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KEEPING GIDEON'S PROMISE: AN EVALUATION OF  
INDIGENT DEFENSE IN THE STATE OF MISSISSIPPI

By:  
Andie Beth Netherland

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of  
the requirements of the Sally McDonnell Barksdale Honors College.

Oxford  
May 2018

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## ABSTRACT

The United States Constitution awards its citizens rights that many other countries do not. One such right is the Sixth Amendment right to a fair trial along with the assistance of counsel. Since the Supreme Court decision *Gideon v. Wainwright*, the responsibility of providing effective counsel has been pushed on each state. States throughout the nation have fragmented systems of indigent defense that fail to meet their responsibility, and thus many citizens have been denied their Sixth Amendment rights. For many decades, this denial of a constitutional right has been a topic of discussion. Some states have taken steps to remedy their indigent defense systems, while in others it is still a point of contention. All but a token few of the states have implemented a statewide indigent defense system that has proven to remedy the initial problem. The state of Mississippi, on the other hand, has continued to use a broken county-based indigent defense system despite the protest from attorneys and legal organizations alike. This work explores the consequences the Mississippi has faced due to its dismissal of the need for a change in the system. Arkansas will be used as a reference state for which Mississippi could follow suit. Though Arkansas shares many characteristics with Mississippi, it has had a statewide indigent defense system in place for over ten years. Evidence presented in this work proves the effectiveness of Arkansas' indigent defense system and how it can be used as model for Mississippi. The evidence will additionally be used to justify why Mississippi can and should implement a statewide indigent defense system.

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## INTRODUCTION

“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,” Supreme Court Justice Hugo Black wrote in the *Gideon v. Wainwright* (1963) opinion. The Sixth Amendment originally granted every citizen of the United States the right to counsel whether they could afford it or not. The responsibility of providing indigent defense was transferred to the States in 1963 by this Supreme Court decision, *Gideon v. Wainwright* (1963), through application of the Fourteenth Amendment.<sup>16</sup> Since this time, each state has created and developed its own system of providing indigent defense to its citizens, but many states have failed to meet their duty of providing representation to all. In recent years, this malpractice has come to light, and many criminal defendants, equal rights organizations, and even local governments have filed suit against states for not affording all citizens this Sixth Amendment right.

Although each state across the nation is vastly different, it is obvious that some have more effective indigent defense systems than others. The District of Columbia, though not a sovereign state, has one of the most well run systems of indigent criminal defense. On the other hand, there are states that have a plethora of systematic problems and that, more often than not, do not fulfill their duty of providing adequate defense counsel. States specifically cited include, South Carolina, Louisiana, and most notably,

Mississippi. While many states have now implemented statewide, state funded indigent defense systems, Mississippi is one of the few that has not. The states of Mississippi, Arizona, California, Idaho, Pennsylvania, South Dakota, and Utah do not currently fund non-capital trial level defense services.<sup>16</sup>

In Mississippi, the burden of funding non-capital indigent defense is placed solely upon the counties. Without an overall standard, each local system is able to implement the indigent defense delivery method of their choice.<sup>27</sup> And due to the variety of methods that have been adopted across the state's 82 counties, there are inconsistencies in the adequacy of representation. These methods of delivery implemented across the state include assigned counsel, full-time public defenders, part-time public defenders, regional contract defender system, full-time contract public defender, and part-time contract public defender.<sup>16</sup>

The jumbled county system currently in place creates problems with the independence of counsel, it is overall economically inefficient, and it lacks cohesiveness. When the judge is involved in the hiring and firing of public counsel, a problem with independence of counsel is created. The public defender must walk a fine line between serving his client adequately and following the judge's wishes in order to keep his job.<sup>28</sup> The absence of statewide oversight allows for the responsibility of managing the public or contract defenders in each county to be handled by the judges or other local government officials. The fragmentation of the indigent defense delivery systems in Mississippi is speculated to contribute to economic losses. With extended pretrial detainment for indigent persons who must wait for representation, the state both spends



significantly more on incarceration and loses tax revenue than it might spend providing adequate representation initially.<sup>21</sup>

As the current Office of State Public Defense suggests, Mississippi needs to develop a standard of delivery of indigent defense to be applied across the state in order to fulfill the constitutional right of effective representation and become more economically efficient.<sup>16</sup> The implementation of a statewide indigent defense system in Mississippi could be easily developed from analyzing the many states, especially those surrounding states, that have already implemented similar systems. One state in particular that gives insight into a possible statewide indigent system in Mississippi is the state of Arkansas. There has been a statewide and state-funded system in place in Arkansas since 1997.<sup>16</sup> The 23 judicial circuits of the state each has at least one full-time public defender office. The system is overseen by the Arkansas Public Defender Commission that has statutory authority to determine the delivery of indigent defense and to set standards and policies for the offices and indigent services across the state.<sup>16</sup> Arkansas' indigent defense system is far from perfect and still has its own downfalls, but it is more successful than that currently in place in Mississippi. Despite the recent budgetary constraints facing the Arkansas Public Defender commission, the statewide system has succeeded in providing adequate indigent defense counsel and has thus far avoided complaints of denial of constitutional rights, a claim that many states, including Mississippi, cannot make.<sup>25</sup>

Contextualizing the cases of Mississippi and Arkansas, the first chapter examines indigent defense across the United States. The rise in incarceration in the nation over the past forty years is presented in order to emphasize the importance of indigent defense, especially given the fact that the increase occurred in more than just significantly

populated areas. Reports created by the Bureau of Justice and the Justice Department highlight the inequalities in the many different indigent defense systems seen in states across the nation. The District of Columbia is noted as an exemplary system of providing indigent defense, in order to establish a basis for what should be considered a well-run system of indigent defense. The discussion then gravitates to those states that are unable to meet their duty. The states discussed include the southern states of South Carolina, Louisiana, and Mississippi.

The second chapter consists of an in depth explanation of the current state of the indigent defense system in Mississippi, beginning with a brief explanation of how the current system came into play. The background of the county-funded indigent defense system in Mississippi is explained, as well as, the structure of the county-funded indigent defense system that is still in place today. Previous analysis and reports on the viability of the current system, specifically, information from the report, *Assessment of Caseloads in State and Local Indigent Defense Systems in Mississippi*, prelude to the problems Mississippi's indigent defense system faces. Each of the three problems: lack of cohesiveness, lack of independence of counsel, and economic losses, are fully explored. Economic loss is the most emphasized of these problems. Two reports created by the NAACP Legal Defense and Educational Fund, *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-sentencing Behavior from Mississippi* and *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, present evidence on the inadequacy of Mississippi's current indigent defense system and the economic losses that result because of it. The analysis of each downfall and the discussion of systemic

inadequacies contribute to a need for a change in the indigent defense system in Mississippi.

The final chapter consists of a consideration of a statewide indigent defense system in Mississippi in reference to Arkansas'. Arkansas' statewide indigent defense system is presented initially, in order to lay background for this chapter. This background explanation includes how the current system came into place, the general organization of the system, and the recent complications that the Arkansas Public Defender Commission has been faced with. Before considering the actual implementation of a similar system, the similarities between Mississippi and Arkansas are explored in order to establish that Arkansas can serve as a valid reference state. These are drawn through the comparison of the characteristics of population, poverty rates, median household incomes, and state expenditures. The information presented is collected from government reports and reputable data collection agencies. The data for each characteristic is presented along with an analysis of its relevance to the comparison of systems. Additionally, the notable characteristics that differ between the two states are discussed. Differences in characteristics such crime rates, annual jail populations, annual jail admissions, and pre-trial jail incarceration rates support the idea that Arkansas' indigent system is more successful in its purpose compared to Mississippi's system, despite its flaws. Once these similarities are established, they contribute to a conclusion on whether Arkansas' model of indigent defense could be successful in the state of Mississippi. Analysis of the Arkansas indigent defense system reveals how the transfer to a similar system would correct the problems of cohesiveness, independence, and economic loss. While continuously using Arkansas as a reference, the benefits of

implementing a statewide system are weighed against the possible costs for the state of Mississippi through a cost benefit analysis. Finally, the budgetary feasibility of such a statewide indigent defense system in Mississippi is also considered.

All of this information together clearly points to the state of Mississippi implementing a statewide indigent defense system. Yet, it is also obvious that many organizations have proposed such a change many years before this work. Despite this fact, nothing has been done. This work not only supports and presents extensive evidence for a statewide indigent defense system, but also presents it in such a manner that strives to stimulate consideration by those entities that have previously ignored the obvious fact that Mississippi should implement a statewide, state-funded indigent criminal defense system.

