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Minnesota's Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source

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**MINNESOTA'S ATTEMPTS TO FUND INDIGENT
DEFENSE: DEMONSTRATING THE NEED FOR A
DEDICATED FUNDING SOURCE**

By Susan Herlofsky[†] and Geoffrey Isaacman^{††}

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I. INTRODUCTION

In 1963, in *Gideon v. Wainwright*,¹ the United States Supreme Court established the constitutional mandate that all indigent defendants charged with a felony should be provided a lawyer at government expense, regardless of whether that defendant was

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1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

charged in state court or federal court.² In the years that followed, the United States Supreme Court expanded the constitutional right to a lawyer to include: juvenile delinquency cases,³ misdemeanors,⁴ first appeals,⁵ in person line-ups,⁶ and cases involving suspended jail sentences.⁷ The Court also expanded the states' obligation to pay for nonattorney resources necessary to protect the defendant's right to a fair trial.⁸ While the courts have expanded the right to

2. Prior to *Gideon*, several states provided indigent defendants with government paid lawyers in capital and noncapital serious felony cases. See *Betts v. Brady*, 316 U.S. 455, 477–79 (1942) (Black, J., dissenting) (listing the thirty-five states which recognized the right to a government provided lawyer, either by statute, judicial decision, established practice, or state constitution).

3. *In re Gault*, 387 U.S. 1, 41 (1967) (noting that the Due Process Clause of the Fourteenth Amendment of the United States Constitution required that in a proceeding where a juvenile could potentially be committed to an institution, “the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent that child”).

4. *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972) (recognizing that “the problems associated with misdemeanors and petty offenses often require the presence of counsel to insure the accused a fair trial,” the Court held that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”); see also *Glover v. United States*, 531 U.S. 198, 203 (2001) (reiterating that “any amount of actual jail time has Sixth Amendment significance”).

5. *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (noting that the Fourteenth Amendment of the United States Constitution is violated “where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . has only the right to a meaningless ritual”).

6. *United States v. Wade*, 388 U.S. 218, 223 (1967).

7. *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (noting that a defendant is entitled to counsel on a case where he received a suspended sentence); cf. *Scott v. Illinois*, 440 U.S. 367, 373 (noting that no constitutional right to a lawyer exists if the sole sentence imposed is a fine).

8. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (noting that “fundamental fairness entitles indigent defendants to ‘an adequate opportunity to present their claims fairly within the adversary system’” (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974))). Furthermore, “justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Id.* at 76. Moreover, the court stated that:

mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Id. at 77.

counsel, they have provided no guidance to states on how to deliver indigent defense or how to pay for indigent defense.

It is here that the state and local governments have failed to live up to their obligations. Nearly half a century after *Gideon*, indigent defense remains in a state of crisis.⁹ Indigent defense is woefully underfunded.¹⁰ Lawyers providing indigent defense are overwhelmed with case volume and complexity, and often struggle to devote the time, energy, and resources each case deserves,¹¹ even in times of economic prosperity. During the economic downturns

9. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (noting “[b]y every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced”); Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004) (“[F]orty years after *Gideon*, this nation is still struggling to implement the right to counsel in state criminal and juvenile proceedings.”); A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 1 (2004) (noting that “forty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this county”) [hereinafter *GIDEON’S BROKEN PROMISE*]; Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1809 n.14 (2000) (discussing articles ranging from 1967 through 1993 detailing the problems with indigent defense due to inadequate funding); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13 (1994) (discussing the impact of charging more cases while providing less resources for indigent defense); Penny J. White, *Mourning and Celebrating Gideon’s Fortieth*, 72 UMKC L. REV. 515, 516 (2003) (noting that “every major study that had been conducted from the late 1970s through the late 1980s concluded that the right to counsel remained largely unfulfilled”); Editorial, *Hard Times and the Right to Counsel*, N.Y. TIMES, Nov. 21, 2008 (noting that as a result of “state revenue in free fall, the problem [of underfunded indigent defense] is reaching crisis proportions and creating a legal and moral challenge for the criminal justice system, state legislatures, and the legal profession”); NAT’L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 4, 50 (2009) [hereinafter *JUSTICE DENIED*], available at <http://www.constitutionproject.org/manage/file/139.pdf>.

10. See Spangenberg & Schwartz, *supra* note 9, at 13 (noting that in 1990 spending on indigent defense was still less than one-third of that spent on prosecution); see also, *infra* notes 56–63 and accompanying text; White, *supra* note 9, at 516 (noting that in 1979 combined state and local government spending on indigent defense was about one-quarter of what was spent on prosecution); BILL WHITEHURST, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION #110*, at 1, 2 (2004) (noting the “woefully inadequate” funding for indigent defense and accurately predicting that the funding crises will worsen after 2004 given state budget deficits), available at www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf.

11. See *infra* notes 111–140 and accompanying text.

in the early 1990s, early 2000s, and the past couple of years, funding for indigent defense has been repeatedly slashed.¹²

As United States Attorney General Eric Holder noted in early 2010:

[P]ublic defender programs are too many times underfunded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their client properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding. . . .

I continue to believe that if our fellow citizens knew about the extent of this problem, they would be as troubled as you and I. Public education about this issue is critical. For when equal justice is denied, we all lose. . . . Although they may stand on different sides of an argument, the prosecution and the defense can, and must, share the same objective: Not victory, but justice. Otherwise, we are left to wonder if justice is truly being done, and left to wonder if our faith in ourselves and in our systems is misplaced.

But problems in our criminal defense system aren't just morally untenable. They're also economically unsustainable. Every taxpayer should be seriously concerned about the systematic costs of inadequate defense for the poor. When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense.

So, where do we go from here?¹³

12. See, e.g., Backus & Marcus, *supra* note 9, at n.38 (discussing the impact of a sixteen percent reduction in public defense budgets in Oregon for 2001–03); Spangenberg & Schwartz, *supra* note 9, at 13 (listing significant budget cuts in New Jersey and Tennessee in 1991 and 1992); JUSTICE DENIED, *supra* note 9, at 7 (noting the “country’s current financial crisis, which afflicts state and local governments everywhere, is having severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement.”); see also *infra* notes 86–106 and accompanying text.

13. Eric H. Holder, Attorney Gen., Dep't of Justice Nat'l Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), available at <http://www.ojp.usdoj.gov/BJA/topics/Speeches/Eric%20Holder%20Remarks%20Indigent%20Defense%20Summit%202.18.10%201.pdf>.

This article attempts to answer that question.

Part I lays out the evolution of the constitutional right to a lawyer provided at government expense. Although the courts have been willing to expand the circumstances in which an indigent defendant gets free legal representation, they have been reluctant to define what “legal representation” entails. Furthermore, they have deferred to state legislatures to define how legal services are provided and the manner in which state governments fund these services.

Part II examines how state legislatures have responded to the lack of guidance by the courts. Part II.A. looks at the various ways of delivering legal services to indigent defendants. Part II.B. notes the various funding mechanisms used at the state and local levels to pay for these services. Part II.C. examines caseloads and highlights the fact that, despite the significant increase in spending on indigent defense, state and local governments have failed in their obligation to fully provide indigent defense.

Part III examines the history of indigent defense in Minnesota, the financial problems experienced, and the attempts to generate the revenue necessary to provide indigent defense. It also examines how the legislature dealt with public defense during budget crunches. Many of the strategies employed nationwide have been used in Minnesota with little or no success. It is clear that no matter what the intentions, the priority to fully fund indigent defense does not exist.

Part IV lays out an alternative dedicated funding stream, which would generate sufficient revenue in Minnesota to fully realize *Gideon's* mandate. At the same time, the dedicated revenue stream would insulate indigent defense from budget cuts enacted during times of economic crisis. This funding stream would rely upon a tax on alcohol as a means to meet the mandate of adequate indigent defense. The relationship between alcohol and crime is examined, and much of the money allocated for the criminal justice system would come from the people who often participate in the criminal justice system.

II. THE EVOLUTION OF THE INDIGENT'S RIGHT TO COUNSEL

In 1932 the United States Supreme Court addressed the meaning of the Sixth Amendment's guarantee of the right to counsel in *Powell v. Alabama*.¹⁴ In *Powell*, several African American defendants were accused of raping two white girls.¹⁵ They were indicted seven days after the alleged incident, and within six days of indictment, began trial.¹⁶ Although it appears that members of the local bar expressed a willingness to help in the representation of the defendants, no investigation was conducted, and it appears the defense was "pro forma [rather] than zealous and active."¹⁷ The trials for each of the defendants were each completed in less than a single day, each of the defendants were convicted, and each defendant was sentenced to death.¹⁸ As such, the Court concluded that there was no meaningful representation in this case.¹⁹ After examining the historical right to counsel in the original thirteen states, the United States Supreme Court concluded that the right to have an attorney appointed was "a logical corollary from the constitutional right to be heard by counsel."²⁰ Furthermore, the Court concluded that this obligation was imposed upon the states by due process within the meaning of the Fourteenth Amendment.²¹ However, at that time the Court limited the right to

14. 287 U.S. 45 (1932).

15. *Id.* at 49.

16. *Id.* at 53.

17. *Id.* at 58.

18. *Id.* at 50.

19. *Id.* at 58 (noting that to conclude otherwise would be to ignore reality).

20. *Id.* at 72. In recognizing the need for representation, Justice Sutherland noted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he [may] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68–69.

21. *Id.* at 71–72 (applying the obligation on states because "there are certain immutable principles of justice which inhere in the very idea of free government

appointed counsel to capital cases where “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”²²

In 1942, the United States Supreme Court was asked to extend the constitutional guarantee of counsel to all felonies in *Betts v. Brady*.²³ In that case, the defendant, Mr. Betts, was charged with robbery in the state of Maryland.²⁴ Betts asked the court to appoint a lawyer for him, but was instructed that the practice was to only appoint lawyers in cases involving murder or rape.²⁵ As a result, Betts served as his own lawyer. He was convicted at trial and sentenced to serve eight years in prison.²⁶

As in *Powell*, the Court in *Betts* examined the practice of the states to determine the scope of the fundamental right to an attorney.²⁷ Specifically, the Court examined whether the right to counsel meant access to counsel of one’s choice versus access to counsel regardless of financial means.²⁸ The Court concluded that, in a majority of states, appointment of counsel is not a fundamental right essential to a fair trial.²⁹ As a result, the Court declined to adopt a bright line rule requiring the appointment of counsel in all cases.³⁰ Rather, in a six-three decision, the Court warned that convictions arising out of cases where the defendant is unrepresented may not stand if the trial “is offensive to the

which no member of the Union may disregard” (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

22. *Id.* at 71. The Court specifically limited its ruling to 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.

Id.

23. 316 U.S. 455 (1942).

24. *Id.* at 456.

25. *Id.* at 457.

26. *Id.*

27. *Id.* at 465–71.

28. *Id.*

29. *Id.* at 471.

30. *Id.* at 473. The Court specifically noted “we cannot say that the [Fourteenth] [A]mendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.” *Id.*

common and fundamental ideas of fairness and right”³¹

Twenty-one years later, the United States Supreme Court revisited the issue in *Gideon v. Wainwright*.³² In that case, the defendant was charged with felony burglary.³³ As in *Betts*, the defendant, Mr. Gideon, asked the trial court to appoint him a lawyer, and that request was denied.³⁴ Gideon represented himself at trial, was convicted, and was sentenced to five years in prison.³⁵ Justice Black, writing for the majority, noted:

[I]n 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. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. . . . From

31. *Id.* Three justices dissented. Justice Black, writing for the dissent, noted, “If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the Fourteenth Amendment made the sixth applicable to the states.” *Id.* at 474 (Black, J., dissenting) (footnote omitted). He went on to note that:

A practice cannot be reconciled with “common and fundamental ideas of fairness and right,” which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of [certainty], that the defendant’s case was adequately presented.

Id. at 476. Noting that thirty-five states provide counsel in some form for capital and serious noncapital cases, Justice Black concluded his dissent with his stated belief that “no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.” *Id.* at 477 (footnote omitted).

32. 372 U.S. 335 (1963).

33. *Id.* at 336–37.

34. *Id.* at 337 (the noting that, under Florida law, indigent defendants only received appointed counsel in capital cases, trial court apologetically denied Mr. Gideon’s request).

