

**CONFRONTING MAINE’S INDIGENT DEFENSE CRISIS:  
LESSONS TO BE LEARNED FROM THE GREEN  
MOUNTAIN STATE**

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## INTRODUCTION

In March of 2022, Brandy Grover was incarcerated at the Somerset County Jail in Madison, Maine.<sup>1</sup> She was awaiting sentencing on a conviction stemming from her arrest on July 9, 2021, for aggravated trafficking.<sup>2</sup> After being prescribed opioids following an injury while working as a nursing assistant, Grover developed a substance-use disorder.<sup>3</sup> She is now in recovery. Because Grover could not afford to hire an attorney, the court assigned her a “lawyer of the day” following her arrest.<sup>4</sup> According to Grover, her attorney never advocated for Grover’s release. Instead, Grover got the impression that her attorney thought she was “better off in jail.”<sup>5</sup> Grover believed her attorney was “annoyed and angry” when she did not take a plea deal.<sup>6</sup>

Moreover, while incarcerated, Grover was unable to contact her attorney altogether. Her attorney did not answer her calls or the calls of her family members, so Grover resorted to writing letters.<sup>7</sup> She received no response. Grover decided to plead guilty to Class B trafficking.<sup>8</sup> She worried that her attorney would not advocate for her adequately at sentencing, as her attorney never explored mitigating circumstances, including Grover’s disability and family status.<sup>9</sup>

Grover, along with four other named plaintiffs and the American Civil Liberties Union (ACLU) of Maine, filed a lawsuit against the Maine Commission on Indigent Legal Services (Commission).<sup>10</sup> She and the other

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1. Class Action Compl. for Injunctive and Declaratory Relief at 6, *Robbins v. Maine Comm’n on Indigent Legal Servs.*, No. KENSC-CV-22-54 (Mar. 1, 2022) [hereinafter *Complaint*].

2. *Id.*

3. *Id.*

4. *Id.*; SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN MAINE: EVALUATION OF SERVICES PROVIDED BY THE MAINE COMMISSION ON INDIGENT LEGAL SERVICES 51–53 (2019), [https://sixthamendment.org/6AC/6AC\\_me\\_report\\_2019.pdf](https://sixthamendment.org/6AC/6AC_me_report_2019.pdf) [hereinafter *SIXTH AMEND. CTR. REPORT*]. The “lawyer of the day” appears at 48-hour hearings for defendants in custody and at initial appearances for defendants not in custody. *Id.* at 51. Some counties in Maine have attorneys that regularly fill this role, while others rotate. These attorneys report being expected to represent up to 30 people on a single docket. *Id.* at 52. They may or may not have received discovery or had a chance to meet with their clients before appearing in court on their behalf. *Id.* The Sixth Amendment Center’s (Center) report noted one attorney in Androscoggin County who estimated having about five minutes to spend with each of their clients in this capacity. *Id.* at 53.

5. *Complaint*, *supra* note 1, at 6.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 4.

plaintiffs are indigent<sup>11</sup> defendants incarcerated in Maine jails.<sup>12</sup> A court-appointed attorney represented each of them in their criminal proceedings.<sup>13</sup> The plaintiffs allege that the Commission—which supervises, administers, and funds the indigent counsel system in Maine—has failed to provide adequate representation to indigent defendants.<sup>14</sup> They contend that the current system “create[s] an unconstitutional risk that indigent criminal defendants will be denied the benefit of effective assistance of counsel at critical stages of their cases.”<sup>15</sup> They have sued under the Sixth Amendment to the United States Constitution and Article I, § 6 of the Maine Constitution.<sup>16</sup>

Grover and her co-plaintiffs are not alone. Recent reporting reveals that Maine’s indigent defense system is on the brink of catastrophe, with indigent defendants facing the consequences.<sup>17</sup> Maine Public<sup>18</sup> reported that last year 18 defendants in Aroostook County went more than 1,200 days combined without legal counsel.<sup>19</sup> This constitutes an “actual denial of counsel,”<sup>20</sup> contrary to Maine’s constitutional obligation to provide counsel to criminal defendants who cannot afford to hire an attorney.<sup>21</sup> The number of criminal cases with assigned counsel is increasing while the number of

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11. The word “indigent” is biting. Another article could be written on the ways language dehumanizes and isolates criminal defendants. However, “indigent” is the word used in the Commission’s name, and the phrase “public defense” does not reflect the system that Maine currently employs. “Indigent” felt like the practical, if imperfect, choice.

12. Complaint, *supra* note 1, at 5–7.

13. *Id.* at 4.

14. *Id.* at 2.

15. *Id.* at 5. Employing Vermont’s public defense model, utilizing both public defenders and private criminal defense attorneys, could pull Maine from this constitutional muck.

16. *Id.* at 1; U.S. CONST. amend. VI; ME. CONST. art. I, § 6.

17. See, e.g., Kevin Miller, *Commissioner Warns Maine’s Indigent Legal System Has ‘Gone Over a Cliff,’* ME. PUB. (May 24, 2022), <https://www.maine-public.org/courts-and-crime/2022-05-24/commissioner-warns-maines-indigent-legal-system-has-gone-over-a-cliff> (explaining criminal defendants are being held in jail without counsel, because there are not enough attorneys willing to represent indigent defendants).

18. *The Mission of Maine Public*, ME. PUB., <https://www.maine-public.org/the-mission-of-maine-public> (last visited Nov. 30, 2023). Maine Public is an independently owned and operated 501(c)(3) nonprofit news organization, operating from offices in Bangor, Lewiston, and Portland, Maine. Its media services include public radio, television broadcasting, print, and web publications. *Id.* Kevin Miller’s reporting for Maine Public, as well as Samantha Hogan’s reporting for the Maine Monitor, were invaluable resources while working on this project.

19. Miller, *supra* note 17.

20. *Id.*

21. See *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702, 708 (Me. 2006) (holding Maine’s Constitution “imposes an affirmative obligation” that the State provide counsel to indigent defendants, and that the right to counsel afforded by the Sixth Amendment to the United States Constitution is commensurate with the right afforded by Article I, § 6 of the Maine Constitution); ME. CONST. art. I, § 6.

attorneys willing to take such cases is decreasing dramatically. During the 2022 fiscal year, Maine reported a record 31,257 indigent defense cases.<sup>22</sup> The annual average number of indigent defense cases in Maine is approximately 26,500.<sup>23</sup> Meanwhile, the number of attorneys willing to take court-appointed cases has dropped by more than 50% statewide over the past three years. In May 2019, there were 410 attorneys on the Commission's roster.<sup>24</sup> The COVID-19 pandemic compounded preexisting challenges in Maine's judicial system.<sup>25</sup> In September 2022, there were less than 170 attorneys on the roster.<sup>26</sup> By January 2023, there were just 136 attorneys, 64 attorneys accepting adult criminal cases and 72 attorneys willing to take on child protective cases, in the entire state of Maine.<sup>27</sup> Maine now faces a situation where—because of the declining number of attorneys—the remaining attorneys are spread thin attempting to keep up with caseloads.<sup>28</sup>

This situation is a result of how Maine provides counsel to indigent defendants. Maine is the only state in the country that does not have a public defender's office providing counsel to indigent individuals who have been charged with crimes.<sup>29</sup> Instead, a shrinking roster of private, court-appointed defense attorneys provide all of Maine's constitutionally required indigent defense.<sup>30</sup> This method of providing defense is failing Maine's indigent defendants.

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22. Samantha Hogan, *Availability of Maine Defense Lawyers Reaches All-Time Low*, ME. MONITOR (July 5, 2022), <https://www.themainemonitor.org/availability-of-maine-defense-lawyers-reaches-all-time-low/> [hereinafter Hogan, *All-Time Low*].

23. *Id.*

24. Miller, *supra* note 17. Note that this roster does not appear to be publicly available.

25. See Emily Allen, *Backlogs Causing Delays in Thousands of Maine Court Cases*, PORTLAND PRESS HERALD (Apr. 3, 2022), <https://www.pressherald.com/2022/04/03/backlogs-causing-delays-in-thousands-of-maine-court-cases/> (describing thousands of cases pending in Maine's judicial system, both criminal and civil).

26. Kevin Miller, *Indigent Legal Defense Commission Asks Lawmakers to Approve \$13M for 'Emergency' Situation*, ME. PUB. (Sept. 28, 2022), <https://www.mainepublic.org/politics/2022-09-28/indigent-legal-defense-commission-asks-lawmakers-to-approve-13m-for-emergency-situation>.

27. Samantha Hogan, *New Public Defenders Help but Don't Fully Alleviate Court's Troubles Finding Enough Defense Lawyers*, ME. MONITOR (Jan. 15, 2023), <https://www.themainemonitor.org/new-public-defenders-help-but-dont-fully-alleviate-courts-troubles-finding-enough-defense-lawyers/> [hereinafter Hogan, *New Public Defenders*].

28. Telephone Interview with a Maine Defense Attorney (Oct. 26, 2022) (on file with the author). Anecdotally, a criminal defense attorney in Maine recently explained to the author that the controversy surrounding the Commission encouraged some defense attorneys to remove themselves from the court-appointment roster. The remaining attorneys were saddled with higher caseloads, leading to burnout and more attorneys removing themselves from the roster. *Id.*

29. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 26.

30. Miller, *supra* note 17.

This Article proposes that Maine remedy the constitutional and statutory violations in its indigent defense system by adopting a public defender system like that of another rural New England state: Vermont. Vermont's system—which utilizes both public defenders and private criminal defense attorneys—is a necessary solution to Maine's indigent defense crisis. Part I discusses the history of indigent defense in the United States, beginning with the Sixth Amendment, the 1963 case *Gideon v. Wainwright*, and caselaw developments through modern day. Maine's current system will be explored through the lens of this history and the pending ACLU of Maine lawsuit. Part II analyzes Vermont's indigent defense system and proposes that adopting a similar system could help Maine remedy the constitutional violations alleged by the ACLU. Part III addresses counterarguments related to funding, Maine's rural attorney shortage, and the risk of replacing one flawed system with another.

I. A BRIEF HISTORY OF INDIGENT DEFENSE IN THE UNITED STATES—AND  
IN MAINE

Exploring how Maine might fulfill its constitutional indigent counsel mandate requires an understanding of how the right to counsel developed. This Part first examines the Sixth Amendment and significant caselaw developments through modern day. Then, this Part outlines Maine's current indigent defense system. Lastly, this Part provides an overview of the pending American Civil Liberties Union (ACLU) of Maine lawsuit against the State of Maine.

