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How to Defend Those Who Defend: An Examination of the Underfunding of the Public Defender System

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by

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ABSTRACT

The public defender system in the United States is in an indigent defense crisis because it is often unable to provide adequate representation to the citizens that the United States Constitution requires them to give. The growing attention on the system today is shedding light on public defenders' stifling caseloads and on the people who are failing to receive the legal representation to which they are entitled by the constitution. The lack of political prioritization, the systemic inequities throughout the criminal justice system, and the underfunding of the public defender system has often rendered public defenders unable to provide their clients with adequate representation in court.

The purpose of this research is to examine the history of the public defender system, to address the problems within the system as it stands today, to explore what scholars suggest can be done to improve the system, and to give my own suggestions as to what should be done after conducting this research. The specific shortcomings that will be investigated include the lack of financial support given to public defenders; the disparate impact a lack of public defenders has on specific communities; and how implementing standardization to the current legislation would allow all public defenders to provide their defendants with adequate representation.

Keywords: public defender, indigent defense, uniformity, parity, constitutional standard

DEDICATION

To my mother and my grandparents: Thank you for being my rocks, my superheroes, the smartest three people I know, and my favorite humans in existence. You have always encouraged me to do whatever I set my mind to, and I truly would not be here in every sense of the phrase without you.

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CHAPTER I: INTRODUCTION

"You have the right to remain silent…You have the right to an attorney. If you cannot afford an attorney, one will be provided for you" (*Miranda v. Arizona*). This may sound familiar to anyone who has watched a movie or show where someone is being arrested by the police. That is because the same string of sentences, known as a person's Miranda Rights, must be recited by the police every time they arrest someone. However, when someone is being arrested, they are not often thinking about how vague the Miranda Rights are in the moment or pondering what that statement legally entails. Since the 1963 Supreme Court decision of *Gideon v. Wainwright* when the right to counsel became a requirement for everyone in the United States, defendants have often been left with more questions than answers while going through this process. When will a public defender be provided if a defendant cannot afford one? How long does a person have to wait until they can get an attorney? What qualifications do people have to meet to have a public defender represent them? How many cases can public defenders take on at one time? Can the public defenders meet the constitutional standard for adequate representation for every single defendant they represent? These public defenders are the first line of defense for economically disadvantaged United States citizens, but their jobs are consistently surrounded by questions that never seem to get answered.

A public defender is an attorney who is paid by the government and is appointed by the court system to represent people who cannot afford to hire themselves a private attorney (Legal Information Institute n.d.). Public defenders are tasked with the job of defending anyone in the United States who needs representation in court after being arrested, so every person is legally entitled to have a public defender represent them if

they qualify for one (Legal Information Institute n.d.). The question has arisen many times over the years as to where the money to pay public defenders comes from, and while there are many nuances to that answer, because their clients do not pay them, the short answer is that they get their money from the government (Legal Information Institute n.d.). The question of which level of government should supply those funds is one of the many unanswered questions that surrounds the public defender system in the United States. One of the issues that public defenders face in their job is that they themselves are often not defended by the court systems that appoint them. In many places, public defenders are not compensated highly for the work that they do because of the ongoing argument of whether the state should be paying their public defenders or whether the federal government should be funding each state's public defender system. This argument has been going on since the Supreme Court decision in 1963 and has never been answered. There has never been uniformity in the public defender system across the country.

Another problem that public defenders, especially state public defenders, face is that they are consistently overloaded with cases that they cannot adequately dedicate themselves to because of the limited time they have (Kura 1989). The crushing caseloads they must handle are not something that they receive compensation for either. Public defenders are essentially doing more work and enduring more stress for less pay than they could get practicing in another area of law. Although public defenders serve in a role that is constitutionally necessary, the system that they live and work in does not give them the support that they need to adequately do their jobs. Many times, the lawyers who take these cases on are fresh out of law school and need pro bono experience. After they

get that experience, because the system is so underfunded, lawyers are not often interested in making a career out of being a public defender (Jaffe 2018). These factors all contribute to the biggest issue with the public defender system - people who are entitled to a public defender not getting the adequate legal assistance that is constitutionally promised to them. The consistent absence of the public defender system from political discussion has caused unfixable damage in people's lives and has left people without trust in the system that was created to protect and advocate for them.

The research question posed in this thesis is what is the constitutional standard that public defender systems should be held to, and what could bring the systems as they are now to that standard? Throughout this research, I will address how the constitutional standard that public defender systems adhere to are not currently being met. I will then address the solutions that I have proposed because I think that they have the most potential in effectively benefitting the system. The overall argument of this thesis is that currently, the constitutional standards, as discussed by the Supreme Court in 1963, for assuring a fair trial are not being met. After collecting research and analyzing the problems that most negatively impact the public defender system, my overall conclusion is that public defender systems around the country can be brought to the standard I argue for by clarifying the ambiguity in the constitution's verbiage. By implementing standardization into this sector of the criminal justice system, specifically regarding uniformity across all jurisdictions and parity between the resources provided to the defense and the prosecution, indigent defense will be more capable of providing representation that upholds the constitutional standards of the public defender system. By

utilizing uniformity and parity throughout the justice system, public defender systems will be able to provide more adequate representation to each client that they receive.

I begin my research discussion in chapter two where I discuss the literature that I utilized for this research and address the main arguments surrounding the public defender system in the United States. In chapter three, I define what the public defender system is, explain how it functions, why the right to counsel is essential to the system, and what the role public defenders play within state, civil, and federal courts is. In chapter four, the four main problems with the public defender system are addressed, and I discuss each one in depth in order of how significantly they effect the system. These categories are lack of funding, systemic inequities, the absence of counsel, and the lack of political prioritization. In the final chapter, I introduce the counterarguments I have found in literature, address the arguments of the scholars who do not agree with my perspective or who offer alternate solutions, and explain why my arguments make more sense for the public defender system as it stands now. This transitions into the final section where I discuss what the research that I have conducted has led me to believe are the best solutions for how to bring the public defender system to the constitutional standard it should be held to.

CHAPTER II: LITERATURE REVIEW

Over the past six decades, scholarly articles have been published on the important subject of public defenders and the public defender system in the United States. Throughout the research I collected and utilized for this paper, I was able to separate the literature I found into four categories. Those are the court cases that give history, facts, and constitutional standards; the scholars who have published research that contributes to the solutions I argue for; the researchers who analyze the problems within the public defender system and come up with solutions that are different from mine; and the researchers who analyze the problems within the system but do not contribute solutions. Regardless of how I use each of these researchers' arguments in this paper, they all contribute to the discussion that the public defender system needs to be improved in the United States. Some researchers are bigger supporters of how the public defender system stands right now than others, but no author that I have found argues that there are no problems or that no improvement should be made. After addressing each of these categories, I will explain how the research I have conducted has led me to my conclusion and proposed solutions.

The articles that were utilized throughout this paper put together different opinions from scholars who have researched what has influenced the past and current public defender systems. These topics of influence were geographic locations, identifying the best and worst jurisdictions in different states and discussing their strengths and weaknesses, public counsel versus private counsel and the resources provided to each, the overwhelming caseloads that state and civil public defenders face, the lack of funding, and the ambiguity of not knowing who should be funding the system. The most common

conclusion that these scholars come to is that there are problems all over the country and that the public defender systems need help. Many researchers' conclusions are more focused on what the system is doing wrong and give a big-picture solution as opposed to giving specific solutions that can be implemented now. None of the research I found gave the me the impression that the researchers felt as though the system needs to be completely scrapped to make it successful. If an author did not feel like there was a solution, rather than wipe the whole system out, they would make the statement that the systems need work or that they need more money invested into them. While both of those statements are ones that I have found to be true, there are not many tangible solutions offered.

While much of the research that I did on the public defender system had to do with the opinions of scholars, the most factual and consistent sources that I relied on are Supreme Court decisions throughout history. The decisions of *Powell v. Alabama* (1932), *Johnson v. Zerbst* (1938), *Hamilton v. Alabama* (1961), *Gideon v. Wainwright* (1963), and *Argersinger v. Hamlin* (1971) are integral to my research, and the factual basis of the results is not contested. These Supreme Court case decisions all had to do with people having equal access to indigent defense present that would provide them with legal representation in court, regardless of their economic class. Each case's decision was made a decision that altered how an amendment was viewed and was often a catalyst for another important decision on the horizon. The cases were important to discuss and utilize in this paper because while there are different opinions floating around from myself and other scholars on the topic, these cases and decisions remain consistent.

