

THE PUBLIC DEFENDER SYSTEM: A COMPARATIVE ASSESSMENT

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“Without sufficient resources for public defenders, the famous words of Gideon are just words, a guarantee of little more than a companion at arraignment.”¹

I. INTRODUCTION

In 2013, the United States District Court for the Western District of Washington issued a stunning decision. The Court handed down a ruling that found a broken indigent defense system to “an extent that ‘the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.’”² In this decision, the Court intended a strong message to the nation: “If you’re not running a public defense system that complies with the constitution, you’d better fix it.”

There are three types of indigent defense models used throughout the United States. They are: “1) public defender systems; 2) assigned counsel; and 3) contract counsel.”³ The type discussed mainly in this Note is the public defender model. The state or county is the primary funding source in the public defender model.⁴

A public defender’s job is to represent indigent defendants. “Indigent defense involves the use of publicly financed counsel to represent criminal

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¹ Stephanie L. McAlister, Note, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender’s Office and the Resulting Ethical Double Standard*, 64 U. MIAMI L. REV. 1317, 1351 (2010).

² Federal Court Finds Public Defense System Violates Constitutional Rights of Indigent Defendants, ACLU (Dec. 5, 2013), <https://www.aclu.org/criminal-law-reform/federal-court-finds-public-defense-system-violates-constitutional-rights> [hereinafter ACLU].

³ Heather Baxter, *Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 348.

⁴ *Id.*

defendants who are unable to afford private counsel.”⁵ “There is *no* lawyer that becomes a public defender to disserve their clients.”⁶ Effective representation is difficult to achieve without proper resources, funding, and caseload management.

Too often, indigent defendants are represented by an overworked public defender who is unable to dedicate sufficient time, focus, and resources to each case. As a result, public defense systems have become little more than a “meet and plead” system.⁷ The “meet and plead” system is parlance for when public defenders meet with their client for only a brief period of time before encouraging them to plead guilty in attempt to dispose quickly of the case.⁸

This was not the indigent defense system the nine United States Supreme Court Justices envisioned in handing down the landmark *Gideon v. Wainwright* decision in 1963. “The right to be represented by an attorney if you can’t afford one is essential to ensuring that everyone—rich and poor alike—has a fair chance to defend themselves in court.”⁹ Research shows the amount of time a public defender spends on cases annually differs greatly from the recommendations.¹⁰ Representing indigent defendants should be more than a formality. U.S. District Court Judge Robert Lasnik wrote, “[t]he appointment of counsel . . . for the most part . . . little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant.”¹¹ Judge Lasnik and the U.S. District Court stated there needs to be effective counsel from a properly prepared public defender in order to ensure the “fundamental right to assistance of counsel.”¹²

The growing indigent defense system crisis remains a national problem, not limited to any one state. The nationwide problem consists of “too little money, too few attorneys, and too many defendants.”¹³ While the crisis of indigent defense funding is not a novel concept,¹⁴ the majority of defendants who make their way through the criminal justice system today are represented by public defenders,¹⁵ thus impacting the majority of criminal

⁵ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE, STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000), <http://perma.cc/QS55-7YG2>.

⁶ Hannah Levintova et al., *Charts: Why You’re in Deep Trouble if You Can’t Afford a Lawyer*, MOTHER JONES (May 6, 2013), [available at http://perma.cc/UWN2-S9WU](http://perma.cc/UWN2-S9WU).

⁷ ACLU, *supra* note 2.

⁸ Levintova, *supra* note 6.

⁹ ACLU, *supra* note 2.

¹⁰ Levintova, *supra* note 6.

¹¹ ACLU, *supra* note 2.

¹² *Id.*

¹³ McAlister, *supra* note 1, at 1324.

¹⁴ Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, 36 CHAMPION 38, 38 (2012) [hereinafter Klein, *The Role of Defense Counsel*].

¹⁵ *Id.*

cases. For these reasons, a positive solution needs to be found that addresses the longstanding and current issues.

Scholars have often addressed the disparity in resources, pay, and caseloads between public defenders and prosecutors. The issue, however, has yet to be resolved. In fact, the disparity may be growing as public defender resources dwindle and caseloads increase.¹⁶ Adequate representation of indigent defendants remains on the forefront of discussion topics, and improvements to the system are essential. Our legal system is founded on the promise of a fair trial. This promise fails when defendants do not receive the counsel they are constitutionally required to receive.

This Note will expand upon previous scholarship on the indigent defense system. First, this Note will discuss the right to counsel in a criminal trial. Second, it will discuss the American Bar Association Standards as they relate to a Public Defense Delivery System. Third, it will discuss disadvantages public defenders have compared to prosecutors, including a disparity in resources, funding, and caseloads. Fourth, it will compare and contrast the Indiana and Florida public defender systems. Finally, it will offer recommendations to improve Indiana's public defender system. This Note will offer that Indiana use Florida's public defender system as a model and propose that putting resources into the criminal justice system on the front end will benefit society in the long term.

The United States has an adversarial system of justice "designed to ensure that the guilty are convicted and the innocent are not, that people are treated fairly, that persons of similar circumstances are treated the same, and that when the court is properly constituted, there is a prosecutor, a defense attorney, and a judge."¹⁷ The promise of this system cannot be kept without properly functioning players, including an effective indigent defense system.

II. HISTORY: THE RIGHT TO COUNSEL IN A CRIMINAL TRIAL

Criminal defendants have always had the right to an attorney, but not at public expense. The requirement of representation of counsel in criminal trials has only been around for a little over fifty years.¹⁸ *Gideon v. Wainwright* was the most significant right to counsel decision handed down by the United States Supreme Court.¹⁹ With its decision in *Gideon v. Wainwright*, the Supreme Court interpreted Sixth Amendment language,

¹⁶ Levintova, *supra* note 6.

¹⁷ Roberta M. Gubbins, A Public Defense System for Michigan's 21st Century, INGHAM COUNTY LOCAL NEWS, <http://www.michigancampaignforjustice.org/docs/Ingham%20County%20Legal%20News.pdf>.

¹⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹ History of Right to Counsel, NAT'L LEGAL AID & DEFENDER ASS'N. (Jan. 24, 2014, 3:24 PM), http://www.nlada.org/About/About_HistoryDefender [hereinafter History of Right to Counsel].

“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”²⁰ The Court unanimously held that an indigent person accused of a serious crime was entitled to the appointment of defense counsel at state expense.²¹ Justice Black, writing for the Court, reasoned, “in our adversary system of criminal justice, 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.”²² Justice Black continued:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.²³

These strong words mean a lot to indigent defendants in our country. Eventually, after *Gideon*, the Supreme Court expanded the right to counsel to juveniles²⁴ and to misdemeanor cases.²⁵ From these monumental case decisions, our nation’s public defender agencies evolved.

Of course, some states had already grappled with the issue. Prior to *Gideon*, the Indiana Supreme Court decided the case of *Webb v. Baird*.²⁶ In this case, the Indiana Supreme Court “recognized a right to an attorney at public expense for an indigent person accused of crime, grounded in ‘the principles of a civilized society’ not in constitutional or statutory law.”²⁷ While Indiana recognized the right to counsel for indigent defendants in the middle of the nineteenth century, it was not until *Gideon* that other states followed suit. Previously many states “relied only on the volunteer pro bono efforts of lawyers to provide defense for poor people accused of even the most serious crimes.”²⁸ It was *Gideon* that shifted the public defender system of our entire nation. In response to *Gideon*, states began establishing their own public defender systems. These systems varied drastically from each other.

²⁰ *Gideon*, 372 U.S. at 339.

²¹ History of Right to Counsel, *supra* note 19.

²² *Gideon*, 372 U.S. at 344.

²³ *Id.*

²⁴ *In Re Gault*, 387 U.S. 1 (1967).

²⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

²⁶ *Webb v. Baird*, 6 Ind. 13 (1854).

²⁷ History of Right to Counsel, *supra* note 19.

