Seattle Journal for Social Justice

Volume 16 | Issue 3 Article 14

4-1-2019

The Plight and Power of the Low-Bono Defendant: Solving the Public Defense Funding Crisis by Providing Access to Representation for Low-Bono Defendants

Stephen Anderson
ander230@seattleu.edu

The Plight and Power of the Low-Bono Defendant: Solving the Public Defense Funding Crisis by Providing Access to Representation for Low-Bono Defendants

Stephen Anderson

> [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. This seems to us to be an obvious truth. . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[1]

I. INTRODUCTION: A DIRE PROBLEM AND A PROPOSED SOLUTION

The United States of America has, from its very conception, fought to be a nation of laws and civic entitlements above all else. The ideal of protecting the rights of the citizen against the tyranny of the government through individual liberties has been ingrained in the American ethos since its inception and is often reflected in political and social discourse.[2] From a young age, American children who have attended a public school have likely experienced the Pledge of Allegiance to the flag, a symbolic and political gesture begun in 1892, but nonetheless a prime example of the nation's professed commitment to the guarantee of "Liberty and Justice for all."[3] One of the more tangible means employed to uphold this weighty commitment to justice is the guarantee that all those charged with a crime may have access

---

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

2 LIBERTY VERSUS TYRANNY, http://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/liberty-versus-tyranny/# [https://perma.cc/QN7J-Y4PK] (last visited March 7, 2017).

3 *The Pledge of Allegiance*, WASHINGTON STATE SECRETARY OF STATE, https://www.sos.wa.gov/flag/pledge.aspx [https://perma.cc/7U4U-96D7] (last visited June 9, 2018).

to counsel.[4] While ideals and guarantees serve to instill confidence, in practice the reality is often very different. The criminal justice system of this nation is at an unprecedented crossroads that may very well relegate the so often espoused ideals of "Liberty and Justice" to mere words without substance, and the systems employed to protect them into farce.

A. The Problem

The current need for public criminal defense attorneys has never been greater, yet the funding to provide those attorneys has never been less sufficient.[5] These competing forces create a simple yet functionally devastating problem; the inadequacy of funding currently available to public defense attorneys has acted to deprive indigent criminal defendants of their right to a competent attorney.[6] The result has been that underfunded and overworked public defenders have come to serve as counsel to their indigent clients in name only.[7] Many public defense attorneys are hamstrung, unable to provide clients the level of competent representation necessary to ensure a fair and just trial because they do not have the resources to do so.[8]

B. The Solution

To combat the chronic and severe problem of underfunding, and the resulting decline in competent representation, I propose that public defender offices be allowed to accept a new class of "low-bono" paying clients in addition to their traditional indigent "pro-bono" clientele. The addition of paying clients would allow public defender offices access to a previously untapped funding source, to be used to both provide representation to the

---

4 *Gideon*, 372 U.S. at 344.
5 Harvard Law Review, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734–35 (2005).
6 *Id*.
7 *Id*.
8 *Id*.

historically underserved "low-bono" population and to increase the quality of representation for all clients.

Further, to facilitate the shift from a purely indigent client base to one inclusive of both indigent and "low-bono" clients, I propose that public defender offices be awarded temporary federal and state grants, be provided with access to better student-loan forgiveness programs, and be granted the authority to slowly integrate "low-bono" clients into their existing structure.

C. Article Summary

The key aspects of this article will be presented in six subsequent sections, each addressing: the background of the right to competent counsel; the status of current public defender offices, nationally and within the State of Washington; the unique problems faced by those offices; and the proposed solution for the problems faced by many offices.

Section II of this article will provide a brief introduction to the public defender system in the United States. Section III of this article will recount the general history of access to competent counsel in a criminal trial, the creation of modern public defender offices, and the many traditional problems faced by public defender offices in the past: first, in access to representation; second, in quality of representation; and third, in securing the funding necessary to accomplish both. Section IV of this article will outline the current status of Washington State and King County public defender services, and explain how the problems faced by these agencies are indicative of the problems faced by public defender offices around the nation.

Section V of the article will provide background information and an explanation of the interconnectedness between the lack of competent council for indigent criminal defendants and the current crisis regarding over-incarceration. In Section VI, the article will put forward the current King County Department of Public Defense as an example of how allowing public defender offices to incorporate "low-bono" clients into their clientele will (1) remedy the dire funding problem, and (2) allow offices to provide competent

legal representation. This section will also address potential problems with implementation.

The final substantive section, section VII, will address how the implementation of a public defender program allowing low-bono clients will help remedy the problem of over-incarceration. I argue it will combat over-incarceration by increasing competent representation necessary to minimize pretrial detention and overall sentence duration.

II. INTRODUCTION TO THE PUBLIC DEFENDER SYSTEM AS A WHOLE

The modern public defender system has been designed to provide those accused of a crime, yet unable to afford an attorney, with access to competent legal representation during their criminal trial.[9] The necessity of an attorney for all defendants, not only for those who may afford to hire one on their own, can be justified by both the Sixth Amendment of the Constitution's guarantee of counsel during a criminal trial and the long held cultural belief that to deter state tyranny against the individual, the accused must be guaranteed the right to a competent and zealous advocate.[10]

In the past, what it meant to truly have the right to counsel has been subject to great debate, ranging from the post-Revolutionary War ideal that such a protection only extended to the right to hire a private attorney, to the eventual right to an attorney, but only during capital cases.[11] However, a clearer definition has arisen. In *Gideon v. Wainwright*, the linchpin of modern interpretation regarding the right of a criminal defendant to an attorney, the Supreme Court held that the right to counsel must be provided to nearly all criminal defendants, regardless of whether they can afford an attorney.[12]

---

[9] Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment,* 25 IND. INT'L & COMP. L. REV. 237, 237–39 (2015).
[10] *Id.*
[11] Heather Baxter, Gideon's *Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 344 (2010).
[12] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

The application of *Gideon* has taken many forms with varying levels of success in fulfilling *Gideon's* promise. As of 2007, there are currently public defender offices in every state and in the District of Columbia, with over one thousand offices employing over fifteen thousand public defense attorneys.[13] However, even with the current number of public defense attorneys available, the workload many face is staggering, with offices nationwide receiving nearly 5.6 million cases per year.[14] A recent 2010 study conducted by the United States Department of Justice found that almost 80 percent of state public defender offices exceeded the nationally recognized workload standards.[15] As public defenders represent 80 percent of criminal defendants, these attorneys play a pivotal role in the criminal justice process and provide the lion's share of representation to indigent clients.[16]

III. HISTORY OF PUBLIC DEFENDER OFFICES

A. A Brief History of the Pre- and Post-Constitutional Ideal of Right to Counsel

The ideal that any citizen accused of a crime must be afforded access to an attorney to advocate on their behalf is inseparable from, and intimately associated with, the ideals and motivations of the American Revolution.[17] When the framers of the United States Constitution decided what to include in the document that came to be the basis of their new government, they placed great importance on securing against abuses similar to those that

---

[13] UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Public Defender Offices Nationwide Received Nearly 5.6 Million Indigent Defense Cases In 2007*, https://www.bjs.gov/content/pub/press/spdpclpdo07pr.cfm [https://perma.cc/R4BN-2Z3Q] (last visited June 9, 2018).
[14] *Id*.
[15] Heather Perry Baxter, *At A Crossroads: Where the Indigent Defense Crisis and the Legal Education Crisis Intersect*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 25, 29 (2016).
[16] *Effectively Ineffective, supra* note 5, at 1735.
[17] LIBERTY VERSUS TYRANNY*, supra* note 2.

