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INTERNATIONAL INEQUALITY OR AMERICAN ATROCITY?:
A COMPARATIVE INVESTIGATION OF INDIGENT LEGAL REPRESENTATION
IN THE UNITED STATES AND THE EUROPEAN UNION

by
Sydney Wilson

A Thesis Submitted in Partial Fulfillment
Of the Requirements for the
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ABSTRACT

International Inequality or American Atrocity?: A Comparative Investigation of Indigent Legal Representation in the United States and the European Union

Sydney Wilson

Director: Thomas Horton, J.D.

Criminal justice systems across the globe are faced with multifaceted monetary limitations. The European Union and United States have similar overarching provisions ensuring that indigent defendants are guaranteed the right to counsel in legal proceedings with the possibility of infringing on their liberties. On the whole, they leave the decisions pertaining to each jurisdictions' system up to the individual governments. This practice allows for differing systems, quality, and problems. The differences between the individual countries in the EU and in the states in America are not as vast as initially believed; therefore, the problems pertaining to indigent representation affect more than just the poor minorities in the United States. The European Union's Legal Aid systems fail to have the complex legal framework that the United States Public Defender Systems seem to have; however, the problems in the United States persist nevertheless due to structural issues and extreme lack of consideration for funding services for the poor.

KEYWORDS: Indigent Legal Representation, United States, European Union, Public Defender, Legal Aid

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CHAPTER ONE

Introduction

Across the globe, it has become blatantly obvious that criminal justice systems commissioned in each country deal with multifaceted issues that come to fruition in different ways and for different reasons. One of those issues that challenges jurisdictions to support the civil rights of their citizens is legal representation. In the case of citizens with sufficient resources to secure legal representation, the challenges are small. These minor challenges relate to maintaining standards of effective representation in order to secure some degree of parity for the accused with the resources available to the state in their prosecution. The challenges are much greater, however, when considering the legal representation of those without sufficient resources to secure legal representation.

Indigent citizen defendants present an enormous challenge to contemporary jurisdictions seeking to support the civil rights of those accused of crime. An obvious problem seen in essentially every country on the planet is poverty, the degrees of which vary from country to country. The extremely critical problems are created when poverty and legal representation intersect. A strong correlate with poverty is the lack of education. Those without financial resources are often left with a lower level of education and, in turn, a lesser understanding of legal requirements. A 2001 article written by Hilary Sommerlad connects the fact that “social citizenship therefore led to the establishment of legal aid, and also the later expansion of higher education” (p. 337).

When light was shed upon the issue of inadequate knowledge among criminal defendants, the result was greater investment in legal assistance and the growth of systems to provide that assistance.

When governments decided that accused people deserve the right to someone with specialized legal knowledge and training in order to get through the system, it was obvious that there was something missing from the common person that is involved in the system. This right to counsel is handled differently in America and other countries around the world. Within this paper, the aim is to isolate the history and components of the American indigent defense system, most commonly known as the public defender system, then move to the European Union's legal aid system. Finally, comparisons will be drawn between the varying systems in order to highlight the areas that needs the most reform and attempt to find the causes of these areas of concern. The thesis begins in Chapter Two with a review of United States' Public Defender Systems. It looks at the breakdown of the state's sovereignty and differing priorities. In Chapter Three when the focus turns to legal aid within the European Union, and the fact that they established an overarching mandate upon the individual countries to provide legal representation to those who could not afford it. The systems in each country are different despite the same requirements being asked of them. Then the comparison between the European Union and United States occurs in Chapter Four. The similarities are clarified, and the differences are explained. Chapter Five offers recommendations as to the solution of the problems seen in indigent defense systems across the world. The recommendations are broken down into both practices based in evidence and the promising practices that are yet to be established. Finally, Chapter Six offers a conclusion of this investigation which

looks back at the initial problems of indigent representation. It then provides the reasoning for the problems and looks at the best solutions. Finally, the conclusion draws on the aspects of research that are still necessary to fully answer the questions explored in this investigation.

CHAPTER TWO

United States of America

Section A:

Overview

Public defense work has long been a hotly debated topic within the criminal justice system. This debate began during the time in American history without any acknowledgement of the constitutional right to counsel. The largest point of transformation within this idea came with the US Supreme Court Case *Gideon v. Wainwright* (1963). This case required that state's appoint attorneys for indigent defendants as set forth in the Sixth Amendment. Prior to *Gideon v. Wainwright* (1963), counsel was only guaranteed for federal criminal cases and, according to Florida law, capital cases. This change in precedent sent shockwaves through the United States due to the increase in financial costs of appointing attorneys. This decision "left many states scrambling to provide public defense" resources (Burkhart, 2017, p. 404). Following this landmark decision, the Supreme Court continued to expand the requirements pertaining to the right to counsel for all citizens. The crucial aspect of this topic is the problems that have been the downfall of the indigent defense system within the United States since its creation following *Gideon v. Wainwright* (1963). The criminal justice system is troubled by inherent racism, classism, and inequality, and these problems have infiltrated every

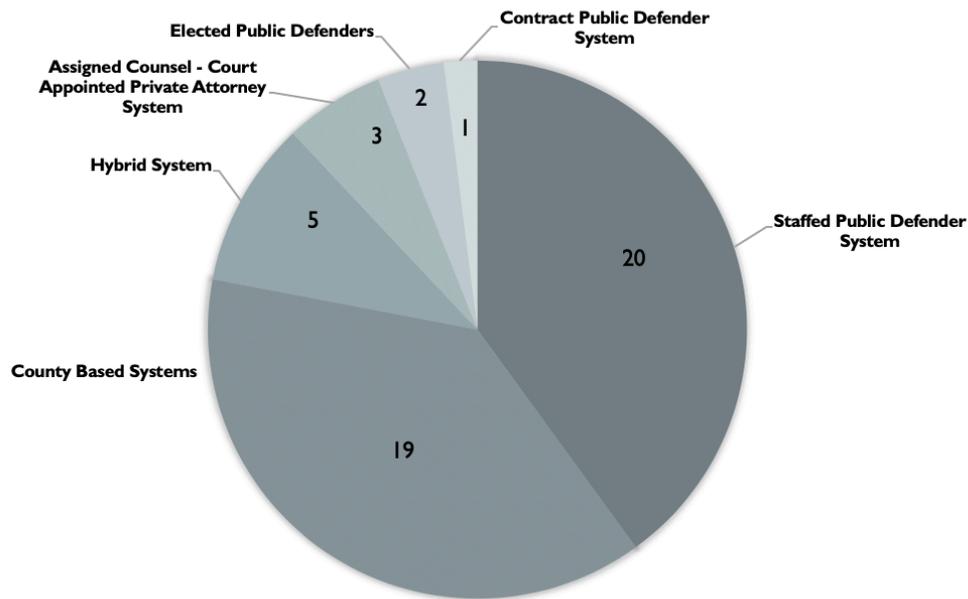
individual sector of the system, especially the indigent defense systems.