Public defenders are put at a major disadvantage when it comes to the level of representation that they can provide because of the problems I discuss throughout the paper. An article written by Glen Wilkerson in the *American Journal of Criminal Law* discusses that most public defenders will defend their clients to the best of their ability, but there are obstacles that prevent this from "adequate service being provided" (Wilkerson 1972). The obstacles Wilkerson names that public defenders face include heavy caseloads without compensation, a lack of resources, a lack of federal government interference in state affairs, and the mental health the clients that public defenders are tasked with defending have (Wilkerson 1972). Wilkerson is an example of an author who analyzes the problems with the public defender system in depth and raises interesting points with research to back up his claims, but he does not offer ways to improve the system. His research, while very informative, has a tone of blatant frustration with how public defenders must function and identifies problems that no other scholar that I read about does. However, Wilkerson does not offer a solution that will solve the issues that he presents throughout his paper.

The two most discussed issues in public defender literature are the effects of heavy caseloads and a substantial lack of useable resources in the system. Starting with excessive caseloads, the caseloads that state public defenders are forced to take every year are numerous and "impossible to handle" (Jaffe 2018). Because of how overtaxed these public defenders are, with most of them not receiving compensation, most public defenders end up leaving the job. Author Samantha Jaffe argues that the overtaxing of public defenders and the overwhelming caseloads that they face will eventually lead in a public defender system that is broken beyond repair. In her article in the *Michigan Law*

Review, Jaffe writes that the lawyers that became lawyers because they wanted to help people are the ones who want to be public defenders but cannot afford to be public defenders (Jaffe 2018). She states that these lawyers do not want to be a part of a system that ignores the problems of those who cannot afford representation and misuses their public defender resources (Jaffe 2018). Jaffe also makes a large claim that unless the federal government starts finding a way to lessen the caseloads that public defenders have, public defenders will become extinct (Jaffe 2018). Public defenders, in Jaffe's perspective, may be forced to take the jobs because no well-known lawyer would want to take a job that pays nothing compared to what a lawyer could be making in private defense, just because they want to defend the defenseless (Jaffe 2018).

Another issue that authors discuss is the variation between how much time public defenders can spend on their clients in some jurisdictions spend compared to others. In an article published in 2009 by the Constitution Project, the unnamed authors discuss how and why public defenders in some areas can spend on a case depending on where they are in the United States. Because there has been no decision made on whether state or federal government should be paying for the public defender systems around the country, states that invest more in their public defender systems are statistically better than states that do not allot enough money to theirs (Constitution Project 2009). This lack of standardization in laws results in the cases that public defenders take on being neglected and public defenders becoming frustrated with the systems that they work in.

According to a countrywide public defender review written by Robert Stein in *Human Rights*, a lawyer in one of Washington's county public defender offices could spend approximately fourteen hours on a case, whereas in a neighboring county in

Washington, that same lawyer is only allowed to spend a total of three hours on each case they take on (Stein 2013). These numbers vary from county to county and from state to state, depending on the number of convictions that are processed. The article ends with talking about how the lack of uniformity in public defender systems around the country causes many public defenders to become frustrated because some defenders have the ability to commit themselves to their clients, whereas other defenders are struggling to stay afloat amongst their caseloads (Stein 2013). While this article does not explicitly give a solution to the problems that Stein addresses, the research Stein provides on how a lack of uniformity within the public defender system helped me to solidify one of my solutions. That solution became the answer to both his research and my own, as uniformity and clarification on the current ambiguity in the constitution is necessary for a successful system that supported clients equally around the United States.

While most research articles I found either helped me shape my solutions by addressing the problems in detail or by providing information that assisted in creating my solutions, I also found scholars who argue for a very different solution that what I came up with. The first notable argument that goes directly against the solutions that I have come up with says that "defendants represented by public defenders do not receive better or worse outcomes than defendants with appointed or private counsel" (Mantel 2008). Legal scholars such as author Barbara Mantel from *CQ Researcher* believe that there is a significant correlation between the type of counsel a person gets and the outcome of the case, based on their own research and experiences (Mantel 2008). While equal and adequate representation for people by both private attorneys and public defenders is the goal, this argument is in complete opposition with one of my solutions that states that

parity between indigent defense and the prosecution in how they receive resources is essential to the betterment of the public defender system.

The final argument I will address was made by two scholars with the view that public defenders acquire more valuable experience with many different types of criminal cases than prosecutors and private attorneys (Kura 1989). Because of author James Kura's belief that public defenders have more opportunities to become better litigators than other lawyers, Kura states that public defenders will remain the superior form of defense in the courtroom (Kura 1989). Authors Wood and Burkhart in their 2016 article in *Litigation* and write that the public defender system will always attract lawyers who want to better themselves and others (Wood, et.al 2016). While I agree with Wood and Burkhart's sentiment, I do not think that public defenders are given opportunities to improve themselves, especially if they do not have time to dedicate adequate energy and resources to each case they receive. Kura elaborates further in his article in *Criminal Justice* and writes that even though public defenders are often underfunded and overloaded with cases, they are repaid in the legal experiences they get from simply serving as public defenders (Kura 1989). While this argument does not contribute research to the solutions that I suggest, it is an interesting perspective that I had not considered because most articles give pity to the public defenders. In Wood and Burkhart's article, they admit that there are areas of the United States that do not pay their public defenders well enough, even though the underfunding of the public defender system is hardly discussed at all in Kura's article (Kura 1989). Both Kura's article and Wood and Burkhart's article were beneficial to me as I created my solutions because it

provided me with a new way to think about the benefits that public defenders get, rather than focusing solely on the negatives that they experience.

After reading many different authors and articles about the public defender system, I have discovered that the literature that exists is focused on primarily on the problems within the system. Authors overall do not focus on reasonable and possible solutions on how to create a more equitable public defender system around the United States. There are many critiques on the system, complaints on its shortcomings, and where political leaders have gone wrong in what direction they have taken the system, but solutions are rarely offered. If a solution is offered, it seems more hypothetical or what the authors wish or hope would happen, as opposed to what tangible changes can be implemented into the system. The purpose of my thesis is to add a piece of research that analyzes existing literature and gives an informed opinion on how to best advocate for a better public defender system for the betterment of the United States. The solutions that I offer at the end of the research on parity between indigent and private defense, uniformity and clarity of the constitution's verbiage, and enforcement implementation ideas are inspired by the research discussed in this literature review. While some of these authors may disagree with what the solutions that I suggest, I still took from their expressed opinions to successfully reach my own conclusions.

CHAPTER III: PUBLIC DEFENDER SYSTEM

Right to Counsel:

The right to counsel as dictated by the Constitution is accepted today as a fundamental precept of justice in the United States. Its purpose is to ensure that every person in this country has the right to have indigent defense present if they are arrested, regardless of how much money they have (Bibas n.d.). The issue that defendants are running into today in different jurisdictions of the United States is that the counsel that is supplied to those who need indigent defense is often inadequate, according to the standards that are upheld by the Constitution (Weiss 2005). These standards will be discussed in further detail through this research paper. Because of the issues that most jurisdictions have with supplying their public defenders with the resources that are necessary for them to provide adequate representation to their clients, indigent defense systems around the country are struggling due to how underfunded the systems are (Weiss 2005). This underfunding leads to a lack of public defenders, a lack of resources, and a consistently weakening public defender system.

The Sixth Amendment of the United States Constitution was ratified in 1791 with the purpose of affording those who have been arrested rights and protections while going through the criminal justice system (Bibas n.d.). Bibas gives a summary of the rights the people are guaranteed by Sixth Amendment which are the right to a speedy and public trial; the right to an impartial jury; the right to be informed of the charges held against them; the right to confront and to cross-examine witnesses; and the right to legal counsel (Bibas n.d.). When this amendment was originally passed in 1791, it only applied to criminal cases that were heard at the federal level, but it is now applicable to cases at the

state and civil courts as well (Bibas n.d.). After observing the amendment from 1791 and looking at it in 2021, the Supreme Court has provided limitations on this amendment and has clarified some of the ambiguous verbiage that the decision had in it over time.