²⁸ *Id.*

While the right to counsel has been established as “one of the safeguards of the Sixth Amendment deemed necessary to insure the fundamental human rights of life and liberty,”²⁹ these fundamental rights are at risk. The level of funding for indigent defense systems in the United States “has reached the crisis level and threatens the effective implementation of the Sixth Amendment right to counsel.”³⁰ The indigent defense crisis must be improved because it is fundamental and essential to a fair trial.³¹

III. STANDARDS AND PRACTICES

In 2002, the American Bar Association (ABA) made an attempt to improve public defender systems nationwide. The ABA House of Delegates approved the “ABA Ten Principles of a Public Defense Delivery System.”³² The ten principles include:

- (1) The public defense function, including the selection, funding, and payment of defense counsel, is independent;
- (2) Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar;
- (3) Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel;
- (4) Defense counsel is provided sufficient time and a confidential space within which to meet with the client;
- (5) Defense counsel’s workload is controlled to permit the rendering of quality representation;
- (6) Defense counsel’s ability, training, and experience match the complexity of the case;
- (7) The same attorney continuously represents the client until completion of the case;
- (8) 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;
- (9) Defense counsel is provided with and required to attend continuing legal education;
- (10) Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted

²⁹ Gideon, 372 U.S. at 343.

³⁰ Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13 (1994).

³¹ Gideon, 372 U.S. at 344.

³² NORMAN LEFSTEIN, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

standards.³³

While it is up to each state to determine their own standards for a public defender system, the ABA suggests each state adhere to these standards in order to maintain an effective public defender system. These principles act “as a practical guide for governmental officials, policymakers, and other parties who are challenged with creating and funding new, or improving existing, public defense delivery systems.”³⁴ While states and localities have adopted these standards in different ways, the “[s]tandards are the most effective means of ensuring uniform quality of indigent defense services.”³⁵ The more closely jurisdictions follow these standards, the more likely we will have a more uniform system throughout the United States.

IV. PUBLIC DEFENDERS V. PROSECUTORS: RESOURCES, FUNDING, AND CASELOADS

A. *Introduction*

While they represent opposing parties, as public servants, prosecutors and public defenders share an obligation to serve the community they represent. However, public defenders are often at a disadvantage to prosecutors when it comes to resources, funding, and caseloads. “Today’s public defenders are underfunded and overburdened. The caseloads and workloads have risen to crushing levels in recent years, and caps on funding both for individual cases and for overall compensation levels have effectively rendered many lawyers ineffective.”³⁶ While there are numerous arguments about why there is such a resource disparity between prosecutors and public defenders, some claim it may be attributed to “the political unpopularity of criminal defendants and their lack of financial and political capital, state legislatures are unlikely to allocate significant attention or resources to the problem of indigent defense, leaving courts with the task of creating a constitutionally mandated remedy.”³⁷

³³ *Id.*

³⁴ *Id.*

³⁵ NAT’L LEGAL AID & DEFENDER ASS’N, REPORT OF THE 1999 SYMPOSIUM ON INDIGENT DEFENSE (Published Mar. 2000 from *Indigent Defense*, Oct./Nov. 2000, Vol. 4, No. 2), available at http://www.nlada.org/Defender/Defender_IndigentDef/NLADA/Defender/Defender_IndigentDef/Publications/Indigent_Defense/OctNovArticle4.

³⁶ Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731–32 (2005) [hereinafter *Effectively Ineffective*].

³⁷ *Id.*

B. Resources and Funding

A properly functioning criminal justice system requires sufficient resources. One of the largest obstacles in providing proper defense for indigent defendants is funding.³⁸ When discussing funding, another issue that must be raised is the disparity in many states between the funding of counsel to represent indigent defendants and the offices that prosecute those defendants.³⁹ Public defense agencies often lack proper budgets to properly represent their clients. “Perhaps the most pervasive problem affecting indigent defendants, however, is not that their lawyers are incompetent, but that those lawyers lack adequate resources to defend their clients.”⁴⁰

The discrepancy between the resources available to the prosecutor and those for counsel for the indigent is profound. The prosecutor has not only the tools of an office that is better funded and well-staffed with paralegals and legal assistants, but typically has police department investigators and laboratory technicians available as well. Eighty percent of prosecutions nationwide are against indigents who are represented by a public defender’s office, a private non-for-profit corporation such as a legal aid society, or court-appointed private attorneys.⁴¹ Inadequately funded public defender agencies are a disservice to the many clients they are expected to serve. The ABA has considered the funding for criminal defense services as “shamefully inadequate and found that the system ‘lacks fundamental fairness and places poor persons at constant risk for wrongful conviction.’”⁴²

Not only do public defenders have fewer resources than prosecutors when it comes to staffing, investigators, and laboratory technicians, there is also a salary discrepancy between the two.⁴³ “[I]n many jurisdictions, the salaries of public defenders are well below those of prosecutors.”⁴⁴ This disparity is in violation of the standards set forth by the ABA.

Salary parity between prosecutors and defenders is a central component of all national standards and is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. The concept of parity encompasses all resource allocations, including staffing and workloads,

³⁸ Baxter, *supra* note 3, at 349.

³⁹ *Id.*

⁴⁰ *Effectively Ineffective*, *supra* note 36.

⁴¹ Klein, *The Role of Defense Counsel*, *supra* note 14.

⁴² Maureen McGough, Indigent Defense: International Perspectives and Research Needs, NATIONAL INSTITUTE OF JUSTICE, available at <http://www.nij.gov/journals/268/Pages/defense.aspx>.

⁴³ Baxter, *supra* note 3, at 363.

⁴⁴ *Id.*

support staff, investigative and expert services, and technology, as well as access to Federal grant programs and student loan forgiveness options.⁴⁵

The funding discrepancy is widely apparent in Indiana. The county ultimately funds public defender services. The county auditor controls disbursement of funds received from the state. The only state funding county public defender agencies receive is flow-through money from the county auditor. County public defender agencies must comply with standards to receive these funds. On the other hand, the state directly funds the prosecutors' budget, totaling \$26.9 million in salaries and benefits.⁴⁶

If public defenders are provided adequate support staff, supplies, investigators, interns, research tools, technology, and training, they will be on a more level playing field with the prosecution. The level playing field helps public defenders in preparation for and during trial. When public defender agencies offer better salaries to their employees, turnover rates are likely to be reduced. One "problem that results from low compensation is the difficulty in attracting qualified attorneys to act as court-appointed counsel for the indigent."⁴⁷ It may be argued that higher retention of employees may lead to more knowledgeable, well-trained, successful employees. In turn, this has an effect on client representation.

In addition to retention of qualified public defenders, "[i]nadequate funding has created a situation wherein overburdened counsel cannot possibly provide competent representation to all of the clients they are assigned to represent."⁴⁸ Prosecutor office spending largely outweighs that of public defender offices. "In 2007, total spending by state prosecutors nationwide exceeded that of public defender offices by nearly \$3.5 billion."⁴⁹ Proportionate funding allocation for public defenders would greatly impact their ability to represent their clients.

While the exact reason for funding discrepancy is unclear, some believe it may be attributed to the perception that "public defenders represent people who commit the most heinous crimes. There's a sense of, 'Why would I fund a lawyer to help get a rapist or murderer out of prison?'"⁵⁰ However, the reality is that only a small portion of funding goes to the most violent

⁴⁵ Klein, *The Role of Defense Counsel*, *supra* note 14.

⁴⁶ IND. PUB. DEF. COMM'N, 2012-13 ANN. REP., *available at* <http://www.in.gov/judiciary/pdc/files/pdc-ann-rpt-12-13.pdf>.

⁴⁷ Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 365 (1993) [hereinafter Klein, *The Eleventh Commandment*].

⁴⁸ *Id.* at 363.

⁴⁹ Levintova, *supra* note 6.

⁵⁰ *Id.*

criminals.⁵¹ “Considering that 80 percent of defendants can’t afford lawyers, the reality is quite different. ‘The vast majority of people who public defenders represent are those we see every day.’”⁵² Most indigent defendants are not necessarily charged with violent crimes.

