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Toward Swifter Justice: Overburdened Prosecutors and Public Defenders Linked to Wisconsin Court Backlogs

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A PREFACE TO

Toward Swifter Justice: Overburdened Prosecutors and Public Defenders Linked to Wisconsin Court Backlogs

Wisconsin's court system is plagued by massive delays and a growing backlog of criminal cases. It now takes more than a year for a court to resolve an armed robbery charge, 14 months to resolve a sexual assault case and more than 15 months to resolve an allegation that someone committed a murder.

Victims are often waiting a year or even longer for justice, and some high-profile defendants have been inappropriately released to commit more crimes in a system where justice is rarely swift. Others are being denied for too long the constitutional guarantees to a quality, state-funded defense meant to ensure that the innocent are not unjustly incarcerated.

There are many facets to the criminal justice system ranging from cops dealing with crime on the streets to judges who decide on punishment. Here, we ask policy analyst Jeremiah Mosteller to look strictly at prosecutors who frequently have been the subject of intense criticism in some high-profile cases as well as state-funded defense attorneys who appear stretched too thin.

Wisconsin cannot flourish without an efficient and fair criminal justice system. Fortunately, Mosteller tells us, there are important initial steps we can take to begin to address the crisis.

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By Jeremiah Mosteller

Introduction

Our court system is frequently described as one that merely seeks to discover the truth. A core foundation of that search for truth is a belief that both sides in our adversarial system have an opportunity to present their arguments on equal footing to a neutral, unbiased arbiter.

It is vitally important for justice that both prosecutors and defense attorneys have the necessary resources to ensure accurate justice, respect for the rule of law and the proper exercise of the government's power to restrict individual liberty. Prosecution and defense are not just the two sides in a courtroom but necessary balancing forces to ensure that proper accountability is imposed for those who have violated our laws.

What happens when both sides face overwhelming workloads and do not have the resources to meet the demands placed on them by state and local leaders?

Prosecutors must stretch their limited resources by declining to prosecute certain cases, rushing the process in others or waiting to act for weeks or months after receiving a potential case from law enforcement.¹ Defense attorneys facing similar constraints will have less time to devote to individual cases — causing additional delays, increasing the likelihood of erroneous case results and blunting their ability to provide the vigorous defense promised by the Sixth Amendment.²

These understandable responses to limited resources on both sides of the courtroom leave crime victims without the justice they deserve, result in the unnecessary incarceration of innocent individuals accused of a crime and undermine public safety in our communities.³ These are surely not the results that many taxpayers believe they are receiving from their investment.

Prosecution and Criminal Defense Structure in Wisconsin

Every state has a unique approach to providing for the prosecution and defense of criminal charges. Some states completely delegate this responsibility and power to local juris-

dictions, whereas others have built out state-funded and state-controlled systems. This complicated patchwork of systems can seem confusing, but it truly reflects our founders' view of states as "laboratories of democracy." This study neither analyzes nor reaches a conclusion on the better choice between local and state control of these vital government services, but it explores the structures in a number of states as context.

District Attorneys

In Wisconsin, district attorneys and those they hire to work in their offices are responsible for prosecuting all violations of the state's criminal laws and other related matters such as forfeitures, grand jury proceedings and appeals. District attorneys are elected by the voters of each county and have responsibility for the criminal prosecutors within that jurisdiction. The state provides funding for the salaries of district attorneys, assistant district attorneys and other staff in the offices, but counties must provide the financial resources needed for other operating expenses such as equipment, office space and additional staff. The amount of funding each district attorney's office receives is generally based on the reported caseload of each office.⁴

Public Defender Board

Wisconsin has chosen a combination of public defenders and appointed counsel to fulfill its Sixth Amendment obligation to defendants. The state's Public Defender Board is an independent executive agency responsible for appointing the State Public Defender to a five-year term of service. This officer and any staff he or she select are responsible for coordinating the legal defense for all individuals charged with a criminal offense in the state and determined to be indigent as defined in statute. This representation can be handled by assigning individual cases to private attorneys or utilizing the services of full-time employees of the State Public Defender's 36 regional offices.⁵ The state Legislature appropriates all funding for both the Public Defender Board and the State Public Defender's office.

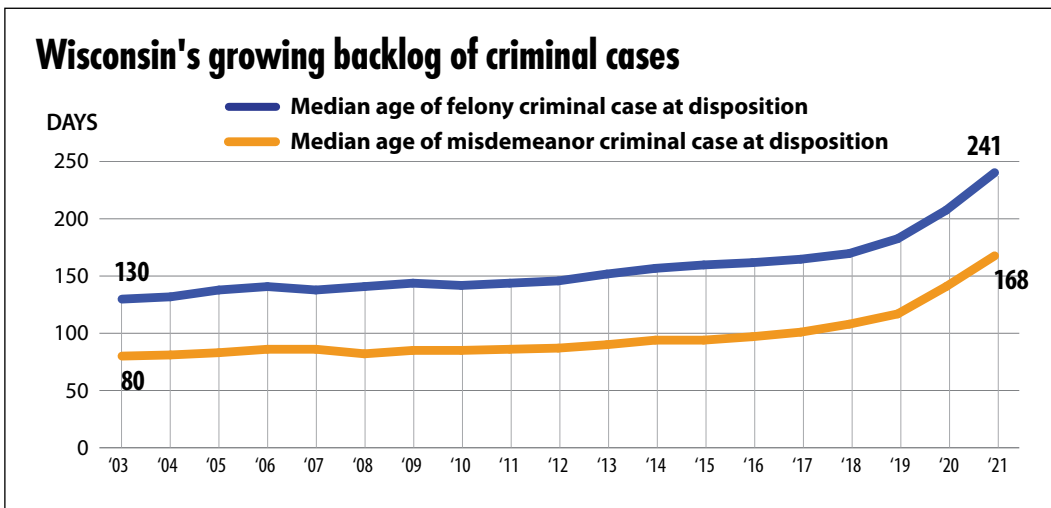
A Crisis of Delays in Justice

Hidden in plain view is a growing crisis in Wisconsin. The state's court system is plagued by massive delays and a growing backlog of criminal cases. It now takes more than a year for a court to resolve an armed robbery charge, 14 months to resolve a sexual assault case and more than 15 months to resolve an allegation that someone committed a murder.⁶

Some misdemeanor charges take just as long — with one particular drug offense charge taking more than 16 months to resolve and ending only after prosecutors chose to dismiss the charge before a trial occurred.⁷ Every day of delay is another day that crime victims go without justice or a blameless defendant is awaiting a jury to confirm his or her innocence at trial.

This crisis was severely exacerbated but not created by the COVID-19 pandemic or its associated shutdowns.⁸ The number of backlogged cases already was growing year over year for many years, and the average time it takes to resolve a criminal case has grown consistently since 2003.⁹ It now takes 85% longer to dispose of a felony criminal case and more

Figure 1



than 100% longer for a misdemeanor case.

Some may say that this growth indicates decades of neglect or apathy by Wisconsin's leaders, but the Badger State does not stand alone in seeing these types of delays. Other states surveyed for this analysis and the federal court system have seen a similar growth pattern in the time it takes to resolve a criminal case.¹⁰

Most of us, we can hope, will never see the harms of these delays firsthand, but they are ruining the lives of more and more families across Wisconsin every year. The state's leaders must step up to ensure that crime victims and defendants receive the justice they deserve. Without bold action to slow down this growth in delays, even a return to pre-pandemic growth will increase the delays by more than an additional 52 days for felonies and 48 days for misdemeanors before 2030.¹¹

Methodology and Hypothesis

Studying the criminal justice system of any state is challenging given how extraordinarily poor data reporting and transparency are throughout every single segment of the justice system.¹² Prosecutor and public defender offices are even further behind other parts of the system such as corrections departments in reporting data that can help legislators and other decision-makers implement improvements to the criminal justice system. This is partially understandable given the unique privacy and ethical concerns existing in the legal field, but it makes studying these systems in any state difficult. Here, we seek to effectively utilize the limited data available to explore how Wisconsin can improve justice for victims and defendants alike.