The right to a speedy trial discusses what happens to a defendant when there is a delay, according to the Supreme Court. When analyzing each individual case, the Court takes into consideration the length of the delay, the reasons for the delay, and if the delay was caused by any prejudice towards the defendant (Bibas n.d.). Because of the ambiguity in the Constitution, there is no minimum or maximum amount of time that someone can spend waiting for their trial. This has caused issues and controversy with defendants and their public defenders all over the country. For the right to a public trial, any defendant may request what is called a "closed trial" so that no one from the public can be in attendance. However, to get this right granted, the defendant must show inarguable proof that having an open trial would hinder the defendant's right to having a fair hearing (Bibas n.d.). These requests are rarely granted by any courts because having a public trial is a constitutional requirement, but the request can always be made by the defendant and will have the potential to be granted.

For the right to an impartial jury, since every defendant has a constitutional right to be heard by a jury, the jurors must be unbiased. This rule requires that the jurors selected must be representative of the community's diversity in which the defendant lives (Bibas n.d.). For the right to be notified of charges, the Court holds that in every case, all indictments must be specific and state every crime with which the defendant is being charged for (Bibas n.d.). For the right to calling and confronting witnesses, the defendant can cross-examine witnesses from the opposing side to ensure that their due process

rights are upheld. This is also to ensure that witnesses' statements can be taken in open court. Finally, for the right to legal counsel, every defendant has the right to an attorney that can provide them with adequate representation regardless of economic status (Bibas n.d.). The right to counsel and the indigent defense provided to the people who qualify to have them are the focus of this paper.

Aside from *Gideon*, the other court cases involved in making the public defender system what it is today are *Powell v. Alabama* (1932), *Johnson v. Zerbst* (1938), and *Hamilton v. Alabama* (1961). In the case of *Powell*, the Court decided that "counsel must be provided to all defendants that are charged with a capital felony in any state court, regardless of that defendant's ability to pay." This was the first Supreme Court decision that addressed that those experiencing economic disadvantages should not immediately be incarcerated just because they do not have the money to pay for a lawyer (*Powell v. Alabama*). The next case that addressed the ambiguity of the Sixth Amendment was the *Johnson* case, which eventually expanded the scope of the Sixth Amendment's right to counsel for all indigent defendants going through federal criminal trials. It also added that unless a "knowing, intelligent, and competent waiver of counsel is evidenced," it is each person's right to have indigent defense present for the defendant in every court setting, not just federal (*Johnson v. Zerbst*). In the case of *Hamilton*, the Supreme Court decision closest to *Gideon*, the Court unanimously ruled that because of the absence of counsel at Hamilton's arraignment, Hamilton's due process rights were violated under the Fourteenth Amendment. This decision gave momentum to the decision of *Gideon v. Wainwright* which guaranteed the right of legal counsel to anyone accused of a crime

(*Hamilton v. Alabama*). The decision of *Gideon v. Wainwright* will be discussed in depth later in this research paper.

Over the years since *Gideon* was decided, the Supreme Court has continued to elaborate on the details and nuances of the right to counsel. Since 1963, the Court has recognized that there are opportunities to amend the decision because there are still areas that need more detail to provide adequate representation for clients and better conditions for public defenders. The case of *Gideon* involved a felony, but in the case of *Argersinger v. Hamlin*, the Court ruled that "an indigent defendant may not be imprisoned, even for a misdemeanor, unless they are given the right to an attorney" (*Argersinger v. Hamlin*). The statement that the arrested person must be told by the police that encompasses their right to an attorney is known as a person's Miranda Rights (*Miranda v. Arizona*). *Argersinger v. Hamlin* was the Supreme Court case decision that continued to expand upon the idea of the right to counsel regardless of economic limitations a few years after *Gideon* had already been decided on. The Supreme Court eventually ruled that every defendant has the right to an attorney, which obligated lower courts around the country to provide attorneys to indigent defendants (*Argersinger v. Hamlin*).

There is still a long way to go before the standard of fair access to trial is reached for those who receive representation from the public defender system. However, there have been a few important additions and clarifications to Supreme Court case decisions that have slowly but surely helped to expand and improve the scope of the Sixth Amendment and the right to counsel. Authors Weiss and Joe each mention an example of how even a small change to clarify or to expand on the right to counsel or on the Sixth

Amendment is helpful. Weiss's article discussed expanding the scope of the *Argersinger* case in 2002 when the Supreme Court declared that "a defendant who receives a suspended sentence in a misdemeanor case cannot legally be imprisoned for a probation violation after they had already been arrested unless counsel was afforded when they were initially prosecuted" (Weiss 2005). Joe's example of a right to counsel clarification was in 2008 when the Supreme Court held that the right to counsel should be presented at their client's initial court appearance (Joe 2016). Both examples given by these authors show that there are ways to amend past Supreme Court decisions with the purpose of creating a public defender system that offers every client access to fair trial.

The right to counsel as written in *Gideon* also dictates that the "right to experts and transcripts can assist in a person's defense." In the same way that a public defender is always an option for those who need representation in court but cannot afford it on their own, the courts also must pay for extraneous resources such as experts and transcripts if the lawyer believes they necessities for the case (Federal Judiciary n.d.). Even though Supreme Court has not held that defendants are required to be represented by lawyers, since it is possible for a defendant to waive their right to legal defense, it is held that having a lawyer provided to the accused is necessary, even if they do not take it. The accused person must "knowingly, voluntarily, and intelligently decide to forego the representation in court" (Federal Judiciary n.d.). Although the Court has made the decision of the right to counsel and what resources must be provided by the government to the defendant, they have not made it clear which level of government is responsible for paying for the necessary resources for each case that a public defender takes on. It is also not clear who should be paying the salaries of the thousands of public defenders across

the country who must be provided for so that they can assist the accused persons (Federal Judiciary n.d.). Because the Court has never directly said who should pay for the expenses that come along with obtaining legal representation, the financial burden is often placed on whichever government hands over the money to the public defender systems first.

One of the most complicated issues to navigate that arises due to the Court never clarifying who should be paying for the expenses that come with indigent defense is that the federal government does not allot money to the criminal defense system in the same way to each state. Therefore, some states and local governments struggle with adequate public defender representation much more than others. What researchers and legal experts know as of right now is that these expenses place an extreme financial burden on the federal and state governments, which is the result of the Court's interpretation of the ambiguous verbiage in the constitution (Constitution Project 2009). This interpretation has put the brunt of the work on the state and local governments who are tasked with translating the right to counsel into every jurisdiction's indigent defense program. This makes the Court's decisions "a significant high-cost, unfunded mandate imposed upon state and/or local governments" (Constitution Project 2009). The people who suffer the most are the public defenders that are in between the courts and the defendants. They carry the burden of representing as many cases as the Court gives them and are held to the standard of providing each client with adequate defense, regardless of how many other cases they are handed.

The right to counsel is expensive, as one can observe from the various expenses that the government must provide for all public defender systems around the United

States and for the public defenders themselves. One reason that the right to counsel costs so much is because the public defenders charged with providing representation to their clients on behalf of the government must go through special training and are required to have individual offices, computers, and whatever other assistance is necessary of investigators and paralegals (McNichol 2009). Private attorneys are expensive because they have to receive adequate compensation for their services as well, but if the lawyer is employed as a public defender, they are required to have all the resources that a private attorney has, plus reasonable salaries. While this is all technically required, this is where the system fails because not all public defenders receive the same compensation, training, and resources as others (Jaffe 2018).

In addition to the requirements given by the constitution surrounding the right to counsel, the law requires that all attorneys who represent any kind of client must be both "competent" and "diligent" in providing that representation (Constitution Project 2009). Consequently, they should not be allowed to have so many clients that they can no longer provide that kind of representation. Otherwise, they will be depriving their clients of the representation that an attorney is expected to provide. However, the issue with that line of thinking is that parity amongst private attorneys and public defenders is not something that is required in the constitution, and there is no set number for how many caseloads a public defender can have.

Author McNichol states that, "states frequently require that legal representation be made available in situations where the right to counsel is not constitutionally required" (McNichol 2009). States are concerned in exceeding what is constitutionally required of them, due to the possibility of being sued by clients who did not feel as though their

public defender could provide them with all six requirements laid out by the Sixth Amendment discussed earlier on in this chapter (McNichol 2009). Although the constitutional requirement for how many cases a public defender does not have a set maximum number, the six rights are directly laid out with the expectation that they will all be fulfilled by the public defenders with every client they represent. Because many public defenders do not use the six rights from the constitution, public defenders put their systems in jeopardy by exceeding the caseloads that a single public defender can handle. These defenders can face legal action if they do not reach what is required of them by their respective jurisdiction (McNichol 2009). Further strain is then put on the limited resources that public defender systems have when they are not being adequately funded or fully supported throughout the United States in the first place.

