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# “License, Registration, and State Funding, Please”: Overhauling Louisiana’s Traffic-Ticket Funding Scheme of Public Defenders

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# **“License, Registration, and State Funding, Please”: Overhauling Louisiana’s Traffic-Ticket Funding Scheme of Public Defenders**

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## INTRODUCTION

Gregory Bright was barely 18 years old when the State of Louisiana charged him with second-degree murder.<sup>1</sup> The prosecution based the charge on a sole piece of eyewitness testimony from a woman addicted to heroin and diagnosed with paranoid schizophrenia whom the police paid in exchange for her testimony.<sup>2</sup> An adequately staffed and well-funded defense counsel easily could have won this case; Bright, however, like 85% of Louisiana's accused criminals, was indigent and could not afford to hire competent counsel.<sup>3</sup> The court, therefore, appointed Bright a district public defender who interviewed no witnesses, conducted no discovery, and performed no investigation.<sup>4</sup> Subsequently, the court sentenced Bright to life in prison without the possibility of parole.<sup>5</sup> Twenty-seven years later, the Innocence Project overturned Bright's conviction after the organization's work revealed crucial evidence the public defender had failed to locate.<sup>6</sup>

"Equal justice under law" is considered a stalwart of American democracy and is prominently inscribed on the United States Supreme

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1. *Defending the Innocent*, LA. PUB. DEFENDER BOARD, <http://lpdb.la.gov/About/Defending%20the%20Innocent.php> [<https://perma.cc/A4L4-F4MF>] (last visited Sept. 24, 2018).

2. *Gregory Bright*, INNOCENCE PROJECT NEW ORLEANS, <http://www.ip-no.org/exonoree-profile/gregory-bright> [<https://perma.cc/8BP9-5NNU>] (last visited Sept. 24, 2018).

3. David Carroll, *Louisiana's Right to Counsel Problems Explained*, SIXTH AMEND. CTR. (Apr. 4, 2016), <http://sixthamendment.org/louisianas-right-to-counsel-problems-explained/> [<https://perma.cc/RJ4U-BZ5D>]; *Defending the Innocent*, *supra* note 1.

4. *Defending the Innocent*, *supra* note 1.

5. Bright was illiterate prior to entering jail, but taught himself to read and write and appealed his case to the Louisiana Supreme Court. The Innocence Project New Orleans ("IPNO") eventually took up the case. IPNO brought forth all the evidence the public defender failed to find in the first case, including several alibi witnesses. The Louisiana Supreme Court overturned Bright's and his co-defendant's convictions. On June 24, 2003, the prison released Bright and Truvia, his co-defendant. Bright spent nearly 27 years in prison for a crime he did not commit, and competent defense easily could have proven Bright's innocence the first time. *Id.*; *Gregory Bright*, *supra* note 2.

6. *Defending the Innocent*, *supra* note 1; *Gregory Bright*, *supra* note 2.

Court building.<sup>7</sup> Well-known indigent defense reformer Stephen Bright,<sup>8</sup> however, argues that “unless something changes, we’re going to have to someday blast ‘equal justice under law’ off the Supreme Court building.”<sup>9</sup> Bright argues the removal of this inscription is necessary because the indigent defendant has nothing resembling “equal justice under the law.”<sup>10</sup>

Louisiana is synonymous with chronically underfunded and overworked public defenders.<sup>11</sup> The state has these issues because of its unique and unstable funding model.<sup>12</sup> Louisiana funds its public defenders on both the state and district level,<sup>13</sup> but court fines on the district level generate the bulk of the funding.<sup>14</sup> Although constitutionally secured through the Sixth Amendment, the indigent right to counsel has plagued Louisiana since the United States Supreme Court’s landmark decision in *Gideon v. Wainwright*.<sup>15</sup> In *Gideon*, the Court construed the Sixth Amendment of the Constitution to mandate an affirmative right to counsel to all indigent defendants charged with a felony.<sup>16</sup> Post-*Gideon*, Louisiana has struggled to adequately provide for public defenders to represent the poorest in society.<sup>17</sup> Unless the state secures a stable system of funding for Louisiana’s public defenders, justice will be guaranteed only for those who can afford it.

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7. See *The Court and Constitutional Interpretation*, U.S. SUP. CT., <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/9YPX-2U4M>] (last visited Sept. 24, 2018).

8. Stephen Bright bears no relation to Gregory Bright, mentioned in the preceding paragraph.

9. Lee Cowan, *Unequal Justice Under the Law*, CBS NEWS (Aug. 13, 2017, 9:12 AM), <https://www.cbsnews.com/news/unequal-justice-under-the-law/> [<https://perma.cc/5723-5NJ8>].

10. *Id.*

11. See generally Andrea M. Marsh, *State of Crisis: Chronic Neglect and Underfunding for Louisiana’s Public Defense System*, NAT’L ASS’N CRIM. DEF. L. (2017), [https://www.nacdl.org/louisianapublicdefense\\_report/](https://www.nacdl.org/louisianapublicdefense_report/) [<https://perma.cc/K25X-4QXK>].

12. John Burkhardt, *The Crisis in Public Defense Funding: The Approaching Storm & What Must Be Done*, 62 LA. B.J. 360, 361 (Feb./Mar. 2015).

13. Louisiana has 42 judicial districts; each district is comprised of at least one parish. *Maps of Judicial Districts*, LA. SUP. CT., [https://www.lasc.org/about\\_the\\_court/map01.asp](https://www.lasc.org/about_the_court/map01.asp) [<https://perma.cc/BG3S-UWAZ>] (last visited Sept. 24, 2018).

14. Burkhardt, *supra* note 12, at 361.

15. *Id.* at 361–62.

16. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

17. Burkhardt, *supra* note 12, at 361–62.

This Comment proposes a new funding structure for Louisiana's public defenders that eliminates budget shortfalls by substituting the current district-level user-pay system,<sup>18</sup> in which all criminal defendants bear the cost of indigent defense through court fees and fines, for a centralized, state-funded general revenue stream.

Part I of this Comment briefly explains the United States Supreme Court's constitutional obligation mandated in *Gideon v. Wainwright* and discusses the application of *Gideon* in Louisiana. It focuses on problems posed by Louisiana's distinctive and highly unstable public defender funding structure. Part II addresses proposed solutions to the funding crisis, ranging from broad criminal justice reform to smaller administrative reform initiatives. Part III focuses on Louisiana-specific needs for indigent defense funding and considers solutions tailored to those needs. Part IV concludes by proposing the ideal Louisiana solution of a state-centralized funding stream for indigent defense while addressing potential caveats and the future of indigent defense in the state.

### I. THIS IS HOW WE DO IT, WHERE I'M FROM<sup>19</sup>

Louisiana is infamous for its unique traditions in government and politics,<sup>20</sup> including the way the state funds indigent defense.<sup>21</sup> Louisiana primarily funds public defenders through criminal conviction fees—the bulk of which are generated from traffic tickets.<sup>22</sup> The current funding system is barely keeping the public defenders' offices open, much less providing adequate counsel to the indigent defendant.<sup>23</sup> Despite a constitutional mandate, Louisiana has consistently underfunded and disregarded public defenders since the Supreme Court's decree in *Gideon* in 1963.<sup>24</sup>

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18. This Comment uses "user-pay system" interchangeably with "district-level court fine system" to describe Louisiana's funding of indigent defense.

19. BIG TYMERS, *This Is How We Do It, on BIG MONEY HEAVYWEIGHT* (Cash Money Records 2003).

20. See generally WAYNE PARENT, *INSIDE THE CARNIVAL: UNMASKING LOUISIANA POLITICS* (La. State Univ. Press 2004).

21. Carroll, *supra* note 3.

22. Marsh, *supra* note 11, at 9–16.

23. *Id.*

24. *Id.*

A. *Gideon and Louisiana's Attempt at Meeting its Requirements*

The Sixth Amendment of the United States Constitution broadly proclaims, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”<sup>25</sup> The Supreme Court, however, did not extend this provision to the states until 1963 in the landmark decision of *Gideon v. Wainwright*.<sup>26</sup> Prior to *Gideon*, the Court declared the Sixth Amendment right to counsel to be a fundamental right in *Powell v. Alabama*<sup>27</sup> and, therefore, incorporated by the Fourteenth Amendment to the states as a fundamental Bill of Rights protection.<sup>28</sup> Ten years after *Powell*, however, in *Betts v. Brady*,<sup>29</sup> the Court held that the right to counsel was not a fundamental right, utilizing the same historical data as the *Powell* Court but reaching the opposite conclusion.<sup>30</sup> The *Gideon* Court rectified this inconsistency by declaring the Sixth Amendment a fundamental right and overruling *Betts*, therefore applying the right to counsel to the states through the Fourteenth Amendment.<sup>31</sup>

In *Gideon*, the Supreme Court recognized the essential nature of the right to counsel for an indigent defendant charged with a felony.<sup>32</sup> The Court stated the right to counsel was an “obvious truth” based on “reason and reflection . . . [that] 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.”<sup>33</sup> The Court later expanded the right to counsel to cover all crimes that deprive a defendant of his liberty, describing the right as a “requisite to the very existence of a fair trial.”<sup>34</sup>

Although the Court interpreted a constitutional requirement, many have described *Gideon's* decision as an unfunded mandate requiring states to provide attorneys to all indigent criminal defendants.<sup>35</sup> Post-*Gideon*, states were forced to develop different solutions to comply with the

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25. U.S. CONST. amend. VI.

26. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

27. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

28. *Gideon*, 372 U.S. at 342–43.

29. *Betts v. Brady*, 316 U.S. 455, 471–72 (1942), *overruled by Gideon*, 372 U.S. 335 (1963).

30. *Gideon*, 372 U.S. at 340.

31. *Id.* at 342–43.

32. *Id.* at 342–44.

33. *Id.* at 344.

34. *Argersinger v. Hamlin*, 407 U.S. 25, 31–32 (1972).

35. Stephen Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 687 (2010).

expensive mandate. Many states did not devote adequate resources to the new requirement;<sup>36</sup> Louisiana was one of them.<sup>37</sup>

In the first 30 years post-*Gideon*, Louisiana implemented a highly unorganized system in which each judicial district controlled the supervision and distribution of funds to indigent defenders.<sup>38</sup> The funding for Louisiana's early program originated from a criminal conviction fee the Louisiana Legislature levied in 1966.<sup>39</sup> The state legislature established local indigent defender boards ("IDB") and charged local state judges to appoint members to the local boards.<sup>40</sup> The local IDBs continued to provide services to indigent defendants without the benefit of state oversight until 1993.<sup>41</sup> The bulk of public defense funding continued to derive from conviction fees and was later extended to include money collected from traffic ticket convictions.<sup>42</sup> Despite the extension, the IDB "existed in a state of 'chronic underfunding.'"<sup>43</sup> In 1993, the Louisiana Supreme Court rebuked the state legislature for its failure to provide adequate funds and oversight to the district public defender and warned the legislature that lack of action would cause the court to intervene.<sup>44</sup>

The Louisiana Legislature failed to heed the warning of the Louisiana Supreme Court, prompting the court to create the Louisiana Indigent Defense Board ("LIDB") in 1994.<sup>45</sup> The LIDB kept the IDBs intact but created a statewide board to implement defense-delivery standards.<sup>46</sup> By 1997, the Louisiana Legislature finally acquiesced and embraced the board, changing the name to the Louisiana Indigent Defense Assistance Board ("LIDAB") and provided the program with the state's first-ever appropriation of funds for indigent defense services.<sup>47</sup> Despite the statewide supplement, the LIDAB struggled with the same funding problems because local funding remained within the control of the IDBs

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36. *Id.*

37. Marsh, *supra* note 11, at 9–10.

38. *Id.*

39. *Id.*

40. *Id.* at 9.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 10.