Supply and Demand Problem

The growing delays in Wisconsin's justice system are a basic function of supply and

demand. Every crime and arrest constitute an event that requires a prosecutorial and potentially a public defender response. In aggregate, these serve as the level of “demand” for such services.¹³ Prosecutors, defense attorneys and judges in Wisconsin for years have raised concerns that the “supply” of legal resources in the system is not enough to meet the demand. This has only gotten worse in recent years as the pandemic and inflation have further undermined how much supply can be provided with the financial resources provided by the Legislature.

Selecting Comparison States

To analyze some of the factors discussed in this study, it is necessary to compare Wisconsin to other states. Three groups of states were selected to ensure a more effective “apples to apples” comparison with Wisconsin:

- All neighboring states (Iowa, Illinois, Michigan and Minnesota).
- Three states with the most similar property and violent crime rates (New York, Pennsylvania and West Virginia).
- Six states with the most similar total number of property and violent crimes (Arkansas, Oklahoma, New Jersey, Massachusetts, Kentucky and Virginia).

Classifying States

An extensive review was completed of the sample states’ laws and fiscal budgets in recent years to determine how each has decided to support both the prosecution and defense functions of its justice system. Every state has a unique approach. The 14 states included in this study can be broken down roughly into three buckets:¹⁴

- State-funded: The state is statutorily required to provide all of the personnel and operational cost. (Six defense systems, one prosecutor system.)
- Hybrid: The state is statutorily required to provide some portion of the personnel and operational cost (e.g., 66% of the district attorney’s salary). (Five defense systems, seven prosecutor systems.)
- County-funded: The state has no statutory obligation to provide any portion of the personnel or operational cost but may choose to provide some grant funding. (Two defense systems, five prosecutor systems.)

(Appendix A, at badgerinstitute.org, provides a detailed breakdown of how each sample state is classified and the statutory or other legal justification for such classification.)

Hypothesis

A major part of the conversation about improving the prosecution and defense functions of our justice system frequently revolves around fiscal resources.¹⁵ Almost every year, Wisconsin’s Public Defender Board and district attorneys request an increase in state funding to deal with ever-growing demands on their time. My hypothesis is that a survey of the funding in the 14 states studied would reveal that Wisconsin provides less funding both per capita and per crime than other states — especially those with similar laws requiring the state to assume most or all of the fiscal burden for those functions — and compensates its attorneys at a much lower rate than other states. Both potential fiscal failures could have a clear impact on the “supply” of legal resources provided in those functions and could explain a substantial portion of the growing delays in justice found in the Badger State.

States' Support of Prosecution and Public Defense

As discussed above, Wisconsin provides all of the funding for the state's Public Defender Board, but the Legislature provides only a portion of the personnel cost for the state's district attorney's offices. Many may worry that this is an uneven level of funding for these two systems within our adversarial justice system, but it is worth remembering that the state has a constitutional duty to provide a defense attorney to someone who cannot afford one and does not bear any constitutional burden to prosecute any crime.¹⁶ Wisconsin's funding for these core government functions is significantly lower than the other states surveyed on a per capita basis but the situation is less clear when viewed on a per crime basis.

Wisconsin's Prosecutor Funding Below Closest Peers

The Wisconsin Legislature appropriated more than \$58 million in annual funding for the state's district attorney's offices in the past two years.¹⁷ This represents slight negative real growth in appropriations once inflation has been considered. While this is surely a substantial investment, the state's current funding is significantly less than the most similarly situated states on a per crime and per capita basis.

Kentucky and Massachusetts are the sample states that have statutorily assumed the most similar fiscal burden among those with a hybrid funding method. Wisconsin's state funding for prosecutors is currently less than 40% of that provided by both states on a per crime basis.¹⁸ On a per capita basis, Wisconsin provides less than half the prosecutor funding of Massachusetts and less than a third of Kentucky.¹⁹ Both states also recently sought to significantly increase the total funding provided to their prosecutor systems, while Wisconsin's Legislature has failed to provide any real increase when growth is adjusted for inflation.

Among all of the other sample states, Wisconsin's funding of prosecutors is exactly where you would expect once you consider it within the context of each state's funding method. It provides less funding both per capita and per crime than the only fully state-funded system, the one in Oklahoma. Conversely, the Badger State provides more funding according to both metrics when compared to the other hybrid funding states that have assumed a much lower statutory proportion of the overall funding. Among all of those states, a few — Arkansas, Oklahoma and New Jersey — have increased their funding for prosecutors at a rate significantly faster than inflation, whereas the other states all have allowed inflation to slowly erode away the resources they provide to prosecutors.

Wisconsin's Public Defense Spending in the Middle

Wisconsin's Public Defender Board and State Public Defender received roughly \$113 million in funding over the past two fiscal years.²⁰ The board also recently received a one-time \$5.5 million grant from Wisconsin's American Rescue Plan Act funds to create a team of remote public defenders who can fill gaps when local counsel is not available. However, this is not a permanent increase in the system's resources.²¹ The board's most recent appropriation is a net decline in fiscal resources given inflation.

Only five of the sample states — Kentucky, Massachusetts, Minnesota, Virginia and West

The right to legal counsel in Wisconsin

Both the Sixth Amendment to the United States Constitution and the Wisconsin Constitution state that every defendant subject to an accusation that he or she has violated the law has a right to be represented by legal counsel as the state attempts to prove that such a violation occurred.¹ The Wisconsin Supreme Court has concluded that the state constitution “does not provide greater protections than the Sixth Amendment” even though its framers decided to use slightly different language than our nation’s founders.² This means the Wisconsin Supreme Court has merely adopted the case law developed by the United States Supreme Court as the rules that apply within its state for both constitutional provisions.

When are someone’s Sixth Amendment rights triggered in Wisconsin?

The U.S. Supreme Court has been explicit that a defendant’s right to counsel “arises after adversary judicial proceedings have been initiated.”³ It is not restricted only to trial or other court hearings but extends to any other stage “where the results might well settle the accused’s fate.”⁴ Given the uniqueness of every state’s justice system, the exact moment when this constitutional right is triggered may vary based on local context, but in Wisconsin, this right is triggered upon “the filing of a criminal complaint or the issuance of an arrest warrant.”⁵

How does someone qualify to have legal counsel provided in Wisconsin’s justice system?