## **CHAPTER I**

### **Indigent Defense in the United States**

Incarceration rates in prisons in the United States have risen drastically over the last forty years with an approximately 500% increase.<sup>2</sup> This fact has been emphasized by the United States having a total prison and jail population of 2.2 million people.<sup>2</sup> Jails follow the same incarceration trends as prisons. Jails, in contrast to prisons, are characterized as facilities for short-term use. Unlike prisons, jails hold people who are too poor to post bail, people who failed to comply with their pre-trial conditions, or those convicted of misdemeanor criminal offenses. The number of people held in jails has increased from 157,000 incarcerated in 1970 to 690,000 in 2014.<sup>3</sup> Only about 3,000 small to mid-sized counties have driven this drastic growth.<sup>3</sup> Since 1970, jail populations in mid-sized counties have increased by an average of 4.1 times and small counties by an average of 6.9 times.<sup>3</sup> In contrast to intuition, the country's largest counties' incarceration rates, including those with the largest jails, have only increased by an average of 2.8 times since 1970.<sup>3</sup> The largest jails such as, Los Angeles County Jail or Rikers Island in New York City, have not grown as fast as many of the smaller jails, pointing to the nationwide increase in jail populations being affected by variables other than increased population.<sup>3</sup>

As overall incarceration rates continue to increase, so does the need for public defense attorneys. Almost 80% of state criminal defendants cannot afford a lawyer and

thus must be appointed one by the state according to their constitutional rights.<sup>1</sup> The census of public defense offices, conducted in 2007, reported that total felony non-capital and misdemeanor cases received by state public defender programs was approximately one million.<sup>6</sup> Given that this number only included data from 22 states, the number of indigent cases for all of the United States would likely have been over double if cases from all states had been included. This large number of indigent cases had increased by 20% since the last census of public defense offices in 1999, which only included seventeen states with statewide indigent defense systems.<sup>6</sup> The most recent census of public defense systems, *State Administered Indigent Defense Systems, 2013*, reported that between the 28 states and District of Columbia with statewide Indigent Defense services at that time, a total of 2,696,950 cases were closed by their full time equivalent attorneys.<sup>7</sup> This number would have again been larger had all 50 states and the District of Columbia been included and had it included ongoing cases during the time of the census.

Despite the steady increase in number of indigent cases between the 1999 and 2007 censuses, there was only a 4% increase in the staffs of the offices of the seventeen states included in the census of both years.<sup>6</sup> Though there has over time been an increase of need of public defenders due to rising incarceration rates, there has not been a reciprocal increase in attorneys to meet this need. In 2007 the Bureau of Justice Statistics (B.J.S.) reported in *State Public Defender Programs, 2007*, that there were 4,321 full-time equivalent attorneys working in the 22 states included in the report.<sup>6</sup> These values combined with the number of cases for those states that year, showed that each full-time equivalent attorney handled 88 felony, non-capital cases and 133 misdemeanor cases.<sup>6</sup> According to the U.S. Department of Justice's National Advisory Commission on

Criminal Justice Standards and Goals, an attorney handling only one case type should be responsible for no more than 150 felony or no more than 400 misdemeanor cases per year.<sup>8</sup> The B.J.S. approximates this guideline to be half of each for attorneys responsible for both types of cases. As mentioned in the report, *State Public Defender Programs 2007*, the B.J.S. approximates that each attorney handling both felony non-capital and misdemeanor type cases should be responsible for no more than 75 felony cases and no more than 200 misdemeanor cases per year.<sup>6</sup> Additionally in *State Public Defender Programs 2007*, the B.J.S. approximated that in order to meet this guideline a state program would need a median of 151 attorneys to appropriately handle the median number of felony non-capital, misdemeanor, and also juvenile cases. The number of attorneys needed to meet each state's unique caseload varies, but overall thirteen of seventeen states did not meet the caseload guidelines as defined previously.<sup>6</sup> Five of the 22 states with statewide public defense programs in 2007 were unable to provide caseload data and thus were exempt from this analysis. Although there is not data for every state in the U.S., those states where there is sufficient data lend insight into the problems across the nation and have lead both the Department of Justice and the Supreme Court to recognize the problems seen.

The U.S. Department of Justice has filed briefs siding with plaintiffs for cases suing states for violations of the Sixth Amendment right to counsel in states such as Washington, New York, Pennsylvania, and Georgia. In the opinion of the 2016 Supreme Court decision, *Luis v. United States*, Justice Stephen Breyer commented on the problems plaguing public defense in respect to the current case. Justice Breyer wrote that the appellant in the case, Sila Luis, being unable to use her own frozen assets to pay for a

lawyer during her indictment for health care fraud of \$45 million dollars, would have qualified as an indigent.<sup>10</sup> He went further to write that defendants, like Luis with frozen funds then, “would fall back upon publicly paid counsel, including overworked and underpaid public defenders.”<sup>10</sup> Justice Breyer addressed how this could be a problem by saying, “as the Department of Justice explains, only 27% of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards. And as one amicus points out, ‘many federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources.’”<sup>10</sup> He concluded that by increasing the public defender work load, through the addition of defendants bound to indigence as a result of frozen assets would, “render less effective the basic right the Sixth Amendment seeks to protect.”<sup>10</sup> Justice Breyer in these statements not only expressed that many public defender systems were falling short of standards, but also expressed that adding more cases to public defense systems, as a result of a decision to not allow defendants to use frozen funds, would make them even less effective.

Though the acknowledgements from the Department of Justice and the Supreme Court were one of the first recognitions of a previously overlooked problem, an across the board fix to the inadequacy in the indigent defense system in the U.S. has yet to be presented. Each state still carries the responsibility of providing poor defendants with a lawyer per the supreme court decision *Gideon v. Wainwright*, but without any federal oversight, each states fulfills this responsibility and funds it in a different way. Though there are many guidelines and suggested standards for the delivery of indigent defense offered by organizations such as the American Bar Association and the U.S. Department



of Justice's National Advisory Commission on Criminal Justice Standards and Goals, not all states follow these standards. There is inconsistency in the delivery of indigent defense across the nation. Due to this, some states are able to provide indigent defense and fulfill their citizen's Sixth Amendment rights to counsel more effectively than others.

The states that fund indigent defense through state funding have shown to be most effective in providing counsel to all their residents. Yet, even between these states there are discrepancies; and again, some statewide indigent defense systems are better run than others. One such well-run 'statewide' system is that of the District of Columbia. The District of Columbia's public defense services are provided by the 'Public Defender Service for the District of Columbia.' This organization is federally funded as the District of Columbia is not a sovereign state; however, it is independent of federal oversight like other statewide indigent defense systems and instead is governed by a board of trustees. The Public Defense Service evolved from the Legal Aid Agency that was in place in the District of Columbia from 1960 to 1970. After *Gideon v. Wainwright*, the Public Defense Service was created in 1970 through federal statute, in order for the District of Columbia to comply with new precedent and responsibility of states to provide indigent rights to their citizens.<sup>11</sup> Since its creation, the Public Defense Service has become recognized as a notable and model system of indigent defense. The organization not only represents indigent clients, but also works to exonerate those who are wrongly convicted. While other states are unable to keep up with their caseloads, the Public Defender Service goes above and beyond when providing legal representation for indigent clients.

Although the organization's funding mechanism is unique, relying solely on federal funds, the Public Defender Service attributes its success to its holistic approach

not its funding. The Public Defender Service is divided into seven different practice groups, which handle various case types. These groups are believed to cultivate continuous representation in individual cases.<sup>11</sup> Together, with the help of private attorneys appointed under the Criminal Justice Act, the Public Defender Service undertook 15,000 legal matters in the fiscal year of 2016.<sup>11</sup> The Public Defender Service over the years has continuously received high ratings on surveys of quality of legal representation by judges throughout the District of Columbia. Additionally, the organization has met and continues to meet the ABA's principles of public defense, a feat that many state's indigent defense systems cannot attest to.

The District of Columbia clearly provides adequate and even exceptional defense for its citizens, but most states do not match their example. States such as Mississippi, Florida, Georgia, and Missouri have even requested that the attorneys of the Public Defense Service of the District of Columbia provide training for the attorneys in their state.<sup>11</sup> There are a plethora of states that have indigent defense systems considered to be "in crisis" due to various reasons such as funding, structure of delivery of offense, or lack of public defenders. A few notable examples of states considered to be "in crisis" include South Carolina, Louisiana, and Mississippi.

The state of South Carolina offers indigent defense through its Office of Indigent Defense, which is overseen by the South Carolina Commission on Indigent Defense. This system of indigent defense was created in 1993.<sup>15</sup> Each of South Carolina's Judicial Circuits is assigned a public defender by a public defender selection panel. This circuit public defender is then allowed to hire an assistant public defender and other employees or to hire contract attorneys to provide public defense services. The counties in these

circuits receive state funding that can be allocated to cover the cost of indigent defense services. Any additional costs, including the payroll expenses for all employees of the circuit public defender, are covered through county funding.<sup>15</sup> Despite the state of South Carolina allocating \$32,904 for indigent defense services in 2013, a combination of state and county revenue, a recent report by the New York Times highlighted the deficiencies that have arisen in South Carolina's indigent defense system.<sup>7</sup>

In 2017 in Sumter, South Carolina, a city located in Sumter County of the 3<sup>rd</sup> Judicial Circuit of South Carolina, overseen by public defender Jack D. Howle Jr., a homeless man by the name of Larry Marsh had been arrested or cited for trespassing over 270 times.<sup>12</sup> Without money to pay for a lawyer and without receiving representation by the state, Mr. Marsh has appeared in court for and has been convicted of the same misdemeanor crime repeatedly. Mr. Marsh has been arrested for trespassing at places of business such as the post office, fast-food restaurants, and convenience stores. As he has a history of mental illness, the business owners would often call the police as soon as they spotted him, because he had a reputation for scaring customers. For 85 of those instances, Mr. Marsh appeared in court without a lawyer and most appearances lasted only a couple of minutes.<sup>12</sup> The fine for trespassing in South Carolina is \$250, which Mr. Marsh cannot pay, thus he often has served a 30 day sentence instead.<sup>12</sup> According to the New York Times, this sentence would cost the city \$1,650 of taxpayer revenue.<sup>12</sup>

With the help of a public defender, Mr. Marsh could possibly receive other treatments besides jail time, due to his mental illness, which could reduce the amount of money spent on his incarceration. Unfortunately, Mr. Marsh is not the only defendant who has been cheated out of their Sixth Amendment rights in South Carolina. According

to Tess Borden, an attorney for the American Civil Liberties Union or A.C.L.U., in South Carolina, roughly 65% of the municipal courts, 139 of the total of 212 municipal courts, have no public defenders available.<sup>12</sup> Additionally the A.C.L.U.'s Criminal Law Reform Project filed a federal class-action lawsuit in 2017 against the city of Beaufort, South Carolina, for violating the rights of defendants.<sup>12</sup> The state of South Carolina has clear inefficiencies in its indigent defense system, just like many other states in the nation.