*A. The Sixth Amendment in United States History*

The Sixth Amendment to the United States Constitution is the source of a criminal defendant's right to counsel. The Sixth Amendment reads in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."<sup>31</sup> While the Sixth Amendment originated in the Bill of Rights,<sup>32</sup> a criminal defendant's right to counsel did not always exist in the form that many would imagine it today.

In the late 19th and early 20th centuries, the United States saw an influx of European immigrants.<sup>33</sup> American elites who were "interested in maintaining the existing social order" hoped to "discipline and control" immigrant populations through the criminal legal system.<sup>34</sup> Fear of social upheaval led legal-aid organizations to begin providing services to recent immigrants and the working class for civil disputes.<sup>35</sup> However, indigent criminal defendants were not provided with equivalent counsel.<sup>36</sup> A class of elite lawyers considered to be "reformers" focused their efforts on ensuring the criminal justice system could "efficiently process" indigent criminal

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31. U.S. CONST. amend. VI.

32. *The Bill of Rights: A Transcription*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> (last visited Nov. 30, 2023).

33. *E.g.*, Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 592 (1986–87).

34. *Id.* at 592–94. Elites feared that the poor would revolt against a legal system that failed to provide for vulnerable populations. They feared a "crime wave," anarchy, and revolution. *Id.* (footnote omitted).

35. *See id.* at 593–94. For example, the New York Legal Aid Society sought to assist immigrants and the working class by helping them recover unpaid wages and protecting them from loan sharks and greedy landlords. *Id.*

36. *See id.* at 593–95 (describing how the private bar failed to fulfill its imposed obligation to the poor).

defendants.<sup>37</sup> Classism, in society as a whole and within the legal community, defined the rights afforded to criminal defendants.<sup>38</sup>

Simultaneously, major changes to the criminal legal system were afoot across the country. State legislators introduced bills at the state level to provide for public defenders, but these bills failed after opposition from the organized bar.<sup>39</sup> In 1914, the City of Los Angeles established the first public defender office.<sup>40</sup> In 1917, because the organized bar, courts, and prosecutors were unwilling to endorse the creation of a public defender system, New York attorneys employed a cost-efficient, non-adversarial system of indigent defense that ignored a number of major contradictions.<sup>41</sup>

The first major judicial discussion in the area of indigent defense occurred in 1932, when the Supreme Court reviewed the case of the Scottsboro Boys in *Powell v. Alabama*.<sup>42</sup> In that case, an Alabama trial court appointed two thoroughly unqualified attorneys to represent nine Black boys accused of raping two white women.<sup>43</sup> Juries convicted the boys of rape—a capital offense at the time.<sup>44</sup> The Supreme Court reversed the boys' convictions with a narrow holding that the Fourteenth Amendment required state courts to provide “effective” counsel to indigent defendants

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37. *Id.* at 595 (footnotes omitted) (discussing how these “reformers” proposed abolishing grand juries, restricting the right to remain silent, restricting the presumption of innocence, introducing the majority verdict, increasing the court’s power to assemble and comment upon evidence at trial, and eliminating court-assigned counsel for more “cost-efficient” counsel).

38. *See id.* at 596–600; *Classism*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/classism> (last visited Nov. 30, 2023) (defining “classism” as “a belief that a person’s social or economic station in society determines their value in that society” or “the systemic oppression of the lower class and middle class to the advantage of the upper class”).

39. McConville & Mirsky, *supra* note 33, at 593, 602. The organized bar was the “organized sector” of the private legal community. *Id.* at 593 n.47. Think of the New York City Bar Association.

40. *Id.* at 602.

41. *See id.* at 610–31. The system that New York cooked up is shocking. The Voluntary Defenders’ Committee in New York only accepted out-of-court referrals from individuals who would vouch for the “worthiness” of the case. The Committee’s attorneys actively discouraged their clients from going to trial. Most indigent defendants were assumed to be guilty and “unworthy” of legal defense, and thus were not entitled to the most “able” attorneys. The prosecution was presumed to provide adequate safeguards against unjust outcomes. Prosecutors approved of the Committee’s approach because it alleviated fears that public defense would lead to the “socialization of legal services.” *Id.*

42. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

43. *Id.* at 53, 55, 57. The trial court did not appoint counsel for the boys until the day of trial. The attorneys who represented the boys had no time to prepare, and one of the attorneys was from Tennessee and was thus unfamiliar with Alabama criminal procedures. *Id.*

44. *Id.* at 52, 56.

in capital cases.<sup>45</sup> The legacy of the *Powell* decision, however, is the idea of “fundamental fairness.”<sup>46</sup>

The Supreme Court applied *Powell*'s “fundamental fairness” test six years later in *Johnson v. Zerbst*.<sup>47</sup> There, the Court concluded indigent defendants have a right to court-appointed counsel in federal prosecutions, but not state prosecutions.<sup>48</sup> Because the issue presented to the Court involved the federal court system, the Court found only a right to counsel in federal trials.<sup>49</sup> Four years later, the Supreme Court upheld and clarified this decision in *Betts v. Brady*.<sup>50</sup> The Court held that indigent defendants in state court do not have a right to court-appointed counsel.<sup>51</sup> At the time, most states did not consider the right to counsel to be a fundamental right or essential to a fair trial.<sup>52</sup> Instead, the right to counsel was a matter of policy, one that the Court considered best left up to the states and their constituencies.<sup>53</sup>

Then, finally, in the famous 1963 case *Gideon v. Wainwright*, the Supreme Court overruled its previous decisions.<sup>54</sup> The Court held that the Sixth Amendment applies to the states through the Fourteenth Amendment and asserted that indigent defendants in state court have the right to court-

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45. *Id.* at 71, 73.

46. See *Understanding Powell v. Alabama*, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/understanding-powell-v-alabama> (last visited Nov. 30, 2023) (using the phrase “fundamental fairness” to characterize *Powell*'s holding that state courts have a constitutional obligation to appoint counsel for indigent defendants in capital cases); see also *Powell*, 287 U.S. at 71–72 (examining the right to counsel in the context of the “fundamental postulate” that “there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard” (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898))).

47. *Johnson v. Zerbst*, 304 U.S. 458, 462–64 (1938) (“The Sixth Amendment guarantees that ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’ This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.”). This case is a classic American tale of two Marines on leave of duty, allegedly possessing counterfeit \$20 bills, and then being indicted, arraigned, tried, convicted, sentenced, and sent to prison—entirely without the assistance of counsel—over the course of four days in January of 1935. *Id.* at 459–60.

48. *Id.* at 467.

49. *Id.*

50. *Betts v. Brady*, 316 U.S. 455, 471–72 (1942). The defendant in this case, *Betts*, had been indicted for robbery in Carroll County, Maryland. He was unable to afford an attorney. He informed the judge of this at arraignment and asked the court to appoint counsel to him. The judge declined, explaining that the court appointed counsel to indigent defendants only in cases of rape and murder. *Betts*' case proceeded to a bench trial. He called his own witnesses—one of whom established an alibi for *Betts*—and cross-examined the State's witnesses. The judge found *Betts* guilty. *Id.* at 456–57.

51. *Id.* at 471–72.

52. *Id.* at 471.

53. *Id.* at 471–72.

54. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

appointed counsel.<sup>55</sup> The facts of this transformative case are surprisingly innocuous. Police arrested Clarence Earl Gideon for felony breaking and entering after he stole money from a pool hall's vending machines in Panama City, Florida.<sup>56</sup> Gideon was unable to afford an attorney, so he appeared in state court without one.<sup>57</sup> He asked the judge to appoint counsel for him.<sup>58</sup> The judge denied his request, explaining that the court could only appoint Gideon an attorney if he faced a capital offense.<sup>59</sup> Gideon responded, "[t]he United States Supreme Court says I am entitled to be represented by Counsel."<sup>60</sup> Still without counsel, Gideon proceeded to trial and mounted his own defense: he made an opening statement to the jury, cross-examined witnesses, and presented his own witnesses.<sup>61</sup> The jury found him guilty.<sup>62</sup>

Upon appealing his habeas corpus petition to the United States Supreme Court, the Court unanimously agreed with Gideon.<sup>63</sup> "[R]eason and reflection require[d]" the Court to acknowledge that a defendant who cannot afford an attorney "cannot be assured a fair trial unless counsel is provided for him."<sup>64</sup> This, the Court ruled, was "an obvious truth."<sup>65</sup>

In the years since, the Court has clarified and expanded the meaning of this "obvious truth," both substantively and procedurally. Turning first to procedure, a defendant now has the right to counsel in misdemeanor cases when facing jail time and in misdemeanor cases with a suspended sentence.<sup>66</sup> Juveniles now have the right to counsel in delinquency proceedings.<sup>67</sup> A defendant has the right to counsel when "formal judicial proceedings have begun."<sup>68</sup> This is the defendant's initial judicial appearance, when they learn of the charges against them and their liberty is

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55. *Id.* at 340–41.

56. *Id.* at 336–37; Alex McBride, *Landmark Cases: Gideon v. Wainwright (1963)*, THIRTEEN, [https://www.thirteen.org/wnet/supremecourt/rights/landmark\\_gideon.html](https://www.thirteen.org/wnet/supremecourt/rights/landmark_gideon.html) (last visited Nov. 30, 2023).

57. *Gideon*, 372 U.S. at 337.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 345.

64. *Id.* at 344.

65. *Id.*

66. *See Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (holding that a criminal defendant's right to counsel extends to misdemeanor cases where punishment includes imprisonment); *see also Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (holding that a criminal defendant's right to counsel extends to misdemeanor cases in which a defendant receives a suspended sentence of imprisonment).

67. *In re Gault*, 387 U.S. 1, 41 (1967).

68. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211 (2008).

“subject to restriction.”<sup>69</sup> Once the right to counsel attaches, the defendant is entitled to counsel at all “critical stages” of proceedings.<sup>70</sup> The list of events considered “critical stages” is long and not exhaustive.<sup>71</sup>

Second, substantively, the Court has clarified that assigned counsel must be effective and able to “subject the [government’s] case” to “the crucible of meaningful adversarial testing.”<sup>72</sup> Because the right to counsel “affects [a defendant’s] ability to assert any other rights he may have,” it is “by far the most pervasive” of all the rights that a defendant has.<sup>73</sup> The Court has also explained what a defendant must show to prove ineffective assistance of counsel.<sup>74</sup> The defendant must be able to demonstrate that their attorney’s representation fell below an “objective standard of reasonableness” under “prevailing professional norms.”<sup>75</sup> The American Bar Association outlines these prevailing norms of practice, but this acts as a guide, not a “particular set of detailed rules.”<sup>76</sup>

In light of this history, again consider Brandy Grover’s situation: incarcerated, unable to contact her attorney, awaiting sentencing after

69. *Id.* at 213.

