

THE IMPACT OF NEGLECTING INDIGENT DEFENSE ON THE ECONOMICS OF CRIMINAL JUSTICE

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INTRODUCTION

Criminal justice decision-making does not begin with a police officer, a prosecutor, or even a judge; rather, it begins with an appropriator—the legislator or legislators who determine how much funding should be dedicated and for what purpose. At the most basic level, the appropriator can be described as pushing the equivalent of a shopping cart through the criminal justice store, up and down aisles lined with an ever-increasing array of options: prison beds, police officers, drug courts, probation and parole officers, electronic monitoring devices, victim advocates, mental health services, and yes, even public defenders. The appropriator has to decide precisely how much funding to dedicate to each specific function in order to achieve the overarching goals of enhancing public safety and preserving an equitable system of justice.

These options are each represented by constituency groups with varying degrees of influence over the budgetary process. Police officers and prosecutors traditionally have considerable sway, and perhaps rightfully so, with public safety providing a compelling case for funding that translates into a simple and resonant message with voters. Conversely, and if history is any indication, criminal defense lawyers for the poor have very little clout when it comes to attracting resources from elected officials. Regardless, these groups engage appropriators each budgetary cycle on why they should receive additional funding. Given the mutual exclusivity with which budgets are generally constructed, greater funding for one often comes at the expense of another; that is to say, an additional dollar for corrections could mean a dollar less for treatment courts, and so on. Adding to the complexity of the process, these groups—each a spoke in the criminal justice wheel—make their case to appropriators who are often not well-versed on effective public safety strategies or emerging best practices, or even how to scale funding decisions to achieve the aforementioned public safety and criminal justice goals.

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The regrettable practice is then to formulate individual budgets in a vacuum; for example, to develop probation and parole's budget without scrutinizing what is driving its request or how an adjustment to funding in other areas might improve outcomes and decrease the need for resources. Data is regularly overlooked in favor of politics, and funding priorities are instead set by those with the greatest influence.

This approach to criminal justice system funding, not surprisingly, leads to poor outcomes. The following is an illustration of how traditional budget construction often fails to achieve the universal goals of public safety and a fair system of justice. The case for review involves the State of Missouri and how a fiscally conservative state that is self-styled as "tough on crime," pro-liberty, and anti-Government, has achieved opposite results.

I. UNDERFUNDING INDIGENT DEFENSE AND THE ESCALATION OF THE STATE PRISON BUDGET

Throughout the country, in red and blue states alike, indigent defense finds itself at the end of the line when it comes to budget priorities. The immediate past two U.S. Attorneys General, Holder and Lynch, have both described the state of indigent defense as something of a national crisis.¹ Even given the epidemic of anemic funding in support of the right to counsel, however, there are few states where the situation is more dire than in Missouri.

The right to counsel is guaranteed by the United States Constitution to all persons facing criminal prosecution.² Every state is obligated to provide counsel to poor persons who face the loss of liberty by virtue of a pending criminal charge.³ Given this, one might draw the assumption that public defense funding would fare better in a state where the prevailing political ideology is that government should only deliver those functions that it is required to perform under the state and federal constitutions; however, that is not the case.

The State of Missouri ranks forty-ninth among the fifty states in the funding it provides for indigent defense, spending just \$5.85 per capita.⁴ Meanwhile, other fiscally conservative states that are contiguous to Missouri

1. See Eric Holder, U.S. Att'y Gen., Remarks at the Brennan Center for Justice, New York University School of Law: Indigent Defense Reform (Nov. 17, 2009), <https://www.brennancenter.org/print/5287> [<http://perma.cc/356W-CZDY>]; Loretta E. Lynch, U.S. Att'y Gen., Remarks at the White House, Washington, D.C.: Convening on Incarceration and Poverty (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> [<http://perma.cc/6R2F-ETAW>].