precipitated the breach from English rule—including the subjection of citizens to trial without personal protections.[18]

With recent history in mind, many framers were worried that a strong centralized government could eventually risk repeating some of those same practices.[19] Accordingly, the framers sought to protect certain aspects of personal liberty through guarantees of rights like those included in the Sixth Amendment.[20] Thomas Jefferson, writing in 1787 on the purpose of the Bill of Rights, stated that it was intended to enshrine in the Constitution the guarantee that certain rights could not be taken away from a citizen, and that the right to counsel was sacrosanct among them, something the federal government was obligated to enforce for all time.[21]

This promise of a right to counsel took many forms, and prior to the ground-breaking decision of *Gideon v. Wainwright*, some state governments had begun to extend the right to appointed counsel to indigent criminal defendants.[22] However, there was no uniformity in application, nor was there a national mandate that appointed counsel for the indigent that was expressly protected under the Sixth Amendment.[23] The states that chose to provide appointed counsel often did so by legislative grant, providing that all indigent cases would be covered by a single appointed "Public Defender."[24]

Over time, the right to counsel began to emerge. In *Powell v. Alabama*, the Supreme Court first held that a state must appoint counsel for an indigent defendant in a capital case.[25] While *Powell* expanded the right to counsel for

---

18 *Id*.
19 *Id*.
20 U.S. CONST. amend. XI.
21 LIBERTY VERSUS TYRANNY, *supra* note 2.
22 UNDERSTANDING GIDEON'S IMPACT PART 2: THE BIRTH OF THE PUBLIC DEFENDER MOVEMENT, sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/understanding-gideons-impact-part-2-the-birth-of-the-public-defender-movement/ [https://perma.cc/7AMA-GJ3P?type=image] (last visited March 8, 2017).
23 *Id*.
24 *Id*.
25 Baxter, *supra* note 11, at 344.

those who could not afford it to capital cases, any further progress was overturned shortly thereafter in *Betts v. Brady*.[26] In *Betts*, the Supreme Court held that requiring states to appoint counsel in non-capital cases would not be universal, as it would be too burdensome on the states.[27] The Court stated in *Betts* that counsel would not need to be provided to indigent defendants for "charges of small crimes."[28]

By the 1950s, only thirteen states required appointed counsel for indigent defendants in all felony cases.[29] Washington State, the jurisdiction in which this article bases its own proposed solution, was one of those thirteen pioneering states.[30]

B. Gideon v. Wainwright: The Landmark Decision

Not until 1963, in the case of *Gideon v. Wainwrigh*t, did the Supreme Court first hold that the right to counsel was essential to ensuring a fair trial under the Sixth Amendment.[31] The *Gideon* decision stated that the right to counsel was a fundamental constitutional right, and that as such, states were required to provide indigent defendants with counsel.[32] In effect, *Gideon* overruled the *Betts* decision and paved the way for greater access to counsel for indigent defendants.[33] Soon after, the Court found that indigent defendants in misdemeanor cases were also entitled to appointed counsel.[34] The Court subsequently expanded that right in a series of decisions, holding that

---

[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] UNDERSTANDING GIDEON'S IMPACT, PART 1: RIGHT TO COUNSEL SERVICES, http://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/understanding-gideons-impact-part-1-right-to-counsel-services/ [https://perma.cc/CT2S-AMJD?type=image] (last visited March 8, 2017).
[30] *Id*.
[31] Brennan, *supra* note 9, at 239–40.
[32] *Id*.
[33] *Id*.
[34] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

juveniles are entitled to counsel[35] and that defendants are entitled to appointed counsel on their first appeal.[36]

C. Post-Gideon Problems with the Right to Counsel

While the right to counsel was secured for indigent defendants in *Gideon* and later cases, that right has not yet been applied by the states so as to be fully workable in practice.[37] The Court in *Gideon* may have held that an indigent defendant had the right to counsel, but left it up to the state legislatures to determine how to do so.[38]

This problem in deciding how the right to counsel should actually function led to the case of *Strickland v. Washington*, in which the Court held that to honor a defendant's right to counsel, that counsel must provide "effective assistance."[39] While *Strickland* required effective assistance, it put the burden of proof on the defendant to show that they received "ineffective assistance" in violation of their right to effective counsel.[40]

In order for a defendant to prove their counsel's assistance was ineffective, they must show both that (1) the assistance was below an objectively reasonable level, and that (2) but for that counsel's deficient performance, there is a reasonable probability that the outcome would have been different.[41] The *Strickland* test has been applied by courts with rather troubling results, finding that attorneys who slept through a portion of a trial or were intoxicated still provided effective assistance.[42] *Strickland* has also created the even more problematic presumption that while counsel is

35 *In re* Gault, 387 U.S. 1, 36 (1967).
36 Douglas v. California, 372 U.S. 353, 357 (1963).
37 *Effectively Ineffective*, *supra* note 5, at 1733.
38 Brennan, *supra* note 9, at 242.
39 Perry Baxter, *supra* note 15, at 30.
40 *Id*.
41 *Id*.
42 *Effectively Ineffective*, *supra* note 5, at 1731.

guaranteed, the level of counsel needed for truly adequate representation is not.[43]

1. General Trends of Public Defender Offices Across the Country

In the post-*Gideon* era, most criminal public defense is supported by funding acquired from the states rather than any federal grant.[44] Federal public defense attorneys, by comparison, are still funded by congressional grant. While federal public defense attorneys often face heavy workloads, and are required to represent some of the nation's most detested individuals, compared to many state and city public defenders, they are relatively well off.[45]

To comply with the federal mandate to provide appointed counsel for indigent defendants, each of the fifty states has adopted either purely state or a mixture of state and county funding to support its public defender offices,[46] the one exception being Pennsylvania, which funds local public defenders exclusively via county funds.[47] The pressure on states and counties to provide funding has led to a moray of problems for indigent criminal defendants and the lawyers who serve them.[48]

Studies conducted in the 1990s have shown that roughly 80 percent of defendants charged with felonies received court-appointed counsel and that public defender programs were the primary source of legal defense counsel

---

43 Perry Baxter, *supra* note 15, at 29.

44 Stephen D. Owens, Elizabeth Accetta, Jennifer J. Charles & Samantha E. Shoemaker, *Indigent Defense Services in the United States FY 2008-2012 – Updated,* U.S. DEPT. OF JUSTICE, (2015), http://www.bjs.gov/content/pub/pdf/idsus0812.pdf [https://perma.cc/ZR29-7DFQ].

45 U.S. COURTS, DEFENDER SERVICES, http://www.uscourts.gov/services-forms/defender-services [https://perma.cc/69E2-AQRV] (last visited March 8, 2017).