To wrap up the discussion on the purpose of the right to counsel, an important question to ask is why does the right to counsel matter for people outside of the criminal justice system to understand so that they can advocate for a better system? The most compelling answer, given the cases and research discussed throughout this section, is that fairness to all parties involved in a case can only be obtained if both sides are represented by lawyers who are provided with the same kinds of resources. This includes having available time and compensation to devote to every case, access to the required public defender training, experience that goes above only handling pro bono cases, and adequate resources. When the resources that the indigent defense has does not measure up to what the prosecution has access to simply due to what the government will provide the indigent defense with, it can be inferred that there is a higher risk of the justice system making mistakes and incarcerating the wrong people. Innocent people can be convicted

and imprisoned, and these mistakes take away people's lives. Since 1963, DNA research has proven that many incarcerated people have been wrongly convicted people. Although that issue has more to do with detectives and the police, these false convictions also have occurred because public defenders are not able to give their clients the representation or resources necessary to have a successful trial. This also means that there are just as many people who are guilty that get to be free, while the court systems around the country pays to incarcerate those who have not committed crimes.

Public Defenders: What Are They?

Many people in United States do not know what a public defender is, even though they are constitutionally entitled to one if they ever need one. In layman's terms, the job of a public defender is to be an attorney appointed by the courts to defend people accused of crimes that do not have the economic means to hire a private attorney or any other form of legal assistance (Cornell Law). When someone is arrested, even if that person cannot afford a lawyer, they have the inalienable right to have a lawyer represent them in court under the Sixth Amendment. If they cannot afford to hire a private attorney to represent them in court, the defendant is given the option to request a public defender (Stein 2013). Once their financial records are checked to ensure that the person accused truly cannot afford to hire a private lawyer, they will then be appointed a public defender. The duties of the public defender include tasks such as "researching laws, writing documents to submit to the courts, representing their clients in court, or negotiating plea bargains" (Stein 2013).

However, there are problems that people who need a public defender face when they are appointed one. People who can afford attorneys have many options when they are looking for who should represent them in court; this is not the case for the person needs a public defender. The accused person is essentially stuck with whichever public defender they are assigned to by the court. Author Robert Stein discusses how this causes problems for some defendants because if they do not believe that their public defender is acting in their best interest or if they feel as though their public defender does not have the time or resources to devote to their case, that person cannot ask for a different representative (Stein 2013). Another issue within the public defender system is how long the accused person must wait in prison before their public defender can get to their case. Because the constitution left length of time spent waiting in prison ambiguous, people can sit behind bars for months and even years before they get to see a public defender if that public defender is overloaded with other cases. The only other option for the accused person is to hire a private attorney, which circles back to the issue that they do not have the funds to do so (Jaffe 2018). The public defender system was designed to provide people with representation in court who cannot monetarily afford counsel on their own, but often, the public defender system cannot provide adequate service or representation.

The right to a public defender has not been around for very long. A little over 55 years ago in 1963, the United States Supreme Court's decision of *Gideon v. Wainwright* expressly stated that the right to counsel regardless of economic limitation will be upheld in every case in every court in the country. In *Gideon*, the Court's decision says, "in our adversary system of criminal justice, any person that is called into court that is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him" (*Gideon*

v. Wainwright). Observing that "lawyers in criminal courts are necessities, not luxuries," the Court held that under the Sixth Amendment, a person's "right to counsel is fundamental and essential to a fair trial," and this ruling has been upheld from 1963 to the present (*Gideon v. Wainwright*). The Supreme Court Justices in 1963 overturned their past ruling where the right to counsel had limitations to some people or did not apply to specific kinds of court systems before Gideon. They then implemented their new decision to the states under the Fourteenth Amendment's due process clause (Federal Judiciary n.d.).

The United States has made considerable progress in how the public defender system functions since the time when *Gideon* was decided, but public defenders are not consistent in their improvements from state-to-state. The lack of consistency and uniformity in public defender systems around the country hurts the weaker public defender systems and allows the federal level of government to brush off the systems as something the states should be focusing on fixing. Many systems are not providing adequate representation to their clients around the United States, and some even face being sued by the clients who feel that they have been cheated out of better representation.

If a person who was recently arrested had the option to choose a "free" lawyer as opposed to undertaking the financial burden of hiring a private attorney, author Barbara Mantel hypothesizes that people would choose to have legal representation provided to them for free (Mantel 2008). Because many people would take advantage of being represented by an attorney that they themselves do not have to pay for, there are rules, regulations, and standards in place for deciding who monetarily needs a public defender

rather than who wants a public defender. The Supreme Court anticipated the potential abuse of the system when the *Gideon* decision was made. According to the Constitution, one of the few clear and standardized rules that applies in every state is that to have a public defender, the accused person requesting the public defender must turn over their financial records to determine their financial eligibility (Joe 2016). After those records are pulled and if they meet the qualifications to have a public defender represent them, the client meets with their public defender, and they have a conversation on what the best options for the defendant are. Ideally, there are multiple conversations had between the defense and their defendant, but unfortunately, there is typically only one big conversation between the public defender and their client because of the lack of time that public defenders have to spend on their clients individually (Joe 2016). The client discusses what their offense is with their public defender, what they are being charged with, and what the public defender thinks is the client's best option after reviewing the case (Joe 2016).

The consultation between client and public defender is where issues often arise because after their initial meeting, the client must decide if they want to proceed to court with the case or if they want to take a plea bargain or deal (Trivedi 2020). The author Somil Trivedi discusses the issue of "coercive plea bargaining" in their article and takes the position that the public defender is tasked with assisting their client in making a decision based on what is best for them, but sometimes, they take the easy route (Trivedi 2020). There have been clients that report that they are talked into or coerced into taking a plea deal rather than taking their case to court, and this gives public defenders a bad reputation even if what the client is saying is not the whole story (Trivedi 2020). While

Trivedi's article is not in favor of public defenders and the decisions that they make, it does imply that it rather unlikely that it is done with malicious intent. The public defender may be suggesting this because they feel as though this is their client's best option to get out of prison at an earlier time or would result in fewer or less severe charges on their records (Trivedi 2020). This research combined with the research given by other scholars previously presented in this paper on the lack of resources and the extensive caseloads that public defenders have do not help the sometimes - perpetuated idea that public defenders cannot do their jobs adequately or that the public defenders are self-serving. The serious issue at hand in the public defender system is that it just does not give its public defenders the necessary time to invest themselves into their clients and their cases because there are so many people and cases but so few public defenders and resources available.

Some states have more successful public defense systems than others because of the financial investments that different jurisdictions put into their respective systems. Since there is no specificity in how much money the system needs, while some areas ensure that their public defenders have the adequate resources necessary and are meeting the constitutional standard, many do not. An example of a public defender system that has been failing for many years is that of New Orleans, Louisiana. In an interview conducted by *The Atlantic* in 2016, the Orleans district's chief public defender explained how one public defender office that he oversees handles about 3,300 cases per year (Walsh 2016). They also do not have any full-time public defenders on their staff, so when the cases are divided amongst the part-time attorneys, each person's caseload amounts to more than triple what the state recommends. The district chief public defender

also states in the interview that, “Some detainees stay in jail waiting for attorneys for longer than the potential sentences for their crimes” (Walsh 2016).

Another example of a failing public defender system in a completely different area of the country is in Kansas City, Missouri, considered to be one of the worst public defender systems in the United States. In an interview with *The Kansas City Star* in November of 2019, one of the public defenders that was interviewed said by 9:45 am on a normal Tuesday morning, he can expect to have appeared in court with two defendants and then be ready to run down the street to meet two of his new clients for the first time ahead of their court appearances at a courthouse down the block. At the moment that he was being interviewed, this public defender was representing people in 74 cases including nine murders and five sex crimes (Moore 2019). These public defender systems are not only failing the people they are charged with representing but also the public defenders themselves. Both Walsh and Moore described the public defenders that they interviewed as feeling powerless in giving every person they defend adequate representation because it is impossible to do with the systems as they are now. The constitutional standard for representation in court cannot be met by no fault of the defender.