35. *Id.*

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.³⁶

As such, the United States Supreme Court overruled *Betts*³⁷ and held that the Sixth Amendment right to counsel is so fundamental that the Fourteenth Amendment makes it obligatory on the states.³⁸

In the aftermath of *Gideon*, the Supreme Court continued to review and expand the right to counsel to the point where if an indigent defendant risks spending any time incarcerated, then he or she is entitled to a lawyer.³⁹ However, the Court has consistently deferred the manner in which indigent services are provided and funded to the individual state legislatures.⁴⁰ When asked to require increased resources for indigent defendants, the courts have consistently held that funding is specifically the responsibility of the legislature.⁴¹

36. *Id.* at 344. Justice Black's words proved to be prophetic. On remand, Mr. Gideon was represented by a local attorney, who conducted extensive investigation, effectively cross-examined the witnesses, and essentially established that the state's eyewitness was the likely culprit. The end result was that Mr. Gideon was acquitted by a jury after an hour of deliberations. JUSTICE DENIED, *supra* note 9, at 21 (citing ANTHONY LEWIS, *GIDEON'S TRUMPET* 234–50 (1964)).

37. *See id.* at 342.

38. *Id.* at 345.

39. *See supra* text accompanying notes 3–7.

40. *See, e.g.*, THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS I (2006), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf [hereinafter STATE INDIGENT DEFENSE COMMISSIONS] (noting that the Supreme Court has never ruled who is responsible to establish and fund indigent defense, and as such the duty has been met by the state, local governments, or a combination of both); JUSTICE DENIED, *supra* note 9, at 5.

41. *See* Bill Meyer, *Public Defender Offices Are in Crisis Nationwide*, CLEVELAND.COM (June 3, 2009, 7:02 PM), http://www.cleveland.com/nation/index.ssf/2009/06/nationwide_public_defender_off.html (noting that an appellate court in Florida overturned an order allowing public defenders to decline to take new cases on the grounds that solutions are within the province of the legislature and the lawsuit was “nothing more than a political question masquerading as a lawsuit”); *see also* State v. Smith, 681 P.2d. 1374, 1381–84 (Ariz. 1984) (finding low-bid indigent defense contracts unconstitutional, but not requiring an alternative means of providing indigent services or minimum costs for future contracts); *In Re* Order on Prosecution of Criminal Appeals, 561 So.2d. 1130, 1138–39 (Fla. 1990) (recommending the Florida legislature provide additional funds for criminal defense); State v. Citizen, 898 So.2d. 325, 338–39

III. STATE RESPONSES TO *GIDEON* AND ITS PROGENY

A. *The Delivery of Services to Indigent Defendants*

Over the years, delivery of indigent defense has developed into three categories: (1) public defender programs;⁴² (2) a contract system;⁴³ and (3) assigned counsel.⁴⁴ Each state was allowed to develop its own system for the delivery of services, resulting in a “‘crazy quilt’ in which the quality of representation depended not only upon the state, but perhaps even, the county of the

(La. 2005) (noting that while the state had taken some actions in the twelve years since the *Peart* decision, it was still not providing sufficient funds for indigent defense, but ruling that the appropriate remedy was to put the criminal case on hold rather than compel the state or the parish to provide additional funds); *State v. Peart*, 621 So.2d 780, 783 (La. 1993) (holding that case loads in the New Orleans indigent defense system were so high that clients were not provided assistance of counsel as constitutionally required, but not requiring any governmental agency to provide additional resources); *Lavelle v. Justices in the Hampden Super. Ct.*, 812 N.E.2d 895, 911 (Mass. 2004) (noting that the Massachusetts legislature underfunded indigent defense, but declining to order additional money, and instead ordering that cases against defendants would be dismissed without prejudice if they did not receive an appointed lawyer within forty-five days of being charged); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (upholding Minnesota’s funding mechanisms for indigent defense even though the Fourth Judicial District’s public defender’s office was so understaffed that it would need to increase its staff by fifty percent simply to meet state guidelines for maximum caseloads); *Quitman v. Mississippi*, 910 So.2d 1032 (Miss. 2005) (upholding lower court’s granting of summary judgment on the grounds that the county did not establish that state law putting the burden on the county for the funding of indigent defense created ineffective assistance of counsel, despite the high case loads and lack of support resources available for the public defenders).

42. A public defender program is a program where full or part-time public defenders provide legal services for a given location or jurisdiction. Robert L. Spangenberg & Marea L. Beeman, *Toward a More Effective Right to Assistance of Counsel: Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 36 (1995).

43. A contract system is one where a government entity enters into a contract with individuals or firms to provide legal representation for indigent defendants. Contracts can be fixed price contracts (a set fee to handle all cases during a set time period) or fee-per-case contracts (payment of a set amount for each case handled during the time period). *Id.* at 35–36.

44. Assigned counsel programs rely upon appointment of private lawyers to individual cases. Attorneys may be assigned by judge on an ad hoc basis or by an administrative body. Under either method, payment may be hourly or a set amount, although there are often caps on payment. *Id.* at 32–34; ABA CRIMINAL JUSTICE SECTION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-2 (3d ed. 1992), available at <http://www.abanet.org/crimjust/standards/providingdefense.pdf>.

prosecution.”⁴⁵ By 1983, public defender offices provided indigent defense in just over one-third of the counties nationwide.⁴⁶ Fifty-two percent of the counties used assigned counsel programs, and the balance relied upon contract systems.⁴⁷

By the early 1990s, assigned counsel remained the predominant system for the delivery of indigent defense, although there had been some increase at the county level in public defender offices and contract programs.⁴⁸ The primary change during this decade was the expansion of statewide indigent defense programs.⁴⁹ Statewide programs were responsible for some or all of the following: developing policy, providing oversight of indigent defense programs, integrating public defender programs, developing caseload standards, and dispersing money for indigent defense.⁵⁰ By the early 1990s, more than half the states instituted some form of statewide program.⁵¹ The growth of statewide programs continued in the following decade, and as of 2005, some form of statewide body overseeing indigent defense existed in forty-one states.⁵²

45. White, *supra* note 9, at 533.

46. *Id.* at 531–32 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: CRIMINAL DEFENSE FOR THE POOR 1986, at 3 (1998)).

47. *Id.* at 531 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: CRIMINAL DEFENSE FOR THE POOR 1986, at 3 (1998)).

48. *Id.* at 532 (citing Spangenberg & Beeman, *supra* note 42, at 33).

49. *See* White, *supra* note 9, at 534–35.

50. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 16. For a more detailed description of the responsibilities of statewide commissions, *see id.* at 18–29.

51. White, *supra* note 9, at 532. These statewide programs either involved a state public defender with authority for providing indigent defense statewide or a statewide public defender system run by a commission instead of a public defender. *Id.* (citing Spangenberg & Beeman, *supra* note 42, at 37–38).

52. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 2. Nine states added statewide bodies in the 1980s, five additional states added statewide bodies in the 1990s, and seven states added statewide programs between 2000 and 2005. *Id.* at 3. One state, Mississippi, did disband its statewide program one year after creating it, partly because the legislature never provided any funding for the program. THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005, 17 (2006) [hereinafter STATE AND COUNTY EXPENDITURES IN 2005], *available at* www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf. In addition, Tennessee created a limited statewide commission, dealing only with post-conviction relief. Local public defenders are elected at the district court level and operate without any state oversight. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 2.

Just as there is great variance from state to state regarding the delivery of indigent defense services, there is also great variance within the statewide indigent defense programs. Some variances include supervisory authority, funding control, or a combination of both, depending upon the specific wishes of each state's legislature.

Eleven states have established statewide commissions that administer statewide public defense systems, including both supervision and funding.⁵³ Nine states have a statewide public defender system without a commission.⁵⁴ Five states have a statewide commission that finances the entirety of indigent defense, but allows counties or regions to determine the method by which legal services are provided.⁵⁵ Ten states have a statewide commission which provides only a portion of the finances for indigent defense, but the counties retain primary responsibility for the delivery of legal services, as well as the remaining financial responsibility.⁵⁶ Finally, there are five states where the statewide bodies have no statutory authority over local jurisdictions and the

53. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 6. These states are: Arkansas, Colorado, Connecticut, Hawaii, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, and Wisconsin. *Id.*

54. *Id.* These states are: Alaska, Delaware, Iowa, New Jersey, New Mexico, Rhode Island, Vermont, West Virginia, and Wyoming. *Id.* In these states, a chief public defender is appointed by the governor and is personally responsible for the oversight and administration of the state public defender system. *Id.*

55. *Id.* These states are: Massachusetts, North Carolina, North Dakota, Oregon, and Virginia. *Id.* However, even with these categories there are significant variations. For example, in Massachusetts, there is a hybrid system where cases are handled both by full time public defenders in regional offices and approximately 2400 private attorneys who get appointed to individual cases. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 15. All of these lawyers are supervised by the statewide body. *Id.* In North Carolina, by contrast, individual counties still determine the model for the delivery of services, with thirteen of the state's one hundred counties using a public defender system, while the remaining counties rely upon either assigned counsel or contract defenders. *Id.* at 23.

56. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 7. These states are: Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, and Texas. *Id.* The partial authority is often over a type of case. For example, in Georgia, the state commission has authority over felony and juvenile delinquency cases, but counties retain responsibility for misdemeanor cases. *Id.* In Kansas, the state is responsible for felonies and appeals, and the counties are responsible for misdemeanor and juvenile cases. *Id.* Partial responsibility can also be divided by geographic location. For example, in Oklahoma, the state authority covers the entire state, except for the two largest counties, who have chosen to opt out of the state system. *Id.* at 7-8. In Nevada, seven counties are covered by the state system, but the remaining nine, including the two most populous, have opted out of the system and chosen to provide their own systems, at their own costs, but without state oversight. *Id.* at 8.

delivery of services, but try to exercise some control through the administration of supplemental state funding for indigent defense.⁵⁷

B. State and Local Funding for Indigent Defense

The effect of *Gideon* and its progeny is that the United States Supreme Court has created an unfunded mandate that has fallen on the shoulders of state and local governments.⁵⁸ The result of this constitutional mandate, without adequate funding, leaves indigent defense overwhelmed and undermines the principle of equal justice for all.

57. *Id.* These states are: Indiana, Louisiana, Nebraska, Ohio, and Texas. *Id.* In all but Texas, compliance with the state authority is discretionary, but to get the supplemental funding, local jurisdictions must agree to state standards. *Id.* However, due to budget limitations, the state funding often amounts to only a small portion of total expenses incurred for indigent defense. *Id.* For example, in Louisiana, state funding amounted to only 29% of the total spent on indigent defense. *Id.* at 9. In Nebraska, the original goal of 25% was never appropriated, and in 2004, state spending was only 4% of the total spent on indigent defense. *Id.* at 9–10. In Texas, state funding was 11% of the total costs. *Id.* Ohio, which once provided almost half the total costs, saw its contributions drop below 30%. *Id.*

58. JUSTICE DENIED, *supra* note 9, at 29–30 (citing Norman Leftsein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843 (2004)). Justice Powell, in his concurring opinion in *Argersinger*, raised concerns about the financial impact of expanding the right to counsel, noting:

[T]he easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases. The simplicity of such a rule is appealing because it could be applied automatically in every case, *but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems.*

Argersinger v. Hamlin, 407 U.S. 25, 50–51 (1972) (emphasis added). Justice Douglas, writing for the majority, dismissed Justice Powell's concern, indicating that there were sufficient legal resources in the United States to meet the expanded need for counsel. *Id.* at 37 n.7. Justice Douglas noted that it would take between 1575 and 2300 full time lawyers to provide legal representation to the expanded class of misdemeanor defendants, a small number of the estimated 355,200 lawyers practicing in the United States in 1972. *Id.* Justice Brennan, in a concurring opinion, opined that law students in clinical programs would be able to “make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.” *Id.* at 44. The only discussion about the financial cost being imposed upon the states was by Justice Powell, who concluded his concurrence by noting that courts and legislatures in individual states established limits for the appointment of counsel, and that by extending the right to counsel to all misdemeanors, the Court's decision “may seriously overtax capabilities.” *Id.* at 60.

By 1972, nine years after *Gideon*, and the year the right to counsel was extended to misdemeanors, nationwide indigent defense expenditures were estimated at \$87 million annually.⁵⁹ The estimated expenditures grew to \$200 million in 1976,⁶⁰ and \$436 million by 1980.⁶¹ By 2002, this total grew to \$3.3 billion.⁶² By 2005, it was estimated that county, state, and federal funding for indigent defense was approximately \$4.1 billion,⁶³ with state governments now assuming a majority of the financial responsibility for indigent defense.⁶⁴ Although this seems like a tremendous amount of money, it translates into approximately \$11.72 per person in the United States.⁶⁵

Currently, twenty-eight states essentially provide all the funding for indigent defense.⁶⁶ Four additional states provide a majority of indigent defense funding.⁶⁷ Sixteen states require counties to pay the majority,⁶⁸ while two states provide no state

59. JUSTICE DENIED, *supra* note 9, at 51. County governments were responsible for approximately \$50 million of the total expenditures. *Id.* at 51 n.18 (citing SHELDON KRANTZ, ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin* 5 (1976)) [hereinafter KRANTZ].

