The Minnesota Public Defender System: A Change of Governance Should Occur for the State to Effectively Fulfill Its Constitutional Obligation

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THE MINNESOTA PUBLIC DEFENDER SYSTEM: A CHANGE OF GOVERNANCE SHOULD OCCUR FOR THE STATE TO EFFECTIVELY FULFILL ITS CONSTITUTIONAL OBLIGATION

Judge Randall J. Slieter† and Elizabeth M. Randa‡

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Any intelligent fool can make things bigger, more complex . . . . It takes a touch of genius—and a lot of courage—to move in the opposite direction.
—E.F. Schumacher

I. INTRODUCTION

The most casual follower of the current condition of the economy and its effects on public governance will note that the current financial shortages and the resulting impact on the Minnesota public defense system are not unique. The most common solutions offered for the restoration of adequate funding to the public defense system—such as increased fees, layoffs, or

3. An example of an increased fee is the $75 increase in the attorney registration fee implemented by the Minnesota Supreme Court in November of 2009. Order Temporarily Increasing Lawyer Registration Fees, C1-81-1206 (2009), available at http://www.mncourts.gov/Documents/0/Public/Clerks_Office/2009_11_04_Order_Re_Lawyer_Reg_Fees.pdf. The public defense appropriation for fiscal years 2010 and 2011, signed by Governor Pawlenty, called for a $4 million reduction in the Board of Public Defense’s (BOPD) budget. AUDITOR’S REPORT, supra note 2, at 32; see also Petition to Continue the Attorney Registration Fee to Provide Funding for Public Defense, 7 (Aug. 26, 2010), http://www.mncourts.gov/Documents/0/Public/Clerks_Office/2010-09-23%20Lawyer%20Reg%20Fee%20Order.pdf (“We . . . argue that [the lack of adequate funding has] not changed and in fact [has] gotten worse. Since the implementation of the fee, the budget for the BOPD has been further reduced.”). The bill also included a request for a $75 increase in the attorney registration fee, with the funds to be
reductions of service,\textsuperscript{5} employee buy-outs,\textsuperscript{6} and increased taxes—are also not unique and tend to be focused on the short-term. Ernest Friedrich “Fritz” Schumacher, an influential Twentieth Century British economist and statistician who was influenced by fellow German-born Albert Einstein, concisely described the futility of this approach.\textsuperscript{7}

Schumacher was initially influenced by the well-known twentieth century economist John Maynard Keynes,\textsuperscript{8} but later diverged from Keynes with his theories involving decentralization.\textsuperscript{9} In particular, Schumacher was well known in post-war Europe for his economic theories that large organizations must create “smallness from bigness” to be more effective.\textsuperscript{10}
Whether the solution for short-term budget deficits in Minnesota’s public defense system ought to occur via increased taxes or reductions of services and personnel is not the focus of this article. Instead, this article will focus on the governance of public defense, and how changes thereto will address long-term issues of public funding and, more importantly, increase public defense’s effectiveness. Further, such changes will better equip the public defense system to address inevitably recurring funding shortfalls.

The overriding premises for this article are as follows:
1. There is no “new” money.
2. Criminal defense is constitutionally required to be provided.
3. Financial struggles within the Minnesota public defense system are not unique in government.
4. Problem-solving focus in the broader criminal justice community will aid in resolving the funding issue in public defense and elsewhere in government.

The overriding governance principle used to resolve public defense’s financial inadequacies, while addressing the above premises, is decentralization. This principle of change is long-term in its approach and requires a change of direction, first, by policymakers and, second, by those within the system. Ultimately, these changes require increased trust among the professionals within the system who must work with limited resources to maximize incentives and benefits for those served and for the public that supports and benefits from this system.

This article will proceed as follows:
1. Outline the history of public defense in Minnesota and its governance.

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11. See infra Part IV.
12. The authors wish to point out that, as here and elsewhere in the article, though the focus is the public defense system in Minnesota, the governance problems identified and resolutions, apply to all public agencies and branches of government.
15. See infra Part II.
2. Identify the current problems in Minnesota’s Public Defense System, including a review of the major findings made by the Minnesota Office of the Legislative Auditor in February of 2010.16

3. Provide solutions to the public defense system’s current problems, including a comparison of this article’s proposals to some of the recommendations made by the Minnesota Office of the Legislative Auditor.17

II. HISTORY OF THE RIGHT TO COUNSEL

A. Sixth Amendment Right to Counsel

The right to counsel found in the Sixth Amendment to the U.S. Constitution has its roots in English jurisprudence. The right to an attorney in a criminal case first appeared in England during the twelfth century.18 “[P]arties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel.”19 Persons charged with treason or felony, however, were generally denied the aid of counsel.20 “After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right [to counsel] was granted in respect of felonies generally.”21

The American colonies initially adopted English law and common law practices, but over time began to recognize the importance of the right to counsel.22 Legal transformations such as the use of public prosecutors, the aversion to English common law, and the rise of legal codes and courts unique to the colonies led people to seek out individuals familiar with the law despite strong anti-lawyer sentiments. When the federal Constitution was adopted on September 17, 1787, twelve of the thirteen colonies

16. See infra Part III.
17. See infra Part IV.
20. Id.
21. Id. at 1122–23.
22. Wilson, supra note 18, at 1122 (citing WILLIAM F. MCDONALD, IN DEFENSE OF INEQUALITY: THE LEGAL PROFESSION AND CRIMINAL DEFENSE, THE DEFENSE OF COUNSEL 20 (1983)). The key protection from arbitrariness and oppression by the government offered to the colonies, as in England, was the right to trial. Id.
recognized the right to counsel in all criminal prosecutions, except
in one or two instances where the right was limited to capital
offenses or to the more serious crimes.\footnote{24}{Powell, 287 U.S. at 64–65 (discussing in detail the right to counsel
provided by the thirteen colonies’ state constitutions and statutes).}

The Sixth Amendment to the federal Constitution provides,
“In all criminal prosecutions, the accused shall enjoy the right . . .
[to] have the Assistance of Counsel for his defense.”\footnote{25}{U.S. CONSTIT. amend. VI.} The right to
the assistance of counsel meant only that an accused person could
retain an attorney.\footnote{26}{Wilson, supra note 18, at 1124.} The Court construed the Sixth Amendment’s
right to counsel to mean that in federal courts, counsel must be
provided for defendants unable to employ counsel unless
competently, knowingly, and intelligently waived.\footnote{27}{E.g., Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).}