45. *Id.*

46. *Id.* These defense-delivery standards established quality and performance standards for the district public defender. *Id.*

47. Richard Drew, *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA. L. REV. 955, 966 (2009).

and varied depending on the size and population of the judicial district.<sup>48</sup> In addition to unstable local funding, the Louisiana Legislature refused to fully fund the LIDAB.<sup>49</sup> In 1998, the LIDAB estimated a need of about \$20 million, but the legislature appropriated only \$5 million.<sup>50</sup> By 2002, state and local funding could not cover indigent defense services in almost half of the judicial districts.<sup>51</sup>

In 2007, the Louisiana Legislature—again amidst increasing call for reform—passed Act 307, establishing the state-centralized Louisiana Public Defender Board (“LPDB”) to provide equal and sufficient public defense throughout all judicial districts.<sup>52</sup> One major benefit of the LPDB was a larger appropriation of state funds; nevertheless, the main source of indigent defense funding remained at the district level through conviction fees.<sup>53</sup> The district public defender continued to control the conviction fees and could not disburse them to any other district or the LPDB.<sup>54</sup> Despite the legislature’s noble intention, funding reform failed and indigent defense remained on the same uncertain fiscal foundation that caused previous reform efforts in Louisiana to fail.<sup>55</sup>

### *B. Funding Structure of Louisiana Public Defenders*

Louisiana delivers funding to its public defenders on the state and district level through a user-pay system.<sup>56</sup> A user-pay system is one in which the cost of indigent defense is spread among all criminal defendants through court fees and fines imposed on those found guilty.<sup>57</sup> The court fees include both the application fee indigent defendants pay to secure a public defender and criminal conviction fees.<sup>58</sup> Nearly two-thirds of

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48. Marsh, *supra* note 11, at 10–11.

49. *Id.* at 11.

50. *Id.*

51. *Id.*

52. Louisiana granted the LPDB broad authority “over all aspects of the delivery of public defender services throughout the courts of the State of Louisiana.” LA. REV. STAT. § 15:147(A) (2018); Burkhardt, *supra* note 12, at 360.

53. Burkhardt, *supra* note 12, at 361.

54. Marsh, *supra* note 11, at 13.

55. *Id.*

56. Burkhardt, *supra* note 12, at 361.

57. *Id.*

58. A \$45 fee is levied on every criminal defendant who is “convicted after trial, pleads no contest, or who forfeits his or her bond for violation of a state statute or a parish or municipal ordinance other than a parking ticket.” Frank Neuner, *The Funding Crisis in the Louisiana Public Defender System: Public*

funding for indigent defense in Louisiana comes from these criminal conviction fees, specifically from traffic tickets.<sup>59</sup>

The criminal conviction fee is shared among multiple parties, including the local district attorney, the sheriff, the clerk of court, the crime lab, and many other criminal justice related groups.<sup>60</sup> The amount each party receives varies depending on the district and the type of crime, but the district attorney and sheriff are each guaranteed at least 12% of the fines.<sup>61</sup> The remainder of the fines are disbursed to various criminal justice groups.<sup>62</sup> The funding structure in Louisiana is collapsing under the weight of issues like the unequal distribution of funds among different districts, the decrease in traffic tickets, and the overall instability created by relying on a user-pay system.<sup>63</sup>

Traffic ticket convictions are the most important part of the user-pay system because they represent 75% of each indigent defender's district budget.<sup>64</sup> Traffic tickets, however, have presented a new set of problems over the last decade, highlighting even greater volatility in Louisiana's already unstable indigent-defense-funding model.<sup>65</sup> Problems associated with traffic tickets include an unequal distribution of interstate and

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*Defense Reform Has a Long Way to Go*, 60 LA. B.J. 110, 112 (Aug./Sept. 2012); Marsh, *supra* note 11, at 20.

59. Burkhardt, *supra* note 12, at 361.

60. The groups that receive the criminal conviction fees include the Crime Victims Reparations Fund, the Crime Stoppers Organization, the Coroner, the Drug Abuse Education and Treatment Program, and more. LA. LEGIS. AUDITOR, THE COLLECTION OF COURT COSTS AND FINES 2–3 (2014), [http://app.la.state.la.us/PublicReports.nsf/0/EC68FCD9E9FFA8AC486257CAE00699A86/\\$FILE/00038BDE.pdf](http://app.la.state.la.us/PublicReports.nsf/0/EC68FCD9E9FFA8AC486257CAE00699A86/$FILE/00038BDE.pdf) [<https://perma.cc/9Z9N-MXEZ>].

61. LA. REV. STAT. § 15:571.11 (2018); LA. LEGIS. AUDITOR, *supra* note 60.

62. The legislature has failed to make a clear law explaining the distribution of fees to groups and has mainly left it discretionary based on the district. LA. LEGIS. AUDITOR, *supra* note 60. But the Public Defender is guaranteed \$45 in all criminal convictions. LA. REV. STAT. §15:168.

63. Samantha Sunne, *Louisiana Public Defenders Lose Key Source of Income as Prosecutors Divert Speeding Ticket Fines*, ADVOCATE (July 31, 2017, 2:06 PM), [http://www.theadvocate.com/baton\\_rouge/news/courts/article\\_5ad996c6-7623-11e7-a3f7-effbaf2e7ad1.html](http://www.theadvocate.com/baton_rouge/news/courts/article_5ad996c6-7623-11e7-a3f7-effbaf2e7ad1.html) [<https://perma.cc/6UBX-JMLT>].

64. John Simerman & Chad Calder, *Louisiana at a Crossroad on Providing Poor with Access to Public Defenders in Criminal Cases, Funding the Program*, ADVOCATE (Mar. 1, 2016, 4:09 AM), [http://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_70441639-c7b0-5c26-b97c-e47feb08f6b5.html](http://www.theadvocate.com/baton_rouge/news/crime_police/article_70441639-c7b0-5c26-b97c-e47feb08f6b5.html) [<https://perma.cc/6WN9-XDHP>].

65. Sunne, *supra* note 63.

highways, decrease in overall traffic ticket convictions, and conflicting local police priorities.<sup>66</sup>

Of the 42 judicial districts in Louisiana, 13 do not have a significant enough portion of the U.S. Interstate highways located within its district to collect traffic tickets.<sup>67</sup> Interstate highways are more heavily populated roadways, which both local commuters and long-distance travelers use, increasing the potential for more traffic tickets as compared to other roadways.<sup>68</sup> The disparity of interstate highways automatically puts 25% of judicial districts at a significant disadvantage.<sup>69</sup> For example, Vernon, the 30th district, and St. Charles, the 29th district,<sup>70</sup> have roughly the same population and number of criminal cases filed.<sup>71</sup> The two districts, however, have significantly different indigent defense budgets.<sup>72</sup> Vernon's public defender's office is in the midst of a budget shortfall and had to refuse new indigent clients; meanwhile, the St. Charles Parish public defender's office operates with a sufficient budget and double the staff of Vernon.<sup>73</sup> The explanation for this difference is simple: St. Charles Parish has Interstate 10 and two major highways—U.S. Highway 90 and Highway 61—running through its judicial district,<sup>74</sup> whereas Vernon Parish only has U.S. Highway 171, and no interstate in its jurisdiction.<sup>75</sup> This disparity in funds shows that relying on traffic tickets to fund the indigent defender is inequitable and ineffective in guaranteeing the right to counsel.<sup>76</sup>

Furthermore, traffic ticket convictions have been declining in Louisiana.<sup>77</sup> Over the last five years, Louisiana has experienced a 30%

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66. Burkhardt, *supra* note 12, at 361.

67. *Id.*

68. See generally *The Interstate Highway System*, HISTORY.COM, <http://www.history.com/topics/interstate-highway-system> [<https://perma.cc/SL7C-Z8GT>] (last visited Sept. 24, 2018).

69. Sunne, *supra* note 63.

70. *Maps of Judicial Districts*, *supra* note 13.

71. The average total population in both St. Charles and Vernon Parishes is 50,000, and the average number of criminal cases filed in both districts is 1,600. Simerman & Calder, *supra* note 64.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Vernon Parish*, GOOGLE MAPS, <https://www.google.com/maps/place/Vernon+Parish,+LA/@30.7606761,-93.1378046,9z/data=!4m5!3m4!1s0x863a59c00aa74a7b:0xa9681f147d3c3df!8m2!3d31.1320009!4d-93.1779659> [<https://perma.cc/KUZ7-EDVC>] (last visited Sept. 24, 2018).

76. Simerman & Calder, *supra* note 64.

77. Sunne, *supra* note 63.

drop in traffic tickets handled in court.<sup>78</sup> The decrease is based primarily on the district attorney's traffic ticket diversion program.<sup>79</sup> The pre-trial diversion program allows the offender to pay an increased sum of money to the district attorney's office in exchange for avoiding a criminal conviction.<sup>80</sup> The clearance of a conviction allows the offender to avoid the necessary report to his insurance company and the corresponding premium hike.<sup>81</sup> The local district attorney also benefits from the program because he receives the entirety of the fine without dividing the money among the multiple agencies that normally receive a share of the conviction fees.<sup>82</sup> The effect of the decline of traffic tickets on the public defender's budget is staggering; the LPDB calculated in 2014 that the decrease in conviction fees from 2009 to 2014 resulted in nearly a \$9.2 million loss to public defender offices.<sup>83</sup>

The diversion program also highlights inequity between the District Attorney and the district public defender.<sup>84</sup> The Louisiana District Attorneys' budget is already significantly larger than the public defenders' budget.<sup>85</sup> Louisiana's public defense spending in 2014 totaled \$63 million while the district attorney spent almost double that amount at \$122 million.<sup>86</sup>

In addition to the problems created by the diversion program, the public defender lacks control to secure a certain number of traffic tickets. Control of dispensing tickets remains within the purview of local police officers and parish sheriffs.<sup>87</sup> Each police department has its own safety concerns and budgetary restraints, and may not be able to dedicate a substantial portion of its staff to the collection of traffic tickets.<sup>88</sup> For example, Orleans Parish does not have a traffic diversion program but has

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78. In some parishes, the number is even greater. For example, Calcasieu Parish saw a 42% decrease in traffic tickets processed in court from 2011 to 2012. *Id.*

79. *Id.*

80. *Id.*

81. Julie O'Donoghue, *District Attorneys Traffic Ticket Programs Cause Public Defenders to Lose Money: report*, NOLA.COM (Aug. 1, 2017), [http://www.nola.com/politics/index.ssf/2017/08/public\\_defender\\_funding\\_crisis.html](http://www.nola.com/politics/index.ssf/2017/08/public_defender_funding_crisis.html) [https://perma.cc/2ANE-3JJF].

82. *Id.*; see *supra* Part I.B.

83. *A Review of Public Defense Funding in Louisiana*, LA. PUB. DEFENDER BOARD, <http://files.lsba.org/documents/CJC/PublicDefenderFundingPP.pdf> [https://perma.cc/3QQW-98VB] (last visited Sept. 24, 2018).

84. Marsh, *supra* note 11, at 21.

85. *Id.*

86. *Id.*

87. Carroll, *supra* note 3.

88. Burkhardt, *supra* note 12, at 361.

still seen a decrease in traffic tickets since 2008, largely because of the lack of resources and understaffing in the New Orleans Police Department.<sup>89</sup> Regardless of local police department's budgetary and staffing priorities, the public defender must still represent all indigent defendants, therefore, a stable indigent defense funding solution must be implemented.<sup>90</sup>

Louisiana public defenders are tasked with representing 85% of defendants convicted of crimes.<sup>91</sup> The public defenders' job becomes even more difficult when supported by an inadequate funding mechanism.<sup>92</sup> The answer to Louisiana's funding crisis must involve multiple innovative solutions to provide the indigent defendant with constitutionally sufficient services. These solutions must include cooperation and coordination on the local, state, and national level, as one solution would be unable to fully stabilize Louisiana's indigent defense budget.