60. JUSTICE DENIED, *supra* note 9, at 51 (citing NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 7 (1976)).

61. *Id.* (citing NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 10 (ABA 1982)).

62. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 2.

63. *Id.* Of this total, \$1.777 billion was paid by states, \$1.684 billion was paid by counties, and \$668.8 million was paid by the federal government for indigent defense in federal court. *See id.* at 34–37.

64. *Id.* at 37.

65. Lefstein, *supra* note 9, at 921. When expenditures for federal court were removed, it amounts to less than \$10 per capita. *Id.* at 922. By comparison, in England, the per capita expenditure for indigent defense was almost \$34 for the same time period. *Id.* at 921. Only five states spent more than \$15 per capita on indigent defense, while twenty-nine spend less than \$10 per capita. *Id.* at 922.

66. Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. JUSTICE DENIED, *supra* note 9, at 54.

67. Kansas, Louisiana, Oklahoma, and South Carolina. *Id.*

68. Alabama, Arizona, California, Georgia, Idaho, Illinois, Indiana, Michigan, Mississippi, Nebraska, Nevada, New York, Ohio, South Dakota, Texas, and Washington. *Id.* Of these, six states contributed less than ten percent of the total funding—Arizona, California, Michigan, Nebraska, Nevada, and Washington. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 35–37.

funding at all.⁶⁹ Just as there was a general movement toward increased state oversight and administration of indigent defense services, there has been a corresponding increase of state financial responsibility.⁷⁰

Unfortunately, as states were assuming more responsibility for indigent defense, there were competing demands for limited state revenues. As such, states have turned to alternative revenue sources to supplement general funds when allocating resources for indigent defense.⁷¹ These alternative sources have included reimbursements,⁷² application fees,⁷³ filing fees and court costs, and various assessments on criminal files or fees.⁷⁴

Traditional reimbursement targeted defendants who were considered “indigent” but also had the financial means to pay for part of his or her legal defense.⁷⁵ However, recovery often required a significant amount of administrative resources to try and collect from defendants upon completion of the case.⁷⁶

In the early 1990s, states were under both the pressure of budget deficits and legal challenges to the underfunding of indigent defense. In an attempt to get a higher rate of return,

69. These states are Pennsylvania and Utah. JUSTICE DENIED, *supra* note 9, at 54.

70. Not only did states increase the amount they were contributing for indigent defense, but the number of states which contributed nothing decreased from ten in 1986 to two in 2005. *Id.* at 55; STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 40, at 31.

71. JUSTICE DENIED, *supra* note 9, at 57.

72. Also called recoupment, it is usually collected at the end of the case, and reflects the costs of the legal representative provided. THE SPANGENBERG GROUP, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE 2 (2002), available at www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf [hereinafter APPLICATION FEES].

73. Application fees are fees imposed at the onset of proceedings. *Id.* They are also called “copayments,” “user fees,” “administrative fees,” or “registration fees.” Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052 (2006). Application fees can generally be broken down into two categories: (1) fees applied statewide, and (2) states where individual counties have the discretionary ability to impose and collect the fees. See APPLICATION FEES, *supra* note 72, at 5.

74. Spangenberg & Schwartz, *supra* note 9, at 16.

75. Wright & Logan, *supra* note 73, at 2046.

76. *Id.* Some recoupment programs spent more on administrative costs than they were able to recover. See APPLICATION FEES, *supra* note 72, at 29 n.6. Contrast this with Kentucky’s experience, which actually saw an increase in its recoupment collections after the imposition of application fees, resulting in \$1.8 million in collections between the two sources for 2000. *Id.* at 10.

many states supplemented reimbursement with application fees.⁷⁷ In 1994, application fees existed in only six states and one county.⁷⁸ By 1997, application fees were used by eleven states and seven counties within a twelfth state.⁷⁹ By 2006, application fees were utilized by twenty-five states and two counties within a twenty-sixth state.⁸⁰ Fees ranged from \$10 to \$480 depending upon the state, the charges, and the ability of the defendant to pay.⁸¹ However, despite the expansion of application fees, the revenue collected continued to fall far short of expectations.⁸²

77. Wright & Logan, *supra* note 73, at 2046. Copayments were often sought by leadership in indigent defense organizations in an attempt to avert budget problems. *Id.* at 2055. For example, a budget crisis in New Jersey in 1991 led directly to the imposition of a \$50 application fee for indigent defense. APPLICATION FEES, *supra* note 72, at 12. In New Mexico, application fees were enacted at the request of the New Mexico State Public Defender in 1992. *Id.* at 13.

78. APPLICATION FEES, *supra* note 72, at 4.

79. *Id.*

80. Wright & Logan, *supra* note 73, at 2052. These included Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Vermont, Wisconsin, West Virginia, and King County and Pierce County, Washington. *Id.* at 2052 n.20–21.

81. *Id.* at 2053. Florida is the only state which does not allow the waiver of an application fee. See APPLICATION FEES, *supra* note 72, at 8. This is so despite the United States Supreme Court ruling that imposing an application fee unconstitutionally violates a defendant's Sixth Amendment right to counsel if the defendant is required to pay and the payment would create a manifest financial hardship. See *Fuller v. Oregon*, 417 U.S. 40, 53 (1974); see also *State v. Tennin*, 674 N.W.2d 403, 409–10 (Minn. 2004) (finding unconstitutional the same copayment statute once the legislature amended it to remove the court's ability to waive copayments); *State v. Cunningham*, 663 N.W.2d 7, 12 (Minn. Ct. App. 2003) (finding constitutional a copayment imposed by the court as long as the court had the ability to waive it due to hardship).

82. See Wright & Logan, *supra* note 73, at 2070. Collection of application fees ranged from only six to twenty percent. APPLICATION FEES, *supra* note 72, at 29. In 2001, only two states generated more than \$1 million in application fees, and one of those was Florida, which appears to be imposing and collecting fees in violation of the Sixth Amendment of the United States Constitution. *Id.* Indiana collected almost \$1.5 million in 2000 through a combination of both application fees and recoupment. *Id.* at 9. Minnesota only generated \$93,000 during the first three months of its nonwaivable application fee, even through the program was expected to generate \$5 million each year. Amy Sherman, *Defendants Squeezed for Drug Tests, Probation Fees Are Part of Trend to Help Pay for Criminal Defense*, PIONEER PRESS (St. Paul, Minn.), Dec. 27, 2003, at B1. In South Carolina, an application fee expected to raise \$1.4 million annually starting in 1994 never generated \$200,000 in any given year. APPLICATION FEES, *supra* note 72, at 17–18. Although Wisconsin estimated it would generate \$7 million in application fees, through 2000 it had failed to collect \$1 million in any year since its enactment. *Id.* at 20.

An additional avenue of revenue explored by states was surcharges on fines and other fees. For example, Kentucky began assessing fees on DUI cases.⁸³ South Carolina began imposing assessments on top of criminal fines.⁸⁴ In Georgia, money was raised through fees on civil and criminal cases and surcharges on bail.⁸⁵ In New York, nearly half of the money spent on indigent defense came from nongeneral fund sources.⁸⁶ In Louisiana, the overwhelming majority of money for indigent defense is generated through fees associated by traffic fines.⁸⁷ Capital cases and appeals

Connecticut failed to generate close to fifty percent of anticipated revenue. *See id.* at 6. New Mexico hoped to earn as much as \$200,000 annually, yet it was barely earning half that in 2000. *Id.* at 13–14. In Santa Barbara, California, the public defender fee was discontinued in 2001, in part because of the fact that the fee failed to generate significant revenue. *Id.* at 22. Nationwide, in 2001 the rate of collection for public defender fees was between six and twenty percent. Whitehurst, *supra* note 10, at 6.

83. APPLICATION FEES, *supra* note 72, at 10. Of the \$200 DUI assessment, twenty-five percent of that collected went toward public defense. *Id.* In 1999, this generated almost \$1.17 million for statewide indigent defense. *Id.*

84. *Id.* at 17. South Carolina has a complicated formula for fines from general court sessions, magistrates' courts, and municipal courts. Assessments on fines in each of these courts range from fifty-two to one hundred percent of the fines, with a portion of the collected assessments (ranging from 11.38% of magistrate assessments to 19.38% of municipal assessments) allocated for statewide indigent defense. *Id.* In 2000, these assessments on fines generated \$5.67 million for indigent defense. *Id.* Other states acted along similar lines. For example, in Ohio, counties are partially reimbursed by the state for indigent defense. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 25. The reimbursement fund is supported primarily by assessments on criminal convictions. *Id.* South Dakota also uses a portion of a surcharge on fines to reimburse counties for a portion of the costs of indigent defense. *Id.* at 28.

85. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 10. These fees included civil filing fees as well as surcharges on fines and bonds. *Id.* All of the fees were specifically earmarked for indigent defense. *Id.* However, the additional assessments, started in 2004, were insufficient in covering Georgia's costs. JUSTICE DENIED, *supra* note 9, at 57. Money was diverted from the collection, so that in 2009, indigent defense was only appropriated \$40 million, even though \$45 million was raised in 2008 from the various fees. *Id.* at 58. From 2005 through 2009, indigent defense in Georgia was shortchanged more than \$20 million from collections initially earmarked for indigent defense. *See* Bill Rankin, *Georgia's Public Defender System May Go Back Under County Control*, THE ATLANTA J-CONST., Apr. 6, 2010, <http://www.ajc.com/news/georgia-politics-elections/georgias-public-defender-system-440964.html>.

86. JUSTICE DENIED, *supra* note 9, at 58–59. These alternative sources of income included fees for criminal history checks, lifting license suspensions, surcharges on parking tickets, and additional attorney registration fees. *Id.* at 59 n.59.

87. Backus & Marcus, *supra* note 9, at 1050; JUSTICE DENIED, *supra* note 9, at 58. Unfortunately, in Louisiana the state provides less than twenty percent of the

in Mississippi are funded through assessments on criminal cases,⁸⁸ while all other cases are funded at the county level by fines in criminal cases.⁸⁹ In Arizona, virtually all of the funding for indigent defense is provided by the county through various assessments and fees.⁹⁰ Pennsylvania and Utah are the only states where indigent defense is funded entirely by the counties.⁹¹

Despite the increase in both sources of revenue and total revenue, indigent defense budgets have continued to be cut during times of economic downturns.⁹² The pattern has held true during three major downturns in the past twenty years: early 1990s, early 2000s, and 2008 to present.⁹³

Faced with budget deficits, some states started reducing public defense budgets in the early 1990s.⁹⁴ In Kentucky, funding was reduced at the state level by over five percent.⁹⁵ Similarly, spending for public defense in Tennessee was reduced by 5.3%.⁹⁶ Tennessee attempted to deal with the budget reductions by reducing hourly

financial assistance to indigent defense. JUSTICE DENIED, *supra* note 9, at 58. Although a significant amount of money is raised at the parish level, the lack of state contributions left parishes financially vulnerable. Some jurisdictions found themselves without the money to pay for attorney's fees. *See State v. Citizen*, 898 So.2d 325, 338 (La. 2005) (noting that it is appropriate for the trial court to halt prosecution when there is insufficient funds to guarantee payment for the defense in a capital murder case); Backus & Marcus, *supra* note 9 at 1050 (discussing the negative balance for Lake Charles with six capital murder cases still outstanding).

88. STATE AND COUNTY EXPENDITURES IN 2005, *supra* note 52, at 17. The assessments are on all criminal cases, including traffic tickets, fish and game violations, as well as traditional felonies and misdemeanors. *See id.* at 18.

89. *Id.* at 17. There is no tracking of money put into the general funds of each county, so it is impossible to track whether the fines collected at the local level are actually spent on indigent defense. *Id.* at 18.

90. *Id.* at 5. These assessments were on both criminal and civil cases, including traffic violations. *Id.* In addition, there was a surcharge on filing fees and an additional assessment on court fees. *Id.* Like Arizona, Nebraska and Washington are states that also relied upon surcharges and court fees to generate revenue for indigent defense. *Id.* at 20, 32.

91. *Id.* at 27, 30. Funding is left to each county to decide how to pay for indigent defense. *Id.*

92. *See infra* notes 96–116 and accompanying text.

93. *See infra* notes 96–116 and accompanying text.

94. *See infra* notes 96–99 and accompanying text.

95. Richard Klein, *The Eleventh Amendment: Thou Shall Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 363 n.1 (1993) (citing William R. Jones, *Defense of Poor Crisis Needs Funding Help*, THE ADVOC., Apr. 1992, at 3).