Another state known for its broken indigent defense system is the state of Louisiana. Just this past year in February of 2017, the American Bar Association Standing Committee on Legal Aid and Indigent Defendants found that the state of Louisiana had only one fifth of the needed public defenders to handle the annual indigent caseload of 150,000.<sup>13</sup> In Louisiana, public defense is provided through a statewide public defender system that is supervised by the Louisiana Public Defender Board.<sup>15</sup> This board is composed of fifteen distinguished appointed members, and it creates standards and guidelines in order to establish consistency across the state. Most of Louisiana's districts attempt to provide indigent representation through contract attorneys, but a few have full-time public defender offices. The source of revenue for the statewide indigent defense system in Louisiana is largely through court fines and fees.<sup>15</sup> This funding mechanism has proved to be unstable and inadequate in supporting the statewide system. The Louisiana Supreme Court even acknowledged this fact in 1993.<sup>13</sup> In the *State v. Peart* opinion, the Louisiana Supreme Court stated that Louisiana's "unique system which funds indigent defense through criminal violations assessments, mostly traffic tickets," is systematically inadequate.<sup>13</sup>

Without sustainable funding, Louisiana's indigent defense system has suffered

due to the gap between their large caseloads and the small number of contract and public defenders available. This is seen specifically in the parish of New Orleans, a notoriously high crime area. A 2009 report by the National Association of Criminal Defense Lawyers found that part-time defenders in New Orleans Parish of Louisiana were handling almost 19,000 misdemeanor cases each per year per attorney.<sup>14</sup> This number grossly exceeds the suggested guidelines established by the U.S. Department of Justice's National Advisory Commission on Criminal Justice Standards and Goals mentioned before, a guideline that suggested an attorney working on a single type of case should be assigned no more than 400 misdemeanor cases per year in order to fulfill their duty of accurate representation.<sup>8</sup>

The overwhelming caseload has affected some offices so much that that have been forced to turn down defendants. The New Orleans parish office of public defense recognized the conflict of interest that was created when attorneys were assigned so many clients that they were unable to provide adequate representation despite their effort, and thus, began to triage the cases it was able to take on.<sup>17</sup> Because of this, New Orleans parish began to turn down serious felony cases for charges such as attempted murder, forcible rape, and armed robbery in 2016.<sup>17</sup> Just as in South Carolina, civil rights organizations have taken actions to rectify this situation. The Southern Poverty Law Center filed a class action lawsuit in February 2017 for the denial of the Sixth Amendment right to counsel on behalf of all defendants with non-capital charges.<sup>13</sup> Due to its overwhelming large caseloads and high crime rate, Louisiana is considered by many to be one of the most distressed systems of indigent defense. The state of Louisiana is a prime example of the severity of the problems with indigent defense that plague the

nation.

South Carolina and Louisiana each have distinctly different contributors to their inadequate indigent defense systems. These states are just two examples that highlight the problem that plagues the nation. Yet, neither South Carolina nor Louisiana, unfortunately, has a clear and feasible solution to their problems.

This is not the case in the state of Mississippi; there is no uncertainty in how Mississippi can improve its indigent defense system. Mississippi's indigent defense system is distinct in comparison to these two states, and to 43 other states, along with the District of Columbia, as it is one of only seven states that provides indigent defense through county funding.<sup>16</sup> Many of the problems that arise in the state of Mississippi causing lack of adequate indigent defense are due to its structural inefficiency. Indigent defense in Mississippi could be improved by developing a statewide and state funded indigent defense system that would replace the current county funded system. This action would not only bring Mississippi's indigent defense system up to date, but it would eliminate the current problems with the delivery of indigent defense.

## CHAPTER II

### THE CURRENT INDIGENT DEFENSE SYSTEM IN MISSISSIPPI

#### 2.1: History of Indigent Defense

Mississippi first recognized the responsibility to provide counsel under *Conn v. State (1964)*, a Mississippi Supreme Court decision that accepted the obligation of the state to provide indigent defendants with counsel.<sup>21</sup> Over time, a jumbled system of county funded indigent defense came into to place. Eventually this county-run system became the official system of indigent defense by legislation in 1971.<sup>38</sup> Today, the state of Mississippi still employs the same inefficient and uncoordinated county-run system. Despite various Mississippi Supreme Court cases that have suggested reform, such as *Mease v. State (1991)* in which Justice Lenore L. Prather suggested that “Legislature address the problem of indigent representation on a statewide basis, rather than thrust the burden on financially-strapped counties,” little has been done to improve the situation.<sup>37</sup>

Following this and other Mississippi Supreme Court decisions citing this same problem, the state began to take small steps toward progress in the 1990s. Unfortunately these steps toward reform were not all successful. This was specifically the case with the “*Mississippi Public Defender System Act of 1994.*” As the state of Mississippi began to acknowledge the problems it had with indigent defense, committees were created to study the indigent defense system. The committee led by James L. Robertson proposed

the previously mentioned act to the Mississippi Legislature in 1994. The *Mississippi Public Defender System Act* was initially put to rest but was brought back to the Mississippi Legislature's attention in the 1998 session and was passed. This Act provided framework for a statewide indigent defense system, but the system was never actually put into place. Funding for the bill was removed later that year followed by its complete demise in 1999 when the *Mississippi Public Defender System Act* was repealed.

The proceeding legislative session in 1999 was successful in creating the Office of Capital Defense Counsel, now referred to as the Office of State Public Defender or O.S.P.D. This counsel, which is still utilized today, was created to handle capital cases and appeals.<sup>38</sup> It is likely that this legislation was in response to the Mississippi Supreme Court case, *Wilson v. State (1990)*, where Justice Sullivan in the opinion stated, "we would encourage the Legislature to review the system and provide funds for the representation of indigent defendants in capital cases from State funds rather than county funds. Since the State funds the prosecution in these cases, why not the defense?"<sup>37</sup>

Since these developments, the only other further progress was the creation of the Mississippi Public Defender Task Force in 2001, which was charged with reporting information regarding the state of criminal indigent defense to the legislative committee meetings every October.<sup>38</sup> Though this task force was originally created to explore and gather information pertaining to the cost and possible implementation of a statewide indigent defense system, much of the information has been ignored by Mississippi's legislature.<sup>38</sup> Each year, the reports created by the Mississippi Public Defender Task Force include valid information and arguments for a statewide indigent defense system. Now in 2018, seventeen years after its initial creation, the years of information gathered



by the task force that support the implementation of a state-wide indigent defense system have yet to be utilized. Much of the basis of the analysis of this paper will come from the data and reports created by the Mississippi Public Defender Task Force in conjunction with the Office of State Public Defender.

## **2.2: The Indigent Defense System Today**

Mississippi is one of the just seven states in the United States that does not currently contribute any state funds to non-capital, trial level counsel services.<sup>16</sup> The burden of funding and delivering counsel services is instead pushed on to the local governments. The local governments thus have the responsibility to not only fund and provide adequate representation for criminal defendant, but also have the discretion to decide how this defense is provided. In turn, each of Mississippi's 82 counties has developed a unique system of indigent defense.<sup>16</sup> In total, there are six different models of delivery of indigent defense that are used throughout the state.<sup>16</sup> Each of the public defender offices and delivery models may be established by the board of supervisors in a county or by the boards of supervisors in two counties, provided that two counties are working in conjunction.<sup>15</sup> These models include assigned counsel, salaried public defender office, salaried part-time public defender, regional contract defender, full-time contract public defender, and part-time contract defender.<sup>16</sup> Each system was identified through a 2014 survey that was delivered to each county and data compiled by the Mississippi Public Defender Task force. This information is outlaid in detail in a report titled *The State of the Right to Counsel in Mississippi*.