\textbf{B. A Fundamental Right}

In 1932, in \textit{Powell v. Alabama}, the famous “Scottsboro Case,”
the Court concluded that under the circumstances of the case, the
“necessity of counsel was so vital and imperative that the failure of
the trial court to make an effective appointment of counsel was
likewise a denial of due process within the meaning of the
Fourteenth Amendment.”\footnote{28}{Powell, 287 U.S. at 71.} However, the Court limited its
decision, deciding that:

\begin{quote}
\begin{quote}
in a capital case, where the defendant is unable to employ
counsel, and is incapable adequately of making his own
defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether
requested or not, to assign counsel for him as a necessary
requisite of due process of law; and that duty is not
discharged by an assignment at such a time or under such
circumstances as to preclude the giving of effective aid in
the preparation and trial of the case. To hold otherwise
would be to ignore the fundamental postulate, already
adverted to, “that there are certain immutable principles
of justice which inhere in the very idea of free
government which no member of the Union may
disregard.”\footnote{29}{Id. at 71–72 (quoting Holden v. Hardy, 169 U.S. 366, 386 (1898)).}
\end{quote}
\end{quote}
In 1942 the Court in *Betts v. Brady* again addressed the issue of whether the Sixth Amendment’s right to counsel was incorporated under the Fourteenth Amendment to the states.\(^{30}\) The *Betts* Court ultimately held that a refusal to appoint counsel for an indigent defendant charged with a felony in a state court proceeding did not necessarily violate the Due Process Clause of the Fourteenth Amendment, and that the “appointment of counsel is not a fundamental right, essential to a fair trial.”\(^{31}\) The *Betts* Court stated that while the Sixth Amendment laid down no rule for the conduct of the states, “the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.”\(^{32}\)

In 1963, in *Gideon v. Wainright*, which had facts similar to those in *Betts*, the Court granted certiorari to address the controversy and litigation over a defendant’s federal constitutional right to counsel in a state court, and unanimously overruled *Betts*.\(^{33}\) The *Gideon* Court concluded that the right to counsel of one charged with a crime was fundamental and essential.\(^{34}\) The Court held that the Sixth Amendment to the U.S. Constitution, providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense, was made obligatory on the states by the Fourteenth Amendment and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him.\(^{35}\)

Justice Black, writing for the Court, noted that reason and reflection require us to recognize that 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. This seems to us to be an obvious truth.\(^{36}\)

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\(^{31}\) Id. at 471.

\(^{32}\) Id. at 465.

\(^{33}\) Gideon v. Wainwright, 372 U.S. 335, 338 (1963). Three states asked that *Betts v. Brady* be left intact. Twenty-two states, as friends of the Court, argued *Betts* was “an anachronism when handed down” and that it should be overruled. *Id.* at 345.

\(^{34}\) Id. at 344.

\(^{35}\) Id. at 340–41.

\(^{36}\) Id. at 344.
Though the scope of the *Gideon* decision was limited to felony prosecutions, the right to counsel has since been expanded. In 1967, the Court extended the right to counsel to children charged with juvenile delinquency. In 1972, the right to counsel was expanded to any case in which the defendant could be sentenced to imprisonment. In 2002, the Court found that defendants must receive counsel if they received a suspended jail sentence or were placed on probation, and later, the probation was revoked and imprisonment imposed. In Minnesota, defendants also have a statutory right to counsel in their first direct appeal of a verdict and in appeals following a guilty plea.

C. Right to Counsel in Minnesota

Prior to *Gideon*, states used three different model systems of providing counsel to indigent defendants: contracts, assigned counsel, and public defenders. Under the contract system, the state or county would solicit and receive bids. The assigned counsel system used private lawyers who were court appointed and compensated. The public defender system used full-time, salaried staff and attorneys. Minnesota utilized the assigned counsel

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37. *In re Gault*, 387 U.S. 1, 41 (1967) (“We conclude that the Due Process Clause . . . requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to counsel.”).

38. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).


40. MINN. STAT. § 611.14(2) (2010).

41. The Bill of Rights in Minnesota’s Constitution directly addresses the rights of the accused in criminal prosecutions. MINN. CONST. art. I, § 6 (“The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.”); see also *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996) (public defenders cannot refuse to accept new clients under Minnesota law).


43. *Id.* (citing STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, 5-3.1 cmt. (1990)).

44. *Id.* (citing Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, 4 CRIM. JUST. 16, 16–17 (1989)).

45. *Id.* (citing Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205,
system; attorneys were available only for indigent defendants charged with felonies or gross misdemeanors. The small number of indigent defendants for whom courts appointed counsel were generally represented by volunteer legal service agencies and uncompensated attorneys.

In 1965, following Gideon, Minnesota adopted legislation to create full-time and part-time public defenders. Minnesota’s public defender system was revised throughout the 1980s, and since then the legislature has made significant structural and organizational changes.

Until the late 1980s, the funding of public defender services in Minnesota was primarily a county responsibility. Each of the ten judicial districts in the state were responsible for administering this constitutionally mandated service; financial resources were provided from property tax revenues.

In 1981, the State Board of Public Defense was created by the legislature to oversee the public defense system and to distribute any funds appropriated by the state for public defense services.

209–10 (1993)).

46. Id. at 1130 (citing Charles W. Wolfram, Scottsboro Boys in 1991: The Promise of Adequate Criminal Representation Through the Years, 1 CORNELL J. L. & PUB. POL’Y 61, Appendix (1992) (citing MINN. STAT. ANN. §§ 611.07, .12, .13 (1945))). While Minnesota generally used the assigned counsel program, Hennepin and Ramsey Counties had public defender offices and did not use an assigned counsel program. Id. at 1130 n.76.


48. Jeffrey H. Rutherford, Comment, Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders, 78 MINN. L. REV. 977, 982 (1994). Counsel in Minnesota was compensated, however, when the assignment was mandatory upon request by the defendant. See MINN. STAT. §§ 611.07, .12, .13 (1945).


50. See infra notes 54–62 and accompanying text.

51. Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn 1996).

52. Id. Minnesota’s eighty-seven counties are organized into ten judicial districts. Eight of the ten districts are comprised of multiple counties. Ramsey and Hennepin Counties, however, are their own districts, the Second and Fourth Districts respectively. See Minnesota District Courts, http://www.mncourts.gov/?page=238 (last visited Nov. 24, 2010).

53. Kennedy, 544 N.W.2d at 3 (citing MINN. STAT. §§ 611.26, 611.27 (1965)).

The State Board of Public Defense, however, was not subject to the judicial branch’s administrative control. The State Board of Public Defense assumed the duty of appointing chief public defenders to the judicial districts. The Board of Public Defense delegated responsibility for distributing state public defender funding to each judicial district. In 1987, the legislature expanded the authority of the State Public Defender.

In 1989, the legislature began shifting the financial burden of funding the state’s public defender offices from the counties to the state. The transfer of the primary financial responsibility for public defense was completed in 1990, when the legislature incorporated all ten judicial districts into the state funding system.

611.215 (2008)).