There is an important distinction between the right to *access* legal counsel and the right to be *provided* legal counsel that is frequently lost in conversations about the Sixth Amendment.⁶ In 1963, the U.S. Supreme Court clarified that a proper understanding of the amendment requires states to provide individuals with legal counsel when they are unable to afford an attorney with their own financial resources.⁷ The Wisconsin Supreme Court had already concluded that counties must do this in 1858, but the constitutional burden shifted to the state after the 1963 ruling.⁸ The U.S. Supreme Court did not clarify in its ruling when individuals should be considered “too poor” to afford their own legal counsel, so states have adopted a variety of mechanisms to make that determination.⁹

The Wisconsin Legislature has decided that a few small classes of individuals should be provided a state-funded attorney automatically.¹⁰ Otherwise, it has delegated the responsibility of determining whether someone is indigent and should be provided legal counsel to the state’s Public Defender Board.¹¹ The board has decided to define whether someone qualifies for a public defender or appointed counsel according to whether the defendant’s family has either current assets or future income available to pay the cost of legal representation.¹²

In instances where the Public Defender Board does not find the person indigent, a trial court still must ensure that an individual’s right to counsel is satisfied.¹³ In 1991, the Wisconsin Supreme Court ruled that a judge has “inherent authority” to appoint legal counsel for a defendant whom he determines is unable to afford private counsel and does not qualify for representation by the State Public Defender.¹⁴ The cost of this appointment is borne by the local county and is called a “Dean appointment.”¹⁵

Virginia — have joined Wisconsin in assuming the full financial burden of indigent defense.²² Wisconsin sits near the bottom of this sample when it comes to the amount of public defense funding it provides on a per capita basis, but when viewed on a per crime basis, the state moves to the center of the pack. When adjusted for inflation, three of those states (Massachusetts, Kentucky and Virginia) have drastically increased their total appropriations for public defense by a significant percentage in recent years. Minnesota has kept its adjusted appropriations flat, and West Virginia has seen a significant decline.

The remaining states sampled have statutorily chosen to be responsible for only a certain portion of the cost of indigent defense or have assumed no statutory obligation. Among those states, Iowa and New York stand out for their higher funding than Wisconsin for public defense even though they have assumed a smaller burden. New York provides close to the same amount of funding as Wisconsin on both a per capita and per crime basis even though the state has only voluntarily decided to provide certain grant programs to assist county-based public defender systems. Iowa provides funding that exceeds Wisconsin's level on both metrics, but it has required counties to retain a portion of local public defense cost.

Data Gaps Hinder Comparisons and Analysis

My initial goal was to complete a comparison of the number of prosecutors and public defenders in addition to their respective caseloads across states, but data in these two areas is lacking. It is vital that states improve tracking of both metrics if they truly want to better understand how their prosecution and public defense system are performing.

Only Iowa and Virginia complete any annual reporting on the number of full-time equivalent (FTE) positions provided by the funding appropriated by the legislature. It is therefore impossible to determine if Wisconsin is providing a comparatively smaller or larger number of attorneys in these two functions. But it is reasonable to conclude based on Wisconsin's relative lack of total funding when compared to other states that this lack of financial resources results in a lower number of attorneys being employed by the state for both prosecution and public defense.

What officials are saying about backlogs

"We certainly have experienced a rise in cases and that has added to the workload of assistant district attorneys. The pandemic and case backlogs have extended the time between charging and resolution and that causes witnesses to lose interest, some move from the community and many victims and witnesses indicate an overall decreased level of engagement and increase frustration with the process."

— Kent Lovern,

chief deputy district attorney, Milwaukee County

"Across Wisconsin, the number of open cases sitting on the desks of public defenders has gone from 32,000 before the pandemic to 64,000 in May of this year, according to data provided by the State Public Defender's Office. 'This is unsustainable and can potentially jeopardize the constitutional rights of our clients throughout the state,' SPD spokesperson Wilson Medina noted."

— Channel 3000 report in July by Naomi Kowles

Comprehensively reported data on the per-attorney prosecutor and defender caseloads across the sample states is completely lacking and cannot be used to analyze differences across states. But both public reporting and speaking with prosecutors and public defenders in Wisconsin revealed that high caseloads are a problem in the state that has existed for years.²³ These high caseloads are further complicated by the fact that the workload and time commitment associated with each individual case has increased because of new technologies such as police body-worn cameras, an overall increase in the volume of video evidence from various sources and digital data from computers and cellphones.²⁴

A Failure to Retain Talent

A separate but related funding failure that might be driving the growing delays in the state's court system is the salaries paid by Wisconsin's district attorneys and the Public Defender Board to their attorneys. Both have raised concerns for years about how low salaries established by the state for assistant district attorneys and assistant public defenders hinder their ability to retain hard-working and experienced attorneys.²⁵ This problem is not restricted to the Badger State.²⁶ Many of the states studied, including Wisconsin, have taken steps in recent decades to increase the salaries of these public servants.²⁷ There is limited research on the impact of such compensation changes, but evidence from one state shows that improved pay did result in better retention.²⁸

How Wisconsin's Prosecutor and Public Defender Salaries are Decided

Wisconsin is an outlier among the sample states in that its salary schedule for assistant district attorneys and assistant public defenders is uniform across both roles. They are subject to a statutorily created and merit-based "pay progression plan" that provides for 17 steps, enabling merit-based raises if the Legislature provides the funding. The base salary and 17 steps are recalculated by Wisconsin's Division of Personnel Management for each two-year budget cycle.²⁹ Counties are unable to provide additional compensation for assistant district attorneys or assistant public defenders, but the Legislature can provide one-time merit raises without altering the standard pay progression plan.³⁰

Wisconsin's Prosecutor and Public Defender Salaries Compared to Other States

Nine of the sample states similarly provide some form of salary schedule for their equivalent prosecutor or public defender roles. The way these schedules are established (union contract, agency decision or statute) varies widely by state.

(Appendix E, at badgerinstitute.org, details salary schedules in the sample states.)

Common characteristics of these schedules include a standard salary range, minimum starting salary and some form of raise schedule based on merit, length of service or both. These common characteristics allowed a comparison across states. Differences in the cost of living within and between states can affect retention but were not considered for this analysis.

(Assistant prosecutor salaries in Michigan and Illinois are set at the county level by their equivalent of a district attorney, and there is no "standard" starting salary or salary range. A similar situation exists for their assistant public defender equivalents with the

exception that Michigan's Indigent Defense Commission is tasked with setting "minimum compensation standards" that amount to nothing more than saying that the compensation paid to assistant attorneys general is reasonable guidance. See Appendix E for more detail.)

Starting salaries for Wisconsin's assistant district attorneys and assistant public defenders are much lower than the national averages for prosecutors (\$68,056) and public defenders (\$63,638) reported in recent studies.³¹ They also rank toward the bottom of the 14 roles in the nine sample states where starting salaries are established in a public document or could be secured from an official source.

In Minnesota, prosecutors and public defenders are provided a base salary that is 26% higher than they would receive in Wisconsin. Public defenders in Arkansas earn a starting salary that is 40% higher than they would receive in the Badger State. These low salaries surely play a role in Wisconsin's inability to recruit and retain quality legal talent in its prosecutor and public defender offices.

Many of the state's prosecutors and public defenders likely join the field with a sense of public duty or mission, expecting that their sacrifice

will pay off in a few years after a promotion or a few raises. Five years into their careers, though, these attorneys still will lag behind many of their counterparts in other states. Even in a state with a lower starting salary, Oklahoma, public defenders will earn significantly higher salaries by year five given Wisconsin's slow salary progression method. It is not until more than a decade later that this sacrifice might pay off for those still working in the state's criminal justice system, since Wisconsin's maximum salary for these roles is in the middle of pack for the sample states.

