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## Court-Appointment Compensation and Rural Access to Justice

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# COURT-APPOINTMENT COMPENSATION AND RURAL ACCESS TO JUSTICE

HANNAH HAKSGAARD<sup>†</sup>

## Abstract

*Hourly rates paid to court-appointed lawyers impact access to justice. Court-appointed lawyers provide necessary counsel in civil and criminal cases, yet hourly rates in many jurisdictions are so low that many lawyers cannot afford to take court-appointed cases. This article argues that low hourly rates cause problems: namely, appointed lawyers will be insufficient in number, inaccessible to their clients, and sometimes even ineffective. These problems are heightened in rural America where they are compounded by geographical distance and the rural lawyer shortage. This article concludes by suggesting a number of policy solutions.*

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## INTRODUCTION

Court-appointed lawyers play an important role in access to justice in criminal and civil cases. Among other services, court-appointed lawyers serve as guardians ad litem to represent the interest of children; they represent indigent<sup>1</sup> witnesses; they represent parties in guardianship cases, termination-of-parental-rights cases, and involuntary civil commitments.<sup>2</sup> In the criminal context, court-appointed lawyers represent defendants where public defenders are unable to take a case. This might be because of a conflict or because, as occurs frequently in small and rural communities, the locality has no public defender's office.<sup>3</sup> These appointed attorneys are critical in ensuring that indigent Americans have access to justice.

Despite the critical role that these attorneys play, court-appointed lawyers are chronically underpaid. In recent years—as costs increase and hourly rates stagnate—much has been written on the topic of hourly rates for court-appointed attorneys. Most of the recent literature on court-appointment rates focuses on criminal law, but court-appointed lawyers also play a critical

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<sup>1</sup> Throughout this article, I use the word “indigent” to refer to any client who qualifies for appointed counsel based on income levels set by the relevant jurisdiction. I use indigent because that is the most-used descriptor; however, sources also will use language such as “poor” and “impecunious” to describe individuals who receive appointed counsel based on inability to afford private counsel. *See, e.g.*, Bruce Andrew Green, Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 367 (1981) (using the phrases “impecunious litigants” and “the poor”).

<sup>2</sup> *See, e.g.*, N.H. SUP. CT. R. 48 (providing a list of instances outside of the criminal context where courts may appoint attorneys).

<sup>3</sup> Many rural counties have no public defender and instead rely entirely on court-appointed attorneys. Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter*, 22 RUTGERS L.J. 361, 363 (1991) (observing that “[t]he counties served by assigned and contract counsel tend to be smaller” than those served by public defender's offices); David Paul Cullen, *Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions*, 17 OKLA. CITY U. L. REV. 311, 322 (1992) (“The public defender system is used primarily in urban areas since it requires a relatively large population for support.”). *See also* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010) (profiling the different types of criminal defense systems in Arizona counties). The only state without any public defender's offices is Maine, which relies entirely on court-appointed lawyers for criminal appointments. Andrew Davies & Alyssa Clark, *Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places*, 71 ME. L. REV. 245, 269 (2019).

role in civil cases.<sup>4</sup> This article builds on existing literature and once again addresses the issue of hourly rates for court-appointed attorneys, this time for the University of St. Thomas Journal of Law and Public Policy's "Inequality of Wealth, Race, and Class, Equality of Opportunity" symposium. In particular, this article is inspired by the advocacy work of Phil Garland,<sup>5</sup> a rural attorney practicing in Garner, Iowa (population 3,036) who originally brought this issue to my attention two years ago. This article builds off Garland's advocacy by focusing on inequalities in access to justice for rural clients and the role that low hourly rates for court-appointed lawyers play in access to justice issues in rural America.

By focusing on rural areas, I do not suggest that more densely populated places do not face access to justice barriers because of low hourly rates. In fact, more populated areas likely have different access problems that this article does not address. Although low hourly rates are a problem everywhere, I choose to narrowly focus on rural areas. My focus is on rural areas because rural areas face certain unique disadvantages that should be studied separately.<sup>6</sup> Although the problems created by low hourly rates in rural areas are widely known by rural practitioners and those connected with appointment systems,<sup>7</sup> almost none of the scholarship written in the last fifty

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<sup>4</sup> The criminal law focus in access to justice literature is not unique to appointed rates; it has previously been observed—and remedied—in other areas. See, e.g., Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1270 (2016) ("Despite a great deal of interest among socio-legal scholars in studying race and class disparities in the *criminal* justice system, there has been relatively little work examining similar disparities in the *civil* justice system.").

<sup>5</sup> GARLAND & RODRIGUEZ, <http://garlandandrodriguezattorneys.com/home/4545912> (last visited July 13, 2020) (website of Phil Garland's law firm).

<sup>6</sup> As legal scholarship begins to examine issues germane to rural areas, scholars are acknowledging that work about rural areas might apply outside of rural areas, but also that specific issues arise in rural areas that should be addressed separately. See, e.g., Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 168 (2017) ("[There are] specific incentives, both personal and institutional, that arise in smaller, often rural but also suburban and urban, jurisdictions through the country[.]"); *id.* at 210 ("Providing for indigent defense services, much like prosecution services, is also difficult for small governments, especially those located in nonmetropolitan areas.").

<sup>7</sup> Telephone Interview with Phil Garland, Attorney, Philip L. Garland Law Firm (July 14, 2020) (discussing impacts of low hourly rates in rural areas); Zoom

years even mentions the particular impact of low hourly rates in rural areas.<sup>8</sup> It has been over a half a century since the last article focused on hourly rates in rural areas. Robert S. Hunter, a former Illinois judge, authored a 1969 article that focused on the particular impact of unpaid or low-paid court appointments in rural areas and small communities.<sup>9</sup> Hunter discussed the problems with low- or no-pay court appointments generally, while also acknowledging the special burdens in rural areas.<sup>10</sup> Much of his analysis remains true today. The fact that scholarship on court-appointment rates has largely ignored rural areas in the last fifty years is particularly concerning because the rural lawyer shortage is becoming more pronounced.<sup>11</sup> Research on providing counsel to indigent criminal defendants has looked specifically at rural areas,<sup>12</sup> and state-specific studies on hourly rates have taken rurality and the rural lawyer shortage into account. But this article is the first in fifty years to take a direct look at the specific problems that court-appointment compensation schemes create in rural areas. Throughout this article I discuss

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Interview with Kathy Pakes, Assigned Couns. Div. Dir. at Wis. State Pub. Defs. (July 25, 2020) (same); Zoom Interview with Adam Plotkin, Legis. Liaison at Wis. State Pub. Defs. (July 25, 2020) (same).

<sup>8</sup> See, e.g., Greene, *supra* note 4. In 1992, David Paul Cullen wrote about contracted defense work in five semi-rural counties in Oklahoma (the smallest of which had a population of 15,000), but despite the word “rural” appearing in the title of the article, he did not analyze rurality in his study. Cullen, *supra* note 3, at 339-75.

<sup>9</sup> Robert S. Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 CASE & COMMENT 3, 8 (1969). One other article that analyzed court appointments with discussion of the special impact on rural areas was Henry M. Hills, Note, *Current Status of the Traditional Duty of the Attorney to Serve Without Compensation Upon Court Appointment*, 93 W. VA. L. REV. 1001 (1991). Hills cited to and quoted Hunter for the proposition that the biggest burden of court appointments fell on lawyers in small communities. *Id.* at 1013 (citing Hunter, *supra*, at 7-8). Finally, another student article included an overview of the rural argument from Hunter and Hills in a single footnote. Kim Schimenti, Comment, *Pro Choice for Lawyers in A Revised Pro Bono System*, 23 SETON HALL L. REV. 641, 683 n. 197 (1993).

<sup>10</sup> Hunter, *supra* note 9, at 9.

<sup>11</sup> See generally Lisa R. Pruitt et. al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 121 (2018) (“lawyers [in rural areas] are aging and retiring, and too few new lawyers are stepping forward to take their place.”).