Court System: Nuts and Bolts

By the 1960s, the Supreme Court ruled that “almost every aspect of the Sixth Amendment applies not only to the federal government but also to all state and local governments” (Federal Judiciary n.d.). This clarification vastly expanded the Sixth Amendment’s reach to jurisdictions all over the United States because most criminal

prosecutions did and still do occur in state and civil courts, not so much in federal courts. Before the Sixth Amendment's implementation to state and civil courts, it was nearly impossible for the federal courts to provide enough attorneys to represent the many cases around the country that qualified for the right to counsel (Federal Judiciary n.d.). The Sixth Amendment's presence in state and civil courts required the Supreme Court to spell out the Amendment's protections more clearly, even though that clarification was and still is relative. Once the protections were more clearly defined, each state court applied these protections to their criminal justice systems throughout their states' various jurisdictions (Federal Judiciary n.d.).

Attorneys who become state public defenders often start their public defender careers by handling criminal cases on the misdemeanor level (Farole 2010). Author David Farole gives an assessment of public defenders and their caseloads, along with the experiences these public defenders have when they begin to take cases. State public defenders are typically lawyers who had just finished up law school or are lawyers who are unfamiliar with representing clients in the role of public defenders. Once these lawyers gain misdemeanor experience and become familiar with juggling many cases at one time, they graduate to handling both misdemeanor and felony criminal cases (Farole 2010). Public defenders also have a presence in civil courts where they can be appointed to represent those involved in criminal civil cases, such as the removal of children from unfit parents (Farole 2010). The cases that state and civil public defenders are charged with representing cover many of the crimes that are committed on a daily basis around the United States, so these public defenders are often faced with excessive caseloads.

This leads to the overburdened public defender becoming unable to provide adequate representation to their clients.

State and civil public defenders have vastly different experiences than federal public defenders do in the resources they have available to them and in how many cases they must handle at one time. Public defenders in civil and state courts become overburdened quickly due to the number of cases they receive, coupled with the lack of resources provided to them. In contrast to state and civil, federal public defenders provide defense services in federal criminal cases to whichever clients are eligible to receive their services (Farole 2010). Federal public defenders are often considered to be the least burdened of the three types of public defenders because they have the least number of caseloads to handle. This is because their court cases are deemed to be more serious because each case is a federal criminal case and has surpassed the civil and state courts. Because of this, these federal public defenders often have less cases to take on even the cases that they do handle often take more time and resources due to the severity of the crime (Farole 2010).

CHAPTER IV: WHAT'S MISSING?

Throughout the third chapter, the public defender system's purpose its development throughout history was explained with brief mentions of the problems that public defenders face every day. In this chapter, I will directly address and discuss what research has led me to conclude are the four most severe and pervasive problems within the public defender system. The problems are also organized in order of what research shows is the most significant issue to what the least significant issue is, although each problem has serious negative effects on the system. This chapter will also describe why these problems are so severe and what researchers think will happen if these problems continue to evade positive change.

Lack of Funding:

For federal, state, and civil public defender systems to be as effective as the Sixth Amendment expects them to be throughout the United States, the public must have an understanding as to what the public defender system does. In 2016, author Irene Joe wrote an article for the *Denver Law Review* where she reviewed a public opinion research organization that polled about 1500 Americans on their views regarding indigent criminal defense and the effectiveness of the public defender system overall. The results revealed that there was an overwhelming support for what the public defender system does and that the public would like to see more money being invested into hiring public defenders to provide necessary and adequate representation to those who are economically disadvantaged (Joe 2016). While Joe did not discuss the minority opinion of the survey in her article, which was those who did not support the public defender system being funded

more, she did mention that there were many Americans who were not sure what public defenders did at all. This is concerning since every person in the United States has the right to indigent defense if they find themselves in need of one. Although funding for public defender systems from both the federal and state governments has increased since the 1960s, inadequate funding for individual jurisdictions continues to be the greatest obstacle to delivering "competent" and "diligent" defense representation and "effective assistance," as stated in the Sixth Amendment's expectations of what the right to counsel provides (Federal Judiciary n.d.). It is unrealistic to assume that citizens would support more money being invested into a system that they know nothing about.

A provision of the legal system is the guarantee that everyone should have access to defense in court regardless of economic status, which has been discussed in depth throughout this research paper. However, the reality is that there is not enough money being spent on systems throughout the country as there are cases that are in need of the money (Harlow 2000). While this is due in part to more people qualifying for public defenders due to their economic status, the court systems have underfunded public defender systems for years. It is just becoming more apparent to the public now, as the public is starting to see the number of people waiting in prison for their public defender to get to their case because of the excessive caseloads they have.

According to the Bureau of Justice Statistics, "the annual caseload assigned to public defenders spanned from 50 to 590 cases in different jurisdictions throughout the United States" (Harlow 2000). For comparison, the American Bar Association (ABA), which will be discussed in greater detail later in this research paper, sets the recommended maximum caseload at 150-200 misdemeanor cases per year for one public

defender (ABA 2002). While caseloads do vary based on location, public defender system, and content, the burden on public defenders far exceeds the recommendation given by the ABA. The result of such a strenuous number of caseloads that each public defender must handle is that there is extremely limited time for each defender to devote to their individual cases. The lack of funding given to public defender systems will also determine how many public defenders can be hired and maintained. Because of the lack of public defenders in many jurisdictions around the country, the representation that the public defenders provide to their individual clients is often inadequate through no fault of their own.

There have been many reported scenarios over the years where defendants have limited interactions with their assigned public defenders. An example of this is in the Kansas City, Missouri public defender system that was mentioned in the previous chapter. The chief public defender who was interviewed said that people who have been arrested sometimes must wait in jail for weeks or months before they know if they financially qualify to have a public defender, much less meet with their public defender and discuss their options (Moore 2019). Because these public defenders have very little time to focus on each individual case and hardly get a chance to know the client they are representing, plea bargains are not uncommon at all. According to the BJS, 94 - 97% of criminal cases end that public defenders represent end up in a plea bargain and never go to trial (Harlow 2000). Looking at all the research and statistics that have been presented, there are not enough funds or time for public defenders to do everything that they are expected to do, such as meet with their clients, examine all evidence presented to them, meet with witnesses, file any necessary motions, and effectively argue their case in court.

These constraints on what a fair trial should be explains why public defenders may prefer to offer their client the option of taking a plea bargain. It puts less strain on the public defender, and it ultimately gets the client a deal that could potentially be better than what may be offered to them in court.

Plea bargains are deals taken that forfeit the defendant's right to a trial in court in exchange for leniency in the sentence or punishment they receive. These plea bargains are negotiated on between the defense and the prosecution. Author Trivedi states that another perk of taking a plea deal is when a plea deal is accepted by the defendant, the state is not required to prove its case (Trivedi 2020). Trivedi states that, "public defenders are far more prone to rush to the plea due to the impossibility of arguing so many cases at once" (Trivedi 2020). The public defenders who were interviewed from Louisiana and Missouri that were mentioned earlier in this research paper confirm Trivedi's claim that when they individually discuss their feelings of helplessness at having so many cases at once with so little time to represent them all. The root of this issue lies in not investing enough time, money, or resources into the public defender system, which causes the significant issue of the underfunding of the public defender systems. These factors combined make it difficult for public defenders to effectively uphold the constitutional rights of their clients.

Inadequate funding is most evident when public defenders attempt to provide defense services while handling the heavy caseloads they are forced to take on by the courts. According to author Weiss, "public defenders are asked to represent far too many clients. Sometimes they have well over 100 clients at a time with many of them charged with serious offenses, and those cases move quickly through the court system" (Weiss

2005). Because of this, public defenders are put in the difficult position of having to violate their oaths as lawyers through no fault of their own. The problem is that they have too many cases to effectively provide the representation necessary to ensure a fair trial (Weiss 2005). Author Robert Stein talks about the responsibilities public defenders and says they must, interview clients properly, effectively seek pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources" (Stein 2013). Through no fault of their own, public defenders are not able to provide the representation they are legally required to provide and end up instead providing "second-rate legal services" (Weiss 2005). Other difficulties that public defenders encounter as they attempt to provide effective defense to their clients include, "a lack of experts, investigators, and interpreters; insufficient contact or frequency of interaction with their client; and inadequate access to technology and data," according to Weiss (Weiss 2005). If public defenders are not provided with these services, the absence of parity between the defense and the prosecution becomes very apparent, as is discussed by author Tony Fabelo in his article *Public Defense: Papers from the Executive Session on Public Defense*.