In the assigned counsel model, the county has one or more attorneys who are paid an hourly fee for indigent defense work. Counties such as Issaquena, Amite and Leflore utilize this model. Counties that use a salaried public defender office have an office of three or more full-time attorneys who receive a salary and benefits from the county. As county employees, full-time public defenders are precluded from undertaking private cases. Jackson, Harrison, and Hinds counties each exemplify a salaried public defender model. The salaried part-time public defender model is similar to the previous model, but in this model, one or more attorneys are paid a part-time salary for defense work. The counties with this model may not have a distinct office for indigent services. Though these part-time public defenders are considered county employees, part-time defenders are allowed to take on private cases as well. This model is utilized by many other counties throughout the state. Carroll and Panola are two such counties that offer indigent defense through part-time public defenders. A more rare model presented is that of a regional contract defender system in which counties pool indigent defense services in a particular region and split the costs. Regional contracts can be seen in counties such as Newton and Neshoba County.<sup>16</sup>

The remaining counties offer contract public defense services. Contract public defender systems are further divided into part-time and full-time contract public defense systems as well. Under a full-time contract public defender system, one or more attorneys are contracted out in order to provide counsel services. In contrast to public defender offices, these full-time attorneys are not paid a salary nor do they receive benefits. Likewise, part-time contract defender systems consist of one or more non-salaried attorneys. In the full-time contract defender systems, the attorneys are precluded

from taking on private cases, while part-time contract defenders are not. As attorneys under contract defender systems do not receive salaries, four types of compensation have emerged. Contract defenders, whether working part-time or full-time, are paid by either a flat fee, flat fee with expenses, limited flat fee, or limited flat fee with expenses. Flat fee compensation is characterized by a single fee to be paid for an unlimited number of cases taken on. In some cases, attorneys may petition the court for coverage of trial related expenses along with the flat fee compensation. An alternative method of compensation is a limited flat fee. Under limited flat fee, public defenders are compensated with single fee for a limited number of cases. Attorneys are typically responsible for trial related expenses with the exception of certain counties in which they are allowed to petition for funding of these expenses.<sup>16</sup>

These wage procedures make contract indigent defense delivery systems economically unfavorable for the state. Though the full-time contract public defenders are precluded from cases, their method of payment results in economic disincentives to devoting maximum time and efforts to representing their indigent clients. Behavioral economics states that humans will attempt to maximize their wage benefits while also not exceeding their working hour preferences; thus, an attorney will behave in such a way that requires the least amount of time but will reap the most financial benefit. Both full-time and part-time contract public defenders that are paid a flat fee have natural incentive, through a behavioral economics perception, to work the least amount of cases required to receive the flat fee. Likewise, those defenders who are paid a limited fee have incentive to work the least amount of time on the cases that they are assigned.<sup>21</sup>

Economic disincentives occur also when attorneys are not precluded from cases,

such as occurs under the assigned counsel, salaried part-time public defender, regional contract defender, and part-time contract defender models. Counsel that are not precluded from taking on other cases will gain maximal income by spending minimal time on indigent cases, as the financial benefit is lower, and more time on private cases, for which they can bill at their own discretion. Since in the full-time public defender model defenders are working solely with their indigent clients, incentives and motivation to devote time and resources to private practice will generally be eliminated.<sup>21</sup> Per the NAACP Legal Defense and Educational Fund, the full-time public defender system is the most favored due to its positive economic incentives. Through the same behavioral economics perspective, public defenders will attempt to maximize their income while staying consistent with their preference on working hours. The NAACP specifically showed data confirming this economic theory in *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-sentencing Behavior from Mississippi*. They reported that in Mississippi “full-time public defenders make more motions on behalf of their clients,” therefore, individuals represented by full-time public defenders experience fewer changes in counsel compared to those represented by contract public defenders and “are more likely to exit jail, specifically resulting in at least 81 fewer days spent in jail prior to sentencing.”<sup>21</sup>

The scarce use of the full-time public defender method of delivery across the state of Mississippi is just one indicator of an overall weak state system of indigent defense. Most statewide indigent defense systems principally operate through the use of full-time public defender offices and only use other methods of delivery of representation to supplement the full-time offices.<sup>7</sup> Additionally, without oversight by the state, the

economic disincentives resulting from the unfavorable methods of delivery cultivate inadequate indigent criminal representation within the county offices and throughout Mississippi.

### **2.3: Problems within the System**

Just as each county has authority over the delivery method that they may choose to provide indigent criminal defendants with counsel, the judges in each county have the authority to appoint counsel to those charged with any felony or misdemeanor that may be subject to a period of confinement of 90 days or more.<sup>15</sup> The leading judge in that county's circuit, if there is more than one presiding judge, holds the responsibility of appointing a public defender.<sup>15</sup> This is consistent throughout all the counties despite their method of delivery. When the indigent criminal defense attorney is not independent of the judge presiding over the case, such as the system in Mississippi provides, a problem arises. This practice breaks the very first rule of the American Bar Association's ten principles on public defense. "The public defense function, including the selection, funding, and payment of defense counsel, is independent."<sup>40</sup>

Courts across the state of Mississippi have seen judges reprimand indigent criminal defense attorneys for simply acting in their client's best interest. The judges systemically should not be allowed to determine if a lawyer is doing a good job or not. Presiding judges do not have the authority to review a case file or interview a defendant to specifically determine whether or not the attorney is acting in the best interest of the client. Because judges do not have the authority to investigate an attorney's actions, they

thus have imperfect information about how well an attorney is working. In Mississippi, given that the judges appoint attorneys, they are given the power to decide whether or not the attorney is doing his or her job to the best of his or her abilities, in spite of their incomplete consciousness. Unfortunately, this has caused instances where judges have displayed bias in favor of speedy proceedings over the clients best interest.

A prime example of a judge favoring speedy trial occurred in Mississippi's Hinds County. Judge Jeff Weil, in 2015, found two public defenders to be in contempt and banned one of the public defenders from his courtroom entirely. Michele Purvis Harris, one of the public defenders found in contempt of court, stated to WAPT news of Jackson, Mississippi that in this case the court was not respecting every individual that came into the courtroom. She also stated that she and others, "will continue in our representation of our clients and do so in a zealous manner," despite being forcibly removed from the courtroom.<sup>20</sup> Many times attorneys in Mississippi do not zealously represent their client, as Purvis and her colleagues have, but instead submit to the judge's requests of keeping proceedings short in order to keep their attorney position. This conflict of interest makes it rare that attorneys go against the judge, such as the attorneys in Hinds County did.<sup>20</sup> Although many public defenders want to defend their client adequately, they also value their job and their contract. The systemic bias resulting from Mississippi's indigent defense system forces many public defenders to inadequately represent their clients, thus depriving them of their constitutional rights.

Mississippi's indigent defense system differs from many other states, who have statewide systems that are consistent throughout all districts and counties, some of which are completely funded by the state and others which funding is split between state and

local government. Unlike in states such as Alabama, there are also currently no unique standards or guidelines that are mandatory throughout the state of Mississippi.<sup>15</sup> Each county in Mississippi has only one responsibility pertaining to indigent defense: to maintain the Sixth Amendment constitutional rights of its citizens by providing an attorney to those who cannot afford one. Without these standards and without a level of accountability provided by the state, some counties have failed to even fulfill the single duty of providing adequate attorneys to indigent persons.

The lack of cohesion across the state was recognized in *State v. Quitman County*, when Quitman County filed a complaint against the state of Mississippi for breaching the constitutional duty to provide adequate representation for indigent criminal defendants.<sup>18</sup> Quitman County, who spent \$38,000 on indigent defense in 2014 and provided counsel through part time public defenders to their 8,233 county residents, argued that the state of Mississippi pushing this duty on to its counties resulted in “widespread ineffective assistance of counsel due to the fact that the County cannot afford to discharge its burden of providing funding for indigent defendants in a constitutional manner.”<sup>16&18</sup> Per the county, the breach of duty was caused by the “systemic ineffective assistance of counsel that has gone unchecked and un-remedied by the State,” and has existed since the obligation to provide indigent defense was been pushed on to the counties.<sup>18</sup> The Mississippi Supreme Court noted in the majority opinion of *State v. Quitman County* that with evidence presented in a trial this complaint, that the state is breaching its duty to provide adequate representation of indigent criminals due to pushing the responsibility on to it’s counties, could be proven true. Reports and studies from the Mississippi Bar Association, as well as from the Mississippi Public Defender Task Force, have since

provided adequate out-of-court evidence to prove this assertion. Specifically, the *Assessment of Caseloads in State and Local Indigent Defense Systems in Mississippi* does so by providing data on counties that exceed appropriate caseloads as set by the *American Bar Association Standards for Criminal Justice Providing Defense Services Third Edition*.

The American Bar Association, or A.B.A, recognized the importance of appropriate workloads in its report, *ABA Standards for Criminal Justice Providing Defense Services Third Edition*, by establishing that; “One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads.”<sup>39</sup> Though there is a distinction between the terms “workload” and “caseload,” the influence of each is equivalent. Caseload is defined as the specific number of cases assigned to an attorney during a specific period of time. Workload, on the other hand, is the total amount of work, cases and other matters, assigned to an attorney during a specific period of time.<sup>39</sup> The general standards for full-time public defender caseloads established in this report are consistent with the standards set by the U.S. Department of Justice’s National Advisory Commission on Criminal Justice Standards and Goals. The A.B.A. recommends that a public defenders handle no more 150 felony cases or no more than 400 misdemeanor cases per year.<sup>39</sup> This standard may be moderately adjusted by each state as seen in Department of Justice’s *Compendium of Standards for Indigent Defense Systems Vol, I*.