70. *Id.* at 212.

71. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977) (when subject to interrogation); *Massiah v. United States*, 377 U.S. 201 (1964) (custodial interrogations before and after prosecution commences); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (preliminary hearings before prosecution commences where “potential substantial prejudice to defendant’s rights inheres in the . . . confrontation”); *Moore v. Illinois*, 434 U.S. 220 (1977) (corporeal identification conducted without counsel); *United States v. Wade*, 388 U.S. 218 (1967) (lineups and show-ups when or after prosecution commences); *Lafler v. Cooper*, 566 U.S. 156 (2012) (during plea bargaining); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (to understand collateral consequences); *McMann v. Richardson*, 397 U.S. 759 (1970) (during plea negotiations and during the entry of a guilty plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignments); *Powell v. Alabama*, 287 U.S. 45 (1932) (during the pre-trial period between arraignment and trial); *Wiggins v. Smith*, 539 U.S. 510 (2003) (during sentencing); *Glover v. United States*, 531 U.S. 198 (2001) (when sentence is being increased); *Mempa v. Rhay*, 389 U.S. 128 (1967) (during sentencing); *Halbert v. Michigan*, 545 U.S. 605 (2005) (when seeking appellate review); *Douglas v. California*, 372 U.S. 353 (1963) (for direct appeals); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (during probation and parole revocation proceedings). *But see, e.g.*, *Kirby v. Illinois*, 406 U.S. 682 (1972) (police station showup after arrest but before initiation of formal proceedings not entitled to counsel).

72. *See United States v. Cronin*, 466 U.S. 648, 656, 659 (1984) (explaining that ineffective counsel equates to a denial of Sixth Amendment rights, making the adversary process “presumptively unreliable”).

73. *See id.* at 654 (“[T]he core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.” (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973))).

74. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

75. *Id.* at 687–88.

76. *Id.* at 688; *see also* AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, standards 4-1.1 to 4-1.9, at 1–12 (4th ed. 2015).

pleading guilty without assistance.<sup>77</sup> If Grover lived in Vermont, she would have been appointed a public defender prior to or at her arraignment. If a conflict arose, or if the public defenders had reached their case limit, the court would have appointed her a private, contracted attorney. This attorney would have advocated for Grover at all critical stages. While trying to avoid Monday morning quarterbacking, imagine if this attorney could have gotten Grover released from jail pre-trial, or negotiated a superior plea, or taken Grover's case to trial. Instead, Grover pled guilty and was left to worry that sentencing would not go her way. With this in mind, what follows is a closer examination of Maine's entire system.

### *B. The State of Maine's Indigent Defense System*

Maine is struggling to meet the constitutional requirements outlined above with its current indigent defense system. Maine is the only state in the country that does not fulfill its constitutional mandate under the Sixth Amendment through a public defender's office.<sup>78</sup> Instead, it relies (almost) entirely on court-appointed, private defense attorneys to represent indigent defendants in criminal cases.<sup>79</sup>

Maine's system has evolved over the last 50 years. After the Supreme Court decided *Gideon* in 1963,<sup>80</sup> various concerned parties began to question Maine's method of funding and assigning indigent defense counsel.<sup>81</sup> At that time, individual counties in Maine were still responsible for funding all their indigent defense services.<sup>82</sup> The State only paid for

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77. Complaint, *supra* note 1, at 6.

78. *Know Your State: Maine*, SIXTH AMEND. CTR., <https://sixthamendment.org/know-your-state/maine/> (last visited Nov. 30, 2023).

79. See SIXTH AMEND. CTR. REPORT, *supra* note 4, at 26; see also Kevin Miller, *Maine's Top Judge Makes Plea for More Attorneys to Address 'Crisis'*, ME. PUB. (Nov. 10, 2022), <https://www.maine-public.org/courts-and-crime/2022-11-10/maines-top-judge-makes-plea-for-more-attorneys-to-address-crisis> (noting that earlier in 2022, the Maine Commission on Indigent Legal Services (Commission) received state funding to hire its first five public defenders, and that the Commission's Executive Director hopes they will be hired and begin their rural-focused work by the end of 2022).

80. *Gideon v. Wainwright*, 372 U.S. 335, 340–41 (1963) (holding that the Sixth Amendment applies to the states through the Fourteenth Amendment and asserting that indigent defendants in state court have the right to court-appointed counsel).

81. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 9–10. In 1965, the Maine Judicial Council expressed “dissatisfaction” with “the assigned counsel system.” *Id.* at 9 n.30 (citation omitted). In 1971, the Institute of Judicial Administration reviewed court data that failed to instill “much confidence” that the assigned counsel system worked. *Id.* at 10 n.32 (citation omitted).

82. *Id.* at 9.

public defense in post-conviction proceedings.<sup>83</sup> Judges and justices appointed counsel to indigent defendants on a case-by-case basis.<sup>84</sup>

In 1976, the State finally took full responsibility for funding indigent defense services,<sup>85</sup> but the appointment process remained a function of the courts.<sup>86</sup> Judges kept lists of attorneys willing to provide counsel to indigent defendants and assigned counsel to defendants based on those lists.<sup>87</sup> Compare this to the efficiency of a judge appointing a county public defender.<sup>88</sup>

Then, in 2009, the Maine Legislature created the Maine Commission on Indigent Legal Services (Commission) to oversee the roster of private defense attorneys.<sup>89</sup> The Legislature tasked the Commission with providing “efficient, high-quality representation” to indigent defendants, consistent with constitutional and statutory mandates.<sup>90</sup> Representation needed to be provided by “qualified and competent counsel” consistently across Maine.<sup>91</sup> In addition, the Commission is responsible for promulgating standards including eligibility for indigent defense services; attorney qualifications, experience, and training; attorney caseloads; and other necessary standards.<sup>92</sup>

Eight years after establishing the Commission, in 2017, the Maine Legislature charged the Working Group to Improve the Provision of Indigent Legal Services (Working Group) with developing recommendations for improving the delivery of indigent defense services.<sup>93</sup> The Working Group’s report found that the Commission “does not have systemic oversight and evaluation of attorneys” and needs to improve its

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83. *Id.*

84. *Id.*

85. ME. REV. STAT. ANN. tit. 4, § 22 (2023) (“Beginning with the fiscal year commencing July 1, 1976, the Legislature shall appropriate funds for the expenses of the Judicial Department.”); SIXTH AMEND. CTR. REPORT, *supra* note 4, at 10.

86. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 10.

87. *Id.*

88. With attorneys joining and leaving the roster as they please, one can imagine the confusion at the local courthouse during Monday morning arraignments. Judge: “Where is Attorney X? I thought he was taking cases!” Attorney Y: “No, Your Honor, he took himself off the roster.” Judge: “And who are you?” Attorney Y: “I was just added to the roster.” So on and so forth. With a public defender’s office in place, this confusion is avoided because there is always a core group of attorneys tasked exclusively with representing clients who cannot afford to hire their own attorney.

89. ME. REV. STAT. ANN. tit. 4, § 1801 (2023).

90. *Id.*

91. *Id.*

92. *Id.* § 1804(2)(A)–(C).

93. See SIXTH AMEND. CTR. REPORT, *supra* note 4, at 11.

fiscal management.<sup>94</sup> The Working Group advocated for the State to conduct an “outside, independent, nonpartisan study” of Maine’s indigent defense system to determine if alternative methods would “increase quality and efficiency.”<sup>95</sup>

In response to the Working Group’s report, the State hired the Sixth Amendment Center (Center).<sup>96</sup> In April 2019, the Center published its report on Maine’s indigent defense system. The Center found that:

(1) The Commission’s attorney qualification standards are “too lenient”;<sup>97</sup>

(2) The “advice of rights” video shown to indigent defendants is insufficient. Prosecutors are engaging in plea discussions with unrepresented defendants;<sup>98</sup>

(3) Financial screening presents a conflict of interest with an attorney’s duty to provide “zealous representation”;<sup>99</sup>

(4) The “lawyer of the day” system serves to process as many defendants as possible in a single day, while presenting a “critical gap” in the representation of indigent defendants;<sup>100</sup>

(5) There are too many attorneys not performing adequately;<sup>101</sup>

(6) Insufficient time is an issue in Somerset County. High caseloads and a fixed-fee contract create perverse incentives to dispose of cases;<sup>102</sup>

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94. WORKING GROUP TO IMPROVE THE PROVISION OF INDIGENT LEGAL SERVICES, 128TH LEGIS., 1st Sess., at 1 (Me. 2017).

95. *Id.* at 14.

96. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 11. The Center was founded in 2013 and is an information center on the right to counsel in the United States. The Center conducts independent evaluations of states and counties’ methods of providing counsel to indigent defendants. They offer their services to policymakers at the state and local levels. See *6AC & Our Work*, SIXTH AMEND. CTR., <https://sixthamendment.org/about-us/> (last visited Nov. 30, 2023).

97. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 25.

98. *Id.* at 42.

99. *Id.* at 45.

100. *Id.* at 51.

101. *Id.* at 57.

102. *Id.* at 66.

(7) The Commission's hourly rate is inadequate, and the fixed-fee contract creates a conflict of interest;<sup>103</sup>

(8) The Commission does not exert "adequate financial oversight" over private attorneys.<sup>104</sup>

While Maine has hired its first five public defenders, the issues identified by the Center continue to confront Maine today.<sup>105</sup>

Maine is also suffering from a more general problem: a lack of attorneys. While the national average is 40 attorneys per 10,000 residents, Maine's average is just 30 attorneys per 10,000 residents.<sup>106</sup> Beyond this, more than half of all of Maine's attorneys live or practice in Cumberland County, a large county in southern Maine that is home to the state's largest city, Portland.<sup>107</sup> This uneven distribution of legal services leaves rural Maine, home to 60% of Maine's population, "vastly underserved" by attorneys.<sup>108</sup>

Compounding this problem is Maine's aging class of attorneys. In 2017, of the 3,700 attorneys practicing in Maine, approximately 1,000 were 60 or older. Of the attorneys practicing in rural Maine, 65% were more than 50 years old.<sup>109</sup> Doing some quick math, this means that in the next 15 years, nearly two-thirds of Maine's rural attorneys will reach retirement age. Maine's legal community is increasingly concerned that the "graying" of the State bar is creating an "increasing lack of access to justice" for rural Mainers.<sup>110</sup> This problem, unfortunately, is not unique to Maine.<sup>111</sup>

Maine's system faces multiple crises. The number of attorneys willing to do indigent defense work has fallen dramatically. This is harming indigent defendants and affecting the level of representation they receive. With an aging bar, the prognosis for Maine's indigent defense system will be determined by the changes that Maine makes in the short- and long-term.