Funding issues within the indigent defense system is not a new phenomenon. “Problems began to occur shortly after Gideon placed the unfunded mandate on the states to provide counsel whenever a defendant was charged with a serious offense.”⁵³ Indigent defense funds are lower than those provided to the rest of the criminal justice system. “Public defense budgets are paltry compared to spending on the other side of the criminal justice system—prosecution, police, and corrections.”⁵⁴

In a 2008 ranking of states, Indiana was one of the lowest spenders on public defense per capita.⁵⁵ To combat funding issues, Indiana established the Public Defense Fund in 1989 pursuant to I.C. 33-9-14.⁵⁶ The “[f]und was established to ease the counties’ burden of the costs associated with indigent defense legal representation in capital and other cases and to improve delivery of these services by requiring compliance with the Indiana Public Defender Commission’s Standards.”⁵⁷ Indiana public defender offices receive the majority of their funding from the county, not the state. “The reimbursement from the state’s Public Defense Fund is the only state level funding provided for indigent defense services.”⁵⁸

The funding discrepancy between prosecutor’s offices and public defender’s offices in Indiana is illustrated by the appropriation of funds by the Indiana General Assembly. Recently, the General Assembly has afforded a larger amount of money to prosecutors than public defenders.⁵⁹

During fiscal years 2011/2012 and 2012/2013, the Indiana General Assembly appropriated \$20 million to the Public Defense Fund for distribution to the counties. In the FY 2013/2015 biannual budget, the General Assembly increased the Public Defense Fund to \$22 million. By way of comparison, in the FY 2013/2015 biannual budget the General Assembly appropriated \$28,643,667 and

⁵¹ *Id.*

⁵² *Id.*

⁵³ Klein, *The Role of Defense Counsel*, *supra* note 14.

⁵⁴ Levintova, *supra* note 6.

⁵⁵ *Id.*

⁵⁶ IND. PUB. DEF. COMM’N, 2011–12 ANN. REP., *available at* <http://www.in.gov/judiciary/pdc/files/pdc-ann-rpt-11-12.pdf>.

⁵⁷ Deborah A. Neal & Lilla G. Judson, *Lawmakers Boost Public Defense Funding*, *IND. COURT TIMES* (Jun. 24, 2013), <http://indianacourts.us/times/2013/06/lawmakers-boost-public-defense-funding/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

\$29,299,933 for chief and deputy prosecutors' salaries and benefits for each of the budget years.⁶⁰

The Public Defense Fund, based on compliance with standards, is a step in the right direction to address narrowing the funding gap between prosecutors and public defenders. It helps ease the burden of the costs associated with providing a proper defense for indigent defendants. However, a fully state-funded program, which puts prosecutors and public defenders on equal footing, is more desirable.

Funding issues carry with them other problems, including increased caseloads. "Indigent defense systems nationwide are chronically underfunded, forcing individual lawyers to carry excessive caseloads."⁶¹ This affects the public defender in many ways. "The underfunding of the public defender specifically affects the obligations relating to competence, diligence, communication with clients, and conflicts of interest."⁶² These effects are detrimental not only to the public defender, but also to the clients they serve.

C. Excessive Caseloads

Since *Gideon*, the prison population has increased, and so have public defender caseloads.⁶³ "America's prison population has grown more than tenfold from 217,000 inmates to 2.3 million."⁶⁴ It has been difficult for the public defense system to keep up with this increase. "The lack of adequate funding for indigent defense services is sorely lacking and, therefore, many defenders have such extensive caseloads as to bring into doubt whether the mandate of *Gideon* has been met."⁶⁵

Establishing a proper caseload for public defenders is a daunting task, however, some have attempted to tackle the issue. "Joint weighted caseload studies are collaborations among courts, prosecutors, and public defenders on a shared methodology for projecting caseloads and resource needs, which can improve planning and budgeting for the entire system."⁶⁶ These studies illustrate the need for all members of the justice system to work together to manage caseloads.

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) has added recommendations to combat caseload issues. The

⁶⁰ *Id.*

⁶¹ McAlister, *supra* note 1, at 1323.

⁶² *Id.* at 1318.

⁶³ Levintova, *supra* note 6.

⁶⁴ *Id.*

⁶⁵ Klein, *The Role of Defense Counsel*, *supra* note 14.

⁶⁶ NAT'L LEGAL AID & DEFENDER ASS'N REPORT OF THE 1999 SYMPOSIUM ON INDIGENT DEFENSE, *supra* note 35.

NAC has “recommended that full-time public defenders accept a maximum of 150 felony cases in a year.”⁶⁷ These standards were established in 1973, and while they are only national recommendations, many argue these numbers are still imperfect.⁶⁸ These numbers were established when the number of defendants in our criminal justice system were much lower. John Gross of the National Association of Criminal Defense Lawyers (NACDL) says, “[m]any of us don’t consider them to be realistic if you expect quality representation.”⁶⁹ Gross continues, noting the recommendations were established over thirty years ago when criminal cases were less complex than today.⁷⁰ “And even so, these recommended caseload limits are consistently exceeded in public defenders’ day-to-day practice. On average, a public defender would need about 3,035 work hours—a year and a half—to do a year’s worth of work.”⁷¹ In order to meet this standard and to provide adequate assistance to the nation’s indigent defendants, approximately 6,900 additional public defenders would be needed to complete the current caseload. It is no wonder that many well-meaning defense lawyers are sucked into a “meet ‘em and plead ‘em” routine.”⁷² Standards need to be revised to reflect today’s caseloads.

Excessive caseloads often require attorneys to continue their cases or try cases without proper preparation. “Worse yet, they can lead to mistakes that seriously affect a client’s right to counsel and liberty.”⁷³ In one unfortunate situation, a criminal defendant agreed to a plea of 2.6 years in prison for his crime of theft. It was later realized, however, that the minimum sentence allowed was one year.⁷⁴ If his defense attorney had time to check the minimum sentence calculation, it is likely his client would not have agreed to such a high prison sentence.⁷⁵ This is a prime example of a public defender not having the time to research his client’s case.

D. Public Defenders Do More Than “Work Cases”

While public defender caseloads are rising, there are other duties in public defenders’ work beyond cases. Caseload numbers often fail to account for time spent on other essential tasks that keep an office running. This includes time spent “on administrative tasks, attending training sessions,

⁶⁷ McAlister, *supra* note 1, at 1330.

⁶⁸ Levintova, *supra* note 6.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (2009), available at www.constitutionproject.org.

⁷⁴ *Id.*

⁷⁵ *Id.*

fulfilling supervisory responsibilities, or consulting with colleagues about each other's cases—all tasks that are essential to keep a defender's office functioning, but that detract from time spent working on clients' cases and are not taken into account in determining caseloads."⁷⁶ There are many factors that contribute to the caseload of a public defender. Some of the factors that increase a public defenders caseload include:

- (1) the need for interpreters to interview clients and witnesses (and the unavailability of those interpreters),
- (2) the remote locations of clients detained pretrial and the amount of driving time to reach such facilities,
- (3) the waiting time at such detention facilities because of a lack of jail staff to escort clients and interview rooms,
- (4) the scheduling of cases 'off-week' so that days when attorneys should be preparing cases are instead spent in court,
- (5) the practice of having private counsel cases heard before [public defender] cases on calendar (resulting in assistant public defenders waiting in court),
- (6) the (over)charging decisions of the [prosecutor],
- (7) waiting in court for specialized prosecutors to appear, and
- (8) the lack of experienced prosecutors in the courtrooms, requiring . . . supervising prosecutors' [involvement] in plea negotiations.⁷⁷

This list is by no means exhaustive. In order to create an accurate representation of the day-to-day tasks of a public defender, these additional tasks need to be accounted for in assessing a proper caseload.

E. Disadvantage to Clients

Excessive caseloads serve as an extreme disadvantage to the clients public defenders represent. When a public defender has a large caseload, he "does not have time to visit crime scenes or to 'fully prepare' for depositions, and . . . does 'very little' investigation into [their] clients' cases . . ."⁷⁸ The burden of an excessive caseload may force a public defender to waive their clients' right to a speedy trial by asking for a continuance.⁷⁹ Even worse, a public defender without sufficient time to research their clients' case may forego any research at all and proceed to trial without proper knowledge of the case. This "can lead to mistakes that seriously affect a client's right to counsel and liberty."⁸⁰

⁷⁶ McAlister, *supra* note 1, at 1331.

⁷⁷ *Id.* at 1331–32.

⁷⁸ *Id.* at 1336.

⁷⁹ *Id.*

⁸⁰ *Justice Denied*, *supra* note 73.