The Mississippi Public Defender Task force, in conjunction with the Mississippi Office of Public Defender, specifically analyzed the caseloads across the state of Mississippi and reported their findings in, *Assessment of Caseloads in State and Local*



*Indigent Defense Systems in Mississippi.* This report was created in order to assess the effectiveness of indigent counsel, as well as to determine the need for assistant public defenders. An assessment of total caseloads for each county was adjusted by Mississippi's estimated indigence rate of 80% in order to obtain data for this report. The caseloads for each Mississippi county were compared to caseload standards derived from a previous study conducted by Texas A&M Public Research institute in 2014. The caseload standard utilized included 77 cases per attorney each year for crimes with maximum punishment of more than twenty years, 105 cases per attorney each year for crimes with maximum punishment of up to twenty years, and 144 cases per attorney each year for crimes with maximum punishment of less than twenty years.<sup>27</sup>

A comparison of the caseload data for each county and the standards for attorney caseload contributed to the analysis of each county's indigent defense system presented in *Assessment of Caseloads in State and Local Indigent Defense Systems in Mississippi*. 68 of Mississippi's counties were either categorized as "within standard," "moderately above standard," "significantly above standard," and "in crisis." Fourteen counties did not have sufficient caseload reporting and thus were uncategorized. Those counties that were considered to be "moderately above standard" were recognized as having the ability to come into compliance with the standards without hiring additional staff, whereas the counties "significantly above standard" would need to add one or more additional attorneys in order to come into compliance. Of the 68 total counties included in the study, 40 were "within standards," 14 were "moderately above standards," and 4 counties were "significantly above standards."

Most notably in the report, there were ten counties, which handle 30.5% of the

total state caseload that were found to be “in crisis.”<sup>27</sup> Of the ten counties “in crisis,” Desoto, Lee, Lamar, Lauderdale, Marshall, Prentiss, and Tishomingo counties all employ contract systems of indigent defense. The remaining three counties of Panola, Pearl River, and Rankin County, function under a part-time public defender system.<sup>16</sup> These counties considered to be “in crisis” have a joint indigence rate of 82%, a rate above the State’s 80% indigence rate.<sup>27</sup> Due to the high percentage of cases handled by counties considered to be “in crisis,” the State is not only in need of more attorneys to bring the collective caseload within standards, but it is also in need of a more cohesively structured indigent defense system. Counties that do not have enough attorneys to handle their caseloads not only deny their indigent citizens of a Sixth Amendment right, but they also suffer economic losses due to prolonged incarceration of these indigent defendants.

#### **2.4: Economic Losses Incurred**

One of the most substantial deficiencies with the current indigent defense system in Mississippi is the economic loss that it induces. Tax revenue lost due to prolonged incarceration of indigents, not only affects those incarcerated but also the state population as a whole. Income tax revenue lost from and revenue spent on prolonged incarceration, that could have been avoided had the incarcerated person received adequate representation in a timely manner, takes away from the total general revenue of the State and thus, takes away from the funding of other beneficial state programs. The NAACP Legal Defense and Educational Fund found that the current failing system of indigent defense in Mississippi not only contributes to inadequate defense and prolonged

incarceration and but also to monetary waste because of this inadequacy.

On report put together by the NAACP Legal Defense and Educational Fund, *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-sentencing Behavior from Mississippi*, specifically highlights the inadequate indigent representation in Mississippi as well as the economic losses that have thus resulted. The study considers the factors of race, gender, and representation and how they contribute to economic losses for the state during the time prior to sentencing.<sup>21</sup> Both public records and personal interviews of indicted persons from eleven counties across the state lent information about demographics of individuals, information about crimes individuals committed, information related to the processing of the individuals, and information on money spent by the state during the individuals time in jail.<sup>21</sup> These counties were carefully chosen to be representative of all counties throughout the state of Mississippi. The delivery systems of the counties, from which data was extracted, were also considered in the analysis. The 2003 report presented some very daunting statistics that presumably apply in a similar manner today and may have even been amplified over time.

The *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-sentencing Behavior from Mississippi* report showed that out of the 700 cases reviewed, pre-sentencing motions were filed in only four cases.<sup>21</sup> This directly shows the lack of adequate representation throughout the counties studied and likely throughout counties across the state. Furthermore, on average, indicted persons spent 135 days in jail prior to sentencing.<sup>21</sup> This average included significant variation, but, more specifically, roughly 48% of the cases analyzed spent at least two months in jail before

being sentenced.<sup>21</sup> According to the 100 personal interviews, only 38% of those criminally convicted felt that they had adequate representation.<sup>21</sup> This was also given that only 41% of the interviewees met with an attorney while they were in jail, and those who did, spent on average a total of only an hour and fifteen minutes with their attorney.<sup>21</sup> Less than 20% of the interviewees reported that their attorney investigated their cases or spoke with witnesses.<sup>21</sup> Although those indigent defendants with full-time public defenders overall spent more time in jail than those without, it is likely due to the fact that most of the counties with full-time public defenders contained urban areas that had higher crime rates and more burdened legal systems.<sup>21</sup> Additionally, it was concluded from the personal interviews that the full-time public defenders visited their clients more often, accepted calls from their clients, investigated, talked to witnesses, and overall spent more time with their clients.<sup>21</sup>

Continuously throughout the report, data supported the fact that the few full-time public defender systems in Mississippi were working better than other systems, the indigent defense system in Mississippi was inadequate, and that there was increased jail time because of the deficiencies in the system. All of the factors in conjunction have cost the state more money than it would have spent in creating a statewide indigent defense system. According to the NAACP, the implementation of a statewide full-time public defender system in state of Mississippi would raise personal income by \$90.9 million, which would likely have generated \$5.3 million annually in tax revenue for the state.<sup>21</sup> The savings from the reduced spending for incarceration costs would further increase this revenue. Although, in *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-sentencing Behavior from Mississippi*, the NAACP estimated

the potential savings from shorter incarceration periods to be around \$16.5 million for the local governments, this idea of monetary waste and potential savings is further explored in a separate report, *Assembly Line Justice: Mississippi's Indigent Defense Crisis*.<sup>21</sup>

The report, *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, also constructed by the NAACP Legal Defense and Educational fund, in the same year, 2003, expanded on the idea of monetary waste resulting from Mississippi's current indigent defense system. Through the interviews of over 150 current and former defendants, observation of court proceedings in ten counties, and consultation of those involved in the justice system across the state such as: public defenders, sheriffs, judges, and district attorneys, the NAACP was able to evaluate the hidden costs incurred on tax payers due to defendant's time spent in jail pre-trial.<sup>22</sup> One defendant, Gail Chester of Harrison County, who was indicted for shoplifting charge for the value of \$72, spent fourteen months in jail without ever talking to the attorney assigned to defend her prior to pleading guilty on June of 2002.<sup>22</sup> Immediately following her plea, she was released. Not only was Chester likely incarcerated for a longer time than she would have been sentenced had she received a lawyer at an earlier date, but it took approximately \$12,090 of taxpayer's funds to incarcerate her during this time.<sup>22</sup> The money spent on Chester's incarceration could have been drastically lower had there been an adequate system of criminal defense in place.

The NAACP Legal Defense and Educational Fund reported other defendants who were incarcerated for a number of years, only to be acquitted or to have their trial dismissed due to inadmissible evidence. Again, this incarceration was a cost that taxpayers bore. All of these costs occurred due to the inefficient system.<sup>22</sup> Some counties

simply cannot afford to have enough public defense attorneys to keep up with their congested dockets and others, who may have the funds, do not have a strong enough system in place to assure adequate representation.<sup>22</sup> Many of the interviewees of *Assembly Line Justice: Mississippi's Indigent Defense Crisis* cited that they never met with an attorney or only met for a very short period of time prior to their hearing or trial, that their attorney never filed motions nor did an investigation of any sort on their behalf, and that in some cases their attorney gave them erroneous legal advice.<sup>22</sup> These responses were consistent with the responses of interviewees in the NAACP's earlier report. The inadequate representation is a direct reflection of the workload crisis of many counties; even those attorneys who work to zealously defend their client are not afforded enough resources or funds to do so to their best ability. At the time of this report, Mississippi spent the second least amount of money per capita on indigent defense in the United States.<sup>22</sup> The state of Mississippi spent a measly \$3.19 on indigent defense per capita in 2000.<sup>22</sup>

Evidently, the current indigent defense system in Mississippi, and the inadequacy of representation of indigent defendants that it evokes, contributes to substantial economic loss. There has been also been extensive research and data presented on these issues and how they contribute to a broken system. The lack of action to correct this problem affects more than just indigents. Not only are indigent defendants denied their Sixth Amendment rights, but taxpayers and the state as a whole suffer because of the economic loss. So many have offered a solution to all of the issues raised. All of the sources included in this work point to one solution, a solution that many believe would relieve the justice system in Mississippi and improve indigent representation: to

implement a statewide state funded indigent defense system.<sup>22</sup> The Mississippi Supreme Court, the financially strapped counties of Quitman, Noxubee and Jefferson, the District Attorney of Harrison County, the Mississippi Bar Association, the NAACP Legal Defense and Educational Fund, public defenders across the state, and the sheriffs of eleven counties have all noted that a statewide indigent defense system is needed.<sup>22</sup>

Since many of these reports are from several years past, even some from early 2000's, why has such a system yet to be implemented? For this reason, this work analyzes the cost and benefits of implementing a statewide indigent defense system and the feasibility of implementing such a system through a comparison to the state of Arkansas. Arkansas is a state that has comparable features to the state of Mississippi besides just their region, but in contrast to Mississippi, the state of Arkansas has had a well-run statewide indigent defense system in place for many years. This state is used as leverage for the argument that Mississippi not only needs a similar system, but that it would also be feasible just as it is for the state of Arkansas.