96. *Id.* (citing John B. Arango, *Tennessee Indigent Defense System in Crises*, CRIM. JUST., Spring 1992, at 42).

remission for indigent defense to \$5–\$7.50 per hour.⁹⁷ Kansas reduced by twelve percent the amount it would pay appointed lawyers for expenses and fees for indigent defense.⁹⁸

In the early 2000s, indigent defense budgets were once again under siege by state legislatures. Funding for indigent defense in several states fell.⁹⁹ In Alabama, costs for indigent defense rose while budget cuts ranged from ten to eighteen percent.¹⁰⁰ In Georgia, statewide reform was enacted, but only \$8.3 million in funding was provided even though the system required \$50–\$70 million more to satisfy the mandated reform.¹⁰¹ In Kentucky, budget problems also gutted attempts at reform, leaving the indigent defense system woefully understaffed.¹⁰² In New Orleans, thirty-four of the forty-one public defenders were laid off in the aftermath of Hurricane Katrina.¹⁰³

From 2008 to 2010, states budgets were once again in dire financial straits.¹⁰⁴ As a result, states and counties once again cut funding for indigent defense. In Florida, many county public defender offices reduced positions and even transferred costs to

97. BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 17 (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>, [hereinafter DEFENDER WORKLOADS].

98. Klein, *supra* note 95, at 372.

99. JUSTICE DENIED, *supra* note 9, at 59. These states included Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin. In Oregon, \$10.1 million was cut from the statewide Indigent Defense Account. Lefstein, *supra* note 9, at 856. As a result, only the most serious crimes were prosecuted during the last three months of 2003 because of dramatic cuts in the indigent defense budget. GIDEON'S BROKEN PROMISE, *supra* note 9, at 11.

100. GIDEON'S BROKEN PROMISE, *supra* note 9, at 11.

101. Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 402 (2004) (citing Bill Rankin, *Indigent Defense Gets Force But Needs Funds*, THE ATLANTA J.CONST., May 23, 2003, at F1).

102. For example, heavy Kentucky caseloads led a panel of Kentucky state leaders to recommend hiring thirty-five additional lawyers; however, due to significant budget problems, that number was first reduced to ten additional lawyers, and then ultimately reduced to five additional lawyers—a whole thirty lawyers short of the original recommendation. Lee, *supra* note 101, at 376 (citing John Cheves, *Big Caseloads Swamp Public Defenders*, LEXINGTON HERALD LEADER (Nov. 24, 2002), <http://www.uky.edu/SocialWork/courses/sw571-001/Caseloads-Swamp-Defenders.pdf>).

103. David Winkler-Schmit, *The Life of a New Orleans Public Defender*, GAMBIT, (Feb. 21, 2009), <http://www.bestofneworleans.com/gyrobase/Content?oid=oid%3A51258>.

104. JUSTICE DENIED, *supra* note 9, at 59. For fiscal year 2009, thirty-seven states were looking at budget shortfalls, and of these thirty-seven, twenty-two fully funded their own indigent defense department. *Id.*

defendants by requiring those convicted to pay a nominal fee or outright rejecting cases.¹⁰⁵ In Kentucky, the state budget was reduced by \$2.3 million.¹⁰⁶ In Georgia, forty-one employees were laid off, and bills for contracted lawyers went unpaid.¹⁰⁷ Successive budget cuts in the state of Maryland resulted in a reduction of ten percent of the workforce.¹⁰⁸ In 2008, city and state contributions for indigent defense in New York City fell by \$2.7 million.¹⁰⁹

105. *Id.* at 60. In Orange-Osceola County, budget reductions of \$3 million resulted in the loss of ten attorney positions and forty positions over all. *Id.* In Miami-Dade County, the public defenders budget was reduced by 12.6%, but the workload climbed by twenty-nine percent. Erik Eckhold, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1, available at http://www.nytimes.com/2008/11/09/us/09defender.html?_r=1&pagewanted=1&hp.

106. JUSTICE DENIED, *supra* note 9, at 60. Due to budget cuts, public defenders stopped handling conflict cases, some misdemeanors, and even probation and parole violations. *Id.* (citation omitted). The future does not look any brighter, and the Kentucky governor's proposed budget calls for a \$400,000 cut for fiscal year 2011, and another \$400,000 in cuts for fiscal year 2012. Ronnie Ellis, *Public Defenders, KSP Plead for State Funding*, MCCREARY CNTY. RECORD (Feb. 3, 2010), available at <http://mccrearyrecord.com/statenews/x1512273178/Public-defenders-KSP-plead-for-state-funding>.

107. JUSTICE DENIED, *supra* note 9, at 60. In addition, the state of Georgia was unable to pay lawyers hundreds of thousands of dollars owed them for indigent defense in capital cases. *Id.* The reductions in Georgia's state funding resulted in the dismantling of parts of the statewide public defender system created just five years previously. Brenda Goodman, *Plan to Cut Back Public Defenders Stirs Worry in Georgia*, N.Y. TIMES, June 10, 2008, available at <http://www.nytimes.com/2008/06/10/us/10defenders.html>.

108. PAUL DEWOLFE, MD. PUB. DEFENDER, ADDRESS TO THE HOUSE APPROPRIATIONS SUB-COMMITTEE ON PUBLIC SAFETY AND ADMINISTRATION 3 (2010), available at http://www.dbm.maryland.gov/agencies/operbudget/Documents/2011/BudgetTestimony/C80B00_OfficePublicDefender.pdf. The reductions, from 2007-10, constituted one hundred positions, including twenty-nine attorney positions. *Id.* at 7. In addition, during this three year time period, the lawyers were subject to mandatory furloughs. *Id.* Such furloughs reduced the amount of time each lawyer worked during the year, further increasing caseload pressures, and placing lawyers in the impossible bind of working for free or neglecting the needs of their clients. *Id.*

109. Eckhold, *supra* note 105, at A1. At the same time, the number of cases handled grew by 16,000. *Id.* On top of these cuts, there was an expected additional \$11.3 million shortfall for the 2010 fiscal year. John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES, Apr. 5, 2009, at A19, available at <http://www.nytimes.com/2009/04/06/nyregion/06defenders.html?scp=1&sq=public%20defender%20caseloads&st=cse>. The 2011 New York City budget anticipates a drop of \$20.1 million in city funding for indigent defense. LEGAL AID/INDIGENT DEF. SERVS., COMM. ON FIN. & COMM. ON FIRE AND CRIMINAL JUSTICE SERVS. 2 (2010), available at http://council.nyc.gov/html/budget/PDFs/legal_aid_exec_rpt_fy_2011.pdf.

In 2009, the Montana Public Defender's Office budget was cut by \$800,000.¹¹⁰ In California, budget cuts and layoffs occurred in multiple counties.¹¹¹ Meanwhile, Oregon was looking at a repeat of its 2003 crisis, facing the prospect of a 6.6% budget reduction in 2009.¹¹² Louisiana's statewide indigent defense budget was cut by \$1.4 million in 2009 and is facing an additional \$7 million in state cuts for the upcoming budget.¹¹³ Oklahoma lost 7.5% of its budget in 2010, and is facing an additional 10% cut in 2011.¹¹⁴ Wisconsin was looking at a \$2 million reduction from 2009 to 2011.¹¹⁵

C. *Translating Funding into Caseloads*

As discussed above, there has been a dramatic increase in funding for indigent defense, increasing twenty fold from 1976 to 2005.¹¹⁶ Doesn't this demonstrate that state and local governments have fulfilled their financial obligations created by *Gideon* and its

110. Jennifer McKee, *Office of Public Defender Underfunded Already*, HELENA INDEP. REC. (Feb. 3, 2010), available at http://www.helenair.com/news/local/govt-and-politics/article_ff78c74-1093-11df-a76a-001cc4c002e0.html. The office was looking at an additional reduction of five percent of its budget, or \$990,951 in 2010 as the state legislature attempted to deal with its budget shortfall. *Id.*

111. For example, the Sacramento County public defender's office laid off eighteen staffers and was looking at laying off an additional twenty-nine attorneys due to budget problems in 2009. *Public Defenders Face Layoffs Across USA*, USA TODAY (June 15, 2009), available at http://www.usatoday.com/news/nation/2009-06-15-lawyers-poor-layoffs_N.htm. At the same time, the San Francisco public defender's office was fighting to stave off a \$2 million budget cut which would result in firing fifteen to twenty attorneys. *Id.*

112. Jake Thomas, *Lacking Lawyers: State Budget Cuts Threaten Public Defenders*, PORTLAND MERCURY, Feb. 5, 2009, available at <http://www.portlandmercury.com/portland/lacking-lawyers/Content?oid=1106650> (last visited Feb. 4, 2011).

113. Winkler-Schmit, *supra* note 103. In New Orleans, the city council cut additional allocations for public defense by \$500,000, on top of state cuts, even though the number of charges filed had increased by over 1000 from the previous year. Laura Maggi, *N.O. Public Defenders Office Says It Will Refuse New Murder and Rape Cases Due to Council Budget Cuts*, THE TIMES-PICAYUNE (Dec. 3, 2009), available at http://www.nola.com/crime/index.ssf/2009/12/orleans_parish_public_defender.html.

114. Julie Bisbee, *Oklahoma Indigent Defense System Struggles to Survive Cuts*, NEWSOK, Apr. 14, 2010, available at <http://www.newsok.com/indigent-defense-system-struggles-to-survive-cuts/article/3453740>.

115. WIS. LEGISLATIVE FISCAL BUREAU, PUBLIC DEFENDER BUDGET (2009–11), available at www.legis.state.wi.us/lfb/2009-11Budget/Governor/spd.pdf. The numbers break down to a \$618,000 reduction for 2009–10 and a \$1.25 million reduction for 2010–11. *Id.*

116. See *supra* notes 56–61 and accompanying text.

progeny? In short, no.¹¹⁷ The measure is not the total amount of money spent, but rather whether the amount of money spent ensures that every indigent defendant receives adequate legal counsel.¹¹⁸ Some form of caseload or workload measure is appropriate.¹¹⁹

117. Several factors contributed to the dramatic increase in cases where government lawyers needed to be provided for indigent defendants. Some of these factors included: (1) increases in the crime rate and number of cases filed, in particular drug related cases; (2) changes in economics, resulting in increased rates of people claiming to be indigent; (3) increases in the percentage of serious felony cases; and (4) changes in sentencing policies including mandatory sentences. THE SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE 5-6 (1991) (draft report) [hereinafter WEIGHTED CASELOAD STUDY], available at www.leg.state.mn.us/docs/2009/mandated/090611.pdf. It is estimated that as much as eighty percent of all criminal defendants receive the services of government lawyers. Whitehurst, *supra* note 10, at 1 (citing William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y, 443, 452 (1997)).

118. The standard articulated by the United States Supreme Court is that a lawyer must provide a reasonable standard of care "under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To that end, the Court pointed to standards articulated by the American Bar Association as a guide to what was reasonable. *Id.*

According to the American Bar Association, any system must provide "effect[ive], efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENDER DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. Principle 5 specifically states "[d]efense counsel's workload is controlled to permit the rendering of quality representation." *Id.* at 2. To that end, a lawyer's caseload "should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations National caseload standards should in no event be exceeded." *Id.* Furthermore, while there has been considerable emphasis on building public defense programs, there has been no analysis about whether the public defenders can handle the caseload. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PUBLIC DEFENSE REFORM SINCE *GIDEON*: IMPROVING THE ADMINISTRATION OF JUSTICE BY BUILDING ON OUR SUCCESSES AND LEARNING FROM OUR FAILURES 18 (2008), available at www.ojp.usdoj.gov/BJA/pdf/NLADA_PubDefLeadership.pdf.

119. DEFENDER WORKLOADS, *supra* note 97, at 7. Although caseloads are important for establishing a standard, they cannot be looked at in a vacuum. Support staff, training, and supervision all are things which need to be considered, as well as caseloads when determining whether each individual attorney has the time and resources necessary to meet the needs of each client. *Id.*

The first attempt to establish caseload maximums was in 1973, by the National Advisory Commission on Criminal Justice and Goals (NAC).¹²⁰ At that time the NAC determined that even under the best conditions, annual criminal defense attorney caseloads should not exceed the following: one hundred fifty felonies per year; four hundred misdemeanors per year; or two hundred juvenile cases per year.¹²¹ These standards were the maximum an attorney should handle if the attorney was doing only cases in one category.¹²² In the decades that followed, individual states tinkered with caseload maximums,¹²³ although most of the standards established roughly mirror those established by the NAC.¹²⁴

120. *Id.* at 8 (citing NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS (1973)).

121. *Id.* at 8 (quoting NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 186 (1973)). There are obvious limitations with establishing caseload maximums by category. In addition to the issues of support staff, training, and supervision, there are also issues about waiting or travel time, professional development responsibilities, and the variance in time needed for various types of crimes within each category (for example, a simple theft case is treated no differently than a complicated murder or child sex abuse case). *Id.*

122. *Id.* at 10.