Table 1

Salaries in Wisconsin vs. other states Assistant district attorneys and assistant public defenders in Wisconsin earn less than their peers in other states.		
State	Title	Starting salary
Arkansas	Public defender	\$77,862
Minnesota	Assistant county attorney	\$70,352
Minnesota	Assistant public defender	\$70,146
New Jersey	Assistant deputy public defender	\$68,214
Massachusetts	Assistant district attorney	\$68,000
Massachusetts	Trial attorney	\$63,440
Arkansas	Deputy prosecuting attorney	\$62,531
Virginia	Assistant commonwealth attorney	\$62,509
Iowa	Public defender	\$55,952
Virginia	Assistant public defender	\$55,707
Wisconsin	Assistant district attorney	\$55,536
Wisconsin	Assistant public defender	\$55,536
Kentucky	Staff attorney	\$52,000
Oklahoma	Defense counsel	\$50,000

Source: See appendix at badgerinstitute.org

Prosecutor and Defender Salaries Compared to Similar Roles in Wisconsin

Wisconsin may underpay its assistant district attorneys and assistant public defenders relative to other states, but it is more likely that offices are losing these attorneys to other legal jobs within the state rather than to prosecutor and defender offices in other states. A

survey of roles in the Badger State that allow the employment of both entry-level and experienced attorneys reveals why district attorney’s offices and the Public Defender Board are consistently losing their legal staff to other government attorney roles and private firms. Assistant district attorneys and assistant public defenders are significantly underpaid in comparison to attorneys in similar legal roles.

These public servants have the lowest average salary for attorneys in Wisconsin employed by both the public and private-sector institutions surveyed. Their average salary is nearly half that of attorneys employed by the University of Wisconsin, nearly 30% less than attorneys employed by the attorney general’s office and nearly 20% less than attorneys employed by counties. Even the private sector — with its much more diverse work settings — pays the average non-partner attorney in Wisconsin \$5,000 more than the average assistant district attorney and \$10,000 more than the average assistant public defender.

Table 2

Legal salaries in Wisconsin	
Prosecutors and public defenders here are paid far less than attorneys in similar legal roles.	
Title	Average salary ³²
University legal counsel	\$143,833
Assistant city attorneys	\$102,747
Assistant attorneys general	\$102,049
State agency attorney	\$99,454
Assistant corporation counsel	\$95,176
Private-sector associate/attorney	\$84,647
Assistant district attorney	\$79,769
Assistant public defender	\$74,728

Source: See appendix at badgerinstitute.org

Some of this appears to be driven by more experienced attorneys simply choosing different state government roles, but there are a number of roles with higher starting salaries that likely lure quality candidates away from prosecutor and defender jobs from the very start.³³ For example, an assistant district attorney could earn an additional \$4,000 to \$18,000 in his or her first year by working as an assistant city attorney. An assistant public defender could work as a federal or state court law clerk, boosting his or her pay by a similar or greater amount in the first year out of law school.

The blunt reality is that an attorney choosing to work as a prosecutor or public defender in Wisconsin is choosing to earn a lower starting salary on day one, a lower salary throughout his or her career and a lower ceiling on future earnings growth.

Low Pay is Causing Major Staff Turnover

Both district attorneys and public defenders report high turnover among assistant district attorneys and assistant public defenders. Kent Lovern, the chief deputy district attorney in Milwaukee County, directly affirmed the findings of this research when he noted:

*“We consistently lose attorneys to the city attorney office, U.S. attorney offices and county corporate counsel offices. A majority of these attorneys love their work as assistant district attorneys and leave regrettably. Unfortunately, assistant district attorneys are one of the lowest-paid public service roles for attorneys in Wisconsin. **We lose 10% of our staff — or 12.5 attorneys — a year on average.** We rarely lose someone in their first year, so*

the attorneys we lose are those who have been here three, five or seven years, and they are now able to handle complicated felony cases. This experience takes years to replace, even with the talented new attorneys we consistently hire to replace a veteran prosecutor.

“When one of our attorneys purchases a home, has a child or undergoes another major

“If we don’t put bodies in the courtroom, that is going to slow down cases”

District attorneys throughout Wisconsin are finding it difficult or impossible to fill vacant prosecutor positions due largely to low pay — a key reason for worsening case backlogs.

Kurt Klomberg, the Dodge County district attorney and past president of the Wisconsin District Attorneys Association, said assistant district attorney jobs are difficult anyway, “and it has become worse in the last five years. There is a real acrimony toward law enforcement in this country, and that is overlaid on prosecutors as well.”

“You want to make sure you have quality people handling this work because they are carrying the burden for these victims,” he said.

According to state figures provided by Klomberg, counties have just over 30 vacancies in their state-funded assistant district attorney ranks. Another 22 prosecutor jobs funded by federal pandemic relief are vacant.

There is no doubt, said Klomberg, that prosecutor vacancies are a key factor: “If we don’t put bodies in the courtroom, that is going to slow down cases. It is that simple.”

Clark County District Attorney Melissa Inlow has funding for only one assistant district attorney. By mid-September the position had been vacant for seven weeks “without any interest or applications.”

“I did recently get permission to ‘hire above the minimum,’ where I can increase starting pay based on experience after law school graduation, but that hasn’t generated any interest,” she wrote in an email. “Based on conversations with colleagues, defense attorneys and community members, the continued vacancy is due to the pitifully low starting pay. Paralegals start at more an hour. Some support staff members make close to, if not more than, the starting pay for an ADA. Although they (the support staff) have several years’ experience, they do not have a law degree or an advanced degree.

“The cost of living along with student loans make it nearly impossible to make ends meet at \$26.70 (per hour). The starting pay in Clark for an assistant corporation counsel is \$40.31, a nearly \$15 difference.”

The lack of an assistant district attorney, said Inlow, is definitely slowing cases.

“I’m only one person. ... I need time to prep my cases, draft motions and motion responses, answer law enforcement questions and answer to the public. I cannot move cases forward with this caseload (approximately 720 criminal cases) and new cases coming in every day. There’s a longer delay in getting cases reviewed and charged out.”

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*life event, the 40%-50% salary increases they can receive in other public service roles are undeniable. **You cannot hold a grudge against someone who wants to serve their community and be able to provide effectively for their family.***

Among assistant public defenders, the situation appears to be even worse. Adam Plotkin, legislative liaison for the Office of the State Public Defender, recently noted that his agency is facing “the most significant turnover we’ve seen” and that turnover has jumped from about 10% to “just about 20%” over the past two years.³⁴

Until the Wisconsin Legislature steps in to resolve this situation, district attorneys and the Public Defender Board will continue to see attorney after attorney depart for other roles with higher compensation. Public safety and justice should be two of our highest values as a society, but the status quo does not seem to reaffirm those principles.

Impact of Fiscal Failures on Pending Cases

Every sample state surveyed saw its number of pending criminal cases increase throughout the pandemic, but only one — New York — has been able to effectively recover to pre-pandemic levels. Figure 2 summarizes the growth in pending criminal cases for sample states that are capable and willing to provide such data (excluding Kentucky and Oklahoma).³⁵ Some states such as Minnesota, Michigan and New Jersey matched or exceeded the growth rate in Wisconsin, while others saw only minimal growth in the backlog of criminal cases. Wisconsin ranks fifth in the total number of pending cases per 1,000 residents among the 12 states that were willing or able to provide this data, with nearly 13.5 pending criminal cases per 1,000 residents.

Impact of Total Funding on Pending Cases

Comparing the pending case data with the funding data discussed in the previous section does not indicate that total appropriations alone are a strong predictor of how many pending cases a state had starting in 2019 or at the end of 2021, or the rate at which that figure has grown. For example, New York provides very similar levels of funding for public defense on both a per capita and per crime basis as Wisconsin but almost no state funding for prosecutors. In 2019, New York had a similar number of pending cases per 1,000 residents as Wisconsin but experienced only a small increase in 2020 and then recovered to a position better than its pre-pandemic pending caseload.