## II. GO P-D, 'CAUSE THAT'S MY P-D: POTENTIAL FIXES TO THE CURRENT SYSTEM<sup>93</sup>

Two categories describe the potential solutions to solving Louisiana public defenders' funding crisis: broad criminal justice reform and smaller solutions based on administrative changes. Many indigent defense reformers advocate for a federal solution.<sup>94</sup> Litigation-focused solutions, however, are not discussed as this Comment focuses exclusively on the most practical solutions.<sup>95</sup> The first set of solutions discussed are

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89. Jessica Williams, *Cash grabs, decline in ticket revenue leave New Orleans Traffic Court with dire \$2.1M deficit*, ADVOCATE (Aug. 30, 2016), [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_4aa4a6c2-6e1f-11e6-ace0-7be149a87f2e.html](https://www.theadvocate.com/new_orleans/news/courts/article_4aa4a6c2-6e1f-11e6-ace0-7be149a87f2e.html) [<https://perma.cc/6SF9-N6X6>]; Sunne, *supra* note 63.

90. *See supra* Part I.A.

91. Dylan Walsh, *On the Defensive*, ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> [<https://perma.cc/74JF-T6K6>].

92. Marsh, *supra* note 11, at 16.

93. *See generally* LIL WAYNE, *Go D.J., on THA CARTER* (Cash Money Records 2004).

94. Sara Mayeux, *Gideon v. Wainwright in the Age of a Public Defense Crisis*, TALK POVERTY (May 9, 2016), <https://talkpoverty.org/2016/05/09/gideon-wainwright-age-public-defense-crisis/> [<https://perma.cc/M3GM-76S5>].

95. Litigation has played a vital role in funding and reforming public defenders' budgets throughout the United States. Currently, the Southern Poverty Law Center is suing Louisiana's public defenders on behalf of eight different indigent defendants; however, litigation reform of public defense will not be addressed in this Comment due to the complexity of the issue. Litigation as a tool

comprehensive measures that aim to reform the criminal justice system as a whole in order to properly address the indigent defense funding crisis.

*A. Solutions Based on Broader Criminal Justice Reform*

The United States is a society of mass incarceration.<sup>96</sup> Since the imposition of *Gideon*'s mandate in 1963, the criminal justice system has exploded.<sup>97</sup> In 1963, federal and state prisons incarcerated 217,000 people; today those same prisons house approximately 2.3 million people.<sup>98</sup> Louisiana has the second highest per capita incarceration rate in the United States, with 712 residents imprisoned for every 100,000—nearly double the national average.<sup>99</sup> Louisiana spends over \$3.5 billion annually to maintain the largest per capita prison population in the world.<sup>100</sup> The majority in *Gideon* could not have foreseen such drastic growth in the prison population; *Gideon*'s holding, however, remains a constitutional *requirement* to provide the indigent defendant with counsel.<sup>101</sup> Many reformers have suggested the only way to accurately solve the indigent

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for reform in indigent defense must be discussed in isolation to fully develop each facet. See Lorelei Laird, *Starved of Money for Too Long, Public Defender Officers Are Suing—and Starting to Win*, A.B.A. J. (Jan. 2017), [http://www.abajournal.com/magazine/article/the\\_gideon\\_revolution](http://www.abajournal.com/magazine/article/the_gideon_revolution) [<https://perma.cc/73WG-JQ4T>].

96. Thomas Giovanni & Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CTR. FOR JUST. 3 (2013), [http://www.brennancenter.org/sites/default/files/publications/Gideon\\_Report\\_040913.pdf](http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf) [<https://perma.cc/WT5A-XFG6>].

97. *Id.*

98. *Id.* Between 1970–2000 the general United States population only rose by 40%, but the prison population rose by 500%. Ryan S. King, Marc C. Mauer & Malcolm C. Young, *Incarceration and Crime: A Complex Relationship*, SENT'G PROJECT 1 (2005), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf> [<https://perma.cc/CC63-HZD3>].

99. At the inception of this Comment, Louisiana had the highest incarceration rate in the United States, but as of 2018 there has been a slight decline in Louisiana's prison population. See John Simerman, *'Prison capital' no more: Louisiana sheds long-held title, but remains above U.S. incarceration rate*, ADVOCATE (June 20, 2018), [https://www.theadvocate.com/baton\\_rouge/news/article\\_65844992-6b53-11e8-ac2d-97c9311b1424.html](https://www.theadvocate.com/baton_rouge/news/article_65844992-6b53-11e8-ac2d-97c9311b1424.html) [<https://perma.cc/39ZX-QQCY>]; Associated Press, *Louisiana Has the Highest Incarceration Rate in the Nation*, WASH. TIMES (Mar. 16, 2017), <https://www.washingtontimes.com/news/2017/mar/16/louisiana-has-the-highest-incarceration-rate-in-th/> [<https://perma.cc/5A7K-FF9J>].

100. Burkhardt, *supra* note 12, at 362.

101. Bright, *supra* note 35, at 687.

defender funding crisis is to engage in broader criminal justice reform throughout Louisiana.<sup>102</sup>

### *1. Reclassifying Misdemeanors as Fine Crimes*

One proposal many reform activists support is simply to “decreas[e] the need for public defenders” by reclassifying the punishment for minor, nonviolent misdemeanors as fine crimes.<sup>103</sup> The Sixth Amendment right to counsel attaches only to crimes that involve imprisonment,<sup>104</sup> but no similar requirement exists for crimes that merely impose a fine as a punishment.<sup>105</sup> In the era of mass incarceration, many minor offenses have been over-criminalized, placing an even greater workload on the public defender.<sup>106</sup> A declassification of minor misdemeanors would decrease significantly the number of cases the public defender is required to handle.<sup>107</sup>

Reclassifying misdemeanors may decrease the overall workload for public defenders, but it also places a substantial financial burden on indigent defendants.<sup>108</sup> Some activists have referred to decriminalization as “repackaging punishment for poor people”<sup>109</sup> because it has the greatest effect on the poor.<sup>110</sup> Defendants with the means to pay the fine attached to the crime have ample opportunity to do so, but courts usually send defendants who cannot afford to pay the fine to jail,<sup>111</sup> perpetuating the cycle for public defenders.<sup>112</sup>

A way to ensure both indigent defendants *and* public defenders both benefit from this reform is to ensure that states’ decriminalization statutes include certain provisions.<sup>113</sup> Specifically, the provisions must ensure no

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102. Carroll, *supra* note 3.

103. *Id.*

104. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). *See generally* Rodney Uphoff, *Symposium: Broke and Broken: Can We Fix Our State Indigent Defense System, Foreword*, 75 MO. L. REV. 667 (2010).

105. Scott v. Illinois, 440 U.S. 367, 374 (1979).

106. Uphoff, *supra* note 104, at 675.

107. *Id.*

108. Leon Neyfakh, *Does Decriminalization Work?*, SLATE (Feb. 17, 2015, 10:51 AM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/02/decriminalization\\_why\\_reducing\\_the\\_punishments\\_for\\_misdemeanors\\_doesn\\_t.html](http://www.slate.com/articles/news_and_politics/crime/2015/02/decriminalization_why_reducing_the_punishments_for_misdemeanors_doesn_t.html) [<https://perma.cc/2JFG-SS83>].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

arrest, no jail time, and a limited criminal record for a defendant convicted of a fine crime.<sup>114</sup> For example, in 2008, Massachusetts decriminalized the possession of an ounce or less of marijuana.<sup>115</sup> Today, instead of imposing jail time, the offender pays a civil penalty of \$100 to the city in which the offense was committed and forfeiture of the marijuana.<sup>116</sup> The text of the bill specifically prohibits imposing any other “form of penalty, sanction or disqualification” on the offender, and the bill offers no specific punishment for failure to pay the civil penalty.<sup>117</sup> Despite decriminalization’s flaws, most notably the greater burden on poor defendants, decriminalization reforms can alleviate some of the strain on the system, the defendant, and the public defender.<sup>118</sup>

## 2. Reexamining Sentencing Provisions

A further way to engage in broader criminal justice reform is to reduce prison sentences that courts impose on offenders.<sup>119</sup> Systemically reduced sentences would decrease the overall burden on prisons, freeing money spent on prison administration for use by the underfunded public defender.<sup>120</sup> The Louisiana Legislature can also abolish mandatory minimum sentences and three-strike laws, which sentence people charged with their third crime to life in prison.<sup>121</sup> In the 1990s, New York removed mandatory minimums for most drug crimes and gave judges sentencing discretion.<sup>122</sup> As a result, the country heralded New York as an effective leader in reducing the state’s criminal justice budget and incarceration rates—seeing a 10% reduction in prison population from 1995 to 2007—

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114. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1109–14 (2015).

115. Keriann Speranaza, *The Effects of Massachusetts’ Decriminalization of Marijuana Law on Use Patterns*, 7 UNDERGRADUATE REV. 101, 101–02 (2011).

116. *Id.*

117. MASS. GEN. LAWS ch. 94C, § 32L (2018).

118. *See generally* Natapoff, *supra* note 114.

119. Uphoff, *supra* note 104, at 676.

120. *Id.* at 676.

121. For example, in Louisiana, if an offender possessed or used a firearm in the commission of certain violent felonies the court must sentence the offender to a minimum of ten years. If the offender discharged the firearm during the commission of the violent felony, the court must impose a 20-year mandatory minimum sentence. *See* LA. CODE CRIM. PROC. art. 893.3 (2018). Uphoff, *supra* note 104, at 676.

122. Jackie Rothenberg, *For State Prisons, West Isn’t Best*, 95 A.B.A. J. 15 (Dec. 2009).

as the rest of the United States saw a significant increase in prison population during that same period.<sup>123</sup>

Opponents to reducing prison sentences argue that public safety warrants locking up habitual offenders; nevertheless, the “public safety” notion is largely a myth.<sup>124</sup> Nearly 80% of inmates in Louisiana are nonviolent offenders who could benefit from rehabilitation or reduced sentencing rather than imprisonment.<sup>125</sup> Sentence reduction is the most cost-effective method of criminal justice reform and would reduce the overall burden on the criminal justice system.<sup>126</sup> Instead of spending more funds on prison maintenance, Louisiana should reevaluate its criminal justice priorities—such as rehabilitation and adequate representation for all criminal defendants—and adjust its massive criminal justice budget to match those priorities.<sup>127</sup>

### 3. *Abolishing the Death Penalty*

In addition to reforming sentences and punishments on certain crimes, the Louisiana Legislature should replace the death penalty with a more cost-effective measure.<sup>128</sup> The death penalty remains one of the most substantial monetary burdens on Louisiana’s criminal justice system.<sup>129</sup> Although Louisiana has not completed a study on the cost of the death penalty, other states’ studies serve as sufficient comparative models.<sup>130</sup> For example, a study in Oregon found that of 61 death penalty cases, the average cost on taxpayers was \$2.3 million per case, including costs of

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123. *Id.*

124. Uphoff, *supra* note 104, at 676.

125. Associated Press, *supra* note 99.

126. Rothenberg, *supra* note 122.

127. Burkhardt, *supra* note 12, at 362.

128. *See generally* *Death Penalty: Saving Lives and Money*, ECONOMIST (Mar. 12, 2009), <http://www.economist.com/node/13279051> [<https://perma.cc/ET5C-748M>].