46 U.S. DEPT. OF JUSTICE, *supra* note 43.

47 *Id.*

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

for approximately 65 percent of Americans.[49] Over recent years, the number of criminal cases has increased exponentially, with the number of those defendants being increasingly classified as indigent.[50] What has not increased exponentially is the proportional level of funding being given to public defenders to provide counsel to these defendants.[51]

2. Historical Funding for Public Defender Offices

Public defender offices were in existence long before the Supreme Court ruled in favor of mandatory appointment of counsel for an indigent defendant.[52] Beginning with Legal Aid Societies in New York in the late 19th century and the introduction of a county public defender office in California at the turn of the 20th century, the roots of what we know today as the public defense system began to take hold.[53] However, these programs were initially limited to county funding, often with a single part-time public defender appointed for a designated term and cases assigned based on judicial preference rather than need.[54]

In the 1930s, when many areas began transitioning towards larger organized public defense offices, strong backlash at then-current standards began to arise, as public defenders were often inexperienced and frequently paid "laughably" low fees for each case.[55] Many of the common issues surrounded the fact that providing funding was put solely on counties, a system of inadequacy strikingly similar to problematic practices that persist to this day.[56] As recently as 1999, studies have shown the overall annual spending budget on criminal defense nationwide was more than 97.5 billion

---

49 *Effectively Ineffective*, *supra* note 5, at 1735.
50 Spangenberg & Schwartz, *supra* note 47, at 13.
51 *Id*.
52 UNDERSTANDING GIDEON'S IMPACT, PART 2*, supra* note 22.
53 *Id*.
54 *Id*.
55 *Id*.
56 *Id*.

dollars.[57] Of the nearly 100 billion dollars, more than half goes to fund police and prosecution resources.[58] However, from that same total of 100 billion dollars, only 2 percent of all state and federal criminal justice expenditures fund indigent defense services.[59]

3. Frequent Problems Faced by Public Defender Offices

When *Gideon* was decided, there were only roughly 217,000 people incarcerated in the United States, while as of today, there are approximately 2.3 million.[60] The result of this tenfold increase is that in the modern criminal justice system, there are simply too many indigent defendants and not enough funding for public defenders to provide the true level of effective assistance the Supreme Court intended under the Sixth Amendment. In a 2010 study, the United States Department of Justice reported that almost 80 percent of state public defender offices exceeded nationally recognized workload standards.[61] From 1999 to 2007, that same study showed that while staffing in public defender offices increased by 4 percent, the amount of indigent cases increased by 20 percent.[62]

This had led to the nearly inescapable problem that quality representation cannot be provided according to the current standards of effective counsel—standards that rationalize current funding levels.[63] Currently, a typical public defender would need to do a year and half's work to provide a year's worth of adequate and effective assistance to their clients.[64] The lack of funding to provide quality representation has also negatively affected many public

---

[57] *Effectively Ineffective*, *supra* note 5, at 1734.
[58] *Id*.
[59] *Id*.
[60] Perry Baxter, *supra* note 15, at 28.
[61] *Id*. at 29.
[62] *Id*.
[63] Brennan, *supra* note 9, at 237.
[64] Lee Levintova & Charts Brownell, *Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May. 6, 2013, 10:30 AM), http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts [https://perma.cc/KCV9-PDX6].

defenders' abilities to perform basic administrative tasks and receive the training necessary to provide their clients with appropriate representation.[65] The resulting inability to conduct proper background work in addition to providing legal services has created a pattern of depriving indigent clients of the level of representation necessary to achieve a favorable plea agreement or acquittal.[66]

The lack of capacity for preparation and support is further compounded because public defenders who know that they are unable to provide adequate support are often unable to withdraw.[67] This may be true even when doing so would be required for a defense attorney to comply with their ethical duty to provide competent representation.[68] Many who seek withdrawal are denied that request by the court.[69] Others may even face termination from their job for either making such a request or refusing to accept a case that would necessitate one.[70] Once a public defender is unable to withdraw, they will likely represent their client on their own, while facing at least one experienced prosecutor and without access to the same level of resources and experience of that prosecutor.[71]

IV. THE STATUS OF CURRENT WASHINGTON STATE PUBLIC DEFENDERS OFFICES

A. The Washington State Office of Public Defense

In Washington State, the Office of Public Defense (OPD) is the established agency responsible for overseeing the distribution of state funding and

65 Brennan, *supra* note 9, at 247–48.
66 *Id*.
67 *Id.* at 249.
68 *Id*.
69 *Id*.
70 *Id*.
71 Brennan, *supra* note 9, at 250.

providing appellate services to the indigent.[72] The OPD is authorized by the state legislature to provide what that legislature intended to be adequate access to counsel for indigent criminal defendants.[73]

The Washington State OPD, under the Revised Code of Washington (RCW), is tasked with providing indigent defendants access to counsel in appeals proceedings in all Washington State counties.[74] As a means of doing so, the OPD frequently employs the use of contracted private defense attorneys to handle their caseloads.[75] This system of relying solely on private attorneys is unique to the state OPD, and does not include any means of providing access to counsel for indigent criminal defendants until their case is on appeal.[76]

The funding for the Office of Public Defense comes from a legislative grant provided by the state government.[77] A portion of this funding is then dispensed to qualifying counties for indigent defense under WASH. REV. CODE § 10.101.050 (2005).[78] While some of this funding is distributed to Washington State's largest county, King County, the portion given from the state to King County is miniscule in comparison to the funds currently raised and relied on by the county itself.

B. The King County Department of Public Defense

To fully explain the benefits of incorporating low-bono clients in existing public defense programs, it is first necessary to outline the existing structure, services provided, and funding sources of King County, as the problematic

---

72 WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, *About OPD: What We Do*, http://www.opd.wa.gov/index.php/about-opd (last visited June 11, 2018).
73 WASH. REV. CODE §2.70.005 (2008).
74 Levintova, *supra* note 63.
75 *Id*.
76 *Id*.
77 *Id*.
78 WASH. REV. CODE §10.101.050 (2005); "The Washington State Office of Public Defense shall disburse appropriated funds to counties and cities for the purpose of improving the quality of public defense services."

aspects of the current system may all be positively influenced by the funding available from low-bono clients.

Historically, King County relied on the services of four independent non-profit firms to provide public defense services.[79] In an effort to standardize and improve indigent criminal defense services, the county recently incorporated all four independent firms into one system overseen directly by the county, creating the current King County Department of Public Defense (DPD).[80] The DPD provides direct legal services to indigent criminal defendants for capital, felony, and misdemeanor cases.[81] The DPD also provides public defender services to indigent defendants in juvenile dependency, civil commitment, and civil contempt proceedings.[82]

King County's DPD has also expanded its public defender program to include programs involving alternative sentencing for both adults and youth alike, in which incarceration is replaced with community service and rehabilitation programs.[83] These programs had been a hallmark of the previously independent non-profit firms and were widely touted as an overwhelming success.[84] In an effort to preserve the success of these programs during the incorporation of the formerly independent firms into the DPD, the DPD has continued to maintain them and advocate their expansion.[85]

However beneficial and desirable the alternative services may be, under the new county DPD, they are now funded by the same pool of money as the

---

79 King County Public Defense Advisory Board, *The State of King County Public Defense*, Page 5, http://www.kingcounty.gov/~/media/courts/OPD/documents/The_State_of_King_County_Public_Defense_PDAB_Report_March_2015.ashx?la=en [https://perma.cc/FB4C-22SX] (last visited June 11, 2018).
80 *Id*.
81 *Id*. at 7–8.
82 *Id*. at 9–11.
83 *Id*. at 12.
84 *Id*. at 7–8.
85 *Id.*

general indigent defense programs and subject to the same current resource restraints.[86] The alternative services face the same problematic financial reliance of traditional DPD services on the limited funding from King County and Washington State.[87] In an effort to provide for these valued programs, one of the stated goals of the King County panel appointed to oversee the newly created DPD is to allow for greater latitude and training for attorneys.[88] This would allow attorneys in alternative service programs to function in both a legal capacity and as advocates within affected communities to promote these programs as alternative measures to criminal sentencing.[89]