2. U.S. CONST. amend. VI & XIV, § 1.

3. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

4. Michael Barrett, *Message from the Director*, in STATE OF MO. PUB. DEF. COMM'N, FISCAL YEAR 2016 ANNUAL REPORT (2016); *Missouri*, GIDEON AT 50, <http://gideonat50.org/in-your-state/missouri/> [<http://perma.cc/U9H9-RKG4>].

provide significantly more generous funding, some even double or triple that of Missouri. For instance: Arkansas contributes \$9.19 per capita;⁵ Iowa \$17.49 per capita;⁶ Kansas \$10.94 per capita;⁷ Nebraska \$13.37 per capita;⁸ Oklahoma \$8.61 per capita;⁹ and Tennessee \$11.36 per capita.¹⁰

As a result, the Missouri State Public Defender's (MSPD) per-attorney caseloads are extremely high. In Fiscal Year 2016, the MSPD was assigned 76,150 new trial division cases, about a twelve percent increase over 2015, together with 31,738 cases that were carried forward from the previous fiscal year.¹¹ These cases were handled by just 313 trial division attorneys for an average annual caseload of about 344 cases per attorney.¹² Bearing in mind that the often-cited suggested maximum caseload is 150 felony cases per attorney, per year, Missouri's assistant public defenders often maintain caseloads that are more than double the recommended best practice.¹³

In 2014, the American Bar Association enlisted the accounting firm RubinBrown to study the MSPD's caseload in light of its existing number of attorneys, and the study was later publicized as "The Missouri Project" report.¹⁴ As part of this process, the MSPD became the first statewide defender organization to require its attorneys to electronically keep track of their time in order to generate specific data on how much time they were spending on each attorney-related task for each given case type.¹⁵ In other words, the MSPD

5. *Arkansas*, GIDEON AT 50, <http://gideonat50.org/in-your-state/arkansas/> [<http://perma.cc/T8P8-HS9W>].

6. *Iowa*, GIDEON AT 50, <http://gideonat50.org/in-your-state/iowa/> [<http://perma.cc/D4RQ-3CKT>].

7. *Kansas*, GIDEON AT 50, <http://gideonat50.org/in-your-state/kansas/> [<http://perma.cc/B6TS-HTFZ>].

8. *Nebraska*, GIDEON AT 50, <http://gideonat50.org/in-your-state/nebraska/> [<http://perma.cc/S7UJ-XG6A>].

9. *Oklahoma*, GIDEON AT 50, <http://gideonat50.org/in-your-state/oklahoma/> [<http://perma.cc/634F-8B39>].

10. *Tennessee*, GIDEON AT 50, <http://gideonat50.org/in-your-state/tennessee/> [<http://perma.cc/2TXT-4LZG>].

11. FISCAL YEAR 2016 ANNUAL REPORT, *supra* note 4, at 5.

12. *Id.*

13. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE 66 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<http://perma.cc/U4D2-44M6>] ("In its report on the Courts, the [National Advisory Commission on Criminal Justice Standards and Goals] recommended the following maximum annual caseloads for a public defender office . . .").

14. RUBINBROWN LLP, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5-6 (2014) http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf [<http://perma.cc/UZB5-5FZR>].

15. *Id.*

tracked how much time was being dedicated to meeting with clients, investigating a case, performing motion practice, attending court appearances, and so forth.

This data was then juxtaposed with similar data provided by private defense attorneys. Using the Delphi methodology, a business forecasting tool, RubinBrown used these two data sets to establish thresholds that detail precisely how much time an attorney should be spending on a given task for a given case type.¹⁶ Then it applied the MSPD's existing resources (i.e., the number of attorneys) to the number of cases assigned by case type, which revealed precisely how many additional attorneys the MSPD needed to provide competent representation. Using the number of cases assigned to the MSPD when the report was released in 2014, this calculation resulted in a need for 290 additional attorneys; two years later, when caseloads increased about twelve percent, that number rose to more than 330 additional attorneys.¹⁷ Nonetheless, in the few years since the release of the Missouri Project, the MSPD has not received funding for a single additional attorney.

Missouri's informed neglect for the rights of the poor has been met with stark criticism. In July of 2015, the Civil Rights Division of the U.S. Department of Justice issued a report detailing the repeated denial of due process for poor children, particularly children of color, in St. Louis County, pointing to the "staggering caseload of the sole public defender assigned to handle all indigent juvenile delinquency cases."¹⁸ This finding comes on the heels of a 2013 study by the National Juvenile Defender Center that described Missouri's indigent defense system as being in crisis after having "endured at least two decades of crushing caseloads and inadequate resources."¹⁹ Still yet, no additional attorneys were added.