Massachusetts provides the most per capita and per crime funding for public defense among the states studied and the second most funding for prosecution. In 2019, the state had almost the same number of per capita pending cases as Wisconsin and still saw nearly 25% growth over the course of the pandemic. This example alone suggests that other factors are driving a state’s number of pending cases at year-end and any growth in case backlog.

Impact of Prosecutor and Defender Salaries on Pending Cases

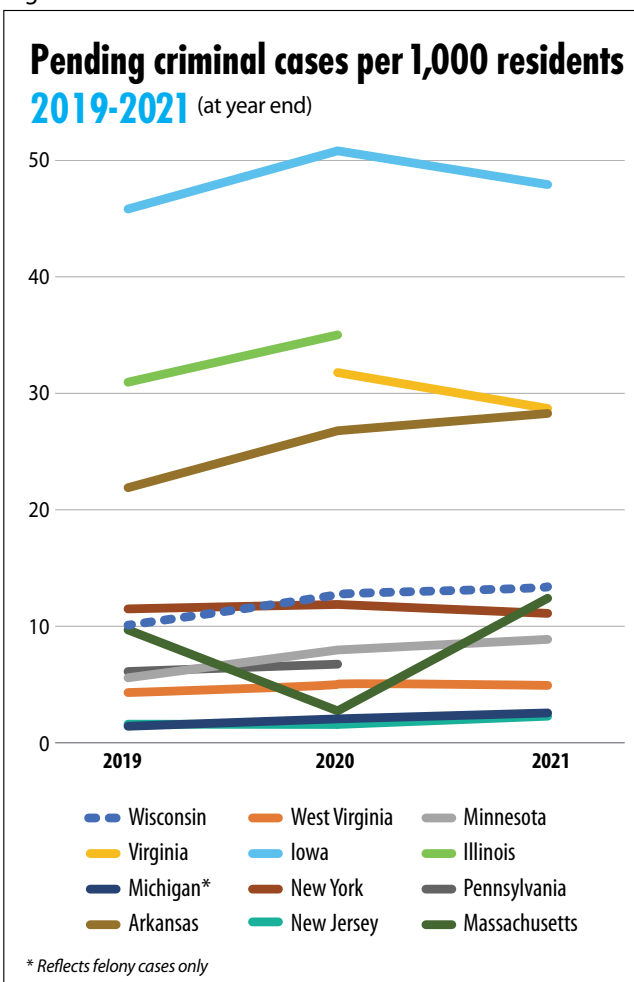
An analysis of the pending case and salary data for prosecutors and public defenders does not allow us to quantify how much the state’s comparatively low starting or maximum

salaries for these jobs are contributing to the growing delays in the state's criminal justice system. Minnesota and New Jersey, for instance, both have higher starting and maximum salaries than Wisconsin and a much lower number of pending cases per capita, but they also saw their growth in pending cases increase significantly more in recent years. Arkansas and Massachusetts both saw a similar growth rate in criminal case backlog through recent years but provide substantially higher starting salaries but lower maximum salaries than Wisconsin. The impact of the pandemic and government reactions to it in different states significantly complicate the analysis.

Even though we may not be able to empirically quantify the relationship between these salaries and Wisconsin's case backlog, it is clear that this failure is contributing to the delays either directly or indirectly through the high turnover among these attorneys. Each new prosecutor or public defender must be trained for his or her position, and this training most likely will be completed by more senior attorneys. While proper training is important, this means that both the new and existing attorneys will not be focused on their caseloads during the hours spent on training.

In addition to training time, whenever a new attorney is assigned to a case, there will be necessary case delays so that the attorney can prepare to effectively represent the client, whether that client is the state or a defendant. The National Center for State Courts has found that the number of continuances and hearings occurring in a state's criminal cases is the largest contributor to its case processing times.³⁶ Both are likely to occur each time a new attorney is assigned to the case, and that will be quite frequent when 10% to 20% of attorneys are leaving district attorney's or public defender offices each year. Reducing turnover could help, on its own, to mitigate or reduce the growing case delays in Wisconsin.

Figure 2



Source: Respective state court systems

Conclusion and Recommendations

Wisconsin's courts, prosecutors and defense attorneys should be applauded for being transparent about how they are unable to keep up with the growing burdens placed on them to ensure public safety and justice in the Badger State. But the state's consistent growth in backlogged criminal cases and case delays is an untenable situation that leaves crime victims and defendants alike without justice and the ability to move forward with their lives. Even a return to pre-pandemic performance will result in the state having nearly 900,000 backlogged cases by 2030.

This problem is not unique to Wisconsin, but the state can lead the nation in trying to resolve case backlogs and delays by adopting a slate of reforms focused on better maximizing the state's current justice system performance. Any action to merely improve the capacity of the state's current justice system without action to improve its performance and utilization of resources will result only in a temporary improvement in justice for the state's citizens.

To better understand the growing delays and improve the efficiency of the state's court, prosecution and public defender systems, the Legislature should adopt the following reforms:

- Establish a working group to identify how the state previously achieved reductions in both the number of backlogged cases and case disposition times between 2006 and 2011 so that those results can be replicated going forward.³⁷ This commission should be required to publish a report containing recommendations for legislative and judicial action within 180 days of being established.
- Require district attorneys and the Public Defender Board to annually track office turnover and the reasons for assistant district attorney and assistant public defender departures so the impact of future salary and funding increases can be evaluated.
- Require the Wisconsin Court System to track and provide an annual report on the number and justification for continuances being granted by judges in misdemeanor and felony cases.³⁸
- Improve the starting salary and rate of pay progression for assistant district attorneys and assistant public defenders so both positions will be more competitive with other public sector attorney roles in Wisconsin and similar roles in other states.
- Require the Legislative Audit Bureau to publish on its website its annual analysis of the caseload of each district attorney's office and include a county-by-county comparison of current staffing vs. the staffing level needed to handle that caseload.³⁹ The Legislature should provide additional prosecutor positions to fill any reported gap between current and necessary staffing levels.⁴⁰
- Revise the Wisconsin Code so that its statutorily proscribed caseload standard for assistant public defenders conforms to national caseload standards of 150 felonies

per attorney per year and 400 misdemeanors per attorney per year.⁴¹ The Legislature should provide additional assistant public defender positions to fill any gap between the current statutory standard and necessary staffing levels.

These are some of the initial steps that the state must take to achieve an acceptable rate of justice. These actions are likely to slow the growing case backlog but will not be sufficient to reverse the trend without the addition of some separate steps to reduce crime in areas where it has been resurgent and the number of new cases entering the system or to reduce the complexity of future criminal cases so that they can be resolved more quickly.



Badger Institute takeaways

Wisconsin's consistent growth in backlogged criminal cases and case delays leaves crime victims and defendants alike without justice and the ability to move forward. Lawmakers should:

- Identify how the state previously reduced case backlogs and disposition times.
- Require annual tracking of prosecutor and public defender office turnover.
- Require courts to track the number of and justification for continuances.
- Improve the starting salary and rate of pay progression for assistant district attorneys and assistant public defenders.
- Require the Legislative Audit Bureau to publish its annual analysis of the caseload of each district attorney's office, and provide additional prosecutor positions to fill any reported gap.
- Revise the Wisconsin Code so that its statutorily proscribed caseload standard for assistant public defenders conforms to national caseload standards.