In 2009, the *Center on Budget and Policy Priorities*, a nonpartisan research and policy organization, reported that "at least 47 states faced or are facing shortfalls in their public defense budgets for this and/or next year" (McNichol 2009). This article writes of the sad reality that even in the jurisdictions where progress has been made in the United States, the lack of standardization in public defender systems around the country

negatively impacts the system altogether. The reason that I determined that the lack of funding in the public defender system is the most significant is because it prevents people from having access to fair trial in countless ways. The commitment of public defenders to their profession is consistently overridden by the lack of funding they receive due to inadequate funding from local, state, and federal levels of government; the excessive and impossible caseloads that they individually must handle; and the insufficient availability of resources that are essential to providing adequate representation to their clients.

Systemic Inequities:

Based on the research provided by the Bureau of Justice Statistics (BJS) in their 2008 - 2012 study, one can infer that marginalized communities are disparately affected by the criminal justice system as a whole because of systemic inequities, including the public defender system. Because public defenders are provided to people who are arrested and cannot afford an alternative form of defense in court, certain communities utilize public defenders more than others. In 2014, the BJS released a comprehensive survey of inmates in both state and federal prisons that qualified to have a public defender appointed to them. By a wide margin in both state prisons, at 76.6%, and federal prisons, at 64.7%, the black community had the highest number of inmates who were in need of a public defender (Owens 2014). The Hispanic community came in a close second with 73.1% needing appointed counsel at the state level and 56% at the federal level (Owens 2014). In regard to gender, as defined as the binary categories of male and female, men were more likely to need public defenders since the BJS's statistics on

women said that women were the more likely category to hire a private attorney, even if they were struggling financially (Owens 2014).

The data on educational attainment on incarcerated people shows that there is a disparate impact on people with a lower education level. At the federal level, 70.2% of incarcerated people have an education level lower than a high school diploma as opposed to 49.6% having a high school diploma or higher (Owens 2014). According to these statistics, marginalized communities need public defenders the most and are incarcerated at a higher rate than those who are not in a marginalized community. While the public defender system is not what incarcerates these communities, these statistics show that there are significant injustices in the criminal justice system with who can afford their own defense and who must rely on the public defender system. (Owens 2014). While this is a significant issue within the entire United States criminal justice system, it is imperative that it be addressed when talking about public defenders. Public defenders are the lawyers who must represent the marginalized communities that the BJS has identified as those who need their representation most often. Without the public defenders being better funded, these marginalized communities will be at even more of a disadvantage in accessing fair trial in court.

Absence of Counsel:

From reading chapter three of this research paper, the readers are now informed that public defenders are provided for those who cannot afford legal representation, but there is another dimension of the problem that has not yet been addressed - the absence of counsel. *Gideon v. Wainwright* and the Sixth Amendment guarantee every person

represented by a public defender the right to have counsel present at each stage of the proceedings; the absence of counsel is the opposite. According to the *American Constitutional Society*, the absence of counsel is when a trial is conducted without the defendant being present because they have waived the constitutional right to face the prosecution (Benner 2011). The most significant issue regarding the absence of counsel is when a defendant is not adequately advised of their right to waive legal representation in court. If the defendant is not made aware that they have the option to waive the right to counsel in a timely manner, defendants may sit in prison for weeks or months waiting to tell someone that they do not want legal defense (Benner 2011). This can cause the public defender systems themselves to be sued by a defendant for allowing that defendant to stay in prison without informing them of their right to represent themselves in court or to inform them that they do not have to attend the decision made by the court on their sentence at all (Benner 2011).

Another issue that has to do with the absence of counsel is that some state and civil courts, especially in states where the public defender system is severely underfunded, often do not maintain a record of each client's proceedings. If a defendant sues a public defender for not informing them of their right to waive counsel, without the record of the proceedings, the court cannot be sure how, when, or if a public defender had been offered to the defendant or if the waiver of legal representation was valid because there was no paper trail left behind (Benner 2011). This makes the public defender system as a whole look unprofessional in how they handle internal conflict. This is also unhelpful for the image of the public defender system because the public defenders are

trying to fight for better representation for both themselves and their clients, so when they themselves get sued, it causes everyone unnecessary problems.

One of the most serious effects of a defendant not being provided the opportunity to agree to the absence of counsel is that the public defender systems sometimes get sued for not adhering to the rules laid out for them in the Sixth Amendment (Benner 2011). A common issue, especially with lawyers who are either directly out of law school or new to the public defender scene, is that a public defender will be disciplined if they do not ask for permission before refusing to take on any more cases. If a public defender does not believe that they can provide adequate representation to all clients assigned to them because that public defender was already overloaded and they refuse to take the case, they can face serious legal consequences (Benner 2011). Although they are already violating the constitution through no fault of their own by providing legal representation that is inadequate, refusing to provide counsel is a more direct breach of the requirements that public defenders are expected to uphold. In rare cases, public defenders can also be disciplined for taking on too many cases without permission (Benner 2011). Not allowing attorneys to have a say in the number of cases they can or cannot handle takes away the autonomy that these attorneys may have in a private sector, thus losing public defenders to a feel where they have more autonomy. Conflict within the public defender system just creates more issues for the public defenders themselves.

Lack of Political Prioritization:

The first of the American Bar Association's ten principles of a public defender system says, "The public defense function, including the selection, funding, and payment

of defense counsel, is independent" (ABA 2002). This means that the public defender system is not affiliated with any political party, so the representation that they provide to their clients should not change significantly when politicians from new parties come into executive government positions. However, that does not mean that the public defender system does not need political prioritization or that they are not affiliated with politics at all. Their jobs are to represent their clients adequately and provide each of them with access to fair trial, but they cannot do so without receiving funding from the government. As stated earlier on in this paper, no one knows exactly which level of government should be paying for the public defender system or how much money the systems should be receiving, but the constitution does say that the responsibility falls on one of the forms of government. Even though public defenders have their own set political beliefs, the politicians who promise to better fund the public defender system will receive more support from the public defenders. However, this is with the assumption that politicians mention the reform of the public defender system at all or that any tangible solutions are offered during a politician's campaign.

According to the Sixth Amendment Center, politics for public defenders usually involves two main issues - the lack of money and the lack of independence (Sixth Amendment Center 2017). The two issues are forever linked for public defenders because if resources were guaranteed and if adequate funding for every jurisdiction was given, independence would be assured. Since resources and funding must come from somewhere, no matter how meager that funding may be, public defenders will remain dependent upon whomever funds them, including governments with often conflicting priorities (Sixth Amendment Center 2017). All this tension between politicians and

public defenders leads to an often-strenuous relationship between political parties and public defender systems because public defenders have the responsibility of fighting for both themselves and their clients.

The Sixth Amendment Center also discusses why the public does not hear much discussion on the public defender system from politicians, especially when they are campaigning. Politicians fear that there will be a lack of public support for investing money into the public defender system, especially those who have more supporters in a higher tax bracket and do not have an affiliation with anyone who would ever need a public defender (Sixth Amendment Center 2017). These politicians' fears lead to the consistent underfunding of the system that the public sees, no matter which political party is in office. From the research collected and conducted throughout this paper, the political reality of the public defender system is that when budgets are tight, public defense spending will often be cut first because it can be assumed that the public will hardly notice or care. If politicians do not start prioritizing the public defender system during and after their time campaigning, they will continue to be active partners in ensuring that the economically disadvantaged citizens of the United States who are entitled to adequate representation by the constitution do not receive the representation that they are promised.

CHAPTER V: MAKING IT BETTER

Public defenders are a necessity, not a luxury in the United States criminal justice system, as established in the Sixth and Fourteenth Amendments of the Constitution. There is never an excuse to provide someone with incompetent legal representation in court, but the problems that I addressed in the previous chapter prove to be detrimental to all people when they are obtaining legal representation. Public support and trust in the justice system is vital so that people who need indigent defense present to represent them in court will not be at a disadvantage simply because they cannot afford a lawyer. The standards addressed at the beginning of this chapter are the standards that I will hold the solutions I propose to as well. This is to ensure that the solutions will provide every client with access to a fair trial. The solutions I propose aim to improve the public defender system by ensuring uniformity, parity, and an implementation of tangible changes across public defender systems throughout the United States. These solutions are necessary because the system as it stands now does not guarantee fair trial. By holding the system to a higher and less ambiguous standard, fair trial will be more easily obtainable, and the system will improve for the people it represents.