123. *Id.* at 10–13. Some states have established caseload maximums by statute. For example, Wisconsin has a specific maximum annual caseload spelled out by law. *Id.* at 13–14 (citing WIS. STAT. § 977.08(5)(bn) (1999)). Other states have statutory language calling for the creation of maximums, but defer either to the statewide public defender program (New Hampshire) or counties or cities (Washington State) to establish maximums. *Id.* at 13 (citing N.H. REV. STAT. ANN. § 604-B:6 (2003); WASH. REV. CODE ANN. § 10.101.030 (1999)). Other sources of caseload maximums include: “court rule, contractual terms, court opinion, and published guidelines by national organizations.” *Id.* at 7. In addition, several statewide public defender organizations have established caseload maximums based upon case weighted studies done to reflect the particularized circumstances in that state. *Id.* at 8–9.

124. *See id.* at 11–12 for a comprehensive list of standards established relating to maximum caseloads for felonies, misdemeanors, juvenile cases, and appeals. For felonies, the standard maximums range from forty in Missouri to 302 in Tennessee, although both Missouri and Tennessee differentiate between the severity of the class of felonies. *Id.* In Minnesota, there is a cap of three homicides per year, but no distinction between all other types of felonies. *Id.* at 12 n.4. For misdemeanors, the range is a maximum of 250 per year in Minnesota (for gross misdemeanors, punishable by up to one year in jail) to 598 misdemeanors per year in Colorado (for nontraffic misdemeanors). *Id.* at 11–12. For juvenile cases, the range is 175 juvenile cases per year in Minnesota to 480 juvenile cases per year in Oregon. *Id.* Indiana has one set of standards based upon sufficient support staff and a lower maximum if support standards are not met. *Id.* at 10. If sufficient support staff exist, the standards are 200 felonies, 450 misdemeanors, 250 juvenile cases, or twenty-five appeals. *Id.* at 11. However, if there are not sufficient support staff, those maximums are lowered to 100–150 felonies, 300 misdemeanors, 200

Unfortunately, many of these established standards were ignored, and attorneys handled caseloads significantly higher than established ceilings.¹²⁵

Despite the significant increase in spending for indigent defense, caseload levels remain at dangerously high levels.¹²⁶ For example, in 1991, public defenders in Knox County, Tennessee had caseloads as high as five times the national standards.¹²⁷ In 1992, public defenders in Dade County, Florida, were handling double the recommended number of juvenile cases.¹²⁸ Meanwhile, in Connecticut, public defender caseloads were almost three times the recommended maximums in 1993 and 1994.¹²⁹ The average caseload in Orange County, California in 1995 was 610 cases.¹³⁰

juvenile cases, or twenty appeals. *Id.* at 10. The ratio of necessary support staff included one paralegal for every four attorneys handling felony or juvenile cases (1:5 for misdemeanors), one investigator for every four attorneys handling felonies (1:6 for misdemeanors and juvenile cases), and one secretary for every four attorneys handling felonies (1:6 for misdemeanors, and 1:5 for juvenile cases). *Id.*

125. JUSTICE DENIED, *supra* note 9, at 67. For example, even though the State of Washington had legislation requiring caseload maximums, many jurisdictions had caseloads far exceeding the established standards. Lefstein, *supra* note 9, at 854 (quoting MICHAEL S. SPEARMAN, REMARKS AT A HEARING ON LEGAL AID AND INDIGENT DEFENDANTS: ARE WE KEEPING THE PROMISE? THE RIGHT TO COUNSEL 40 YEARS AFTER *GIDEON* V. *WAINWRIGHT* (2003), available at [http://www.nacdl.org/public.nsf/GideonAnniversary/Index1/\\$FILE/Spearman_comments.pdf](http://www.nacdl.org/public.nsf/GideonAnniversary/Index1/$FILE/Spearman_comments.pdf)).

126. See Klein, *supra* note 95, at 393. According to studies through the 1990s there was “an unmistakable trend showing that ‘caseloads of most public defenders [had] grown at an alarming rate.’” *Id.*; SCOTT WALLACE & DAVID CARROLL, NAT’L LEGAL AID & DEFENDER ASS’N, THE IMPLEMENTATION & IMPACT OF INDIGENT DEFENSE STANDARDS 5 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf> (noting that a survey of the one hundred largest counties in the United States indicated that average caseloads were over 530 cases annually, with some attorneys handling as many as 2000 adult cases or 1400 juvenile cases in one year).

127. DEFENDER WORKLOADS, *supra* note 97, at 17. Additional funds were obtained in 1992, almost doubling the size of the office. *Id.* However, in the years that followed, funding did not keep up, and by 1999 it was determined that fifty-nine additional attorneys were needed statewide simply to reduce caseloads to the maximum recommended level. *Id.* at 18.

128. *Id.* at 19.

129. *Id.* at 22. Adult criminal lawyers were handling on average 1,045 combined misdemeanors and lesser felonies, and juvenile criminal lawyers were handling 716 cases each per year. *Id.*

130. See Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 377 (2004).

In the early 2000s, with budgets being reduced, caseloads once again soared to ridiculously high levels.¹³¹ For example, lawyers in Clark County, Nevada handled approximately 1500 juvenile cases each, about seven times the NAC recommended limit.¹³² In Kentucky, caseload averages rose to 489 cases per lawyer, with many jurisdictions averaging between 500–600, and one jurisdiction averaging over 600 cases per year.¹³³ Some parishes in Louisiana had caseload averages four to six times the recommended maximum.¹³⁴ Some attorneys in the state of New York were handling between 1000 and 1600 cases annually.¹³⁵ In Pennsylvania, a public defender's office caseload doubled over twenty years without any increase in attorneys.¹³⁶ Maryland public defender offices were so understaffed that by 2002, 300 full time lawyers were needed to reduce caseloads to the maximum levels.¹³⁷

131. See Backus & Marcus, *supra* note 9, at 1055–59.

132. *Id.* at 1055.

133. *Id.* at 1057. Rhode Island had similar numbers, with felony caseloads almost forty percent higher than the established maximums and misdemeanors 150% higher. *GIDEON'S BROKEN PROMISE*, *supra* note 9, at 18. Similarly, caseloads in Tennessee were at 670 cases in 1999, and the additional funding recommended to bring the state into compliance with caseload maximums was never allocated. White, *supra* note 9, at 537.

134. Backus & Marcus, *supra* note 9, at 1058–59 (citing Editorial, *Don't Allow Justice to Derail*, THE SHREVEPORT TIMES, May 8, 2005, at 6I; Elizabeth Fitch, *Indigent Defenders Overloaded, Underfunded*, NEWS-STAR (Monroe, La), May 5, 2005, at A1).

135. *GIDEON'S BROKEN PROMISE*, *supra* note 9, at 17. Nebraska public defenders had similar experiences, handling 1200 cases, including felonies, misdemeanors, child support contempt cases, and juvenile cases. *Id.* at 18. In Berrien County, Michigan, six lawyers handled a total of 4479 felony and misdemeanor cases, with one lawyer handling 700 misdemeanors, 300 felonies, and 200 private cases on the side. *Duncan v. Michigan*, 774 N.W.2d 89, 135 n.21 (Mich. Ct. App. 2009). In Muskegon County, Michigan, one lawyer reportedly handled 700 felony cases per year. *Id.*

136. *GIDEON'S BROKEN PROMISE*, *supra* note 9, at 18.

137. Lefstein, *supra* note 9, at 855. The Maryland public defender's office had not had an increase in the number of attorneys for five years, despite dramatic caseload increases. *Id.*

Not surprisingly, the budget crises in the late 2000s resulted in skyrocketing caseloads.¹³⁸ In one county in Tennessee, six lawyers handled 10,000 misdemeanors in a one year period.¹³⁹ In Kentucky, lawyers who were already operating forty percent above maximum caseloads and experiencing an eight percent annual increase in cases, were told by the legislature to expect budget decreases in upcoming years.¹⁴⁰ In Dade County, Florida, budget cuts resulted in felony lawyers handling 500 cases per year, and misdemeanor attorneys handling 2225 annually,¹⁴¹ while in Dallas County, Texas, misdemeanor lawyers are expected to handle 1200 cases while felony attorneys are expected to do 480 felonies annually.¹⁴² Average caseloads for Rhode Island were 1517

138. See Jeff Adachi, *Budget Cuts Threaten Promise of Equal Justice*, THE RECORDER (San Francisco), (Feb. 13, 2009), available at www.sfpublicdefender.org/media/2009/04/budget-cuts-threaten-promise-of-equal-justice (noting that public defenders in Arizona, Florida, Kentucky, Minnesota, Missouri, Maryland, and Tennessee all refused to accept new cases or sued to reduce excessive caseloads as budgets were reduced). In some larger cities, notably Chicago, Atlanta, and Miami, some public defenders reported handling caseloads in excess of 2000 misdemeanors annually. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 9 (2009) [hereinafter *MINOR CRIMES*], available at [www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf).

139. JUSTICE DENIED, *supra* note 9, at 68. One attorney reported having open 240 cases, of which 144 were felonies, while another lawyer reported representing 151 clients in the months of January and February of 2008. *Id.* Two attorneys reported handling 3000 misdemeanors during a one year period. *MINOR CRIMES*, *supra* note 138, at 21.

140. JUSTICE DENIED, *supra* note 9, at 68; see *Statement to the Subcomm. on Commerce, Justice, Science & Related Agencies, of the U.S. Comm. on Appropriations*, 111th Cong. 1-2 (2010) (statement of Virginia Sloan, President, The Constitution Project), available at www.constitutionproject.org/manage/file/389.pdf (noting that despite the insufficient expenditure per case and high average number of cases, Kentucky's Governor proposes reducing the Department's budget).

141. Eckholm, *supra* note 105, at A1. Although a district court judge initially granted the public defender's request to refuse to take defendants charged with less serious felonies, an appellate court reversed the decision, instead referring the problem to the legislature. See Bill Meyer, *Public Defender Offices Are in Crisis Nationwide*, CLEVELAND.COM (June 3, 2009), www.cleveland.com/nation/index.ssf/2009/06/nationwide_public_defender_off.html. Unfortunately, the legislative response repeatedly has been that indigent defense needs to learn how to better use its limited resources. Eckholm, *supra* note 105, at A1..

142. WESLEY SHACKELFORD, *REVIEW OF DALLAS COUNTY PUBLIC DEFENDER: APPELLATE DIVISION AND CASELOAD STANDARDS* 7 (2008), available at <http://www.courts.state.tx.us/tfid/pdf/Dallas%20PD%20Report-%20FINAL.pdf>. These caseloads were established to insure that public defenders "remain cost effective vis-a-vis the private assigned counsel." *Id.* at 17. The research indicated that the caseload caps were significantly higher than necessary to ensure "cost

misdemeanors and 239 felonies annually.¹⁴³ In Missouri, cases increased statewide by 12,000 over an eight year period, and yet staff numbers remained unchanged.¹⁴⁴ In New York City, the average indigent Legal Aid Society lawyer handled almost 600 cases in 2008.¹⁴⁵

Despite the significant increase in spending on indigent defense, overall the systems for providing indigent defense are inadequate.¹⁴⁶ These problems are exacerbated when states face budget deficits. So the question becomes: how can the constitutional right to counsel be insulated from the competing demands experienced by state and local governments during times of budget shortfalls?

IV. THE EVOLUTION OF INDIGENT DEFENSE IN MINNESOTA

In response to the United States Supreme Court's decision in *Gideon*, the Minnesota legislature passed the Public Defender Act in 1965.¹⁴⁷ The Public Defender Act allowed judges in each of the judicial districts to vote on establishing a public defender system.¹⁴⁸ However, the funding for indigent defense was the responsibility of individual counties, and was financed from property tax revenues.¹⁴⁹

effectiveness," with public defender costs per misdemeanor at approximately half that of private assigned counsel and about eighty percent of the cost of assigned counsel on felony cases. *See id.*

143. Talia Buford, *R.I. Public Defender Looks to Lighten Load*, THE PROVIDENCE J. (Apr. 20, 2009), available at www.projo.com/news/content/PUBLIC_DEFENDER_REFUSES_CASES_04-20-09_HMDUF3_v38.35d5d5b.html.

144. Eckholm, *supra* note 105, at A1.

145. *See* Eligon, *supra* note 109, at A19. While a new law would establish caseload maximums for New York City, it does nothing for other parts of the state of New York. "While the law applies only to lawyers who represent indigent defendants in New York City, supporters say they hope the guidelines will be expanded." *Id.* The caseload maximums do not go into effect until 2010. *Id.*

146. *See* Lefstein, *supra* note 9, at 845 (discussing the findings of the Department of Justice's national symposia on indigent defense in 1999 and 2000). England spends more than three times as much per capita as the United States on indigent defense. *Id.* at 921-23.