About the Author



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Endnotes

Toward Swifter Justice

¹ Peter Joy & Kevin WcMunigal, Overloaded Prosecutors, 33 A.B.A. Crim. Just. 31 (2018); see e.g., Ashley Luthern & Alison Dirr, 'A mistake': Chisholm, chief judge explain low bail given to Waukesha parade suspect in earlier case, Milwaukee Journal Sentinel (2022), [jsonline.com/story/news/local/milwaukee/2021/12/02/john-chisholm-discuss-low-bail-given-man-charged-waukesha-christmas-parade-attack-darrell-brooks/8814614002/](https://www.jsonline.com/story/news/local/milwaukee/2021/12/02/john-chisholm-discuss-low-bail-given-man-charged-waukesha-christmas-parade-attack-darrell-brooks/8814614002/); Keegan Kyle, Sexual assault victims in Wisconsin often wait months to see charges filed, review shows, PostCrescent (2019), postcrescent.com/story/news/investigations/2019/01/25/sexual-assault-cases-wisconsin-often-sit-idle-prosecutor-desks/2389873002/

² Aaron Gottlieb & Kelsey Arnold, Do Public Defender Resources Matter? The Effect of Public Defender and Support Staff Caseloads on the Incarceration of Felony Defendants, 12 J. Society Soc. Work Res. 569 (2021); Bryan Furst, A Fair Fight: Achieving Indigent Defense Resource Parity, Brennan Center for Justice (2019), brennancenter.org/our-work/research-reports/fair-fight; Jon B. Gould, et al., Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice, U.S. Department of Justice (2009), justice.gov/atj/publication/predicting-erroneous-convictions-social-science-approach-miscarriages-justice-nkj; Radha Iyengar, An Analysis of the Performance of Federal Indigent Defense Counsel, National Bureau of Economic Research (2007), nber.org/papers/w13187

³ Gottlieb, *supra* note 2; Irene Oritseweyinmi Joe, Regulating Mass Prosecution, 53 U.C. Davis L. Rev. 1175 (2020); Adam M. Gershowitz & Laura R. Killinger, The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants, 105 Nw. U. L. Rev. 261 (2015); Jennifer Wyatt Bourgeois, et al., An Examination of Prosecutorial Staff, Budgets, Caseloads, and the Need for Change, Texas Southern University (2019), centerforjusticeresearch.org/reports/prosecutor-workload; Furst, *supra* note 2; Joy, *supra* note 1.

⁴ The Badger Institute has previously discussed the problems and perverse incentives inherent in a caseload-based allocation method of prosecutor funding. See Julie Grace & Patrick Hughes, Problems with prosecutor funding in Wisconsin, Badger Institute (2020), badgerinstitute.org/News/2019-2020/Problems-with-prosecutor-funding-in-Wisconsin.htm

⁵ The Public Defender Board is statutorily required to handle 67% of the felony and juvenile cases with its own attorneys but can appoint private attorneys to handle all misdemeanor and the remaining felony and juvenile cases.

⁶ Wisconsin Court System, Felony Disposition Summary by Disposing Court Official: Statewide Report, Wisconsin Court System (2022), available at wicourts.gov/publications/statistics/circuit/circuitstats.htm

⁷ Wisconsin Court System, Misdemeanor Disposition Summary by Disposing Court Official: Statewide Report, Wisconsin Court System (2022), available at wicourts.gov/publications/statistics/circuit/circuitstats.htm

⁸ Jeremiah Mosteller, Courts clogged: Pandemic made the problem of delayed justice worse in Wisconsin, Badger Institute (2022), badgerinstitute.org/Diggings/Spring-2022/Courts-clogged.htm

⁹ Wisconsin Court System, Circuit Court Statistical Reports, Wisconsin Court System (2022), wicourts.gov/publications/statistics/circuit/circuitstats.htm

¹⁰ In Minnesota, the average number of days to dispose of major criminal cases has risen from 166 to 245 days (48% longer) and for minor criminal cases from 44 to 112 days (155% longer) between 2009 and 2020. See Court Services Division, Performance Measures: Key Results and Measures Annual Report, Minnesota Judicial Branch (2021), available at mncourts.gov/About-The-Courts/PublicationsAndReports.aspx; Court Services Division, Performance Measures: Key Results and Measures, Minnesota Judicial Branch (2009), available at mncourts.gov/About-The-Courts/PublicationsAndReports.aspx.

The length of time it takes to dispose of a felony criminal case in the federal court system has increased from 6.6 months to 10.8 months since 2001 — a 53% increase. See United States Courts, United States District Courts — National Judicial Caseload Profile, United States Courts (2022), available at uscourts.gov/statistics-reports/caseload-statistics-data-tables; United States Courts, U.S. District Court — Judicial Caseload Profile, United States Courts (2006), available at uscourts.gov/statistics-reports/caseload-statistics-data-tables.

See also National Center for State Courts, Effective Criminal Case Management Interactive Dashboard, National Center for State Courts (2022), ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/caseload-management/effective-criminal-case-management/effective-criminal-case-management-interactive-dashboard (showing that a number of court systems fail to resolve a majority of their criminal cases within 180 days or six months); Brian J. Ostrom, et al., Delivering Timely Justice in Criminal Cases: A National Picture, National Center for States Courts (2020), ncsc.org/_data/assets/pdf_file/0017/53216/Delivering-Timely-Justice-in-Criminal-Cases-A-National-Picture.pdf; Trevor Brown, Despite Reforms, High Caseloads Continue to Stress Public Defender System, Oklahoma Watch (2019), oklahomawatch.org/2019/10/02/despite-reforms-high-case-loads-continue-to-stress-public-defender-system/ (noting that the number of criminal cases being carried over from previous years increased by more than 150% between 2009 and 2019).

Toward Swifter Justice: Overburdened Prosecutors and Public Defenders Linked to Wisconsin Court Backlogs

¹¹ The average growth in days it took to dispose of cases before 2020 was 2.18% for felonies and 2.45% for misdemeanors each year.

¹² See e.g., Stuart Buck, *We Need Criminal Justice Data That Doesn't Exist. Here's How the Biden Administration Can Fix It*, Arnold Ventures (2021), arnoldventures.org/stories/we-need-criminal-justice-data-that-doesnt-exist-heres-how-the-biden-administration-can-fix-it; Matt Ford, *The Missing Statistics of Criminal Justice*, The Atlantic (2015), theatlantic.com/politics/archive/2015/05/what-we-dont-know-about-mass-incarceration/394520/; See also Justice Center, *Use data to understand crime trends*, The Council of State Governments (2018), 50statespublicsafety.us/part-1/strategy-1/

¹³ In a perfect world, the equilibrium of this “market” would be an intersection between the total number of crimes committed (demand) and a high enough amount of prosecution and defense resources (supply) to resolve cases for those crimes. The number of arrests each year serves as the current actual demand for prosecution and defense services given that law enforcement only arrest someone in 41.7% of violent and 14.6% of property crimes. See Federal Bureau of Investigation, *Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group*, 2020, U.S. Department of Justice (2021), available at crime-data-explorer.app.cloud.gov/pages/downloads

¹⁴ New York is an outlier for both its prosecutor and public defense funding in that the state has established county-funded systems, but then the state provides substantial funding through several non-statutorily required grant programs or funding streams.