Standards:

The standard that the public defender system should be held to according to the United States constitution versus what they are realistically held to by their respective jurisdictions' court systems do not align with each other. What is currently spelled out for public defenders in the constitution is an adequate foundation for what should be expected of public defenders, but it does not give enough specificity to ensure uniformity

between the various jurisdictions around the country. As it is written now, public defenders are held to a high standard based on the characteristics of fairness and equal access, but without specificity and clarity, many systems end up overworking their public defenders. What is expected of these systems by both the state and federal government is that all jurisdictions receive and distribute as many caseloads as they are handed, regardless of how many public defenders are employed or how many resources they have. Because some jurisdictions do not want to invest in their public defender systems, they find loopholes in the ambiguity of the standards.

As the constitution stands now, when in practice, public defenders are expected to meet an unrealistic standard of perfection without the resources or compensation to do so. The standards that are written out in the Sixth and Fourteenth Amendments are intended to serve the best interests of those that public defenders must represent in court. While the goals are very clear, how to obtain those goals while also respecting the needs and capabilities of public defenders is up for interpretation. This is a problem because these standards should be clear enough to be relied on by every jurisdiction no matter how big or small their public defender system is. These standards should also be descriptive enough to justify any decision that is made in the client's best interests because they should be the foundation of every rule and decision that a public defender follows.

I argue that the standards in the constitution right now are inadequate for the level of defense they expect to be provided from public defenders around the country. I also argue that the principles and standards written out by the American Bar Association (ABA) are the ones that should be utilized by all levels of government because of their mission "to serve equally the public by defending liberty and delivering justice as the

national representative of the legal profession." Their standards are also recognized by many high courts, and their principles are upheld by Supreme Court cases such as *Gideon v. Wainwright* (ABA 2008). According to the ABA, the public defender system's standards in the constitution are "aspirational" in their verbiage (ABA 2008). I interpret the meaning of the word "aspirational" is that the standards set in place right now do not demand what is expected of state public defender systems and the public defenders when representing their clients. An example that the ABA article I utilize discusses is that words such as "should" or "should not" are used in these standards, rather than more demonstrative phrases such as "shall" or "shall not" (ABA 2008). This is where various interpretations and loopholes become an issue because the words currently used in the constitution can be interpreted as optional or suggested, as opposed to as mandatory. Due to the nature and the needs of the public defender system, the words need to be more explanatory to better describe the expectations for all attorneys under the standards laid out for them in the constitution (ABA 2008).

The two reports by the ABA that discuss the standards and principles that the public defender system needs to be held to are entitled "Ten Principles of a Public Defense Delivery System" and "Eight Guidelines of Public Defense Workloads." In "Ten Principles," the ABA has set out what they have determined to be the "fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney" (ABA 2002). The ten principles are written out on one page and then describes in depth in the pages afterwards to provide more information on the standards that public defender systems should be held to and how to best support both their public

defenders and clients. Principles 4 and 5 are the two of the ten principles that provide the expectations for public defender systems in how to support public defenders, which is necessary for a successful system. Principle 4 says, "Defense counsel is provided sufficient time and a confidential space within which to meet with the client," and principle 5 says, "Defense counsel's workload is controlled to permit the rendering of quality representation" (ABA 2002). Both of these principles are essential in the discussion of what public defender systems and court systems are expected to be cognizant of when handing public defenders their case after case.

In "Eight Guidelines," the ABA writes that the purpose of the guidelines is to achieve "quality representation as the objective for those who furnish defense services for persons charged…who cannot afford a lawyer" (ABA 2008). However, they also address that this mission is not currently achievable because there are too many cases of inadequate defense being provided to indigent defendants in the United States. The purpose of this report is to set out attainable goals that are intended for the use of public defender programs and their public defenders around the country who are expected to provide representation when they are confronted with too many people to represent. The sixth guideline is just one example of how these standards are utilized to support the public defenders when they are forced to take on heavy caseloads. The ABA writes, "public defense providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable" (ABA 2008). Without this guideline in place, public defenders would have no legal say in how many cases their

system was handed, thereby limiting any chance of providing adequate representation to their clients.

The purpose of having standards for public defender systems is to provide guidance for both the professional conduct of the practicing public defenders and for their performances as the defense counsel for those who are unable to afford their own. The standards in place in the constitution are intended to uphold the best practices of public defenders serving as the counsel for the defense and how to do that job adequately for each client they represent. By reading these standards next to the principles that the ABA upholds, the public defender system will have clearer guidelines to follow. The ABA standards are also often relevant in the "judicial evaluation of constitutional claims regarding the right to and the absence of counsel" (ABA 2008). For purposes of consistency, the standards also provide details beyond what is stated in the Model Rules of Professional Conduct, according to another article on the ten principles upheld by the ABA (ABA 2002).

Solutions:

In the last chapter, I established the four most significant problems in the public defender system, according to the research, statistics, and personal testimonies provided throughout this paper. They were all chosen because they each limit the opportunity for defendants to get access to a fair trial. In the previous section, I established the standard that I believe the public defender system should be held to and how the system as it currently stands is not meeting it. In this section, I am going to discuss three solutions that I believe will bring the public defender system to the standard that the constitution

calls for. The solutions are uniformity within the United States public defender system, parity in the resources that are provided to the indigent defense and the prosecution, and both present and future attainable implementation solutions. These solutions have all been chosen in response to the four problems that I discussed in the last chapter and with the both the constitutional standards and the ABA principles in mind.

The first solution that I will address is uniformity within the public defender system. A repeated issue that has proven to be prevalent when researching the problems within the public defender system is the ambiguity of the verbiage in the constitution. An example of the ambiguity of language is that the right to an attorney in criminal proceedings is clearly stated in the Sixth Amendment, but the application of this right is complicated and can be interpreted differently. Another example is that even though a defendant's right to representation by an attorney is unquestionable, the issue remains of how legal services will be paid for and which level of government should be paying. Due to the ambiguity of the constitution, individual jurisdictions are often left floundering trying to figure out how to provide funds for their public defender systems that are already so critically underfunded. Without clarification of how to obtain the money to pay for public defenders and the resources necessary for their representation to meet the standards previously discussed, public defender systems continue to not receive adequate funding. A review of the verbiage used in the constitution would make the expectations for all public defender systems clearer and would establish my proposed solution of uniformity in what the minimum amount of time that must be spent on each client is as well as what the maximum number of caseloads public defenders can have at one time is.

While the amendments in the constitution are not intended to provide any lesser standard of conduct, that is how they can be and often are interpreted now.

The implementation of uniformity into the constitution would also give public defenders a sufficient minimum amount of time that they must spend with their clients. In this minimum time, the public defender should have the ability to thoroughly interview and work with their defendant soon after they have been arrested and well before their preliminary examination or trial date takes place. The public defender should also have the time to obtain and examine all information on the client's case while also having access to the client whenever necessary to discuss both legal and procedural information. To meet the constitutional standard for confidential communication between the public defender and their client, clarification must also be provided that a private meeting space is essential. These private spaces should be available in any space places where defendants must confer with their counsel, including jails or courthouses. Without this clarification, the standard of both available time and resources, including confidentiality, is not adequately met because the expected services are not being provided to the client. By implementing this required minimum time, the constitutional standard for adequate representation would be more uniformly met by public defender systems throughout the United States.

Clarification to the constitution's verbiage would also determine the number of caseloads that is sufficient for a public defender to handle at a given time. By giving a concrete number of how many cases each public defender should be allowed to take on at one time, public defenders would finally provide adequate legal representation to their clients. Currently, the constitutional standard assumes that the counsel's workload

matches counsel's capacity, but the research throughout this paper has shown that many public defenders leave the job because their workload far outweighs what they are capable of handling. They are critically underfunded, under resourced, and overburdened. A public defender's caseload of both appointed cases and other legal work that they must complete should never interfere with providing quality representation or lead to the breach of ethical obligations as laid out by the standards and principles previously discussed. National caseload standards should never be exceeded once they are set, but because that number does not currently exist, different jurisdictions give their public defenders case after case and hope that the public defender can represent their client well. Uniformity throughout the system would solve many of the problems that I address in chapter four and will provide people with the fair access to trial that they currently lack. By performing a comprehensive review of this verbiage, the constitution will be much clearer and less up to interpretation.