At this time in the American criminal justice system, there are three principal methods of appointing counsel for indigent defendants in criminal proceedings: “assigned counsel, contract, and public defender programs” (Spangenberg & Beeman, 1995, p. 32). The main focus of this paper will be on public defender programs. The variation between all of the indigent defense programs is huge, and the systems are complicated due to the differences and inconsistencies from program to program (Owens, Accetta, Charles, & Shoemaker, 2014, p. 1). While there is not a standard set forth by the federal government or any national governing body for public defender systems, the “defining characteristic is the employment of staff attorneys to provide representation” (Spangenberg & Beeman, 1995, p. 36). The systems can vary greatly apart from having full-time attorneys working solely on indigent defendants’ cases, and the biggest factor that affects the systems is where their funding comes from and oversight levels.

There are predominantly two options: a state funding a state-wide system, and an individual county funding their own system (Spangenberg & Beeman, 1995, p. 37). These systems vary in oversight levels as well. Frequently, states will have “a governing body or commission” that are utilized to select state public defenders, sometimes known as “the chief counsel of the agency” as well as enact policy (Spangenberg & Beeman, 1995, p. 37). These governing bodies allow for oversight and a bit more uniformity across the state, which is in direct opposition to what is seen when looking at various systems across the country. As seen in Figure 1 below, sixteen of the fifty states across the US “utilize a state public defender with full authority for the provision of defense services statewide” (Spangenberg & Beeman, 1995, p. 37). In addition to those

sixteen, “twelve states have indigent defense commissions setting guidelines for the provision of indigent defense services” without having full-fledged statewide systems (Spangenberg & Beeman, 1995, p. 38). These statewide commissions allow local jurisdictions to choose whether they need to devote complete public defender systems, or not, based upon their caseloads; however, the commissions control funding and the guidelines that each jurisdiction must uphold regardless of the type of system they choose (Spangenberg & Beeman, 1995, p. 38).

Figure I.



Source: Spangenberg & Beeman, 1995.

The level of oversight is integral because the “absence of state oversight is perhaps most apparent in the realm of managing public defense workload” (The Sixth Amendment Center, 2015, p. 5). The workload issue stems from the biggest issues within the criminal justice system and causes even more issues within the system. Simply throwing money at this problem will not solve it completely, and that fact shows that

these problems are far more complex than the majority of the public thinks. The problem is twofold: “states with little guidance on structure or funding must provide counsel to all those who cannot afford it” without much contesting, and “public defenders have a duty to provide effective and ethical representation but face few repercussions when those duties are breached” (Burkhart, 2017, p. 409).

In order to adequately represent someone, the Rules of Professional Conduct requires that lawyers provide: 1) “competent representation” of a client, 2) timely and thorough demonstration of the client’s interests in court, 3) “exercise independent professional judgement”, and 4) must know and adequately prepare a defense for the case (Mann, 2010, p. 734-735). This makes it blatantly obvious that “simply assigning an attorney to a defendant does not ensure a fair outcome (RubinBrown, 2014, p. 8). Quality is affected based upon the type of system and manner in which the system is ran because “distrust of [attorney’s] commitment and professionalism” can completely ruin an attorney-client relationship; therefore, it severely affects the outcome for the defendant (Sommerlad, 2001, p. 355). The system needs to compensate for the influx of charges with an increase in the amount of funds and people they are devoting to uphold defendants’ constitutional rights; however, that does not happen because “most states are not willing to provide a decent level of representation for poor people accused of a crime” (Bright, 2010, p. 683). The criminal justice system is just continuing to fail people in the cyclical fashion of the modern time.

Section B:

Cultural Framework

The inability to achieve the ideals that America stands for has exacerbated the problem with indigent legal representation due to the boom in criminal prosecutions and mass incarceration. The reality of America has failed to uphold the ideals of freedom and has created a gap and disharmony within the culture (Huntington, 1982, p. 1). The system that America has created for itself formed after the creation and embodiment of the ideals of liberty, equality, democracy, individualism, and unity; therefore, it was expected that the policies that followed thereafter would uphold the ideals (Huntington, 1982, p. 15). This has allowed for a conflict within the reality and the ideal of what systems our government ought to be utilizing.

The ideals of the criminal justice system are far from the reality. The image used to depict justice is Lady Justice or Justitia. She is often depicted blindfolded as if to represent the impartiality to wealth, power, and status (Robinson, 2009, p. 4). Scales in her hands to show the balancing of each side of the case to decide a proper winner. And a sword to represent justice's swift and final authority (Robinson, 2009, p. 5). This blindfold seems to be ripped away by the wealthy in order to push the indigent even farther from equality. In hopes of benefitting the rich and able in society. Meanwhile the cases against the poor are growing, and the public defender systems are becoming overwhelmed. The most recent Bureau of Justice Statistics report states that "over 80% of felony defendants charged with a violent crime" in the major counties across the country are represented by a public defender or otherwise appointed indigent defender (Harlow,

2000, p. 1). The majority of the people being charged with these crimes are of a lower economic class and cannot afford private legal representation. The reality of justice in America needs to find a way to better match up with the ideals on which the system was developed.

Fifty years ago, prisons and jails held approximately 200,000 American citizens; however, there was “an increase of 800 percent, so that today there are 2.3 million” people incarcerated (Bright, 2010, p. 683). The majority of these people are poor and minorities that are targeted due to the war on drugs and the associated hyper focus on being “tough on crime” (Alexander, 2012, p. 85). Even apart from the criminal justice system, American culture is wrought with societal bias towards minorities.

The majority takes a view of ingroup versus outgroup when considering any type of minority. The non-criminal majority of citizens have a bias towards the outgroup of criminals. Same thing applies to racial and economic biases to name a few examples. The bias is used to evaluate members of the outgroup less favorably as well as decrease the amount of rewards allocated to the outgroup (Taylor & Moriarty, 1987, p. 192). It has been found that the biases are continued even when benefits from the behavior do not exist (Taylor & Moriarty, 1987, p. 192). This directly applies to the conversation at hand because criminal defendants are considered an outgroup, and the poor are considered an outgroup of the middle class and wealthy. That gives two biases affecting the allocation of resources to indigent defenders. It is a service to the poor and criminal, and the majority of Americans think that the money is not deserved. However, the number of criminal prosecutions is increasing, and the outgroup is unable to use their constitutional rights.

