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Bargain Brand Justice: Ohio's Indigent Defense Funding Model Makes Justice Inaccessible and Undermines the Sixth Amendment

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Bargain Brand Justice: Ohio's Indigent Defense Funding Model Makes Justice Inaccessible and Undermines the Sixth Amendment

Cover Page Footnote

I would first like to thank Desiree Patrice Dixon for bringing this subject to my attention and providing the initial information that guided my research. I extend my deepest gratitude to my Comment Editor, David Bailey, who assisted me throughout the writing process. I am also thankful to Professor John Feldmeier, UDSL, for sparking my interest in constitutional law and for advising me during this process. Lastly, I would like to thank my family whose love and support carry me through my work.

BARGAIN BRAND JUSTICE: OHIO'S INDIGENT DEFENSE FUNDING MODEL MAKES JUSTICE INACCESSIBLE AND UNDERMINES THE SIXTH AMENDMENT

Ebony Davenport^{*}

“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”¹

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^{*} J.D. (2018) at the University of Dayton School of Law. I would first like to thank Desiree Patrice Dixon for bringing this subject to my attention and providing the initial information that guided my research. I extend my deepest gratitude to my Comment Editor, David Bailey, who assisted me throughout the writing process. I am also thankful to Professor John Feldmeier, UDSL, for sparking my interest in constitutional law and for advising me during this process. Lastly, I would like to thank my family whose love and support carry me through my work.

¹ Franklin Delano Roosevelt, Inaugural Address, AMERICAN PRESIDENCY PROJECT (Jan. 20, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15349>.

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I. INTRODUCTION

In 1963, the Supreme Court assured that the constitutional right to counsel would not be denied to anyone due to their inability to pay.² The right to adequate legal representation is a noble one that sets our nation apart from other areas of the world. Justice Stewart recognized, “in an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.”³ However, without the proper infrastructure, this right becomes less revolutionary and more decorative. When public defender offices are not properly funded, the most vulnerable among us are denied a fundamental right; justice becomes an experience exclusive to the elite; and the adversarial system is won not by the best advocate, but by the depth of her resources.

Each state takes a different approach to funding.⁴ Some are completely state-funded, some leave the funding up to the various counties, and other states split the funding between the state and the counties.⁵ Ohio has adopted the latter model, which has the potential for causing greater disparities from county to county.⁶ The county model is similar to how many public school systems are funded, which is based on property tax revenue.⁷

² *Gideon v. Wainwright*, 372 U.S. 335, 334 (1963).

³ *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

⁴ See generally, *Indigent Defense Systems*, BUREAU OF JUSTICE (May 3, 2017), <http://www.bjs.gov/index.cfm?ty=tp&tid=28>.

⁵ JUSTICE POLICY INSTITUTE, *SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE*, 4 (Jul. 2011) (citing Phone Interview with Robert Spangenberg, Professor and Researcher, The Spangenberg Project, George Mason University (Apr. 27, 2011)), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf [hereinafter *System Overload*].

⁶ See OFFICE OF THE OHIO PUBLIC DEFENDER, *ANNUAL REPORT 2015*, 1 (citing Message from the Chair Jefferson Liston), <http://opd.ohio.gov/Portals/0/AnnualReports/Annual%20Report%202015.pdf> [hereinafter *Annual Report 2015*]. (“Ohio’s indigent defense system is in dire need of reform and additional resources. Defense services are provided, controlled, and funded by each of Ohio’s 88 counties, resulting in vast differences in the quality and cost of services provided. Ohio’s patchwork system of indigent defense is remarkably inefficient, causing increased costs in other parts of the criminal justice system.”).

⁷ NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *A RACE TO THE BOTTOM, SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS*, 5–6 (2008), http://nlada.net/sites/default/files/mi_racetothetbottomjseri06-2008_report.pdf [hereinafter *Race to Bottom*].

On the surface this may seem innocuous, but if you live in a poorer community it has serious implications.

Unsurprisingly, affluent areas tend to have greater resources to draw from than their poorer counterparts. Although suburban areas have smaller populations, the concentration of people in urban areas invites stronger police surveillance which, in turn, leads to a greater need for criminal defense resources.⁸ This approach to funding creates “[piecemeal] systems in which access to justice could depend on which side of the county line a person is arrested.”⁹ When the burden is shifted to the counties, they struggle to provide for public services like waste management, libraries, and schools. This strain on funding creates a Hunger Games-like situation in which various public services compete for extra crumbs.

Underfunding poses serious threats to the community: the quality of work a public defender can provide is significantly compromised due to excessive caseloads; clients may be persuaded to take plea deals that do not have their best interests at heart; and attorneys spend more time litigating ineffective assistance of counsel than tending to their client’s needs.¹⁰ Indigent clients are at risk for being convicted solely because they are poor.¹¹ This goes against what the Framers intended when they included the Equal Protection Clause in the 14th Amendment.¹²

Improper funding threatens the collective faith in our legal system and makes justice a commodity available only to the highest bidders. This presents not only a moral dilemma but an economic one as well. Inadequate indigent defense poses a serious financial cost to taxpayers.¹³ “When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals.”¹⁴ Criminal justice reform has long been a

⁸ Petra Bartosiewicz, *Beyond the Broken Window: William Bratton and the New Police State*, HARPER’S MAGAZINE (Sept. 23, 2016, 1:49 PM), <http://harpers.org/blog/2016/09/beyond-the-broken-window/>.

⁹ *System Overload*, *supra* note 5, at 4 (citations omitted).

¹⁰ “Indigent defendants often ‘plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring.’” Zachary Zurek, *Current Issue: Gideon’s Promise: Can the Michigan Indigent Defense Commission Act Fix the State’s Broken Indigent Defense Delivery System?*, 61 WAYNE L. REV. 123, 126 (2015).

¹¹ Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, THE GUARDIAN (June 17, 2015, 7:30), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>.

¹² Jon Roland, *Intent of the Fourteenth Amendment Was to Protect All Rights*, CONSTITUTION SOCIETY (Sept. 24, 2000), http://www.constitution.org/col/intent_14th.htm.

¹³ Susan Herlosfky and Geoffrey Isaacman, *Recent Development in Criminal Law: Issues of Sentencing and Public Defense: Public Defense: Minnesota’s Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 562 (2011).

¹⁴ Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010, THE DEP’T OF JUST. (Feb. 18, 2010), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent>.

buzz-phrase used for political gain at the expense of the most vulnerable.¹⁵ Despite a bipartisan effort to reform the system, “calls for robust support for public defenders—which should be at the center of the discussion—are notably lacking.”¹⁶

Because Ohio’s current funding model for indigent defense prevents citizens from equal access to justice, thus depriving them of a fundamental right to counsel, a new funding source that is independent from the general fund will allow for: (1) counties to be fully staffed, (2) proper expert witnesses that can potentially strengthen a client’s defense, (3) reduce excessive caseloads which undermine quality representation, and (4) ensure that *Gideon*’s promise is upheld.

Following this introduction, Part II will examine the history of the Sixth Amendment, the legal developments of the counsel provision, and provide a brief history of the common indigent defense delivery systems. Part III will explore the county model and the disparities it creates, looking specifically at four counties in southwest Ohio; and propose a Fourteenth Amendment framework to resolve the issue. Part IV will examine the current legislation regarding indigent defense funding, examine alternatives to the county model, and make a proposal for a centralized source of funding. Finally, Part V will conclude that although no perfect model exists, the move towards centralized funding is the necessary step to ensure unfettered access to the Sixth Amendment right to counsel and preserve the *Gideon* mandate.

II. BACKGROUND

A. Pre-Gideon Era

Before the right of counsel reached the Supreme Court, the Framers of the Constitution proposed the Sixth Amendment without any “comment or controversy.”¹⁷ The lack of commentary made it difficult to determine the parameters of the counsel provision in modern application.¹⁸ The absence of guidance for the federal courts resulted in a very slow evolution toward interpreting what protections the provision provided.