55. Act of June 1, 1981, ch. 356, § 360, 1981 Minn. Laws 1770, 1982 (codified as amended at MINN. STAT. § 611.215 (2008)). MINN. STAT. § 611.215, subdiv. 1(a) provides “The State Board of Public Defense is a part of, but is not subject to the administrative control of, the judicial branch of government.”


59. Act of June 3, 1989, ch. 335, art. 1, § 7, 1989 Minn. Laws 2693, 2699–700. This shift in financing was based on the idea that a centralized state system would be more efficient. Wilson, supra note 18, at 1130 n.81 (citing Appellant’s Brief at 5, Kennedy, 544 N.W.2d 1 (No. CO-95-1282)). This idea was based on the counties’ inability to cope with increased costs, the inequality amongst counties in generating property tax revenue, and a drought in the late 1980s which significantly reduced rural counties’ tax revenue. Id. For most of Minnesota’s history, court funding has been through county boards. Scott Russell, Courts at the Tipping Point: Tight Funding Imperils Justice Function, 65 BENCH & B. MINN. 20, 24 (Dec. 2008). “Services varied considerably, depending on the county’s property wealth and political will. State leaders found service disparities unacceptable.” Id. In the 1990s, the state began taking over court funding starting with a pilot program in the Eighth Judicial District, and by July 2005 courts were fully state funded. Id.

60. In 1989, the legislature expanded the authority of the Board of Public Defense to include all ten judicial districts. Act of June 3, 1989, ch. 335, art. 1, § 262, 1989 Minn. Laws 2897 (codified as amended at MINN. STAT. § 611.215, subdiv. 2 (2008)). This transfer was to take place within one year, but the completion
The State Board of Public Defense is required by statute to recommend to the legislature a budget for statewide public defense services, and then distribute the funds to all public defender offices. Therefore, under the current funding system, public defenders rely almost entirely upon state funding for their budgets.

The right to counsel is constitutionally guaranteed in certain circumstances. In other contexts, the right to counsel is based on statute or the exercise of the inherent power of the courts. Currently, the following persons who are financially unable to obtain counsel are entitled to be represented by a public defender:

(1) a person charged with a felony, gross misdemeanor, or misdemeanor including a person charged under Minnesota Statute sections 629.01 to 629.29 (2008);

(2) a person appealing from a conviction of a felony or gross misdemeanor, or a person convicted of a felony or gross misdemeanor, who is pursuing a postconviction proceeding and who has not already had a direct appeal of the conviction.


62. Minn. Stat. § 611.27, subdiv. 1(b) (2008); see also Kennedy, 544 N.W.2d at 3 (“In distributing funds to district public defenders, the board shall consider the geographic distribution of public defenders, the equity of compensation among the judicial districts, public defender case loads, and the results of the weighted case load study.”).

63. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (declaring that the Sixth and Fourteenth Amendments to the United States Constitution give an indigent defendant in criminal proceedings in state court a right to court-appointed counsel).

64. In re Welfare of J.B., 782 N.W.2d 535, 540 (Minn. 2010). In addition to Minn. Stat. § 611.14 (2008), which provides a right to a public defender for indigent persons accused of certain crimes, the right to counsel is provided in the following: Minn. Stat. § 253B.07, subdiv. 2c (2008) (civil commitment matters); Minn. Stat. § 524.5-304(h) (2008 & Supp. 2009) (guardianship matters); Minn. Stat. § 257.69, subdiv. 1 (2008); Cox v. Slama, 355 N.W.2d 401, 403-04 (Minn. 1984) (civil contempt proceedings); Hepfel v. Bashaw, 279 N.W.2d 341, 341 (Minn. 1976) (paternity cases); State v. Borst, 278 Minn. 388, 399, 154 N.W.2d 888, 895 (Minn. 1967) (invoking the inherent power of the court to provide counsel in misdemeanor cases).


(3) a person who is entitled to be represented by
counsel under Minnesota Statute section 609.14,
subdivision 2 (2008); or

(4) a minor ten years of age or older who is entitled to
be represented by counsel under Minnesota
Statute section 260B.163, subdivision 4 (2008),
or section 260C.163, subdivision 3 (2008).

Despite—and, the authors suggest, perhaps as a result of—the
conversion of the public defender system to a statewide system,
there exists significant shortages which have resulted in a threat to
the primary goal of the system: to provide legal services to indigent
individuals who are entitled to be represented by a public
defender. This will be explored in the following sections.

III. IDENTIFYING THE CURRENT PROBLEMS IN THE PUBLIC
DEFENSE SYSTEM

As noted in the outset of this article, the economic slowdown
has affected the public defense system as drastically as any part of
government. As a result of budget cuts and the simultaneous affect
of increased case filings in Minnesota, the public defender
workloads have increased, and the time spent by individual public

67. “[The] National Advisory Commission on Criminal Justice Standards and
Goals recommended the following maximum annual caseloads for a public
defender office, i.e., on average, the lawyers in the office should not exceed, per
year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200
mental health cases; or 25 appeals.” ABA STANDING COMM. ON LEGAL AID AND
INDIGENT DEFENDANTS, ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO
EXCESSIVE WORKLOADS 9 n.30 (2009), available at http://www.abanet.org
/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.p
df (citing NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE
dENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO
/file/139.pdf). However, as noted by the ABA, “these caseload numbers are 35
years old, the numbers were never ‘empirically based,’ and were intended ‘for a
public defender’s office, not necessarily for each individual attorney in that
office.’” Id. Minnesota’s weighted caseloads per attorney far exceed that standard.
In 2009, 376 full-time equivalent attorneys handled an average of 779 weighted
case units per attorney. AUDITOR’S REPORT, supra note 2, at 36 tbl.3:1. In 2009
weighted caseloads in the districts ranged from a low of 688 in the Seventh District
(ten counties in central Minnesota) to 860 in the Ninth District (seventeen
counties in the northwest). Id. Furthermore, Minnesota’s public defender office
does not have caseload limits or the authority to refuse appointments due to
caseload. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF PUBLIC
DEFENDER OFFICES, 2007: PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES
tbl.7a (Nov. 19, 2009, revised June 17, 2010), available at http://bjs.ojp.usdoj.gov
defenders on cases has also decreased. The representation of those charged with crimes is a constitutional obligation of the state. The criminal justice system has no choice other than to provide legal representation to indigent individuals charged with crimes. Further, though reference to the public defender system in the Legislative Auditor’s Report is limited to those situations as set forth in Minnesota Statute section 611.14, this article references all situations in the Minnesota court system, constitutionally and statutorily, in which an attorney is appointed at public expense.

The problems, however, will not be resolved by additional funds, which are not forthcoming, and some of the suggestions as outlined in the Legislative Auditor’s Report will exacerbate the problems.