129. *Louisiana Legislature Considers Bipartisan Measure to Abolish Death Penalty*, DEATHPENALTYINFO.ORG, <https://deathpenaltyinfo.org/node/6732> [<https://perma.cc/MP8A-UG9V>] (last visited Sept. 24, 2018).

130. The legislature tasked a committee in 2014 to determine the costs of the death penalty, and although it was only supposed to take two years, the report publication has been pushed back to January 2018. Mark Ballard, *Mark Ballard: Budget Mess Aside, Could Louisiana Soon Be 1st Southern State to Abolish Death Penalty?*, ADVOCATE (Apr. 9, 2017, 7:15 PM), [http://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_3bb6a2a6-1bac-11e7-b284-73b4969736c0.html](http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_3bb6a2a6-1bac-11e7-b284-73b4969736c0.html) [<https://perma.cc/7N5L-QQQE>].

incarceration.<sup>131</sup> In comparison, the same Oregon study found that of 313 aggravated murder cases, for which the punishment was life without parole, the average cost was \$1.4 million, nearly a million dollars less.<sup>132</sup>

A significant portion of taxpayer money spent on death row inmates is dedicated to the criminal trial and post-conviction appellate process.<sup>133</sup> The same Oregon study found that after removing the cost of incarceration and focusing solely on the cost to prosecute and defend such a case, a death penalty case still costs taxpayers an average of \$1.4 million, while life without parole only costs \$334,522, an 80% cost difference.<sup>134</sup> Although Oregon and Louisiana do not bear the same demographics, the study demonstrates the wide cost margin between a death penalty case and a life-without-parole case.<sup>135</sup>

Louisiana currently has 74 people on death row, and based on the current number of indigent defendants in Louisiana, approximately 63 of those inmates require assistance from the public defender.<sup>136</sup> The total burden of the indigent death row inmates on the state public defender is greatly out of proportion with the public defender's total budget.<sup>137</sup> The state public defender spends over one-third of its total annual state general revenue—nearly \$10 million—on litigating death penalty cases.<sup>138</sup> Six million dollars is reserved for trial-level capital representation, and the remaining four million dollars is spent on appellate and post-conviction representation.<sup>139</sup>

The average public defender does not have the time or resources to adequately defend a death penalty case, but the state is still required to

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131. Aliza B. Caplan et al., *Oregon's Death Penalty: A Cost Analysis* 41–42, LEWIS & CLARK L. SCH. (Nov. 2016), <https://deathpenaltyinfo.org/files/pdf/OregonDeathPenaltyCostAnalysis.pdf> [<https://perma.cc/H93D-RM6Q>].

132. Ballard, *supra* note 130.

133. William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805, 811–12 (2014).

134. Caplan et al., *supra* note 131, at 41–42.

135. *Id.*

136. *Louisiana Legislature Considers Bipartisan Measure to Abolish Death Penalty*, *supra* note 129. There is not an exact report on how many of the inmates on death row are indigent; 63 is an estimate based on the fact that 85% of criminal defendants in Louisiana are indigent. *See supra* Part I.B.

137. Joe Gyan, Jr., *District Attorneys Take Aim at Louisiana Public Defender Board Spending on Death Penalty Cases*, ADVOCATE (Apr. 28, 2016, 8:54 AM), [http://www.theadvocate.com/baton\\_rouge/news/article\\_48e80c7f-fc9a-525c-9037-d8d63b8b7f92.html](http://www.theadvocate.com/baton_rouge/news/article_48e80c7f-fc9a-525c-9037-d8d63b8b7f92.html) [<https://perma.cc/CN4F-A7KP>].

138. *Id.*

139. *Id.*

provide the indigent charged in a death penalty case with counsel.<sup>140</sup> Because of the requirement, the LPDB must contract out most of the death penalty cases to nonprofits and private firms.<sup>141</sup> The LPDB generously compensates the nonprofits and private firms, placing a hefty burden on the LPDB budget.<sup>142</sup> Criminal justice reform activists urge abolishment of the death penalty, advocating that doing so will save Louisiana millions of dollars in litigation fees and create a more stable criminal justice and public defender budget.<sup>143</sup> Additionally, research has shown the death penalty does not create a safer society.<sup>144</sup> The death penalty imposes a significant strain on an already failing indigent defense budget, and Louisiana should abolish it to better allocate public defense resources.<sup>145</sup>

### *B. Solutions Based on Administrative Changes*

Broad reforms, such as abolishing the death penalty, are not the only way to solve Louisiana's indigent defense funding crisis.<sup>146</sup> Incremental and small-scale solutions can effect great change.<sup>147</sup> These potential solutions, hereinafter referred to as "administrative solutions," require either the state or federal government to modify existing programs to increase their effectiveness.

#### *1. Funding Proportional to Caseloads*

The Brennan Center for Justice, a non-partisan law and policy think tank,<sup>148</sup> recommends making state indigent defense funding proportional to public defenders' caseloads.<sup>149</sup> As an example, New York City courts

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140. See *supra* Part I.A.

141. Gyan, Jr., *supra* note 137.

142. *Id.*

143. Uphoff, *supra* note 104, at 676.

144. Post-1976, when the U.S. Supreme Court reinstated the death penalty, large swaths of research on the highly effective deterrent of the punishment filled academic journals. The consensus today among criminologists and sociologists, however, is that this previous research on the deterrent effect is faulty and inconclusive. Daniel Nagin, *Deterrence and the Death Penalty: Why the Statistics Should Be Ignored*, 11 SIGNIFICANCE, Iss. 2, 9–13 (2014).

145. Uphoff, *supra* note 104, at 676.

146. See generally Giovanni & Patel, *supra* note 96, at 8–9.

147. *Id.*

148. *About Us*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/about> [<https://perma.cc/Y78U-VC79>] (last visited Sept. 24, 2018).

149. Giovanni & Patel, *supra* note 96, at 8.

limit public defenders to the American Bar Association standard<sup>150</sup> of 150 felonies or 400 misdemeanors per attorney per year.<sup>151</sup> The New York state legislature increased funding to achieve the caseload standards and hired more attorneys.<sup>152</sup> The Brennan Center proposes states go beyond New York's example and both establish caseload standards and make funding proportional to those standards in the same legislative initiative.<sup>153</sup> Under the Brennan Center's recommendation, a state would fund public defenders as long as they did not exceed caseload standards, creating a heightened incentive to meet those standards.<sup>154</sup>

Louisiana promulgated its own caseload standards under the LIDB in 1994<sup>155</sup> of either 450 misdemeanors per year or 200 felonies per year,<sup>156</sup> but these standards are largely ignored because of the lack of funds and attorneys.<sup>157</sup> The average Louisiana public defender caseload in 2015 was 2.36 times the state's caseload standard.<sup>158</sup> The benefit of establishing caseload standards in proportion to funding is the decreased workload on the district public defender.<sup>159</sup> Louisiana is infamous for its overworked public defenders; therefore, incentivizing public defenders to meet a

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150. The American Bar Association proscribes certain caseload standards which should not be exceeded in its "Ten Principles of a Public Defense Delivery System." *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [<https://perma.cc/K9PS-LXLM>]. A Department of Justice study proscribed the numerical caseload limit the ABA adopted, which limits an attorney to 150 felonies, 400 misdemeanors, 200 juvenile delinquencies, or 25 appeals per year. Although the ABA standards are merely guidelines, each state is free to establish its own caseload standards on their public defenders. *Sufficient Time to Ensure Quality Representation – ABA Principle 4*, SIXTH AMEND. CTR., <http://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/sufficient-time-to-ensure-quality-representation-aba-principle-4/> [<https://perma.cc/BNZ5-UDKS>] (last visited Sept. 24, 2018).

151. Giovanni & Patel, *supra* note 96, at 8.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See supra* Part I.A.

156. James T. Dixon, Jr., *The Louisiana Public Defender Board at the Crossroads Ethics and Law in Public Defense*, LA. PUB. DEFENDER BOARD 1–2 (July 2015).

157. Marsh, *supra* note 11, at 16.

158. *Id.*

159. *Id.* at 29.

caseload standard would ensure adequate service for indigent defendants.<sup>160</sup>

One of the complications of making funds dependent on compliance with caseload standards is that a lack of service to all indigent defendants—and therefore a lack of constitutionally guaranteed Sixth Amendment protections—would result.<sup>161</sup> There simply will not be enough attorneys to match the ABA’s caseload requirement or the funds to hire new attorneys to meet those limits.<sup>162</sup> Lawmakers would have to significantly increase funding for indigent defense to achieve this proposed reform.<sup>163</sup> Louisiana must first prioritize a stable source of funding for public defenders, and then the LDPB can work to achieve attainable caseload standards.<sup>164</sup>

## 2. JAG Grants—Distribution and Eligibility

Greater organization and application of federal grant money within the LPDB would provide another solution to the current indigent funding crisis. The Edward Byrne Memorial Justice Assistance Grant (“JAG”) program provides the largest amount of federal criminal justice resources to state and local jurisdictions.<sup>165</sup> The program provides states with the resources necessary to fund law enforcement, prosecution, court programs, prevention and education, corrections, and much more.<sup>166</sup> Congress is permitted to spend up to \$1.095 billion per year for the program, but Congress has not dedicated that level of funding to the program in over a decade.<sup>167</sup>

Congress awards the funds via a base allocation to each state; lawmakers can enhance the funding depending on two factors: the population of the state and the amount of violent crime within the state.<sup>168</sup> The state then allocates 60% of the funding to the state government and

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160. *Id.*

161. *See generally id.*

162. *Id.* at 16.

163. *Id.*

164. *Id.* at 29.

165. 34 U.S.C. § 10152(a) (2018); *The Byrne JAG Grant Program*, NAT’L CRIM. JUST. ASS’N, <http://www.ncja.org/ncja/policy/about-byrne-jag> [<https://perma.cc/DA53-5TVG>] (last visited Sept. 24, 2018).

166. U.S. DEP’T JUST., INT’L PERSPECTIVES ON INDIGENT DEFENSE 8–9 n.24 (2011), <https://www.ncjrs.gov/pdffiles1/nij/236022.pdf> [<https://perma.cc/KP2D-UTQY>].

167. *The Byrne JAG Grant Program*, *supra* note 165.

168. *Id.*

40% of the funding to local governments.<sup>169</sup> In each state, the governor or other chief officer must appoint an agency to distribute the JAG funds.<sup>170</sup> In Louisiana, the Louisiana Commission on Law Enforcement (“LCLE”)<sup>171</sup> is tasked with administering JAG funds in Louisiana and many other federal grants on both the state and local level.<sup>172</sup>

Distribution of federal funds is problematic due to the inadequate representation of district public defenders on state commissions tasked with distributing the grant money.<sup>173</sup> LCLE currently has 55 members.<sup>174</sup> Of those 55, however, nearly half are sheriffs and police chiefs, and 7 more are local district attorneys, many of whom have interests in opposition to those of the indigent defender.<sup>175</sup> Only the state public defender serves as a clear advocate of the public defender on the LCLE.<sup>176</sup> District public defenders must be given a greater voice in the LCLE in order to ensure parity in distribution of JAG funds and other federal grants. Parity is essential because the current system benefits law enforcement and prosecution, leaving the indigent defendant with little help from the federal government.<sup>177</sup> To remedy the under-representation problem, the Brennan Center recommends the Department of Justice (“DOJ”) require state agencies like the LCLE to have equal representation of the criminal justice community.<sup>178</sup>

The state’s law enforcement and district attorney advocates are likely to push back against public defenders when they campaign for greater representation.<sup>179</sup> The sheriffs and the district attorneys benefit from overrepresentation on the LCLE by ensuring the commission hears and

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169. *Id.*

170. *Id.*

171. LA. REV. STAT. § 15:1202 (2018).

172. *State Administering Agencies*; NAT’L CRIM. JUST. ASS’N, <http://www.ncja.org/state-agencies/agency-contact> [<https://perma.cc/3962-VS28>] (last visited Oct. 21, 2018).