When a public defender is unable to do legal and factual research into their case, this could mean the difference between a guilty verdict and an acquittal, or having leverage during the plea agreement stage. In these situations, inadequate or unprepared counsel may prove as harmful for indigent clients, as nearly equivalent to having no counsel at all, rendering the promise of *Gideon* unfulfilled.

F. Ethical obligations

Excessive caseloads often challenge a public defender's professional obligations to effectively represent a client, and may cause an ethical dilemma in the eyes of a public defender.⁸¹ One public defender wrote,

Inadequate resources cause an ethical stir amongst public defenders. You can't give me too many cases, too many clients, too many prosecutors, and then tell me I have to conduct a farce of a trial when you know I am not ready. A system that will force me to betray my client by failing to represent him adequately at trial, is a system I won't play along with. You can't make me fail my client.⁸²

This emotional discourse is only one representation of the ethical dilemma public defenders face on a regular basis in representing their clients.

Like all attorneys, a public defender has a professional commitment to provide each and every client with effective counsel. "In a formal ethics opinion, the ABA's Standing Committee on Ethics and Professional Responsibility advises lawyers who represent indigent defendants to refuse to accept new cases or to withdraw from existing ones when the lawyers' caseload prevents them from providing 'competent and diligent' representation to their clients."⁸³ Unfortunately, this practice is not the reality in most jurisdictions. Generally, it would not be acceptable to withdraw from cases. Instead, the reality is that not accepting new cases or withdrawing from existing cases may lead to a public defender losing their job. However, one Florida jurisdiction received relief from the court. "The court ruled that the Miami-Dade public defender's office could withdraw from a number of cases because the office is simply too overworked."⁸⁴ While this situation seems to be an anomaly, it may be the beginning of a trend in favor of public defenders.

⁸¹ *The Revolution Needs Lawyers*, PUBLIC DEFENDER REVOLUTION BLOG (Feb. 19, 2010), <http://pdrevolution.blogspot.com/2010/02/revolution-needs-lawyers.html>.

⁸² *Id.*

⁸³ McAlister, *supra* note 1, at 1342.

⁸⁴ Ashby Jones, *Public Defenders Get a Break in Florida*, WALL ST. J., May 28, 2012.

G. Inexperienced Attorneys

Excessive caseloads may also lead to rookie attorneys, straight out of law school, handling cases in matters when they are too inexperienced and unprepared. "Excessive caseloads within a defender program also increase the likelihood that inexperienced attorneys will be forced to handle serious cases for which they are not fully qualified."⁸⁵ In some Indiana jurisdictions, a prosecutor's office will likely have two prosecutors sitting on a felony case, whereas the public defender's office only has one inexperienced public defender on the other side trying the same felony case. While this may serve as a training tool for an inexperienced prosecutor sitting second chair to an experienced prosecutor, it is highly detrimental to an inexperienced public defender, fresh out of law school, who does not have the benefit of working with and learning from a more seasoned co-counsel.

H. Role of the Prosecutor and the Courts

The rate at which prosecutors charge cases also plays a role in creating an excessive caseload for public defenders. Prosecutors have an immense amount of discretion over filing charges. When prosecutors engage in the practice of overcharging, it increases the amount of cases a public defender has and adds to the burden public defenders face in handling their caseloads. This is not to say that prosecutors are at any fault for filing charges, but an examination of alternative measures, such as pretrial diversion, for first-time offenders and minor, non-violent crimes may be more appropriate.

In addition to pressure from prosecutors, public defenders also feel pressure from the courts. Courtrooms are often dynamic places where there is an abundance of activity and a large amount of cases on the docket.

Trial courts may not only reinforce appointed counsel's inclination to do a minimal amount of work per case, but at times may feel compelled to explicitly remind counsel that, due to the overwhelming need and the limited number of counsel for the indigent, large amounts of time should not be spent on any one case.⁸⁶

Pressure from prosecutors and the court can increase the caseload as well as the stress level of public defenders.

⁸⁵ *Justice Denied*, *supra* note 73; *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1135 (Fla. 1990).

⁸⁶ Klein, *The Eleventh Commandment*, *supra* note 47, at 368-69.

V. INDIANA

Indiana Courts defer to the Indiana Code in determining the indigency of a defendant. According to Ind. Code 35-33-7-6, prior to the completion of the initial hearing, the judge determines whether a person requesting counsel is indigent.⁸⁷ If the judge determines the defendant is indigent, the judge then assigns counsel.⁸⁸ While the court appoints an attorney, a fee may be imposed if the court finds the defendant able to pay part of the cost of representation by the assigned counsel.⁸⁹ The judge-imposed fees vary depending on whether the crime is a misdemeanor or felony.⁹⁰ In addition to making the initial indigency determination, the court has the authority to review indigency at any point during the proceedings.⁹¹ Nevertheless, if jurisdiction over a defendant is transferred to a new court, it is the duty of the new court to assign counsel to represent the indigent defendant immediately upon receiving jurisdiction over that defendant.⁹²

A. Indiana Prosecuting Attorney's Council

The Indiana Prosecuting Attorney's Council (IPAC) "is a non-partisan, independent state judicial branch agency and was created by statute in 1973. It is made up of Indiana's 91 prosecuting attorneys and their chief deputies and governed by a 10 member Board of Directors chosen from among the state's prosecuting attorneys."⁹³ Although it does not provide legal representation, IPAC serves as a valuable resource to prosecutors throughout the state of Indiana. "The IPAC assists prosecuting attorneys by preparing manuals, providing legal research, and conducting training seminars. It serves as a liaison to local, state, and federal agencies, study commissions, and community groups in an effort to support law enforcement and promote the fair administration of justice."⁹⁴

B. Indiana Public Defender Council

The Indiana Public Defender Council is the public defender's counterpart to the prosecutor's IPAC. Established in 1977, the Council—with a mission to improve legal representation provided at public expense—has grown to nearly 1100 members and is governed by an eleven member Board

⁸⁷ Ind. Code § 35-33-7-6 (2004).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ INDIANA PROSECUTING ATTORNEYS COUNCIL, available at www.in.gov/ipac/.

⁹⁴ *Id.*

of Directors.⁹⁵ Like IPAC, the Indiana Public Defender Council does not provide legal representation.⁹⁶ Rather, the Council is a judicial branch agency that was created to provide support to attorneys representing criminal defendants in Indiana.⁹⁷

C. Indiana Public Defender Commission

The Indiana Public Defender Commission was created by statute in 1989 under Public Law 284-1989.⁹⁸ “Indiana has created a public defender Commission with some responsibility of the delivery of indigent defense services at the trial level; however, there is no state public defender.”⁹⁹ While each county in Indiana funds and manages its own separate public defender system, the Commission “was created in 1989 to set uniform standards for public defender services.”¹⁰⁰

Before the Commission was established, the public defender system in Indiana “was organized at the county level, with no consistency from county to county and no real accountability.”¹⁰¹ The Commission has worked to create some uniformity amongst Indiana’s counties. The Commission meets four times each year “to review claims, authorize reimbursement to eligible counties and discuss issues in keeping with the Supreme Court and the Legislature’s intent to provide the highest quality indigent criminal defense possible.”¹⁰²

The Commission was originally made up of seven members. However, “in P.L. 283-1993, the General Assembly added four legislators to the Commission.”¹⁰³ The current make-up of the eleven member Commission is as follows: three members are appointed by the Indiana Governor, three are appointed by the Chief Justice of the Indiana Supreme Court, one is appointed by the Indiana Criminal Justice Institute, and four are members of the Indiana Legislature—two members of the House of Representatives are appointed by the Speaker of the House, and two members of the Senate are

⁹⁵ INDIANA PUBLIC DEFENDER COUNCIL, available at www.in.gov/ipdc/.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ IND. JUDICIAL BRANCH DIV. OF STATE COURT ADMIN., PUBLIC DEFENDER COMM’N, available at <http://www.in.gov/judiciary/pdc/>.

⁹⁹ Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995).

¹⁰⁰ Indiana: Standards Tied to State Funding in Non-Capital and Capital Cases, NAT’L LEGAL AID & DEFENDER ASS’N. (Jan. 24, 7:72 PM) http://www.nlada.org/Defender/Defender_Standards/Standards_Attach2.

¹⁰¹ Spangenberg & Beeman, *supra* note 99.