One of the earliest developments of the right to counsel involved the

¹⁵ See Jeff Stein, *The Clinton Dynasty’s Horrific Legacy: How “Tough-on-Crime” Politics Built the World’s Largest Prison System*, SALON, (Apr. 13, 2015, 1:25 PM), http://www.salon.com/2015/04/13/the_clinton_dynastys_horrific_legacy_how_tough_on_crime_politics_built_the_worlds_largest_prison/. “[President Clinton] spoke on the campaign trail of being tougher on criminals than Republicans... [which] was followed by a series of... ‘tough on crime’ measures, including: a \$30 billion crime bill that created dozens of new federal capital crimes; new life-sentence rules for some three-time offenders; [and] mandatory minimums for crack and crack cocaine possession[.]”

¹⁶ Jonathan Rapping, *The Crucial Element of Criminal Justice Reform That Nobody Is Talking About*, TALK POVERTY (Feb. 17, 2016), <https://talkpoverty.org/2016/02/17/element-criminal-justice-reform-nobody-talking-about-public-defenders/>.

¹⁷ WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27 (1955).

¹⁸ *Id.* at 28.

“Scottsboro Boys” case.¹⁹ The defendants, illiterate young black men, were arrested for the alleged gang-rape of two white women, and placed under military control while awaiting trial.²⁰ Due to “the racial overtones and highly emotionally charged atmosphere of the situation, no real assignment of counsel was made until the time of trial.”²¹ Even after counsel was assigned, neither lawyer had adequate time to prepare the case.²² The Court concluded that because the defendants were so uneducated and illiterate they should have been extended the right to counsel.²³ This was only a small victory for criminal defense advocates because the Court ultimately limited this right to capital cases.²⁴

In 1938, two marines had been convicted on federal charges and later filed a *habeas corpus* petition claiming that the government “failed to advise them that they could have appointed counsel.”²⁵ The court dismissed the petition “holding that [it] was not the proper remedy...[but] made a finding that petitioners had been ‘deprived of their constitutional rights.’”²⁶ This was a monumental finding that added meat to the bones of the counsel provision language of the Sixth Amendment.

A few years later, in 1942, a man was charged with burglary, and at trial requested that counsel be appointed.²⁷ The judge denied his request and “replied that it was the practice to appoint counsel only in murder and rape cases.”²⁸ The petitioner relied on the Supreme Court’s treatment of the counsel provision.²⁹ He argued that in another case the provision had been “virtually” incorporated into the Fourteenth Amendment “as an essential part of liberty, and federal courts had not drawn any distinction between capital and noncapital cases, so that none could be drawn logically under due process.”³⁰ The Court rejected his virtual incorporation argument and concluded that because the trial was fair, no duty to appoint counsel was necessary.³¹ The Court ultimately held that appointed counsel was only

¹⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁰ *SHELDON KRANTZ, ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN*, 19 (1976).

²¹ *Id.*

²² *Id.* at 19–20.

²³ *Id.* at 20.

²⁴ *See Powell v. Alabama*, 287 U.S. 45, 71 (1932). (“In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel.”) “Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine.” *Id.*

²⁵ *BEANEY, supra* note 17, at 37.

²⁶ *Id.*

²⁷ *Betts v. Brady*, 316 U.S. 455, 456–57 (1942).

²⁸ *BEANEY, supra* note 17, at 160.

²⁹ *Id.*

³⁰ *Id.* at 161–61.

³¹ *Id.*

needed in “special circumstances.”³² The “special circumstances” exception was originally very narrow but over time became broader and was eventually overruled by the seminal case *Gideon v. Wainwright*.³³

B. The Gideon Mandate

Clarence Earl Gideon was charged with a felony under Florida law and requested a lawyer from the court because he was unable to afford one.³⁴ The trial court was adhering to the “special circumstances” rule fashioned from the *Betts* holding, and as a result denied his request.³⁵ Gideon appeared at trial *pro se*, was found guilty, and later appealed his conviction.³⁶ He made a *habeas corpus* petition on the ground that the “court’s refusal to appoint counsel for him denied him rights [guaranteed by the Constitution and the Bill of Rights.]”³⁷ The facts of the *Betts* case and the ones in *Gideon* were very similar but after “full consideration” the Court decided to overrule it.³⁸

The Court interpreted the counsel provision to provide counsel to defendants in federal courts who could not afford it “unless the right [was] competently and intelligently waived.”³⁹ The Court also looked to precedent to determine if the right to counsel was a fundamental right to be incorporated into the Fourteenth Amendment Due Process Clause and therefore applicable to the states.⁴⁰ The Court departed from *Betts* because it considered the right to counsel to be “fundamental and essential to a fair trial.”⁴¹ The Court made a historic decision that would forever impact the landscape of criminal procedure.⁴²

C. Gideon in Action: Approaches to Funding

Since *Gideon* expressly incorporated the Sixth Amendment right to counsel into the Due Process Clause of the Fourteenth Amendment, states have struggled to fully execute this ambitious delegation.⁴³ There is no uniformity among the states despite the mandate because *Gideon* “never

³² SHELDON KRANTZ, ET.AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 21 (1976).

³³ *Id.* at 22.

³⁴ *Gideon v. Wainwright*, 372 U.S. 335, 336–37 (1963).

³⁵ *Id.* at 337–38.

³⁶ *Id.* at 337.

³⁷ *Id.*

³⁸ *Id.* at 339.

³⁹ 372 U.S. 335, 340 (1963).

⁴⁰ *Id.*

⁴¹ *Id.* at 342.

⁴² *See id.* at 343. “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

⁴³ David Simon, *Equal Before the Law: Toward a Restoration of Gideon’s Promise*, 43 HARV. C.R.—C.L.L. REV. 581, 586–87 (2008).

mandated how such systems should be created or funded.”⁴⁴ “As a result, [indigent] defense remains a low-visibility, decentralized, and highly variable element of state court operations.”⁴⁵ The Supreme Court in *Gideon* placed the burden of providing indigent defense services onto the states, but some have chosen to shift the burden onto “local governments to devise and systems that met budgetary constraints, and that were more politically palatable in their own legislative and political environments.”⁴⁶

State and local governments are free to design their delivery services, but there are generally three common approaches to funding. The first approach involves establishing a public defender office with “salaried public defenders [to] provide representation.”⁴⁷ Another approach is contract counsel, which involves “private attorneys [who] are selected to provide representation through a contract.”⁴⁸ The third most common approach to delivering indigent defense services is assigned counsel, which also involves “private attorneys [who] are selected to take cases and are paid [per] case or by the hour.”⁴⁹

As discussed in the introduction of this Comment, the states, the counties, or both provide funding.⁵⁰ Twenty-eight states provide more than 90% of funding, and five states, including Ohio, provide anywhere from 50-85% of funding.⁵¹ There are advantages and disadvantages to each funding structure; no one approach is inherently superior.

When counties bear the responsibility of providing nearly all of the funds, “there are certain to be inequities among the locally funded systems.”⁵² At the same time however, inequities are bound to arise where states carry the financial burden.⁵³ Indigent defense gets tacked on to the long laundry list of public services that states must provide for and is often relegated to the bottom of the list.⁵⁴

III. SHIFTING THE BURDEN: OHIO’S CURRENT MODEL LEAVES FUNDING UP TO THE COUNTIES

Effectively resolving inadequate funding for indigent defense will require work from both the public and private sectors, in conjunction with all

⁴⁴ NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 53 (2009).

⁴⁵ Alissa Pollitz Worden, et. al, *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1424 (2010/2011).

⁴⁶ *Id.*

⁴⁷ *System Overload*, *supra* note 5, at 4.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See supra* note 5.

⁵¹ LEFSTEIN & ROBERT, *supra* note 44, at 53–54.

⁵² *Id.* at 55.

⁵³ *Lack of State-Funded Public Defender at Core of ACLU Lawsuit*, MISS. BUS. J. (Sept. 29, 2014), <http://msbusiness.com/2014/09/lack-state-funded-public-defender-prompts-aclu-lawsuit/>.

⁵⁴ LEFSTEIN & ROBERT, *supra* note 44, at 57.

three branches of government. This Comment is not intended to solve this issue in its entirety; such an attempt would not only be overly ambitious, but would require a broad lens that would likely blur some of the more nuanced issues. Where a birds-eye-view approach would display the crumbling infrastructure that is indigent defense, a closer examination provides an up close and personal look at the cracks in the foundation.