Due to the large number of poor people with criminal prosecution looming, there are very overwhelmed and overworked public defenders' offices attempting to cope with the caseloads. Because public defenders have little to no right to refuse cases in which they are appointed, the excessive caseloads building up in their offices continue to grow beyond the means of public defenders' offices means and abilities (Reamer Anderson, 2011, p. 429). On top of the growing number of cases, "the decline in the economy has decimated state treasuries, forcing officials to cut the already modest budgets for public defenders in most states" (Baxter, 2012, p. 91). It is clear that "public defender offices require additional funding and staff under an adversarial system" (McLeod, 2010, p. 151). This lack of funding is extremely problematic because it affects the ability for defendants to get a fair trial and fully exercise the rights guaranteed to them in the Constitution. It disallows those attorneys who represent the indigent from the resources typically afforded to criminal defendants based strictly upon the financial capabilities of the accused party. The combination of too many cases and too little funding gives public defenders little option but to try to dispense cases as quickly as possible, in order to try to lighten their load.

The overwhelming caseload problem is further complicated by the "pressure to make it easier and more efficient for prosecutors and judges to convict and sentence" defendants (Leonetti, 2015, p. 387). The societal pressures on public defenders can be unbearable, yet they are an integral part of the criminal justice system. The culture has put in place expectations that public defenders, and criminal defense attorneys in general, are not guaranteed anything more than the least the government is required to provide for them. These views "grind down all but the most ardent square pegs of advocacy until

they can fit into the round holes of apathy” (Leonetti, 2015, p. 393). This system is failing all of those who participate within it, and a solution needs to be developed in order to prioritize the rights of the accused, justice and truth, and care for all of the members of the system.

Section C:

South Dakota

South Dakota utilizes a system that gives all of the power to each individual county to select the system that they need. This way the state provides “very little funding” for indigent defense services, and the burden falls almost entirely upon the counties (Owens et al., 2014, p. 25). South Dakota’s system attempts to prevent the state from obtaining too much power. It stems from the populist history of the state of South Dakota. The rise in populism in the late 19th century occurred in the “wake of the economic hard times” throughout the farming populations in the Midwest, especially South Dakota (Pratt, 1992, p. 309).

The success of populism in South Dakota differed from that of its neighbor North Dakota, and it led to the development of the government that we see in the modern era (Tweton, 1992, p. 344). Populists distrust big government. Increases in populism is problematic for any given society. In collaboration, a writer from *The Atlantic* and a research fellow at the Tony Blair Institute for Global Change studied the effects of populism today. They identified nearly 50 populist leaders in over 33 countries in the past thirty years and compared some integral changes in the societies. One of the most crucial

findings reported “a significant deterioration in the extent to which citizens enjoy basic rights” (Mounk & Kyle, 2018). Populism has limited the size and scope of South Dakota’s public sector, which impacts its commitment to and investment in public defense. This decrease in focus on indigent defense in South Dakota is increasingly limiting citizen’s rights, corresponding with the Mounk and Kyle study.

This furthers the ideals that our culture considers criminal defendants as guilty even prior to their trial. The state funding for indigent defense dropped approximately \$145,000 from FY2008 - FY2012 (Owens et al., 2014, p. 25). This funding decrease has been seen opposite of an increase in caseloads. Following the funding drop in Minnehaha County alone, cases rose nearly 60 percent over the next five years (Ferguson, 2018). The funding has similarly decreased in multiple states; however, the problems that the system is facing are still present even in the states that have increased funding during the same block of time.

Ever since the birth of the Constitutional Right to Counsel, the fees for lawyers has been a question. In order to supplement the minimal state funding and slightly larger county funding, South Dakota utilizes a billable hours system to acquire payment from their clients. In 2016, the rate per hour was set at \$92 (Walker, 2016). This leads to exorbitant bills that most indigent defendants cannot pay; therefore, they risk going to jail regardless of their cases’ disposition due to lack of payment. Defense attorneys loathe this futile attempt to charge poor people for representation (Walker, 2016). Another inconvenience of the billable hours scheme is the fact that the attorneys have to take time to monitor their schedule down to seven-minute increments in order to accurately track the amount of work being allocated to each client. The system cannot afford this

inconvenience when the amount of time in a work day is already stretched so thin. Requiring some sort of payment may be necessary to continue the system; however, the billable hours system is seemingly not the best option.

Section D:

Missouri

Dating back to the Civil War, Missouri has been a conglomeration of differing ideas. During the war, the state was a battleground full of both Union supporters and Confederate sympathizers (Hobson, 2017). This created a dichotomy of people in the state that made every election close, and in turn, Missouri became a swing state that “backed every presidential winner but one from 1904 to 2004 (Hobson, 2017). The cities are predominately liberal, whereas the rural areas of the state remain conservative. This has left a need to compromise, thus placing Missouri in the middle of the spectrum concerning public defender systems. Missouri has a state system that receives state funding and fixed fees from defendants in order to fund the indigent defense work; however, problems persist even in the middle ground states.

In addition to funding, one of the most critical problems facing the American public defender system, and Missouri especially, is excessive caseloads. A study done by Rubin Brown, in conjunction with the American Bar Association, found that the Missouri State Public Defender System’s attorneys were most likely all operating under excessive workloads (RubinBrown, 2014, p. 17). Excessive caseloads create a tendency to decrease quality of representation. The problem “for a public defender laboring under an excessive

caseload conflict, [is] that possibility of sacrifice is more than a temptation-it is a certain and necessary evil" (Anderson 452). It is practically impossible to be an effective attorney for a client when the system is weighing you down with so many cases (Drinan, 2012, p. 139). Missouri is just one of the states in the United States that is drawing attention to their caseload issues and trying to find a way to solve it in the most beneficial way for the attorneys, the system, and most importantly the indigent needing representation.

Missouri is a state that requires flat fees from the indigent to compensate the legal fees. The fee schedule requires that a minimum \$25 is paid to the public defender after appointment, and Capital Murder cases cost \$1500 (Missouri State Public Defender System, 2017). The amount of legal fees is based upon the seriousness of the crime. This is a byproduct of a system which requires more time based upon the seriousness of the crime. As an example, a murder case, regardless of the details, would take more time to prepare a defense for than a driving under the influence case with scientific evidence of intoxication. The more serious the crime often leads to more complex details. It makes sense that more serious crimes require more time, and more time equals more money. Missouri ensures that juveniles, and anyone charged as an adult but under the age of 18, do not owe fees (Missouri State Public Defender System, 2017).