<sup>12</sup> See, e.g., Davies & Clark, *supra* note 3 (analyzing the provision of criminal defense lawyers for indigent defendants in Texas with a particular attention on rural counties); Pruitt & Colgan, *supra* note 3 (analyzing the provision of criminal defense lawyers for indigent defendants in Arizona with a particular attention on rural counties).

problems that exist in all communities, while also pointing out how those issues might operate differently—or similarly—in rural areas.

The focus on rural areas is not meant to hide how any number of other characteristics—including race, gender, age, and immigration status—impact access to justice. Existing literature and this article acknowledge that those characteristics can impact access to justice.<sup>13</sup> While acknowledging how access to justice barriers are frequently intersectional in nature, this article focuses on the additional consideration of rurality. Rural areas are racially and ethnically diverse,<sup>14</sup> and include substantial immigrant populations.<sup>15</sup> Those facts are not forgotten in this article or in the solutions I propose.

This article begins by providing a brief overview of current reimbursement rates and systems. Part I provides an overview of current systems and—in an effort to demonstrate the difficulty of changing hourly rates—profiles recent changes in court-appointment compensation in Iowa, where rates increased on July 1, 2019, and in Wisconsin, where rates increased on January 1, 2020. Part II observes that low hourly rates create a system where there are insufficient numbers of lawyers willing to take court appointments, those lawyers are more likely to be geographically inaccessible, and those lawyers may even be ineffective because of the low hourly rates. Specifically, Part II uses an inequality lens to focus on how legal access in rural areas is uniquely disadvantaged when hourly rates are too low. Finally, Part III discusses potential solutions, again with a focus on the unique circumstances of rural areas.

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<sup>13</sup> See, e.g., Greene, *supra* note 4 (analyzing how race and class impacts civil access to justice); Pruitt et al., *supra* note 11, at 118–19 (noting the impact of race and poverty on rural access to justice).

<sup>14</sup> Pruitt et al., *supra* note 11, at 118 (“Perhaps contrary to popular perception, many rural areas of the states we surveyed are racially and ethnically diverse.”); See also Daniel T. Lichter, *Immigration and the New Racial Diversity in Rural America*, 77 RURAL SOCIO. 3, 4 (2012) (“The demographic reality, of course, is that rural America has been home throughout its history to large numbers of racial and ethnic minorities. America’s rural racial minorities, however, are often geographically and socially isolated from mainstream America and easily forgotten or ignored.”).

<sup>15</sup> See generally Lichter, *supra* note 14 (discussing immigration to rural communities).

## I. CURRENT HOURLY RATES

This section provides a brief overview of how the court-appointment system works and provides some examples of state schemes. Every jurisdiction has different situations where it uses court-appointed lawyers, has different compensation schemes, and has different recoupment schemes. Most important to this article are the compensation schemes. There are three different ways states set the compensation for court-appointed lawyers: (1) at a specific rate set in code or regulation, (2) at the discretion of a court, or (3) through contracts with individual lawyers or firms. Several recent reports commissioned by professional associations—including from 2002,<sup>16</sup> 2007,<sup>17</sup> 2013,<sup>18</sup> and 2018<sup>19</sup>—have collected the details of how each state compensates court-appointed lawyers and at what rate. State-specific reports have also addressed the issue.<sup>20</sup> Examining these various reports from the last twenty years shows that states are constantly shifting how and how much they pay court-appointed lawyers. Although these compensation schemes are constantly in flux, they have not normalized. There are both major and minor differences between jurisdictions.

The clearest payment structures for court-appointed attorneys are found in states that set hourly rates by statute or court rule. Yet even the states

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<sup>16</sup> The Spangenberg Grp., *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, A.B.A. BAR INFO. PROGRAM (Oct. 2002), <http://www.sado.org/fees/2002non-capitalNarrative.pdf>.

<sup>17</sup> The Spangenberg Grp., *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, THE A.B.A. BAR INFO. PROGRAM (Oct. 2007), [https://docs.legis.wisconsin.gov/misc/lc/study/2010/special\\_committee\\_on\\_criminal\\_justice\\_funding\\_and\\_strategies/100\\_october\\_22\\_2010\\_subcommittee\\_on\\_funding\\_components/oct22spangenberg](https://docs.legis.wisconsin.gov/misc/lc/study/2010/special_committee_on_criminal_justice_funding_and_strategies/100_october_22_2010_subcommittee_on_funding_components/oct22spangenberg).

<sup>18</sup> John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, NAT'L ASS'N OF CRIM. DEF. LAWS. 1–18 (Mar. 2013), <https://www.nacdl.org/getattachment/cf613fe0-8f46-4dc1-b747-82346328522e/gideon-at-50-rationing-justice-the-underfunding-of-assigned-counsel-systems-part-1-.pdf>.

<sup>19</sup> Sixth Amend. Ctr., Pub. No. 2018.003, *Justice Shortchanged Part II: Assigned Counsel Compensation in Wisconsin*, WIS. ASS'N OF CRIM. DEF. LAWS. 30–35 (Apr. 2018), <https://www.wicourts.gov/supreme/docs/1706petresp.pdf>.

<sup>20</sup> See, e.g., Neb. Minority Just. Comm., *Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures*, UNIV. OF NEB. PUB. POL'Y CTR. (2006). <https://digitalcommons.unl.edu/publicpolicypublications/33> (discussing Nebraska).

with clearly set rates vary substantially in a number of ways. What follows is a survey of rates set by statutes or rules in ten states.<sup>21</sup> To begin, the rates themselves vary significantly. Alabama compensates court-appointed lawyers at \$70 an hour and has different code sections specifying this as the rate for trial work, appellate work, and post-conviction proceedings.<sup>22</sup> Colorado compensates court-appointed lawyers at “a rate not exceeding \$60 per hour.”<sup>23</sup> Hawaii compensates court-appointed lawyers at the rate of \$90 an hour.<sup>24</sup>

Some state schemes provide different kinds of compensation for different types of cases or different types of work. Alaska—for both criminal cases and guardians ad litem—compensates court-appointed lawyers at the rate of \$60 an hour for in-court representation and \$50 an hour for out-of-court work.<sup>25</sup> Iowa compensates court-appointed lawyers at the rate of \$73 an hour for Class A felonies, \$68 an hour for Class B felonies, and \$63 an hour for all other cases.<sup>26</sup> New Hampshire compensates court-appointed lawyers at the rate of \$100 an hour for major crime cases and \$60 an hour for all other cases.<sup>27</sup> Massachusetts breaks out its compensation amounts into several different categories based on type of case, providing: \$100 an hour for homicide cases, \$68 an hour for other criminal cases occurring in its superior court, \$55 an hour for children and family cases, and \$53 an hour for sex offender registry cases, mental health cases, cases about children in need of services, and cases that occur in its district courts.<sup>28</sup>

Some states’ schemes complicate this by having a combination of established rates and discretionary rates. Kansas compensates court-appointed lawyers at the rate of \$80 an hour, but allows exceptions to that rate.<sup>29</sup> New York statutes set the compensation rate for trial level work,

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<sup>21</sup> These states were randomly selected by my law student research assistant.

<sup>22</sup> ALA. CODE § 15-12-21(d) (2013) (covering trial work); ALA. CODE § 15-12-22(c)(1) (2013) (covering appellate work); ALA. CODE § 15-12-23(d) (1975) (covering post-conviction proceedings).

<sup>23</sup> DEL. SUPER. CT. CRIM. R. P. 44(e)(2).

<sup>24</sup> HAW. REV. STAT. ANN. § 802-5(b) (West 2015).

<sup>25</sup> ALASKA ADMIN. CODE tit. 2, § 60.010 (1986) (covering criminal cases); ALASKA ADMIN. CODE tit. 2, § 60.030(1) (1986) (covering guardians ad litem).

<sup>26</sup> IOWA CODE ANN. § 815.7(4) (West 2019).

<sup>27</sup> N.H. SUP. CT. R. 47(2)(a) (covering criminal defendants); N.H. SUP. CT. R. 48-A(2)(a) (covering guardian ad litem fees); N.H. SUP. CT. R. 48(2)(a) (covering all other cases).

<sup>28</sup> MASS. GEN. LAWS ANN.ch. 211D, § 11(a) (West 2018).