The Spangenberg Group, a special interest organization devoted to the improvement of indigent defense, has contracted with various state bar associations and the Department of Justice to conduct research-intensive surveys to expose the “cracks” in the foundation.⁵⁵ In 2008, the organization contracted with the American Bar Association, in conjunction with its Standing Committee on Legal Aid and Indigent Defendants, to assess the spending trends of each states’ indigent defense delivery system.⁵⁶

The snapshot of Ohio provides some helpful insight. Although the state does not provide 100% of the funding, it does maintain an oversight commission which “has the authority to control the distribution of state funds and to reimburse the counties for up to 50% of their expenditures.”⁵⁷ The eighty-eight counties have the discretion to employ any of the above-mentioned approaches to funding.⁵⁸ Along with reimbursing the counties, the oversight commission also manages the Multi-County Program, which has three offices in the southeastern region of the state.⁵⁹

The counties that adhere to the standards set forth by the oversight commission may be partially reimbursed.⁶⁰ “The state-funded [commission] reimburses counties for up to fifty percent of their indigent defense expenditure, including attorney fees, investigator/expert fees, and travel expenses, but the rate of reimbursement fluctuates each year, depending on

⁵⁵ The Spangenberg Group, 2001, *Our Work*, INDIGENT DEFENSE STUDIES, http://dnewhouse.com/TSG/work_indig.html.

⁵⁶ THE SPANGENBERG PROJECT, *STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008*, 2 (Nov. 2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

⁵⁷ The Spangenberg Group, 2006, *State Authority And Funding*, STATE INDIGENT DEFENSE COMMISSIONS, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwihsYfqkPTcAhUG54MKHZTWAFIQFjAKegQICRAC&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flegal_aid_indigent_defendants%2Fts_sclaid_def_state_indigentdefense_feb07.authcheckdam.pdf&usg=AOvVaw3sd8iqR_yhMqUZ-33hsQ1i.

⁵⁸ *Id.*

⁵⁹ The Multi County Program was established in 1991 because the participating counties lacked an independent public defender office and relied primarily on appointed counsel for indigent defense. The counties cannot afford to maintain their own public defender offices so the Ohio Public Defender contracts with private attorneys and firms to represent indigent clients. *Multi County System*, OFFICE OF THE OHIO PUBLIC DEFENDER (2018), <http://opd.ohio.gov/Trial-Services/Multi-County-System>.

⁶⁰ See also LEGISLATIVE SERVICE COMMISSION, OHIO PUBLIC DEFENDER COMMISSION-RED BOOK 124, 1 (May 7, 2001) (“The Ohio Public Defender Commission, which was created effective January 13, 1976 pursuant to Ann. Sub>H.B. 164 of the 111th General Assembly, provides, supervises, and coordinates legal representation for persons who cannot afford to hire an attorney to represent them in criminal court.”).

the revenue obtained.”⁶¹

A. *Why Southwest Ohio?*

The scope of this Comment is limited to Southwest Ohio because this area offers a textbook example of the divide between the underprivileged and the affluent. The issue of funding gives rise to inequality across the country, but this comparative assessment underscores the spatial inequality that exists from county to county. Montgomery County is largely an urban area with more residents than resources. Greene County is a mix of agriculture and affluence with more residential and commercial development than Montgomery. Hamilton County is like Montgomery but is more densely populated, which has unique implications. Darke County completes the assessment and adds depth to the survey because it is a rural area with fewer residents, that in turn results in fewer resources.

TABLE 1: 2015 Percentage of Ohio Population by County⁶²

County	Population	State Population	% of Total Population (rounded to the nearest tenth)
Montgomery	532,258	11,613,423	4.6%
Greene	164,427	11,613,423	1.4%
Hamilton	807,598	11,613,423	6.9%
Darke	52,076	11,613,423	0.4%

1. Montgomery County

Montgomery County covers over 450 square miles and is centered around the Dayton Metropolitan area.⁶³ In 2015, the United States Census

⁶¹ THE SPANGBERG PROJECT, *supra* note 56, at 52. Revenue is typically derived from nominal assessment fees applied to criminal convictions, but considering the dire financial circumstances of indigent defendants, these fees are usually waived.

⁶² Table 1 is comprised of population data gathered by the U.S. Census Bureau. The Table was created by the Author for the purpose of demonstrating the population difference among the four selected counties. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015, 2015 Population Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPANNRES&prodType=table (last visited Mar. 13, 2018) [hereinafter *2015 Population Estimates*].

⁶³ *Ohio Land area in square miles, 2010 by County*, INDEXMUNDI, <http://www.indexmundi.com/facts/united-states/quick-facts/ohio/land-area#table> (last visited Apr. 2, 2018).

Bureau estimated the population of Montgomery County at 532,258, making it one of the most densely populated counties in the state.⁶⁴ The population density coupled with the median household income makes it one of the poorest urban counties in the state.⁶⁵

The Montgomery County Public Defender's Office employs over forty assistant public defenders and is led by D.K. Rudy Wehner.⁶⁶ The office reported total operating costs of \$4,870,084, for the 2015 fiscal year.⁶⁷

Although the Ohio Public Defender Commission may reimburse counties up to 50%, the reimbursement rate for 2015 was only 40%.⁶⁸ The state reimbursed the county \$1,948,034, which is exactly 40%.⁶⁹ Based on the population data reported to the Census Bureau, Montgomery County spent less than \$10 per resident on services.

2. Greene County

Greene County lies on the suburban end of the spectrum with 164,427 residents and covering 413.73 square miles.⁷⁰ The Greene County Public Defender's Office is led by Arthur Siddell, III and Christopher Beck.⁷¹ The poverty rate of Greene County is the lowest of the four counties surveyed, indicating that fewer residents would require indigent defense services.⁷² The county reported operating costs of \$528,834, \$211,534 of which was reimbursed by the state (exactly 40%).⁷³

The county reported its general fund expenditures at \$45,607,047, of which indigent defense services represented 2.1%.⁷⁴ Based on the information provided by the Census Bureau, the county spent approximately \$30 per resident on services.

3. Hamilton County

Hamilton County is the most urban county surveyed, occupying 405.91 square miles.⁷⁵ The county is centered around the Cincinnati

⁶⁴ 2015 Population Estimates, *supra* note 63.

⁶⁵ See *infra* Charts 2, 3.

⁶⁶ Public Defender, MONTGOMERY COUNTY (2017), http://www.mcchio.org/government/courts/public_defender/index.php.

⁶⁷ *Id.* at 14, tbl. VIII. http://opd.ohio.gov/Portals/0/AnnualReports/Appendices%20to%20Annual%20Report_2015.pdf (last visited Apr. 2, 2018).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 2015 Population Estimates, *supra* note 63; INDEXMUNDI, *supra* note 64.

⁷¹ See generally, Public Defender, GREENE COUNTY, <https://www.co.greene.oh.us/index.aspx?nid=297> (last visited Apr. 2, 2018).

⁷² See *infra* Chart 3.

⁷³ See *supra* note 70.

⁷⁴ AUDITOR'S OFFICE GREENE COUNTY, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED IN DEC. 2015, 100, (2016), <http://www.co.greene.oh.us/DocumentCenter/View/8613>.

⁷⁵ INDEXMUNDI, *supra* note 64.

Metropolitan area and reported 807,598 residents in 2015.⁷⁶ The Hamilton County Public Defender's Office is also the largest, employing over seventy attorneys led by Raymond Faller.⁷⁷ The county's general fund expenditures were \$201,758,211; indigent services accounted for 7.6%.⁷⁸

The office reported total operating costs of \$13,553,074 and was reimbursed \$5,421,230 by the state (exactly 40%).⁷⁹ Based on the foregoing, Hamilton County spent an estimated \$6 per resident on indigent services.

4. Darke County

Rounding out the survey with rural Darke County adds depth necessary to demonstrate the spatial inequality that exists from county to county. Although rural areas have fewer residents, they also have fewer resources to fund various public services. The 2015 Census reported the county's population as 52,076.⁸⁰ Darke County has contracted with the Indigent Legal Assistance Fund of West Central Ohio.⁸¹ The county probably lacks an independent office due to the economic insecurity that is common for most rural areas. The county reported operated costs of \$274,500, of which \$109,800 was reimbursed (exactly 40%).⁸²

⁷⁶ 2015 Population Estimates, *supra* note 63.