## **CHAPTER III**

### **A STATEWIDE INDIGENT DEFENSE SYSTEM IN MISSISSIPPI**

#### **3.1: The Statewide Indigent Defense System in Arkansas**

Until 1993, Arkansas' indigent defense was in a similar state as Mississippi's is in currently. Before this time and before the implementation of a statewide system, the state of Arkansas pushed the obligation of funding indigent defense onto its counties. Just like we see now in Mississippi, the limited funding that Arkansas counties provided led to limited resources and subpar indigent defense representation. Before the pivotal Arkansas Supreme Court decision, *State v. Independence County*, Arkansas counties were authorized to create a fund to cover the fees and appropriations for indigent defense.<sup>42</sup> Much like Mississippi in the presently, Arkansas had no state oversight, and its counties displayed an array of different indigent defense delivery systems and mechanisms of funding. Counties often provided either one of or a combination of the following types of indigent defense delivery: full-time public defenders, part-time public defenders, or appointed counsel.<sup>43</sup> Twenty five years ago, Arkansas lacked the cohesiveness in its indigent defense system that Mississippi still lacks today.

Also at this time, there were statutory limits on indigent defense attorney fees, but due to the fragmented system, the fees were not uniformly enforced across the state.<sup>43</sup> These limits were a significant problem with the indigent defense system at that time and contributed to the change. The attorney fee limits included a \$1000 limit to attorney fees



in capital and first-degree murder case, \$350 limit to attorney fees in all other types of cases, and a \$100 limit to investigations.<sup>43</sup> Some districts in the state of Arkansas were more lenient on the fee limits than others. Within those districts, courts occasionally applied the limits more strictly to certain cases.<sup>43</sup> Often when attorneys were appointed to handle the cases, the courts closely monitored the expense caps.<sup>43</sup> These fees were the point of contention that led to *State v. Independence County*. In this decision, the Supreme Court of Arkansas held that the states were liable for part of the attorney fees for the case in question despite the State's opposition.<sup>42</sup> The acknowledgement that the counties could not cover all of the costs of indigent defense sparked the transition into a statewide system.

Following the decision, legislation was passed in 1993 that created the Arkansas Public Defender Commission.<sup>23</sup> By 1997, the county-based system had been completely converted into a statewide indigent defense system overseen by the Arkansas Public Defender Commission, the system that is in place in the state today.<sup>16</sup> This commission is made up of seven members, each appointed by the governor, and must include at least four licensed attorneys with defense experience, at least one county judge, and at least one trial judge who hears criminal cases.<sup>15</sup> The Arkansas Public Defender Commission has general authority over trial public defender offices across the state and exerts this authority through establishing policies, rules and regulations, and standards for these offices.<sup>15</sup> One noteworthy regulation that was set by the Arkansas Public Defender Commission is the ability of public defender offices to refuse cases.<sup>15</sup> Although the application of this regulation is not widely observed, it is an ability that not many states allow their public defender offices.<sup>15</sup>

Either a county or regional public defenders office is located in each of the 23 judicial districts of the state.<sup>15</sup> The counties still contribute a small amount funding to these services, although the state of Arkansas bears the majority of the responsibility of funding and bears the responsibility to ensure that adequate indigent representation is offered.<sup>15</sup> The Arkansas Public Defender Commission also receives small amounts of funding through the attorney and user fees that defendants are charged with, unless waived by the court.<sup>24</sup> These fees charged are any where between \$10 to \$400, but they make up small amount of approximately 3% of total funding for the commission.<sup>24</sup> Counties are required to cover the operating expenses for their local public defense offices and may choose to fund additional personnel as well in those offices.<sup>24</sup>

Each office offers both full-time equivalent public defense attorneys and contract attorneys. In some districts, there are additional offices that cover conflict cases.<sup>16</sup> These conflict public defender offices often exist in those districts that contain urban areas.<sup>16</sup> According to the budget report created by the Arkansas Public Defender Commission, at the end of the 2014 fiscal year the state employed 161 attorneys.<sup>23</sup> In addition to these attorneys, there are additional contract public defenders as well as support staff for the offices. Support staff includes, but is not limited to, the positions of paralegals, psychologist, psychiatrist, pathologists, investigators, translators, weapon experts, and handwriting experts.<sup>23</sup> The availability of public defender offices, attorneys and support staff are just a few of the factors that contribute the success of Arkansas' statewide public defender system. Additionally, the statewide system, until the last few years, has shown exceptional ability of handling the state indigent criminal caseload.

In 2007, the Bureau of Justice Statistics reported that the state of Arkansas had

81.9% of the estimated attorneys needed to completely cover the caseload of the state given the caseload standards set by the U.S. Department of Justice's National Advisory Commission (NAC) on Criminal Justice Standards and Goals.<sup>6</sup> The Bureau of Justice Statistics estimated that the state of Arkansas needed a total of 372 attorneys to meet caseload standards and, at the time, employed 305 full-time equivalent attorneys.<sup>6</sup> This statistic included full-time public defenders, part-time defenders quantified through a ratio, and contract counsel by their full-time equivalent caseload.<sup>6</sup> Of the seventeen states included in *State Public Defender Programs, 2007*, Arkansas was one of just seven that employed at least 76% of the estimated attorneys needed to fully meet the caseload standards.<sup>6</sup> Compared to the other statewide systems and the other struggling county systems at the time, Arkansas was doing drastically better especially given the high level of indigence in the state. In 2007, the 31 public defender offices in the state handled 83,810 cases.<sup>6</sup> Including only misdemeanor and felony non-capital cases, the public defender offices handled a total of 64,690 cases that same year.<sup>6</sup> Between the 305 full-time equivalent attorneys, each attorney handled approximately 96 felony non-capital cases and 116 misdemeanor cases.<sup>6</sup> This is slightly above the standard of no more than 75 felony non-capital and 200 misdemeanor cases for attorneys working both case types that was derived from the standard for attorneys working a single case type set by U.S. Department of Justice's National Advisory Commission (NAC) on Criminal Justice Standards and Goals.<sup>6</sup>

Though a more recent report by the Bureau of Justice Statistics, *State-Administered Indigent Defense Systems, 2013*, recorded the state of Arkansas to be further above these standards, with 200 felony and 270 misdemeanor cases per full-time

equivalent attorney, the total number of attorneys in this 2013 report did not include the significant amount of contract and assigned counsel public defenders.<sup>7</sup> *State-Administered Indigent Defense Systems, 2013* was a less extensive report and did not split caseload data into delivery type; thus the report did not determine the full-time equivalency of contract attorneys for each state.<sup>7</sup> Despite the erroneous allocation of caseload, this information reflects the trend that in recent years there has been an increase in crime rate, and thus, an increase in indigent criminal cases, which has put a strain on their public defender system. In general, the state of Arkansas has demonstrated the ability to handle a large indigent caseload better than many other states, but Arkansas still has its own dilemmas.

The state of Arkansas and their criminal indigent defense system is not free of imperfections. In the latest budget request put together by the Arkansas Public Defender Commission, they recognized that the duties of public defenders have greatly risen in recent years.<sup>23</sup> Not only have crime rates in general risen, but also there has been an increase specifically in arrests associated with criminal actions. At the end of the fiscal year of 2014, there were 213,281 reported criminal offenses.<sup>23</sup> This is a drastic increase from the reported offenses in 2001 that totaled to 109,829.<sup>23</sup> For a state where public defenders are required by defendants in between 90% and 95% of the criminal cases, the increase in crime has put a strain on their well-run system due to the fact that only 23 attorney positions were added during this thirteen year span.<sup>23</sup>

To counteract the recent rise in crime, Gregg Parish, the executive director of the Arkansas Public Defender Commission, requested a budget increase that would allow the state to add 46 attorney positions and ten support staff positions from the Joint Budget

Committee of the Arkansas Legislative.<sup>25</sup> Though the structure of the system is working well and has greatly benefited the state over the years, Parish believes that a budget increase is needed in order to add enough positions to match the rise in crime.<sup>23</sup> The initial implementation of the statewide public defense system was great accomplishment, but the system must also be adjusted and change just as the state has over the years. Despite the lack of funding, expansion, and growth in Arkansas' statewide indigent defense system, Arkansas is, nonetheless, a valid model for the state of Mississippi. With all of its imperfections a statewide indigent defense, like that seen in Arkansas, would be an improvement from the completely broken county-based system seen in Mississippi. Before using the state of Arkansas as a reference, this work first explores the similarities between Mississippi and Arkansas. Devoid of similarities, the analysis of the mirroring of a system of indigent criminal defense from Arkansas to Mississippi would be invalid. Fortunately, the two states share many commonalities.

