percent of state prison admissions were due to violations of probation or parole").
[154] *See* Giovanni & Patel, *supra* note 70, at 8 ("Reclassifying these petty offenses can reduce demands on not only public defenders, but also law enforcement, prosecutors, courts, jails, and corrections staff. It will allow redirection of criminal justice resources to public safety priorities."); Massive waste PAGE 20 ("Detentions are not only unnecessary, but also extremely expensive, and the costs accrue directly to taxpayers.")
[155] *See* Boruchowitz, *supra* note 71, at 25 (citing "overcriminalization" as the first factor in why misdemeanor caseloads are so high).
[156] *See* Part IV.C.; *see also supra* note 129.
[157] *See* Boruchowitz, *supra* note 71, at 26.
[158] *See id.* at 25.
[159] *See supra* Part IV.C; *see also supra* note 132.

this argument severely. A second argument – "public choice theory" [160] – says that politicians and judges are reluctant to implement this kind of reform because it does not benefit them much. This argument is also unpersuasive based on contemporary experience. Neither argument should serve as a bar to achieving the reform the indigent defense system so desperately needs.

A. Concerns about budget constraints and fiscal responsibility

As discussed in the previous section, reform through parity of resources and rethinking certain criminal statutes may actually save the state and its taxpayers money.[161] What is more, though, is that such parity already exists in multiple systems. The most obvious example is the federal defense system. There, federal defenders operate on the same pay scale as the United States Attorneys tasked with prosecuting their clients.[162] Any state arguing that parity of resources is not feasible monetarily can also look no further than their fellow states. Examples include Kansas, Massachusetts, North Carolina, and Wyoming.[163] In fact, studies indicate that parity of resources "is the norm," not the exception in most states.[164] Additionally, the criminal system of the United States military chooses defenders and prosecutors from precisely the same pool of attorneys.[165] This guarantees adequate representation on both sides.

Moreover, states and the federal government have seen no problems in increasing funds for law enforcement, as their budgets and resources continually grow every year.[166]

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[160] *See generally* Wright, *supra* note 144.
[161] *See supra* Part V.B.
[162] *See* Wright, *supra* note 144, at 232 ("Federal public defenders are paid on the same scale as Assistant United States Attorneys.")
[163] *See id.*
[164] *See id.* at 232-233, 233 n.56.
[165] *See id.* at 232 ("The prosecution and the defense draw attorneys from the same pool of certified attorneys and pay them at the same rate.")
[166] *See* Furst, *supra* note 143, at 11 ("Grants have been provided to law enforcement for billions of dollars per year for decades without a corresponding commitment to funding indigent defense.")

Governments should recognize that "law enforcement" equally embraces the prosecution and defense functions, as the denial of justice so often experienced by defendants is just as much a violation of American laws as is the defendant's alleged crime. If a government was serious about providing justice to its citizens, it would provide funding increases equally. Unfortunately, this is rarely the case. In fact, existing sums of money set aside for both purposes have been overwhelmingly granted to the prosecution and police side.[167] Thus, there is no support for a state's argument that parity of resources comes at too high a cost, and all states can and should implement such parity.

B. Potential resistance from politicians and other government officials

Legislators and other politicians may be reluctant to push for indigent defense resource increases for many reasons. These may include the fact that defendants are politically unpopular and relatively powerless such that any efforts would prove fruitless. But they should not be so hesitant.

"Historically," politicians may have feared the prospect of being viewed as "soft on crime" or as "friends of criminal defendants."[168] But, fortunately, the tides have been shifting recently and the public is becoming increasingly aware of the justice system's deficiencies.[169] "Public choice theory" argues that politicians are only prone to vote and propose changes that

[167] *See* Giovanni & Patel, *supra* note 70, at 4 (detailing the Byrne-JAG program and the fact that "more than 60 percent" of the funds go to law enforcement, and as between prosecutors and defense allocations, the ratio is "a 7 to 1 disparity"); *see also Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, U.S. GOV'T ACCOUNTABILITY OFF. (May 2012), https://www.gao.gov/assets/gao-12-569.pdf.
[168] *See* Furst, *supra* note 143, at 1; *see also* Wright, *supra* note 144, at 253 ("Legislators are none too subtle in explaining that the defense of accused criminals is a low funding priority.")
[169] *See* Furst, *supra* note 143, at 1-2 ("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.")

benefit themselves and their election prospects.[170] This is especially detrimental to the indigent because criminal defendants are, statistically, not very powerful politically[171] – even if they have regained their right to vote which is often stripped upon conviction.[172] Therefore, politicians view the indigent defense situation with skepticism and think there is "not much utility to maximize" because for the most part, they are "young males living in poverty."[173]

However, such a theory may be factually unsupported, as legislators have and continue to vote for things which benefit defendants. One example is the provision, or attempted provision, of free defense services which are above and beyond the minimal standards of competence the constitution apparently mandates.[174] Another example is the fact that prosecutors who campaign on injecting reform and "progressiveness" into the criminal justice system are elected in more and more places throughout the country each year.[175] Politicians, prosecutors, and especially legislators should not fear helping the indigent receive adequate counsel. It is what the constitution mandates (and has always mandated) and the public will come around to the idea of helping defendants, if they have not done so already.

[170] S*ee* Wright, *supra* note 144, at 222 ("According to this application of microeconomic principles to the work of government officials, legislators act rationally to maximize their personal utility - that is, they vote in ways that will assure their own re-election.")
[171] *See id.* at 253 ("This segment of society, poor and alienated, does not and cannot contribute much to election campaigns.")
[172] *See supra* pp. 20-21 and note 135.
[173] S*ee* Wright, *supra* note 144, at 222.
[174] *See supra* pp. 8-9.
[175] Alison Young, *The Facts on Progressive Prosecutors*, AM. PROGRESS (Mar. 19, 2020), https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice (Kim Foxx in Illinois; Larry Krasner in Philadelphia, and, formerly, Dan Satterberg in Washington, who did not run for reelection in 2023).

VII. Conclusion

The indigent defense "crisis" in America today is primarily caused by funding and resource disparities between public defenders and prosecutors. This imbalance has led to far-reaching, detrimental effects on defendants, their families, the public, and the criminal justice system as a whole. While the Supreme Court has established the constitutional right to counsel, its decisions have not adequately addressed the systemic issues that prevent the effective implementation of this right.

Mandating parity of resources through legislation is the most promising solution to these challenges. By ensuring that public defenders have access to the same resources, support, and funding as prosecutors, we can begin to rectify the injustices faced by indigent defendants. This approach has already proven successful in several jurisdictions, demonstrating that it is both feasible and effective. By addressing the disparities in indigent defense and implementing meaningful reforms, we can work towards a system that truly upholds the principles of fairness, equality, and the rule of law. The constitution demands nothing less, and it is our collective responsibility to ensure that every defendant, regardless of their economic status, receives the competent legal representation they deserve. Only then can we confidently call our system a "justice" system.