A. Funding is Not the Problem

Funding, or more accurately the lack thereof, is not the problem in the public defense system or, for that matter, elsewhere in government. As is described below, the centralized governance model, which minimizes the best use of existing funding, is the

68. *Auditor’s Report*, supra note 2, at 36 tbl.3:1; *see also* Duchschere, *supra* note 6; *Public Defenders May Seek Further Service Reductions*, ASS’N OF MINN. CNTYS., (Aug. 2, 2010), http://www.mncounties.org/publications/update/update2aug10.htm (examining the third judicial district in southeast Minnesota); Frederick Melo, *Overworked, Understaffed Attorneys Seeking Relief: Minnesota Public Defenders Question If Justice Is Served*, ST. PAUL PIONEER PRESS (Minn.), Aug. 17, 2010, 2010 WLNR 16495816 (“Chief Public Defender Karen Duncan will ask a Steele County judge to remove public defenders from 45 open cases, which would be a bold first for Minnesota.”).

69. MINN. STAT. § 611.14(a) (2008); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963).

70. *See Gideon*, 372 U.S. 335, 344–45 (reasoning that indigent defendants must be represented by counsel to assure a fair trial).

71. *Auditor’s Report*, supra note 2, at 6. Within the constitutional framework, Minnesota statute requires a public defender to be appointed to persons who are financially unable to obtain counsel and fit into one of the categories listed in Minnesota Statute section 611.14(a) (2008). *See also* MINN. STAT. § 253B.07, subdiv. 2(c) (2008) (civil commitment matters); MINN. STAT. § 257.69, subdiv. 1 (2008) (guardianship matters); MINN. STAT. § 524.5-304(b) (2008) (proceedings); *Hepfel v. Bashaw*, 279 N.W.2d 341, 341 (Minn. 1976) (paternity cases); *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888, 894 (1967) (invoking the inherent power of the court to provide counsel in misdemeanor cases).
problem. Therefore, once the structure is identified as the problem, we know that adding additional funds to an organization with structural defects cannot provide a solution.

The easiest solution offered by those of us in public service when we are short of funds is to increase revenue.\textsuperscript{72} Of course, this separates the real solution, effective governance, from those who are paying for it, the public. This solution does not provide leadership in our role as keepers of the public trust, and it does not engender changes that might be necessary to address economic realities. Further, Minnesota history demonstrates that there have been constant increases in government spending over the course of forty years; usually well above the cost of living.\textsuperscript{73} This reality—that increased revenues still results in the current budget shortfall—suggests convincingly that the lack of revenue is not the issue.

Further, the Minnesota Supreme Court in 1996 rejected a Fourth District public defender’s claim that the lack of funds led to ineffective assistance of counsel.\textsuperscript{74} The court determined:

The district court did not find that Kennedy’s staff had provided ineffective assistance to any particular client, nor did it find that Kennedy faced professional liability as a result of his office’s substandard services. Nor do any of Kennedy’s clients join him in attacking the statutory funding scheme at issue here by presenting evidence of inadequate assistance in particular cases. In light of Kennedy’s failure to provide more substantial evidence of an “injury in fact” to himself or his clients, we hold that the district court erred in granting Kennedy’s summary judgment motion.\textsuperscript{75}

This decision supports a conclusion that further funding will not solve the long-term problems associated with the State’s obligation to provide attorneys for those who cannot afford counsel.

\textsuperscript{72} See supra notes 2, 6 and accompanying text.


\textsuperscript{74} Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996).

\textsuperscript{75} Id.
B. Centralization is the Problem—Not Part of the Solution

Minnesota moved to a centralized system beginning in the early 1980s. The issues of lack of efficiency resulting in funding shortages persisted early on during this transition, existed during the 1990s as demonstrated in *Kennedy*, \cite{76} and still persist today.

The State Board of Public Defense has assumed responsibilities for the public defense system that was previously a “patchwork of local public defense systems.”\cite{77} The legislature tasked the Board of Public Defense to oversee the public defense system in Minnesota as part of the State’s takeover of funding for the entire system.\cite{78} There is no reason to doubt this portion of the Legislative Auditor’s Report, or to believe that the Board of Public Defense has not executed its responsibilities well. However, the Legislative Auditor’s Report did not address whether this was the best form of governance for the public defense system.\cite{79} The empirical evidence will suggest that it is not.

The *Kennedy* court recognized the great importance the Judiciary has placed upon the role of public defense of adults and juveniles charged with crimes, and that funding must be adequate.\cite{80} Further, the *Kennedy* court noted that the increased caseload along with stretched budgets was straining all of public defense at that time.\cite{81}

The current Legislative Auditor’s Report confirms that this poor financial condition continues today. Expenditures during the 2008–09 biennium for the public defender system totaled $136 million with staffing of about 528 full-time-equivalent staff.\cite{82} Budget reductions in the public defense system resulted in staff reductions in fiscal years 2003 through 2005.\cite{83}

Therefore, although the centralized system may be more streamlined, these numbers suggest that it may have been streamlined in less than the most efficient way.

\begin{footnotesize}
\begin{enumerate}
\item Id. at 3.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
C. Lack of Professional Trust and Incentive

Typical of most forms of centralization is that there becomes a tendency to control an organization from the top. The “best” form of control requires uniformity from the top so that, consequently, it is easier to assure compliance and to report such compliance to the legislature. Also, if a decision is made from a


85. See MINN. STAT. § 611.215, subdiv. 2(c) (2008) (describing the standards that must be approved by the board, established by the state public defender, and applied to “the offices of the state and district public defenders and [to] the conduct of all appointed counsel systems”). The legislation that created the current public defender system specifically included a requirement that the State Board of Public Defense report to the legislature regarding budgeting recommendations for “the board, the office of state public defender, the judicial district public defenders, and the public defense corporations.” Id. at subdiv. 2(a). The following are examples of policies within the State Judicial System Minnesota Judicial Branch Policy/Procedure that demonstrate other attempts at uniformity: “It is the policy of the Minnesota Judicial Branch to utilize uniform court practices to promote reliable and consistent statewide data and reporting.” Memorandum from State Court Adm’r on Policy No. 506(e): Uniform MNCIS Data Entry Standards for Problem-Solving Courts Policy and Procedure (June 18, 2010) (on file with author).

“This policy implements Judicial Branch Policy 503, which designates court forms identified as Statewide on the judicial branch websites and MNCIS as mandatory court forms. Mandatory court forms must be used without alteration, except to the extent local modification is permitted under this implementing policy.” Memorandum from State Court Adm’r on Policy 503(a): Development and Modification of Court Forms Policy and Procedure (July 1, 2009) (on file with author).