147. MINN. STAT. § 611.14-29 (2009).

148. JAIME BAILEY & MAREA BEEMAN, THE SPANGENBERG GROUP, CASE STUDIES OF TWO INDIGENT DEFENSE SYSTEMS: MINNESOTA AND WYOMING 8 (2001) [hereinafter TWO INDIGENT DEFENSE SYSTEMS], available at www.abanet.org/legalservices/downloads/sclaid/indigentdefense/mn-wystudies.pdf; WEIGHTED CASELOAD STUDY, *supra* note 117, at 1. Hennepin County and Ramsey County already had public defender systems in place prior to 1965. TWO INDIGENT DEFENSE SYSTEMS, *supra* note 148, at 8.

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

Consistent with national trends,¹⁵⁰ in the early 1980s, Minnesota began to shift to a statewide system.¹⁵¹ In 1981, a State Board of Public Defense (the Board) was created.¹⁵² In 1987, the Board's authorities were expanded,¹⁵³ and in 1989 public defenders in the statewide system became responsible for all felony and gross misdemeanor representation throughout the state.¹⁵⁴ In 1995, the state took over the responsibility for the funding and delivery of all indigent defense.¹⁵⁵ Finally, as of January 1, 1999, the two metropolitan counties were folded into the statewide system,¹⁵⁶ and public defenders became the primary providers of indigent defense statewide.¹⁵⁷

150. OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT: PUBLIC DEFENDER SYSTEM 9 (2010) [hereinafter PUBLIC DEFENDER SYSTEM], available at <http://www.auditor.leg.state.mn.us/PED/pedrep/pubdef.pdf>.

151. *Id.* at 10 (“About 20 years ago, Minnesota state government assumed responsibility for public defender services, shifting from a patchwork of local public defense systems.”).

152. *Id.* at 9. The Board's responsibility was primarily the appointment of the State Public Defender and the Chief Public Defenders in Minnesota's ten judicial districts. *Id.* at 10.

153. Among the responsibilities added to the Board in 1987 was the establishment of public defender caseload standards. WEIGHTED CASELOAD STUDY, *supra* note 117, at 1–2.

154. TWO INDIGENT DEFENSE SYSTEMS, *supra* note 148, at 8. Among the changes in 1989 was the allocation of approximately \$17 million for representation of all felonies and gross misdemeanors while misdemeanors, juveniles, and other cases remained the responsibility of the counties. WEIGHTED CASELOAD STUDY, *supra* note 117, at 3.

155. TWO INDIGENT DEFENSE SYSTEMS, *supra* note 148, at 8. Under Minnesota law, public defenders shall provide services to those financially unable to obtain counsel for the following cases: felonies, gross misdemeanors, misdemeanors; appeals from convictions of felonies or gross misdemeanors or minors ten years of age or older entitled to counsel. *Id.* at 8–9. For juveniles, this includes anyone charged by delinquency petition with the commission of a felony or gross misdemeanor or charged with being delinquent and facing a potential out-of-home placement. MINN. STAT. § 260B.163, subdiv. 4 (2008). It also includes children over ten in child protection cases where out-of-home placement may be ordered. MINN. STAT. § 260C.163, subdiv. 3 (2008). In addition, public defenders represented parents on child protection cases until 2008. See *MN to Lose 72 Public Defenders to Budget Cuts*, WCCO.COM (June 5, 2008) (on file with author); see also *infra* note 194 and accompanying text.

156. MINN. STAT. § 611.263 (1999). Prior to 1999, public defenders in the Fourth Judicial District (Hennepin County) and Second Judicial District (Ramsey County) were county employees, while all the remaining public defenders were state employees.

157. The State Board of Public Defense provides some funding for four nonprofit public defense corporations which provide services to minority indigents in Minneapolis, St. Paul, Duluth, and the Leech Lake and White Earth Reservations.

When the state assumed responsibility for organizing indigent defense and providing services, it also took on the financial responsibility for indigent defense.¹⁵⁸ From approximately \$17 million in 1989,¹⁵⁹ state appropriations grew to almost \$22 million in 1995.¹⁶⁰ This number grew to \$35 million in 1997,¹⁶¹ and \$53.8 million in 2003.¹⁶² For the next two years, state allocations dropped slightly, by approximately \$200,000.¹⁶³ Appropriations then increased again over the next several years, peaking at \$68 million in 2009 before being reduced to \$65.4 million in 2010.¹⁶⁴ The

PUB. DEF. BOARD, AGENCY PROFILE 1 (2008), *available at* http://www.leg.state.mn.us/docs/2008/other/081000/public_defense.pdf.

158. Hennepin County continued to contribute for some of the costs of public defense, providing almost \$2.7 million in 1994. *Kennedy v. Carlson*, 544 N.W.2d 1, 4 (Minn. 1996).

159. WEIGHTED CASELOAD STUDY, *supra* note 117, at 3.

160. *Id.*

161. *Id.*

162. E-mail from Kevin Kajer, Chief Administrator, State Board of Public Defense, to author, attachment 1 (June 9, 2010, 15:44 CST) (on file with author). The legislature initially cut allocations to public defense by \$3.4 million in FY 2003. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 32. As a result of the budget reductions, twenty positions were eliminated through retirement or layoffs. *Id.* at 33.

163. E-mail from Kevin Kajer to author, *supra* note 162, attachment 1.

164. *Id.* The initial recommendation by the governor was for a \$5.1 million cut. Scott Russell, *Public Defenders: A Weakened But Indispensable Link*, BENCH AND B. OF MINN., (2009), *available at* www.mnbar.org/benchandbar/2009/feb09/public_defenders.html. There was a tremendous amount of support for the public defenders office. For example, Michael Ford, President of the Minnesota State Bar Association, led a group lobbying on behalf of public defense funding. *Id.* County Attorneys also publicly supported public defense funding. See Susan Gaertner, Editorial, *A Court System Starved Equals Justice Denied*, STAR TRIB. (Minneapolis), Apr. 8, 2009, *available at* www.startribune.com/opinion/commentary/42706427.html (arguing against any additional cuts to public defense funding); Joy Powell, *Dakota County Public Defenders Buried In Cases*, STAR TRIB. (Minneapolis), Apr. 1, 2009, *available at* <http://www.startribune.com/local/south/42258087.html> (quoting Dakota County Attorney Jim Backstrom that public defenders are “woefully” underfunded,” and that without more funding “our system of equal and fair justice for all will begin to erode”). In addition, The Coalition to Preserve Minnesota’s Justice System was created. It included Minnesota Supreme Court Justice Eric Magnuson, district court judges, the President of the Minnesota State Bar Association, the County Attorneys Association, the City Attorneys Association, the Board of Public Defense, the Minnesota Sheriffs Association, the Minnesota Chiefs of Police Association, the League of Women Voters, ASFCME, and the Teamsters. See *The Coalition to Preserve Minnesota’s Justice System* (on file with author); see also *The Coalition to Preserve Minnesota’s Justice System*, Ramsey Cnty. Bar Ass’n, http://www.ramseybar.org/court_funding_coalition.html (last visited Mar. 28, 2011). The coalition held press conferences, met with legislative leaders, and pushed for funding for all

budget allocation for 2011 calls for a further reduction to \$64.7 million,¹⁶⁵ although larger cuts than that are likely given the anticipated \$6 billion state budget deficit for FY 2011.¹⁶⁶

Minnesota law allowing for client reimbursement for attorney's fees was enacted in 1965,¹⁶⁷ and this law remained in effect when the state took over financial responsibility for indigent defense.¹⁶⁸ In an attempt to generate additional revenue, and consistent with national trends, in 2002 the Minnesota legislature established a \$28 public defender copayment.¹⁶⁹ In 2003, in response to a budget deficit, the legislature made all copayments nonwaivable, and increased copayments to: \$200 for a felony, \$100 for a gross misdemeanor, \$50 for a misdemeanor, \$100 for a child in a juvenile case, and \$200 for an adult in a child protection case.¹⁷⁰ Copayments returned to \$28 after the 2003 changes were deemed

justice system entities. *Id.* While it was able to minimize budget cuts to public defense, there were still significant reductions in public defense funding. See Eric J. Magnuson, *The State of the Judiciary*, BENCH AND B. OF MINN., Aug. 10, 2010, available at <http://mnbenchbar.com/2010/08/the-state-of-the-judiciary/> (explaining how the coalition worked hard to spread the word about justice system funding, but that resources still dwindled).

165. E-mail from Kevin Kajer to author, *supra* note 162, attachment 1.

166. Baird Helgeson, *Deep Cuts, Regardless of Outcome*, STAR TRIB. (Minneapolis), July 25, 2010, at B1. According to proposals articulated by the five major candidates for governor, cuts to state funding will range from \$680 million to \$8.4 billion, and there is no indication public defense will be spared cuts under any candidate's plan. *Id.*

167. MINN. STAT. § 611.20 (1965). Today, money collected through reimbursements are distributed to part-time public defenders to offset their overhead costs, and does not constitute additional money the Board of Public Defense can use to pay for additional attorneys or support the state. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 64–70 (discussing reimbursement in Minnesota and recommending that the law be changed to allow the Board of Public Defense “to use the funds as it sees fit”). Consistent with the experiences of other states, reimbursement collections have not resulted in significant revenues, producing only \$928,047 in the two year period of 2007–2009. *Id.* at 67.

168. MINN. STAT. ANN. § 611.20 (West 2009 & Supp. 2010) (noting minor changes in the law in 1993, 1994, and 1995).

169. MINN. STAT. ANN. § 611.17 (West 2009 & Supp. 2010) (noting the addition of the \$28 copayment in 2002); 2002 Minn. Laws 36.

170. MINN. STAT. ANN. § 611.17 (West 2009); 2003 Minn. Laws 1402. Of the money collected from copayments, the first \$2.74 million was to be deposited in the general fund and any additional money was earmarked for the Board of Public Defense. *Id.* Minnesota only generated \$93,000 during the first three months of its nonwaivable application fee, even though the program was expected to generate \$5 million each year. Amy Sherman, *Defendants Squeezed for Drug Tests, Probation Fees Are Part of Trend to Help Pay for Criminal Defense*, PIONEER PRESS, Dec. 27, 2003, at B1.

unconstitutional.¹⁷¹ Finally, effective July 1, 2009, public defender copayments were raised to \$75 per case, regardless of the type of case.¹⁷²

Despite the various plans to raise alternative revenue, public defense in Minnesota was funded entirely from legislative allocations from the general fund.¹⁷³ However, in 2009, while once again facing a budget deficit, the Minnesota legislature authorized the Minnesota Supreme Court to increase attorney license fees as a way of generating additional resources for indigent defense.¹⁷⁴ The Minnesota Supreme Court agreed to temporarily raise attorney fees by \$75 per year for a two-year period.¹⁷⁵

As a result of the budget cuts, the number of public defenders in Minnesota declined dramatically. In March of 2007, for example, there were 423 full time equivalent (FTE) public defenders.¹⁷⁶ By May of 2009, this number had decreased to 376 FTEs,¹⁷⁷ and by June 2010 it had been further reduced to 352 FTEs.¹⁷⁸

Just as the massive increase in resources nationwide were insufficient to meet the needs of indigent defense, Minnesota's budget increases, even in the times of state budget surpluses, have fallen far short of what was necessary to adequately fund indigent

171. *State v. Tennin*, 674 N.W.2d 403, 410 (Minn. 2004).

172. MINN. STAT. ANN. § 611.17 (West 2009 & Supp. 2010). Even with the increase in copayments, collections were modest, amounting to \$499,000 in fiscal year 2009. See e-mail from Rebecca Pirus, Legislative Analyst, Minnesota House of Representatives Research, to author (June 10, 2010) (on file with author).

173. PUB. DEF. BOARD, AGENCY PROFILE, *supra* note 157, at 1. There are mandatory fines and various surcharges assessed to all fines in traffic and criminal cases, but these funds go into the general fund, with some amounts diverted to victim assistance programs or chemical dependency programs, depending upon the crime committed. See MINN. STAT. § 609.101 (2008 & Supp. 2009) (discussing mandatory fines and the distribution of the collected fines); MINN. STAT. § 357.021 subdiv. 7 (2008 & Supp. 2009) (discussing the distribution of mandatory surcharges to the general fund, peace officer training fund, and the Department of Natural Resources).

174. MINN. STAT. § 481.22 (Supp. 2009).

175. See Order Temporarily Increasing Lawyer Registration Fees, C1-81-1206 (Minn. 2009), available at www.lawlibrary.state.mn.us/archive/supct/0911/ORC1811206-1104.pdf. The Court made it clear that it believed funding was the responsibility of the governor and the legislature, and was agreeing to a one-time fee because of "exceptional financial circumstances currently facing the courts and the state in general". *Id.* at 4.