<sup>29</sup> KAN. STAT. ANN. § 22-4507(c) (West 2007).

compensating appointed attorneys at the rate of \$75 an hour for felonies and covered family law cases and \$60 an hour for misdemeanor or lesser offenses.<sup>30</sup> However, the New York statutes allow appellate courts to set compensation and reimbursement rates.<sup>31</sup> South Carolina compensates court-appointed lawyers at a rate of \$60 an hour for in-court time and \$40 an hour for out-of-court time,<sup>32</sup> but in murder cases court-appointed lawyers are paid based on what a court deems appropriate.<sup>33</sup>

These ten states provide just a sample of jurisdictions that set their rates by statute or administrative rule. In ten jurisdictions, including Alaska and Colorado as profiled above, the state supreme court sets the rate of compensation for some or all appointments.<sup>34</sup> Some states allow local governments to hire appointed counsel by contract. In other states, local judges get to appoint counsel and decide reasonable fees. Arizona provides an example of this: “[i]f counsel is appointed by the court and represents the defendant in either a criminal proceeding or insanity hearing . . . [c]ompensation for services rendered to the defendant shall be in an amount that the court in its discretion deems reasonable, considering the services performed.”<sup>35</sup> Additionally, some states use a mixture of different payment schemes in different counties.<sup>36</sup>

Complicating the payment schemes even more, in many states appointments for criminal cases and appointments for civil cases are governed by different rules. A final wrinkle is that sometimes the rate paid depends on *how* the lawyer is appointed. For example, in Wisconsin, appointed criminal defense attorneys—doing the exact same work—can be

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<sup>30</sup> N.Y. COUNTY LAW § 722-b(1)(a)-(b) (McKinney 2004).

<sup>31</sup> *Id.* § 722-b(3).

<sup>32</sup> S.C. CODE ANN. § 17-3-50(A) (West 2007).

<sup>33</sup> S.C. CODE ANN. § 17-3-20 (West 1976).

<sup>34</sup> David Carroll & Phyllis Mann, *Wisconsin Supreme Court increases compensation to some, but not all, indigent defense attorneys*, SIXTH AMEND. CTR. (July 11, 2018), <https://sixthamendment.org/wisconsin-supreme-court-increases-compensation-to-some-but-not-all-indigent-defense-attorneys/> (reporting state supreme courts setting rates in ten states as of 2018: Alaska, Colorado, New Hampshire, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming).

<sup>35</sup> ARIZ. REV. STAT. ANN. § 13-4013 (West 2005).

<sup>36</sup> Neb. Minority Just. Comm., *supra* note 20, at 23 (outlining court-appointment payment schemes for appointed defense counsel in Nebraska); *See also* Pruitt & Colgan, *supra* note 3, at 315 (chart outlining different payment schemes in some Arizona counties).

appointed by the state public defender at a rate of \$70 an hour<sup>37</sup> or by a court at a rate of \$100 an hour.<sup>38</sup>

In addition to setting hourly rates, many states also impose limits on the total amount of fees a court-appointed attorney can collect,<sup>39</sup> thus encouraging attorneys to limit their hours of work to stay at or under the maximum compensation amount. Much like hourly rates can be different based on the type of work, the maximum total fees also changes based on the type of case in some jurisdictions.<sup>40</sup> At least one state—Massachusetts—sets the limit based on the number of billable hours per case, not based on total collected fees.<sup>41</sup> In Philadelphia, flat rates are paid to criminal defense attorneys on murder cases regardless of how many hours are worked.<sup>42</sup> These limitations serve as a cap on the number of hours a court-appointed lawyer should spend on a particular case. If a lawyer exceeds the cap, the excess hours worked go unpaid.

Differences also exist in how states change hourly rates. Periodic increases are necessary to maintain a competitive rate, yet most states have no easy mechanism for increasing their set hourly rates.<sup>43</sup> Massachusetts requires periodic review of the hourly rates by a committee not less than once every three years.<sup>44</sup> To the envy of many, South Dakota's court-appointed hourly rate increases automatically with any cost of living increase received

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<sup>37</sup> WIS. STAT. ANN. § 977.08(4m)(d) (West 2019).

<sup>38</sup> *In re the Petition to Amend SCR 81.02*, No. 17-06, at 13–14 (Wis. June 27, 2018), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=215099>.

<sup>39</sup> *See, e.g.*, ALA. CODE § 15-12-21(d) (1975) (providing specific limits for all cases except for death penalty cases).

<sup>40</sup> *See, e.g.*, N.H. SUP. CT. R. 48(2)(b)-(k) (providing specific limits for various categories of cases).

<sup>41</sup> MASS. GEN. LAWS ANN. ch. 211D, § 11(b) (West 2018).

<sup>42</sup> James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 162–63 (2012).

<sup>43</sup> *See, e.g.*, Neb. Minority Just. Comm., *supra* note 20, at 23 (“As one judge remarked, ‘The base rate should be increased by 5-10% every 3-5 years. If we don’t pay a competitive rate, we loose [sic] our most qualified practitioners.’”).

<sup>44</sup> MASS. GEN. LAWS ANN. ch. 211D, § 11(a) (West 2018). For additional information on how Massachusetts came to this policy, *see In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 10, and Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1051–54 (2006) (noting the situation in Massachusetts in the 2000s).

by state employees.<sup>45</sup> Since this policy was adopted in 2000, South Dakota's hourly rate increased from \$67 in 2000<sup>46</sup> to \$97 in 2020.<sup>47</sup>

States that set their hourly rates by statute tend to face large political battles every time rates need to be raised because raising rates requires legislative buy-in. Recent increases in hourly rates in Wisconsin and Iowa demonstrate how intractable legislatures are with increasing fees. Until 2020, the hourly rate in Wisconsin for criminal defense counsel appointed by the state public defender's office was set at a maximum of only \$40 an hour.<sup>48</sup> That rate had been in place since 1995, when the state legislature actually decreased the maximum rate from \$50 an hour to \$40 an hour.<sup>49</sup> It took years of legal advocacy and maneuvering to ultimately see the 2020 increase to \$70 an hour. Between 1995 and 2018, the public defender's office in Wisconsin asked the legislature for an increase in the rates during every biennial budget.<sup>50</sup> Before the increase to \$70 was approved by the legislature, the advocacy work in Wisconsin included asking the Supreme Court of Wisconsin to overrule the legislatively set rate, which the court declined to do.<sup>51</sup>

In Iowa, a similarly long process occurred. Phil Garland, a rural Iowa attorney, has played a key role in multiple advocacy efforts to raise rates in Iowa—his efforts contributed to an increase in 2007 and an increase in

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<sup>45</sup> *Court Appointed Attorney Guidelines*, S.D. UNIFIED JUD. SYS. 7 (Jan. 21, 2020), <https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf> (“Subsequently, court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.”).

<sup>46</sup> Gross, *supra* note 18, at 13 (“[B]eginning in the year 2000, flat fees were abolished and an hourly rate of \$67 was established along with an order that each year the fees would increase in an amount equal to the cost of living increase that state employees received that year.”).

<sup>47</sup> *Court Appointed Attorney Guidelines*, *supra* note 45, at 2 (“The rate effective as of January 1, 2020, is \$97.00 per hour.”).

<sup>48</sup> WIS. STAT. ANN. § 977.08(4m)(c) (West 2019) (noting that appointments between 1995 and 2020 should be paid no more than \$40 an hour).

<sup>49</sup> *Id.* § 977.08(4m)(d) (noting that appointments between 1992 and 1995 should be paid no more than \$50 an hour).

<sup>50</sup> Zoom Interview with Adam Plotkin, *supra* note 7; *See In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 9; *See also id.* (“Since 1999, 18 separate formal efforts to obtain a rate increase have been tried and failed.”).

<sup>51</sup> *In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 2 (pointing out the real purpose of the petition was to leverage a Supreme Court order to force the legislature to act).