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103. *Id.* at 72.

104. *Id.* at 79.

105. Miller, *supra* note 26.

106. Liz Woodbury, *Tackling the Rural Law Crisis: Innovative Program Puts Students in Underserved Communities*, 2018 ME. L. MAG. 15, 15.

107. *Id.*

108. *Id.* at 15–16.

109. *Id.* at 16.

110. *Id.* at 16–17.

111. See Elaine S. Povich, *Lack of Rural Lawyers Leaves Much of America Without Support*, ME. MONITOR (Feb. 4, 2023), <https://www.themainemonitor.org/lack-of-rural-lawyers-leaves-much-of-america-without-support/> (explaining that 40% of counties in the United States are considered "legal deserts," as they have less than one lawyer per 1,000 residents).

Brandy Grover, and Maine’s other indigent defendants as a whole, do not have time to wait.

### C. *The Lawsuit*

On March 1, 2022, the ACLU of Maine filed a class-action lawsuit against the State of Maine and the Commission in Kennebec County Superior Court.<sup>112</sup> The five named plaintiffs are criminal defendants in Maine being represented by court-appointed counsel.<sup>113</sup> The lawsuit contains two claims. First, a constitutional claim (Count I), seeking judgment under 42 U.S.C. § 1983, the statutory basis for civil actions for deprivation of constitutional rights.<sup>114</sup> They alleged that the Commission’s current system creates the “unconstitutional risk” that indigent defendants will not receive the effective assistance of counsel at “critical stages” in their cases, in violation of the Sixth Amendment and Article I, § 6 of Maine’s Constitution.<sup>115</sup> The right to counsel afforded to criminal defendants through Article I, § 6 of the Maine Constitution is commensurate with the rights afforded by the Sixth Amendment.<sup>116</sup> Thus, the plaintiffs challenged Maine’s indigent defense system under both constitutional provisions. Second, the plaintiffs brought a state law claim (Count II), alleging that the Commission failed to promulgate standards

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112. Complaint, *supra* note 1, at 1.

113. *Id.* at 4.

114. 42 U.S.C. § 1983 (2018).

115. Complaint, *supra* note 1, at 5; U.S. CONST. amend. VI; ME. CONST. art. I, § 6. A reminder as to the events considered to be “critical stages”: *see, e.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977) (when subject to interrogation); *Massiah v. United States*, 377 U.S. 201 (1964) (custodial interrogations before and after prosecution commences); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (preliminary hearings before prosecution commences where “potential substantial prejudice to defendant’s rights inheres in the . . . confrontation”); *Moore v. Illinois*, 434 U.S. 220 (1977) (“corporeal identification conducted” without counsel); *United States v. Wade*, 388 U.S. 218 (1967) (lineups and show-ups when or after prosecution commences); *Lafler v. Cooper*, 566 U.S. 156 (2012) (during plea bargaining); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (to understand collateral consequences); *McMann v. Richardson*, 397 U.S. 759 (1970) (during plea negotiations and during the entry of a guilty plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignments); *Powell v. Alabama*, 287 U.S. 45 (1932) (during the pre-trial period between arraignment and trial); *Wiggins v. Smith*, 539 U.S. 510 (2003) (during sentencing); *Glover v. United States*, 531 U.S. 198 (2001) (when sentence is being increased); *Mempa v. Rhay*, 389 U.S. 128 (1967) (during sentencing); *Halbert v. Michigan*, 545 U.S. 605 (2005) (when seeking appellate review); *Douglas v. California*, 372 U.S. 353 (1963) (for direct appeals); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (during probation and parole revocation proceedings).

116. *See State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702, 708 (Me. 2006) (holding that Maine’s Constitution “imposes an affirmative obligation” that the State provide counsel to indigent defendants, and that the right to counsel afforded by the Sixth Amendment to the United States Constitution is commensurate with the right afforded by Article I, § 6 of the Maine Constitution); U.S. CONST. amend. VI; ME. CONST. art. I, § 6.

related to the supervision and training of counsel, in violation of the Maine Administrative Procedure Act, 5 M.R.S. § 11001 and Article I, § 6 of the Maine Constitution.<sup>117</sup> The plaintiffs asked the court to require the Commission to promulgate standards.<sup>118</sup> The plaintiffs requested declaratory and injunctive relief.<sup>119</sup>

The State of Maine moved to dismiss the ACLU's case for three reasons.<sup>120</sup> First, the State argued that the plaintiffs did not have standing to pursue Count I because the alleged circumstances do not constitute "actual or constructive denial" of counsel or prejudice resulting from denial of counsel.<sup>121</sup> Second, the State argued that Count I failed to state a claim where the court could grant relief because the court cannot order the Commission to fund the indigent defense system.<sup>122</sup> Third, the State argued for Count II's dismissal because the Commission is not required to participate in formal rulemaking, and the plaintiffs failed to state a "proper or timely claim."<sup>123</sup>

The Maine Superior Court denied the State's motion to dismiss as to Count I's constitutional challenge but granted the State's motion to dismiss as to Count II's state law claim.<sup>124</sup> The court concluded that plaintiffs had alleged harm sufficient to establish standing on Count I.<sup>125</sup> Further, the plaintiffs had asserted a claim upon which the court could grant relief.<sup>126</sup> While the court did not have the authority to direct a specific appropriation of funds, it could issue an order that is "cognizant of the separation of powers doctrine" and "accords with the Commission's role in the statutory scheme."<sup>127</sup> Count II failed because the court found that the Maine Legislature intended the "standards" outlined in the rulemaking provision

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117. Complaint, *supra* note 1, at 5; ME. REV. STAT. tit. 5, § 11001(2) (2023); ME. CONST. art. I, § 6.

118. Complaint, *supra* note 1, at 32–33.

119. *Id.* at 33–34. The plaintiffs requested declaratory relief as to the State's denial of assistance of counsel, declaratory judgment that the Commission failed to adhere to rules related to supervision and training, and declaratory judgment that Maine's "lawyer of the day" program violates the Sixth Amendment. The plaintiffs requested injunctive relief requiring the Commission to guarantee assistance of counsel to plaintiffs and others by establishing adequate supervision and training of counsel and requested injunctive relief requiring the Commission to ensure indigent defendants adequate counsel at their 48-hour hearings. *Id.* at 4.

120. Order on Mot. to Dismiss at 1, *Robbins v. Maine Comm'n on Indigent Legal Servs.*, No. KENSC-CV-22-54 (June 2, 2022).

121. *Id.*

122. *Id.*

123. *Id.* at 4.

124. *Id.* at 6.

125. *Id.* at 3.

126. *Id.* at 3–4.

127. *Id.* at 4 (citations omitted).

of the statute governing the Commission's responsibilities to be discretionary, not a formal requirement.<sup>128</sup> The court concluded that if the Legislature intended the power to be discretionary, the Commission need not have promulgated rules. The court declined to rule on the question of improper filing because of this.<sup>129</sup>

Supreme Court precedent, Maine's history, and the ACLU lawsuit provide needed context to Maine's crisis. Precedent reveals what courts require of states and of attorneys. History demonstrates that Maine has been grappling with this issue for decades. And the lawsuit lays out where the issue stands today: a constitutional crisis that is shaping Mainers' lives. Maine can look to Vermont for solutions.

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128. *Id.* at 4–5.

129. *Id.* at 5. On August 21, 2023, the parties submitted a joint motion to the court, asking the court to approve a proposed settlement agreement. Joint Motion to Conduct Preliminary Review of Class Action Settlement, Direct Notice to Class Members of Proposed Settlement, and Make Further Orders as Part of the Settlement Approval Process at 28–29, *Robbins v. Maine Comm'n on Indigent Legal Servs.*, No. KENSC-CV-22-54 (Aug. 21, 2023). The parties asked that the court stay the proceedings for four years while the State pursued adequate reforms. *See id.* at 16. During those four years, plaintiffs would not be able to obtain emergency relief through the lawsuit if unable to obtain counsel. *See id.* Oral argument occurred on August 29, 2023. Order on Joint Motion for Preliminary Settlement Approval at 1, *Robbins v. Maine Comm'n on Indigent Legal Servs.*, No. KENSC-CV-22-54 (Sept. 13, 2023). On September 13, 2023, Justice Michaela Murphy of the Maine Superior Court rejected the proposed settlement, concluding that the parties “failed to demonstrate that the Proposed Agreement [would] likely be approved as fair, reasonable, adequate and in the best interest of Class Members.” *Id.* at 20. Justice Murphy cited concerns that the proposal did not adequately address the Commission's ongoing struggle to maintain enough rostered attorneys. *Id.* at 16. She also expressed skepticism about provisions requiring plaintiffs to forfeit substantive rights during the proposed stay. *Id.* at 14. Regarding language prohibiting plaintiffs from alleging “in any court” a “systemic failure[] or deficiency[] in Maine's indigent defense system,” Justice Murphy balked, expressing worry that it would leave plaintiffs without the “ability to demand systemic changes.” *Id.* at 19. The temporary stay remains in place as of publication.

## II. FROM THE GREEN MOUNTAINS TO THE ATLANTIC: INDIGENT DEFENSE IN VERMONT AND MAINE

Maine's system is in crisis. Maine must hire designated public defenders: attorneys who work for the State full-time, and whose only clients are indigent defendants. Luckily, because Maine is the only state that does not currently have a public defender system, there are 49 different examples of how to satisfy Sixth Amendment requirements. Maine need only look west, over the tops of the White Mountains, for an example of how a rural state successfully fulfills its constitutional duties.

### *A. Vermont's Public Defender System*

Vermont established its public defender system in 1972, through the Public Defender Act.<sup>130</sup> The Office of the Defender General (the Office) is a part of Vermont's executive branch. The Defender General, the head of the Office, is appointed by Vermont's governor.<sup>131</sup> The Office is funded entirely at the state level and is responsible for upholding the rights of indigent defendants facing criminal charges.<sup>132</sup> The Office is statutorily required to provide counsel to:

- (1) Children who are the subject of juvenile proceedings as alleged delinquents;
- (2) Parties in juvenile proceedings, including children in need of care and supervision (CHINS) as required by the interests of justice;
- (3) Children in the custody of the Department of Children and Families;
- (4) Persons in the custody of the Department of Corrections; and

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130. VT. STAT. ANN. tit. 13, § 5205 (2023); *About the Office of the Defender General*, OFF. OF THE DEF. GEN., <https://defgen.vermont.gov/about-us> (last visited Nov. 30, 2023).

131. *Know Your State: Vermont*, SIXTH AMEND. CTR., <https://sixthamendment.org/know-your-state/vermont/> (last visited Nov. 30, 2023).