176. E-mail from Kevin Kajer to author, *supra* note 162, attachment 3.

177. *Id.*

178. *Id.*

defense. After the 1991 caseload review authorized by the legislature,¹⁷⁹ the State Board of Public Defense established that a full time lawyer should handle no more than 100–150 felonies, 250–300 gross misdemeanors, 400 misdemeanors, 80 child welfare cases, 175 juvenile cases, or 200 other cases annually.¹⁸⁰

Recognizing that most Minnesota public defenders handled a mixed caseload rather than simply doing misdemeanors or felonies, the State Board of Public Defense quantified the levels of effort associated with different types of cases by adopting the system of weighting cases based on the 1991 caseload review.¹⁸¹ A misdemeanor case was used as a standard unit, and all other cases were converted into units based upon the ratio of the maximum number of cases in that category versus misdemeanors.¹⁸² As a result, a felony case was assigned 2.67 units,¹⁸³ a gross misdemeanor was 1.33 units,¹⁸⁴ a child protection case was five units,¹⁸⁵ and a juvenile delinquency was 2.29 units.¹⁸⁶ An attorney's weighted caseload was determined by adding up the units for each case handled during the year. The caseload limits have not changed since they were adopted.¹⁸⁷

179. See generally WEIGHTED CASELOAD STUDY, *supra* note 117 (discussing the findings of the caseload study).

180. Kennedy v. Carlson, 544 N.W.2d 1, 4 (Minn. 1996); TWO INDIGENT DEFENSE SYSTEMS, *supra* note 148, at 14 n.10 (citing THE SPANGENBERG GROUP, RECOMMENDED CASELOAD STANDARDS FOR DISTRICT PUBLIC DEFENDERS IN MINNESOTA (1991)). The numbers adopted by the State Board of Public Defense differ from the recommendations made by the Spangenberg Group in two significant ways. First, the Spangenberg Group recommended that homicides be treated differently from all other felonies and that no lawyer handles more than three homicides per year if that was all the lawyer did for the year. WEIGHTED CASELOAD STUDY, *supra* note 117, at 70–71. On top of that, the Spangenberg Group recommended capping felonies at 100–120 annually. *Id.* The State Board of Public Defense decided to treat homicides no different than all other felonies and to cap felonies at 100–150 cases annually. Carlson, 544 N.W.2d at 4. The Spangenberg recommendations were based upon sufficient support staff for the attorneys, including one legal secretary for every four lawyers, one investigator for every three felony lawyers or six lawyers handling other types of cases. WEIGHTED CASELOAD STUDY, *supra* note 117, at 76–77.

181. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 28.

182. *Id.*

183. *Id.* at 29 n.9 (400/150 = 2.67).

184. *Id.* (400/300 = 1.33).

185. *Id.* (400/80 = 5).

186. *Id.* (400/175 = 2.29).

187. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 28. Critics of the 1991 caseload standards note that Minnesota's criminal statutes and associated consequences have changed the nature of public defense. *Id.* at 30. "More

Regardless of budgetary limitations, public defenders cannot decline new clients.¹⁸⁸ In 1991, attorneys in Hennepin County, Minnesota were handling caseloads fifty percent higher than the recommended maximums.¹⁸⁹ This translated to a weighted caseload of 600.¹⁹⁰ By 2001, the weighted caseload had risen to 864, and it was at 868 in 2003.¹⁹¹ By 2007, statewide weighted caseloads had fallen slightly to 748, still almost double the maximum caseload.¹⁹² The next year, caseloads dropped to 714 cases per lawyer,¹⁹³ in large part because the State Board of Public Defense determined that public defenders would no longer represent parents in child protection cases.¹⁹⁴ In 2009, even while refusing to handle the child protection cases, the weighted caseloads increased to an average of 779 per attorney.¹⁹⁵

One result of the crushing caseloads was that public defender offices stopped providing some services, even on the cases they were legally obligated to handle. For example, in the First and

complex cases and serious consequences” mean the amount of time each public defender needs to spend on each case goes up. *Id.* In addition, “collateral consequences” have increased, “includ[ing] denied access to public assistance or student loans . . . and loss of immigration status, jobs, or housing.” *Id.* at 39. An increase in the number of clients who do not speak English or suffer from mental illness or chemical dependency has also significantly added to the amount of time spent on each case. *Id.* at 40.

188. *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996); *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993) (noting that “a public defender may not reject a client, but is obligated to represent whomever is assigned to her or him, regardless of her or his current caseload . . .”).

189. *Kennedy*, 544 N.W.2d at 5.

190. The state and national standard for weighted caseloads is a maximum of 400 per attorney per year. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 35.

191. E-mail from Kevin Kajer to author, *supra* note 162.

192. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 36. It appears the weighted caseload numbers may actually underestimate caseloads of individual attorneys. The State Board counts all FTEs, even vacant positions it has no intention of filling. *Id.* at 31. As of May 2009, as many as twenty-two positions were vacant due to salary-saving leaves. *Id.* at 33. Because the vacant positions are not handling cases, the actual number of cases handled by lawyers may be significantly higher.

193. *Id.* at 36.

194. PUBLIC DEFENSE BOARD, *supra* note 157, at 9. Although a parent is entitled to an attorney in a child protection case, the law does not require that the public defender’s office provide the attorney. *Id.* Rather, that financial obligation falls upon the individual counties. See MINN. STAT. § 260C.331, subdiv. 3(4) (2008); *In re Welfare of the Child of S.L.J.*, 772 N.W.2d 833 (Minn. Ct. App. 2009) (ruling that the county that commenced a termination of parental rights (TPR) case against an indigent parent was statutorily obligated to pay reasonable compensation to the parent’s appointed private attorney).

195. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 36.

Seventh Districts, public defenders stopped covering misdemeanor arraignment calendars.¹⁹⁶ In the Fifth District, a waitlist was created for certain misdemeanor cases.¹⁹⁷ The First and Fifth Districts also stopped staffing certain courts or court calendars.¹⁹⁸ The situation became so bad that union members filed a grievance in the Third Judicial District.¹⁹⁹ As a result, the weighted caseloads standard forced public defenders to represent clients in numbers far above national standards; they struggled to find the time and resources to devote to each case.²⁰⁰ To meet the state weighted caseloads standards, state spending would need to increase to approximately \$108.4 million annually.²⁰¹ With the projected \$6 billion deficit looming on the horizon²⁰² the likelihood of getting additional resources from the legislature is slim.²⁰³

196. *Id.* at 33–34. These calendars were not covered, despite the fact that an arraignment calendar is considered a “critical stage” where the right to counsel attaches. *See* *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

197. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 33.

198. *Id.* This was especially true of drug courts, where many clients continue to appear in court as part of their period of probation. Public defenders no longer appeared with these clients, unless there was a claim that the client violated the conditions of his or her probation and faced being sent to jail or prison. *See id.* at 34.

199. Joy Powell, *Stressed Public Defenders File Grievance*, STAR TRIB. (Minneapolis), Apr. 12, 2010, available at www.startribune.com/local/90709914.html; Grievance with Respect to Excessive Attorney Workloads from Martha Albertson et al., to Karen Duncan, Chief Pub. Defender, Third Judicial Dist. (Mar. 5, 2010) (on file with author).. According to the grievance, attorneys asked for caseload relief in 2009 but continued to receive new cases. *Id.* at 4. As a result, lawyers are unable to have meaningful meetings with clients, prepare witness testimony at hearings, review discovery in a timely fashion, or honor client’s constitutional right to a speedy trial. *Id.* at 5. Public defenders lost cases they believe they could have won. *Id.*

200. *See* Grievance with Respect to Excessive Attorney Workloads, *supra* 199.

201. E-mail from Kevin Kajer to author, *supra* note 162.

202. *See* sources cited *supra* notes 155, 157, and accompanying text (discussing the Minnesota budget shortfall and resulting impact on program allocations).

203. PUBLIC DEFENDER SYSTEM, *supra* note 150, at 49. As the Legislative Auditor noted, “[a]lthough we think adding more public defenders to the system would address many of the concerns we identified, the likelihood of substantial funding increases in the state’s current fiscal environment is small.” *Id.* *See also* White, *supra* note 9, at 545 (recognizing that as a result of political realities, adequate funding for indigent defense will remain problematic); Lefstein, *supra* note 9, at 840 (stating “unless there are fundamental changes in this nation’s approach to providing defense services to the poor, the struggle to do so will continue indefinitely”).

V. DEDICATING THE REVENUE GENERATED FROM A FIVE-CENT TAX PER DRINK OF ALCOHOL TO PUBLIC DEFENSE WOULD MEET MINNESOTA'S CONSTITUTIONAL OBLIGATIONS

Minnesota has historically relied upon dedicated funding for particular uses.²⁰⁴ Some dedication of funds is spelled out in the Minnesota Constitution.²⁰⁵ Others are statutorily created by the legislature.²⁰⁶ In some cases, the legislature has empowered other governmental bodies to establish taxes for dedicated purposes.²⁰⁷ Whatever the mechanism, Minnesotans have used dedicated funding sources to meet specific societal needs. A dedicated funding source for public defense is necessary to protect those who cannot otherwise protect themselves through the political process.²⁰⁸

204. See generally MINN. CONST. art. XI, § 14 (supporting the Environmental and National Resources Trust fund from proceeds from the state lottery); MINN. CONST. art. XI, § 15 (supporting the Outdoor Heritage Fund by a general sales tax increase); MINN. STAT. §§ 270.072–.078 (2010) (State Airports Fund); MINN. STAT. § 287.12 (2010) (County Revenue Fund).

205. See, e.g., MINN. CONST. art. XI, § 14 (supporting the Environmental and National Resources Trust fund from proceeds from the state lottery); MINN. CONST. art. XI, § 15 (supporting the Outdoor Heritage Fund by a general sales tax increase); MINN. CONST. art. XIV, §§ 5, 12, 13 (supporting the Highway User Tax Fund by taxing motor vehicle and gasoline sales).

206. See, e.g., MINN. STAT. §§ 16A.724, 2971.05 (2010) (Health Care Access Fund); MINN. STAT. § 256.9658 (2010) (Heath Impact Fund); MINN. STAT. §§ 270.072–.078 (2010) (State Airports Fund), MINN. STAT. § 287.12 (2010) (County Revenue Fund).

207. A recent example of this was the authorization that allowed Hennepin County to raise sales taxes to finance the building of the new Twins baseball stadium. MINN. STAT. § 473.757, subdvs. 10, 11 (2009).

208. Lee, *supra* note 101, at 404, 407 (noting that often “[l]egislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space” and in tough budgetary times “indigent defense is one of the first things to go”); Wright & Logan, *supra* note 73, at 2068 (quoting Robert Kennedy as stating “[t]he poor man charged with crime has no lobby”); Donald Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (concluding that legislatures routinely decline to uphold the rights of criminal defendants because “a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant”). According to a national survey, only six percent of respondents believed funding for indigent defense should be decreased. BELDON, RUSSONELLO & STEWART, THE OPEN SOC'Y INST. & NAT'L LEGAL AID AND DEFENDER ASS'N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 7 (2001) [hereinafter NATIONAL MESSAGE], available at www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf. Despite general support for

Establishing a dedicated tax on alcohol would accomplish several goals. Each one-cent tax per “drink”²⁰⁹ would generate approximately \$25 million in revenue.²¹⁰ As such, a \$.05 tax per drink would generate more than enough to cover the \$108.4 million needed to fully fund public defense statewide.²¹¹

The legislature has attempted to create user fees for public defense without much luck.²¹² While not everyone who drinks alcohol commits a crime,²¹³ there has been a long accepted causal link between alcohol and crime.²¹⁴ Studies from around the world demonstrate a positive correlation between high alcohol use and involvement in assaultive behavior,²¹⁵ with some studies demonstrating alcohol involvement in as much as sixty-eight

funding indigent defense, the calculus changes when the question is funding indigent defense versus other government programs, and as a result public defense budgets end up with an inadequate piece of the state funding pie. *See, e.g., id.* at 7, 37.

209. For purposes of this tax, a “drink” is defined as 5 ounces of wine, 12 ounces of beer, or 1.5 ounces of distilled spirits. E-mail from Nina Manzi, Legislative Analyst, Minn. House of Representatives Research, to author (June 3, 2010, 12:01 PM CST) (on file with author).

210. *Id.*

211. There are numerous options for the \$20 million annual surplus generated by the alcohol tax. First, the money could be used for caseload relief so that attorneys are handling less than the maximum allowable number of cases. Second, the money could sit in the account so that it can be used to pay for future indigent defense needs. Third, the additional money could be used to provide civil legal services for indigent clients. *See* Order Temporarily Increasing Lawyer Registration Fees, *supra* note 175, at 6 (increasing attorney license fees by \$25 annually to be allocated to the Legal Service Advisory Committee because civil legal services are dramatically underfunded). Finally, excess revenue each year could be transferred to the general fund, much like the Health Care Access Fund. *See* MINN. STAT. § 16A.724 subdiv. 2(a) (2010).