⁷⁷ See generally *Attorneys and Staff*, HAMILTON COUNTY PUBLIC DEFENDER, <http://www.hamilton-countypd.org/index.php?page=attorneys-staff> (last visited Apr. 2, 2018).

⁷⁸ OFFICE OF BUDGET AND STRATEGIC INITIATIVES, HAMILTON COUNTY, OHIO, 2015 BUDGET IN BRIEF 4, <http://www.hamilton-co.org/administrator/bsi/budget/BIB15WEB.pdf> (last visited Apr. 2, 2018).

⁷⁹ *Annual Report 2015*, *supra* note 6, at D5.

⁸⁰ 2015 Population Estimates, *supra* note 63.

⁸¹ *County Resources*, OHIO PUBLIC DEFENDER, [#D](http://opd.ohio.gov/The-Library/County-Resources) (last visited Apr. 2, 2018).

⁸² *Annual Report 2015*, *supra* note 6.

CHART 2: 2015 Economic Indicators by County⁸³

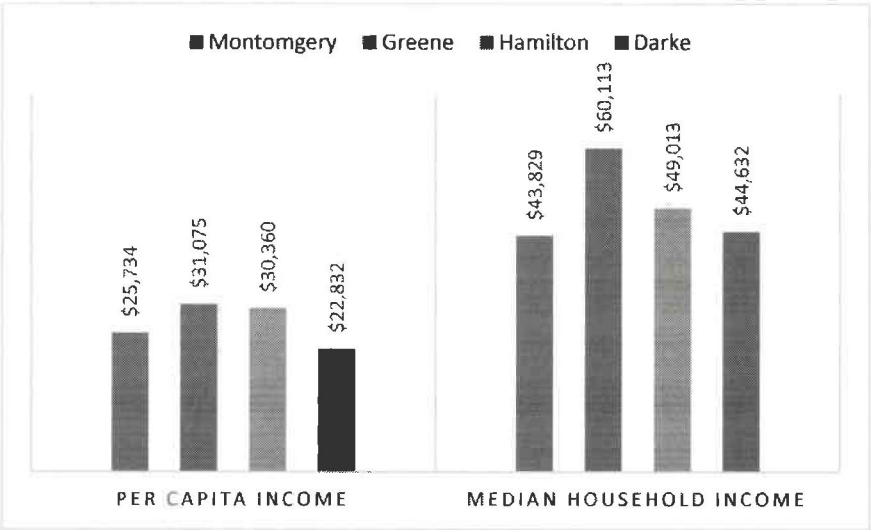
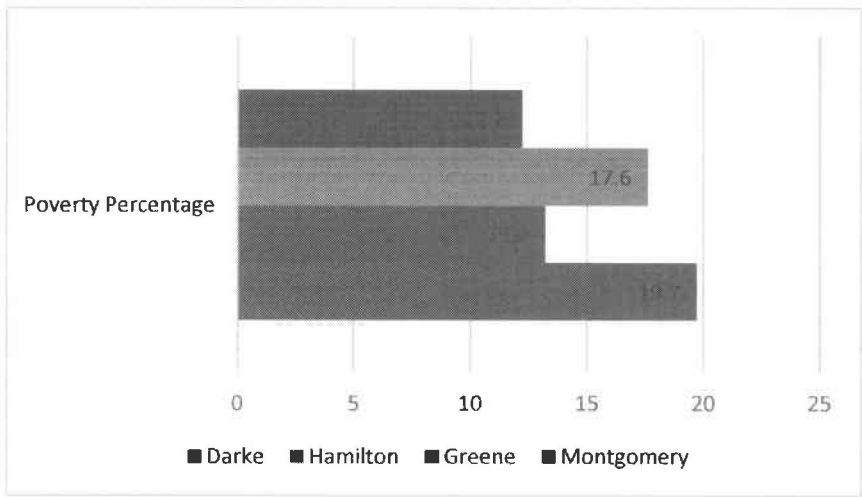


CHART 3: 2014 Poverty Percentage by County⁸⁴



⁸³ Chart 2 is comprised of socioeconomic data gathered by the U.S. Census Bureau. The Chart was created by the Author to illustrate the spatial inequality. Arguably, the better the economic profile, the more tax revenue can be generated which, in turn, funds indigent defense services. See *infra* Charts 2, 3.

⁸⁴ Chart 3 is comprised of poverty data gathered and calculated by the Ohio Development Services Agency, a state arm of the U.S. Census Bureau. The Chart was created by the Author to further illustrate the spatial inequality. Arguably, the better the economic profile, the more tax revenue can be generated which, in turn, funds indigent defense services. OHIO DEVELOPMENT SERVICES AGENCY, THE OHIO POVERTY REPORT, <https://www.development.ohio.gov/files/research/p7005.pdf>.

B. Don't Bring a Knife to a Gun Fight: Inadequate Funding Threatens the Existence of Our Adversarial System

The United States prides itself on the format of its criminal proceedings; each party is represented by an equally effective attorney who will represent them zealously, and the best advocate prevails.⁸⁵ This format may exist in theory, but in practice, “this model of adversarial fairness is near fantasy.”⁸⁶ “Despite [the] constitutional guarantee, state and county spending on lawyers for the poor amounts to only \$2.3 billion—barely 1 percent of the more than \$200 billion governments spend annually on criminal justice.”⁸⁷

In 2002, the American Bar Association developed standards to help guide the delivery of indigent defense.⁸⁸ The standards provide guidance in various areas such as funding, caseload, client screening, and continuing legal education.⁸⁹ Principle 8 addresses the threat that inadequate funding poses to our adversarial system.⁹⁰

Among the specific categories listed in Principle 8, parity among resources, “such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts[,]” is perhaps the most significant.⁹¹ Absent resources, “the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching.”⁹²

Failure to equip public defenders with the necessary resources that they need prevents their clients from fully and adequately participating in the adversarial system.⁹³ Improper funding leads to excessive caseloads, which

⁸⁵ See Mary Sue Backus, *The Adversary System is Dead: Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 946–47 (“When each side is fully developed and zealously presented, the judge or jury is in the best position to ascertain the truth.”).

⁸⁶ *Id.* at 945.

⁸⁷ John Pfaff, *A Mockery of Justice for the Poor*, NY TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html?_r=0 (citing Erinn Herberman, Ph.D., and Tracey Kyckelhahn, Ph.D., *State Government Indigent Defense Expenditures, FY 2008–2012–Updated*, Special Report (July 2014) (prepared for Bureau of Justice Statistics)).

⁸⁸ *ABA Ten Principles of a Public Defense Delivery System*, AMERICAN BAR ASSOCIATION, (Feb. 2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_scl_aid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter *ABA Ten Principles*].

⁸⁹ *Id.*

⁹⁰ *ABA Ten Principles*, *supra* note 92, at 1 (“There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.”).

⁹¹ *Race to Bottom*, *supra* note 7, at 83 (“One of the reasons why *Gideon* determined that defense lawyers were ‘necessities’ rather than ‘luxuries’ was the simple acknowledgement that states ‘quite properly spend vast sums of money’ to establish a ‘machinery’ to prosecute offenders.”); *ABA Ten Principles*, *supra* note 92, at 3.

⁹² See, *Race to Bottom*, *supra* note 95.

⁹³ Time is arguably an advocate’s most precious resource. When public defenders are handling excessive caseloads, they are not able to devote the time necessary to developing a strong defense for their client. See John Pfaff (@JohnFPfaff), TWITTER (Nov. 18, 2015, 7:35 AM), <https://twitter.com/JohnFPfaff/status/667003286604640256> (Pfaff, a professor at Fordham Law School and criminal justice

in turn makes it difficult to “perform even core functions, such as conducting [thorough] factual investigation into guilt or innocence.”⁹⁴ “Faced with too many clients and not enough time to serve them, defense attorneys are forced to take shortcuts and thus often fail to adequately prepare, to investigate or interview witnesses, and to maintain sufficient contact with their clients or prepare and file appropriate motions.”⁹⁵

Because the State has elected to fund both the prosecutor and the public defender, inequity in criminal budgets can be viewed as a state-sponsored gunfight wherein the prosecutor shows up with a revolver, and the public defender a knife.⁹⁶ This disparity not only undermines the adversarial process, but as discussed below, it also has serious constitutional implications regarding due process.