2019.<sup>52</sup> The 2019 increase is modest—Iowa’s hourly rate for court-appointed attorneys increased by only \$3.<sup>53</sup> For appointments made from July 1, 2007, to June 30, 2019, Iowa compensated attorneys at the rate of \$70 an hour for class A felonies, \$65 an hour for class B felonies, and \$60 for all other cases.<sup>54</sup> Starting on July 1, 2019, that rate increased by \$3 an hour for each category to \$73 an hour for class A felonies, \$68 an hour for class B felonies, and \$63 an hour for all other cases.<sup>55</sup> The Iowa State Bar Association continues to lobby for additional and immediate increases to these rates.<sup>56</sup> Although the original goal was to increase the rates \$3 in 2019, \$3 in 2020, and \$4 in 2021—for a total of a \$10 an hour increase—the 2020 increase did not happen, and, because of COVID-19, it is unlikely that the 2021 increase will occur.<sup>57</sup> Iowa, then, has not seen a significant increase in hourly rates since 2007 and is unlikely to see one soon.

Although this article focuses on the hourly rates paid to appointed attorneys, it is worth mentioning two related issues that impact court-appointed counsel. The first is court appointments that come without any compensation. The second is recoupment statutes, by which the government attempts to collect attorney’s fees from indigent clients.

In the first situation—where a lawyer is appointed with no compensation—a court might appoint a lawyer without any intent and/or ability to later award attorney’s fees to that lawyer.<sup>58</sup> Lawyers who agree to take these court appointments are taking *pro bono* appointments. Most of the

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<sup>52</sup> Willard L. “Bill” Boyd III, *Rural Practice: Challenges, Rewards and Solutions*, 79 THE IOWA LAW. 5, 5 (Nov. 2019), [https://www.drake.edu/media/collegesschools/law/docs/November\\_Iowa\\_Lawyer\\_2019\\_Updated.pdf](https://www.drake.edu/media/collegesschools/law/docs/November_Iowa_Lawyer_2019_Updated.pdf) (“[Phil Garland has been involved in] seeking legislative approval for additional increases in the hourly rate for court-appointed lawyers[.]”). Telephone Interview with Phil Garland, *supra* note 7.

<sup>53</sup> IOWA CODE ANN. § 815.7(5) (West 2019) (establishing rate for cases appointed on or after July 1, 2019).

<sup>54</sup> *Id.* § 815.7(4).

<sup>55</sup> *Id.* § 815.7(5).

<sup>56</sup> *Indigent Defense*, IOWA STATE BAR ASS’N, at 1, [https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/legislative\\_items/2020\\_INDIGENT\\_DEFENSE\\_INFORM.pdf](https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/legislative_items/2020_INDIGENT_DEFENSE_INFORM.pdf) (last updated Dec. 23, 2019).

<sup>57</sup> Telephone Interview with Phil Garland, *supra* note 7.

<sup>58</sup> *See, e.g.*, Scott M. Strauss & Alexander W. Chak, *Requiring the Uncompensated Lawyer to Represent Civil Litigants Is Unconstitutional: The Emperor Has No Clothes*, 53 ARK. LAW. 20, 20 (2018) (criticizing appointments with no compensation in the federal courts); *See also* Green, *supra* note 1, at 369 (“Some courts, however, have continued to appoint attorneys without compensation in both criminal and civil cases.”).

time, lawyers voluntarily accept uncompensated court appointments, but this is not always the case. Courts are currently split on whether it is constitutional to require lawyers to take cases without compensation,<sup>59</sup> but we know that forced *pro bono* appointments do occur on occasion.<sup>60</sup> Sometimes, uncompensated appointments, while not forced, are unexpected. This might happen when a lawyer takes an appointment expecting payment, but a judge never orders that the lawyer be paid.<sup>61</sup>

For example, in the 2010 South Dakota Supreme Court case of *In re Guardianship of S.M.N.*,<sup>62</sup> a trial court had appointed counsel for the natural mother of three children when a family member sought guardianship of those three children.<sup>63</sup> The trial court made this appointment under a state statute that allows a court to appoint “an attorney, guardian ad litem, or court representative if the court determines that such an appointment is

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<sup>59</sup> Compare *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) (“While we encourage members of the bar to explore all possible avenues for assuring equal access to justice, we do not believe that courts have the inherent power in civil cases to provide the alternative of compelling representation without compensation.”), with *In re Smiley*, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55 (N.Y. 1975) (“Inherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants. Such counsel serves without compensation.”). See also Ronald D. Rotunda & John E. Nowak, *No Power to Require Attorneys to Take § 1983 Actions*, 4 TREATISE ON CONST. L. § 19.36(e) (May 2020) (“Some courts have reached the issue and declared unconstitutional statutes requiring attorneys to serve as counsel, without compensation, in civil cases. Other courts, in appointed criminal cases, have declared that there was an uncompensated taking of property (the lawyer’s services) unless the lawyer is paid adequately.”), and Christopher D. Atwell, Comment, *Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden*, 44 Sw. L.J. 1229 (1990).

<sup>60</sup> See *Naranjo v. Thompson*, 809 F.3d 793, 804 (5th Cir. 2015) (“We hold that, where a district court has determined that exceptional circumstances warrant appointment of counsel and has unsuccessfully attempted to secure a non-compulsory appointment, the court may invoke its inherent power to order an attorney to represent an indigent civil rights litigant *pro bono*.”); See also Sarah B. Schnorrenberg, Note, *Mandating Justice: Naranjo v. Thompson As A Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 262 (2019) (discussing uncompensated court appointments).

<sup>61</sup> See, e.g., E-mail from Ashley Anson, Att’y, Ashley Anson, Prof. LLC to author, Assoc. Professor of L., Univ. of S.D. Sch. of L. (May 5, 2020, 10:48 AM) (on file with author) (detailing an appointment that the attorney expected the county would pay, but then did not pay to her).

<sup>62</sup> 2010 S.D. 31, 781 N.W.2d 213.

<sup>63</sup> *Id.* at ¶ 8; 781 N.W.2d at 227.

necessary.”<sup>64</sup> Although the state statute authorized appointment of the attorney to represent the natural mother, no statute specified that the county would pay the attorney.<sup>65</sup> The Supreme Court of South Dakota held that the county could not be required to pay attorney’s fees.<sup>66</sup> In situations like this, a court-appointed lawyer may be able to seek fees directly from the indigent client, but will face a difficult journey in collecting attorney’s fees from a client who was appointed counsel precisely because the client could not afford to hire counsel.

The second issue related to hourly rates is that some states also have recoupment statutes. Recoupment statutes require represented individuals to reimburse the government for the cost of the legal services provided.<sup>67</sup> These statutes can cover the costs of appointed counsel, as well as the public defender.<sup>68</sup> In 1974, the Supreme Court held recoupment statutes constitutional for criminal defendants,<sup>69</sup> and recoupment is now a widespread practice.<sup>70</sup> In jurisdictions that attempt to recoup attorneys’ fees from clients who receive appointed counsel, increasing hourly rates for attorneys naturally leads to increased fees and financial obligations faced by those indigent clients.

Although fully uncompensated service and recoupment statutes inform this topic, the rest of this article focuses on the hourly rates paid to appointed counsel. Much of this article focuses on state compensation schemes, but the federal government also uses appointed counsel. As of

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<sup>64</sup> S.D. CODIFIED LAWS § 29A-5-117 (1995).

<sup>65</sup> *In re Guardianship of S.M.N.*, 2010 S.D. 31 at ¶ 38, 781 N.W.2d at 226–27.

<sup>66</sup> *Id.* at ¶ 38, 781 N.W.2d at 227 (“[T]he Legislature has not provided any statutory authority imposing the duty to pay the natural parent’s attorney’s fees in a guardianship proceeding on the county.”).

<sup>67</sup> Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 324 (2009) (“Throughout the country, debts for defense fees and costs are imposed on defendants either as recoupment (court-ordered reimbursement over time) or as contribution (a co-pay or application fee imposed at the time of appointment) or both. Recoupment might be a flat fee of several hundred dollars or the attorney’s hourly fee for representation.”).

<sup>68</sup> *Id.* (discussing recoupment statutes as applied to public defenders and appointed counsel).