The second solution that will help public defender systems meet the constitutional standards discussed in the previous section of this chapter is to ensure that there is a parity of resources provided to the defense and the prosecution. This includes public defenders being viewed by all court systems as an equal partner to the prosecution in the criminal justice system. From jurisdiction to jurisdiction, there should be relative consistency in the caseloads, salaries, facilities, legal resources, investigators, and access to forensic services between the prosecution and the public defenders. I recognize that all individual public defender systems are different and, therefore, have different needs, so the establishment of parity would also allow jurisdictions to create their own standards

that discuss the anticipated caseloads of their public defenders and provide compensation for excess, unusual, or complex cases.

For this proposed solution to be successful, dialogue between the federal, state, and local public defender systems will be vital because to receive the resources necessary to achieve parity, money must be invested into all levels of the public defender system. For the public defender systems to receive parity with the prosecution, discussing how money is nationally invested into the criminal justice system and how it should be allocated in each area is necessary. While everything that all jurisdictions discuss should adhere to the standards provided in the constitution, each area has specific needs and expectations for their public defenders based on both geography and necessity. Therefore, each state should have a representative present at this proposed discussion so that they can advocate for the money that their individual criminal justice systems need. Public defenders should be an individual category within the criminal justice system that receive money for necessary resources, as opposed to them being lumped into the criminal justice system's budget. The purpose of this discussion would be to ensure that each state has a place at the table so that they receive the financial means necessary to have a successful public defender system. The establishment of parity between public defenders and prosecution will be beneficial for the criminal justice system as a whole.

The third and final solution I offer is implementation. As I mentioned in my literature review, when discussing the primary research on this topic from various scholars, the problems within the public defender system are often agreed upon and addressed in detail. However, tangible solutions were rarely provided. Right now, the tangible solution that I propose is that it is time to make the decision as to which level of

government funds and overlooks the public defender systems throughout the country. Based on the research that I have collected, I propose that the state governments should provide funding for public defenders offices and ensure uniformity and parity the public defender systems within their respective states. These state government will be more familiar with their respective criminal justice systems than the federal government will. State governments should also be able to respond to any large concerns that individual jurisdictions have quicker than the federal government can. I also suggest that the federal government should establish an interim office or department that would have an annual check-in with each state government to see how their public defender systems are doing. If there are massive issues with funding or with any other problems that may arise, the federal government can assist the state government in finding the best course of action to take.

As public defender systems become more stable after the implementation of uniformity across all jurisdictions and parity between the indigent defense and the prosecution in what resources they are provided, the question of if there is anything else that should be done to improve the system arises. As a long-term goal, I propose that there should be an establishment of a national public defender office housed within the Department of Justice. Earlier in my solutions section, I proposed that state governments should be responsible for providing necessary funds and resources to their public defender systems to ensure their success. I also mentioned that annual federal check-ins would be helpful to keep all states informed of what is going on with other public defender systems around the country. This proposed national public defender office would hold the annual federal check-ins that I suggest. If there was a federal public

defender office dedicated to consistently working with the state governments to ensure adequate representation was being provided to clients around the United States, public defenders and clients alike would reap the benefits. I believe that there would also be an influx of lawyers who would make careers out of being public defenders, and the overall opinion of the public defender system would go up as well. While this is a solution that may not be immediately feasible due to the state of the overall public defender system, with the implementation of the other solutions that I offer, this is a possible and tangible solution.

Counterarguments:

The solutions that I propose in the previous section are not universally agreed upon by the other scholars I took inspiration from when conducting my research. While the problems with the system are relatively similar throughout different scholars' opinions, how to solve the problems is more contentious. The current public defender system fails to meet the standards and principles discussed in this chapter as well as the values laid out in this thesis of equal access to representation, standardization, and the most crucial value of fairness. If fairness is to be understood in terms of a fair trial, the conditions of a fair trial depend on the equality of the representation provided to clients by the public defender systems. The counterarguments that I will address by two notable scholars do not put enough emphasis on the value of fairness and also do not discuss in detail why the public defender system is lacking in the representation it has provided in the past and in the present.

An interesting argument I found by was written by author Barbara Mantel from *CQ Researcher* on the state of the public defender system. Mantel's argument is that "defendants represented by public defenders do not receive better or worse outcomes than defendants represented by private counsel" (Mantel 2008). In other words, they are completely equal forms of representation. Her argument for the defense and the prosecution providing equal representation to their clients is a direct counterargument to the solution I offer of parity between the defense and prosecution. Mantel's belief stems from inferences she makes throughout her article that both private attorneys and public defenders have equal motivation to represent their clients, even though their motivations are different.

Mantel's argument is that a private attorney is often more motivated in their efforts to represent their clients because of the financial incentive they have and because they have more freedom over what cases they do or do not take on (Mantel 2008). A public defender is motivated by the opportunity to provide representation to a client who is in need because that is what excites them as "social justice agents" (Mantel 2008). However, Mantel's proposed argument does not at all mention the advantages that private attorneys have over public defenders and, instead, focuses only on what advantages public defenders have, especially those who stay in the public defense sphere for many years. Mantel's argument only addresses one dimension of the issue of parity between the indigent defense and the prosecution, and because mine addresses multiple dimensions, I am able to fully agree with my solutions as opposed to the solutions that she proposes.

Another notable argument I found that counters what I propose in my "solutions" section is made by authors Kura in one article and is backed up by authors Wood and

Burkhart. His view on public defenders is that they acquire more valuable experience than the prosecution does because public defenders are tasked with representing a plethora of cases at once, thus strengthening their skills as lawyers (Kura 1989). While I do not disagree that public defenders cultivate skills that will be helpful to them throughout their legal careers, I do disagree with Kura and the concurring opinion by Wood and Burkhart in their opinion that public defenders are typically the superior form of defense in the courtroom. My solutions state that public defenders do not often the opportunity to provide adequate defense for their clients, much less superior defense.

The research that I have collected has informed me that while public defenders are constantly given new opportunities to learn more about their profession, they do not have time to dedicate adequate energy and resources to each case they receive. I argue that overall, public defenders are not able to dive in and absorb what they are learning because they are too busy worrying if they can provide their client with adequate representation or not. Although Kura does admit that there are areas of the United States that do not pay their public defenders well enough, the underfunding of the public defender system is hardly discussed at all by Kura (Kura 1989). Kura's article was beneficial to me as I created my solutions because while I was able to agree with some of the points that he made in his argument about the benefits that public defenders get, I was also able to strengthen my own opinion and argument.

CONCLUSION

The public defender system in the United States needs reform immediately, but after conducting research on existing court cases and literature from other scholars, I have concluded that the system is not so far gone that it is beyond saving. After analyzing the biggest problems within the system and doing background research on how the system reached the stage that it is currently in, I have found that there is still hope embedded within the solutions I propose for adequate and attainable reform. These proposed solutions emphasize the vital values discussed throughout this paper of fairness and equal access to justice. They also are designed to make sure that the constitutional expectation for what kind of representation public defenders should be providing since 1963 is a reality for their clients. If public defenders continue to be overburdened and underfunded around the country like they are right now, citizens will continue to not have adequate representation in court. The trust in the criminal justice system overall will continue to decline, and the lack of public defenders will decline along with it due to the mistreatment that they receive.

The betterment of the United States criminal justice system depends on the condition of the public defender system, so it is time for policymakers and lawmakers to start prioritizing the state of the public defender system. Although there is a certain amount of stress that undoubtedly comes with being a lawyer of any kind, much of the stress public defenders experience could be mitigated through the changes I discuss throughout my “solutions” section. These changes and implementation ideas would provide public defender systems around the country with both the financial support and

the resources that many of the systems in various jurisdictions around the country currently lack. The solutions that I offer are important not only for the public defenders but also for the economically disadvantaged citizens that are charged with crimes and need that representation in court. A further study that could add on to the research provided throughout this thesis is how economic inequality in the criminal justice system is utilized in other countries around the world. If what these other countries do is something that could be beneficial for the United States' criminal justice system, adding those strategies to the United States' arsenal while also creating solutions that could be utilized to improve the system in the future could offer new solutions for a more effective criminal justice system. Citizens in the United States should not have to receive inadequate representation in court due to issues within the public defender system that are out of their control. Unless lawmakers start taking care of the public defender system and making it a priority to defend those who defend, the public defender system may reach a state where the system can no longer be saved.

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