C. Constitutional Fall-Out: Inadequate Funding Raises both Procedural and Substantive Due Process Concerns

The Fourteenth Amendment provides that

no [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁷

In examining the current state of indigent defense, it is vital to do so in light of the Due Process Clause.

1. Procedural Due Process

Budget differences between the prosecutor and public defender places a procedural restraint on the administration of the law.⁹⁸ The Supreme Court noted that

expert, uses crime data to illustrate the relatively steady caseload of prosecutors while public defender caseloads increase).

⁹⁴ Laurence A. Benner, *Eliminating Excessive Public Defender Workloads* 2 (2011), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsul1_benner_authcheckdam.pdf.

⁹⁵ Backus, *supra* note 89, at 955.

⁹⁶ The Author is not asserting that public defenders are *per se* ineffective due to funding issues. The Author has a great deal of respect for public defenders and believes that by and large they are devoted public servants. However, even the most dedicated public defender is faced with the formidable obstacle of budget restraints.

⁹⁷ U.S. CONST. amend. XIV, § 1.

⁹⁸ *Id.*; Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of Daubert v. Merrell Dow Pharmaceuticals to Ake v. Oklahoma*, 15 CAP. DEF. J. 1, 12. (2002). Disparity among resources prevents indigents from “the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Id.* (citing majority opinion in *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985)).

mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.⁹⁹

The disparity between defense spending and prosecution spending is stark. “In 2007, total spending by state prosecutors’ offices nationwide exceeded that of public defender offices by nearly \$3.5 billion.”¹⁰⁰ That same year in Ohio, \$6,928,156, was spent on indigent defense services.¹⁰¹ One year later, the operating budget for the prosecutor’s office was nearly two and half times the operating budget for the public defender’s office in Montgomery County.¹⁰²

The adversarial system is severely compromised when one advocate lacks the resources needed to represent their client. The State has no duty to “purchase...all the assistance that his wealthier counterpart might buy [but] fundamental fairness entitles indigent defendants to an ‘adequate opportunity to present their claims fairly within the adversary system.’”¹⁰³

Faith in the criminal justice system is already on a steady decline; coupled with the stigma associated with public defenders, the continued existence of such disparities will eventually erode the system.¹⁰⁴ One approach “to restore the legitimacy of the adversarial model in the criminal

⁹⁹ *Ake*, 470 U.S. at 77.

¹⁰⁰ Hannah Levinota, Jaeah Lee & Brett Brownell, *Charts: Why You're in Deep Trouble if You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 5:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

¹⁰¹ JOSEPH ROGERS, *Ohio Legislative Service Commission, Final Fiscal Analyses* 660, <http://www.lsc.ohio.gov/fiscal/fiscalanalysis/126ga/sen.pdf>.

¹⁰² The operating budget for the Montgomery County Prosecutor’s Office was \$12,086,251, compared to operating budget for the Montgomery County Public Defender’s Office of \$5,175,171. See MONTGOMERY COUNTY OFFICE OF MANAGEMENT AND BUDGET, *2008 ADOPTED BUDGET AND PLAN* tbl. E4 (2008), http://www.mcoho.org/2008CombinedAdoptedBudget_Plan.pdf.

¹⁰³ *Ake*, 470 U.S. at 77.

¹⁰⁴ See e.g., Jonathan Casper, *Did You Have a Lawyer When You Went to Court? No I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 6 (1971) (examining the relationship between criminal defendants and their public defenders); Charles J. Ogletree JR., *An Essay on the New Public Defender for the 21st Century*, 58 DUKE L. & CONTEMP. PROBS. 81, 82 (1995) (“The public appears to dislike lawyers of all kinds, but it reserves a special contempt for those who represent indigent clients charged with crimes. After all, public defenders are called upon every day to represent indigents who are accused of murder, rape, kidnapping, robbery, theft, drug usage and distribution, assault, and other conduct that threatens persons and property alike.”) (internal citations omitted). The funding issue has led to public defender offices across the country to reject cases. See Rachel M. Zahorsky, *Public Defenders Can Reject Cases Because of Excessive Workloads, State Supreme Court Says*, ABA JOURNAL (May 28, 2013, 11:30 AM), http://www.abajournal.com/news/article/state_supreme_court_says_public_defenders

[can_reject_cases_due_to_overload/](http://www.abajournal.com/news/article/state_supreme_court_says_public_defenders); David Carroll, *MO Supreme Court Rules That Public Defense Commission Can Decline Cases*, SIXTH AMEND. CTR. (Aug. 7, 2012), <http://sixthamendment.org/mo-supreme-court-rules-that-public-defense-commission-can-decline-cases/>; Mark Hertsgaard, *New Orleans Public Defender Turns Away Felony Cases*, DAILY BEAST (Nov. 25, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/11/25/new-orleans-public-defender-turns-away-felony-cases.html>.

context is to follow through on the promise of *Gideon* and ensure adequate legal representation to criminal defendants who cannot otherwise afford a lawyer."¹⁰⁵

2. Substantive Due Process

States are prohibited from depriving persons of liberty without due process.¹⁰⁶ In the criminal arena, a defendant's most precious liberty is at stake—his freedom. When the State fails to properly fund indigent defense services, the defendants experience a constructive deprivation of their fundamental right to counsel.¹⁰⁷ In *Ake v. Oklahoma*, the Court held that indigent defendants must have access to the "raw materials" for an effective defense.¹⁰⁸

Access to counsel is one such raw material; it would follow that any barrier to this "material"—funding of public defender offices in this case—cheapens an indigent's entire experience with the court.¹⁰⁹ Pre-*Gideon* cases even draw attention to the Court's emphasis on the fundamental role of the right to counsel.¹¹⁰ This type of barrier essentially reroutes their access through a "service door" reserved only for those without funds.

Due to the disparate impact inadequate funding has on indigent defendants, there is a temptation to raise an equal protection argument, particularly because the Court has recognized the resulting inequality.¹¹¹ Employing such a framework, however, does not promise any systemic change because the Court has refused to apply exacting scrutiny to class-based discrimination.¹¹² The difficulty in making an equal protection argument is that there is no comparison class; indigent defendants' wealthier counterparts do not have to access the system by virtue of not being indigent. One could argue however, that when the State has an affirmative duty to provide a public service to a specific class of people, failure to provide

¹⁰⁵ Backus, *supra* note 89, at 950.

¹⁰⁶ See *supra* note 102.

¹⁰⁷ See *System Overload*, *supra* note 5, at 6 ("As a result of limited societal investment, many public defenders find it impossible to provide adequate—let alone quality—counsel to their numerous clients due to a fundamental lack of time and resources.") (internal citations omitted).

¹⁰⁸ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

¹⁰⁹ See *id.* at 82 (holding that psychiatric assistance to the defense was integral to an insanity defense, thus it is a "basic tool" required for the defense to fully participate in the adversarial system). If access to ancillary services is needed to safeguard the adversarial system, it then follows that access to counsel—that is, access that is not reduced by lack of resources—is required to ensure the vitality of the criminal justice system as it currently exists.

¹¹⁰ See also *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (explaining that even an educated man lacks the skill to knowledge to defend himself against a potential conviction to underscore the need for counsel for the uneducated, poor man); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (describing the "humane policy of the modern criminal law" to provide counsel to indigent defendants) (internal citations omitted).

¹¹¹ See also *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (writing for the Court, Justice Black realized that "[t]here can be no equal justice where the type of trial a man gets depends on the amount of money he has.") (internal citations omitted).