¹⁰² IND. JUDICIAL BRANCH DIV. OF STATE COURT ADMIN., PUBLIC DEFENDER COMM’N, *supra* note 98.

¹⁰³ IND. PUB. DEF. COMM’N, 2011–12 ANN. REP., *supra* note 56.

appointed by the President pro tempore of the Senate.¹⁰⁴

The Commission has mandates it is required to follow under the Indiana Code.¹⁰⁵ The Commission's primary purposes are to:

1. Make recommendations to the Indiana Supreme Court concerning standards for indigent defense services provided for defendants against whom the state has sought the death sentence . . . [d]etermining indigency and eligibility for legal representation. . . .
2. Adopt guidelines and standards for indigent defense services under which counties are eligible for reimbursement
3. Make recommendations concerning the delivery of indigent defense services in Indiana.
4. Make an annual report to the Governor, the General Assembly, and the Supreme Court on the operation of the public defense fund.¹⁰⁶

The Commission has a large responsibility in ensuring effective indigent defense representation throughout the State of Indiana. Therefore, they have been tasked with a plethora of duties.

Since 1989, The Indiana Public Defender Commission has served to recommend standards for indigent defense in capital cases, to adopt guidelines of salary and fee schedules for individual county reimbursement eligibility, and to review and approve requests for reimbursement in capital cases. In 1993, the responsibility of the Commission was expanded to include the adoption of guidelines and standards for county reimbursement eligibility in non-capital cases. The Division of State Court Administration provides administrative and support for the Commission.¹⁰⁷

While these organizations are a key component to the Indiana criminal justice system, more can be done to improve the quality of representation provided for indigent defendants. Meanwhile, other states have employed a variety of tactics to improve indigent defense systems. Florida, in particular, has experienced success in this area, and offers a compelling model for Indiana to follow.

¹⁰⁴ IND. JUDICIAL BRANCH DIV. OF STATE COURT ADMIN., PUBLIC DEFENDER COMM'N, *supra* note 98.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

VI. FLORIDA

A. *Florida Public Defender Association*

The mission of the Florida Public Defender Association is more equivalent to the mission of the Indiana's Public Defender Council: "The Public Defender protects the constitutional and statutory rights of all citizens through the effective criminal legal representation of court appointed clients."¹⁰⁸ The Florida Public Defender Association has been in existence longer than the Indiana Public Defender Council. "Founded in 1974, the Florida Public Defender Association, Inc. and the Florida Public Defenders Coordination Office has been proudly providing training, support, and services to the Public Defenders, Assistant Public Defenders, Investigators, Administrators, and support staff of the state of Florida."¹⁰⁹

The Association does not employ any attorneys and cannot provide legal advice.¹¹⁰ Florida's Statute 27.50 sets out the framework for public defenders.¹¹¹

For each judicial circuit, there shall be a Public Defender who shall be and shall have been for the preceding 5 years, a member in good standing of The Florida Bar. The Public Defender shall be elected at the general election, for a term of 4 years, by the qualified electors of the judicial circuit. The Public Defender shall be an elector of the state and shall reside within the territorial jurisdiction of the judicial circuit in which he or she serves.¹¹²

The Florida Public Defender Association has also created a system to handle conflict of interest cases. "Before 2007, private attorneys were appointed from a registry to represent indigent defendants when the local public defender's office had a conflict of interest. That year, the Legislature created a system of regional offices, the Office of Criminal Conflict and Civil Regional Counsel, to handle such conflict cases."¹¹³

The Florida Supreme Court has been rather progressive in their support of the Florida Public Defender Association. "In 1990, the Florida Supreme

¹⁰⁸ PUBLIC DEFENDERS: FLA. PUBLIC DEFENDER ASS'N, INC. (2013), <http://www.flpda.org/wordpress/>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 2003–04 Criminal Justice Directory, *Diamond R. Litty, Public Defender: 19th Circuit Public Defender's Office*, http://www.pd19.org/PD%20Links/florida_public_defenders_07.html (last visited Jan. 24, 6:31 PM).

¹¹² PUBLIC DEFENDERS: FLA. PUBLIC DEFENDER ASS'N, INC., *supra* note 108.

¹¹³ McAlister, *supra* note 1, at 1326.

Court . . . found that the large workload and enormous backlog of appellate cases of public defenders, caused the “woefully inadequate funding of the public defenders’ offices,” was a “crisis situation of constitutional dimensions, requiring a systematic response.”¹¹⁴ In recognizing this crisis, the Florida Supreme Court addressed the caseload issue head-on. “The Florida Supreme Court concluded that the excessive caseloads were requiring public defenders to choose between the rights of clients, creating a conflict of interest and a violation of the right to counsel.”¹¹⁵ This was not something the court wanted lawyers to choose between, so the court offered a remedy. “To remedy the situation, the court ordered lower courts to appoint alternate counsel upon public defender motions to withdraw and stated that the legislature should appropriate funds for a ‘massive employment of the private sector on a one-shot basis.’”¹¹⁶ Another way Florida public defenders have managed to get around excessive caseloads is allowing public defenders to withdraw from cases.¹¹⁷ This was a novel concept.

VII. COMPARATIVE

A. Funding

One major way the Indiana and Florida public defender systems differ is in their source of funding. Indiana’s source of indigent defense funding is primarily—more than 50 percent—County funding¹¹⁸, whereas, Florida’s indigent defense system is a largely state funded program.¹¹⁹

1. Indiana Funding

In Indiana, “local jurisdictions within the state are authorized by statute to determine the type of program (public defender, assigned counsel, contract) that best suits their needs within the promulgated guidelines. They can operate the program independently at the local level.”¹²⁰ When the system was created, “each county system was given local autonomy, some state resources and independence from the judiciary.”¹²¹ While the counties are responsible for the majority of the public defense funding in Indiana, the “state’s Public Defense Fund is the only state level funding provided for

¹¹⁴ *Justice Denied*, *supra* note 73.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Jones, *supra* note 84.

¹¹⁸ *Justice Denied*, *supra* note 73.

¹¹⁹ *Id.*

¹²⁰ Spangenberg & Beeman, *supra* note 99.

¹²¹ Indiana: Standards Tied to State Funding in Non-Capital and Capital Cases, *supra* note 100.

indigent defense services.”¹²²

The Public Defense Fund pays some reimbursement to the counties.¹²³ This Fund “is the only state assistance given to the counties for their expenditures in providing indigent defense services.”¹²⁴ While Indiana’s counties pay for the majority of indigent defense, they devised a scheme “whereby any county that can show that it has developed a comprehensive plan to provide indigent defense services meeting the standards developed by the Indiana Public Defender Commission will receive [partial] state reimbursements . . .”¹²⁵ Fifty-three of Indiana’s ninety-two Counties are eligible to receive partial reimbursements from the Public Defense Fund in specific cases if they “meet statutory requirements and standards promulgated by the Indiana Public Defender Commission.”¹²⁶

The Public Defense fund offers relief to counties participating in the reimbursement program.¹²⁷ “In 1993, the General Assembly . . . authorized reimbursement from the public defense fund of 25 percent of a county’s net expenditures in non-capital cases.”¹²⁸ However, the percentage of reimbursement has since increased. “Effective July 1, 1997, the reimbursement level in non-capital cases was amended to provide 40 percent reimbursement of defense services in non-capital cases, except misdemeanors.”¹²⁹

While state reimbursement was rising, so too were defense costs. “In 2012, the total public defense costs in Indiana were in excess of \$71 million.”¹³⁰ In order for an Indiana county to receive reimbursement from the state for defense expenses, “a county must adopt a comprehensive plan for the delivery of indigent defense services approved by the Commission and comply with standards adopted by the Commission as authorized by state statute.”¹³¹ While not all Indiana counties participate in the reimbursement program, “[a]pproximately 67% of the state’s population resides in counties eligible for noncapital reimbursement.”¹³²

While the funding scheme in Indiana has room for improvement, Indiana’s method of indigent defense funding has been used as a positive example for other states. In 2000, U.S. Attorney General Janet Reno used Indiana as an example for indigent defense funding. “[Indiana] now

¹²² Neal & Judson, *supra* note 57.

¹²³ IND. PUB. DEF. COMM’N, 2012–13 ANN. REP., *supra* note 46.