<sup>69</sup> *Fuller v. Oregon*, 417 U.S. 40 (1974). *Fuller* was decided only two years after the Supreme Court found the Kansas recoupment statutes unconstitutional in *James v. Strange*, 407 U.S. 128 (1972), for violating the Equal Protection clause of the Fourteenth Amendment.

<sup>70</sup> Anderson, *supra* note 67, at 329–32.

2020, the federal courts compensate appointed attorneys at the rate of \$152 an hour for non-capital criminal appointments.<sup>71</sup> This rate is substantially higher than the rate paid by many states. The federal government prosecutes a low percentage of criminal cases in the United States overall, but a substantially higher percentage in some areas, including crimes committed on the largely rural Indian Reservations governed by the Major Crimes Act.<sup>72</sup> Although this higher federal hourly wage might mitigate some of the issues raised in the next section, serious access to justice issues continue to exist on rural reservations.<sup>73</sup>

## II. INSUFFICIENT, INACCESSIBLE, AND INEFFECTIVE LAWYERS

Society—through legislation and constitutional litigation—has decided that justice requires some individuals be provided appointed counsel. There is a constitutional right to counsel in criminal cases.<sup>74</sup> Although not constitutionally guaranteed, states have sometimes statutorily decided to provide counsel in other contexts, such as termination of parental rights cases or involuntary commitment hearings. But promising access to counsel through the constitution or statutes is only one step to achieving equal access to justice.<sup>75</sup> For the promise of counsel to be fulfilled, there must be enough

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<sup>71</sup> *Guide to Judiciary Pol’y*, 7 U.S. CTS. pt. A, ch. 2, § 230.16 (Jan. 17, 2020), [https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230\\_16/](https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16/).

<sup>72</sup> 18 U.S.C. § 1153. The Major Crimes Act provides that federal courts will have criminal jurisdiction over crimes committed in “Indian country” by Native Americans. *Id.* The Major Crimes Act applies to most reservations, but not all. With Public Law 280, Congress gave criminal and civil jurisdiction to state courts in six states: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 18 U.S.C. § 1162 (criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). *See also* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 917 (2012) (“In 1953, Congress passed Public Law 280 (P.L. 280), which required six states to assert jurisdiction over Indian country[.]”).

<sup>73</sup> *See* Richard Braunstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S.D. L. REV. 171, 179 (2003) (discussing Native Americans in South Dakota), *and* Richard Braunstein & Amy Schweinle, *Explaining Race Disparities in South Dakota Sentencing and Incarceration*, 50 S.D. L. REV. 440 (2005) (same).

<sup>74</sup> *See e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>75</sup> And of course, access to justice means more than just being provided counsel, but counsel is a start. *See* Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through A Prosecution Lens*, 71 ME. L. REV. 227, 234

lawyers who can take those appointments, those lawyers need to be accessible to their clients, and those lawyers need to be effective. This section lays out the problems with low hourly rates and argues that if rates are too low, there will be insufficient lawyers, inaccessible lawyers, and even ineffective lawyers.

Geography and the rural lawyer shortage compound the problems created by low hourly rates for court-appointed lawyers in rural areas. Accordingly, this section also discusses how these problems—that appointed lawyers may be insufficient, inaccessible, and ineffective—are heightened in rural areas.

### A. Number of Lawyers

When hourly rates for court-appointed attorneys are too low—particularly in comparison to other work available—courts are unable to find lawyers to take cases.<sup>76</sup> There may be delays in finding lawyers willing to take cases<sup>77</sup> and fewer attorneys will be willing to take the cases at all.<sup>78</sup> Some

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(2019) (“Access to justice, however, incorporates much more than access to counsel and should be thought of as addressing a number of conditions.”).

<sup>76</sup> *In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 3 (“Most attorneys will not accept [state public defender] appointments because they literally lose money if they take these cases. Consequently, the [state public defender] struggles to find counsel who will represent indigent criminal defendants.”).

<sup>77</sup> Thomas John Walsh, *Frozen in Time: Criminal Justice System & Public Defender Pay*, 91 WIS. LAW. (June 1, 2018), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=6&ArticleID=26398> (“[T]he court may wait significantly longer to process the case while waiting to find private counsel willing to take the case at the lower rate.”).

<sup>78</sup> Steven D. Benjamin, *Foreword to Gideon At 50: A Three-Part Examination of Indigent Defense in America*, NAT’L ASS’N OF CRIM. DEF. LAWS 1, 6 (March 2013), <https://www.nacdl.org/getattachment/cf613fe0-8f46-4dc1-b747-82346328522e/gideon-at-50-rationing-justice-the-underfunding-of-assigned-counsel-systems-part-1-.pdf> (“Inadequate compensation substantially reduces the number of attorneys willing to represent indigent defendants[.]”); *See also* Gross, *supra* note 18, at 8 (“Inadequate compensation for assigned counsel discourages the participation of the private bar[.]”); Laura A. Bischoff, *Ohio pours cash into paying lawyers to represent indigent clients*, DAYTON DAILY NEWS, (January 21, 2020), <https://www.daytondailynews.com/news/local/ohio-pours-cash-into-paying-lawyers-represent-indigent-clients/UuE0Uqsi8iLVRBpfF9ARFJ/> (“Multiple studies have found that when appointed counsel rates are too low, qualified attorneys stop taking appointed cases.”).

lawyers may choose to accept some court appointments, but limit the number because they are losing money.<sup>79</sup> All of these problems are more serious in rural areas that face a general lawyer shortage.<sup>80</sup> In rural areas there may not be enough lawyers to cover the legal needs of the community.<sup>81</sup> The shortage of attorneys in general practice also means a shortage of attorneys available for court appointments.<sup>82</sup> Existing state-specific research indicates that rural areas are most impacted by low hourly rates. A survey of judges in Nebraska found that “[j]udges in some rural areas of the state felt that there were not enough qualified attorneys in their jurisdiction to appoint.”<sup>83</sup> In Kansas, rural counties pose the most difficult problem for finding qualified lawyers to take cases.<sup>84</sup> In Wisconsin, “[t]he impact [of low hourly rates] is sharply accentuated in rural areas” where sometimes calls have to go out to dozens or even hundreds of lawyers to find one willing to take the case. Even then, the lawyer taking the case “might be one whose office is several counties away.”<sup>85</sup> The negative impacts of low hourly rates affect both urban and rural areas, but some of the impacts are exacerbated by the nature of practicing in rural areas and the existing rural lawyer shortages.

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<sup>79</sup> See, e.g., Neb. Minority Just. Comm., *supra* note 20, at 23 (“As one district court judge [from Nebraska] explains, ‘[y]ou cannot expect private assigned counsel to accept frequent appointments unless compensation is close to their hourly rate of retained counsel.’”).

<sup>80</sup> See generally Pruitt et al., *supra* note 11 (providing evidence of the rural lawyer shortage).

<sup>81</sup> See generally *id.* (documenting the rural lawyer shortage). A shortage of lawyers in rural areas has wide-ranging consequences, including public health consequences. Michele Statz & Paula Termuhlen, *Rural Legal Deserts Are a Critical Health Determinant*, 110 AM. J. OF PUB. HEALTH 1519 (2020).

<sup>82</sup> See Pruitt et al., *supra* note 11, at 106–08 (providing a vignette about Gregory County, South Dakota, to demonstrate that even if there are rural attorneys in a community, very few may be able to take court appointments).

<sup>83</sup> Neb. Minority Just. Comm., *supra* note 20, at 13.

<sup>84</sup> Peter Hancock, *Attorneys seek pay raise for indigent defense work; situation could reach ‘crisis’ level in Douglas County*, LAWRENCE J.-WORLD (Sept. 28, 2015, 04:52 PM), <https://www2.ljworld.com/news/2015/sep/28/attorneys-seek-pay-raise-indigents-defense-work/>.

<sup>85</sup> Bruce Vielmetti, *A long-haul defense lawyer makes do with Wisconsin’s lowest-in-nation pay*, MILWAUKEE J. SENTINEL (May 11, 2018, 03:17 PM), <https://www.jsonline.com/story/news/local/wisconsin/2018/05/11/wisconsin-lowest-nation-pay-defense-lawyers-crisis/579026002/>; See also *In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 6 (“The testimony from our public hearing indicates that the decrease in lawyers available to accept SPD appointments disproportionately affects rural counties and has reached a state of crisis in Northern Wisconsin.”).