132. *Id.*

(5) Indigent persons in probation or parole revocation or extradition proceedings.<sup>133</sup>

The Office has seven Serious Felony Units that provide counsel in cases involving “potential life term imprisonment and major felonies.”<sup>134</sup> The Office also has a Juvenile Defender’s Office that provides counsel to juveniles in state custody, the parents of juveniles in state custody in delinquency matters, CHINS matters, and termination of parental rights matters.<sup>135</sup> Finally, the Office has two post-adjudication offices, the Prisoners’ Rights Office and the Appellate Defender. The Prisoners’ Rights Office represents individuals in the custody of the Commissioner of Corrections.<sup>136</sup> The Appellate Defender handles appeals to the Vermont Supreme Court.<sup>137</sup>

Beyond the Office, Vermont provides counsel to indigent defendants through two programs: public defense and assigned counsel.<sup>138</sup> Of the 14 offices statewide, 7 are staff offices—staffed by public defenders—and 7 are contract offices.<sup>139</sup> When conflicts arise with public defense, the court appoints an assigned counsel contractor. When conflicts arise with both public defense and assigned counsel, the court will assign an attorney ad hoc.<sup>140</sup> Caseload relief contractors provide assistance to staff offices statewide.<sup>141</sup>

Vermont funds its public defender system primarily through a general fund appropriation.<sup>142</sup> A Public Defender Special Fund receives money when financially able indigent defendants “are required to reimburse the state for their representation.”<sup>143</sup> The Fund also receives a surcharge assessed against every person convicted of operating a vehicle under the influence.<sup>144</sup>

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133. *About the Office of the Defender General*, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Contract offices are private firms that contract with the Office to provide primary public defense services. *Id.*

140. *Id.*; *Ad hoc*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “ad hoc” as “[f]ormed for a particular purpose”).

141. *About the Office of the Defender General*, *supra* note 130.

142. DAVID CARROLL, RIGHT TO COUNSEL SERVICES IN THE 50 STATES: AN INDIGENT DEFENSE REFERENCE GUIDE FOR POLICYMAKERS 131 n.18 (Mar. 2017).

143. *Id.*; VT. STAT. ANN. tit. 13, § 5238 (2023).

144. VT. STAT. ANN. tit. 23, § 1210(j) (2023); CARROLL, *supra* note 142, at 131 n.18.

Vermont's equivalent of Maine's "lawyer of the day" program varies by county.<sup>145</sup> No standardized practice exists. Instead, at arraignment, members of the county's public defender's office are in court to represent the clients that have been assigned to them. For indigent defendants that have not yet been assigned counsel, the court will assign a public defender. Either way, at least one public defender is always at arraignments. "Conflict counsel is typically also" present "to handle any conflicts of interest" that arise with the public defender's office.<sup>146</sup>

This system ensures that Vermont provides effective, cost-efficient counsel to indigent defendants. The Office maintains oversight of the offices and attorneys throughout the State. The unique needs of juveniles, the incarcerated, those fighting for parentage, and those appealing their convictions are met through specialized offices.<sup>147</sup> Vermont's system also acknowledges the particular challenges of legal representation in rural areas.<sup>148</sup>

Having established an understanding of how Vermont's indigent defense system functions, what follows is a comparative analysis of Maine and Vermont's respective systems. The Sixth Amendment Center's (Center) classifications for indigent defense systems highlight the divergent methods and the benefits of Vermont's system.

#### *B. A Comparative Analysis of Vermont & Maine's Indigent Defense Systems*

The Center analyzed the 50 states' indigent defense systems in a report published in 2017.<sup>149</sup> The Center used three major classifications to compare the patchwork of approaches: "state oversight, funding, and delivery of trial-level services."<sup>150</sup> Comparing Vermont and Maine's respective systems through these classifications demonstrates key similarities and differences.

The first classification of services is through state oversight. One key difference between Vermont and Maine is that Maine's indigent defense system is overseen by an independent, statewide commission in the judicial

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145. Interview with Anna Saxman, Dir. of Training, Vt. Off. of the Def. Gen., in S. Royalton, Vt. (Dec. 8, 2022) (on file with the author).

146. *Id.*

147. *About the Office of the Defender General*, *supra* note 130.

148. Vermont is the best state for Maine to model because it is another rural state with small counties that uses a hybrid public/private system of indigent defense. *See About the Office of the Defender General*, *supra* note 130.

149. CARROLL, *supra* note 142, at 96.

150. *Id.* at 97.

branch: the Maine Commission on Indigent Legal Services (Commission).<sup>151</sup> Vermont has no such commission. Instead, Vermont has the Office, which is housed within the executive branch.<sup>152</sup> According to the experts at the Center, Maine’s approach is considered superior.<sup>153</sup> Maine should maintain a commission-based system because “[t]here is a direct correlation between the extent to which states authorize commissions to hold state or local services accountable to state promulgated standards, and the quality of services rendered.”<sup>154</sup>

Commission-based systems also isolate indigent defense from political and judicial interference.<sup>155</sup> In a state with a gubernatorially appointed top defender, the appointee may choose to yield their goals and positions in order to please the governor and keep their job.<sup>156</sup> However, not all commissions work well or offer ideal “systemic protections” for indigent defendants.<sup>157</sup>

The second classification looks at how services are funded. Both Vermont and Maine fund their indigent defense systems entirely at the state level.<sup>158</sup> State funding is the “most stable” method of funding indigent defense for two reasons. First, states limit local governments by placing revenue-raising restrictions on them.<sup>159</sup> Local governments are often prohibited from deficit spending by statute. Second, the jurisdictions that most need indigent defense services are often also the jurisdictions least likely to be able to afford such services.<sup>160</sup> Maine should continue to fund its indigent defense system at the state level, especially considering the wealth gap between urban and rural Maine.<sup>161</sup> Funding the indigent defense system at the local level would result in rural Mainers having further diminished access to legal representation.

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151. *Id.* at 113.

152. *Id.* at 126.

153. *See id.* at 99.

154. *Id.*

155. *Id.* at 98.

156. *Id.*

157. *Id.*

158. *Id.* at 104.

159. *Id.* at 101.

160. *Id.*

161. *My Congressional District: Maine*, U.S. CENSUS BUREAU, <https://www.census.gov/mycd/?st=23&cd=01> (last visited Nov. 30, 2023). Using Maine’s First and Second Congressional Districts as a proxy for urban and rural Maine, respectively, socio-economic disparities emerge. In the First District, home to Portland, Boothbay Harbor, and Kennebunk, the median household income is \$80,938, with 12.5% of the population living below the poverty line. In the Second District, encompassing all of northern and downeast Maine, the median household income is \$59,676, with 21.1% of the population living below the poverty line.

The third way to classify these services is through delivery of services. The most striking difference between Vermont and Maine's indigent defense systems is how the two states administer legal representation to indigent defendants. While both states have organized their services to be administered at the state level,<sup>162</sup> their methodologies in administering representation vary greatly. In Vermont, there is a public defender office in each of Vermont's 14 counties. Half are staff offices, and half are public defense contract offices.<sup>163</sup> These are private firms that contract with the Office to provide primary public defense services. This means that these private firms act as the public defender office in their respective counties.<sup>164</sup> In Maine, comparatively, there is a statewide roster of private attorneys willing to take court-appointed cases.<sup>165</sup> Unlike Vermont, there is no designated team of attorneys ready to provide representation in each of Maine's 16 counties. This method has led Maine to the position it finds itself in today: facing an American Civil Liberties Union (ACLU) lawsuit and an ever-shrinking list of attorneys willing to provide a vital and constitutionally mandated service.

### *C. Why Vermont's System Would Benefit Maine*

Every other state has moved away from utilizing private defense attorneys to provide principle indigent defense services for two primary reasons.<sup>166</sup> The first is the challenge associated with forecasting and containing the costs of a private defense system.<sup>167</sup> The second is the difficulty of supervising and training private attorneys to ensure adequate representation is being provided to indigent clients.<sup>168</sup> To address these concerns, and because of Vermont's successful hybrid model, Maine should adopt Vermont's method of providing counsel to indigent criminal defendants.<sup>169</sup>

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162. CARROLL, *supra* note 142, at 103.

163. *See About the Office of the Defender General*, *supra* note 130.

164. *See id.*

165. *See About Us*, ME. COMM'N ON INDIGENT LEGAL SERVS., <https://www.maine.gov/mcils/about> (last visited Nov. 30, 2023).

166. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 26.

167. *Id.*

168. *Id.*

169. Don't forget that Maine scores more points than Vermont on state oversight via its commission-based system! Maine should retain this aspect of their system even as their system evolves, per the Center's recommendations. *See* CARROLL, *supra* note 142, at 99 (describing the benefits of a commission-based indigent defense system).

First, a closer look at the hybrid model. Maine should adopt a system like Vermont's, where there is a designated office, either a public defender or a contracted private firm, in each county. Admittedly, the analogy is imperfect. Maine is larger than Vermont, both in population and in land area.<sup>170</sup> The flexibility of Vermont's system, however, lends itself to scaling up. Maine's most populous counties, including York and Cumberland, would require a large office, or more than one office, to accommodate the caseload. In the smaller, more rural counties, where individual private attorneys and small firms may be shouldering most of the indigent defense work, Maine could hire individual attorneys to form a staff public defense office. Maine could also contract with existing firms to provide primary public defense services.

Employing a hybrid indigent defense model in Maine is not a new idea. In its 2019 report on Maine's indigent defense system, the Center noted that in 1971, the Institute of Judicial Administration, along with Maine's Supreme Judicial and Superior Courts, recommended a "hybrid public defender/assigned counsel delivery model" that included staff public defender offices in Portland, Augusta, and Bangor.<sup>171</sup> These cities are located in Cumberland, Kennebec, and Penobscot Counties, respectively, which are the counties with the highest number of indigent defense cases.<sup>172</sup> While the Center refrained from making formal recommendations for Kennebec and Penobscot Counties, the Center did suggest that their respective caseloads would justify Maine establishing a public defender office in each.<sup>173</sup>

The Center did formally recommend, however, that Maine establish a public defender office in Cumberland County.<sup>174</sup> They applied the recommendation of the American Bar Association that where caseloads are "sufficiently high," the indigent defense system should consist of both a public defense office and "active participation" from the private bar.<sup>175</sup> The

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170. Maine's population is 1,362,359, while Vermont's is about half that at 643,077; Maine's land area is 30,836.6 square miles, while Vermont's is just 9,215.4 square miles. *See Maine*, U.S. CENSUS BUREAU, <https://data.census.gov/profile/Maine?g=0400000US23> (last visited Nov. 30, 2023); *Vermont*, U.S. CENSUS BUREAU, <https://data.census.gov/profile/Vermont?g=0400000US50> (last visited Nov. 30, 2023).

171. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 94–95.

172. *Id.* at 95 n.332.

173. *Id.* at 95. Note that the Center refrained from making formal recommendations for Penobscot or Kennebec County because they did not conduct site visits in either county. *Id.*

174. *Id.* at 94.

175. *Id.* at 96; *see also* AM. BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 n.6 (2002) ("'Sufficiently high' . . . generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload

Center concluded with “little doubt” that Cumberland County’s caseload surpassed that threshold.<sup>176</sup> Based on case totals and the workload standards prescribed by the National Advisory Committee on Criminal Justice Standards and Goals, and assuming this hypothetical office would handle 80% of cases, the Center proposed a Cumberland County office staffed with a chief public defender, a deputy public defender, and 12 assistant public defenders.<sup>177</sup> The office would cost the state approximately \$3 million to establish, with the attorneys being paid commensurate to the prosecutors in Cumberland County’s District Attorney’s Office.<sup>178</sup>

The Center also formally recommended that Maine create a statewide appellate defender officer.<sup>179</sup> Separating the work of the appellate defender from the work of the trial-level public defenders ensures that appeals can be an appropriate avenue for potential claims of ineffective assistance of counsel.<sup>180</sup> The Center highlighted Florida, Louisiana, Michigan, North Carolina, and Oregon as states with varying public defense systems all employing separate and specialized appellate defender offices.<sup>181</sup> Based on case totals and the workload standards prescribed by the National Advisory Committee on Criminal Justice Standards and Goals, and assuming 80% of direct appeals and post-conviction relief cases would be handled by this hypothetical office, the Center proposed an appellate office staffed with a chief appellate defender, a deputy appellate defender, and 11 staff attorneys.<sup>182</sup> The Center estimated that the office would cost the State approximately \$2.3 million, with the attorneys being paid commensurate to the prosecutors in Cumberland County’s District Attorney’s Office.<sup>183</sup>

Taking the Center’s recommendations into account, Vermont’s indigent defense structure is a compelling solution to Maine’s ongoing issues. First, Maine would not have to tear down its system entirely. Instead, Vermont’s structure could be a model for utilizing pre-existing

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diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.”).

176. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 96. In 2018, for Cumberland County, the Commission reported “1,232 murder, class A, B, and C cases, 2,022 class D and E cases, and 329 juvenile crime cases . . .” *Id.* at 104.

177. *Id.* at 104. The National Advisory Committee recommends that trial-level attorneys manage no more than 150 felonies, 400 misdemeanors, or 200 delinquency cases per year. *Id.*

178. *Id.* at 103–05.

179. *Id.* at 94.

180. *Id.* at 95.

181. *Id.* at 95–96.

182. *Id.* at 101. In 2018, the Commission reported 235 direct appeals and 96 post-conviction relief cases statewide. The National Advisory Committee recommends that attorneys handle a maximum of 25 appeals per year. *Id.*

183. *Id.* at 96.

structures in Maine. Thus, the “hybrid model,” first imagined for Maine in 1971, could finally emerge. A patchwork of new and existing offices could meld into a hierarchy of primary offices, assigned counsel, and caseload relief contractors, determined, as the Center proposed, based on caseloads per county.<sup>184</sup> Regardless of average caseloads, all counties would have private firms and private defense attorneys rostered to assist with overflow and conflict cases.

Second, consider the challenges associated with predicting and containing costs in a privatized indigent defense system. Such a system relies on estimating what caseloads may look like in the future based on current trends and calculating what level of funding those caseloads may require. However, because there is no guarantee that current averages will continue, costs can fluctuate.<sup>185</sup> Beyond this, as Maine’s system stands now, perverse financial incentives are paired with insufficient financial oversight.

Up until 2019, the Commission paid three attorneys in Somerset County a fixed monthly fee to provide all trial-level indigent defense and handle any appeals or post-conviction review proceedings, absent a conflict of interest.<sup>186</sup> Fixed fee contracts incentivize attorneys to dispose of cases quickly, rather than effectively, because attorneys are “not rewarded with additional pay for the additional work involved in zealous advocacy.”<sup>187</sup> Illogically, attorneys are hurt financially the more they do for their clients.<sup>188</sup> Under these conditions, Maine was paying three attorneys in Somerset County three times the hourly rate it paid all of its other attorneys while receiving about a third less work product.<sup>189</sup> After the Center report

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184. *Id.* at 94–105 (using caseload data to propose the number of attorneys needed to run a Cumberland County public defender office and an appellate defender office).

185. *Id.* at 26.

186. *Id.* at 75.

187. *Id.* at 76. Note that the Center’s use of the word “zealous” here does not equate with the standards outlined in the American Bar Association Model Rules of Professional Conduct. Those rules require only that an attorney “act with reasonable diligence and promptness in representing a client”—no zeal required. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2021).

The Task Force discussed the use of the term “zeal” as used in Model Rule 1.3 Comment [1] (2002). The Task Force determined that the term “zeal” was often used as a cover for a lawyer’s inappropriate behavior. Moreover, the Task Force thought the term was not needed to describe a lawyer’s ethical duties.

Accordingly, the Task Force recommended its deletion.

See ME. RULES OF PRO. CONDUCT r. 1.3 reporter’s notes (2023).

188. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 76.

189. *Id.* In 2017, the fee per case in Somerset was \$573.16. The fee per case elsewhere in the state was \$554.80. The average hours per case in Somerset was 3.27, compared to the statewide average of 9.25 hours. While the rest of the court-appointed counsel in Maine was receiving the 2017 hourly rate of \$60/hour, Somerset counsel was being paid \$174.97/hour. *Id.*

was published in April 2019, the Commission did not renew its contract with this Somerset County firm.<sup>190</sup>

Maine has also struggled with financial oversight. Some private defense attorneys were found to be billing the state for an exorbitant number of hours.<sup>191</sup> When the Center conducted its study in 2019, the Commission's hourly rate was \$60 per hour.<sup>192</sup> If an attorney was contracting with the state 40 hours per week, 52 weeks per year, that attorney would make \$124,800 annually.<sup>193</sup> During the fiscal years from 2014 to 2018, individual private defense attorneys were billing the state for the equivalent of between 70 and 98.5 hours of work per week.<sup>194</sup> At that time, the Commission had a staff of just three people, who were expected to approve all payments and trial-related expenses for the statewide roster of attorneys.<sup>195</sup> Now, the Commission employs an audit director, an audit counsel, and an accountant.<sup>196</sup> Regardless, it is more difficult to predict caseloads, and thus regulate costs, within a private attorney system.<sup>197</sup> In contrast, public defender offices employ salaried attorneys and supervising attorneys who can oversee billing matters. These offices make monitoring financials more straightforward.

Finally, public defender offices allow for improved attorney supervision—and thus better outcomes for clients. In Vermont, each public defender's office has a supervising attorney.<sup>198</sup> The Defender General selects the supervising attorney to lead each office.<sup>199</sup> The supervising attorney works as a public defender while also managing their office. This system allows for efficient monitoring of attorneys' work and ensures communication from the staff attorneys up to the Defender General's office. The Defender General also supervises the training of all public

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190. OFF. OF PROGRAM EVALUATION & GOV'T ACCOUNTABILITY OF THE ME. STATE LEG., AN EVALUATION OF MCILS'S STRUCTURE OF OVERSIGHT AND THE ADEQUACY OF ITS SYSTEMS AND PROCEDURES TO ADMINISTER PAYMENTS AND EXPENDITURES 3 (2020).

191. See SIXTH AMEND. CTR. REPORT, *supra* note 4, at 79–83 (noting excess attorney billing amounting to hundreds of thousands of dollars each year in the fiscal years from 2014 to 2018).

192. *Id.* at 80.

193. *Id.*

194. *Id.* at 80–82.

195. *Id.* at 83.

196. *Contact Us*, ME. COMM'N ON INDIGENT LEGAL SERVS., <https://www.maine.gov/mcils/about/staff-directory> (last visited Nov. 30, 2023).

197. See, e.g., Allen, *supra* note 25 (noting the backlog of over 26,000 pending felony and misdemeanor cases in March 2022, approximately 10,500 more cases than those open in March 2019).

198. *Attorneys*, OFF. OF THE DEF. GEN., <https://defgen.vermont.gov/staff/attorneys> (last visited Nov. 30, 2023).

199. VT. STAT. ANN. tit. 13, § 5271 (2023) (“Each public defender office shall be headed by a public defender selected by the Defender General within the limits of funds and staffing authorized by the General Assembly.”).

defenders and is statutorily empowered to establish training courses.<sup>200</sup> The Office employs a Director of Training, who focuses on teaching and professional development, and organizes several trainings each year in the areas of criminal and juvenile law.<sup>201</sup>

By comparison, Maine's system lacks sufficient training and supervision of the roster of private attorneys. There is no *supervising attorney* in each county, and Maine does not require any supervision of court-appointed attorneys.<sup>202</sup> As of 2019, the Commission only required its contracted attorneys to complete eight hours of continuing legal education each year.<sup>203</sup> These eight hours need not be on the topic of indigent defense. This amount falls below what all Maine attorneys are required to complete each year: 12 hours.<sup>204</sup> The Commission has established a mentoring program to pair less experienced attorneys with veteran attorneys, but only 25 mentors have been selected and each is capped at serving for ten hours per month.<sup>205</sup> The public defender office, with designated supervising attorneys, provides a superior model for ensuring that attorneys are developing the skills they need to effectively represent their clients.<sup>206</sup>

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200. VT. STAT. ANN. tit. 13, § 5253(c) (2023).

201. *Training*, OFF. OF THE DEF. GEN., <https://defgen.vermont.gov/training> (last visited Nov. 30, 2023).

202. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 31.

203. *Id.*

204. *Id.*

205. *Id.*

206. Public defense offices also have access to many professional development resources. Being a government office eases access to many of these services. *See, e.g., Public Defense Training Programs*, NAT'L ASS'N OF CRIM. DEF. LAWS. (Aug. 31, 2022), <https://www.nacdl.org/Content/PublicDefenseTrainingPrograms> (outlining the free programs that the Association offers to public defenders); *Our Committees & Groups*, NAT'L ASS'N OF PUB. DEFS., <https://www.publicdefenders.us/committees-groups> (last visited Nov. 30, 2023) (describing how the NAPD prepares public defense trainers to work with public defenders); *Public Defender Events*, NAT'L LEGAL AID & DEF. ASS'N, <https://www.nlada.org/conferences-and-training/public-defender-events> (last visited Nov. 30, 2023) (listing the upcoming events that the Association is hosting for groups of public defenders).