There are many pros and cons to this fixed fee system. The flat fee method does not require tracking of billable hours which is beneficial to conserving time; however, it is problematic when considering that lawyers are not necessarily bringing in more money to the system if they spend more time on a case. This can cause many negative consequences including increased pleas and lawyers being unprepared to deal with their

cases. This can increase questioning of quality of representation. Due to the increase in cases, pleas are increased which decreases the amount of knowledge necessary. If the lawyers are overwhelmed, they want to dispose cases as quickly as possible, and pleas solve that problem. They do not require serious inquiry and investigation, and they minimize the time between charging and disposition. The positive aspect of the flat fees is that the lawyers are on a fixed salary regardless of the fees collected from their clients. The solution to this problem remains controversial.

CHAPTER THREE

European Union

Section A:

Overview

The European Union is comprised of twenty-eight countries ranging in culture and size that make up the majority of the continent; however, they are a united political and economic coalition (“The EU in brief”, 2019). In December 2012:

the United Nations General Assembly (UNGA) agreed on a Resolution to adopt the *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*.

The approval of these *Principles and Guidelines* marks a milestone for access to justice because it is the first international instrument exclusively dedicated to legal aid. (Willems, 2014, p. 185)

The EU is a prominent group within the world, thus the comparison between their systems and America is fair and beneficial. Legal aid is one of the most important aspects of the criminal justice systems around the world due to the importance of fairness, justice, and upholding human rights.

Legal aid is critical to the fairness in judicial proceedings because it is meant “to assist people who cannot afford legal assistance but require it in order to obtain access to justice” (Barendrecht, Kistemaker, Scholten, Schrader, and Wrzesinska, 2014, p. 25). In

the European Union, a “suspect has the right to free legal aid on two conditions, namely (1) if he does not have sufficient means to pay for legal assistance and (2) when the interests of justice so require” (Van Puyenbroeck & Vermeulen, 2011, p. 1028). While the suspect has to display a financial need, it has been held that the burden of proof is not exorbitant, and they do “not have to prove 'beyond all doubt' that he lacks the means to pay for his defense” (Van Puyenbroeck & Vermeulen, 2011, p. 1028).

Section B:

Cultural Framework

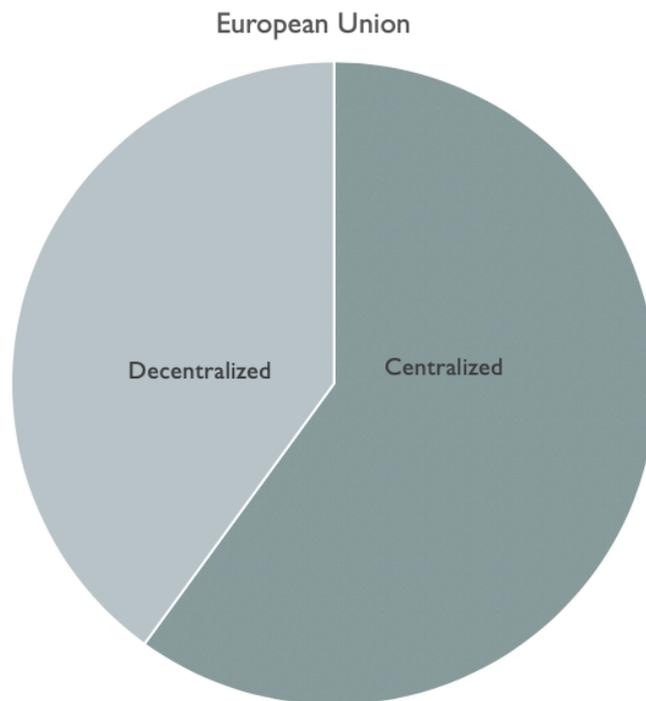
Culture in the European Union varies from the United States from its creation. The countries have ideals and beliefs; however, the country was established as a government before the ideals were cemented. It is said that “in most European societies at least an embryonic national community and, in large measure, a national state existed before the emergence of ideologies” (Huntington, 1982, p. 15). The culture of these countries is created from the government system rather than the opposite like the United States. This creates a more communal idea of government rather than individualistic. The government collaborated to create the ideals that the citizens adhere to, rather than promoting rugged individualism and populism.

The legal aid system can be established in many different ways, but the EU has made strides to provide some common protections between all of their member countries by implementing the requirements set forth in the 2012 Resolution. The members of the EU that exhibit the options of varying systems, and show some degree of success within

those systems, are Scotland, Ireland, Finland, the Netherlands, England and Wales, France, Germany, Belgium, and Poland. These nine countries can be further broken down into two subcategories: centralized systems and decentralized systems.

Great Britain, Ireland, Finland, and the Netherlands have their own country-level centralized legal aid systems (Barendrecht et al., 2014, p. 29). This means that the organizing body that controls the allocation of resources to the local jurisdictions so that indigent defendants can be represented in their legal matters is one sole entity for the entire country.

Figure 2.

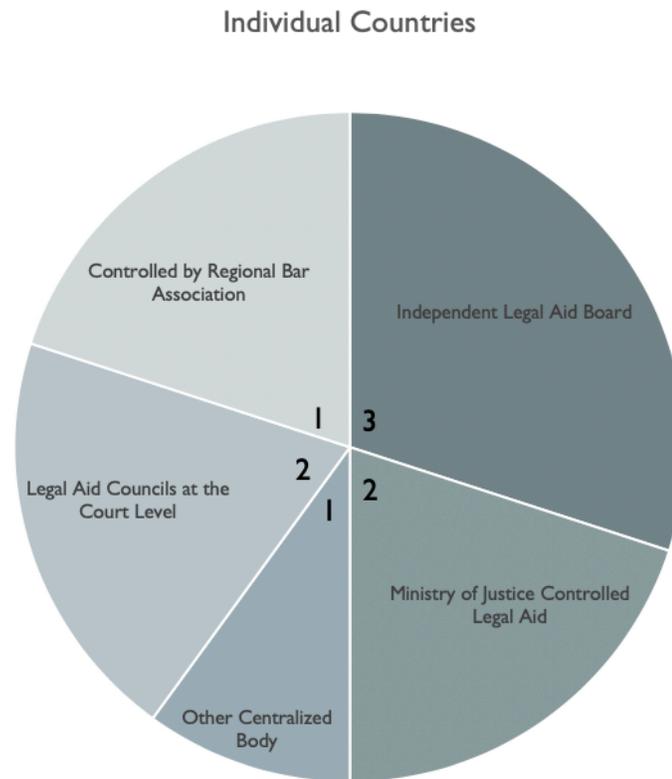


Source: Spangenberg & Beeman, 1995.