### **3.2 Similarities of Arkansas and Mississippi**

The adjoining states of Mississippi and Arkansas not only share a state line, but they share many other characteristics that make Arkansas a valid state of reference. Besides the states' regional characteristics, they share similar populations, poverty rates, median household incomes, and state expenditures. According to the 2010 Census, Arkansas had a population of 2,915,918 while Mississippi's population was at 2,967,297.<sup>29</sup> This is the latest official measurement of population, but many other organizations still estimate their populations to be extremely similar. Data USA, an online data tool that compiles U.S. government data developed in 2014 by the companies of Deloitte and Datawheel along with Massachusetts's Institute of Technology, reported

many similarities between the states.<sup>30</sup> This tool also reported that each state had very similar populations. Arkansas' resident population was estimated at 2.89 million and Mississippi's resident population to be approximately 2.99 million, in 2015 by Data USA.<sup>30</sup>

Data USA also reported similarities between the two states in factors other than just populations including poverty rate and median household income. This source reported Arkansas' poverty rate to be at 19.1% of the state population.<sup>30</sup> Just slightly higher, Mississippi's poverty rate was reported to be 22% in 2015.<sup>30</sup> With similarly high poverty rates, this may suggest that the states have similar need for criminal indigent defense. Though Arkansas and Mississippi both have estimated indigence rates that are higher than average, Arkansas' self reported rate is greater than Mississippi's. In 2016, Mississippi reported its average indigence rate to be around 80% in *Assessment of Caseloads in State and Local Indigent Defense Systems in Mississippi*.<sup>27</sup> This estimation was based solely on a survey of county circuit clerks, and though it was missing responses, is consistent with previous indigence rate estimations. On the other hand, Arkansas indigence rate is closer to 90%. Based on the data submitted to the Arkansas Public Defender Commission from offices across the state, the commission estimates that public defenders represent 90% to 95% of the persons criminally prosecuted by the state of Arkansas.<sup>23</sup>

Additionally, Data USA reported that the states had similar median household incomes with Mississippi's median household income resting at \$40,593 and Arkansas' at \$41,995.<sup>30</sup> Intuitively, similar median household incomes might indicate that each state has similar tax revenue. This is also not necessarily the case, according to each states

2017 fiscal year budget, Arkansas' income tax revenue was \$3,214.7 million and Mississippi's was \$1,840.2 million.<sup>31, 32</sup> Despite this, the supplementation of other forms of revenue, other than income tax, bring both states to approximately five billion dollars in total general revenue available.<sup>31, 32</sup> Likewise, each state had similar general fund expenditures in the 2017 fiscal year. Arkansas' general fund expenditures totaled at \$5,251,773,479.<sup>33</sup> Mississippi's was just slightly higher with a total of \$5,794,927,951.<sup>32</sup> Given the data on each of these general characteristics, Arkansas and Mississippi are very similar states, and thus Arkansas can validly be used as reference state. Crime rates and incarceration trends of the two states are also important to consider, as they are important aspects of the topic of indigent defense.

In spite of all the similar characteristics of Mississippi and Arkansas, when it comes to crime rates, jail incarceration rates, pre-trial incarceration rates, and prison incarceration rates of the two states there are some concerning differences. Arkansas, per the Federal Bureau of Investigation, has higher crime rates in all types of crime except for murder and non-negligent manslaughter.<sup>35</sup> 2012 data reflects that Mississippi had the second highest non-negligent homicide rate in the nation of 7.4 per 100,000 residents.<sup>35</sup> Arkansas' murder and non-negligent manslaughter is significantly lower at 5.9 per 100,000 residents.<sup>34</sup> For all other types of crime including violent crime, forcible rape, robbery, aggravated assault, property crime, and burglary, the state of Arkansas has higher rates.<sup>35</sup> Arkansas in 2012 reflected rates that were 469.1, 42.3, 78.7, 342.3, 3,660.1 and 1081.3 per 100,000 residents, consequently.<sup>35</sup> Compared to these, Mississippi's rates per 100,000 residents included violent crime of 260.8, forcible rape of 27.5, robbery of 76.5, aggravated assault of 149.4, property crime of 2,811.0, and burglary of 940.6.<sup>35</sup>

These facts point to a more exhausted indigent defense system in Arkansas compared to that of Mississippi, but this is not the case.

As mentioned before, the indigent defense system in Arkansas has experienced far less problems and has yet to suffer backlash due to the denial of constitutional rights as Mississippi has. The prosperity of the statewide indigent defense system in Arkansas is seen not only in its lack of failure by comparison, but is also supported by empirical evidence. The pre-trial incarceration rates, jail admissions, and jail populations in each of the states show additional evidence that support the speculation of Arkansas' indigent defense system being better off in spite of the state's higher crime rates. Although there were almost double jail admissions in Arkansas in 2015, annual jail populations were higher in Mississippi. Jail admissions in Arkansas were approximately 303,449 in this year compared to Mississippi's approximately 163,056 admissions.<sup>35</sup> On the other hand, the annual jail population of Mississippi in 2015 was approximately 12,142 and the annual jail population of Arkansas was only approximately 7,562.<sup>35</sup> It is counterintuitive that Arkansas, who had almost double annual jail admissions as Mississippi, had almost half the annual jail population. This is most likely caused by a higher percentage of people held in jails in Mississippi for a prolonged period of time as they are awaiting their trial. Pre-trial incarceration rates support this speculation. In Mississippi, the annual pre-trial jail incarceration in 2015 was at 6,847, a number that is a little over eight times the pre-trial jail incarceration population of Arkansas that was reported to be only 809.<sup>35</sup>

Pre-trial jail incarceration is linked directly to the effectiveness of indigent defense. As both states have extremely high indigence rates, there should not be such a



drastic difference in pre-trial jail incarceration. More often than not, those persons who are unable to pay their bail are the same persons who require criminal defense provided by the state; therefore, the majority of the pre-trial jail incarceration population is likely to be considered indigent. The higher pre-trial jail incarceration rate in Mississippi, when also considering the lower crime rates and jail admissions, is a direct reflection of the brokenness of Mississippi's indigent defense system. Though Mississippi's higher rate of homicide would contribute to a greater pre-trial incarceration population, it would not contribute so much as to make this population to be eight times as Arkansas'. The NAACP Legal Defense and Educational fund's report, *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, cited earlier supports this theory of Mississippi's indigent defense system contributing to higher pre-trial incarceration population. Many indigent defendants included in the NAACP's report served pre-trial jail time for extended periods before being assigned an attorney. This waiting period experienced by indigent defendants in Mississippi directly contributes to the pre-trial jail population and provides evidence that Mississippi's indigent defense system is significantly weaker than Arkansas'.

Arkansas' statewide indigent defense system, despite its own downfalls, is more successful than Mississippi's fragmented county-based system. Given all of the similar characteristics between the two states, Mississippi should be able to implement a statewide system like that seen in Arkansas in order to experience comparable success. Even though there is an obvious need seen for a change in indigent defense in the state of Mississippi, it is also important to consider if the benefits of such a change outweigh the costs. Additionally, the general feasibility of the change in system is an important factor

in considering if Mississippi should implement a statewide indigent defense system. Since Arkansas has already been established as a similar state and as a state with a successful system, Arkansas gives a direct reflection to both a cost benefit analysis and funding feasibility consideration of a statewide indigent defense system in Mississippi.

### **3.3: Cost Benefit Analysis of Statewide Indigent Defense**

For a state that is tight on funds, during the consideration of any new state program, commission, or legislation, the cost versus the benefit of the program will be an important aspect. The cost benefit factors of a statewide indigent defense system will be especially important for the state of Mississippi. From an economic perspective, the benefits provided by a statewide indigent defense system must outweigh the costs in order for it to be assumed that such a system should be implemented. Both the costs and benefits to the state include qualitative factors and quantitative or monetary factors. The social costs of the current system have been seen in previous chapters along with how a statewide system might alleviate these social costs for the residents of Mississippi. Additionally, the economic losses of the county system have been discussed. This information is supplementary to the cost benefit analysis of the implementation of a statewide indigent defense system. The monetary costs of the statewide indigent defense system of Arkansas lend an approximation of cost for the state of Mississippi. Furthermore, it is important to consider how there would be leeway in Mississippi's state budget for this program. Options such as reallocation of current funds and the additional sources of revenue not yet utilized will be considered. Both mechanisms will be based on

the state of Arkansas given the budgetary differences between the two states.

The state of Arkansas spent approximately \$24,557,329.00 on their statewide indigent defense system in the 2016-2017 fiscal year according to the Arkansas Public Defender Commission's budget report.<sup>23</sup> This amount includes all types of criminal indigent defense representation: felony capital, felony non-capital, misdemeanor, juvenile and appeals. The state of Mississippi funds only felony capital defense and indigent appeals through state funds.<sup>41</sup> In this same fiscal year, Mississippi spent \$3,081,341.00 on these two types of indigent representation.<sup>41</sup> The difference in this value and Arkansas' total expenditure results in a difference of \$21,475,988.00. If assuming that the states are similar, Mississippi would likely need to allocate approximately an additional \$21,475,988.00 annually for a statewide indigent defense system. This might also be an overestimate as Mississippi has a lower crime rates, and thus a less burdened criminal legal system. Along with this monetary cost of annual funding, there would also be a switching cost of implementation of this new system. Though there is a limit to quantifying this exact value of the costs of the implementation of this program, there are obviously various costs to be considered. Additionally there would be social costs of implementing such a system.

Additional qualitative costs of a statewide indigent defense system in Mississippi may include, but are not limited to, political disagreements and legislative time. Though many may argue that there would additionally be an opportunity cost of funds lost by other important programs, this is not necessarily true. In the short run, during the implementation of a statewide indigent defense system in Mississippi, funds might have to be allocated from other programs initially, but it is estimated that in the long run the

state will save money on incarceration. These funds saved from incarceration funds could be re-allocated to needy programs and may even supplement the programs more than before.