¹¹² Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 292 (1999) ("[I]t is now relatively well established that such classifications are not suspect.").

meaningful access is per se discrimination.¹¹³

Incorporating a Fourteenth Amendment argument into a Sixth Amendment challenge has the potential to resolve the severe underfunding of indigent defense.¹¹⁴ Employing a due process framework for assessing current inadequacies in indigent defense—primarily in regard to funding—puts onus on the states to remove artificial barriers.¹¹⁵

D. Existing Recourse is Insufficient: Strickland Appeals Treat the Symptom as Opposed to the Disease

One may argue that the criminal justice system already provides indigent defendants with a remedy through ineffective assistance of counsel claims.¹¹⁶ While this mechanism addresses the ineffectiveness of an individual attorney, it fails to address the systemic failures that make a public defender ineffective.¹¹⁷ The two-prong test set forth in *Strickland* has proven to be very difficult to satisfy even in the most obvious and egregious cases.¹¹⁸ The test “leaves out any consideration of whether or not a [public] defender had sufficient time or resources to provide the best possible results for his or her client.”¹¹⁹

Aside from being an impossible standard to meet, *Strickland* claims “virtually [rule] out consideration of the sort of systemic deficiencies that [are] crippling.... indigent defense.”¹²⁰ Ineffective assistance of counsel claims are reactionary; the type of structural changes that are needed for meaningful reform require proactive solutions. Aside from being reactionary, *Strickland* claims ignore “the connection between front-ended [inadequate]

¹¹³ See also *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2003) (That people outside of that class could not access the public service did not negate the fact that they were “objects of dissimilar treatment because of their disabilities, or that they were not ‘subject to a more onerous condition,’ than those who did not have disabilities”) (internal citations omitted) (emphasis added).

¹¹⁴ Lauren S. Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1241 (2013).

¹¹⁵ Lucas, *supra* note 120; See also Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2160 (1998) (describing “the state’s obligation to provide due process and equal protection to all who seek access to the judicial process when strong individual liberty interests are at stake.”); Lucas *supra* note 113, at 1230 (arguing that because states are the gatekeepers of the criminal justice system, inadequate funding to indigent defense is a burden on a fundamental right).

¹¹⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹¹⁷ See also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1087 (2006) (“Lawyers may often be stymied in their efforts to resolve the ethical dilemma of how to deliver competent representation in the face of unreasonable caseloads and few resources. Still, their efforts are further undermined by the case law surrounding ineffective assistance of counsel claims.”) (internal citations omitted).

¹¹⁸ See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 634 (1986).

¹¹⁹ *System Overload*, *supra* note 5, at 3.

¹²⁰ Richard Drew, *Louisiana’s New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA. L. REV. 955, 961 (2009).

funding of defense counsel and back-end ineffective assistance claims.”¹²¹ Further, the two-prong test set forth in *Strickland* “is not designed to provide guidance as to how much funding or which resources would be necessary in future cases to guarantee effective assistance of counsel.”¹²²

IV. POLICY PROPOSAL

A. Existing Legislation

The Ohio General Assembly has established legislation regarding the Ohio Public Defender Commission and its various functions, including funding.¹²³ The Ohio State Treasury manages the fund, and it is composed of money paid into it by fines and fees generated by traffic violations and other court costs.¹²⁴ The statute provides that eighty-eight percent of the fund must be used to reimburse the counties and to maintain the commission’s operating costs.¹²⁵ The reimbursements are made once a year and “allocated proportionately so that each county receives an equal percentage of its total cost for operating its county public defender system[.]”¹²⁶

The current legislation provides a sufficient framework but the current source of funding is vulnerable.¹²⁷ In 2015, the State Public Defender, Tim Young, testified before the Ohio General Assembly about the budget for the fiscal year of 2016-17.¹²⁸ Young proposed a three-point plan to address the systemic failures in Ohio’s indigent defense services, listing increased funding as the primary concern.¹²⁹ Despite legislation requiring an oversight commission, “years of budget cuts and flat funding have left [the Office] without the resources to provide oversight, and the state’s diminished financial contribution to the system has left the state with little leverage to encourage improvements in county systems.”¹³⁰

Even if the State split the cost of indigent defense services between the counties, that “will not fix the deeper systemic problem” caused by

¹²¹ Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel Claims*, 2004 UTAH L. REV. 1, 6–7 (2004).

¹²² Lucas, *supra* note 120, at 1250.

¹²³ OHIO REVISED CODE ANNOTATED § 120.08 (2012).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*; See *supra* Section III.A.1–4 (The county comparative assessment shows that each county was reimbursed exactly 40%).

¹²⁷ See *Annual Report 2015*, *supra* note 6, at 3 (“The...operating budget has been cut and flat-funded for several biennia. The agency faces this chronic underfunding despite a healthy economy, an improved state budget, and an ever-increasing prison population.”).

¹²⁸ COUNTY COMMISSIONER ASSOCIATION OF OHIO, FY 16–17 BIENNIAL BUDGET OFFICE OF THE OHIO PUBLIC DEFENDER: HEARING ON H.B. 64 BEFORE THE S. FIN. COMM., CORRECTIONS SUBCOMM. (2015), <http://www.ccao.org/userfiles/3-5-15%20HB%2064%20PUB%20Testimony.pdf> (statement of Tim Young, Ohio State Public Defender) [hereinafter *Biennial Budget*].

¹²⁹ *Id.*

¹³⁰ *Id.*

placing the burden on the counties to fund the services.¹³¹ Under the existing system, reimbursements by the state have “ranged...as low as 25 percent of the costs in 2008 to about 40 percent for the past two years.”¹³²

Even if the State increased the reimbursement rate, the county public defenders do not have unfettered access to the funds since the money goes to the county general fund.¹³³

Providing this service is a substantial expense for a county budget; the rate of reimbursement depends largely on the state of the economy. Constitutional rights are far too precious to be reliant on an uncertain system.

B. “Best Practices”

Ohio is in the minority of states that have adopted the “Indiana Model.”¹³⁴ Data collected in 2008 shows that more than half of the states fund most or all of their indigent defense services at the state level.¹³⁵ This subsection of the Comment will examine best practices across the country that have responded to the funding issue better than the Indiana Model: Oregon’s flat-fee contract system; the Bronx’s community-based response; and San Francisco’s commitment to reentry court in an effort to reduce recidivism.¹³⁶

1. Statewide Contract System

In 2001, the Oregon legislature established an oversight commission to administer indigent defense delivery services.¹³⁷ Unlike other states with oversight commissions, Oregon “utilizes a statewide contract system for trial level services...as a means of enforcing extensive standards and ensuring quality.”¹³⁸ The contracted-services model is thought to create financial conflicts of interest because it incentivizes attorneys to spend as little time as possible with each client.¹³⁹ Another criticism of contracting for indigent defense services is that it prioritizes cost efficiency over the quality of

¹³¹ Tiffany Y. Latta, *Costs to Defend Poor Rise, Counties Call for Changes to Funding System*, SPRINGFIELD NEWS SUN (July 17, 2015, 7:00 PM), <http://www.springfieldnewsun.com/news/local-govt-politics/costs-defend-poor-rise-counties-call-for-changes-funding-system/bpFwiaucXTrgFRMwylFuIN/>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Ohio, GIDEON AT 50, <http://gideonat50.org/in-your-state/ohio/> (“Basically, the state appropriates funds from its general fund to a state commission with authority to reimburse county governments for a portion of their costs of delivering public defense services each year.”) (last visited Apr. 2, 2018).

¹³⁵ *System Overload*, *supra* note 5, at 4.

¹³⁶ Author is not advocating that Ohio adopt any of these delivery systems. They are “best practices” not because they have bigger budgets to work with; they have merely adjusted their systems to account for the funding crisis, which affects every public defender’s office nationwide.

¹³⁷ GIDEON AT 50, Oregon, <http://gideonat50.org/in-your-state/oregon/> (last visited Apr. 2, 2018).