The only differences between the centralized systems are what governing body is in charge. Scotland, Ireland, and the Netherlands have an independent board for legal aid matters (Barendrecht et al., 2014, p. 29). In England and Wales, and Finland, the country's Ministry of Justice, on top of their other responsibilities within the justice system, handles the legal aid system (Barendrecht et al., 2014, p. 29-30). Finally, Ireland's Department of Justice and Equality administers the legal aid system for all criminal matters within the country; however, individual courts decide the distribution of legal aid resources for entitlement matters (Barendrecht et al., 2014, p. 30).

On the other hand, France, Germany, Belgium, and Poland have decentralized legal aid systems (Barendrecht et al., 2014, p. 30). These countries systems are not controlled by the federal government; therefore, there are differences within each jurisdiction. France and Belgium have councils focused solely on the administration of legal aid resources; however, these councils are situated at each of the individual courts rather than the federal level (Barendrecht et al., 2014, p. 30). In addition, France has another strictly advisory body within their system, and Belgium's legal aid counsels are controlled by the regional bar associations (Barendrecht et al., 2014, p. 30). Germany and Poland have no central governing bodies whatsoever; each individual court determines legal aid entitlements (Barendrecht et al., 2014, p. 30). These differences can be beneficial or problematic depending on the execution of justice within each country.

Figure 3.



Source: Spangenberg & Beeman, 1995.

The culture of each country is more than simply how they determine to control their legal aid systems. Germany's culture deems appointed defense attorneys as dependent upon the government (Cape et al., 2010, p. 7). Culturally, they see defense attorneys in general as problematic because prosecutors and judges are skeptical and distrustful of defense investigation and their results (Cape et al., 2010, p. 7). This cultural view of defense attorneys drastically affects their quality and effectiveness. They tend to avoid making motions and standing up to the Court in order to decrease thoughts about defense attorneys being inefficient and purposely delaying proceedings (Cape et al., 2010, p. 8). The culture in Germany displays characteristics that are seen across the world.

Section C:
England & Wales

As two of the countries within Great Britain, England and Wales are commonly linked together due to their overlap in some aspects of their culture and policy. They share the legal aid system between the two jurisdictions; therefore, for the sake of understanding and comparison, they will be referred to as one system, England & Wales. Within this jurisdiction, remuneration is typically based on hourly attorney fees, but there are some irregularities (Barendrecht et al., 2014, p. 56). These payment differences have resulted in some scrutiny in modern society. Reforms in the legal aid system are “a very controversial issue for many stakeholders, including legal aid beneficiaries, legal professionals and policy makers [because] the government claims the legal aid costs are unsustainable, and [they] implement far-reaching scope limitations” (Barendrecht et al., 2014, p. 86). This funding debacle is especially problematic because “legal aid beneficiaries are likely to be affected by the scope limitations” which directly affects how many poverty-stricken people receive subsidized legal assistance “unless they have very serious debt problems” (Barendrecht et al., 2014, p. 86). Since there are funding issues in England & Wales, it is affecting the ability of their legal aid system to succeed and benefit those in need.

Section D:

Germany

Germany is home to a decentralized public defender system, which is similar to America. The federal government of Germany is not responsible for the legal aid system whatsoever; the 16 individual states are entirely responsible to fund and control their own legal aid systems (Barendrecht et al., 2014, p. 99). The systems that the states put into place are completely “embedded in the court system”, thus minimizing the focus on the system because it seems so natural and normal (Barendrecht et al., 2014, p. 85). There has not been a need for much reform of their system in the recent history. However, the main problem is funding since:

the states have to meet the costs, because it is a state issue, whereas the laws are made by the federal government. So there is always a tendency that states want to cut back on costs. The federal government on the other hand, stresses that there needs to be access to justice. States have to lobby the federal government to make changes to the legal aid system. (Barendrecht et al., 2014, p. 85)

Since there is no federal oversight or federal funds, the state’s struggle to allocate enough money to the areas of need. They deal with the funding they have by utilizing “fixed fees for the legal aid providers” where they make a set amount regardless of the time they put into the case (Barendrecht et al., 2014, p. 56). The lack of a centralized system connects Germany with America a bit more than England & Wales because they struggle with similar issues.

CHAPTER FOUR

Comparison

Section A:

Overview

The United States and European Union may refer to their indigent legal representation systems by different names and have some differing characteristics, but their goals and methods are generally similar. The systems are inherently rooted in the requirement of allowing every citizen to exercise the rights afforded to them by some governing document. From there, the similarities extend into the types of problems in which the systems face. Differences stem from systemic issues and cultural variation. All in all, the comparison between the two is not unwarranted, and altogether the systems share more general similarities and vary more in the details of each system.

Section B:

Similarities

The pressures and stresses of a job representing indigent clients remains problematic across the two continents, and the truths of the matter remain the same. It is extremely problematic “when attorneys are operating under such crushing workloads,

[because] they are not capable of providing anything close to effective representation” (Drinan, 2012, p. 139). The countries are all united in the fact that they face critical problems (Willems, 2014, p. 186). Essentially all court systems are faced with a decision concerning indigent defense because:

without legal assistance, many defendants are forced to represent themselves, which leads to delays and increased court operation costs. The *Principles and Guidelines* has the potential to raise awareness on this alternative perspective on legal aid – not as a burden but as a means to cut costs related to the functioning of a criminal justice system. (Willems, 2014, p. 201)

This decision is difficult in all countries because the decision to represent the people who are undesired in society is polarizing and political. The lack of resources and funding are very clearly a universal problem.

The effect of overwhelming caseloads upon the quality of representation is unmistakable and, frankly, nearing on unacceptable in most cases in the United States. The rest of the world is aware of the problems that the American criminal justice system faces in the status quo because “underfunding indigent criminal defense systems is, of course, characteristic of U.S. criminal justice administration” (McLeod, 2010, p. 151-152). This is a sad fact that is seen through the lack of funding and the excessive caseloads. It is obvious that in America “relatively little other assistance is provided to assist the public defense bar, where one meaningfully exists” which is causing a massive epidemic of violating our citizens constitutionally guaranteed rights (McLeod, 2010, p. 124).