1. Qualifying Standards for Public Defender Representation

A criminal defendant qualifies for a public defender if they meet the King County standards of "indigent," or "able to contribute to their defense."[90] Under the Revised Code of Washington, "indigent" is defined for a multitude of client circumstances, but for the purposes of this article, includes (1) anyone receiving an annual income not exceeding 125 percent of the federal poverty line, and (2) anyone unable to pay the anticipated cost of counsel because of insufficient available funds to retain counsel.[91]

King County has applied the above definition of indigent under WASH. REV. CODE § 10.101.010 (2005) to create two classes of qualifying indigent defendants; those who are (1) purely indigent, and (2) those who do not meet

---

[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 29–30.
[90] King County Department of Public Defense, *How To Get An Attorney*, https://www.kingcounty.gov/courts/public-defense/how-to-get-an-attorney.aspx [https://perma.cc/QWT2-JU8Y] (last visited March 24, 2018).
[91] WASH. REV. CODE §10.101.010(3)(a)–(d) (2011); "Indigent, in relation to court proceedings, is defined as any person who, at any stage in the court proceeding is (1) receiving public assistance, (2) involuntarily committed to a public mental health facility, (3) receiving an annual income, after taxes, of 125 percent or less than the current federally established poverty level, or (3) unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel."

the definition of purely indigent but are "able to contribute" and do not have sufficient money to hire a private attorney.[92] King County will require those whom it deems as "able to contribute" to sign a promissory note for a flat fee for services, which may be paid back in monthly installments over the course of a year.[93] This second qualifying category of "able to contribute," while on its face is similar to my proposed solution of allowing access for low-bono services, is quite limited in comparison to the eligible clients it covers. The DPD, in describing those who are "able to contribute," restricts access to a public defender to only those that, while not indigent by law, do not actually have enough money to hire a private attorney.[94] While this is a step in the right direction, it does not fully address the pragmatic financial implications for low-bono clients who may be able to hire an attorney but would devastate themselves financially in doing so.

2. Funding

The King County DPD secures its funding as part of a hybrid system, with money for indigent defense coming from two main sources: King County itself, and Washington State.[95] In order to fund the vast majority of its public defense services, King County annually secures roughly forty million dollars from county and city funds.[96] Additionally, the King County DPD receives a portion of the roughly twenty-five million dollars distributed across the state by the Washington State OPD under its legislative mandate. [97]

3. Current Workload and Access Issues

In a recent opinion, the Washington State Supreme Court held that many public defenders were spending so little time on cases due to their staggering

---

92 King County Department of Public Defense, *supra* note 89.
93 *Id*.
94 *Id*.
95 U.S. DEPT. OF JUSTICE, *supra* note 43, at 28.
96 *Id*.
97 *Id*.

workloads, that they were failing to provide effective assistance of counsel to some of their clients.[98] In response, the DPD adopted the ABA guidelines on attorney caseloads to help try and remedy the problem.[99] While effectively setting limits on attorney caseloads may be a major improvement towards ensuring effective assistance of counsel for indigent defendants,[100] it has also led to two major problems. The first is that these standards, while an improvement, reflect an outdated understanding of the demands faced by many public defenders, functioning more as an idealistic shift than a practical one. The second major problem is that these standards have not remedied the prevalent issue of defense attorneys being unable to provide adequate assistance, and has simply shifted the burden to private attorneys.[101] These private attorneys are currently faced with the problem of both representing indigent clients with little to no economic benefit to their private practice, as well as being unable to dedicate the time needed to represent and acquire new full-paying clients to compensate for the work they are doing for the DPD.[102]

V. THE CORRELATING PROBLEM OF OVER-INCARCERATION

A. History of Increase in Incarceration Practices

The prison population in the United States is growing each year, and has come to give this nation, with its 2.3 million incarcerated, the dubious distinction of having the highest in incarcerated rate in the world.[103] It costs the United States nearly 63.4 billion dollars per year to maintain its current rate of incarceration.[104] Washington State is a prime example of this pattern

---

98 King County Public Defense Advisory Board, *supra* note 78, at 15.
99 *Id*.
100 *Id*.
101 *Id*. at 16.
102 *Id*.
103 Brennan, *supra* note 9, at 246.
104 *The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 23, 2012), https://www.cbsnews.com/news/the-cost-of-a-nation-of-incarceration/ [https://perma.cc/7GW8-2MGN].

of spending, with the state currently spending five percent of its overall budget on corrections,[105] something that will only increase along with the projected increase in incarcerated individuals cited by the Teamster Union representing Washington State corrections officers.[106]

B. Current Problems Resulting from Over-Incarceration

By failing to provide adequate representation to many non-violent criminal defendants the state is diverting funds away from housing more violent offenders. Many non-violent criminal defenders whose crime may not warrant lengthy jail time may be more likely to qualify for alternative sentencing or diversion programs, provided their attorney has the time and resources to appropriately present such an option to the court. State funds, therefore, could better be used to provide effective representation at pre-booking, pre-filing, and pre-trial bargaining stages in order to ensure more appropriate outcomes and promote equitable social justice.[107]

The inmates currently incarcerated often have long sentences resulting from mandatory sentencing, so they won't be eligible for release based on any of the reforms the DPD desires, but with better representation at trial, public defenders may help prevent their clients falling victim to the effects of such sentencing requirements.

On top of the already lengthy sentences many inmates face, Washington State has seen a 24 percent increase in its overall incarceration rates since 1994.[108] As Washington State continues to detain individuals, it will require greater funding to be spent on prisons to hold future inmates. At the same

---

[105] Nicholas K. Geranios, *Most Inmates In Washington State Prison Are Violent Offenders*, SEATTLE TIMES (Feb. 20, 2011), https://www.seattletimes.com/seattle-news/most-inmates-in-washington-state-prison-are-violent-offenders/ [https://perma.cc/U7QM-KBH2].
[106] *Id*.
[107] King County Public Defense Advisory Board, *supra* note 78, at 29.
[108] *Prison and Crime: A Complex Link*, PEW CHARITABLE TRUST (Sep. 11, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime [https://perma.cc/Q3WK-Z594].

time, the state has been facing budget cuts to its prison system resulting in the closure of several prisons, with remaining facilities being forced to absorb the inmates into a smaller space.[109] The Washington State Teamsters Union, which represent corrections officers, charges that this has resulted in the downgrading of potentially dangerous inmates to non-dangerous status, leading to greater safety risks to prison staff and other inmates.[110] Washington State has begun to consider, but has yet to actually implement, the release of some offenders to reduce overcrowding, leading to the possibility that some released inmates may be introduced into society while still posing a danger to those around them.[111]

Additionally, the Washington State prison and jail populations are becoming more violent, putting those kept in jail prior to sentencing at risk of being exposed to an older and more violent population.[112] This is a huge problem for many inmates, as the state does not adequately protect the safety of an accused defendant prior to trial.

The current cost to Washington State taxpayers to maintain their prison population is an astounding roughly forty-nine thousand dollars per inmate annually, the ninth highest in the nation.[113] This cost is funded directly by the 5 percent portion of state budget provided to the Department of Corrections by the state.[114] The natural consequence of Washington State allocating such a large portion of its budget on maintaining its prison population is that taxpayer dollars will be less available to implement alternative programs to incarceration.