“It is the policy of the Minnesota Judicial Branch, pursuant to Minn. Stat. § 609.491, subd. 1, that court administration shall enter a plea of guilty and conviction when a person fails to appear for a petty misdemeanor offense.” Memorandum from Judicial Council on Policy 515: Petty Misdemeanor Failure to Appear (Feb. 3, 2009) (on file with author). This example involves a statewide policy that affects an individual judge’s adjudicative responsibility to resolve an issue on a case-by-case basis. See id. See also Minn. Judicial Council, Priorities & Strategies for Minnesota’s Judicial Branch: Focus on the Future, MINN. JUDICIAL BRANCH, http://www.mncourts.gov/Documents/0/Public/Judicial_Council/FY10-11_Strategic_Plan.pdf (last visited Nov. 24, 2010) (incorporating some of these policies as well as other policies into its strategic plan).

It is not the author’s intention to debate whether these specific examples cited are poor policy decisions. Rather, the examples reference a sampling of the plethora of decisions made in a centralized form of governance that increase ease in central reporting to the legislature, but necessarily stifle local policy discretion, which may better serve the citizens in that local area.
centralized location—in this case the Board of Public Defense—this centralized decision must be the best way to proceed regardless of the realities in the local judicial districts or the counties within those districts.

A common product of such centralization is the resulting mistrust among fellow professionals at different levels of the organization. Some of this mistrust is demonstrated in the Recommendations of the Legislative Auditor, which are described and responded to below.


The Legislative Auditor’s Report concludes: “We found weaknesses in day-to-day supervision of assistant public defenders. . . . Public defense officials said they want to increase the ratio of supervisors to assistant public defenders, but have been stymied by budget restraints.”

This comment overlooks the individual professional responsibilities of public defenders. Attorneys in the public defense system are all trained in the same matter as all lawyers in the state. Public defenders must pass the bar exam and must be licensed to practice law in Minnesota. Further, all lawyers in the public defense system must practice under the same ethical obligations as all other lawyers. Finally, most experienced lawyers in each of the communities where public defenders work are willing and anxious to provide mentoring advice to newer attorneys as needed.

The report does not identify specific examples of problems that resulted from this “lack of supervision.” Thus, one is left with the implication that these attorneys are not to be fully trusted to follow the dictates of their legal training and ethical obligation. It

86. AUDITOR’S REPORT, supra note 2, at 2.
87. Id.
89. See MINN. R. PROF’L CONDUCT (2008) (referring to all lawyers generally in most provisions).
leads, as suggested by the Legislative Auditor’s Report, to requests for further funding so that more supervision may occur according to centralized bureaucratic standards.\(^{90}\)

2. **“Minnesota May Need to Reconsider its Heavy Reliance on Part-Time Public Defenders”\(^{91}\)**

As noted in the Legislative Auditor’s Report, as of July 2009 approximately “half of the state’s 450 public defenders . . . worked on a part-time basis.”\(^{92}\) As one reads the report, it is obvious that the authors view the use of part-time public defenders negatively.\(^{93}\) However, this appears to be based upon the overriding centralized governance philosophy that in order for professionals to be most effective, they must be supervised by more professionals, and there must be uniformity in policies and procedures to assure such professionalism. There is no empirical evidence to support such a philosophy, but there is much research to the contrary.\(^{94}\)

All part-time public defenders must be as equally educated as those who are full-time public defenders and are equally obligated to comply with the rules of professional ethics.\(^{95}\) This latter requirement includes the obligation that public defenders must provide competent representation for their clients, whether those clients are part-time defense clients or part-time private clients.\(^{96}\)

\(^{90}\). See AUDITOR’S REPORT, supra note 2, at 2.

\(^{91}\). Id.

\(^{92}\). Id.

\(^{93}\). See id. at 2–3.

\(^{94}\). See Treisman, supra note 13; Thomas Paine also once stated, “That government is best which governs least.” QUOTEDB (Dec. 9, 2010), http://www.quotedb.com/quotes/1213.

\(^{95}\). See, e.g., Assistant Public Defender—Winona and Olmsted Counties, supra note 88 (soliciting applicants for an assistant public defender position and noting that one requirement for employment is “[g]raduation from an accredited college of law”). See also MINN. R. PROF’L CONDUCT (2008) (referring to all lawyers generally in most provisions).

\(^{96}\). See MINN. R. PROF’L CONDUCT 1.1 (2008) (“A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”). This rule does not distinguish between types of clients and imposes the duty of competent representation on lawyers with respect to all clients. See id.
Many people consider it a mark of effective legal advocacy when a lawyer has represented both sides of an issue.\textsuperscript{97} When I was first practicing law in Canby, Minnesota,\textsuperscript{98} my firm represented local cities in the prosecution of misdemeanor and gross misdemeanor offenses.\textsuperscript{99} At the same time, I had a contract with the State of Minnesota to serve as a part-time public defender.\textsuperscript{100} I am convinced that my obligations to represent clients on both sides of the criminal issue, all while watching for conflicts of interest, made me a better advocate for my clients, including my criminal defense clients.

Under the current system, such dual roles are discouraged.\textsuperscript{101} This is a further example of the centralization philosophy, which hinders rather than enhances the effectiveness of the criminal defense attorney.\textsuperscript{102}

As a judge in the Eighth Judicial District in Minnesota, the majority of criminal matters over which I preside involve part-time public defenders.\textsuperscript{103} This has been a long tradition in rural districts and, as the Legislative Auditor’s Report notes, sixty-five percent of public defenders outside the Twin Cities are part-time.\textsuperscript{104} I also preside over matters in which public defenders are full-time. Based on my experience, both part-time and full-time public defense attorneys excel equally at representing their clients. In my

\textsuperscript{97} See Jonathan R. Cohen, The Culture of Legal Denial, 84 Neb. L. Rev. 247, 298 (2005). “Legal employers hire lawyers to help their clients win cases. The best product in the legal employment market is the lawyer who can skillfully argue for either side, and it is that product most law schools seek to produce.” \textit{Id.}

\textsuperscript{98} This is in reference to co-author, Judge Randall J. Slieter.

\textsuperscript{99} Qualley, Boulton & Vinberg, in Canby, Minnesota (formerly known as Qualley, Boulton & Slieter).

\textsuperscript{100} See Auditor’s Report, supra note 2, at 18 (describing how both attorney and nonattorney staff operate under contract); Minnesota’s Public Defender System, Minn. House of Representatives House Research (Aug. 2007), http://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpds.htm#Q7 (noting that chief public defenders “contract attorneys within their districts”).

\textsuperscript{101} See Auditor’s Report, supra note 2, at 27. “We also think the board needs to consider increasing the proportion of full-time to part-time public defenders and establishing additional satellite offices.” \textit{Id.} The Auditor’s Report also seems to discourage dual roles when it states that “Minnesota’s heavy reliance on part-time public defenders presents risks that need to be addressed.” \textit{Id.} at ix.

\textsuperscript{102} See supra Part III.B.