Another similarity occurs not between the systems as larger entities; however, it occurs at the more local level. Supplemental payment by the defendant of legal fees based within the smaller jurisdictions. The right to counsel in both the United States and the European Union does not come without conditions (Van Puyenbroeck and Vermeulen, 2011, p. 1028). From the birth of the right to counsel in the United States, defendants have been required to pay some sort of fee for public defenders. The Supreme Court when deciding *Gideon v. Wainwright* failed to stipulate how the lawyers were to be paid, so “states turned to user fees” (Shapiro, 2014). Fees for public defender services can be billed in 43 states and Washington D.C. (Shapiro, 2014). The EU seems to share the need to find supplemental funding somewhere; therefore, they result to similar tactics. Germany and Missouri are two examples of jurisdictions that share the fixed fee system of payment. Indigent defendants are required to pay a fixed fee based upon degree of crime rather than time spent on the case. While this type of a system has mixed reviews, this is left up to the individual jurisdictions in charge of their systems to determine. The general systems are very similar; however, the differences lie in the details.

Section C:

Differences

Some of the differences between the two systems are not easily seen or frequently regarded as too important. That would include what a right to legal counsel entails. The accused have a right to representation; however, it has been hotly debated whether they have a right to select who they please to represent them. The ability to choose your

desired attorney, even in appointed representation, is a possibility in the European Union; however, that right seems to never have existed in the United States. In the European Union, “in all countries, apart from Poland, the beneficiary of legal aid can have a particular person appointed as his legal aid lawyer” (Barendrecht et al., 2014, p. 46). However, “in Finland, the beneficiary of legal aid may additionally choose between the lawyers working in the legal aid offices, advocates (members of the bar association) and licensed attorneys” (Barendrecht et al., 2014, p. 46).

These two are quite different from the United States’ system which has judicial precedent clarifying this right. The US uses Supreme Court decisions to clarify constitutional rights, and their holding essentially bars any defendant from the ability to choose appointed counsel; however, they have the right to choose any attorney they desire if they are able to retain them.

In addition to the difference of the scope of the right to counsel, the systems vary because of the causes of their problems. Indigent defense systems cost money, which is an unargued fact; however, the European Union believes that it would be more damaging to everyone involved if the impoverished accused were not afforded the right to competent counsel. There are two main types of concerns that grip the systems we see in the European Union and the United States: firstly, the lack of funds and overloaded system that we see in the United States, and secondly, a system with an insufficient legal framework that is seen in the European Union (Willems, 2014, p. 202).

Primarily, the legal aid system should be easy to access and understand for everyone who comes into contact with the criminal justice system within their respective country. This is not necessarily true in the European Union because:

in some E.U. Member States the application procedure and subsequent eligibility tests are slow, unclear, and complicated, which makes the system of legal aid ineffective. This not only discourages people from applying for legal aid, it also leads to unequal outcomes (Willems, 2014, p. 2014).

The opportunity to obtain the resources meant to be used for the benefit of the impoverished citizens should be easily understood and everyone should be capable of attempting to acquire legal representation. The E.U. lacks procedure that protects the guaranteed rights of the accused. In some “member states, there is no legal obligation to inform the suspect of his right to legal assistance (partly) free of charge” (Willems, 2014, p. 205).

The four countries that fail to have this obligation are Belgium, Denmark, Luxembourg, and Sweden (Van Puyenbroeck & Vermeulen, 2011, p. 1032). This creates a system which does not adequately use the resources they have, for some unknown reason, at the detriment of the defendant. The rest of the nations within the European Union have a legal obligation to share the right with the accused; however, the exact “moment at which the duty arises varies considerably as well as the manner in which the information is given. (Van Puyenbroeck & Vermeulen, 2011, p. 1032). This is completely different from the United States where the system has put in place a specific point that the accused person is informed of their rights. *Miranda v. Arizona* (1966) requires, in part, that detained criminal suspects must know they have a right to have an attorney prior to interrogation. This shows a vast difference between one aspect of an underlying legal framework that supports an adequate indigent defense system.

The problems in the United States are different because there is “a strong legal

framework is in place, and access to legal aid is strongly embedded within the U.S. legal system,” yet there are still problems because they are systemic (Willems, 2014, p. 210). The United States has systemic racism and classism built into the criminal justice system from the beginning. The racial tension within the modern America has led to even more selective prosecution of minorities which has increased their need for legal representation. Due to the overwhelmed and underfunded public defense systems, those minorities become over represented within the corrections system as well. The inequality in race and class represented in criminal justice systems across the United States is seen less in the European Union. The systemic problems leading to American funding issues is not quite so problematic across the pond. While the legal framework in the United States is necessary and good, the way it is utilized and implemented is ineffective due to the systemic issues. If the United States were to implement the necessary aspects of the UN’s 2012 Resolution to ensure effective indigent representation, then it would benefit. The problems in these two continents are differing, but the causes can be linked back to one similar problem, funding.

CHAPTER FIVE

Recommendations

Section A:

Evidence Based Practices

Indigent representation is a critical aspect of the criminal justice system, and the necessary legal tools and assistance must be allocated in some way. As stated previously, the Rules of Professional Conduct requires that lawyers provide: 1) “competent representation” of a client, 2) timely and thorough demonstration of the client’s interests in court, 3) “exercise independent professional judgement”, and 4) must know and adequately prepare a defense for the case (Mann, 2010, p. 734-735). These are the requirements of lawyers, both public and private, that are utilized in order to promote the protection of rights. The practices that are working currently in our system are few and far between; however, we must look to the things that can be changed in order to better the system.

An example of a practice utilized within the United States that has seen some success is creating parity between prosecutorial funding and funding for the public defender system. Parity is recommended by the American Bar Association and includes: “workload, salaries, and other resources such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and

experts” (O’Brien, 2010, p. 876). Connecticut’s State Legislature has mandated parity for over thirty years. It is seen that parity is especially beneficial because it allows public defenders to retain experienced lawyers with the same skill levels as their prosecutorial counterparts (O’Brien, 2010, p. 876). The system in Connecticut has been nationally recognized for excellence and professionalism which is something that most systems seriously lack (O’Brien, 2010, p. 876). If parity were implemented across the country, it would insure that as the funding grows for prosecutor’s offices based on increased caseloads so too does the defenders.

It is difficult to find the best possible way to do that when most jurisdictions are dealing with similar, egregious problems. Government funding is not sufficiently satisfying the monetary needs of offices, even in jurisdictions that require fees from the indigent. Billable hours are seemingly more complicated than necessary for this system, so the recommendation of the system that works the best for obtaining fees from flat fees. The extreme lack of funding requires that money come from somewhere to supplement government money; therefore, the lesser of two evils must be selected in order to protect the defendant from horrible abuses.