---

[109] Geranios, *supra* note 103.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] Shawn S. Lealos, *Rates of Incarceration in Washington State*, NEWSMAX, (Dec. 16, 2015), http://www.newsmax.com/FastFeatures/rates-incarceration-washington-state/2015/12/16/id/706114/#ixzz4O2mMbN7v [https://perma.cc/T7B4-DHHZ].
[114] Geranios, *supra* note 103.

VI. THE BENEFIT OF ALTERNATIVE FUNDING SOURCES FOR WA STATE AND KING COUNTY

A. The Positive Effect of Incorporating Low-Bono Paying Clients on Funding

1. Identifying the Proposed Cut-Off/Current Accessibility to Counsel for "Low-Bono"

According to United States Census Bureau studies, roughly 50 percent of United States medium and low-income households earn just enough to not qualify for pro-bono public defense and yet still cannot realistically afford the market rate for a criminal defense attorney.[115] As the current annual wage cut-off for access to pro-bono representation for indigent clients in Washington State, King County, and the City of Seattle is at 125 percent of the federal poverty guidelines, this excludes the majority of the population from being eligible for services.[116] While the "able to contribute" model employed by King County provides some respite to those who, while not indigent by law, do not possess sufficient resources to hire a private attorney, the model fails to provide access to those who cannot feasibly hire a private attorney.[117] Herein lies the important distinction between those who are "indigent" and "able to contribute," and those who would fall under the "low-bono" definition.

Both of the two current qualifying groups under the King County DPD are defined by their physical inability to hire a private attorney.[118] In contrast, a "low-bono" client is one who may physically be able to pay for an attorney, but unlike the flat-fee paid by an individual who is "able to contribute," will

---

[115] Steven A. Krieger, *Low Bono Legal Counsel: Closing the Access to Justice Gap by Providing the Middle Class with Affordable Attorneys*, 18 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 143, 157–58 (2016).
[116] King County Department of Public Defense, *supra* note 89.
[117] Krieger, *supra* note 113, at 144.
[118] King County Department of Public Defense, *supra* note 89; WASH. REV. CODE §10.101.010(3) (2011).

be left with no other option than to hire a private attorney who will likely charge at an hourly rate that the client cannot actually afford.

There is a simple solution to this problem of access for low-bono clients, one that will also serve to remedy their exclusion from systems like those employed by the DPD—allowing low-bono clients to form a third class, one who pays a reduced hourly rate directly to the King County Department of Public Defense.

2. Potential Funding Generated from Incorporating Low-Bono Clients

Currently, the lack of access to affordable counsel for low-bono clients has led to the creation of massive number of underrepresented and pro-se defendants.[119] These individuals, left out of existing pubic defense programs but unable to feasibly afford full-rate criminal defense attorneys, represent both a large underserved population and an untapped potential source of funding for public defense systems. Facing a crisis in its ability to provide access to currently qualifying clients, King County has increasingly relied on referring pro-bono cases to panel-certified attorneys when public defenders are unable to take on new cases that would exceed their newly mandated workload limits.[120] Panel-certified attorneys are often compensated at such a low level that the funds available to the attorney does not allow them to provide adequate representation, defeating the purpose of providing such counsel to a defendant in the first place.[121]

The current inadequacy of access to counsel and the resulting reliance on referring cases to undercompensated panel attorneys has created a significant problem for the DPD. To secure the funds necessary to remedy the lack of access to adequate representation, the DPD will be allowed to accept low-bono clients at a reduced rate directly correlated to their financial status. A model proposed by Steven A. Krieger, a published advocate for expanding

---

[119] Krieger, *supra* note 113, at 143.
[120] King County Public Defense Advisory Board, *supra* note 78, at 16.
[121] *Id*.

access to justice through low-bono client services, serves as a potential guiding example.[122] Krieger's proposal outlines a program advocated for by public interest lawyers in Virginia, focusing on the use a system of tiered reduced hourly fees for low-bono clients seeking the services of non-profit firms.[123] The model outlined by Krieger begins with those at 200 percent of the federal poverty guideline, stretching to low-bono clients making an annual 450 percent of the guideline.[124] In comparison, the current DPD qualifications require an indigent client to earn less than 125 percent of the poverty guideline annually.[125]

Adapting this scheme—creating a new category of individuals who may receive public assistance—would require tailoring the income of each low-bono client to a corresponding reduced hourly fee, to be paid directly to the DPD. For a low-bono client earning 200 percent of the federal poverty guideline income, a public defender or contracted attorney would be paid an hourly rate of $115. For a low-bono client earning 250 percent of the federal poverty guideline income, a low-bono client would be expected to pay an hourly rate of 130 dollars. From a low-bono client with a 300 percent income, that hourly rate would increase by ten dollars per fifty percent increase in income, and is capped at a maximum level of 450 percent income and hourly-rate of $170. By accepting low-bono clients at reduced hourly rates, the DPD would be securing access to previously untapped funding, while providing low-bono clients the means to still secure representation.

While King County has a median income of nearly seventy thousand dollars, many families would still be unable to afford to pay the full hourly of a criminal defense attorney.[126] King County currently has a population of

---

[122] Krieger, *supra* note 113, at 160–61.
[123] *Id*. at 161.
[124] *Id*.
[125] King County Department of Public Defense, *supra* note 89.
[126] *Household Income in King County*, KING COUNTY, https://www.kingcounty.gov/independent/forecasting/King%20County%20Economic%2

over two million,[127] with only slightly less than 10 percent falling within recognized poverty guidelines.[128] Described by Krieger as the "Access to Justice Gap,"[129] all those hundreds of thousands of individuals in the middle- and low-income realm, but above the 10 percent poverty line, would be eligible under a low-bono approach. With hourly rates ranging from $115 to $175 per hour, paying low-bono clients could contribute millions of dollars to existing DPD funds per year.

An additional benefit is that the DPD already employs a promissory note system to secure fees from "able to contribute" clients at screening,[130] something that could be used to secure the appropriate fees from low-bono clients as well. Should the DPD choose to initially accept some low-bono clients at reduced rates but assign them to panel attorneys, the prevalent standard hourly rate of roughly $50 to $55 for panel attorneys would double to triple in size.[131] This would allow the panel attorneys to afford to spend greater time on each case and spend more on defense resources, providing better representation. The ability to generate previously unavailable funding for both the DPD and associated panel attorneys would greatly increase the time and resources available to serve both low- and pro-bono qualifying clients and ensure that they receive truly effective assistance of counsel.

3. How to Incorporate Newly-Generated Funding into Existing DPD Resources

By accepting low-bono paying clients, the DPD would be creating an entirely new revenue stream to fill its depleted coffers. Instead of relying

---

0Indicators/Household%20Income.aspx [https://perma.cc/3R77-HK3J] (last visited Apr. 7, 2017).

[127] U.S. CENSUS BUREAU, QUICK FACTS: KING COUNTY, WASHINGTON (2016), https://www.census.gov/quickfacts/table/PST045216/53033,53 [https://perma.cc/RY5V-ERWM].

[128] *Id*.

[129] Krieger, *supra* note 113, at 145-46.

[130] King County Department of Public Defense, *supra* note 89.