173. *See generally Louisiana Commission on Law Enforcement and Administration of Justice*, LA. COMM’N ON L. ENF’T, <http://cle.la.gov/commission.asp> [<https://perma.cc/G9SN-Y8P4>] (last visited Sept. 24, 2018).

174. LA. REV. STAT. § 15:1202.

175. *Louisiana Commission on Law Enforcement and Administration of Justice*, *supra* note 173.

176. *Id.*

177. *See generally* Giovanni & Patel, *supra* note 96, at 8.

178. *Id.*

179. *See generally* Cindy Chang, *Louisiana is the World’s Prison Capital*, NOLA.COM (May 3, 2012), [http://www.nola.com/crime/index.ssf/2012/05/louisiana\\_is\\_the\\_worlds\\_prison.html](http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html) [<https://perma.cc/EV2T-WV2V>].

funds their goals and priorities.<sup>180</sup> For example, one of the most recent federal grants the LCLE received focuses on the accessibility of federal and state criminal history records, a grant that greatly benefits both the sheriffs and district attorneys.<sup>181</sup> This pushback from the sheriffs and district attorneys, however, must not deter the legislature from providing adequate representation to all members of the criminal justice community on the LCLE because the imparity of federal grants is just one of many reasons the Louisiana public defender is starved for cash.<sup>182</sup> The Louisiana Legislature should revise the legislation behind the LCLE to guarantee that there are as many public defenders as district attorneys on the commission to ensure that prosecutors and district public defenders are playing on a level field, providing an opportunity for an increase in public defenders' funding.<sup>183</sup>

### 3. Tap into Private Resources

Effective utilization of members of the private bar and law students is the third and final administrative solution.<sup>184</sup> Although Louisiana's district public defenders' offices are forced to restrict services because of the severe lack of funding, indigent defendants still need representation.<sup>185</sup> Private attorneys, therefore, receive judicial appointments in order to

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180. *Id.*

181. Notice of Funding Opportunity, *2017 National Criminal History Improvement Program*, LA. COMM'N ON L. ENFORCEMENT, <http://www.lcle.la.gov/programs/uploads/NCHIP%202017%20Notice%20of%20Funding%20Opportunity.pdf> [https://perma.cc/Q8ZH-8HFD] (last visited Sept. 24, 2018). The LCLE also recently received \$26.5 million for a federal grant intended to protect victims of crimes. Notice of Funding Opportunity, *2017 Victims of Crime Act Program*, LA. COMM'N ON L. ENFORCEMENT, <http://www.lcle.la.gov/programs/uploads/VOCA%202017%20Notice%20of%20Funding%20Opportunity.pdf> [https://perma.cc/YA5Q-QYWX] (last visited Sept. 24, 2018). None of this is to say these causes are not notable, but the different funding opportunities from the federal government to the LCLE in the last three years seem to directly benefit either the sheriff or the district attorneys. *LCLE Funding Information*, LA. COMM'N ON L. ENFORCEMENT, <http://www.lcle.la.gov/programs/funding.asp> [https://perma.cc/MZJ7-CAMM] (last visited Sept. 24, 2018).

182. *See generally* Giovanni & Patel, *supra* note 96, at 8.

183. *See generally id.*

184. *See generally id.*

185. Marsh, *supra* note 11, at 16.

satisfy the state's Sixth Amendment right to counsel requirement.<sup>186</sup> Court-appointed private lawyers<sup>187</sup> usually have little or no experience in criminal defense.<sup>188</sup> The Louisiana State Bar Association should encourage law firms to send associate attorneys to complete externships at local public defender offices.<sup>189</sup> Some New York City and Atlanta law firms use a similar and successful program.<sup>190</sup> The Brennan Center recommends that all major law firms across the country adopt comparable programs, noting the benefits for both the law firm and the public defender.<sup>191</sup> The law firm gains associates who receive a vast amount of trial and litigation experience in a short amount of time and meet pro bono quotas set by the state bar association sets, and the public defender receives an invaluable free resource.<sup>192</sup>

To ensure an efficient and successful program, the externship must be tailored to litigators.<sup>193</sup> Additionally, the program should target the most deprived district defender offices, relieving the burden on inexperienced private Louisiana attorneys appointed by a local judge at random.<sup>194</sup> The externship program could solve both short-term and long-term staffing and funding goals, and although the solution proposes no new increase to state funding for indigent defense, the added workforce would greatly aid the Louisiana public defender.<sup>195</sup>

Future attorneys must also learn the value and importance of pro bono work; one way for them to learn is to require pro bono hours as a prerequisite for completing the bar application.<sup>196</sup> The ABA's Model Rule

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186. Eli Hager, *Louisiana Public Defense: A Lawyer with a Pulse Will Do*, *GUARDIAN* (Sept. 8, 2016, 7:13 AM), <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis> [<https://perma.cc/2Q58-96FS>].

187. Lawyers are distinguished in two big categories: those lawyers that work for private law firms and lawyers that work for the government or a non-profit. Lawyers that work for a private law firm or a company are referred to as the "private bar." Lawyers that work for the government or in non-profit work are referred to as the "public bar." *Private Practice vs. Public Service/Public Interest*, U. MASS. AMHERST, [http://prelaw.umass.edu/topics/private\\_vs\\_public](http://prelaw.umass.edu/topics/private_vs_public) [<https://perma.cc/24W7-PWFD>] (last visited Sept. 24, 2018).

188. Hager, *supra* note 186.

189. Giovanni & Patel, *supra* note 96, at 9.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See generally* Hager, *supra* note 186.

194. *See generally id.*

195. *See generally id.*

196. *See generally Bar Pre-Admission Pro Bono*, A.B.A., [https://www.americanbar.org/groups/probono\\_public\\_service/policy/bar\\_pre\\_admission\\_pro\\_bon](https://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bon)

6.1 strongly recommends that every lawyer participate in at least 50 hours of pro bono legal service every year.<sup>197</sup> In 2012, New York became the first state to require all bar applicants to complete 50 hours of qualifying pro bono service prior to submitting the bar application.<sup>198</sup> Louisiana should join New York in requiring pro bono hours as a prerequisite for the bar application; instilling in young attorneys the importance of serving those in need of legal aid.<sup>199</sup>

An additional way to engage future attorneys in indigent defense work is to utilize law students with an interest in litigation and knowledge of criminal procedure to aid the local public defender.<sup>200</sup> Law schools should create an indigent defense clinic that requires all law students to participate in the clinic to satisfy graduation requirements.<sup>201</sup> The ABA currently recommends that all law schools provide students the opportunity to work in pro bono legal work, but there is no per se mandate.<sup>202</sup> Most law schools

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o.html [<https://perma.cc/98PJ-U2GV>] (last visited Sept. 24, 2018).

197. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983).

198. *Bar Pre-Admission Pro Bono*, *supra* note 196.

199. MODEL RULES OF PROF'L CONDUCT r. 6.1.

200. Heather Perry Baxter, *At a Crossroads: Where the Indigent Defense Crisis and the Legal Education Crisis Intersect*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 25, 47-48 (2016).

201. *Id.*

202. *Definitions: Directory of Public Interest Externships & Internships*, A.B.A., [https://www.americanbar.org/groups/probono\\_public\\_service/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions\\_.html#pb\\_description](https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions_.html#pb_description) [<https://perma.cc/3L4N-BEJH>] (last visited Sept. 24, 2018). The ABA stated in 2007 in Interpretation 302-10 that:

Each law school is encouraged to be creative in developing substantial opportunities for student participation in pro bono activities. Pro bono opportunities should at a minimum involve the rendering of meaningful law-related service to persons of limited means or to organizations that serve such persons; however, volunteer programs that involve meaningful services that are not law-related also may be included within the law school's overall program [of pro bono activities]. Law-related pro bono opportunities need not be structured to accomplish any of the professional skills training required by Standard 302(a)(4). While most existing law school [pro bono programs] include only activities for which students do not receive academic credit, Standard 302(b)(2) does not preclude the inclusion of credit-granting activities within a law school's overall program of pro bono opportunities so long as law-related non-credit bearing initiatives are also part of that program.

*ABA Standards for Approval of Law Schools*, A.B.A. (2007), [https://www.americanbar.org/content/dam/aba/directories/policy/2007\\_am\\_103a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_103a.authcheckdam.pdf) [<https://perma.cc/883S-DNZH>].

offer public interest externship programs in which students receive course credit for working in the local public defender's office or other non-profit legal programs.<sup>203</sup> To fully staff and serve the public defender, all Louisiana law schools should make a commitment to serving indigent defendants within their communities by requiring clinic hours.

An indigent-defense clinic benefits the law students, the law school, and most importantly, indigent defendants.<sup>204</sup> Law students would not only gain useful skills such as trial experience and client interaction, but also fulfill necessary ABA experimental learning requirements.<sup>205</sup> For the indigent defendants, the free counsel law students offer under the supervision of law professors and attorneys serves as a vital resource that might otherwise be unavailable.<sup>206</sup>

Admittedly, not all law students have a future in criminal law or even litigation, so requiring all students to participate in such a program could prove less helpful to some students.<sup>207</sup> Schools could make the programs universally useful by not requiring every student to receive course credit in the clinic, but rather have every student serve a role in the clinic, even if it is a minor one, such as mandatory volunteer hours for legal research and writing to benefit the clinic.<sup>208</sup> The hours would satisfy the mandatory participation requirement for graduation and also give students pro bono experience to enhance their resumes.<sup>209</sup>

An indigent-defense clinic is an expensive undertaking, but funding is available through a variety of sources including the local bar association, federal and state grant money, and existing experimental structures within law schools.<sup>210</sup> Moreover, law schools in the same city, such as Southern University and Louisiana State University in Baton Rouge, Louisiana, can work together to create a shared clinic to assist the indigent defendant

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203. See generally *Learning Through Practice*, LSU L., <https://experiential.law.lsu.edu/externships/public-interestnon-profit-externship/> [<https://perma.cc/9TVR-Q2BF>] (last visited Sept. 24, 2018); *Public Interest Externships & Internships*, A.B.A., [https://www.americanbar.org/groups/probono\\_public\\_service/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions/pi\\_externships\\_internships.html](https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_externships_internships.html) [<https://perma.cc/7JP5-ZZCU>] (last visited Sept. 7, 2018).

204. Baxter, *supra* note 200, at 48–49.

205. *Id.* at 49.

206. *Id.* at 48–49.

207. See generally *id.* at 47–48.

208. See generally *id.*

209. See generally *id.*

210. *Id.* at 48.

more effectively. The schools can then equally share the costs of running the clinic and assist more indigent clients.

### *C. The Federal Option*

Most of the potential solutions discussed are focused at the state level; indigent defense reformers, however, have also advocated for federal government assistance since *Gideon*'s mandate.<sup>211</sup> A possible federal solution involves the creation of a federal agency tasked with supplementing the states' indigent defense budget.<sup>212</sup> Nearly 40 years ago, the ABA's Committee on Legal and Indigent Defendants proposed the National Center for Defense Services, a centralized federal agency tasked with enhancing states' indigent defense budgets.<sup>213</sup> In 2013, the 50th anniversary of *Gideon*, the ABA reaffirmed its desire for this centralized and supplemental funding scheme for public defenders in Resolution 104A.<sup>214</sup>

The National Center for Defense Services under the ABA's model would function as a non-profit entity and would set minimum standards that state indigent defenders must meet in order to receive federal funding.<sup>215</sup> The ABA justified the proposal by stating "[it was] unfair to place upon the local government the entire burden of meeting the Supreme Court's mandate," adding that "state and local governments cannot solve the problem alone."<sup>216</sup> Adopting federal oversight would implement uniform standards that all public defenders must follow in order to receive federal aid.<sup>217</sup> Federal funding would also provide for better research, training, and oversight for state public defenders who currently can barely afford to stay open, much less fund research.<sup>218</sup> One scholar recently

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211. See generally ABA Comm'n on Legal Aid & Indigent Defendants, Formal Op. 121 (1979).

212. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 841 (2004).

213. ABA Comm'n on Legal Aid & Indigent Defendants, *supra* note 211.

214. *Standards and Policies*, A.B.A. (Feb. 2013), [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/indigent\\_defense\\_systems\\_improvement/standards-and-policies.html](https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/standards-and-policies.html) [<https://perma.cc/248N-YSXV>]; ABA House of Delegates, Formal Op. 104A (2013).

215. ABA Comm'n on Legal Aid & Indigent Defendants, *supra* note 211.

216. Lefstein, *supra* note 212, at 925–26.

217. *Id.* at 927.

218. *Id.*

estimated that a congressional designation of \$4 billion would nearly triple indigent defender resources across the country.<sup>219</sup>

England has “the most comprehensive system of state-funded legal assistance to criminal suspects and defendants in the world,” and serves as the best example of a national government funding indigent defense.<sup>220</sup> England’s system ensures that public defenders provide quality service to defendants by requiring certain accreditation standards for public defenders and implementing higher authority’s random peer review of case files.<sup>221</sup> Furthermore, the United Kingdom’s government assures counsel of payment through a variety of methods, including: special negotiated contracts for complex cases; providing greater compensation to those that perform excellent service; and setting fees based on the time constraints the case will put on the public defender.<sup>222</sup>

Despite all the benefits, there are a several obstacles to the federal option.<sup>223</sup> First, proponents of federalism argue that the United States is quite different from the United Kingdom, and the American system thrives with the potential for 50 different solutions to fund public defenders.<sup>224</sup> Federalist proponents advocate for state autonomy in an area they consider traditionally governed by the states.<sup>225</sup> Second, potential problems arise when deciding how the federal government will fund such a program.<sup>226</sup> Taxpayers argue that they do not want more of their federal income tax allocated to an area the states generally fund.<sup>227</sup> All 50 states have struggled with the implementation of *Gideon*’s mandate, and each could benefit greatly from federal government aid; however, opponents to federal intervention are unlikely to support such a measure.<sup>228</sup> The government can solve indigent defense funding in a myriad of ways, and

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219. Mayeux, *supra* note 94.

220. Lefstein, *supra* note 212, at 861.

221. *Id.* at 905.

222. *Id.* at 914–15.

223. *See generally id.*

224. *See generally* Eugene D. Genovese, *Getting States’ Rights Right*, ATLANTIC (Mar. 2001), <https://www.theatlantic.com/magazine/archive/2001/03/getting-states-rights-right/302133/> [<https://perma.cc/R29X-ZXVS>].

225. *See generally id.*

226. *See generally* Brian Riedl, *How to Cut \$343 Billion from the Federal Budget*, HERITAGE FOUND. (Oct. 28, 2010), <http://www.heritage.org/budget-and-spending/report/how-cut-343-billion-the-federal-budget> [<https://perma.cc/ZJQ7-6HCB>].

227. *See generally* Genovese, *supra* note 224.

228. Bright, *supra* note 35.

Louisiana must consider each option to implement the most effective solution.

### III. LOUISIANA 'BOUT TO BOUNCE BACK, BOUNCE BACK<sup>229</sup>

Given Louisiana does not give public defenders an adequate budget to provide services to the indigent defendant, the state legislature should consider both federal and state-level solutions to solving this crisis.<sup>230</sup> In 2016, the Louisiana public defense system oversaw nearly 230,000 cases<sup>231</sup> on a budget of about \$50 million in combined state and local revenue.<sup>232</sup> The total cost of handling these cases exceeded the budget by nearly \$1.3 million,<sup>233</sup> and 19 districts faced a budget deficit.<sup>234</sup> In the spring of 2016, the lack of funds forced 33 of Louisiana's 42 public defender districts to restrict services.<sup>235</sup> Restriction of services is a protocol the LPDB enforces when a district defender's office has a budget deficit in which all cost-cutting measures are considered—including refusing capital cases, nonessential staff layoffs, and cancellation of private firm contracts.<sup>236</sup> Implementation of the protocol places the indigent defendant on a waitlist, and the state allocates spots on the waitlist based on factors such as severity of the case and length of incarceration.<sup>237</sup> Restriction of services has severe constitutional implications, but failure to follow the

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229. JUVENILE, *Bounce Back, on JUVE THE GREAT* (Cash Money Records 2003).

230. *See supra* Part II.

231. Specifically, Louisiana public defenders oversaw 229,726 cases in 2016. *2016 Annual Board Report*, LA. PUB. DEFENDER BOARD 51 (Jan. 2017), <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2016%20LPDB%20Annual%20Report.pdf> [<https://perma.cc/XHE2-HE7Y>].

232. *Id.*

233. *Id.*

234. *Id.* Because district-level funding remains at the district level, some districts will remain solvent while others will not. *See discussion supra* Part I.

235. Marsh, *supra* note 11, at 16.

236. Restriction of services is a protocol detailed in Title 22 of the Louisiana Administrative Code that allows the State Public Defender Board to monitor district public defender spending to avoid a deficit. Restriction of services is a plan the district public defender developed with advice from the State Public Defender Board. The public defenders continue to represent current clients, but plans to either refuse any capital cases, cancel contracts with other firms, and staff lay-offs are all considered. LA. ADMIN. CODE tit. 22, pt. 15, §§ 1701–19 (2012).

237. Emily Lane, *Cash-Strapped Public Defender Facing 'Constitutional Crisis' in East Baton Rouge*, NOLA.COM (Mar. 9, 2010), [http://www.nola.com/news/baton-rouge/index.ssf/2015/03/public\\_defender\\_baton\\_rouge.html](http://www.nola.com/news/baton-rouge/index.ssf/2015/03/public_defender_baton_rouge.html) [<https://perma.cc/7JRS-9V9F>].

protocol forces the district defender to stretch counsel to an excessive amount of defendants, thereby failing almost all indigent defendants.<sup>238</sup>

The Louisiana Legislature attempted to temporarily remedy the funding problem in 2016 by increasing the funds required through District Assistance Fund (“DAF”) grants from 50% to 65%.<sup>239</sup> DAF is part of the state general revenue to public defense and serves as supplemental funding to the neediest judicial districts.<sup>240</sup> Although the new allocation of money will temporarily stabilize the budget by providing the necessary funds to make insolvent districts solvent, the DAF increase is a short-term solution to a looming crisis.<sup>241</sup> Louisiana requires a single and stable source of indigent defense funding to create equitable delivery of public defense services.<sup>242</sup>

### A. Infeasible Solutions

Louisiana requires unique, state-specific solutions to solve the current funding problem because of the extent of the crisis;<sup>243</sup> the ideal solution is a hybrid approach that combines certain aspects of the above-proposed solutions.<sup>244</sup> Solutions that are overly simplistic or that fail to consider the realities of indigent defense reform in Louisiana are not feasible due to the complexity of the problem and the unique politics of the state.<sup>245</sup>

#### 1. Abolishing the Death Penalty

Abolishing the death penalty in Louisiana would free up a significant portion of the LPDB’s budget; however, even a significant budget reduction of 80% has thus far failed to convince a conservative state to abolish the death penalty.<sup>246</sup> Admittedly, change regarding the death penalty may be on the horizon.<sup>247</sup> Lawmakers introduced two bills in 2017, in both the House and Senate of the Louisiana Legislature, proposing the

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238. *Id.*

239. Marsh, *supra* note 11, at 17; *The District Assistance Fund*, LA. PUB. DEFENDER BOARD, <http://lpdb.la.gov/Serving%20The%20Public/Programs/District%20Assistance%20Fund.php> [https://perma.cc/DN4L-YLAG] (last visited Sept. 24, 2018).

240. *The District Assistance Fund*, *supra* note 239.

241. Marsh, *supra* note 11, at 18.

242. *Id.* at 25.

243. *See generally id.*

244. *See generally id.*

245. *See generally id.*

246. *See supra* Part II.A.3; Gyan, Jr., *supra* note 137.

247. *See generally* Ballard, *supra* note 130.

abolishment of the death penalty.<sup>248</sup> Although the Senate bill advanced through committee—the furthest such a measure has advanced in Louisiana—one vote narrowly defeated the House bill in committee.<sup>249</sup> The Senate bill was subsequently abandoned after the failure of the House bill, but the recent debate in the legislature signals that the abolishment of the death penalty could happen soon.<sup>250</sup>

The legislature has implemented other reforms that citizens once thought impossible, indicating the abolition of the death penalty could also become reality.<sup>251</sup> For now, Louisiana needs more time and political pressure; abolition of the death penalty remains a potential solution to increase funding for the indigent defender in the future.<sup>252</sup>

## 2. *Funding Proportional to Caseloads*<sup>253</sup>

Another infeasible solution for Louisiana is the implementation of caseload standards in connection to funding for indigent defense.<sup>254</sup> The ABA recently conducted a study, the Louisiana Project, on the workload of Louisiana's public defenders and found that in order to comply with workload standards the study set out,<sup>255</sup> the state would need to hire over

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248. See generally *id.*

249. Della Hasselle, *Bill to End Death Penalty in Louisiana Killed in House Committee*, GAMBIT (May 17, 2017, 8:08 PM), <https://www.bestofneworleans.com/thelatest/archives/2017/05/17/bill-to-end-death-penalty-in-louisiana-killed-in-house-committee> [<https://perma.cc/TW6C-Z7M5>].

250. R.J. Rico, *Co-Sponsor of Louisiana Death Penalty Ban Trounces Own Bill*, U.S. NEWS (May 17, 2017, 5:43 PM), <https://www.usnews.com/news/best-states/louisiana/articles/2017-05-17/co-author-of-louisiana-death-penalty-ban-trounces-own-bill> [<https://perma.cc/5J35-E3XA>]. The Senate Bill was abandoned because all bills must go through both the Senate and the House, and this same House committee would have had to approve the Senate bill before it could be voted on by the House. Given the House committee's response to its own bill, it seemed unlikely the House would allow the similar Senate bill through committee. Hasselle, *supra* note 249.

251. See *infra* Part III.B.

252. See generally Tracy Connor, *Louisiana Lawmakers Advance Bill to Abolish the Death Penalty*, NBC NEWS (Apr. 25, 2017, 1:49 PM), <https://www.nbcnews.com/news/us-news/louisiana-lawmakers-advance-bill-abolish-death-penalty-n750801> [<https://perma.cc/5KSW-XR98>].