If states expect lawyers to take court appointments, the hourly rates paid must at a minimum be high enough to cover the overhead of running a law office.<sup>86</sup> The hourly rate for a court-appointed lawyer must be high enough to cover the maintenance of an office, including rent, the costs of support staff, professional fees, the cost of liability insurance, the cost of continuing legal education, and the educational costs of law school—including student loan payments.<sup>87</sup>

Simply put, overhead costs often prevent lawyers from doing court-appointed work full-time.<sup>88</sup> Lawyers may have higher hourly overhead costs than the state rate of reimbursement.<sup>89</sup> This issue is well known.<sup>90</sup> Those who write about hourly rates consistently point out that low court-appointment rates will not cover overhead costs.<sup>91</sup> Some attorneys will opt out of the system when the hourly rates cannot cover overhead.<sup>92</sup> Most lawyers

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<sup>86</sup> Walsh, *supra* note 77 (“[T]he lawyer also must pay his or her overhead and have enough money left over to put food on the table.”). Estimating overhead costs per average attorney is difficult, although overhead costs may take over 50% of lawyer earnings on average. Gross, *supra* note 18, at 8. Estimates for overhead costs in Wisconsin found the lowest average overhead per lawyer was \$27,000 for solo practitioners, and the estimates of average overhead per lawyer only rose from there, with one estimate as high as \$113,500 per lawyer. Walsh, *supra* note 77.

<sup>87</sup> See, e.g., Neb. Minority Just. Comm., *supra* note 20, at 22 (“Attorneys are not compensated adequately. The current fee is not commensurate with the costs of maintaining an office and the training, education, duties or liability potential associated with the practice of law.”); See also Hunter, *supra* note 9, at 8 (“Experience indicates that about one-half of a lawyer’s gross income goes to the payment of overhead.”).

<sup>88</sup> Walsh, *supra* note 77; See also Neb. Minority Just. Comm., *supra* note 20, at 21 (“[A]ttorneys believe that rates should be raised to ensure that attorneys’ overhead expenses are covered. . . . ‘The cost of practicing law is very expensive and something that those on the public side don’t often realize.’”).

<sup>89</sup> See, e.g., Hancock, *supra* note 84 (discussing Kansas rates and overhead costs).

<sup>90</sup> Not only is this issue well known, it is not new. The topic was discussed in 1983 Congressional hearings about the hourly rate for federal defense counsel. Cullen, *supra* note 3, at 326.

<sup>91</sup> Bischoff, *supra* note 78; See also Neb. Minority Just. Comm., *supra* note 20, at 22 (“The sentiment held by [some Nebraska] judges is that the hourly rate is too low, and is not sufficient to cover the overhead of counsel.”).

<sup>92</sup> Hancock, *supra* note 84 (discussing that Lawrence, Kansas attorney John Frydman stopped taking court appointments because of low rates and rising overhead costs); Anderson & Heaton, *supra* note 42, at 194 (finding that in Philadelphia murder cases and “[a]s a result of the below-market rate for appointed attorneys, many respected criminal defense attorneys refuse to be on the list to

engaging in court-appointed work must rely on “full-pay clients” to “subsidize the cost” of doing court appointments,<sup>93</sup> and those full-pay clients may garner more focused legal representation than the clients bringing in lower court-appointment rates.<sup>94</sup> This subsidization can also happen between attorneys in the same firm. For instance, in rural Iowa, the law firm of Garland & Rodriguez has one younger attorney who does a substantial amount of court-appointed work on juvenile cases.<sup>95</sup> Phil Garland, the senior attorney at the firm, calculates that having Carrie Rodriguez, the associate attorney, handle juvenile court appointments costs the firm approximately \$35 an hour in the associate’s overall cost.<sup>96</sup> Phil Garland is willing to spend additional time working in order to cover this cost, but not all firms are willing to do this.<sup>97</sup>

When hourly rates are insufficient to cover the average overhead rates of lawyers, there are two populations of lawyers who are potentially best positioned to take a high number of court-appointed cases. First are lawyers in a firm that are subsidized by other firm lawyers.<sup>98</sup> For example, Phil Garland subsidizing court-appointed work that his associate does in rural Iowa.<sup>99</sup> Larger firms, with even more attorneys and more ability to spread around any losses, are even more able to take the financial hit. Second are solo practitioners who are able to keep their overhead costs incredibly low.<sup>100</sup>

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accept indigent defense assignments.”). Another example comes from a 2019 symposium about Maine’s rural lawyer shortage where multiple lawyers noted throughout the event that firms had decided to stop taking court appointments precisely because the hourly rate did not cover overhead costs. Hannah Haksgaard, *Rural Practice As Public Interest Work*, 71 ME. L. REV. 209, 217 n. 53 (2019) (citing three speakers who articulated this point).

<sup>93</sup> Walsh, *supra* note 77; *See also* Gross, *supra* note 18, at 18 (“An unforeseen consequence of under-resourcing assigned counsel may be an increase in the cost of legal services for those defendants who are not classified as indigent.”).

<sup>94</sup> Davies & Clark, *supra* note 3, at 269 (“[Criminal defense appointment] systems [that rely on practicing lawyers] are frequently criticized on structural grounds: private attorneys accepting ad hoc assignments may be distracted by their commitments to paying clients[.]”).

<sup>95</sup> Telephone Interview with Phil Garland, *supra* note 7.

<sup>96</sup> *Id.* Phil Garland explained that the shortage of \$35 an hour combines the amount needed to cover the associate’s salary and her portion of the overhead costs.

<sup>97</sup> Haksgaard, *supra* note 92, at 217 (noting that entire firms stop taking court appointment cases).

<sup>98</sup> Telephone Interview with Phil Garland, *supra* note 7.

<sup>99</sup> *Id.*

<sup>100</sup> Walsh, *supra* note 77.

For example, Matthew Kirkpatrick, an attorney in rural Wisconsin who spends the majority of his time taking court appointments,<sup>101</sup> “keeps his expenses low” by having only a home office with no staff.<sup>102</sup> Kirkpatrick does all of his own administrative work and relies on his wife’s employment benefits—including health insurance.<sup>103</sup> Only by keeping his expenses this low is Kirkpatrick able to dedicate so much of his practice to court appointments in rural Wisconsin—a state that paid only \$40 an hour until a few months ago.<sup>104</sup>

One burden that will be higher for many urban attorneys is the cost of rental space for an office. Even though rental costs may be lower in rural areas generally, office space can be difficult to find in rural areas. There are also increased costs, such as the need for more and better vehicles to travel to court. In addition, most other overhead costs do not decrease simply by living in a rural area—student loan payments stay the same regardless of one’s location. Even if rural lawyers can maintain lower overhead costs on average, rural areas face the highest need for court-appointed lawyers. Not only does the rural lawyer shortage mean there simply may not be enough lawyers to fill the legal needs of a community,<sup>105</sup> but rural areas tend to rely disproportionately on court-appointed attorneys because there are likely no full-time public defenders or legal aid attorneys.<sup>106</sup> Therefore, any problems caused when fees are too low are particularly damaging in rural areas because of the relatively high proportion of the indigent caseload handled by court-appointed attorneys.

One reason that the disadvantages of low hourly rates disproportionately impact rural areas is because there are likely no full-time,

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<sup>101</sup> Telephone Interview with Matthew Kirkpatrick, Att’y, Kirkpatrick Law Office (June 20, 2020).

<sup>102</sup> Vielmetti, *supra* note 85.

<sup>103</sup> Telephone Interview with Matthew Kirkpatrick, *supra* note 101.

<sup>104</sup> *Id.*; WIS. STAT. ANN. § 977.08(4m)(c) (establishing that appointments between 1995 and 2020 should be paid no more than \$40 an hour).

<sup>105</sup> See generally Pruitt et al., *supra* note 11 (discussing access to justice issues in six states that have a rural lawyer shortage).