¹²⁴ *Id.*

¹²⁵ Spangenberg & Beeman, *supra* note 99.

¹²⁶ Neal & Judson, *supra* note 57.

¹²⁷ *Id.*

¹²⁸ IND. JUDICIAL BRANCH DIV. OF STATE COURT ADMIN. PUBLIC DEFENDER COMM’N, *supra* note 98.

¹²⁹ *Id.*

¹³⁰ Neal & Judson, *supra* note 57.

¹³¹ *Id.*

¹³² *Id.*

reimburses counties for a fixed portion of their indigent defense costs when those counties comply with certain minimum standards designed to improve the quality of indigent defense.”¹³³ These efforts are commendable, but still more can be done to improve Indiana’s system.

2. *Florida Funding*

Florida’s state funded public defense system is starkly different than Indiana’s largely county-funded system. “In Florida, the state provides the largest share of funds, but, by statute, the counties are required to pay the cost of assigned counsel in conflict or interest cases and in cases when private attorneys are appointed to provide caseload relief to the public defender.”¹³⁴ While the state provides the majority of public defense funds in Florida, counties are responsible for providing “funding for certain other expenses, including office space, utilities, telephone, and custodial services.”¹³⁵

B. *Elected v. Appointed*

Another way the public defense systems in Indiana and Florida differ is in the way their chief public defenders are appointed or elected. While the citizens of Indiana elect their county prosecutors, the chief public defenders in Indiana counties are appointed.¹³⁶ Alternatively, Florida is different. “In Florida, the legislature has created twenty independent publicly elected public defender offices. There is one office for each judicial district. While structure is mandated by the state, there is no state oversight at the trial level.”¹³⁷ Like Indiana’s county prosecutors, the Florida chief public defenders are elected every four years.¹³⁸

VIII. RECOMMENDATIONS

While many arguments have been made to enhance public defender systems throughout our nation via assignment systems,¹³⁹ compensating public defenders on a per-case basis,¹⁴⁰ or even using privatization¹⁴¹ to

¹³³ NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 100.

¹³⁴ Spangenberg & Beeman, *supra* note 99.

¹³⁵ *Id.*

¹³⁶ *About the State Public Defender’s Office*, IND. JUDICIAL BRANCH STATE PUBLIC DEFENDER, <http://perma.cc/PCP8-BJHZ>.

¹³⁷ Spangenberg & Beeman, *supra* note 99.

¹³⁸ PUBLIC DEFENDERS: FLA. PUBLIC DEFENDER ASS’N, INC., *supra* note 108.

¹³⁹ AM. LAW INST., JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, PROBLEMS IN CRIMINAL LAW AND ITS ADMINISTRATION: THE PROBLEM OF ASSISTANCE TO THE INDIGENT ACCUSED 78 (1961).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

combat overburdened public defenders, I offer solutions to help Indiana's public defender system that have already proven to be successful. My recommendations are: (1) The Florida public defender system should serve as a model for Indiana's public defender system; (2) Indiana public defender offices should focus on quality rather than quantity of work; (3) Prosecutorial discretion will likely lead to a smaller caseload for public defenders; (4) More resources should be allocated for proper indigent defense at the front end of our criminal justice system, rather than reserving capital for correctional facilities and programs on the back end; and (5) establish adequate caseloads, increase funding and bolster resources.

A. Florida Shall Serve as a Model for Indiana

The Florida Public Defender Association has existed fifteen years longer than Indiana's public defense system.¹⁴² Indiana could use Florida's experiences to its advantage in choosing to replicate some of Florida's model for its own use.

Currently, there is no uniform system of providing indigent defense throughout the state of Indiana.¹⁴³ After serving for seventeen years as chairman on the Indiana Public Defender Commission, former Dean of Indiana University Robert H. McKinney School of Law in Indianapolis, Professor, and esteemed legal scholar, Norman Lefstein says, "Indiana is a work in progress."¹⁴⁴ In order to promote more uniformity throughout Indiana, Lefstein "would like to see a system in Indiana that is overseen at the state level and that is largely state funded."¹⁴⁵ A largely state-funded system would have better results than the mainly county-funded systems currently in place in Indiana.

Through studying public defense systems in states like Florida, where the system is organized at the state level, Lefstein has "learned over the years that if a defense system is funded at the state level, you are much more likely

¹⁴² INDIANA PUBLIC DEFENDER COUNCIL, *supra* note 95; PUBLIC DEFENDERS: FLA. PUBLIC DEFENDER ASS'N, INC., *supra* note 108.

¹⁴³ Charles M. Kidd, *Professional Responsibility: 2009 Survey of the Law of Professional Responsibility*, 43 IND. L. REV. 919, 929 (2010).

¹⁴⁴ Malia Brink, *Interview with Professor Norman Lefstein – 2005 Champion of Indigent Defense Award Winner*, 30-FEB Champion 38, 38 (Jan./Feb. 2006). ("Norman Lefstein [was] a Professor of Law and Dean Emeritus of the Indiana University School of Law – Indianapolis. He has served as Chair of the Indigent Defense Advisory Group of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants for the past six years. In this role, he has been responsible for overseeing the ABA's efforts to improve indigent defense systems, in various parts of the United States . . . Professor Lefstein works vigorously on indigent defense issues in his home state of Indiana. Since 1990, he has chaired the Indiana Public Defender Commission, and he is now in his fourth consecutive term in that position.").

¹⁴⁵ *Id.*

to obtain adequate funding and have a structure for monitoring the quality of representation.”¹⁴⁶ By contrast, when control is largely left to the individual counties, as is the case in Indiana, Lefstein has observed “wide variations in the quality of services, funding levels, and in the ways that defense services are provided.”¹⁴⁷ By equating the Indiana public defender system to that of Florida’s state funded system, it will create better quality representation of indigent defendants.

B. State Funding

Currently, Indiana’s indigent defense funding is more than 50 percent county-funded.¹⁴⁸ However, like Florida’s state funded system, the Indiana indigent defense system should also turn to a fully state-funded program. The national “trend is toward greater state funding of indigent services.”¹⁴⁹ As of 2009, twenty-eight states received full state funding.¹⁵⁰ “As numerous statewide indigent defense studies have shown, when counties primarily fund indigent defense, there are certain to be inequities among the locally funded systems.”¹⁵¹ Local funding hurts both urban and rural counties. Rural counties may lack the resources to fund a single major felony case, where understaffed urban counties often have more cases to handle and can be overburdened by the workload.¹⁵² Indiana should relieve the counties of their funding burden by creating a centralized statewide system.

C. Elected Public Defenders

In addition to controlling funding at the state level, Indiana should follow Florida’s lead by electing, rather than appointing, its chief public defenders. Currently, Indiana elects its prosecutors and appoints its public defenders. The elected prosecutors have a duty to act in the best interest of their constituents—in hopes to be re-elected—while the public defender does not necessarily answer to a constituency. Elected officials have a duty to adequately represent their constituents or be faced with replacement come the next election. Elected officials must take ownership of their actions or they will be removed from office. Electing public defenders in Indiana would help ensure a higher level of accountability.

According to the Miami Dade County Public Defender website, elected

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Justice Denied, supra* note 73.

¹⁴⁹ Gubbins, *supra* note 17.

¹⁵⁰ *Id.*

¹⁵¹ *Justice Denied, supra* note 73.

¹⁵² *Id.*

public defender, Carlos J. Martinez, takes pride in the work his office does.¹⁵³ “I’m proud of all that we have accomplished with very limited resources over the years.”¹⁵⁴ Acknowledging the limited resources public defender offices are given, Martinez takes pride and ownership in the work his office does. While his office may represent indigent criminal defendants, he and his staff “are very much involved in helping make [South Florida] a safer community for everyone . . .”¹⁵⁵

In addition to answering to constituents and working to strengthen and empower the community they serve, elected officials also have a sense of responsibility to their staff. With caseloads soaring and funding falling by the wayside, overworked and underpaid employees may be encouraged to know that their boss will fight to get them what they need, because their success and, ultimately, his depends on it. One example of an elected Florida chief public defender fighting for and supporting his staff comes from an action by the elected Dade County public defender. After recognizing his staff was inundated with a caseload they were unable to handle in a “timely and professional manner,” the Dade County (Florida) public defender submitted a report to the Florida Judicial Council notifying them his staff was unable to handle such a caseload.¹⁵⁶ This action shows he is willing to fight for his staff and his office. An elected official owes a duty to the community at large as well as to his staff. In this situation, standing up for his employees—by recognizing they were assigned a caseload they were unable to handle—led to a better result for not only his staff, but for the community as a whole, including the defendants they represent.