[131] King County Public Defense Advisory Board, *supra* note 78, at 16.

solely on funding from state and county sources,[132] the DPD could now receive additional funding generated from affordable hourly rates from paying low-bono clients as well. Admittedly, incorporating paying low-bono clients into a system created to provide counsel for those who cannot pay is likely to raise both significant practical and ethical concerns. However, low-bono clients and the funding they provide can indeed be appropriately and effectively incorporated into the tested structures of the DPD. Even more, the increased funding and new practical and ethical issues arising from including low-bono clients will allow for the system to be improved as a whole.

a) Incorporating Newly-Generated Funds to Avoid Ethical Conflicts for DPD Attorneys

The first major issue with incorporating this funding into the DPD would be to ensure that there is not an ethical conflict for attorneys, since some clients are paying while others are not. A three-part solution will help to ensure that (1) public defense attorneys' knowledge of a client's financial status is restricted to the facts of the case; (2) the quality of representation is not affected by knowledge of a client's financial status; and (3) all fees generated are incorporated into the general program funds, regardless of their source.

First, low-bono screening would be required to be conducted in the same manner as current pro-bono screening prior to any lawyer-client interaction.[133] This prior screening will serve to eliminate any bias by the lawyer due to the client's financial resources. By keeping the lawyer blind to the client's financial resources at the initial stage, and limiting their later access to financial information only directly relevant to the case, the lawyer is prevented from letting client finances affect the quality of their representation. Second, all payments from low-bono clients would be immediately and directly deposited into the overall DPD resource fund. By

[132] United States Department of Justice, *supra* note 43, at 28.
[133] King County Department of Public Defense, *supra* note 89.

requiring the direct deposit of client payments into the overall fund, any risk of attorneys providing different levels of quality between their low- or pro-bono clients to secure more funding for their particular office will be greatly minimized. Finally, by utilizing a portion of the now-increased general funding to create and implement specific ethical and procedural trainings for DPD attorneys on meeting the unique needs of indigent, "able to contribute," and low-bono clients, DPD attorneys will be specifically trained on how to best serve the unique needs of each respective group through both legal and alternative assistance programs.

b) Using Newly-Generated Funds to Increase Current Public Defender Salaries

The second major issue facing the DPD and public defender offices nationwide is the ability to provide competitive salaries to new and existing attorneys.[134] This problem is magnified based on the disparity between public defense attorneys and prosecutors, as well as the growing demand on law graduates to pay back the increasingly large loans necessary to attend law school.[135] The typical student debt faced by many new attorneys can frequently exceed 140 thousand dollars, leaving those who seek employment as a public defender struggling to pay back their loans on the relatively low salaries offered for such positions.[136] Increased funding will inevitably lead to increased resources, which can be used to increase public defender salaries to competitive levels, attracting new candidates as well as retaining experienced and established public defense attorneys.

---

[134] Brennan, *supra* note 9, at 243.
[135] *Id*.
[136] Washington Defender Association, *NACDL: Public Defender Related Advocacy Needed*, http://www.defensenet.org/news/nacdl-public-defender-related-advocacy-needed (last visited March 8, 2017).

c) Using Newly-Generated Funds to Create New Public Defender Positions

The third major issue is how to ensure that the DPD system continues to adequately serve its existing clients, while also increasing the overall number of clients to include low-bono ones as well. This valid concern will be addressed by the fact that once increased funding generated by low-bono clients becomes available, it will provide the means for the DPD to create new public defender positions within existing offices, as well as fund greater numbers of law student Rule 9[137] interns. The newly available public defenders and Rule 9 interns will have no existing clients, putting them in a position to then be competently trained and assist in sharing the workload necessary to serve the increasing number of clients required to incorporate low-bono clients. The creation of new defense attorney positions will also decrease the risk of an attorney having to withdraw from current or new cases to avoid ethical issues, or to turn down a new client in order to prevent a problem arising.[138] This is more in tune with the DPD's goal of providing competent legal representation while still maintaining adequate caseloads for its attorneys.[139] An additional benefit is that the creation of more defense attorney positions will allow the DPD to serve increased numbers of both pro- and low-bono clients, increasing the newly created funding stream from paying clients and providing greater access to those who cannot afford a market rate attorney.

---

[137] *Rule 9 Licensed Legal Interns*, WA STATE BAR ASSOCIATION, (Feb. 7, 2018), http://www.wsba.org/Licensing-and-Lawyer-Conduct/Rule-9-Licensed-Legal-Interns [https://perma.cc/GK39-DENR] ("Admission and Practice Rule (APR) 9 grants a limited license to law students, APR 6 law clerks, and recent law school graduates to practice law under the supervision of a lawyer who has at least 3 years of active legal experience").
[138] Brennan, *supra* note 9, at 249.
[139] King County Public Defense Advisory Board, *supra* note 78, at 15.

4. The Positive Effects of Funding Increases Generated from Low-Bono Clients

The positive effects of a funding increase are present in many ways. First, a funding increase would create an opportunity for low-bono clients to access affordable and competent representation—a major problem faced by a huge population that currently receives little to no legal assistance. Secondly, it would generate a potentially massive amount of new funding that could be directly put back into funding the public defense system. Thirdly, this increased funding would then allow attorneys to provide a level of relatively higher quality representation to current and new clients now possessing the financial means to obtain previously unattainable administrative and investigatory resources. Fourth, the increased funding would increase the DPD's ability to adequately fund panel attorneys, and in doing so, attract greater numbers of new panel attorneys in the future. Fifth, it would allow the DPD to offer the competitive salaries necessary to attract experienced applicants in even greater numbers for new and vacant public defender positions. Finally, it would allow for the creation of new public defender positions that could in turn serve existing clients better, serve new clients, and serve greater numbers of paying low-bono clients.

a) The Positive Effect of Greater Federal and State Loan Forgiveness Programs

In order to ensure that Public Defender's Offices have the experienced attorneys necessary to provide quality representation to their clients, those offices will have to attempt to solve the problem of dealing with the student loans faced by many of those they seek to hire.[140] The sheer magnitude of student loan debt held by many new attorneys is often due to the rising costs of legal education and the loans necessary to pay that rising tuition.[141] While the average nation-wide salary for a first year public defender has been

[140] U.S. NEWS, *supra* note 136.
[141] Perry Baxter, *supra* note 15, at 36.

increasing in past years, it is still far below the average salary of many first year private sector attorneys.[142] The current disparity in pay between public defense and private sector employment opportunities may create the effect of many potential new defense attorneys instead pursing more lucrative career paths out of the necessity to pay back high levels of student debt.

Many public defender offices are aware of that rising levels of student debt is affecting their potential applicants for new positions, and many have some means at their disposal to provide loan forgiveness to those who choose to accept a position as a defense attorney.[143] The current federal public defender loan-forgiveness program offers a qualifying lawyer a maximum of $60,000 in total loan forgiveness over the course of six years.[144]

While current loan forgiveness programs may provide some help, 85 percent of recent law school graduates reported student loan debt averaging to roughly $100,000, significantly higher than the maximum cap of many existing programs.[145] That burden may be only increasing, as many public and private law schools have recently reported tuition costs between $30,000-$40,000 a year,[146] generating roughly $90,000-$120,000 in debt for three years of tuition alone. The six figures of debt held by the vast majority of law students is not limited to tuition alone, with many law students greatly exceeding the $120,000 worth of tuition debt due to living expenses in high cost urban areas.