<sup>106</sup> See generally Pruitt & Colgan, *supra* note 3, at 278 (discussing how limited resources in rural Arizona counties impact the provision of criminal defense services to indigent clients); Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 496 (2014) (“Rural populations are disproportionately poor and . . . lawyers (legal aid attorneys or otherwise) are scarce in rural areas[.]”).

salaried public defenders to take criminal cases.<sup>107</sup> Because a low population and low tax base limits spending, many rural counties do not have a public defender's office or even a full-time prosecutor.<sup>108</sup> The tax base limitations can be even starker in counties containing federally-recognized Indian Land because these lands are not taxed by the county.<sup>109</sup> In rural and small communities without a full-time prosecutor, a part-time prosecutor is frequently appointed by the local government after a competitive bidding process.<sup>110</sup> A similar bidding process can occur for criminal defense attorneys.<sup>111</sup>

For criminal defense work in rural areas, many counties rely entirely on court-appointed lawyers instead of a full-time public defender.<sup>112</sup> Nebraska, for example, has a statute requiring public defender's offices only in counties with populations of 100,000 or more.<sup>113</sup> Less-populated counties in Nebraska are allowed to have public defender's offices, but they are also allowed to forgo public defender's offices and use contracts or court appointments for their criminal defense work.<sup>114</sup> Therefore, while larger or wealthier counties have at least one full-time defense attorney to carry the brunt of criminal defense work, in many rural counties every state-provided criminal defense attorney is appointed. Rural counties struggle "to achieve

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<sup>107</sup> Hunter, *supra* note 9, at 4 (explaining that this is a longstanding problem because the burden of court appointments on rural attorneys is higher because "[t]here may be no public defender in rural areas.").

<sup>108</sup> Romero, *supra* note 6, at 165 (bidding process); *id.* at 181–82 (use of part-time prosecutors in rural and small communities).

<sup>109</sup> Pruitt & Colgan, *supra* note 3, at 254 ("American Indian lands are not taxed by the state or county, which diminishes the tax bases of counties whose territory overlaps with tribal lands.").

<sup>110</sup> Romero, *supra* note 6, at 166 (noting part-time prosecutors are appointed "often by a mayor or a city council[.]"); *id.* at 187–88 (discussing competitive bidding process).

<sup>111</sup> Maybell Romero, *Low-Ball Defense* (work in progress; on file with author).

<sup>112</sup> For example, in South Dakota only three counties have public defender's offices. The remaining counties rely exclusively on court-appointed lawyers. Sixth Amend. Ctr., *Justice Shortchanged Part II*, *supra* note 19, at 35–36. Although more populated counties are more likely to have public defender's offices, the rural-urban divide on this issue is not complete. Studying Texas, Davies and Clark found that "the likelihood [counties] had institutionalized their defense system was no greater in urban than rural areas." Davies & Clark, *supra* note 3, at 263.

<sup>113</sup> NEB. REV. STAT. ANN. § 23-3401(1) (West 1996).

<sup>114</sup> *Id.*; See also Neb. Minority Just. Comm., *supra* note 20, at 3–4 (describing the public defender system in each Nebraska county).

any economy of scale” in criminal defense work because they cannot afford a full-time public defender.<sup>115</sup>

The limited resources that prevent many counties from having a public defender’s office also hamper access to justice in other ways. Providing legal aid in rural areas is difficult. Rural areas have high poverty rates and low per capita spending on legal aid.<sup>116</sup> Legal aid attorneys and offices simply are not available locally in most rural communities.<sup>117</sup> Without legal aid offices available, more private attorneys must provide legal aid-type services, sometimes through court appointments.<sup>118</sup> Attorneys in more populated areas also take underpaid court appointments and *pro bono* cases, but the issue here is the proportionality of that burden.<sup>119</sup> Not only do rural areas lack public defender and legal aid offices, but rural areas also lack attorneys.

In their study of criminal appointments for indigent defendants, Andrew Davies and Alyssa Clark found differences in the provision of counsel in misdemeanor cases between urban and rural counties in Texas.<sup>120</sup> Importantly, their research suggests that “appointment rates in misdemeanor cases are far more a product of the simple unavailability of attorneys in rural

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<sup>115</sup> Pruitt & Colgan, *supra* note 3, at 280 (“As with the high per capita cost of delivering other services to its sparse and small population, the high cost of indigent defense in Greenlee County [Arizona] suggests the inability to achieve any economy of scale by, for example, retaining a single lawyer to provide indigent defense services on an ongoing basis in the way that Apache County [Arizona] engages several under ongoing contracts.”).

<sup>116</sup> Pruitt et al., *supra* note 11, at 116–17 (“Disproportionately high rural poverty rates suggest that rural areas should receive greater amounts of available legal aid funding, but data did not reveal that to be the case. In California, for example, legal aid organizations that serve low-income rural residents receive less than a third of the per-person funding that flows to organizations serving urban populations, and the funding gap between rural and urban organizations has widened in the last decade.”).

<sup>117</sup> *Access to Justice in Rural Areas*, LEGAL SERVICES CORP., <https://www.lsc.gov/grants-grantee-resources/resources-topic-type/access-justice-rural-areas> (last visited June 22, 2020) (“Providing legal aid to low-income people in rural areas can be particularly challenging because of distance, lack of access to transportation, and lack of awareness of the kinds of services and help that legal aid can provide.”).

<sup>118</sup> Haksgaard, *supra* note 92, at 217.

<sup>119</sup> Hunter, *supra* note 9, at 11 (“[T]he burden is shifted onto the general practitioner in the rural county, far out of proportion to the similar burden upon the attorney in the metropolitan area.”).

<sup>120</sup> Davies & Clark, *supra* note 3, at 267.

areas than they are of policy, political, or economic factors.”<sup>121</sup> The rural lawyer shortage plays a major role in heightening the negative impacts of low hourly rates. The few attorneys that do live and work in rural areas are expected to take all of the court appointments, even when those appointments lose money for the attorney because the hourly rate does not cover overhead costs.<sup>122</sup> At the same time, there is a supply and demand issue—in an urban area, there will likely always be an attorney to take a case, but in a rural area, even one or two attorneys refusing to take low-paid appointments can “obstruct the entire system.”<sup>123</sup>

Having local attorneys take cases is good for everyone because then counties do not have to pay for travel and attorneys and/or their clients are not required to travel. However, currently it is not always possible to find local attorneys able or willing to take court-appointment cases and counties must look for outside lawyers willing to travel. In this way, when rates are so low that many lawyers will opt out of taking court-appointment cases, having fewer local lawyers means appointed counsel is more likely to be from a different community. Thus, the access to justice barriers begin to compound because lawyers are not geographically accessible to their clients.

#### B. Accessibility of Lawyers

When there are too few local lawyers able or willing to take cases, the appointed lawyers may be located in different counties—or even different states—decreasing accessibility. This in turn leads to an added burden of travel and distance that falls disproportionately on those in rural areas. Rural travel takes time and resources, and the reality of rural distance—namely, poor roads, inclement weather, driving in the dark, and unreliable cellular reception—impacts attorney willingness to take cases and ability to provide representation. The combination of low hourly rates that prevent some lawyers from taking cases and the rural lawyer shortage means more clients

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<sup>121</sup> *Id.*

<sup>122</sup> *See, e.g.,* Hills, *supra* note 9, at 1004 (arguing the burden falls “upon the few available members of the private criminal bar” in “rural counties with few practitioners[.]”).