¹⁵ See e.g., Bruce Vielmetti, *Wisconsin is sued over delayed lawyer appointments in criminal cases*, Milwaukee Journal Sentinel (2022), jsonline.com/story/news/2022/08/24/wisconsin-sued-over-lack-defense-lawyers/7874165001/; Christine Hatfield, *Wisconsin public defenders stress need for solutions to agency staffing shortage, case backlog*, Wisconsin Public Radio (2022), wpr.org/wisconsin-public-defenders-stress-need-solutions-agency-staffing-shortage-case-backlog/; Danielle Kaeding, *Justice Delayed For Those Who Can Least Afford It?*, Wisconsin Public Radio (2018), wpr.org/justice-delayed-those-who-can-least-afford-it/; Kevin Damask, *Wisconsin district attorneys feel staffing squeeze*, Associated Press (2016), apnews.com/article/a214e3c2fe8d46458c93704deea9a621; Eric Litke, *DA shortage a ‘public safety crisis’?*, PostCrescent (2016), postcrescent.com/story/news/investigations/2016/10/14/da-shortage-public-safety-crisis/92004016/

¹⁶ The Wisconsin Constitution provides victims with the right to “timely disposition of the case, free from unreasonable delay” but does not require the enforcement of any individual case. See Wis. Const. Art. I § 9m (2022).

¹⁷ Appendix B, at badgerinstitute.org, provides a detailed breakdown of the state funding provided to prosecutors in each sample state.

¹⁸ See Appendix B (38.2% of Kentucky's per crime appropriations; 36.4% of Massachusetts per crime appropriations).

¹⁹ See Appendix B (31.3% of Kentucky's per capita appropriations; 46.3% of Massachusetts per crime appropriations).

²⁰ Appendix C, at badgerinstitute.org, provides a detailed breakdown of the state funding provided to indigent or public defense in each sample state.

²¹ Office of the Governor, *Gov. Evers Announces More Than \$50 Million Investment in Safer Communities Across Wisconsin*, Office of the Governor (2022), content.govdelivery.com/accounts/WIGOV/bulletins/30ec88b

²² Counties in Wisconsin do sometimes carry the financial burden for the appointment of attorneys in criminal cases after the state public defender has determined that the person is not indigent. These are called Dean appointments and can be made based on a judge's “inherent authority” to appoint legal counsel for someone who might not be indigent, but the court still determines should receive government-provided representation. See *State v. Dean*, 471 N.W.2d 310 (Wis. 1991); see also Wisconsin State Public Defender, CR 10-133, Wisconsin State Public Defender (2020), docs.legis.wisconsin.gov/ruletext/CR%2010-133 (noting that the cost of Dean appointments to counties in 2008 was \$7.6 million).

²³ See *supra* note 13; Naomi Kowles, *This is unsustainable: Wisconsin public defender caseloads in crisis*, Channel 3000 (2022), channel3000.com/this-is-unsustainable-wisconsin-public-defender-caseloads-in-crisis/; Interview with Kent Lovern, chief deputy district attorney, Milwaukee County (Sept. 8, 2022) (by phone, notes on file with author); email from Lovern to Jeremiah Mosteller (Sept. 9, 2022) (on file with author) (providing details on the significant increase in cases for certain types of crimes — domestic violence (6%), non-fatal shootings (68%), felon in possession of a firearm (36%) and homicide (15%) — seen by the Milwaukee County district attorney's office between 2020 and 2021 and noting that the increased trend is continuing in 2022); Rob Romano, *Many public defenders facing burnout amid high caseloads, staff shortages*, News 8000 (2022), news8000.com/many-public-defenders-facing-burnout-amid-high-caseloads-staff-shortages/; Milwaukee County, *infra* note 33.

²⁴ Interview with Kent Lovern, *supra* note 20 (noting that “New technologies — like body-worn cameras — have also significantly increased the burden of each new case. For example, we review on average 15 non-fatal shootings a week. Each of those cases may include 15-20 hours of video evidence, including body-worn cameras, squad video and police videos of witness and suspect statements.”); State Public Defender's Office (SPD), et al., *Criminal Justice Coalition: 2021-23 Biennial Budget Proposal*, Criminal Justice Coalition (2021), wpr-public.s3.amazonaws.com/

wprorg/2021_budget_coalition_white_paper.pdf

²⁵ See e.g., Christine Hatfield, Wisconsin Public Defenders Badly Short Staffed, Wisconsin Public Radio (2022), urbanmilwaukee.com/2022/05/05/wisconsin-public-defenders-badly-short-staffed/; Doug Schneider & Eric Litke, Broken promise: DA pay hikes haven't materialized, Green Bay Press Gazette (2016), greenbaypressgazette.com/story/news/2016/10/17/broken-promise-da-pay-hikes-havent-materialized/91663640/; Dennis Dresang, et al., Public Safety and Assistant District Attorney Staffing in Wisconsin, Robert M. La Follette School of Public Affairs at University of Wisconsin-Madison (2011), lafollette.wisc.edu/outreach-public-service/past-events-initiatives-and-collaborations/public-safety-and-assistant-district-attorney-staffing-in-wisconsin

²⁶ See e.g., Aleexa Furman, District Attorney's Offices Across Pa. Say Salary Is Causing Staff Drain, Law.com (2022), law.com/thelegalintelligencer/2022/05/25/district-attorneys-offices-across-pa-say-salary-is-causing-staff-drain/; Charles Paullin, Shenandoah County Prosecutor Facing Staffing Woes, Daily News Record (2022), dnronline.com/news/shenandoah-county/shenandoah-county-prosecutor-facing-staffing-woes/article_8281f6ff-0754-575e-a26e-ed9486780e45.html; Andrew Pantazi, Public defenders and prosecutors flee for better salaries, Florida Times-Union (2018), jacksonville.com/story/news/politics/government/2018/02/23/paying-for-justice-public-defenders-and-prosecutors-flee-for-better-salaries/14124984007/; Furst, supra note 2; Commission on Criminal Justice Attorney Compensation, Doing Right by Those Who Labor for Justice, Massachusetts Bar Association (2014), massbar.org/docs/default-source/mba-reports/massbar-blue-ribbon-commission-report-doing-right-by-those-who-labor-for-justice-2014-may-09.pdf?sfvrsn=2.

²⁷ Sample states such as New York, New Jersey, Massachusetts, Kentucky and Wisconsin have taken steps to improve public defender and prosecutor salaries. See Appendix B and C at badgerinstitute.org. See also Mitchell Schmidt, Tony Evers signs bill to boost merit-based pay raises for state public defenders, Madison.com (2021), madison.com/news/local/govt-and-politics/tony-evers-signs-bill-to-boost-merit-based-pay-raises-for-state-public-defenders/article_7da5b820-3b1e-582d-bd6f-0789800cec8c.html

²⁸ Office of the State Auditor, The ADA Retention Fund might have a limited long-term impact, Commonwealth of Massachusetts (2018), mass.gov/info-details/other-matters-the-ada-retention-fund-might-have-a-limited-long-term-impact (finding that turnover of assistant district attorneys declined from 13.4% to 5.4% following the creation of a special state fund to provide ADAs with salary increases).

²⁹ Department of Administration, State of Wisconsin Compensation Plan, State of Wisconsin (2021), dpm.wi.gov/Pages/Employees/CompensationPlan.aspx

³⁰ S.B. 62, 2021 Legis., 2021 Reg. Sess. (Wis. 2021) (providing the Public Defender Board with the ability to provide merit-based pay raises up 0% of base salary during fiscal year 2021-2022); See generally Kent Tempus, Oconto County OKs incentive in hopes of drawing assistant DA applicants, Green Bay Press Gazette (2022), greenbaypressgazette.com/story/news/local/oconto-county/2022/05/19/oconto-county-oks-incentive-hopes-drawing-assistant-da-applicants/9828393002/

³¹ Adam Biener, Prosecutor Workplace and Compensation Study: Report of Findings, Lafayette College & Association of Prosecuting Attorneys (2021), available at apainc.org/press-release-prosecutor-workplace-and-compensation-study/; Matt Perez, Low Pay A Deterrent To Would-Be Public Defenders, Law360 (2021), law360.com/access-to-justice/articles/1430492/low-pay-a-deterrent-to-would-be-public-defenders.