Therefore, the fact that people are systematically denied basic constitutional rights has not been enough to persuade elected leaders to follow their own political ideology as it relates to an individual's fundamental right to liberty. What remains, then, is to demonstrate to the appropriator, to say nothing of the taxpayer, how underfunding public defense indirectly causes budgets to increase elsewhere to the tune of hundreds of millions of dollars. In other words, public defender resources should not be viewed in isolation like

16. *Id.* at 17–24.

17. STATE OF MO. PUB. DEF. COMM'N, FISCAL YEAR 2014 ANNUAL REPORT 4 (2014); FISCAL YEAR 2016 ANNUAL REPORT *supra* note 4, at 5.

18. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, ST. LOUIS, MO. 2 (2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf [<http://perma.cc/3JKX-VFCM>].

19. Mary Ann Scali, et al., Nat'l Juvenile Defender Ctr., *Missouri: Justice Rationed. An Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings* 7 (Spring 2013), <http://njdc.info/wp-content/uploads/2013/11/Missouri-Executive-Summary.pdf> [<http://perma.cc/P8PY-6B9D>].

other funding recipients such as a department of transportation, where a decline in funding may only mean opting not to resurface a particular stretch of highway. Though the road may desperately need it, putting the project off a year seldom drives cost increases in other budget line items.

By contrast, when a public defender has too many clients, as they do, it makes it impossible to perform even some of the most basic attorney-related functions. For instance, attorneys may not have sufficient time to talk to witnesses, closely scrutinize the evidence, request a bond reduction, file motions *in limine* or motions to suppress based on information gleaned from the client, or even work to develop an alternate sentencing option to state prison. It is a denial of competent counsel to be sure, but is also a myopic budgeting practice that fails to account for the generation of substantial unintended costs.

Because these important functions are not sufficiently performed for tens of thousands of defendants annually, Missouri has climbed to eighth highest in the nation in its incarceration rate;²⁰ more critical, however, is the fact that the state prison population is no longer dominated by individuals who pose a public safety threat. Then there are the collateral costs that are manufactured even beyond the criminal justice system. Not only do non-violent offenders, by virtue of their incarceration, become a drain on taxpayer funds at a cost of about \$22,350 a year, per inmate²¹ but also, many of these individuals cease contributing to the tax base themselves. What's more, many of their families left behind due to their incarceration then come to rely on public assistance, thereby needlessly expanding the rolls of individuals dependent upon the state. And so indigent defense, if not funded to scale, becomes a force multiplier for needless government spending.

This is precisely what has occurred in Missouri, where the prison budget has increased substantially in the last decade. In Fiscal Year 2004, the Missouri Department of Corrections ("DOC") housed 29,364 inmates with a budget of \$575,700,362.²² By December 31, 2015, the DOC's population rose to 32,330 inmates with a budget of \$725,156,473.²³ Despite this \$200 million increase,

20. *State-by-State Data*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR> [<http://perma.cc/4T6K-ZRKD>].

21. *The Price of Prisons: What Incarceration Costs Taxpayers, Missouri*, VERA INSTITUTE OF JUSTICE (Jan. 2012), <http://archive.vera.org/files/price-of-prisons-missouri-fact-sheet.pdf> [<http://perma.cc/AK94-B7VQ>].

22. MO. DEP'T OF CORRECTIONS, A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2013, at 1 (Jan. 6, 2014), <https://doc.mo.gov/Documents/publications/Offender%20Profile%20FY13.pdf> [<https://perma.cc/GV93-UU6Q>]; MO. DEP'T OF CORRECTIONS, ANNUAL REPORT 2013, at 10 (2013), <https://doc.mo.gov/Documents/publications/AR2013.pdf> [<http://perma.cc/32NA-SRET>].