Section B:

Promising Practices

These problems are complex and not easily solved; however, they “could be dealt with by an increase in funding for public defense, together with selective decriminalization and increased funding for training for attorneys and social workers in

order to increase effectiveness of public defense” (Willems, 2014, p. 210-211). Promising practices are ideas that could help solve the problems at hand, but they have yet to be implemented on a comparable scale as of yet. The country that comes to mind when considering decriminalization is the Netherlands. The decriminalization of multiple drugs has been considered innovative and beneficial to the health of people (van Ooyen-Houben & Kleemans, 2015, p.214). As an example, if the United States were to decriminalize marijuana and eliminate all the cases pending pertaining to marijuana distribution, possession, or consumption then the criminal justice system would decrease the amount of burden on the courts, especially public defenders. According to 2017 data from the FBI, more than 20 percent of all arrests across the country stemmed from marijuana possession (Ingraham, 2019). The elimination of so many cases would be positive for the systems across the country because it would reduce the amount of cases that are utilizing lawyers, resources, and funding. This could lead to promising results for the public defender systems in most jurisdictions.

Funding increases are required for the success of indigent representation systems. One tactic of attempting to resolve the issues that public defense systems in the United States is litigation. While this is not foolproof, the state frequently wants to settle these cases and find a solution to prevent further lawsuits. In 2017, the American Civil Liberties Union (ACLU) filed suit against Missouri in order to improve the state’s public defender system. In May 2019, the ACLU and Missouri Public Defender System (MSPD) were nearing a settlement agreement that established caseload caps; however, it did not include any provisions for the allocation of more money for attorneys (The Kansas City Star Editorial Board, 2019). This is a step in the right direction; however, the State would

have to be involved in the case in order for changes in funding to be ordered at disposition. This act of litigation is not yet resolved; however, it displays a promising outcome that could help in the resolution of the problems at hand.

CHAPTER SIX

Conclusion

The lack of resources for indigent defendants is extremely problematic due to the loss of their guaranteed rights and freedom. This could lead to a break down in most government systems. Governments are judged based upon their legitimacy, and if the rights of the citizens becoming involved in the criminal justice system are being disregarded then the people lose respect for the system. The rights guaranteed by the governing documents in any given jurisdiction provide a measurement to control how much a government is overpowering the individuals.

Most people go through life blissfully unaware of the government infringing on their rights; however, a growing number of minority citizens are constantly aware of their rights being violated. Some people in the European Union are completely unaware of their rights to free or partially free legal representation because the country's fail to increase understanding of the citizens' rights and resources. The awareness and advocacy for the increase in prioritization and funding for indigent defense systems is necessary because rights do not disappear based upon your race, economic capabilities, or criminal wrongdoing.

Governments around the world have concluded that criminal defendants with the risk of losing their liberties deserve an advocate with specialized knowledge of the criminal justice system. The fulfillment of this right for indigent defendants is

administered in varying degrees and manners across jurisdictional lines. Firstly, the United States was identified as an entity facing many problems while determining the proper system of indigent representation. Each state has a separate system, and funding comes from the state level or the county level exclusively. The European Union was then outlined as another entity containing smaller jurisdictions with autonomy in determining their system for indigent representation. Each country deals with the overarching EU mandates; however, they are solitary beings with their own funding and control mechanisms. Thirdly, comparisons between the United States and European Union were analyzed and considered. Finally, the investigation turned to possible remedies, both evidence-based and promising practices to consider.

The best options for assisting in the resolution of the major funding crises facing indigent representation systems across the globe are funding equality between prosecution and defense offices and selective decriminalization. These two options aids in leveling funding inequalities and decreasing caseload issues. Parity between the prosecution and defense offices is an evidence-based practice utilized in the state of Connecticut. It has helped to level the playing field in resources, quality and experience of lawyers, and funding. Selective decriminalization has occurred in various places proving many benefits. However, the correlation between decriminalization and its effects on indigent representation have not been solidified. It is an effect evidence-based practice in decreasing cases. This is seen in the decriminalization of drugs in the Netherlands and various states in the United States. It shows promising effects on the caseload crises faced by public defenders across the United States and in the European Union.

Further research is necessary in order to find out the success rates for these methods, and the search for methods of resolving the crises occurring in criminal justice systems and the overall cultures are necessary as well. Systems need to be willing to implement changes to find a solution. Without the willingness to try things, the likelihood of finding successful solutions will be limited. Funding increases must be seen in order to implement other ways of solving the inequalities. Further investigation into the differences in funding to social services in the European Union and United States will continue to shed light on the inequality across the world. Overall, the systems display many similarities; however, the United States seems to be more encumbered by their funding and caseload issues than the European Union.

WORKS CITED:

- Alexander, M. (2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.
- Alter, K. (2000). The European Union's Legal System and Domestic Policy: Spillover or Backlash? *International Organization*, 54(3), 489-518. Retrieved March 3, 2019, from <https://www.jstor.org/stable/2601342>
- Barendrecht, M., Kistemaker, L., Scholten, H. J., Schrader, R., and Wrzesinska, M. *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (pp. 1-120, Rep.). (2014). HiiL.
- Baxter, H. (2012). Too Many Clients, Too Little Time: How States are Forcing Public Defenders to Violate Their Ethical Obligations. *Federal Sentencing Reporter*, 25(2), 91-102. Retrieved March 3, 2019, from <https://www.jstor.org/stable/10.1525/fsr.2012.25.2.91>.
- Burkhart, G. (2016, Spring). How to Improve Your Public Defense Office. *Criminal Justice*, 31(1), 56-64.
- Burkhart, G. (2017). How to Leverage Public Defense Workload Studies. *Ohio State Journal of Criminal Law*, 14(2), 403-429. Retrieved March 3, 2019.
- Cape, E., Namoradze, Z., Smith, R., & Spronken, T. (2010). *Effective Criminal Defence in Europe*. Intersentia.
- Bright, S. (2010). Legal Representation for the Poor: Can Society Afford This Much Injustice. *Missouri Law Review*, 75(3), 1-32. Retrieved March 12, 2019.
- Drinan, C. (2012). Lafler and Frye: Good News for Public Defense Litigation. *Federal Sentencing Reporter*, 25(2), 138-140. Retrieved March 12, 2019.
- Fairfax, Jr., R. (2013) Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda. *The Yale Law Journal*, 122(8), 2316-2335. Retrieved March 12, 2019 from <https://www.jstor.org/stable/23528674>
- Ferguson, D. (2018, March 03). As murder cases mount, county attorneys struggle to keep up. Retrieved May 29, 2019, from <https://www.argusleader.com/story/news/crime/2018/02/27/too-many-murders-county-attorneys-strapped-heavy-caseload-tuesday/372650002/>

Garcia Hernandez, M., & Powell, C. (2013). Valuing Gideon's Gold: How Much Justice Can We Afford? *The Yale Law Journal*, 122(8), 2358-2375. Retrieved March 3, 2019, from <https://www.jstor.org/stable/23528676>.