³² Appendix F, at badgerinstitute.org, provides a detailed breakdown of the salaries provided to each attorney role referenced here.

³³ Several roles surveyed — assistant attorneys general, state agency attorney and assistant corporation counsel — start at a similar or lower starting salary, but the current workforce has significantly higher average salaries than assistant district attorneys and assistant public defenders. See Appendix F.

³⁴ Roger Staffaroni, Demand for Public Defenders continues, WXOW (2022), wxow.com/news/demand-for-public-defenders-continues/article_7c20306a-2591-11ed-a4fd-dfad7af5bfff8.html; Rob Romano, Many public defenders facing burnout amid high caseloads, staff shortages, News 8000 (2022), news8000.com/many-public-defenders-facing-burnout-amid-high-caseloads-staff-shortages/; see also Gretchen Schuldt, Bill Gives Pay Parity to Public Defenders, Urban Milwaukee (2021), urbanmilwaukee.com/2021/02/23/bill-gives-pay-parity-to-public-defenders/

³⁵ Appendix G, at badgerinstitute.org, provides a detailed breakdown of the raw pending case data provided by states.

³⁶ National Center for State Courts (2020), supra note 17.

³⁷ Between 2006 and 2010, the state experienced a 22% reduction in its number of pending cases and year-end. It also saw only minimal growth in the time it took to resolve a felony criminal case (2%) and saw no increase in the time it took to resolve a misdemeanor case. See supra notes 13-16.

³⁸ The National Center for State Courts completed a national study on case processing and found that the “number of hearings and continuances were the most influential factors in case duration.” See National Center for State

Courts (2020), *supra* note 17.

³⁹ The Legislative Audit Bureau completes an analysis of prosecutor caseloads reported by each district attorney, but these figures are not accessible to the public unless published by the district attorney's office. See Milwaukee County, District Attorney Budget Summary, Milwaukee County (2022), county.milwaukee.gov/files/county/administrative-services/PSB/BudgetsCopy-1/2023-Budget/2023-Requested/055.4500-DistrictAttorney1.pdf; Grace, *supra* note 7; see also Department of Administration, An Evaluation Allocation of Prosecutor Positions, Department of Administration (2007), docs.legis.wisconsin.gov/misc/lc/study/2010/special_committee_on_criminal_justice_funding_and_strategies/103_august_30_2010/07_9full; Litke, *supra* note 13 (linking to a prosecutor staffing analysis completed in 2016).

⁴⁰ At least initially, new prosecutor positions should be allocated to counties with the longest delays in criminal case resolution — Adams, Dane, Langlade, Menominee, Racine and Shawano. See Wisconsin Court System, Age at Disposition Summary by Disposing Court Official, Wisconsin Court System (2022), available at wicourts.gov/publications/statistics/circuit/circuitstats.htm

⁴¹ Wisconsin's current statutory standard specifies that each assistant state public defender should have an annual caseload of 184.5 felony cases or 492 misdemeanor cases, whereas national standards establish a maximum annual caseload of 150 felony charges or 400 misdemeanor charges. See Wis. Stat. § 977.08(5)(bn) (2022); Standing Committee On Legal Aid And Indigent Defense, ABA Ten Principles of a Public Defense Delivery System, American Bar Association (2022), nacd.org/Document/ABA10PrinciplesPublicDefense; National Advisory Commission on Criminal Justice Standards and Goals, Standard 13.12 Workload of Public Defenders, National Advisory Commission on Criminal Justice Standards and Goals (1976), nlada.org/defender-standards/national-advisory-commission; see also State Bar of Wisconsin, Policy Positions: 2022, State Bar of Wisconsin (2022), available at wisbar.org/aboutus/governmentrelations/pages/policy-positions.aspx

Note: Some sources and endnotes have been shortened or removed entirely due to design constraints. All endnotes and appendices are available at badgerinstitute.org.

Endnotes

The right to legal counsel in Wisconsin

¹ U.S. Const. amend. VI; Wis. Const. Art. I, § 7 ("In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel...").

² *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997) ("The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution."); *State v. Sanchez*, 548 N.W.2d 69 (Wis. 1996) ("The language of the Wisconsin provision, on its face, does not appear to differ so substantially from the federal Constitution's guarantee of the right to counsel so as to create a different right.").

³ *Kirby v. Illinois*, 406 U.S. 682 (1972); see also *Brewer v. Williams*, 430 U.S. 387 (1977).

⁴ *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000) (quoting *Maine v. Moulton*, 474 U.S. 159 (1985)); see also *United States v. Wade*, 388 U.S. 218 (1967).

⁵ *State v. Forbush*, 796 N.W.2d 741 (Wis. 2011); *State v. Harris*, 544 N.W.2d 545, 548 n.3 (Wis. 1996).

⁶ The first is a negative right that bars the government from preventing your use of legal counsel in the justice system, and the second is a positive right that requires the government to provide you with that legal counsel. This nuance has largely been lost in the conversation post-Gideon but is an important fact to understand since states have been given substantial discretion in this area. See Jeremiah Mosteller, Is access to counsel the most important due process right?, Stand Together Trust (2019), <https://standtogethertrust.org/stories/is-access-to-counsel-the-most-important-due-process-right>; see also Felix Rackow, The Right to Counsel: English and American Precedents, 11 Wm. & Mary Q 3 (1954).

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963) ("[A]ny person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him...").

⁸ *Browne v. State*, 129 N.W.2d 175 (Wis. 1964) (explaining that indigent defendants have a right to state-funded counsel, which shifted the prior burden off counties); *Carpenter v. County of Dane*, 9 Wis. 274 (1859) ("And would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him." [sic]).

⁹ John P. Gross, Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel, 70 Wash. & Lee L. Rev. 1173, 1184-1204 (2013).

¹⁰ Individuals who receive counsel from the State automatically include minors under age 17 held in a juvenile detention facility or alleged to be delinquent, adults involuntarily committed for substance use or mental health treatment, or sexual violence. See Wis. Stat. § 977.07(1)(a); 977.02(3) (2022); see also Wis. Stat. § 48.23(1m); 51.60; 55.105; 938.23(1m); 980.03(2)(a) (2022).

¹¹ Wis. Stat. § 977.02(3); § 977.07; 977.08 (2022).

¹² Wis. Admin. Code PD § 3.01; 3.02 (outlining the schedule of anticipated cost for legal counsel); 3.03 (outlining the financial standards) (2022); see also Lola Velazquez-Aguilu, *Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense is Failing*, 2006 Wis. L. Rev. 193 (2006) (further explaining the indigency determination process in Wisconsin).

¹³ *State v. Dean*, 471 N.W.2d 310 (Wis. 1991) (“While this is the end of the inquiry concerning the public defender’s determination of indigency, it is not, however, the end of the trial court’s inquiry concerning the defendant’s right to counsel. An indigent defendant is entitled to be assisted by appointed counsel.”); see also *State v. Kennedy*, 762 N.W.2d 412, 416-419 (Wis. Ct. App. 2008).

¹⁴ *Id.* at 314-315.

¹⁵ *Id.* at 315; see also Wisconsin State Public Defender, CR 10-133, Wisconsin State Public Defender (2020), docs. legis.wisconsin.gov/ruletext/CR%2010-133 (noting that the cost of Dean appointments to counties in 2008 was \$7.6 million).