23. MO. DEP'T OF CORRECTIONS, ANNUAL REPORT 2015, at 9 (2015), <https://doc.mo.gov/Documents/publications/AR2015.pdf> [<https://perma.cc/J4SQ-VFLZ>]; MO. DEP'T OF

the Missouri DOC has repeatedly stated in the past several years that its inmate population has risen beyond operational capacity, presenting yet another critical budgetary issue for state leaders: build a new prison at a cost of more than \$100 million, plus the personnel and other costs associated with operating the prison, or adopt a new approach to criminal justice.

Repeated admissions by legislators continue to reveal a misguided belief that the rising cost of incarceration is uncontrollable; that increases to the prison population are little more than a reflection of the current crime problem. This position fails to recognize the policies and funding decisions that truly drive the rate of incarceration, such as unchecked local discretion, sentencing practices, and opting not to fund indigent defense. Since about 2009, and despite the skyrocketing prison budget, the MSPD's resources have remained relatively flat at about one-half of one percent of the total state budget.²⁴ Considered together, Missouri's position as the state with the eighth highest incarceration rate nationally and second to last amount of public defender funding creates a correlation that is difficult to ignore between underfunding indigent defense and the \$200 million increase in corrections spending.²⁵

In addition to fulfilling the state's obligation to provide the right to counsel to poor persons, the practical utility of a meaningful defense is that it helps the state, by way of the adversarial process that is the design of America's criminal justice system, to distinguish between those who require institutionalization, at considerable cost to taxpayers, from those who could be managed through less resource-intensive means within the community. Relative minor upward adjustments to the public defender budget in Missouri have the potential to save tens, or even hundreds, of millions in taxpayer dollars. Moreover, as the following section will demonstrate, funding indigent defense to scale can also improve public safety outcomes.

II. OVER-INCARCERATION AND THE RISE OF VIOLENT CRIME

There is a potential counterargument that such considerable increases to the prison budget are not, in and of itself, a bad thing, and that retort lies in the state's crime rate. If crime, particularly violent crime, decreased commensurate

CORRECTIONS, ANNUAL REPORT 2014, at 10 (2014), <https://doc.mo.gov/Documents/publications/AR2014.pdf> [<http://perma.cc/2YPN-6L8S>].

24. The Missouri Public Defender's Fiscal Year 2017 operating budget is \$40,703,780 out of the total Fiscal Year 2017 Missouri operating budget of \$9,633,728,780. See OFFICE OF ADMINISTRATION DIVISION OF BUDGET & PLANNING, GOVERNOR JEREMIAH W. NIXON, THE MISSOURI BUDGET FISCAL YEAR 2017 9 (2016), https://oa.mo.gov/sites/default/files/FY_2017_Executive_Budget_download.pdf [<http://perma.cc/7XWS-V95D>]; H.B. 12, 98th Gen. Assemb., Reg. Sess. (Mo. 2015), <https://legiscan.com/MO/text/HB12/id/1290897/Missouri-2016-HB12-Enrolled.pdf> [<http://perma.cc/BD55-SHQR>].

25. THE SENTENCING PROJECT, *supra* note 15; *In Your State*, GIDEON AT 50, <http://gideonat50.org/in-your-state/#per-capita-spending> [<http://perma.cc/FU5K-2D6H>].

with the increase to Missouri's corrections budget, then it could be said that investing in corrections is an effective public safety strategy to reduce victimization. But that is not the case.

It has long been believed that the more individuals a state incarcerates, the safer its citizens will be. Certainly, it is intuitive to think that the more law breakers are removed from the street, the fewer law breakers there will be to victimize people. However, what makes this position intuitive is that it relies on the belief that those who are incarcerated are predominately violent offenders. But, this condition precedent largely has not been met in Missouri, making it a stark example of how an ideologically-driven budget achieves poor outcomes and wastes millions of dollars.