D. Act Like You Are a Million-Dollar Lawyer

Successful attorneys learn to qualify, rather than quantify their work. Despite being overburdened and, potentially, overmatched, a public defender must still give each client’s case undivided attention. As previously noted, the “meet and plead” or half-hearted approach does a great disservice to the defendant. Without adequate representation, potentially innocent citizens could be found guilty and punished unjustly. This not only causes pain and suffering for the innocent defendant and their family, but also unnecessarily burdens society. The snowball effect this has on society is nearly endless: a functioning citizen is sent away to prison, preventing any chance of serving a positive role in the community, the taxpayers must bear the burden to feed, clothe, and shelter the prisoner; already overpopulated prison communities are added to, presenting increased challenges for correctional officers and

¹⁵³ MIAMI DADE PUBLIC DEFENDER, <http://perma.cc/M3GF-PW9G> (last visited Jan. 26, 2:34 PM).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Klein, *The Eleventh Commandment*, *supra* note 47, at 401.

reducing the likelihood of proper rehabilitation for other offenders. Meanwhile, improving the quality of an indigent defendant's representation is in the best interest of both the defendant and society.

Qualifying the work of public defenders may lead to a reduction in recidivism rates and help defendant morale, which may help them get back on their feet and back to their family and jobs.¹⁵⁷ Research has shown there is a higher success rate for clients who have respect for the law.¹⁵⁸

Indiana University Robert H. McKinney School of Law Clinical Professor of Law and Co-Director of Law School Clinical Programs, Frances Watson, who served as Marion County, Indiana's first Chief Public Defender, believes public defenders should be able to provide effective representation to all clients. She said, "If you acted like you were being paid one million dollars to represent every client, what would you do differently?" This concept may be difficult for the public defender, with an extraordinarily large caseload, to imagine. If a public defender were to "act like a million dollar lawyer," the attorney would more likely do more to help his client. He might do more investigation into his client's case. He might act as a better advocate or counselor for his client. He might not take the first plea bargain offered. He may make the extra phone call to a potential witness. All of this work may lead to a better outcome for his client and society. Effective and committed public defenders, acting in the best interest of their clients, will ultimately reflect better justice.

Public defenders serving as advocates and counselors for their clients build the much needed attorney-client relationship. The attorney-client relationship is founded on effective communication.¹⁵⁹ In order to accomplish effective communication between lawyer and client a lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information.¹⁶⁰

Communication between attorney and client is fundamental to effective

¹⁵⁷ Interview with Prof. Frances Watson, Ind. Univ. Robert H. McKinney Sch. of Law, in Indianapolis, Ind. (Sept. 13, 2013) (Prof. Watson served as the first Chief Public Defender in Marion County, Ind.).

¹⁵⁸ *Id.*

¹⁵⁹ McAlister, *supra* note 1, at 1339.

¹⁶⁰ *Id.*

representation. Communication may unearth a crucial piece of the case. It could mean the difference between guilty or acquittal. “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁶¹ Not only is an attorney-client relationship important, the proper mindset is essential. “It is all about attitude. All the funding and caseload reduction in the world cannot compete with the public defender attitude.”¹⁶² Acting like you have been hired as a million-dollar lawyer will ensure the attorney client relationship is a strong one.

E. Prosecutor Discretion in Filing Cases

Prosecutors play a critical role in the criminal justice process. In decision-making, prosecutors consider community safety and retributive justice, among other things. However, some may argue prosecutors overcharge defendants to use as a negotiating tool during the plea bargaining phase. Overcharging leads to more work for everyone involved in the criminal justice process, including prosecutors, defense attorneys, judges, and defendants. Prosecutorial discretion also plays a role in a public defender’s caseload. A higher level of prosecutor discretion—filing fewer charges per defendant—will likely lead to a smaller caseload for public defenders. By exercising greater discretion, prosecutors can avoid adding to the increasing caseload crisis.

Although prosecutors have discretion in filing charges, they are still bound by the Indiana criminal code. Therefore, another solution may begin with the Legislature. While the current Indiana Legislature is working to modify Indiana’s criminal code,¹⁶³ criminalizing minor activities lead to more time defendants remain involved in the criminal justice system.

Criminalizing smaller activities causes several problems. Working these cases occupies valuable prosecutor and public defender time where they could be working on other cases. The charge stigmatizes the individual, and may even lead to them losing their job and family. The judges and courthouse staff must work these cases into their busy calendars. If convicted, the already overburdened corrections system will be unnecessarily burdened. “Maybe they did something wrong. But it’s something relatively minor. And now they’re sitting in jail on a bond they can’t make, they’ve lost their housing, their job. For these mistakes, families are torn apart and communities are ruined.”¹⁶⁴

¹⁶¹ *Id.*

¹⁶² Interview with Prof. Frances Watson, *supra* note 157.

¹⁶³ H.B. 1006, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).

¹⁶⁴ Levintova, *supra* note 6.

F. Administration of Resources at the Front End

In order to work effectively, the criminal justice system requires a lot of money. This money should be administered at the start of the process by focusing on crime prevention and education (talking to students about staying away from drugs and crime, mentor programs, public defense funding, etc.) rather than on the back end (corrections—jail, probation, etc.). Money spent housing prisoners may not be needed if young people are educated more about the consequences of crime and given alternative choices in their lives. It is inevitable money will be spent. Therefore, spending money at the beginning may actually reduce the amount of money actually spent in the long run because fewer people will cause trouble, get arrested, and serve time in jail.

It is important to teach children about crime, violence, and drug prevention from a young age.¹⁶⁵ McGruff, the “spokesdog” of The National Citizens’ Crime Prevention campaign “is one of the most successful public service advertising campaigns in history.”¹⁶⁶ If children are taught at a young age to stay out of the criminal justice system, they may be more likely to stay out of trouble and away from crime. “Law enforcement officers, teachers, and other adults can play an important role in protecting children and helping them gain the skills they need to make positive decisions for the rest of their lives.”¹⁶⁷

An upfront investment will decrease total costs over time, making the system cost-effective in the long-term. Government resources expended at the earlier stages of the criminal justice process will benefit society in a greater capacity than spending the money on the back end of the process. Empowering young people through education and mentoring programs will help keep children out of the system. If someone is accused of a crime, better representation may lead to more innocent defendants being acquitted, avoiding the need to unnecessarily burden the already overwhelmed corrections system and the imprisonment of innocent defendants. “All too often, the limited resources available to the criminal justice system have been used to place more police officers on the street and to build more prisons, ignoring the effect that these policies have on other major components of the system—prosecution, the courts, and public defense.”¹⁶⁸

If attorneys with a reasonable caseload offer defendants fair representation, fewer defendants are likely to serve lengthy prison sentences than if they were not given adequate representation by a public defender. In federal and state courts, if the defendant is found guilty, “higher percentages

¹⁶⁵ *Teaching Children*, NATIONAL CRIME PREVENTION COUNCIL, <http://perma.cc/4QMJ-HLA8>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Spangenberg & Schwartz, *supra* note 30.

of defendants with publicly financed counsel were sentenced to incarceration. In Federal district courts, 88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large State courts 71% with public counsel and 54% with private attorneys were sentenced to incarceration.”¹⁶⁹ It is clear from these statistics that clients of overburdened public defenders are more likely to serve prison time than clients of private defense attorneys.

Providing the funds needed for key resources, including qualified staff, ongoing training, and modern technology for the public defender system, from the beginning of representation, will lead to fairer results in the end. Retention rates for employees will rise since better salary and training will encourage attorneys and support staff to remain with a public defender office, rather than seeking other employment. Fewer defendants will make their way through the system (which saves costs by not imprisoning defendants or subjecting them to probation). Taxpayer dollars can be spent more wisely, by using the money to educate children about drug and crime prevention. Providing funding for adequate representation may also result in a lower rate of recidivism because a more positive experience would restore faith in the criminal justice system.