Giovanni, T. (2012, July 20). *Community Oriented Defense: Start Now*[Scholarly project]. In *Brennen Center for Justice at New York University School of Law*. Retrieved March 29, 2019, from <https://www.brennancenter.org/publication/community-oriented-defense-start-now>

Gideon v. Wainwright 372 U.S. 335 (1963)

Hobson, J. (2017, October 26). Missouri's Political Path From Purple To Light Pink. Retrieved May 30, 2019, from <https://www.wbur.org/hereandnow/2017/10/26/missouri-politics-purple-pink>

Hodgson, J. (2011). Safeguarding Suspects' Rights in Europe: A Comparative Perspective. *New Criminal Law Review: AN International and Interdisciplinary Journal*, 14(4). Retrieved March 3, 2019, from <https://www.jstor.org/stable/10.1525/nclr.2011.14.4.611>

Huntington, S. (1982). American Ideals versus American Institutions. *Political Science Quarterly*, 97(1), 1-37. doi:10.2307/2149312

Ingraham, C. (2019, April 15). Where the war on weed still rages. Retrieved May 29, 2019, from https://www.washingtonpost.com/us-policy/2019/04/15/where-war-weed-still-rages/?utm_term=.a24ad1fda703

Jackson, B., Banks, D., Hollywood, J., Woods, D., Royal, A., Woodson, P., & Johnson, N. (2016). The State of the U.S. Court System Today. In *Fostering Innovation in the U.S. Court System: Identifying High-Priority Technology and Other Needs for Improving Court Operations and Outcomes*(pp. 5-17). RAND Corporation. Retrieved March 12, 2019, from <https://www.jstor.org/stable/10.7249/j.ctt1d41ddx.9>.

Leonetti, C. (2015). Painting the Roses Red: Confessions of a Recovering Public Defender. *Ohio State Journal of Criminal Law*, 12(2), 371-399. Retrieved March 12, 2019.

Mann, P. (2010). *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715

McLeod, A. (2010). Exporting U.S. Criminal Justice. *Yale Law & Policy Review*, 29(1), 83-164. Retrieved March 3, 2019, from <https://www.jstor.org/stable/41308526>.

Miranda v. Arizona, 384 U.S. 436 (1966)

- Missouri State Public Defender System Fee Schedule. (2017). Retrieved May 16, 2019, from <https://publicdefender.mo.gov/clients-and-families/fees-for-services/fee-schedule/>
- Mounk, Y., & Kyle, J. (2018, December 26). What Populists Do to Democracies. Retrieved May 30, 2019, from <https://www.theatlantic.com/ideas/archive/2018/12/hard-data-populism-bolsonaro-trump/578878/>
- O'Brien, S. (2010). Missouri's Public Defender Crisis: Shouldering the Burden Alone. *Missouri Law Review*, 75(3), 853-884. Retrieved May 29, 2019, from <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3890&context=mlr>.
- Owens, S., Accetta, E., Charles, J., & Shoemaker, S. (2014). *Bureau of Justice Statistics*. Retrieved March 3, 2019, from <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5051>.
- Pennington, L. (2017). An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office. *Ohio State Journal of Criminal Law*, 14(2), 603-627. Retrieved March 3, 2019.
- Pratt, W. (1992). South Dakota Populism and its Historians. *South Dakota State Historical Society Quarterly*, 22(4). Retrieved May 30, 2019.
- Reamer Anderson, H. (2011). Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest. *Hastings Constitutional Law Quarterly*, 39(2), 421-456. Retrieved March 3, 2019.
- Robinson, M., & Williams, M. (2009). The Myth of a Fair Criminal Justice System. *Justice Policy Journal*, 6(1), 1-52. Retrieved May 30, 2019, from http://convictcriminology.org/pdf/robinson_williams.pdf
- Shapiro, J. (2014, May 19). As Court Fees Rise, The Poor Are Paying The Price. Retrieved May 29, 2019, from <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>
- Sommerlad, H. (2001). 'I've Lost the Plot': An Everyday Story of the 'Political' Legal Aid Lawyer. *Journal of Law and Society*, 28(3), 335-360. Retrieved March 12, 2019, from <https://www.jstor.org/stable/3657985>
- Spangenberg, R., & Beeman, M. (1995). Indigent Defense Systems in the United States. *Law and Contemporary Problems*, 58(1), 31-49. Retrieved March 3, 2019, from <https://www.jstor.org/stable/1192166>.

- Tata, C. (2007). In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defense Work. *Journal of Law and Society*, 34(4), 489-519. Retrieved March 12, 2019, from <https://www.jstor.org/stable/20109764>.
- Taylor, D., & Moriarty, B. (1987). Ingroup Bias as a Function of Competition and Race. *The Journal of Conflict Resolution*, 31(1), 192-199. Retrieved from <http://www.jstor.org/stable/174176>
- The Kansas City Star Editorial Board. (2019, May 15). Missouri AG wants to punish the poor by overworking and underfunding public defenders. *The Kansas City Star*. Retrieved May 16, 2019.
- The EU in brief. (2019, March 28). Retrieved March 30, 2019, from https://europa.eu/european-union/about-eu/eu-in-brief_en
- The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (pp. 1-48, Rep.). (2014). St. Louis, MO: RubinBrown.
- The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services* (Rep.). (2015). Massachusetts: The Sixth Amendment Center.
- Tweton, D. J. (1992). Considering Why Populism Succeeded in South Dakota and Failed in North Dakota. *South Dakota State Historical Society Quarterly*, 22(4). Retrieved May 30, 2019.
- Van Ooyen-Houben, M., & Kleemans, E. (2015). Drug Policy: The “Dutch Model”. *Crime and Justice*, 44(1), 165-226. Retrieved May 21, 2019, from <https://www.jstor.org/stable/10.1086/681551>.
- Van Puyenbroeck, L. and Vermeulen, G. (2011). Towards Minimum Procedural Guarantees For the Defence in Criminal Proceedings in the EU. *The International and Comparative Law Quarterly*, 60 (4), 1017-1038. Retrieved March 12, 2019, from <https://www.jstor.org/stable/41350124>
- Walker, M. (2016, March 4). In S.D., right to an attorney comes with a price. Retrieved May 16, 2019, from <https://www.argusleader.com/story/news/2016/03/04/sd-right-attorney-comes-price/81205714/>
- Willems, A. (2014) The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: A Step Toward Global Assurance of Legal Aid? *New Criminal Law Review: An International and Interdisciplinary Journal*, 17(2), 184-219). Retrieved March 3, 2019, from <https://www.jstor.org/stable/10.1525/nclr.2014.17.2.184>