The last reported collection of FBI annual crime data reveals that Missouri ranks eleventh overall in violent crime, which includes the offenses of murder, rape, robbery, and aggravated assault.²⁶ Of the seventy-six cities with populations greater than 250,000, Missouri's two largest cities finish fourth and tenth respectively, with St. Louis having the highest murder rate among large cities in the U.S.²⁷ However, Missouri's problem with violent crime is not confined to the major urban areas. Springfield is among the top ten medium-sized cities for violent crime in the U.S., and the City of Wellston ranks second nationally in both violent crime and murder among cities of between 1000 and 10,000 people.²⁸

One of the reasons that Missouri has both a large prison population and a high violent crime rate is the percentage of resources dedicated to individuals who do not pose a public safety risk. Like in any state budget, there are finite resources, and so appropriators should take special care to avoid wasting critical dollars on efforts that do not yield a significant public safety benefit. Regrettably, that has largely not occurred in Missouri.

As the national incarceration rate decreased from 2008 to 2014, Missouri's prison population has steadily increased.²⁹ According to a Missouri DOC report, that increase has largely been made up of non-violent offenders. From 2009 to 2014, there was a 3.2% increase among violent offenders, with just a 1.4% increase among sex offenders; yet, those incarcerated for non-violent

26. *2014 Crime in the United States*, U.S. DEPT. OF JUSTICE, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-5> [<https://perma.cc/63M6-EF2G>].

27. *Most Dangerous Cities in the United States*, WORLD ATLAS (Sept. 19, 2016), <http://www.worldatlas.com/articles/most-dangerous-cities-in-the-united-states.html> [<http://perma.cc/433A-F79U>].

28. Mason Johnson, *FBI's Violent Crime Statistics for Every City in America*, CBS CHICAGO (Oct. 22, 2015 5:00 PM), <http://chicago.cbslocal.com/2015/10/22/violent-crime-statistics-for-every-city-in-america/> [<http://perma.cc/MP97-H4ZZ>].

29. MO. DEP'T OF CORRECTIONS, A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2014, at 1 (Jan. 14, 2015), <http://doc.mo.gov/Documents/publications/Offender%20Profile%20FY14.pdf> [<http://perma.cc/9X7L-3KFD>].

offenses increased by 11.2%.³⁰ According to the same report, about 47.6% of Missouri's prison population was comprised of inmates incarcerated for a non-violent offense.³¹

The average length of sentences changed during this time as well, with a slight -0.4% decrease in the length of prison sentences for violent offenders, but a 4.3% increase in sentence length among non-violent offenders, including a 17% increase in sentence length for DWI offenders.³² As a result, the profile of the Missouri prison population is growing increasingly non-violent, which means that there are fewer resources to cope with the state's violent crime rate.

Even using the low end of cost estimates, incarcerating roughly 15,195 non-violent inmates cost taxpayers well over \$300 million annually.³³ This is a remarkable amount of money. Repurposing just \$100 million for strategic law enforcement efforts, to include solving unsolved violent crime, performing evidence-based crime prevention, executing warrants on violent individuals, and eliminating the rape kit backlog, could drive drastic reductions in Missouri's violent crime rate. When considered in zero-sum terms, the issue becomes less about whether someone should be incarcerated in state prison for a non-violent offense, but rather whether this is the best use of more than \$300 million in limited public safety resources.

In both economic and public policy terms, it is hard for decision makers to argue that incarcerating non-violent offenders is the best use of hundreds of millions in limited public safety resources. Therefore, budget strategies should be implemented to avoid escalating costs that are not directly tied to decreasing victimization and improving public safety. Adequately funding public defense is one such strategy because public defenders work to avoid prison, not just for the innocent, but for the thousands of individuals who are more effectively managed within their communities, through problem-solving courts and other effective alternative sentencing options.

CONCLUSION

The cost of corrections does not grow on its own. Indeed, such considerable increases are a result of policy choices and politically driven funding decisions that weaken efforts that could right-size the ever-increasing prison population, such as an adequately funded system of criminal defense. There is a need to replace the existing method for constructing budgets with a data driven approach that evaluates the entirety of the criminal justice system so that taxpayers get the most public safety and justice out of every dollar

30. *Id.* at 28.

31. *Id.* at 30.

32. *Id.* at 29.

33. *See supra* notes 21 and 29 (taking 15,195 inmates, 47% of the Missouri DOC population, at a reported cost of \$22,350 per inmate, per year).

spent. Only then will Missouri, and other states, come to decrease their reliance on costly programs, such as incarceration, and improve public safety outcomes.