“Many courts have been hesitant to acknowledge the ways in which the realities of indigent defense affect the assistance a defendant actually receives.”¹⁷⁰ However, it is time these realities are acknowledged. We are, and have been, at a crisis level. We need to come up with new solutions. If more money is spent on the front end of the process, it would not only help solve the funding issue, but would have an effect on the caseload limitations as well, all leading to a better outcome for society.

G. Salary Parity Between Prosecutors and Public Defenders

The salary for public defenders and prosecutors needs to be at the same level. While it is acceptable to base pay by experience, it is not acceptable to base pay by which side of the law one serves. This salary difference can lead to higher staff turnover rates,¹⁷¹ leading to a revolving cycle of inexperienced attorneys needed to fill the void and increased resources needed for training. “Salary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing.”¹⁷²

By creating a system of “equal pay for equal work” and ensuring

¹⁶⁹ HARLOW, *supra* note 5.

¹⁷⁰ *Effectively Ineffective*, *supra* note 36, at 1731.

¹⁷¹ Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 262 (2004).

¹⁷² *Id.*

attorneys are satisfied with their employment benefits, public defender offices will have higher retention rates with more experienced attorneys. Salary parity between prosecutor and public defender offices includes all employees, not just attorneys. “The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.”¹⁷³

H. Adequate Caseloads

Caseload limits will help ensure effective representation of defendants. This representation will lead to justice for all. In order to help public defenders maintain a reasonable caseload that ensures proper representation of their clients, once established, caseload limitations must be adhered to. While the ABA has set recommended caseload standards, it has been largely recognized that these numbers are frequently ignored and regularly exceeded at outstanding numbers. Excessive caseloads result in public defenders doing a disservice to their clients, as well as posing an ethical conundrum for themselves.

A public defender is unable to provide effective counsel if he has too many clients.¹⁷⁴ Defenders who cannot effectively represent their clients may find themselves in violation of their professional responsibility, resulting in possible discipline for neglect of a client’s case.¹⁷⁵ In fact, neglecting a client’s case is among the most frequent complaints against attorneys. “The Code of Professional Responsibility and the Model Rules of Professional Conduct do not provide for exceptions for public defenders.”¹⁷⁶ Attorneys also find they do not have ample time to “investigate, communicate with a client, or become familiar with recent developments in the law that relate to the charges against the client.”¹⁷⁷

In Florida, the “Governor’s Commission established maximum caseload standards of 100 felony cases per year. However, the Florida Public Defender’s Association determined that public defenders should handle more than 200 felonies per year.”¹⁷⁸ While this number is still higher than ABA standards,¹⁷⁹ it is not as high as Indiana’s standard, which was raised to 225 cases per year in Marion County, Indiana.¹⁸⁰ By establishing and enforcing

¹⁷³ *Id.*

¹⁷⁴ Klein, *The Role of Defense Counsel*, *supra* note 14, at 43–44.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ McAlister, *supra* note 1, at 1330.

¹⁷⁹ LEFSTEIN, *supra* note 32.

¹⁸⁰ IND. PUB. DEF. COMM’N, 2011–12 ANN. REP., *supra* note 56.

lower caseload maximums, Indiana can go a long way toward increasing the quality of representation public defenders offer their indigent clients.

IX. CONCLUSION

The ultimate goal of the criminal justice system is justice. Justice is served through fair outcomes. In order to achieve fair outcomes, a level playing field between public defenders and prosecutors is necessary. Equality in terms of salary, training, staff, paralegals, investigators, interns, and technology is needed. Public defenders need to serve as advocates to their clients. Prosecutors need to use discretion in filing cases. Communities need to invest resources up front to focus on crime prevention. With all of these actors playing their role, justice will be achieved.

While Indiana has come a long way in the development of its public defender system, there is room for improvement. Florida has found their success in two areas: utilizing a state funded public defender system, and electing chief public defenders within each of the twenty judicial circuits. Given this success, the Florida public defender system should serve as a model for Indiana.

Instead of having the majority of funding come from the counties, as is the current situation in Indiana, Indiana should have a state-funded system, like Florida. Studies have shown vast inequalities in the local funding model and that these inequalities hurt both large, urban counties and small, rural counties. Meanwhile, centralized state funding has become a nationwide trend and has been credited with positive impacts on the effectiveness of public defense systems. By centralizing control and creating uniform statewide standards, representation of indigent defenders will improve throughout Indiana.

Additionally, Indiana's public defender system would benefit from a state funded system with elected chief public defenders. Electing chief public defenders in each of Indiana's counties would guarantee accountability and ensure elected chief public defenders have a constituency to answer to. They owe a duty to the community they represent and the constituents who elected them. If the representation of public defenders is substandard and not up to the electorate's expectations, the chief public defender faces being replaced in the next election. The chief public defender must take ownership of his actions and the actions of his staff, run an efficient and professional office, and at all times focus on the best interests of the community he serves and the clients his office represents.

Indiana's public defender offices need to focus more on quality of work rather than the quantity of cases they try. By focusing on quality, public defenders represent their clients to the utmost ethical standards. All attorneys should act as advocates and counselors for their clients, whether they are making a million dollars or representing an indigent client. Treating each client and each case as a top priority will ensure that the appropriate focus

and attention is given, and will ultimately provide the client with the effective representation promised through *Gideon*. Quality representation may lead to fewer criminal defendants making their way through the criminal justice system. Instead, these defendants could live lives as successful individuals in society. While public defenders may lack resources, they must still act like a million dollar lawyer. It is all about attitude. All the resources in the world cannot replace a determined and positive attitude.

However, that does not diminish the necessity of adequate resources. To strengthen its indigent defense system, Indiana needs adequate resources. Properly staffed offices with adequate funding and training will allow a public defender to better represent clients. To keep up with prosecutors, public defenders must be able to rely on secretaries who can draft and file legal documents, paralegals who can conduct research and meet with clients, investigators who can interview witnesses and analyze evidence. These staff necessities are not cheap, and the funding must be adequate to train and retain quality employees. Better training and salary is also needed for attorneys. This will help with recruiting, development, and retention of quality attorneys within the public defender system. Properly trained and seasoned attorneys will more effectively represent their indigent clients.

Furthermore, adequate resources must be applied on the front end. Communities need to invest in crime prevention and education. Children must be educated on the dangers of criminal behavior and provided with encouragement and incentives to pursue crime-free lifestyles. Not only will this limit the expense required for corrections and rehabilitation, but it can also reduce public defenders' caseloads.

Prosecutor discretion in charging cases also has a direct impact on public defender caseloads. Prosecutors have a great amount of discretion in determining which charges to file. Prosecutors must avoid overcharging cases as leverage for plea negotiations. Additionally, legislators must examine the criminal code and consider revisions for smaller crimes. When smaller offenses are criminalized and prosecuted, individuals may find themselves suddenly on the wrong side of the law. Once a person is labeled a criminal, it becomes difficult to find honest work and is more likely to be drawn into a culture of escalating criminal behavior. By avoiding overcharging, prosecutors help prevent this dangerous cycle, while also assisting public defenders to lighten their caseloads through reduction in frivolous cases.

Nonetheless, public defender caseloads must be limited to ensure proper representation of defendants. There must be a cap on the number of cases a public defender can handle each year. By limiting the number of cases an individual attorney is responsible for, greater focus can be placed on each client. The more time and attention the public defender can offer each client, the better prepared the attorney will be to handle the case. This will allow the attorney to properly and adequately represent each client.

The right to be represented by an attorney in a criminal trial, whether

or not the defendant can afford one, is essential to the justice system. By upholding the promise of *Gideon*, criminal defendants will be afforded the right to be represented by an attorney. However, the representation needs not merely exist, it must be effective. “Without sufficient resources for public defenders, the famous words of *Gideon* are just words, a guarantee of little more than a companion at arraignment.”¹⁸¹ The promise of *Gideon* needs to be afforded the significance it deserves. It is not enough to just show up and sit next to the client in the courtroom. An unprepared, over-worked public defender cannot possibly provide the quality of counsel the client deserves. Indigent defendants must receive representation from an attorney who has the experience, resources, time, and focus that their cases deserve.

¹⁸¹ McAlister, *supra* note 1, at 1351.