¹³⁸ *Id.*

¹³⁹ *Flat-Fee Contracts*, NAT’L LEGAL AID AND DEFENDER ASS’N, http://www.nlada.net/library/article_na_flatfeecontracts (last visited Apr. 2, 2018).

representation.¹⁴⁰ However, Oregon has managed to balance these two competing interests making it a national leader in indigent defense services.¹⁴¹

The contracted-services model attempts to remedy the impact that excessive caseloads have on the funding crisis.¹⁴² “Excessive caseloads contribute to a lack of time to focus on each individual case, preventing even the most dedicated and talented attorneys from providing their clients with a quality defense.”¹⁴³ This focus is aimed at reducing costs and improving quality of services: a manageable caseload allows the attorney to properly prepare the case and get it right the first time, avoiding costs associated with appeals and ineffective assistance of counsel claims.¹⁴⁴

The Department of Justice (with the assistance of The Spangenberg Group) examined the characteristics of an effective contract system in a report published in 2000.¹⁴⁵ The report outlined the following features as characteristics of an effective system:

Minimum attorney qualifications; Provisions for support costs such as paralegals, investigators, and social workers; Independent oversight and monitoring; Workload caps; Limitations on the practice of law outside the contract; Provisions for completing cases if the contract is completed but breached or not renewed; Caseload caps; Case management and tracking requirements; Guidelines on client contact notification of appointment; and A mechanism for oversight and evaluation.¹⁴⁶

Because Oregon’s commission closely manages workload limits and staffing requirements, it is in a better position (compared to a statewide public defender agency) to assess expected costs.¹⁴⁷

The contracted-services model is not inherently superior to other statewide delivery systems, but with the proper safeguards in place (i.e. workload limits, staffing requirements, and enforcement mechanisms) it has the potential to avoid the inequalities stemming from the “Indiana Model.”¹⁴⁸

¹⁴⁰ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 13 (2000) (prepared by The Spangenberg Group) <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

¹⁴¹ PUBLIC DEFENSE SERVICES COMMISSION, EXECUTIVE DIRECTOR’S BIENNIAL REPORT TO THE OREGON LEGISLATIVE ASSEMBLY JULY 1, 2013-JUNE 30, 2015, 16 (2015), <https://www.oregon.gov/OPDS/docs/Reports/BiennialReporttoLeg2015.pdf>.

¹⁴² *System Overload*, *supra* note 5, at 10.

¹⁴³ *Id.* (internal citations omitted).

¹⁴⁴ *Id.* at 21.

¹⁴⁵ *See Flat Fee Contracts*, *supra* note 145.

¹⁴⁶ *Id.*

¹⁴⁷ *See PUBLIC DEFENSE*, *supra* note 147.

¹⁴⁸ *See System Overload*, *supra* note 5, at 13. *But see* Jake Thomas, *Lacking Lawyers: State Budget Cuts Threaten Public Defenders*, THE PORTLAND MERCURY (Feb. 5, 2009), <https://www.portlandmercury.com/portland/lacking-lawyers/Content?oid=1106650>.

2. Community-Based Response

Communities across the country have rejected the three common indigent defense delivery systems in favor of a more comprehensive approach.¹⁴⁹ This community-based response, also referred to as ‘Holistic Defense,’ “is an innovative model of public defense, pioneered by The Bronx Defenders, that achieves better outcomes for clients, their families, and their communities.”¹⁵⁰ This delivery system is characterized by four “pillars”: (1) Seamless access to legal and non-legal services that meet client needs; (2) dynamic, interdisciplinary communication; (3) advocates with an interdisciplinary skill set; and (4) a robust understanding of, and connection to, the community served.¹⁵¹

This approach centers the needs of the clients, examining the various societal factors that contribute to repeat-offenders.¹⁵² “[T]he staggering case load, almost 5.6 million cases a year, for the few public defenders available has created one of the most egregious gaps in the U.S. justice system.”¹⁵³ Evidently, this interdisciplinary approach to indigent defense has yielded promising outcomes.¹⁵⁴ “The average acquittal rate for jury trials in the Bronx is 57.4 percent, but the Bronx Defenders’ trial win rate from July 2003 to June 2005 was 86.7 percent, according to an evaluation completed in 2006.”¹⁵⁵

Unlike the traditional methods of providing indigent defense services, community-based responses take a proactive stance to combat the issue of underfunding.¹⁵⁶ The 21st century wave of criminal justice reform recognizes “that an investment on the front end of the criminal justice system with holistic representation will save money on the back end through reductions in corrections spending and lower recidivism rates.”¹⁵⁷

¹⁴⁹ See also Kirby Mitchell, et. al., *Transforming Public Defense: Stories of Holistic Advocacy and Lessons Learned from Civil/Criminal Attorney Partnerships*, AM. BAR ASS’N, (2014), http://www.americanbar.org/content/dam/aba/directories/pro_bono_clearinghouse/ejc_2014_049.authcheckdam.pdf.

¹⁵⁰ *Holistic Defense, Defined*, BRONX DEFENDERS, <http://bronxdefenders.org/holistic-defense/> (last visited Apr. 2, 2018); see also *System Overload*, *supra* note 5, at 32 (“The Bronx Defenders also engage in systemic and policy reform and engage the community of which they are a part. They host community block parties to connect with local organizations and community members.”).

¹⁵¹ Cynthia G. Lee, et. al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALBANY L. REV. 1215, 1219 (2014/2015).

¹⁵² *Can the ‘Holistic Approach’ Solve the Crisis in Public Defense?* THE CRIME REPORT, (Mar. 8, 2011), http://the_crimereport.org/2011/03/08/2011-03-can-the-holistic-approach-solve-the-crisis-in-public/ (accessing this source requires a subscription) [hereinafter *Holistic Approach*].

¹⁵³ *Id.* “When a client come [sic] to The Bronx Defenders, the initial consultation could reveal that he/she has ‘collateral issues.’ For example, if the crime the defendant is charged with can affect their immigration status[.]...The Bronx Defenders can assign an in-house immigration lawyer to work with the designated attorney on how to structure a plea so it won’t effect [sic] their citizenship status.” *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; But see Radley Balko, *Save the Bronx Defenders*, WASH. POST (Feb. 3, 2015) https://www.washingtonpost.com/news/the-watch/wp/2015/02/03/save-the-bronx-defenders/?utm_term=.dcfc84aebc0 (inferring the entity’s involvement with a rap video that appears to endorse violence against police has threatened funding sources).

¹⁵⁷ *Holistic Approach*, *supra* note 158 (citing an email correspondence with Joshua Dohan, a long time public defender and director of the Youth Advocacy Project in Massachusetts).

3. Reentry Emphasis

Another comprehensive approach to indigent defense services involves non-traditional reentry courts and programs.¹⁵⁸ The San Francisco Public Defender's Office has established a separate reentry unit to reduce recidivism rates.¹⁵⁹ Like the holistic approach, the "Reentry Unit provides clients with an innovative blend of legal, social, and practical support through three programs...to [address] clients' legal and social outcomes" through a comprehensive social services support system.¹⁶⁰

Along with improving client outcomes, the Office has seen increased cost savings.¹⁶¹ "The combination of alternative sentences and shortened sentences cumulate in a significant amount of prison and jail days avoided by Reentry clients."¹⁶² Former Attorney General, Eric Holder, has previously stated that "getting it right" the first-time results in serious cost savings because tax dollars are not being spent on retrials and appeals.¹⁶³

Whereas the Oregon contract model addresses the caseload issue by employing strict workload limits, the reentry model attempts to remedy the issue by removing the barriers that send so many people back to prison.¹⁶⁴ Like holistic defenders, reentry programs seek to save money on the back end by investing on the front end.¹⁶⁵

C. Policy Proposal: Lessons from Colorado's Promise to Dedicate Marijuana Revenue to Education

1. Necessity is the Parent of Innovation

A dedicated centralized source of funding for indigent defense, insulated from budgetary cuts, would eliminate the disparities created by the county model, afford public defenders the opportunity to fully participate in

¹⁵⁸ Robert V. Wolf, *Reentry Courts: Looking Ahead: A Conversation About Strategies for Offender Reintegration*, 1 (2011). "Reentry courts provide close supervision, links to social services, and intensive case management to offenders returning home after incarceration...[i]n an effort to promote law-abiding behavior among parolees, more than two dozen reentry courts are currently in operation in the United States, with more in the planning phase." *Id.*

¹⁵⁹ Office of the Public Defender, *Reentry Unit Social Work Services Program Evaluation*, 26–30 (Apr. 29, 2009), <http://sfpublicdefender.org/wp-content/uploads/sites/2/2009/05/reentry-unit-program-evaluation.pdf> (prepared by the LFA Group) [hereinafter *Reentry Unit*].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; *But see id.* at 31 (explaining that despite improving client outcomes, the Unit cannot meet the demand for the services because of "funding insecurity.").

¹⁶² *See Reentry Unit*, *supra* note 165.

¹⁶³ *See Looking Back, Looking Forward*, *supra* note 14.