### III. ADDRESSING CONCERNS & COUNTERARGUMENTS

To further the argument that Maine can and must reform its system, and that Vermont's public defender system would be feasible in Maine, this Part considers some of the opposing arguments to be made. First, this Part discusses funding and hidden costs in the criminal legal system. Second, this Part considers Maine's rural attorney shortage and how the state is already grappling with the growing crisis. Third, this Part adds a dose of cautious optimism. Finally, this Part grapples with the nature of change in Maine.

#### A. The Cost of Funding Indigent Defense

Fiscal conservatives and Mainers concerned about rising taxes may, at this point, find themselves wondering just how much this would cost. These concerns are not unfounded. As Maine grapples with how to sustain its current system, budgeting requests have skyrocketed.<sup>207</sup> Over the summer of 2022, the Maine Commission on Indigent Legal Services (Commission) requested that the Maine Legislature more than double its annual budget, from \$28.1 million to \$62.1 million per year.<sup>208</sup> To put these amounts into perspective, consider the current budget of New Hampshire's well-established public defender system: \$23.7 million.<sup>209</sup> Neighboring New England states, both Maine and New Hampshire, have populations of approximately 1.3 million people.<sup>210</sup> States like New Hampshire are efficiently providing adequate counsel through public defender programs. New Hampshire's budget is evidence that implementing a public defender

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207. In the fall of 2022, the Commissioners unanimously requested additional emergency funding of \$13.3 million to raise the hourly rate for court-appointed counsel to \$150/hour. The Commissioners hoped that raising the attorney compensation rate would compel Maine attorneys to return to court-appointed work. Samantha Hogan, *Gov. Mills and Legislative Leaders Urged to Approve Emergency Funding of \$13.3 Million for Public Defender*, NEWS CTR. ME. (Oct. 3, 2022), <https://www.newscentermaine.com/article/news/politics/maine-politics/governor-janet-mills-legislative-to-vote-emergency-funding-millions-public-defenders/97-95f32b84-3da4-43af-a628-45164a3b6f00> [hereinafter Hogan, *Emergency Funding*].

208. Samantha Hogan, *Maine Reaches 'Point of Failure,' Seeks \$62.1M for Indigent Public Defense*, NEWS CTR. ME. (Aug. 23, 2022), <https://www.newscentermaine.com/article/news/crime/maine-reaches-point-of-failure-seeks-621m-for-indigent-public-defense-crime-justice/97-60909103-808e-4baf-876b-b4dbd8429d78> [hereinafter Hogan, *Maine Reaches Point of Failure*].

209. CHRISTOPHER T. SUNUNU, STATE OF N.H. DEP'T OF ADMIN. SERVS., GOVERNOR'S OPERATING BUDGET FOR FISCAL YEARS ENDING JUNE 30, 2022–2023, at 574 (Feb. 11, 2021).

210. *Maine*, *supra* note 170 (listing Maine's 2020 population as 1,362,359); *New Hampshire*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/New\\_Hampshire?g=0400000US33](https://data.census.gov/profile/New_Hampshire?g=0400000US33) (last visited Nov. 30, 2023) (listing New Hampshire's 2020 population as 1,377,529).

program in Maine could actually cost the State less than its current court-appointed system.

Beyond this, the flipside of paying for an effective indigent defense system is paying for incarceration.<sup>211</sup> Providing individuals with effective representation can save governments money, from bail hearings to appeals. Other jurisdictions have done the research to prove it. A study in Baltimore, Maryland found that after bail hearings, only 13% of defendants without attorneys were released on their own recognizance, while 34% of defendants with bail project attorneys were released.<sup>212</sup> Judges reduced bail for 59% of represented defendants, but only 14% of unrepresented defendants.<sup>213</sup> For the 4,000 defendants served by bail project attorneys, the City saved a net 6,000 days of pre-trial incarceration.<sup>214</sup> Ensuring that defendants have representation at those “critical” early stages is better for defendants and better for the State’s purse strings.<sup>215</sup>

The benefits are not only evident pre-trial. In Michigan, the Appellate Defender Office showed that from 2003 to 2007, its Office saved the State at least \$3.675 million in prison costs just by correcting sentencing errors.<sup>216</sup> If those sentencing errors had not occurred to begin with, Michigan could have saved almost \$70 million.<sup>217</sup> That number does not include the additional costs of appealing to correct the errors.<sup>218</sup> Just in 2013, Michigan saved more than \$6 million correcting sentencing errors.<sup>219</sup> Michigan also examined ineffective assistance of counsel claims. The Appellate Defender Office found that, in just ten cases where they proved ineffective assistance of counsel, Michigan saved more than \$5 million in prison costs.<sup>220</sup> That figure does not account for any civil settlements that

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211. See, e.g., Ginger Jackson-Gleich & Wanda Bertram, *Nine Ways That States Can Provide Better Public Defense*, PRISON POL’Y INITIATIVE (July 27, 2021), <https://www.prisonpolicy.org/blog/2021/07/27/public-defenders/> (noting mass incarceration is perpetuated when individuals are denied adequate legal representation).

212. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719–20, 1753 (2002).

213. *Id.* at 1753.

214. *Id.* at 1757.

215. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008) (holding that once the right to counsel attaches, the defendant is entitled to counsel at all “critical stages” of proceedings).

216. *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 108, 112 (2009) (statement of Dawn Van Hoek, Chief Deputy Director, Michigan State Appellate Defender Office) [hereinafter *Subcomm. Hearing*].

217. *Id.* at 113.

218. *Id.*

219. MICH. STATE APP. DEF. OFF. & CRIM. DEF. RES. CTR., 2014 ANNUAL REPORT 12 (2014), [http://www.sado.org/content/commission/annual\\_report/10484\\_2014-SADO-Annual-Report.pdf](http://www.sado.org/content/commission/annual_report/10484_2014-SADO-Annual-Report.pdf).

220. *Subcomm. Hearing*, *supra* note 216, at 134.

Michigan paid to those defendants.<sup>221</sup> State and local governments can reap financial benefits by funding effective public defender offices.

### *B. The Rural Attorney Shortage*

Those in Maine's legal community aware of the ongoing rural attorney shortage may worry that it would be difficult to find attorneys interested in filling rural public defender positions. These concerns are unwarranted. With adequate compensation and adequate support, there are attorneys who want to fill these roles.<sup>222</sup> There is already evidence that higher compensation is encouraging attorneys to return to court-appointed work.<sup>223</sup> Beyond that, Maine institutions are already innovating to address the rural attorney shortage. In 2017, the University of Maine School of Law founded the Rural Lawyer Project, which pairs second- and third-year law students interested in serving rural communities with attorneys practicing in rural Maine.<sup>224</sup> Students are immersed in rural practice in hopes of inspiring them to consider legal careers in these communities.<sup>225</sup> The school's program is working to attract young attorneys to rural Maine.<sup>226</sup> Anecdotally, Ryan Rutledge, a 2018 Rural Law Fellow and 2019 graduate of the University of Maine School of Law, accepted a post-graduation position at a law firm in Skowhegan, Maine.<sup>227</sup> Other fellows have remarked at how their experiences confirmed their interest in rural practice.<sup>228</sup> The University of Maine School of Law is also currently in the process of opening a legal clinic in far northern Maine in an effort to incentivize new lawyers to practice in rural areas of the state.<sup>229</sup>

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221. *Id.* at 112, 134–38.

222. Miller, *supra* note 26 (regarding the first five public defender positions in Maine, the Commission's Executive Director Justin Andrus said: "We are getting applicants. We are getting calls. There is a ton of interest, . . . We have local people, we have people from away. It is really fantastic").

223. See Christopher Williams, *Maine Attorneys Coming Back to Court-Appointed Rosters*, SUN J. (Mar. 2, 2023), <https://www.sunjournal.com/2023/03/01/maine-attorneys-coming-back-to-court-appointed-rosters/>.

224. *The Rural Law Project: Summer 2020*, UNIV. OF ME. L. SCH. (Feb. 4, 2021), <https://mainelaw.maine.edu/news/the-rural-lawyer-project-summer-2020/>.

225. *Maine Law Announces Rural Law Fellows for Summer 2020*, UNIV. OF ME. L. SCH. (Apr. 6, 2020), <https://mainelaw.maine.edu/news/maine-law-announces-rural-law-fellows-for-summer-2020/>.

226. See Woodbury, *supra* note 106, at 17.

227. *Id.* at 17, 20.

228. *Id.* at 18–21.

229. See *Rural Practice Clinic*, UNIV. OF ME. L. SCH., <https://mainelaw.maine.edu/academics/clinics-and-centers/clac/rural-practice-clinic/> (last visited Nov. 30, 2023); Robbie Feinberg, *In Maine, Hopes Turn to Law Students Amid*

In addition, it may be unwise to assume that because private rural firms are struggling to attract and hire attorneys, state-run public defense offices in rural Maine would be similarly situated. With the well-known stability and benefits (health insurance, etc.) of state jobs, more attorneys may be interested in rural public defense positions than can be predicted based on the current legal landscape.

### *C. Replacing One Flawed System with Another?*

This is not to say that public defender systems are perfect. Notoriously underfunded, with rising caseloads handled by overworked, burned-out attorneys, public defense systems across the nation are struggling. Some states have faced lawsuits alleging their public defender systems are unconstitutional.<sup>230</sup>

For example, Missouri's public defender system has been plagued by inadequate funding, poor attorney retention, and excessive workloads.<sup>231</sup> The Missouri Legislature has mandated that the public defender system represent all eligible defendants—there is no caseload cap, and public defenders have no control over the number of clients they are expected to represent.<sup>232</sup> This fact, plus inadequate attorney compensation, has resulted in many public defenders leaving the profession.<sup>233</sup> When a public defender resigns, their cases are reassigned to their remaining colleagues instead of to the private bar.<sup>234</sup> These practices exacerbate the workload stressors that caused many public defenders to resign in the first place.<sup>235</sup> Compounding this is Missouri's lack of conflict counsel. When a conflict arises, the case

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*Dearth of Rural Attorneys*, MARKETPLACE (Mar. 28, 2022), <https://www.marketplace.org/2022/03/28/in-maine-hopes-turn-to-law-students-amid-dearth-of-rural-attorneys/>.