\textsuperscript{103} See Auditor’s Report, supra note 2, at 19. The map indicates that the eighth district includes one full-time attorney and sixteen part-time attorneys. \textit{Id.} The Legislative Auditor’s Report also describes Minnesota’s mix of full-time and part-time public defenders as “cost-effective,” “flexible,” and a way “to attract and retain very experienced lawyers.” \textit{Id.} at 24.

\textsuperscript{104} \textit{Id.} at x, 25.
discussions with other judges from throughout the state, their observations are similar.

Though the Auditor apparently based this recommendation upon the concerns expressed by some Chief Public Defender s, the Auditor provides no empirical evidence of actual deficiencies in defense representation by part-time public defenders. No analysis suggests such distinctions. Instead, the Legislative Auditor’s Report raises concerns consistent with the centralization philosophy of mistrust. That is, the Legislative Auditor’s Report notes that some public defender supervisors complain about the lack of their ability to supervise part-time public defenders and raise general concerns about the quality of part-time public defenders’ services. Further, supervisors complain that part-time public defenders may not request investigative or support services, even when supervisors believe such support is needed.

These supervisors’ complaints and concerns, however, are not analyzed for accuracy in the Legislative Auditor’s Report. Further, all part-time public defenders have an equal professional and ethical obligation to effectively represent clients and are subject to disciplinary action if they fail to do so.

It is the author’s opinion that greater, not less, reliance on part-time public defenders will be part of the financial solution. However, this requires a change of governance away from the current centralized model.

105. See id. at 26 (noting that several “district chiefs” were merely concerned about certain part-time public defenders’ performance); see also id. at 40–43 (failing to show deficiencies in part-time public defenders as compared to other public defenders).
106. See id. at 26.
107. Id. (expressing concern specifically over part-time public defenders “that often work alone and with limited supervision,” and those that are “reluctant to challenge judges during their public defense work for fear that doing so would damage their private practices”).
108. Id.
109. See id. (reporting that several district chiefs just “told us they were seriously concerned about the performance of certain part-time public defenders”).
111. See supra Part III.A. (indicating that centralized governance is the root of the financial problem in the public defender system).
3. “The Board of Public Defense Has Taken Important Steps to Improve Accountability”

Part of a centralized governance model is the belief that accountability can only occur if information is funneled to a statewide entity which is then able, with relative ease, to report public use of money to the legislature. Thus, the Legislative Auditor’s Report notes that the Board of Public Defense “has established a clear chain of accountability from assistant public defenders in the field to the board, and it has adopted system-wide policies, procedures, and compensation systems. The state public defender has established training programs for public defenders and procedures for assessing their performance.”

At first glance, this analysis seems convincing. If a clear chain of accountability from the top of an organization to the bottom exists, as well as statewide policies, procedures, and training, that sounds good. Note, however, that the Legislative Auditor’s Report did not, and could not, report the effect such uniformity of procedure has had on the performance of individual public defenders on individual cases.

As explained below, it is precisely this constrictive adherence to uniformity that inhibits the system from improvement and efficiency. Specifically, if allowing a part-time public defender in a location to serve as a city attorney would be prudent, the system should allow for such creativity even if such a dual role would not be prudent in other areas of the state.

112. Auditor’s Report, supra note 2, at x. The Legislative Auditor’s Report also states, “The Board of Public Defense has taken important steps to improve accountability, but they could do more to measure and supervise the quality of public defender services.” Id. at 20.
113. See supra text accompanying note 85.
114. Auditor’s Report, supra note 2, at x, 21.
115. See id. at 18, 20–21. The Auditor’s Report states:

The Board of Public Defense and state public defender have emphasized quality representation of clients as the office’s top priority. However, they have not developed measures of outcomes related to the quality of representation provided to clients. In October 2009, the state public defender asked for and received the board’s approval to begin developing criteria of quality representation. Lack of such criteria make it harder to objectively measure the performance of individuals and districts. It also makes it harder for the board to demonstrate to the Legislature and others the impact of budget and staff cuts.

Id. at 21.
116. See discussion infra Part IV (describing the motivations and goals of centralization).
As described below, a number of creative ideas can be implemented at a local level, fitting in with the local legal culture, to make the public defender system more effective.\textsuperscript{117} This requires a change, however, from the current belief that a centralized system with full uniformity must exist.


This section addresses another example of a recommendation that at first glance sounds of good governance. Certainly, a majority of court administrators, judges, and public defenders believe that those charged with a crime who can afford to reimburse at least some money towards the services of their attorney ought to pay.\textsuperscript{119} This recommendation, however, like most in a centralized model of governance, suggests that the sought results will always follow from the Legislature’s uniform standards. Empirical evidence suggests otherwise.\textsuperscript{120} As described later in this

\textsuperscript{117} See infra Part IV.A.–F. (suggesting basic components of a decentralized structure).

\textsuperscript{118} AUDITOR’S REPORT, supra note 2, at ix. The Auditor’s Report analyzed Minnesota’s procedures for determining public defender eligibility and then made the recommendation that fixed income standards for public defender eligibility should be established. \textit{Id.} at 56–60. The Auditor’s Report analyzed Minnesota’s broad eligibility standard and then made the recommendation to establish a single standard defining who should contribute to the cost of a public defender and the amount to be paid. \textit{Id.} at 64–69.

\textsuperscript{119} See \textit{id.} at 67 (internal citations omitted) (stating “77 percent of court administrators, 63 percent of judges, and 54 percent of public defenders . . . agreed or strongly agreed that ‘all but the truly indigent should pay something toward the cost of their public defender’”).

\textsuperscript{120} See \textit{AUDITOR'S REPORT, supra} note 2, at 64 (stating that “[w]hile state law requires defendants with financial means to reimburse the state for a portion of their public defender costs, these reimbursements are inconsistently ordered and collected”). Other notable disconnects between uniform standards and uniform results include Minnesota’s educational and welfare systems. First, with regard to educational systems, “it is the duty of the legislature to establish a general and uniform system of public schools.” MINN. CONST. art. XIII, § 1. This duty to uniformly fund the state’s public school districts has already been discharged by the legislature. \textit{See} MINN. STAT. § 126C (2010). Yet, an argument has been made that “the current [funding] system . . . permits high wealth districts to generate much more additional funding than their low wealth and average wealth counterparts,” thus “violat[ing] the constitutional duty of uniformity.” Skeen v. State, 505 N.W.2d 299, 308 (Minn. 1993) (finding such an argument unpersuasive). The court in \textit{Skeen} held,
article, only an incentivized system will result in positive results.\textsuperscript{121}

The Rules of Criminal Procedure and certain statutes already provide guidance to judges in determining the qualification of individuals for a public defender.\textsuperscript{122} Further, the Minnesota court system has relatively uniform public defender applications and other documents.\textsuperscript{123} Yet the Legislative Auditor’s Report demonstrates great disparity in the amount of money collected from judicial districts for these services. In particular, the Legislative Auditor’s Report points out that from 2007 to 2009 the