¹⁶⁴ *Courts Explore New Ways to Deal With Heavy Caseloads, Overflowing Jails* AMERICAN UNIV. SCHOOL OF COMM., (Jul. 23, 2013), <http://americawhatwentwrong.org/story/changing-courts/>. "While more money would help the defense system, fewer criminals would too... There is a growing recognition that the current system of impossible caseloads, over-criminalized rulebooks and overflowing prisons is incredibly expensive, unsustainable—and avoidable." *Id.*

¹⁶⁵ Emily V. Galvin, *How Treatment Courts Can Reduce Crime*, THE ATLANTIC (Sept. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/09/how-treatment-courts-can-reduce-crime/407704/>.

our adversarial system of justice, and ensure unfettered access to the Sixth Amendment right to counsel. As discussed earlier in this Comment, when counties are primarily responsible for funding indigent defense services, it is relegated to the bottom of a long list of equally important public services.¹⁶⁶

Despite financial stability in the past, Ohio is preparing to make substantial cuts to various public services in anticipation of the 2018-19 fiscal year.¹⁶⁷ The public defender's office is among those public services, and according to Tim Young, "[w]ithout more money, more lawyers will depart and reimbursements to county public defender[s]...will drop."¹⁶⁸ Because the current funding model exposes public defender offices to budget cuts, which drastically limits the services they can provide, a dedicated source of funding is paramount.

This Comment proposes that the Ohio General Assembly examine the distribution of marijuana tax revenue of Colorado as an alternative source of funding.¹⁶⁹ Almost three years ago, Colorado amended its constitution by popular vote to legalize recreational and medical use of marijuana.¹⁷⁰ Despite the ongoing moral debate, local governments "can leverage [the] revenue by pledging it to repay tax-exempt securities that can be sold to investors; the proceeds from the sale of those securities can then be used for much-needed public infrastructure."¹⁷¹

The tax revenue is applied to two funds: Building Excellent Schools Today ("BEST") and the Marijuana Tax Cash Fund ("MCTF").¹⁷² The first \$40 million in excess tax revenue was dedicated to BEST for public school capital improvements.¹⁷³ The MCTF fund is "used for health care, health education, substance abuse prevention and treatment programs, and law enforcement."¹⁷⁴ Despite the promise of improving education, the revenue is not specifically earmarked for the schools.¹⁷⁵ "Nevertheless, the Colorado

¹⁶⁶ See *supra* Section II.C.

¹⁶⁷ Alan Johnson, *Ohioans Would be Affected in Many Ways by State Budget Belt-Tightening*, THE COLUMBUS DISPATCH (Jan. 8, 2017, 12:01 AM), <http://www.dispatch.com/content/stories/local/2017/01/08/ohioans-would-be-affected-by-belt-tightening.html>.

¹⁶⁸ *Id.*

¹⁶⁹ Author is not advocating for the legalization of marijuana in Ohio, but Colorado's efforts to improve the school system by directing tax revenue from marijuana sales provide some inspiration. Taxing a non-essential good with such a high demand has the potential to provide a seemingly endless stream of revenue.

¹⁷⁰ Douglas A. Praw, et. al, *How Municipalities Can Leverage the Reefer Tax*, LAW 360 (Apr. 8, 2014), <https://www.goodwinlaw.com/~media/Files/Publications/Attorney%20Articles/2014/How%20Municipalities%20Can%20Leverage%20The%20Reefer%20Tax.pdf> [hereinafter *Leverage*].

¹⁷¹ *Id.*

¹⁷² Larson Silbaugh, *Issue Brief: Distribution of Marijuana Tax Revenue*, COLO. LEGIS. COUNCIL STAFF, no. 15-10, (July 2015), https://leg.colorado.gov/sites/default/files/15-10_distribution_of_marijuana_tax_revenue_issue_brief_1.pdf.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See Trevor Hughes, *Colorado Pot Users Helping Build Schools with Tax Dollars*, USA TODAY (Feb. 17, 2015, 5:25 PM), <http://usat.ly/1A3M62W> ("Much of that tax money goes directly into the state's general fund, not the specific school-construction account."); Alia Wong, *The False Promise of Marijuana Money in Education*, THE ATLANTIC (May 4, 2015), <https://www.theatlantic.com/education/archive/2015/>

law is a good starting point to begin thinking about structures that might effectively channel and leverage the prospective tax revenues to optimal public application.”¹⁷⁶

2. Money Alone is Insufficient: The Role of the Oversight Commission

As discussed above in Part III, Ohio has established a state oversight committee to manage the various county public defender offices. Apart from partially reimbursing the counties, “the commission has never established any meaningful standards for attorney or system performance, and therefore there is no measure by which the central office can judge the effectiveness of the counties’ delivery systems.”¹⁷⁷ The absence of clearly-defined standards makes it difficult to ensure the quality of representation.

As Tim Young mentioned in his testimony to the Ohio legislature, increased funding alone will not fix the problem.¹⁷⁸ Although increased funding is desperately needed, Young also requested permission for the Ohio Public Defender to establish caseload and hourly rate standards of which the county offices will be evaluated.¹⁷⁹ As mentioned earlier in this Comment, an integral factor in the success of Oregon’s indigent defense services is the focus on maintaining manageable caseloads.¹⁸⁰ Caseload caps and an enforcement mechanism to ensure the counties are adhering to the standards were featured as characteristics of an effective system.¹⁸¹

In 2006, the Ohio Supreme Court recommended that the commission be provided with the resources it needs to enforce rules and standards concerning indigent defense services.¹⁸² Among other standards, the Court recommended that the commission gain “additional authority to promulgate standards on...maximum caseloads or billable hours per attorney for both public defender offices and assigned counsel[.]”¹⁸³ Additionally, performance-based standards were recommended to ensure quality representation is being delivered.¹⁸⁴

The Court also encouraged the Ohio legislature “to allow new funding sources to provide the increased funding the system needs.”¹⁸⁵

05/the-false-promise-of-marijuana-money-in-education/392165/ (explaining that the failure to specifically earmark the money has prevented marijuana from solving the education funding problem).

¹⁷⁶ *Leverage*, *supra* note 176.

¹⁷⁷ *Ohio*, *supra* note 140.

¹⁷⁸ *Biennial Budget*, *supra* note 134.

¹⁷⁹ *Id.*

¹⁸⁰ *See supra* Section IV.B.1.

¹⁸¹ *See Lucas*, *supra* note 120.

¹⁸² THE SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT 5 (Apr. 2006) (prepared by the Task Force on Pro Se and Indigent Litigants), http://www.supremecourt.ohio.gov/Publications/prose/report_april06.pdf.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 39.

Directing tax revenue from a non-essential good, like marijuana, is the type of innovation the Court was advocating.¹⁸⁶ The expanded authority to promulgate and enforce standards would then allow the commission to adequately support the counties. For example, the revenue could be used to hire support staff, retain expert witnesses, increase salaries, and supplement operating expenses. Regardless of the source of the revenue—gas, alcohol, tobacco, or marijuana—it is evident that continued reliance on an already strained general fund is not going to make the Sixth Amendment right to counsel more accessible.¹⁸⁷

V. CONCLUSION

The issues that stem from inadequate funding affect public defender offices across the nation—from the barely functioning to the ones deemed “best practices.” The hope is that this Comment inspires the Ohio legislature to identify an innovative source of funding, much like Colorado did with marijuana. Although no perfect model exists, it is apparent that general funds are not a sustainable source of funding; they are susceptible to an ever-changing economy. Considering what is at stake—liberty and perhaps one’s life—it is imperative that Ohio seeks an alternative funding source.

A constitutional right to legal representation indeed sets this nation apart from the rest of the world, but failure to safeguard it threatens the entire system. Judge Learned Hand said it best, “[i]f we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”¹⁸⁸

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 2 (“The absence of a fully-funded, effective system creates the risk of denying an individual’s constitutional right to counsel.”).

¹⁸⁸ Learned Hand, Chief Judge on United States Court of Appeals for the Second Circuit, Keynote Speech at The Legal Aid Society’s 75th Anniversary (Feb. 16, 1951) available at <http://www.legal-aid.org/en/las/thoushaltnotationjustice.aspx> (internal quotations omitted).