The need to pay off student loans is often a deciding factor in an applicant's choice to pursue public defense as a career. As student loan debt plays such

---

[142] *Findings from the NALP/PSJD 2018 Public Service Attorney Salary Survey*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, https://www.nalp.org/0618research [https://perma.cc/S8AY-RY74] (last visited August 2, 2018).
[143] *The John R. Justice Student Loan Repayment Program*, EQUAL JUSTICE WORKS, (2017), http://www.equaljusticeworks.org/ed-debt/students/loan-repayment-assistance-programs/federal-LRAPs/JRJ [https://perma.cc/J5J7-3BDF].
[144] *Id*.
[145] Perry Baxter, *supra* note 15, at 37.
[146] *Id*. at 36.

a role, the greater the loan forgiveness available and the faster it can be applied, the greater the likelihood better-qualified and more experienced candidates may join the field. Additionally, if the low-bono program is adopted, a portion of the funds it generates can be used by the DPD to provide for adopting and supplementing any new loan forgiveness programs.

b) The Effect of Federal and State Funding to Facilitate the Transition to a New Model

(1) Acknowledging Potential Problems in the Transition Period to a Low-Bono Program

A major hurdle in convincing a legislature to invest public funds in indigent criminal defense is the misconception that a large portion of society, voters in particular, are unwilling to support legislatures that provide public money to represent accused criminals.[147] This perception of voters' beliefs has been present in national and state legislatures from the beginning of public defense work and helps to explain why funding has been a continuing crisis to the field.[148] Legislators may believe that they will not be looked kindly on, or voted for in the future, if they are willing to spend public tax dollars to "protect" perceived criminals.[149] This mistaken perception has led many legislative bodies responsible for determining state and federal funding regimes to be unwilling to take strong positions in support of public defense programs.[150] The lack of political will to protect these social programs has made them an easy target of budget cuts, creating a system of public defense struggling to stay afloat from its inception, with the waters only rising at a faster rate each year.[151]

---

[147] Brennan, *supra* note 9, at 244.
[148] *Id.*
[149] *Effectively Ineffective*, *supra* note 5, at 1731–32.
[150] Brennan, *supra* note 9, at 244.
[151] *Effectively Ineffective*, *supra* note 5, at 1731–32.

An additional hurdle is that because public defender offices are so burdened nationwide due to a lack of funding, they are widely recognized to be in a state of crisis,[152] making it difficult to propose increased funding for a system perceived to be currently failing. These two problems have had the subsequent effect of halting access to defense counsel for many whom the system was designed to serve initially and precluding any expansion of greater coverage for low-bono clients.

In light of the problems facing many public defender offices, the potential danger of increasing the workload for current public defenders creates three legitimate concerns that must be addressed if low-bono clients are to be allowed access: how the addition of low-bono clients may (1) decrease access for current pro-bono clients, (2) increase the burden on current public defenders, and (3) be impractical in its expectations to secure additional funding from the federal and state governments to facilitate the transition to a self-sustaining system.

(a) The Danger of Not Providing for Existing Pro-Bono Clients

To effectively incorporate low-bono clients into the current scheme of the DPD, I propose a gradual phased-in introduction, with initial numbers of new low-bono clients being relatively small in comparison to new pro-bono clients. As the additional funding produced by these clients accumulates, that funding would then be directly reinvested in the creation of new positions that are able to increase the total number of cases handled by each office. This gradual integration of low-bono clients into the existing programs will help offset the danger of denying qualifying indigent clients in favor of incorporating new low-bono clients.

The proposed method of slow and gradual integration would be restricted to comply with existing case limits; hence, an attorney that already meets the maximum workload would not be able to accept any low-bono clients until

[152] Brennan, *supra* note 9, at 238.

they had sufficient room in their workload to incorporate them just as they would a pro-bono or "able to contribute" client. As each attorney completes his or her representation of current clients, low-bono clients will be slowly incorporated into caseloads alongside current indigent and "able to contribute" clients. The funding secured from these clients will then be directly reinvested into DPD funding, with the initial primary purpose of creating new public defense attorney positions.

(b) The Danger of Increasing the Workload Burden on Public Defense Attorneys

The addition of low-bono clients into the public defense system leads to the very real threat that such an increase would lead to an overall net decrease in effective assistance of counsel for both pro-bono and low-bono clients by increasing the workloads of some of the most arguably overburdened members of the legal profession.[153] However, there are means of offsetting this potential problem.

The first is that the scheme proposed here would rely on pre-implementation grants and funding secured by the gradual introduction of low-bono clients to provide an immediate increase in the number of public defense attorneys. While each new public defense attorney hired would only slightly decrease the overall workload in the system, as more and more defenders are hired, the overall increased availability among attorneys would leave greater room for new low-bono clients. Second, as the integration of low-bono clients would take place gradually, new low-bono clients would not be greatly increasing the overall burden immediately. Instead, low-bono clients would be phased in at a rate that would maintain the same number of cases per attorney as if all the clients were pro-bono. Cases would not increase per attorney; the same number of cases would simply be spread between more attorneys.

---

[153] *Effectively Ineffective*, *supra* note 5, at 1735; Levintova, *supra* note 63.

(c) Potential Difficulties in Securing Initial Temporary Funding from the Legislature

Arguably the most severe hurdle to implementing this scheme will be securing the temporary federal and state grants to increase public defender funds for the initial transition period and to justify the expenditure of those funds towards representing alleged criminals. It would be impossible not to acknowledge the difficulty of securing additional resources from such a traditionally reluctant group as federal and state legislators. However, legislators owe their allegiance to the people who elect them. The opportunity to be seen upholding a constitutional right for their constituents; avoiding potentially costly and unnecessary clashes with the judiciary over funding responsibility; and the politically advantageous money-saving effects of incorporating low-bono clients into the public defense system will overcome any trepidation on the part of career-minded politicians.

First, the federal and state grants necessary to facilitate the transition of integrating low-bono clients will require neither an additional expenditure of overall funds nor any need to raise additional funds. Existing funds will simply be redistributed in a manner slightly more representative of the criminal justice system, and due to the temporary nature of each grant, the funding scheme will return to normal distribution levels after the transition period should Congress so desire. Nearly 80 percent of criminal defendants are represented by public defenders,[154] yet indigent defense services are afforded only 2 percent of the total funds available for criminal justice.[155] The rest goes to prisons, police, and prosecutors.[156] As discussed later in this proposal, the expenditures on prison systems can be reallocated much more efficiently, but as it currently applies here, a simple increase in the overall allocation to defense services would be both greatly beneficial and equitable. By simply allocating an additional 2 percent of funding away from

[154] Brennan, *supra* note 9, at 244.
[155] *Effectively Ineffective*, *supra* note 5, at 1734.
[156] *Id*.

enforcement programs for a period of five to ten years, the percentage of overall funding to public defense services would double, going from 2 percent[157] to a 4 percent, leaving 96 percent of funds available to continue the operation of enforcement programs.