230. See, e.g., Margaret Carmel, *Law to Transition Idaho to Statewide Public Defense System Will Provide Some Property Tax Relief, but Not Much*, BOISEDEV (May 17, 2022), <https://boisedev.com/news/2022/05/17/idaho-public-defense-law/>. Idaho is moving toward a centralized public defender system after the American Civil Liberties Union (ACLU) of Idaho successfully sued the state in 2015, claiming that the state's public defender system was unconstitutional. The Idaho Supreme Court ruled unanimously for the ACLU. The state will begin funding the public defense system, instead of the individual counties. *Id.* Note that Maine retired its county-based system of funding indigent defense in the 1970s. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 10; ME. REV. STAT. ANN. tit. 4, § 22 (2023).

231. See David Carroll & Phyllis Mann, *Missouri's "Perfect Storm" Explained*, SIXTH AMEND. CTR.: PLEADING THE SIXTH (Oct. 16, 2017), <https://sixthamendment.org/missouris-perfect-storm-explained/>.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

is assigned to a neighboring public defender office, not to a member of the private bar.<sup>236</sup> This perpetuates a cycle of excessive work and burnout.

Maine need not copy a failing system to solve its problems. Maine is in a unique position to look at states like Missouri, learn from their mistakes, and build a constitutional, sustainable system. Maine requires an indigent defense system with caseload caps and a roster of private caseload relief attorneys willing to assist. Maine requires an indigent defense system with conflict counsel. Maine requires an indigent defense system with support and engagement from the private bar. Vermont provides a model for how to incorporate the private bar to invigorate the public defender system.

#### *D. Turmoil & Opportunity*

Dornbusch's Law is an economic theory contemplating that "[a] crisis takes a much longer time coming than you think, and then it happens much faster than you would have thought."<sup>237</sup> Taken outside the context of economics, and instead considering Maine's indigent defense crisis, this theory applies twofold. First, to the rapid collapse of the system, and second, to the possibility of a system reborn.

The situation in Maine continues to evolve. Reporting from Maine indicates that things are developing on a near daily basis. Leadership is in flux. In January, Maine's first supervisory public defender resigned after just one month on the job.<sup>238</sup> He was one of the first five public defenders hired by the State of Maine in December 2022.<sup>239</sup> The Commission provided no reasoning for his resignation.<sup>240</sup> Then, in February, the executive director of the Commission, Justin Andrus, announced his resignation.<sup>241</sup> Andrus became the interim executive director in

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236. *Id.* The Missouri Public Defender Commission relies on the private bar in less than 5% of cases. *Id.* The Sixth Amendment Center made its recommendations to Maine based on the assumption that 20% of cases would be handled by the private bar. SIXTH AMEND. CTR. REPORT, *supra* note 4, at 96.

237. *Interviews: Dr. Rudi Dornbusch*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/mexico/interviews/dornbusch.html> (last visited Nov. 28, 2023).

238. Patty Wight, *Maine's Lead Public Defender Resigns After One Month*, ME. PUB. (Jan. 25, 2023), <https://www.maine-public.org/courts-and-crime/2023-01-25/maines-lead-public-defender-resigns-after-one-month>.

239. *Id.*

240. *Id.*

241. Samantha Hogan, *Executive Director of Maine's Public Defense Agency Will Resign*, ME. MONITOR (Feb. 21, 2023), <https://www.themainemonitor.org/executive-director-of-maines-public-defense-agency-will-resign/>.

January 2021—a position he was supposed to occupy for between 90 and 120 days.<sup>242</sup>

The funding landscape is also shifting. In late February, the Commission voted to increase pay for court-appointed attorneys from \$80 to \$150 per hour.<sup>243</sup> Governor Janet Mills had approved the supplemental budget, which included funding that authorized the Commission's decision.<sup>244</sup> This announcement may have persuaded some Maine attorneys in returning to court-appointed work.<sup>245</sup> According to the Commission, within a few weeks, the number of rostered attorneys had increased by roughly 40%.<sup>246</sup>

Then, in mid-March, the Maine Advisory Committee to the U.S. Commission on Civil Rights sent a letter to high-ranking Maine officials, urging them to increase funding for the State's indigent defense system.<sup>247</sup> The Advisory Committee has been working on a report, to be published later this year, outlining the civil rights implications of Maine's "overburdened" indigent defense system.<sup>248</sup> Because the State's biennium budget is currently being considered by the Legislature, the Advisory Committee released preliminary recommendations that align with the Maine Commission on Indigent Legal Services' budget proposal.<sup>249</sup>

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242. *Id.*

243. Phil Hirschorn, *Maine Lawyers Who Represent Indigent Defendants to Receive a Pay Raise*, WMTW (Feb. 22, 2023), <https://www.wmtw.com/article/maine-lawyers-who-represent-indigent-defendants-to-receive-a-pay-raise/43028531#>. Note that this funding runs out at the end of this fiscal year, on June 30, 2023, unless Maine lawmakers choose to make the funding permanent. See Samantha Hogan, *Advisors to U.S. Commission on Civil Rights Urge Maine Lawmakers to Pay for Indigent Defense*, PORTLAND PRESS HERALD (Mar. 10, 2023), <https://www.pressherald.com/2023/03/10/advisors-to-u-s-commission-on-civil-rights-urge-maine-lawmakers-to-pay-for-indigent-defense/> [hereinafter Hogan, *Urge Maine to Pay*].

244. Hirschorn, *supra* note 243.

245. See Williams, *supra* note 223 (noting that attorneys began showing interest in returning to the roster once it looked like the Maine Legislature would be increasing the hourly wage for court-appointed attorneys).

246. *Id.* 40% sounds like a lot of attorneys, but recall that in January 2023, there were just 64 attorneys accepting adult criminal cases. Hogan, *New Public Defenders*, *supra* note 27. Once again doing some mental math, an estimated 90 attorneys now occupy the roster. Four years ago, there were 410 attorneys. Miller, *supra* note 17.

247. Hogan, *Urge Maine to Pay*, *supra* note 243.

248. *Id.* For more information about the Advisory Committee's ongoing work, see *Maine*, U.S. COMM'N ON C.R., <https://www.usccr.gov/states/maine> (last visited Nov. 30, 2023).

249. A pause to emphasize what that budget proposal included: an hourly wage of \$150 for court-appointed lawyers, and four new public defender offices, two providing trial-level services, one exclusively for appeals, and one dedicated to post-conviction relief. Hogan, *Emergency Funding*, *supra* note 207. Sound familiar? See *About the Office of the Defender General*, *supra* note 130 ("There are . . . two offices that handle matters post adjudication. The Appellate Defender handles appeals to the Supreme Court. The Prisoners' Rights Office represents persons in the custody of the Commissioner of Corrections.").

Maine's Judiciary Committee has proposed a more modest budget, but a budget that nonetheless includes \$3 million to open the first county-based public defender office and funding to maintain the wage for court-appointed lawyers at \$150 per hour.<sup>250</sup> All this news in just two and a half months.

The Maine Legislature has since responded. The State's biannual budget for fiscal years 2024 and 2025 contains Commission funding for an additional six public defender positions, two leadership positions, and three support staff positions.<sup>251</sup> Governor Janet Mills signed the budget into law on July 11, 2023.<sup>252</sup> However, later that same week, the Maine Monitor reported that after another public defender's departure from the Commission, more than 100 defendants in criminal and child protection cases in Maine did not have an attorney assigned to their cases.<sup>253</sup> On a typical week in Maine, somewhere between 30 and 50 defendants are waiting for the court to assign them an attorney.<sup>254</sup> The Commission indicated that they expected the list of defendants without an attorney to be cleared within a week.<sup>255</sup> Five days later, Samantha Hogan updated her story to report that only one-quarter of the defendants had since been provided an attorney.<sup>256</sup> The Commission called the situation "critical."<sup>257</sup> [ThisLast](#) summer, while many flocked to Maine's beaches and lakes, folks in rural communities ~~are~~ were being denied a basic constitutional right.

Maine is on the brink of real change and is finally grappling with the best path forward. Suddenly, "Maine has an opportunity to realize a modern, just and equitable legal system."<sup>258</sup> But 11 attorneys<sup>259</sup> are not

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250. Hogan, *Urge Maine to Pay*, *supra* note 243.

251. STATE OF MAINE, AN ACT MAKING UNIFIED APPROPRIATIONS AND ALLOCATIONS FROM THE GENERAL FUND AND OTHER FUNDS FOR THE EXPENDITURES OF STATE GOVERNMENT AND CHANGING CERTAIN PROVISIONS OF THE LAW NECESSARY TO THE PROPER OPERATIONS OF STATE GOVERNMENT FOR THE FISCAL YEARS ENDING JUNE 30, 2023, JUNE 30, 2024 AND JUNE 30, 2025, at 189 (2023).

252. *Id.* at 1.

253. Samantha Hogan, *State Says Defendants in 100 Cases Were Without Legal Representation Late This Week*, ME. MONITOR (July 14, 2023), <https://themainemonitor.org/state-says-defendants-in-100-cases-were-without-legal-representation-late-this-week/>.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Eric Floyd, Opinion, *It's Time for Maine to Make Its Legal System Just and Equitable*, BANGOR DAILY NEWS (Mar. 7, 2023), <https://www.bangordailynews.com/2023/03/07/opinion/opinion-contributor/maine-poor-legal-system/>. Eric Floyd is currently incarcerated at Bolduc Correctional Facility in Warren, Maine. He has studied at the University of Maine at Augusta. *Id.*

259. The original five attorneys plus the six attorneys funded in the new biannual budget, totaling 11 public defenders in all of Maine. *See* Miller, *supra* note 26; *see also* STATE OF MAINE, *supra* note 251, at 189.

enough. Maine's work will not be done until there is a lawyer for every Mainer who finds themselves in Brandy Grover's shoes. Whether a public defender or a contracted private attorney, in Portland or Presque Isle, charged with theft or with murder, every day without such a system is a day Mainers are denied a constitutional right—the right to counsel. While the cogs of government continue to turn, there is no time to waste.

#### CONCLUSION

Maine's current system is not adequately serving Maine's indigent defendants. Andrew Robbins, Brandy Grover, Ray Mack, Malcolm Peirce, and Lanh Danh Huynh,<sup>260</sup> along with all the others caught up in Maine's criminal legal system and unable to afford an attorney, have been failed by their government. Modeling Maine's system after Vermont's hybrid approach, which utilizes both traditional public defenders and the private bar to provide constitutional indigent defense services, is a way for Maine to remedy the constitutional violations alleged by the American Civil Liberties Union lawsuit. The Maine Commission on Indigent Legal Services and the State are already grappling with the finances, oversight, and personnel repercussions of the current system. Vermont's system is a way forward for Maine. Practical, efficient, and robust—a good fit for “the great state of Maine.”<sup>261</sup>

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260. See Complaint, *supra* note 1, at 5–8.

261. JAMES TAYLOR, *Little More Time with You, on HOURGLASS* (Columbia Records 1997).