It's additionally important to consider if the current problems with Mississippi's indigent defense system will be corrected after the implementation of a statewide indigent defense system. These problems, which were previously discussed, include the lack of cohesiveness across the state, the lack of independence of counsel, and the economic losses incurred. The state of Arkansas' indigent defense system is systematically cohesive. As mentioned before, each of the 23 judicial districts has at least one county or regional public defender office.<sup>15</sup> Each of these offices are overseen by the Arkansas Public Defender Commission.<sup>15</sup> All offices in the state of Arkansas must abide by the authority of the commission and by the policies, rules, regulations, and standards set by the commission.<sup>15</sup> The state of Mississippi lacks this cohesiveness because it lacks statewide oversight, such that is present in Arkansas. With the implementation of a statewide indigent defense system, Mississippi could mimic the Arkansas Public Defender Commission by giving similar authorities to the already established Mississippi Office of State Public Defender.<sup>16</sup>

Arkansas also does not experience the lack of independence of counsel that Mississippi does. In the state of Arkansas, the public defender commission recommends to the judges whom to employ as public defenders and the salaries that they should get paid.<sup>23</sup> Judges in Mississippi, on the other hand, have complete control over the hiring, firing, and salary of public defenders in their district, creating a conflict of interest that is otherwise controlled in the state of Arkansas.<sup>15</sup> This problem again could be corrected

with the implementation of a statewide system that includes an oversight or recommendation for the hiring and firing of public defenders. The best way to achieve this independence would be through the creation of a separate and unbiased entity that sets standards and oversees the public defender offices in order to assure that the standards are being followed.<sup>16</sup>

One of the largest benefits that Mississippi could obtain from a statewide indigent defense system would be economic efficiency. As discussed earlier, economic losses occur in the state of Mississippi due to the extended time many defendants spend incarcerated before their trial.<sup>21</sup> During this time, the state loses income tax revenue from the incarcerated person and must also pay for their incarceration. When defendants spend a prolonged time in jail before having their trial, specifically when indigent defendants spend longer in jail than their misdemeanor offense would have allowed, the state suffers significant financial losses.<sup>22</sup> A statewide indigent defense system would improve the overall public defense; and thus, if it is well implemented, it will shorten pre-trial incarceration rates. When public defenders are doing their job better and reaching their indigent clients sooner, pre-trial incarceration rates are expected to decrease. This is supported by the fact that the state of Arkansas has drastically lower annual pre-trial incarceration rates at only 809 in 2015 compared to Mississippi's 6,847.<sup>35</sup> Assuming the state of Mississippi pays around \$30 a day to incarcerate a single person, if the state of Mississippi had annual pre-trial incarceration rates of 809 instead of the current rate, the state would save approximately \$66,116,100.00 in corrections spending.<sup>22</sup> This number is the product of the difference in the annual pre-trial incarceration rates of the two states and the amount Mississippi would pay to incarcerate a single person for 365 days.

Approximately \$66.1 million in savings would not only allow a public defense system to pay for itself, but it would allow for allocation of funds to other programs in need. Additionally, the state would receive more income tax from those who otherwise are held in jails and prisons for longer than necessary.

Though a cost-benefit analysis can be subjective, the benefits recognized here outweigh the costs. Not only would the state benefit monetarily, but also all residents of Mississippi would be afforded their Sixth Amendment constitutional rights. A statewide indigent defense system in Mississippi would not only benefit the people of the state, but the state government as a whole. The problems with the current indigent defense system that have caused discrepancies and lawsuits in recent years will be remedied. Although the initial implementation may be costly and may take from other programs initially, in the long run the state will save money through the usage of statewide indigent defense.

Furthermore, the cost of implementation could be cut through a slow transition from county-funded to statewide indigent defense. Montana successfully used a slow implementation of a fully state-funded indigent defense system when it created its statewide indigent defense system in 2005.<sup>16</sup> The technique of slowly reverting to state funds could also be utilized in Mississippi so that the state does not have to come up with all funds in one year. With the benefits so clearly outweighing the cost of implementation, there should have already been action taken to implement this system. This inspires questions as to why the state has not taken any action; it is possible that there may be budgetary barriers. If a move to statewide indigent defense system is infeasible without a budgetary expansion, Mississippi likely would be unable to implement the system.

### **3.4: Funding Feasibility**

Although it has been established that there are many similarities between Mississippi and Arkansas and between the budgets, there are in fact discrepancies. These discrepancies seem to lead to a possible solution to the funding concerns for a statewide criminal indigent defense system in Mississippi. The state of Arkansas has higher crime rates nearly across the board of types of crime and has a higher rate of indigence; thus, it is fair to assume that Arkansas has a more burdened legal system. Additionally, Arkansas has a slightly smaller general budget and receives less federal funding. The general budget for the state of Arkansas in the 2017 fiscal year was \$5,251,773,479.00, while Mississippi's general revenue budget for the fiscal years of July 1, 2017 through June 30, 2018 was \$5,660,578,000.00.<sup>32,33</sup> During this same fiscal year, Arkansas reported the receipt of \$7,889,945,406.00 in federal revenue where as Mississippi reported the receipt of \$9,104,890,156.00 in federal funds.<sup>32,33</sup> Despite this, Arkansas is still able to fund a statewide indigent defense system. This inspires curiosity as to how Arkansas is able to have implemented and continued to fund such a system.

Even though both federal funding and the general revenue budget of Arkansas is lower than Mississippi's, Arkansas' total state operating expenditures in the 2017 fiscal year were approximately a little over four billion dollars more. Mississippi's estimated total state expenditures were \$21,378,287,785 for the 2017 fiscal year, where as, Arkansas' were \$25,090,401,084.<sup>32,33</sup> This difference in utilization of revenues was not due to a difference in general revenue or federal revenue as Mississippi reported higher

balances in each category. It instead is likely due to the difference in special funds that are not included in the general funds nor the federal funds. Most notably, Arkansas has a special fund characterized as a “HSC/MCF Fund” that is not directly specified in Mississippi’s expenditure, although it might be included in other special funds categories.<sup>33</sup> This fund needs significant consideration as it is the largest source of funding for the Arkansas Public Defender Commission.<sup>33</sup> Arkansas additionally receives revenue from the Administration of Justice and generates revenue from user fees, attorney fees, and bail bond fees to bring the total criminal indigent defense expenditure to \$24,526,806.<sup>24</sup>

The difference in current spending on capital defense of the state of Mississippi and of indigent defense in the state of Arkansas would leave \$21,475,988.00 for which Mississippi would need to allocate. This amount would have to be taken from other programs, at least in the short term. One such program that could cut excess funding could be the Attorney General’s Office of Mississippi. Although the state of Arkansas has overall higher crime rates, Arkansas’ attorney general office was allocated only \$19,877,444.00 in the 2017 fiscal year, where as Mississippi allocated \$28,152,014.00 to the same office.<sup>31,32</sup> Differences like this show areas where Mississippi could reallocate state funds in order to provide a statewide indigent defense system. Though there are limits to deciding particularly where funding must be moved, it is clear that there is room in Mississippi’s budget just as there is in Arkansas.

### **3.5: Implementation**



If a statewide indigent defense system is successful in such a similar state to Mississippi as Arkansas, it would likewise be successful in Mississippi. A statewide indigent criminal defense system would not only bring the state of Mississippi up to constitutional standards, but would also solve many of the problems that the current system faces. The three major problems of the current system of indigent defense system in Mississippi would be remedied. The state of Arkansas and its indigent defense system does not experience the problems of the lack of cohesiveness across the state, lack of independence of counsel, and the economic losses incurred that Mississippi does currently.

Though the change in the system seems costly at first, these costs can be reduced by a slow crossover and over time and are miniscule in comparison to the long-term benefits. The elimination of the economic losses created by the county system, due to pre-trial incarceration rates, could be used in other constrained budgetary areas. Overall, it is clear that the benefits of the implementation of a statewide indigent defense system in Mississippi outweigh the costs, even if those costs are steep initially.

Not only would a statewide indigent defense system be beneficial to the state of Mississippi, it is also a feasible change. Other states with similarly tight state budgets have been able to make the change; therefore, Mississippi can too. By comparison, Mississippi has areas that should be able reduce spending in order to give leeway for such implementation. Arkansas allocates significantly less to its attorney general and office. This is just one example of an area that Mississippi could redistribute spending in order to allocate for the funding of a statewide indigent defense system.

All of this information points to extended benefits of a statewide system, the improvements that such a system would make, and the feasibility of this action. Despite these facts and despite all of the entities in Mississippi that have pushed the legislature for almost a decade to adopt a statewide indigent defense system, there still has been no change. Mississippi is not the only state that is neglecting their poorest citizens, but it is overlooking the effects that subpar indigent defense has on other aspects of the state, including the state budget. Mississippi should take action and implement a statewide indigent defense system.

## CONCLUSION

Indigent defense has been a long deliberated topic in the United States. Specifically since *Gideon v. Wainwright*, it has been a topic within each state. Despite the relevance and importance of this topic, little change has been made throughout the nation. In some states, like Mississippi, there has been no change. Although there is recognition of problems with the indigent defense system that many states have, there is no inclination to take steps to fix the problem. Unfortunately, many people are not concerned about the welfare of poor criminals. This leads to the disregard of the importance of their constitutional rights. In poverty stricken areas, like in many places within the state of Mississippi, this ignorance leads to heightened problems. If every citizen's constitutional rights are not substantial enough to create a desire for change, the losses created and consequences on society as a whole should be.

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