253. See *supra* Part II.B.1.

254. Marsh, *supra* note 11, at 29. See *supra* Part II.B.1.

255. The Louisiana Project utilizes the Delphi Method, a multi-step process in which professionals in a certain field give feedback on a questionnaire or survey. The surveyors give participants in the process the results of the survey at various

1,406 full-time attorneys.<sup>256</sup> The current level of funding provided on both the state and district level allows for only 21% of the attorney capacity the Louisiana Project recommends.<sup>257</sup> Realistically, Louisiana cannot afford to intertwine the unattainable workload standards the ABA proscribes without funding for the program.<sup>258</sup> Once the state dedicates a stable source of general state revenue to public defense, implementation of caseload standards is feasible; but currently, Louisiana has too many indigent defendants and too little money to use this reform.<sup>259</sup> Louisiana should not disregard this goal, however, and the LPDB must continue to encourage all district defenders to manage workable standards.<sup>260</sup>

### 3. *The Federal Option*

The federal solution is also infeasible. Although the creation of a Center for Defense Services would aid the indigent defense crisis nationally, Congress has not shown an interest in legislatively addressing this issue.<sup>261</sup> Senator Ted Kennedy first proposed legislation in Congress in 1979 after the ABA's initial proposal.<sup>262</sup> The legislation mirrored the ABA proposal in seeking to establish a permanent federal agency to distribute grants and enforce minimum standards, but the bill never gained any traction and died in committee.<sup>263</sup> Democratic Congressman Ted Deutch introduced similar legislation in 2013, but the bill also died in committee in 2014.<sup>264</sup> Various sessions of Congress have opposed government intervention into the state public defenders' budgets mainly

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stages and then allow them to modify their answers to the questions based on that feedback. *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*, A.B.A. 14 (Feb. 2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf) [<https://perma.cc/86C7-GX9Z>].

256. *Id.*

257. Marsh, *supra* note 11, at 26.

258. Julie O'Donoghue, *\$1 Billion Budget Gap Topic of John Bel Edwards Meeting with Louisiana Business Leaders*, NOLA.COM (Aug. 8, 2017, 2:27 PM), [http://www.nola.com/politics/index.ssf/2017/08/governor\\_business\\_leaders.html](http://www.nola.com/politics/index.ssf/2017/08/governor_business_leaders.html) [<https://perma.cc/TCT4-NHV7>].

259. Marsh, *supra* note 11, at 26.

260. *Id.* at 19.

261. See generally Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1820 (2016).

262. Mayeux, *supra* note 94.

263. *Id.*

264. H.R. 3407, 113th Cong. (2013).

because of lack of attention for the issue.<sup>265</sup> Such a bill will not pass without pressure from the American public on their legislators.<sup>266</sup>

While the divisive and partisan political climate suggests that the federal solution will not become reality, citizens may support the creation of a National Center for Defense Services in the future.<sup>267</sup> A new administration, different ideological balance in Congress, or increased social pressure could significantly influence federal reform of indigent defense funding.<sup>268</sup> Despite the current infeasibility of a federal option, caseload standards, and abolishment of the death penalty, these options are possible for Louisiana in the future; however, the state must implement realistic and immediate solutions to fix the indigent defense budget.

### *B. Feasible Solutions*

Several solutions to the indigent defense funding crisis are feasible for Louisiana.<sup>269</sup> The passage of a large criminal justice reform bill in 2017 ushered in a new era for Louisiana.<sup>270</sup> Broad criminal justice reform should not stop with reduction of sentences but should continue with reclassification of certain nonviolent misdemeanors into fine crimes to decrease the burden on indigent defenders.<sup>271</sup> Additionally, the state should focus on the front-end of criminal justice reform by fully funding its indigent defense system.<sup>272</sup> If the goal is truly justice, then reform should include those charged with a crime rather than only those already convicted.<sup>273</sup>

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265. Mayeux, *supra* note 94.

266. *See generally id.*

267. *Id.*

268. *Id.*

269. *Supra* Parts II.A.1–2, B.2–3.

270. The bi-partisan criminal justice reform package included ten bills which focused on reducing certain mandatory minimums, expanding the opportunity for parole, and reducing penalties for nonviolent and drug crimes. Adam Gelb, et al., *Louisiana Adopts Landmark Criminal Justice Reforms*, PEW CHARITABLE TRS. (June 22, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/06/22/louisiana-adopts-landmark-criminal-justice-reforms> [<https://perma.cc/M2AC-NK3P>].

271. Bill Keller, *Nine Lessons About Criminal Justice Reform*, MARSHALL PROJECT (July 19, 2017, 2:53 PM), <https://www.themarshallproject.org/2017/07/19/nine-lessons-about-criminal-justice-reform> [<https://perma.cc/9YP4-E5KF>].

272. Burkhardt, *supra* note 12, at 360.

273. Keller, *supra* note 271.

### 1. *Reclassifying Misdemeanors*

Louisiana sought to relinquish the title as the incarceration capital of the world in 2017 by passing a comprehensive criminal justice reform bill.<sup>274</sup> The legislation is expected to reduce Louisiana's large prison population by 10% and save the state over \$260 million over the next ten years.<sup>275</sup> This bipartisan criminal justice reform signals the Louisiana Legislature's willingness to consider reforming the indigent defense system to establish a more equitable and cost-efficient system.<sup>276</sup>

The criminal justice legislation created a felony task force dedicated to examining Louisiana's felonies and dividing them into a new class system based on the seriousness of the offense.<sup>277</sup> The legislature should create a similar task force for misdemeanors in order to reclassify certain nonviolent misdemeanors into fine crimes.<sup>278</sup> The misdemeanor task-force should begin with an overhaul of harsh first-time drug offender laws, under which a first-time marijuana possessor, for example, can face up to six months in jail.<sup>279</sup> Lawmakers should eliminate the jail-time provisions, maintain the fine requirement, and establish a community service or drug treatment provision.<sup>280</sup> In addition, lawmakers should designate certain nonviolent property crimes as fine crimes with a community service provision<sup>281</sup> and reclassify certain misdemeanors as fine and community-service crimes to decrease the need for a public defender.<sup>282</sup> The legislature's attempt at reclassifying felonies is an important step, but it

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274. *Louisiana Takes Historic Step with Criminal Justice Reform*, S. POVERTY L. CTR. (June 15, 2017), <https://www.splcenter.org/news/2017/06/15/louisiana-takes-historic-step-criminal-justice-reform> [<https://perma.cc/3ZRJ-R43H>].

275. *Id.*

276. *Id.*

277. S.B. 220, 2017 Leg., Reg. Sess. (La. 2017); *Louisiana Takes Historic Step with Criminal Justice Reform*, *supra* note 274.

278. Uphoff, *supra* note 104, at 675.

279. LA. REV. STAT. § 40:966(C)(2) (2018).

280. *See generally* Neyfakh, *supra* note 108.

281. *See* LA. REV. STAT. § 14:91.21. This statute makes it a misdemeanor punishable for up to six months in prison for a person to sell a poisonous reptile to a minor. The state should remove the misdemeanor classification and jail time, and maintain the fine of \$100. *Id.* § 14:68.1. This statute can imprison someone for up to six months if they remove a shopping cart from its designated area; the state should amend the statute to remove the prison time and maintain the fine of \$100. *Id.* § 14:71.2. This statute creates the possibility of six months of jail time for someone who fails to pay a bridge toll. The legislature should remove the imprisonment provision, and merely impose a fine for this crime.

282. Uphoff, *supra* note 104, at 675.

should only be the first step in Louisiana's long road to criminal justice reform.

## 2. *Reexamining Sentencing Provisions*

Although not a direct effect on the public defender, a reduction in prison sentences would decrease the monetary burden on the state prison system, thereby creating a new source of money for the public defender's use.<sup>283</sup> A recent study conducted by Pew Charitable Trusts<sup>284</sup> found that of 30 states that engaged in some form of criminal justice reform since 2007, each saw a reduction in its corrections budget and total prison population.<sup>285</sup> For example, South Carolina reduced the punishments for low-level drug offenses and saw a 25% decrease in prison population, a closure of six prisons, and \$491 million in savings to taxpayers.<sup>286</sup> Louisiana must follow the lead of South Carolina and other states and continue to engage in criminal justice reform to reduce its massive prison population.<sup>287</sup>

Louisiana has begun to follow South Carolina's lead in the 2017 criminal justice reform package, which involved reducing maximum sentences for several crimes.<sup>288</sup> The package eliminated mandatory minimums on specific drug and property crimes and decreased other mandatory minimums.<sup>289</sup> Nonviolent offenders saw a reduction in prison

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283. *Id.* at 676.

284. Pew Charitable Trusts is a non-profit and non-partisan research and public policy organization that focuses on collecting and presenting data on a wide variety of issues facing the world today. *Mission & Values*, PEW CHARITABLE TRS., <http://www.pewtrusts.org/en/about/mission-and-values> [<https://perma.cc/LD98-8VVK>] (last visited on Sept. 24, 2018).

285. *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TRS. (Mar. 21, 2017), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth> [<https://perma.cc/M3PH-ZSB3>].

286. *Id.*

287. *Id.*

288. S.B. 221, 2017 Leg., Reg. Sess. (La. 2017); *Louisiana Takes Historic Step with Criminal Justice Reform*, *supra* note 274.

289. Specifically, the reform removed mandatory minimums for crimes such as arson, communicating false information about arson, home invasion, theft, and possession of two grams or less of many illegal drugs. Julie O'Donoghue, *Here's how Louisiana sentencing laws are changing under criminal justice reform*, NOLA.COM (June 26, 2017, 10:00 AM), [http://www.nola.com/politics/index.ssf/2017/06/louisiana\\_crime\\_sentences\\_chan.html](http://www.nola.com/politics/index.ssf/2017/06/louisiana_crime_sentences_chan.html) [<https://perma.cc/T9A8-AZ2U>].

sentences.<sup>290</sup> Lawmakers substantially overhauled habitual offender laws.<sup>291</sup> Although significant, this criminal justice bill must only be the start of reform in Louisiana, and reforming the criminal code should be an annual priority for the legislature.<sup>292</sup> Louisiana should continue to reduce sentences for nonviolent and first-time offenders, easing the burden off the corrections system and allocating more money to the public defender.

### 3. Better Access to Federal Grants

In addition to broad criminal justice reform, Louisiana should make several administrative changes to indigent defense funding. First, the state public defender should efficiently utilize the resources the federal government provides, which involves training district public defenders to be aware of the availability of JAG grants.<sup>293</sup> Second, Louisiana's Commission on Law Enforcement should include district public defenders on its board to ensure that the interests of indigent defenders are adequately represented.<sup>294</sup> To alter the makeup of the board, the legislature should amend the statute creating the LCLE to require parity of district defenders with district attorneys.<sup>295</sup> A minor composition change will help ensure that the government distributes federal criminal justice grant money more equitably so that the prosecutor is not given a significant monetary advantage over the public defender.<sup>296</sup>

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290. Some examples of reduction of maximum prison sentences for nonviolent offense include possessing a gun as a felon and using a car without permission from the owner. *Id.*

291. A habitual offender law "targets offenders who repeat the same type of misdemeanor or felony offense." The law can result in higher fees and longer jail time for the habitual offender. Ken LaMance, *What Is a Habitual Offender?*, LEGALMATCH (Oct. 12, 2017), <https://www.legalmatch.com/law-library/article/what-is-a-habitual-offender.html> [<https://perma.cc/FJP6-E4QZ>]. No longer will courts automatically sentence habitual nonviolent drug offenders to life in prison. Habitual offenders will also face shorter mandatory minimums. O'Donoghue, *supra* note 289.

292. *See generally Louisiana Takes Historic Step with Criminal Justice Reform*, *supra* note 274.

293. Giovanni & Patel, *supra* note 96, at 8.

294. *Id.*

295. *See supra* Part II.B.2.

296. LA. REV. STAT. § 15:1202 (2018).

#### 4. *Tapping into Private Resources—the Right Way*

Louisiana has used private members of the bar for indigent defense since the decision in *Gideon*, and the state must continue to use this valuable resource;<sup>297</sup> however, it should only use those lawyers of the private bar with a focus in criminal defense.<sup>298</sup> In addition, the government should properly compensate and adequately train the private attorneys.<sup>299</sup>

To encourage private bar participation, the state should offer tax incentives for attorneys who assist the public defender.<sup>300</sup> This proposal would allow attorneys to take deductions on their income tax returns based on the hours worked representing the indigent.<sup>301</sup> Louisiana ranks 12th among the 50 states in number of licensed attorneys per capita, thus, an attorney shortage is not a problem.<sup>302</sup> Tax incentives have proven to spur action in Louisiana,<sup>303</sup> and if used properly, such incentives could serve as an efficient tool in enlisting private attorneys to assist the public defender.<sup>304</sup>

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297. See generally Neuner, *supra* note 58, at 112.