Second, legislative and administrative actions to enhance the funding for existing student loan forgiveness programs will encourage the recruitment of greater numbers of qualified public defense attorneys whose availability and expertise will decrease costs to the criminal justice system at the trial and detention stages. More experienced and less burdened defense attorneys may increase judicial efficiency by (1) bringing better prepared defense strategies prior to and at trial, (2) putting pressure on prosecutors to engage in creative plea bargaining, and (3) reducing any delays in the trial process attributable to an overburdened caseload. This may be a politically attractive option in the face of increasing numbers of incarcerated individuals,[158] the rising cost of maintaining the world's largest prison population,[159] and a growing legal and social consensus that current public defense programs are blatantly inadequate.[160]

Third, an increase in public defense funding may adequately remedy the massive inequality between funding for police and prosecutors and for funding indigent defense, allowing the legislature to put its money where its mouth is by funding programs that benefit many of the most underserved and vulnerable in the community. During the current climate of suspicion many citizens feel toward the transparency of police and prosecutors, this may very well be an irresistible option for elected officials to remain in touch with the demonstrated concerns of their constituents.

Fourth, the allocation of funding to pubic defense services will demonstrate that legislators recognize and respect the frequently invoked

---

[157] *Effectively Ineffective*, *supra* note 5, at 1734.
[158] Perry Baxter, *supra* note 15, at 28.
[159] *The Cost of a Nation of Incarceration*, *supra* note 102
[160] *Effectively Ineffective*, *supra* note 5, at 1734.

public desire to adhere to and protect the constitutional rights of it citizens, including the right to effective assistance of counsel.[161] By showing active involvement from the political branches, in using public funds to further the rights of the nation's citizens, legislators may be seen to be acting in the most efficient manner to put public funds directly back into public programs.

Finally, if legislators adequately support the criminal defense system, they will appease a judiciary that has grown increasingly vocal in its criticism of how the legislature has handled the system. By recognizing the judicial branch's calls for the legislature to fulfill their duty to protect constitutional rights of their citizens, increasing funding of those same systems will help minimize the risk of political fallout from a judiciary ruling placing the blame for any such failing directly upon the legislature.

(2) The Positive Effects of Funding Increases During the Transition Period and the Limited Nature of the Funding Commitment

The most dramatic effect of an increase in funding will be the corresponding increase to the overall number of public defense attorney positions and their ability to represent more in-need individuals. The initial funding needs will only entail a limited grant necessary for the new public defense system to become self-sustaining, which once achieved will eventually increase the overall amount of funds available as greater numbers of attorneys are able to serve greater numbers of low-bono clients. Once low-bono clients are allowed into the system, the funds generated will not only negate the need for further grant funding, but will allow for funds that were previously committed to public defense to be used to support greater numbers of alternative sentencing and community activism programs. Alternative sentencing and community outreach programs will allow public defense attorneys and social support staff to interact with the community to address many of the systemic causes of crime, decreasing the eventual costs to the

[161] Perry Baxter, *supra* note 15, at 30.

criminal justice system in the time and money necessary to prosecute and adjudicate crimes. Alternative sentencing and crime prevention programs prior to the involvement of the criminal justice system will also reduce the increasing burden on the state to pay for pre-trial detention, post-conviction detention, and post-release monitoring of convicted felons.

VII. THE CORRELATIONAL BENEFIT TO REDUCING OVER-INCARCERATION BY ACCEPTING LOW-BONO CLIENTS

By increasing the funding for public defender offices, the state may finally be able to provide public defenders with the resources to give each client effective representation at the pre-trial and trial level. By providing public defense attorneys with the financial resources and time to properly represent their clients, attorneys will be able to investigate fully and prepare their cases thoroughly. With more time and money, attorneys can be better advocates for their clients, increasingly the likelihood of achieving better sentencing outcomes and plea bargains for low- and pro-bono clients.[162] This massive increase to the ability of public defense attorneys to fully represent their clients then has the potential to lead to a decrease in overall the prison population, either in time in pre-detention or the resulting sentence length. The fewer prisoners there are in the state prison systems, the lower the amount of funding needed to maintain those prison populations, all while still ensuring that justice is served and funds are used efficiently, instead of being undercut by unnecessary detentions and post-conviction consequences.

Another benefit of public defense attorneys having the funding to adequately prepare for trial is that it may increase the ability of a public defender to secure pre-trial release or access to alternative or diversion programs, negating the need for clients to be imprisoned prior to trial or even proceed to trial at the public's expense at all. Additionally, by providing higher quality representation at trial, public defense attorneys can more

[162] Brennan, *supra* note 9, at 249.

favorably impact the sentencing outcomes for their clients or secure plea arrangements that reduce the total jail time that these individuals will be required to serve, thereby reducing the cost of keeping them imprisoned after conviction. Better representation from the start has the potential to make both the pre-trial and trial processes more economically efficient and equitable for both defendants and the system itself.

Recognizing the value of such an approach, the King County DPD has expressed its desire to continue operating, and to expand on, alternative sentencing and community based programs.[163] In particular, the DPD has placed great value on their impact within the community of providing rehabilitation to defendants and reducing the risk of both initial crimes being committed and recidivism among participants.[164] As the DPD, in their annual reports on the state of and goals for public defense offices, have lamented the lack of funding available to pursue it further,[165] it naturally follows that an increase in funding from low-bono clients would be put to some use in expanding these programs.

Greater funding for public defender offices is absolutely crucial to protecting the basic liberties of the most vulnerable in our society. Increased funding has the potential to help decrease incarceration rates by ensuring that an indigent client is afforded counsel who is equipped to pursue all options prior to trial, prepare an adequate defense, and put a client in the best position to receive a just sentence. By reducing overall incarceration rates and sentence durations, public defense attorneys can ensure that indigent and low-bono clients are reintegrated into society, able to obtain jobs, and unhindered from working in the future, directly combating the roots of recidivism.[166] By preventing recidivism and creating positive opportunities for those released from custody, the added increase to members of the working population will

[163] King County Public Defense Advisory Board, *supra* note 78, at 30–32.
[164] *Id*. at 28–29.
[165] *Id*. at 29.
[166] *Id*.

generate greater tax funding for the state and reduce reliance on social welfare programs. Thousands of individuals will no longer be barred from the economic opportunities necessary to achieve economic and familial stability in a rapidly changing region. Securing a fair outcome for indigent and low-bono criminal defendants will provide untold benefits far beyond the Washington State criminal justice system's pursuit of holding its citizens accountable for their transgressions. It will ensure that truly equal access to justice is guaranteed both now and in the future for all Washington State citizens.

VIII. CONCLUSION

This country is facing the overwhelming problem of attempting to uphold the constitutional guarantee that all those accused of a crime have a fundamental right to effective counsel, but failing to do so because it is unable to take the basic responsibility of paying to protect that right. Washington State bears this same duty, and while on the path to living up to that obligation, has fallen victim to the same conflicts facing public defender offices nationwide. Should we wish to honor the constitutional commitment to provide for the indigent and underserved in our community, to which the Supreme Court says we are bound[167], funding must be made available for public defense attorneys to adequately fulfill their duties to their clients.

For this reason, the King County DPD must be allowed to accept low-bono clients at a reduced hourly-rate. The funds generated by providing legal services to this presently disadvantaged group may then be reinvested to create more public defense attorney positions, lighten the burden on those attorneys, increase their salaries, and demonstrate to the state and federal legislators the need for and desirability of providing further funding. Should such funding be secured, public defense may finally, truly, become a means for which those who cannot afford an attorney in their defense to be

[167] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

guaranteed that fundamental right for which a future president once risked both his reputation and safety to secure. Should we fail to do so we will ultimately deny the "obvious truth" engrained in our Constitution fifty-four years ago by Justice Black's proclamation that a poor man cannot be given a fair trial without a lawyer to assist him.[168]

[168] *Id.*