The structure and history of the Minnesota Constitution indicates that while there is a fundamental right to a ‘general and uniform system of education,’ that fundamental right does not extend to the funding of the education system, beyond providing a basic funding level to assure that a general and uniform system is maintained.\textsuperscript{121}


Second, with regard to welfare systems, Minnesota has a Family Investment Program (MFIP), which gives low-income families welfare, but aims to help them begin earning income and get off the welfare rolls as soon as possible. The Minnesota Family Investment Program (MFIP), Minn. Dep’t of Human Servs., \url{http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=id_004112&RevisionSelectionMethod=LatestReleased} (last visited Nov. 24, 2010). MFIP has been criticized because “recipients might linger on the caseload for two or three years . . . before they . . . needed to move . . . into the job market.” David Hage, \textit{Welfare Reform: Minnesota Style}, St. Legislatures, July/August 2004, at 43, \url{available at http://www.heartland.org/custom/senmod_policybot/pdf/15779.pdf} [hereinafter Hage, \textit{Welfare Reform}]; \textit{see also} Judy Keen, \textit{Crackdowns Target Welfare Cheats}, U.S.A. Today, Sept. 16, 2010, \url{http://www.usatoday.com/news/nation/2010-09-16-welfarefraud16_ST_N.htm} (noting recession-driven welfare cheating in Anoka County). \textit{But see} Hage, \textit{Welfare Reform}, supra, at 42–43 (noting the program’s well-documented positive employment and income effects). Both of these examples show that uniform standards do not necessarily entail uniform results, and that space for localized “free play” should be preserved.

\textsuperscript{121} \textit{See infra} Part IV.F.

\textsuperscript{122} \textit{See MINN. R. CRIM. P. 5.02, subdiv. 5} (2008) (“The court, if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender.”); \textit{MINN. STAT. § 611.17} (2008) (requiring each judicial district to screen requests for representation by the district public defender).

\textsuperscript{123} As noted throughout, the authors do not believe such uniformity of documents creates positive results. However, this example is provided only in response to the Legislative Auditor’s recommendation of more uniformity and the suggestion that such may lead to positive results.
Fifth Judicial District (southwest Minnesota), which reported 26,340 criminal cases filed, ordered $321,412 as reimbursement for public defender services, whereas the Fourth Judicial District (Hennepin County), which reported 148,529 criminal cases filed, ordered only $7,227 as reimbursement.\textsuperscript{124}

This great disparity clearly demonstrates that uniformity will not enhance collections. Instead, offering an incentive to local districts that review and collect such reimbursement will be more effective. Thus, less centralization should be the solution.

An example of such local creativity is occurring in Dakota County.\textsuperscript{125} Dakota County, as well as three other counties within the First Judicial District, has employed screeners to more carefully review public defender applications for eligibility and reimbursement.\textsuperscript{126} This type of creativity at the local level, if encouraged with financial incentive, is precisely the type of decentralization in governance which will help solve the public defense dilemma.

IV. IMPROVEMENTS TO GOVERNANCE—CHANGES THAT CAN IMPROVE THE PUBLIC DEFENDER SYSTEM (AND OTHER PARTS OF GOVERNMENT)

“Any intelligent fool can make things bigger, more complex... It takes a touch of genius—and a lot of courage—to move in the opposite direction.”\textsuperscript{127}

It is an understandable urge among policymakers, when faced with multiple levels of funding in any system, to desire to centralize that system in an attempt to equalize distribution of that service. This provides the appearance, though not the reality, as described earlier in this article.\textsuperscript{128} That is what occurred in the public defense system during the 1980s with the advent of the State Board of Public Defense.\textsuperscript{129}

\textsuperscript{124} Auditor’s Report, supra note 2, at 65 tbl.4.4.

\textsuperscript{125} See Joy Powell, Who Gets a Free Lawyer?: As the Ranks of Public Defenders Shrink, Dakota County Tries to Make Sure Only the Truly Poor Qualify, STAR TRIB. (Minneapolis), June 5, 2010, at 1B, available at 2010 WLNR 11773741.

\textsuperscript{126} Id.

\textsuperscript{127} See supra note 1.

\textsuperscript{128} See supra Part III.B (proposing that centralization, rather than funding, is the problem).

\textsuperscript{129} Minn. Stat. § 611.215 (2010).
This law outlines the membership structure of the Board of Public Defense and creates an ad hoc Board of Public Defense when considering the appointment of district public defenders. It further describes the appointment of a Chief Administrator and describes that person’s duties. Within this framework, it describes further duties and obligations of the Board of Public Defense to allocate funds, establish attorney case loads, establishes minimum qualifications for public defenders, as well as other duties.

The centralization of the public defense system in Minnesota is not unique from other areas of government during this same time period. As described earlier, during the past forty years, state expenditures have increased at double-digit rates in all but four of the past biennia. Most closely to the authors’ experience of such centralization is the recent completion of state funding, and hence centralization, of the Judicial Branch.

Often, the start of such governance is the promise by policy makers to provide statewide, and thus equalized, funding of the service. This is an understandable desire to provide an equalized funding source when, as in criminal defense, the obligation to provide the service is constitutional. The thought process is that funding ought to come from a statewide source when the obligation to provide the service is a statewide constitutional mandate. One may argue that this description of the source of funding bears little on the issue of proper governance because all funding, whether federal, state, or local, comes from the taxpayers.

There may be little dispute of this policy thought process, but the common mistake is to believe that state funding must necessarily also be accompanied by statewide centralized governance. No evidence positively equates state funding to state centralization, or more importantly, centralized governance with an improvement of the service or greater accountability of the use

130. Id. at subdiv. 1(a)–(b).
131. Id. at subdiv. 1(c).
132. Id. at subdiv. 1a.
133. Id. at subdiv. 2.
134. Capitol Solutions, supra note 73.
135. The last transfer of court administration expenditure from the county to the state occurred on July 1, 2005, for the Sixth and the Tenth Judicial Districts. See MINN. STAT. § 480.183 (2010).
136. See MINN. CONST., art. I, § 6; see also Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996).
of public funds. Evidence, such as demonstrated by the current plight of the public defender system, indicates that such centralization does the opposite.

It is the authors’ recommendation that if solutions are implemented as part of a decentralization of the public defender system, this will result in greater accountability, flexibility, and a greater team approach among all criminal justice partners at the local level. The public will benefit from this improvement both in terms of the improved service and the accountability of public funds.