298. A well-known story is that of Trastavein Hardy. Jack Bailey, the attorney, convinced Hardy not to plead guilty, and prepared a defense for which he was not being compensated. When Mr. Bailey showed up for Hardy's criminal trial, the State had dropped the charges, but Mr. Bailey insisted on making a statement on the record: "Judge this man is factually innocent. And I'm sorry the court is not going to get to see me excoriate the police and the district attorney's office in this case." David Zax, *If You Cannot Afford an Attorney, Some Random Dude Will Be Appointed to You*, NAT'L PUB. RADIO (Aug. 26, 2016), <https://www.thisamericanlife.org/radio-archives/episode/595/deep-end-of-the-pool?act=1> (for a transcript of this episode, see <https://www.thisamericanlife.org/595/transcript> [<https://perma.cc/N3BG-PQ9C>]).

299. Burkhardt, *supra* note 12, at 362.

300. Chandra Bozelko & Jaime Lathrop, *Give Lawyers a Tax Incentive to Take on Indigent Defendants*, NOLA.COM (Nov. 10, 2016, 1:23 PM), [http://www.nola.com/crime/index.ssf/2016/11/public\\_defender\\_shortage.html](http://www.nola.com/crime/index.ssf/2016/11/public_defender_shortage.html) [<https://perma.cc/TB4M-CLZN>].

301. *Id.*

302. *Id.*

303. In Louisiana, there are many different tax exemptions to promote and encourage certain social behavior from employers. For example, if you are a doctor or dentist and relocate to an underserved town, you can be eligible for a tax deduction of \$3,000 per year. Another exemption exists for employers that hire first-time drug offenders. LA. DEP'T OF REVENUE, ST. OF LA. TAX EXEMPTION BUDGET 2016–2017 168–70 (2017), [http://revenue.louisiana.gov/Publications/TEB%20\(1617\)%20.pdf](http://revenue.louisiana.gov/Publications/TEB%20(1617)%20.pdf) [<https://perma.cc/5CKA-WUSM>].

304. Bozelko & Lathrop, *supra* note 300.

In addition to members of the private bar, each of Louisiana's four law schools should strive to develop an indigent defender clinical program dedicated to assisting the district defender in the school's area.<sup>305</sup> The clinic would benefit both the law student through invaluable experience, and the district defender, through free assistance.<sup>306</sup> The law schools in Louisiana are charged with molding the minds of future lawyers, and schools must instill the value of pro bono service in law students, and specifically, the importance of adequately represented defendants, at the earliest stage.<sup>307</sup> The Louisiana Legislature should implement these feasible criminal justice reform and administrative solutions to achieve a functioning indigent defense system.

#### IV. I-N-D-E-P-E-N-D-E-N-T DO YOU KNOW WHAT THAT MEANS: AN INDEPENDENTLY FUNDED STATE REVENUE STREAM<sup>308</sup>

Louisiana must fundamentally change the way it funds indigent defense. The first step is to remove the user-pay system at the district level as the primary means of funding and replace it with a general revenue stream.<sup>309</sup> Second, the Louisiana Legislature must allocate money in the state budget to pay for indigent defense through increases in excise taxes on alcohol and tobacco products and utilize savings from the criminal justice reform bill.<sup>310</sup> Indigent defense in Louisiana will no longer survive on traffic tickets and conviction fees; in order to have lasting indigent defense funding in Louisiana, funding must be controlled at the state level.<sup>311</sup>

##### A. State Revenue Stream

Louisiana is the only state in the country to fund its public defenders primarily through conviction fees.<sup>312</sup> The state must retire this archaic

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305. *Supra* Part III.B.4.

306. *Supra* Part III.B.4.

307. *See generally* David A. Kutik, *Pro Bono: Why Bother?*, A.B.A.: GPSOLO MAG. (2005), [https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/2005\\_oct\\_nov\\_probono.html#content](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/2005_oct_nov_probono.html#content) [<https://perma.cc/FE2J-HYX3>].

308. BOOSIE BADAZZ, *Independent*, on LIL BOOSIEANNA (Young Money Entertainment 2007).

309. Burkhardt, *supra* note 12, at 361.

310. *See* O'Donoghue, *supra* note 258. *See supra* Part III.B.1.

311. Burkhardt, *supra* note 12, at 361.

312. *Id.*

system and replace it with a centralized state funding system.<sup>313</sup> The National Association of Criminal Defense Lawyers (“NACDL”)<sup>314</sup> recently reported on the state of indigent defense funding in Louisiana, and its primary recommendations were to adopt state general revenue funding and increase funding to levels consistent with ABA workload standards.<sup>315</sup> Louisiana’s state general revenue funding derives from “taxes, licenses, fees, permits, rents and royalties, gaming revenues, interest on investments, proceeds from bond sales, and federal receipts.”<sup>316</sup> The greatest sources of Louisiana’s general revenue are personal income taxes and state sales taxes.<sup>317</sup>

The benefits of the state providing and controlling the funding for the public defender’s budget are stability and equality among all district public defenders in Louisiana.<sup>318</sup> Instead of district defenders controlling varied and unreliable sources of court fines at the district level, the state public defender would ensure that each district received enough money based on the size and needs of the district.<sup>319</sup>

The NACDL recommendation calculates a sufficient appropriation the state would need to meet ABA-approved standards.<sup>320</sup> Full funding from the state would have to increase from the current \$33 million supplement to \$125 million, but the report notes this is a conservative estimate.<sup>321</sup> The legislature must increase the state budget to fully fund indigent defense, but Louisiana has recently been plagued with significant budget deficits; thus finding the money for indigent defense is no easy task.<sup>322</sup>

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313. *Id.*

314. The National Association of Criminal Defense Lawyers is a professional bar organization and “is the preeminent organization in the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct.” *About NACDL*, NAT’L ASS’N CRIM. DEF. L., <https://www.nacdl.org/about.aspx> [<https://perma.cc/88ZB-6SZT>] (last visited on Sept. 24, 2018).

315. Marsh, *supra* note 11, at 25; *see supra* Part III.A.2.

316. *State and Local Government in Louisiana: An Overview*, LA. HOUSE REPRESENTATIVES, 2A-1, (Oct. 2011), <http://house.louisiana.gov/slg/PDF/Chapter%202%20Part%20A%20-%20State%20Government%20Finance,%20State%20Revenue%20Sources.pdf> [<https://perma.cc/K453-G756>].

317. *Id.*

318. Marsh, *supra* note 11, at 25.

319. *Id.* at 26.

320. *Id.*

321. *Id.*

322. *See generally id.*; O’Donoghue, *supra* note 258.

*B. Funding the State Revenue Stream*

To implement the state general revenue stream, lawmakers first must address significant hurdles.<sup>323</sup> The most identifiable hurdle to funding indigent defense through the state general revenue is locating the money to pay for the program.<sup>324</sup> Louisiana is currently in the midst of the worst budget crisis the state has ever seen, with over a \$1 billion budget gap.<sup>325</sup>

Several options exist, however, to create a fully funded state indigent defense budget.<sup>326</sup> First, the government should continue to collect district-level criminal conviction fees into one account, which the LPDB can distribute evenly among the districts.<sup>327</sup> Currently, the LPDB has no control over the district-level fines; if, however, all the fines were collected into one account, the government could distribute the money throughout the districts based on need.<sup>328</sup> Second, Louisiana should consider raising the excise taxes on alcohol, gambling, and tobacco products because of the extra revenue those products generate and place that revenue into the state's budget.<sup>329</sup> Louisiana maintains one of the lowest alcohol taxes in the country.<sup>330</sup> The per gallon tax rate on liquor in Louisiana is \$3.03 compared to the median in the United States of \$3.75 per gallon.<sup>331</sup> Louisiana should raise excise taxes to create a stable source of funding for indigent defense. Finally, the Louisiana Legislature should use some of the savings generated by the criminal justice reform package to fund the indigent defense program.<sup>332</sup> If the goal of the reform is to reduce the prison population, then investing in the justice system early on would certainly help.<sup>333</sup>

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323. See generally Marsh, *supra* note 11.

324. See generally O'Donoghue, *supra* note 258.

325. See generally *id.*

326. See *supra* Part III.B.

327. See *supra* Part I.B.

328. See generally Burkhardt, *supra* note 12, at 361.

329. These taxes are commonly referred to as "sin taxes," although that is not the technical term. The "sin taxes" are excise taxes, meaning "a tax levied on *some* but not on *all* commodities." An excise tax is levied on top of a sales tax. James Sadowsky, *The Economics of Sin Taxes*, ACTION INST. (July 20, 2010), <https://acton.org/pub/religion-liberty/volume-4-number-2/economics-sin-taxes> [<https://perma.cc/ZG5Q-8BXW>].

330. *State Alcohol Excise Tax Rates 2017*, TAX POL'Y CTR. (Feb. 2017), <https://www.taxpolicycenter.org/statistics/state-alcohol-excise-taxes> [<https://perma.cc/FJR6-8ALV>].

331. *Id.*

332. See *supra* Part III.B.1.

333. Burkhardt, *supra* note 12, at 362.

A potential drawback to the state general revenue stream is the LPDB's over-centralization of power to dispense funds to the local district defenders.<sup>334</sup> District defenders have long had a general distrust of the state public defender.<sup>335</sup> The autonomy concern could be remedied by ensuring that the LPDB adequately represented the district public defenders. For example, the Louisiana Legislature could amend the LPDB composition bill to include local defender representation on the board in order for the district defenders to maintain an active role in funding the program.<sup>336</sup> Furthermore, the legislature could create certain safeguards to prevent the LPDB from arbitrarily spending money dedicated to indigent defense, such as itemized budgets for each district explaining the use of the money.

Although the state general revenue stream faces potential problems, the value of restructuring and adequately supplementing the current user-pay system with a stable source of funding will outweigh any potential drawbacks.<sup>337</sup> A state general revenue stream is the best possible solution to Louisiana's current indigent defense funding problem because the uneven collection of criminal conviction fees at the district level is insufficient to provide the indigent defendant with his Sixth Amendment right to counsel.<sup>338</sup>

#### CONCLUSION

Louisiana has consistently struggled to provide adequate indigent defense services, primarily because the state uses a district level user-pay system that causes instability and unreliability of the district defender's annual budget.<sup>339</sup> To remedy the funding problem, Louisiana must abandon the hybrid district and state model and fund the entirety of indigent defense through a state general revenue stream.<sup>340</sup> The benefits of this general revenue stream include consistent funding throughout all judicial districts and state-based standards for all public defenders to follow.<sup>341</sup> In addition, the state must pursue other feasible reforms, such as reclassifying certain nonviolent misdemeanors and lessening the burden on the criminal justice budget by reducing the length of sentences.<sup>342</sup>

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334. See generally Drew, *supra* note 47, at 976–80.

335. See generally *id.*

336. See LA. REV. STAT. § 15:146(A)(3) (2018).

337. See generally Marsh, *supra* note 11.

338. Burkhardt, *supra* note 12, at 361.

339. *Id.* at 360–62.

340. Marsh, *supra* note 11, at 25–26.

341. *Id.* at 26.

342. See *supra* Part III.B.1–2.

Louisiana must continue the criminal justice reform progress that began in 2017 by reforming the funding structure of the public defenders in order to create equal justice for all—including justice for Gregory Bright.

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