212. *See* sources cited *supra* notes 158–63 and accompanying text.

213. LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, ALCOHOL AND CRIME I (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ac.pdf>.

214. *See, e.g.,* Christopher Carpenter, *Heavy Alcohol Use and Crime: Evidence from Underage Drunk Driving Laws*, 50 J.L. & ECON. 539, 541 (2007), available at <http://web.gsm.uci.edu/~kittc/CarpenterJLEZTCrime0906.pdf> (stating “there is a causal role for heavy episodic alcohol use in the commission of nuisance and property crimes”); Susan E. Martin, *The Links Between Alcohol, Crime, and the Criminal Justice System; Explanations, Evidence and Interventions*, 10 AM. J. ON ADDICTIONS 136 (2001) (noting that “[h]undreds of articles and studies have shown that alcohol abuse is closely associated with violent and other criminal offenses”); Stephen Tomsen, *Alcohol, Violent Crime, and Social Power*, 1 AUSTL. INST. OF CRIMINOLOGY (1990), available at www.aic.gov.au/publications/previous%20series/proceedings/1-27/~media/publications/proceedings/01/tomsen.ashx.

215. Tomsen, *supra* note 214, at 2.

percent of assaults,²¹⁶ sixty-seven percent of incidents of domestic violence,²¹⁷ and almost half of all gun or knife attacks.²¹⁸ Alcohol was also involved in about fifty to sixty-five percent of all sexual assaults and murders.²¹⁹ Studies in the United States indicate that about forty percent of all people in prison, on parole, or on probation for violent crimes were using alcohol at the time they committed their crimes,²²⁰ and that alcohol played a role in the incarceration of 56.6% of all inmates.²²¹ A more recent study for the state of Wyoming concluded that from 2006 to 2008, sixty-nine percent of all arrests involved alcohol.²²²

216. *Id.* at 3 (citing B. Roslund & C. Larson, *Crimes of Violence and Alcohol Abuse in Sweden*, 14 INT'L J. ON ADDICTIONS 1103 (1979)). One study indicated assault suspects consumed alcohol in as much as eighty-two percent of the cases. Gary McClelland & Linda Teplin, *Alcohol Intoxication and Violent Crime: Implications for Public Health Policy*, 10 AM. J. ON ADDICTIONS 70, 71 (Supp. 2001).

217. GREENFELD, *supra* note 213, at v; Tomsen, *supra* note 214, at 3 (citing C. Hamilton & J. Collins, *The Role of Alcohol In Wife Beating and Child Abuse: A Review of The Literature*, in DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR 285 (J. Collins ed., 1982)).

218. Tomsen, *supra* note 214, at 3 (citing NEW SOUTH WALES BUREAU OF CRIME STATISTICS AND RESEARCH, 1974, 1977a, 1977b).

219. Sara Markowitz, *Alcohol, Drugs and Violent Crime*, 25 INT'L REV. L. & ECON. 20, 21 (2005) (citing J.R. Tinklenberg & F.M. Ochberg, *Patterns of Adolescent Violent: A California Sample*, in BIOBEHAVIORAL ASPECTS OF AGGRESSION 121 (D.A. Hamberg & M.B. Trudeau eds., 1981); M.E. Wolfgang & R.B. Strohm, *The Relationship Between Alcohol and Criminal Homicide*, 17 Q.J. STUD. ON ALCOHOL 411 (1956)).

220. GREENFELD, *supra* note 213, at iii, 21. The study also reports that over forty percent of murders involved alcohol, over thirty percent of sexual assaults involved alcohol, and nearly half of all assaults involved alcohol. *Id.* at 21. For public order crimes (DUI, weapons, commercial vice) seventy-five percent of all probationers used alcohol prior to the commission of their crimes. *Id.*

221. THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 2 (2010), available at www.casacolumbia.org/articlefiles/575-report2010behindbars2.pdf. In addition to all people convicted of alcohol law violations, it included 51.6% of all drug offenders, 55.9% of all property offenders, 57.7% of all violent crime offenders, and 52% of all other offenders. *Id.*

222. WYO. ASS'N OF SHERIFFS & CHIEFS OF POLICE, ALCOHOL & CRIME IN WYOMING, 2006-2008, at 5 (2009), available at [http://www.wascop.com/Alcohol%20and%20Crime%20In%20Wyoming%202006-2008%20\(2\).pdf](http://www.wascop.com/Alcohol%20and%20Crime%20In%20Wyoming%202006-2008%20(2).pdf).

In addition, the average blood alcohol level at the time of the criminal activity ranged from .14 to .30.²²³ While studies could not conclude definitively that alcohol use increased the risk of violence, a review of the studies demonstrated that “offender populations usually were found to contain ‘heavy’ or ‘problem’ drinkers.”²²⁴

While binge drinkers²²⁵ are only twenty percent of the population, they consume eighty-three percent of all the alcohol.²²⁶ And, while frequent binge drinkers are only six percent of the population, they consume fifty percent of all alcohol in the United States.²²⁷ As such, a tax on alcohol would be paid primarily by those who abuse alcohol,²²⁸ many of whom end up in the criminal justice system.²²⁹

In addition, increasing the cost of alcohol would have societal benefits. Increasing the cost of alcohol may decrease crime.²³⁰ It

223. GREENFELD, *supra* note 213, at vii. According to the estimates, the average blood alcohol level for all offenders who received probation was .16, while those who were in prison averaged .27. *Id.* Blood alcohol levels for violent crimes seemed to mirror these averages, while blood alcohol levels for property crime offenders were higher than the average, and blood alcohol levels for DUI and vice crimes were slightly lower than the overall average. *Id.*

224. *Id.* at 2 (citing NAT'L RES. COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 184–85 (Albert J. Reiss & Jeffrey A. Roth eds., Nat'l Acad. Press 1993)).

225. A “binge” drinker is a person who drinks five or more drinks on one occasion. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DRINKING IN AMERICA: MYTHS, REALITIES, AND PREVENTION POLICY 1 (1999) [hereinafter DRINKING IN AMERICA] available at <http://breitlinks.com/alcoholawareness/AlcAwarePDFs/DrinkinginAmerica.pdf>.

226. *Id.* at 2. In Minnesota, binge drinkers made up approximately fifteen percent of the population. MINN. INST. OF PUB. HEALTH, MINN. DEP'T OF HUMAN SERVS., SUBSTANCE USE IN MINNESOTA A STATE EPIDEMIOLOGICAL PROFILE 51 (Mar. 2009), available at <http://docs.sumn.org/MNStateEpiProfile2009.pdf>. Of the population as a whole, 58.4% reported drinking within thirty days of being surveyed, leaving 41.6% of the population as not consuming alcohol on a regular basis. *Id.* at 10.

227. DRINKING IN AMERICA, *supra* note 225, at 2. According to an estimate by the National Institute of Alcohol Abuse and Alcoholism, in 2004 there were 17.6 million people in the United States who either depended on alcohol or abused alcohol. *Alcohol and Crime*, NAT'L PARTNERSHIP ON ALCOHOL MISUSE & CRIME, <http://www.alcoholandcrime.org/npamc/issues/alcohol-and-crime> (last visited Oct. 21, 2010).

228. DRINKING IN AMERICA, *supra* note 225, at 4 (stating that “the vast majority of Americans would feel little or no impact from a price increase because they do not drink or drink very little and infrequently”); Martin, *supra* note 214, at 148 (noting that “much of the alcohol-related crime is the result of heavy drinking episodes of non-dependent drinkers”).

229. See *supra* Part IV and notes 217–218.

230. See Markowitz, *supra* note 219, at 24 (summarizing studies from across the world which appear to demonstrate that increased alcohol costs, including added

would also more accurately reflect the impact alcohol has on society. Current taxes on alcohol are insufficient to compensate for the societal harm alcohol causes.²³¹ For Minnesota in particular, alcohol tax generated \$234 million in 2001, while alcohol use cost the state an estimated \$4.5 billion.²³² Enacting this tax and dedicating it to public defense would eliminate the need to support public defense with money from the general fund. As a result, there would be an additional \$65.4 million in the general fund to be used for other purposes.

There is an indication that public support for increasing resources for indigent defense exists. Fifty-seven percent of people surveyed nationwide believe that the states should guarantee indigent defendants a lawyer with a reasonable caseload.²³³ Additionally, almost fifty-six percent of Minnesotans support paying

alcohol tax, would result in lower rates of robbery, assault, and sexual assault). In addition, Markowitz's analysis indicated that an increase in beer tax would result in a decrease in assaults, but not sexual assaults and robberies. *Id.* at 37–39. *See also* Carpenter, *supra* note 214, at 4 (noting that reduction in alcohol use results in a decrease in nuisance and property crimes); Martin, *supra* note 214, at 150 (noting that an increase in alcohol tax would result in a decrease in motor vehicle death and violence, and specifically reduce rapes, assaults, and robberies); Susan E. Martin et al., *Trends in Alcohol Use, Cocaine Use, and Crime: 1989-1998*, 34 J. DRUG ISSUES 333, 351–52 (2004) (noting that a reduction in alcohol availability and misuse will decrease crime rates, particularly violent crimes).

231. For every \$1 in taxes on alcohol or tobacco raised for state and federal coffers, government spends \$8.95 for the consequences of smoking and alcohol abuse. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., SHOVELING UP II: THE IMPACT OF SUBSTANCE ABUSE ON FEDERAL, STATE AND LOCAL BUDGETS iii (2009), *available at* www.casacolumbia.org/articlefiles/380-ShovelingUpII.pdf. In 2005, federal spending as a result of alcohol abuse and addiction was \$238.2 billion, state spending was \$135.8 billion, and local government spending was \$93.8 billion. *Id.* at 2. This constituted 10.7% of all government spending in the United States. *Id.* at i. At the same time, federal, state, and local taxes on alcohol generated only \$14.0 billion in 2005. *Id.* at 4.

232. MINN. DEP'T OF HEALTH, THE HUMAN AND ECONOMIC COST OF ALCOHOL USE IN MINNESOTA 1 (2004), *available at* www.health.state.mn.us/cdrt/alcohol/alcpdf/final2004costfactsheet.pdf.

233. NATIONAL MESSAGE, *supra* note 208, at 5. The specific question asked: Please tell if you think each of the things in the list should be guaranteed by the government to low-income people accused of a crime, is important but should not be guaranteed, is not very important, or is not at all important for someone accused of a crime. . . . A lawyer with a small enough case load to provide the time necessary to prepare a defense for each person.

Id. at 42. Thirty-seven percent of those surveyed indicated that it was important but not a right. *Id.* It is also worthy to note that sixty-four percent of people surveyed supported using taxpayer dollars for indigent defense. *Id.* at 4.

additional fees on alcohol to help offset some of the costs of alcohol to the state, such as health and safety.²³⁴ A modest \$.05 tax per drink would guarantee adequate indigent defense while reducing some of the impact alcohol abuse has on the state's general fund.

VI. CONCLUSION

In the half-century since *Gideon v. Wainwright*, legislatures in every state have failed to protect the constitutional right to a lawyer.²³⁵ Even in times of economic prosperity, funding for indigent defense has fallen short. In times of budget shortfalls, budgets for indigent defense have been slashed.²³⁶ As a result, lawyers representing poor defendants have struggled with untenable caseloads to provide competent representation for their clients.²³⁷ One way to protect budgets from the feeding frenzy during times of budget shortfalls is to have a dedicated funding source. The funding to ensure the constitutional right to counsel would no longer be forced to compete against popular programs or services.

The failure to adequately fund indigent defense hurts all of us. The Minnesota Supreme Court has recognized that the underfunding of legal services for indigent clients has resulted in the suffering of the court system as a whole.²³⁸ It undermines confidence in the justice system, congests the courts, and increases the likelihood of innocent people being convicted. As former U.S. Attorney General Janet Reno stated, "Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter."²³⁹ By using a nominal tax on alcohol, sufficient revenue could be generated to benefit all Minnesotans, as well as to insure that equal justice exists for all, regardless of economic background.

234. MINN. HOUSE REPRESENTATIVES, STATE FAIR POLL RESULTS 2 (2006), available at www.house.leg.state.mn.us/hinfo/Fair/2006Results.pdf.

235. See *supra* Part II.

236. See *supra* note 12 and accompanying text.

237. See *supra* Part II.C.

238. Order Temporarily Increasing Lawyer Registration Fees, *supra* note 175, at 6.

239. OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE xiii (1999), available at www.sado.org/fees/icjs.pdf.