Black’s Law Dictionary defines centralization as “[c]oncentration of power and authority in a central organization or government.”\textsuperscript{137} Merriam-Webster defines decentralization as “the dispersion or distribution of functions and powers; \textit{specifically}, the delegation of power from a central authority to regional and local authorities.”\textsuperscript{138}

Government, it may be argued, often lags behind private industry when it comes to best management practices.\textsuperscript{139} Though we often hear stated in government leadership circles the desire for employee qualities such as “empowerment,” “team building,” and “trust,” actions in a centralized governance system most often result in the opposite result.\textsuperscript{140}

One leader of business management improvement techniques described the result of centralized governance as follows: “The evidence is clear and overwhelming. Centralized, hierarchical organizations work about as well as the old Soviet Union. Despite all the evidence, we keep smacking into many variations on the centralization themes.”\textsuperscript{141}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Black’s Law Dictionary 204 (5th ed. 1979).
\item \textsuperscript{140} See supra Part III.
\item \textsuperscript{141} Jim Clemer, \textit{Decentralized Organization Structures Empower and Energize}, OPPAPERS.COM (June 1, 2010), http://www.oppapers.com/essays
\end{enumerate}
\end{footnotesize}
The difference is that in a decentralized organization, as compared to centralized organizations, the same concepts of “empowerment,” “teams,” and “trust” become actions—not just words. The same is true in the government and is arguably more important because we rely on the public’s money to deliver the governmental services. Hence, increasing governmental accountability closer to the people who are served by the government fits our country’s long history of liberty.

The decentralization of the public defense system will provide the structure to better utilize its existing resources and will increase trust and confidence in the professionals within the system. Some basic components of how this decentralized structure might look in the public defender system are suggested below.

A. Ten Public Defense Districts

Rather than the current single statewide Board of Public Defense, the state should eliminate the single governance board concept, and instead, arrange public defense among the current ten Judicial Districts. Advisory boards could be established with membership from each county within those Districts. Further governance at the county level will be outlined below.

Distribution of funds within the ten Judicial Districts could be based upon an analysis of district size, both geographic as well as population, case load, and any unique district needs. The distribution of funds is never easy due to usual political issues; however, this is also the case in a centralized system and ought not to be an excuse to avoid the improvement to the overall system. An advisory committee, together with the counties, would also allocate additional services, such as investigative time and expert witnesses.

142. The authors concede that there are many feasible ideas to decentralize the public defender system and other agencies and branches of government. These ideas are suggested to begin the discussion.

143. See supra text accompanying notes 49–53.

144. Consideration could be made as to who makes appointment to the advisory board, whether through county commissioners, judges, or a combination of both.

145. See infra Part IV.B.

146. See Russell, supra note 59.

147. Id.
This would allow for the elimination of many of the layers of management in the current system. For instance, there will be no need for a chief public defense administrator at the state level, or chief public defenders at the district level. Management of the public defenders at the district and county level would be determined by the local advisory groups and likely would consist of some form of “lead” public defenders, combined with self-management and working with other members of the local criminal justice system.

B. County Governance

Within each of the Judicial Districts, the counties would also provide direct governance of the public defenders. The current criminal justice system in all of Minnesota’s eighty-seven counties includes a local county attorney who reports to a Board of Commissioners. Those counties are responsible for criminal prosecutions, child protection, juvenile matters, and allocating the budget. Each of these counties has correctional officers involved as well. Though the funding source for these systems is all different, the broad goals of criminal justice for all participants remain the same.

These counties could share the budgetary allocation between both prosecution and defense. Broad supervision of this allocation (to assure an equitable division of funds) can occur at the judicial district level to resolve any disputes. The ability to involve all parties in the local justice community, however, will increase the likelihood of greater teamwork and will allow for greater flexibility to utilize funds which match local interests. Though the attorneys will ultimately have different obligations in and outside of the courtroom involving their cases, such collaboration will increase the likelihood of a just and efficient result.

149. See The County Attorney’s Office, AS’n of Minn. Cnty’s., http://www.mncounties.org/Publications/FYIs/PDF/County_Attorney08.pdf (last visited Nov. 24, 2010).
151. For instance, there are currently three separate delivery services of corrections—state, county, and community corrections.
C. Increased Professionalism

As noted above, attorneys in the public defender system are subject to the same ethical standards as all attorneys in Minnesota. Thus, they are obligated to effectively represent their clients. How the attorney arranges her or his time, the strategies involved, and the criminal justice dynamics involved in each legal community will all be left to the local public defenders. Thus, larger urban communities may decide to have more formal associations of their public defenders. In the rural districts, especially among part-time public defenders, local decisions are made by those individual attorneys in a much less formal way.

The increased responsibility and freedom to rely on the experience of these attorneys will, consequently, increase the professionalism of these attorneys.

D. Part-Time Public Defenders

Local districts will be free to consider greater use of part-time public defenders. The decision, as with all decisions in this decentralized system, will vary across the state. Among the decisions presented to each district and the counties within that district will be allocation of funds. It is conceivable that a more effective use of the funds available would be to hire, almost exclusively, part-time public defenders. In some districts, it may also be prudent to consider pro bono opportunities for new lawyers. Many local firms with multiple lawyers may appreciate this experience afforded to their new attorneys.

As explained above, there is no evidence to suggest that attorneys who devote only a portion of their legal practice to public defense are less prepared or less able to handle these types of cases. Further, it is arguable that this division of duties for an attorney is more consistent with the traditional experience of attorneys—in that they handle a wide array of matters and clients. This process would result in less expensive, wider public defense coverage, while maintaining a high level of competence.
E. Increased Justice Community Collaboration

When professionals within the judicial community work together, it benefits not only those who are progressing through the system, but also the public at large. This is already a reality in many districts despite their varied sources of governance within the system. Once governance of all those within the justice system are localized, collaboration will increase. As noted above, the professionals involved realize they have separate professional obligations to carry out their particular role in the system. 155 These same professionals also realize that by working together, their roles can be combined to provide a more effective result.

F. Increased Incentive to Obtain Partial Reimbursement for Services

As was described in the previous section, lack of guidelines to see partial reimbursement for public defender services is not the problem. 156 Lack of incentive to do so is the problem. 157 With the decentralized system, once all reimbursements are retained at the local level, incentive to carefully review and seek reimbursement will occur. This result is yet another example of how decentralization increases effectiveness and accountability to the public.

There are many forms that decentralization may take. The suggestions described in this article demonstrate a sample of what form it could take and the many benefits to the system which will occur as a result.

V. CONCLUSION

Addressing the issues facing the state’s public defender system requires acknowledging the following premises: there is no “new” money; criminal defense is constitutionally required; 158 the financial problems in the public defense system are not unique; 159 and increasing collaboration among all involved in the criminal justice community will aid in creating long-term solutions. 160
This combination of premises leads to the conclusion that temporary reforms or methods of increasing revenue in the form of fees, taxes, or otherwise will not affect change. Therefore, a long-term approach which changes the public defender system and which results in greater flexibility in the use of existing resources and relies on the ingenuity and professionalism of our public defenders across the state in a decentralized way will lead to greater solutions and to an even greater public defender system.