<sup>123</sup> Zoom Interview with Kathy Pakes, *supra* note 7; *See also* Pruitt et al., *supra* note 11, at 106–08 (providing a vignette about Gregory County, South Dakota, to demonstrate how even a couple of rural attorneys opting out of court-appointed cases can impact an entire county).

in rural counties are without local counsel.<sup>124</sup> Counties may have no option but to hire attorneys who have to travel long distances for appointed cases.<sup>125</sup> No national data exists on how many court-appointed lawyers are crossing county or state lines to take cases, but the anecdotal evidence suggests it is a substantial problem.<sup>126</sup>

In 2015, Kansas paid only \$62 per hour for court-appointed work; the dearth of local lawyers willing to take cases at that rate meant that counties were considering appointing lawyers from out of state.<sup>127</sup> In Wisconsin, rural northern counties have long struggled to appoint local attorneys.<sup>128</sup> As the Wisconsin Supreme Court described the situation for criminal appointments:

In Bayfield County, cases are now assigned to out-of-county private attorneys 99 percent of the time. At a recent legislative hearing, the [state public defender] testified that its Appleton office had to make an average of 17 contacts per case just to find an assigned counsel attorney. In three difficult cases, it took 302, 261, and 260 contacts to find an attorney. The Ashland office (Ashland, Bayfield, and Iron counties) needed nearly 39 contacts per case and an average of 24 days to find an attorney. In Marathon County, it takes an average of 80 contacts and 17 days to appoint a private

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<sup>124</sup> Zoom Interview with Adam Plotkin, *supra* note 7 (explaining that even if hourly rates are high enough that most attorneys are willing to take cases, if a rural community does not have attorneys available, there will be no local appointments and outside attorneys will be asked to travel far distances).

<sup>125</sup> Hancock, *supra* note 84 (“And because of the lack of qualified attorneys willing to accept appointed cases at the hourly rate that the board pays, we’re having to call in attorneys at a distance,” [Patricia] Scalia told reporters after the hearing.”); Vielmetti, *supra* note 85 (discussing a lawyer who travels to 19 rural counties because “fewer and fewer lawyers” will accept court appointments).

<sup>126</sup> Even the first national attention paid to the issue of the rural lawyer shortage included a discussion of a rural county having to pay for court-appointed attorneys to travel. Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. TIMES (Apr. 8, 2013), <http://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html> (“All [of the lawyers gathered in town for court day] had driven more than two hours from Rapid City and Pierre, paid by Bennett County[.]”).

<sup>127</sup> Hancock, *supra* note 84.

<sup>128</sup> *In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 6.

attorney to a case. In Price County, it takes an average 33 days to appoint a private attorney to a case.<sup>129</sup>

One natural solution to the difficulty of finding lawyers to appoint is to look outside of the communities that need the lawyers. This was happening in Wisconsin. The Wisconsin Supreme Court gave the example of Ashland County who, “in FY 2012 . . . appointed only 28 percent of cases to out-of-county private attorneys. In FY 2017, that number had risen to 73 percent.”<sup>130</sup> Matthew Kirkpatrick, the Wisconsin attorney who keeps his expenses low so he can afford to take court appointments, demonstrates an extreme case of travel in northwestern Wisconsin. In 2017, Kirkpatrick “took on cases for the State Public Defender in 19 rural counties, putting more than 46,000 miles on his 2012 Dodge Durango, sometimes driving 350 miles round-trip for a single case.”<sup>131</sup>

As Lisa R. Pruitt with various co-authors has argued repeatedly, distance itself decreases access to justice.<sup>132</sup> The problem exists regardless of whether it is the lawyers or the clients who travel. Asking attorneys to do all the traveling is not a tenable solution. While some states pay for travel time and costs,<sup>133</sup> not all do.<sup>134</sup> Wisconsin, which pays for travel at the rate of \$25 per hour, has not increased that hourly compensation rate since at least

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<sup>129</sup> *Id.* at 6–7.

<sup>130</sup> *Id.* at 6.

<sup>131</sup> Vielmetti, *supra* note 85 (discussing lawyer Matthew Kirkpatrick).

<sup>132</sup> Pruitt et al., *supra* note 11, at 121 (“Many counties with too few attorneys are contiguous to others with the same deficit, so that engaging an attorney in a neighboring county may also prove difficult, even for those who can afford to travel.”); Lisa R. Pruitt et al., *Justice in the Hinterlands: Arkansas As A Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It*, 37 U. ARK. LITTLE ROCK L. REV. 573, 634–35 (2015) (“I know that many Arkansans miss out on legal representation simply because there are no lawyers around and it is often too expensive to travel for legal advice.”); Pruitt & Showman, *supra* note 106, at 485–87 (“Physical space itself is often a literal roadblock to gaining access to all sorts of services . . . include[ing] those provided by lawyers[.]”).

<sup>133</sup> WIS. STAT. ANN. § 977.08(4m)(d) (“[A]ttorneys shall be paid . . . \$25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.”).

<sup>134</sup> Hancock, *supra* note 84 (noting Kansas does not pay for transportation costs or travel time).

1992.<sup>135</sup> The low rate for travel is a “disincentive” for attorneys to take cases in Wisconsin.<sup>136</sup> Attorney travel costs time and money. It also decreases the efficacy of representation. In rural Arizona,

[a]ttending the required hearings allows an opportunity for attorneys to meet with clients in each locale, but it also requires significant travel time. This pulls the attorney away from other important matters, such as case investigation, legal research, and motion preparation. As a result, attorneys must choose between opportunities for meaningful client communication on the one hand, and other important forms of advocacy on the other.<sup>137</sup>

In an effort to decrease his travel commitments and time on the road, Kirkpatrick has since reduced his regular travel from nineteen counties to ten counties in rural Wisconsin.<sup>138</sup> His personal decision to decrease his travel is eminently reasonable. The issue is not that any individual attorney wants to limit their travel; the issue is that low hourly rates have created a system where there are not enough willing local attorneys in rural counties to take the cases.

Things are no better when clients are asked to travel to their appointed lawyers. When lawyers are not local to clients, it makes the provision of legal services more difficult. This is especially true for clients who are already disadvantaged: “[t]o overlook or deny the economic and often gendered aspects of [travel] is to perpetuate a crisis.”<sup>139</sup> Clients with

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<sup>135</sup> Compare WIS. STAT. ANN. § 977.08(4m)(a) (providing travel reimbursement of twenty-five dollars an hour for cases assigned before December 1, 1992), with WIS. STAT. ANN. § 977.08(4m)(d) (providing travel reimbursement of twenty-five dollars an hour for cases assigned on or after January 1, 2020).

<sup>136</sup> Zoom Interview with Kathy Pakes, *supra* note 7 (“[N]o attorneys [in some rural areas], [and] we really can’t pay for them to travel and that is a disincentive to take cases.”).

<sup>137</sup> Pruitt & Colgan, *supra* note 3, at 291.

<sup>138</sup> Telephone Interview with Matthew Kirkpatrick, *supra* note 101.

<sup>139</sup> Michele Statz & Jon Bredeson, *Concerned about rural access to justice? Start here first*, NORTHLAND ACCESS TO JUST., <https://www.northlandproject.org/the-rural-a2j-guide> (last visited June 22, 2020). For a relevant and related analysis of how women interact with barriers of distance and travel in the context of health care see Michele Statz & Kaylie Evers, *Spatial Barriers as Moral Failings: What Rural Distance Can Teach Us About Women’s Health and Medical Mistrust*, 64 HEALTH & PLACE 102396 (2020).

court-appointed lawyers are, by definition, indigent. Indigency combined with other barriers will have a large impact on a client's ability to travel to meet an attorney in a rural area: "[a]n individual's ability to traverse rural distance largely depends on available childcare; a reliable vehicle; a driver's license; a consistent work schedule; the ability to secure time off; dis/ability; age; health; weather; and road infrastructure. *Each* of these diverse needs deserves attention."<sup>140</sup> Many of these same burdens exist in urban areas, but the burdens are compounded in rural areas by distance and lack of public transportation. In rural areas, these barriers can make it impossible for indigent clients to travel to meet an appointed lawyer, which in turn can harm the level of representation the client receives.<sup>141</sup>

### C. Effectiveness of Lawyers

The fee structure, the insufficient number of willing attorneys, and even inaccessibility of appointed attorneys means that the current court-appointment system risks appointing ineffective lawyers or encouraging otherwise effective counsel to not act in the best interests of their clients.<sup>142</sup> The system-wide concern about overall quality of lawyers is not an indictment of individual lawyers, but instead that the system has created incentives that are concerning. Various publications, including policy reports, have expressed a fear of encouraging ineffective assistance of counsel.

A report for the National Association of Criminal Defense Lawyers asserts that "inadequate compensation" because of low hourly rates for court-appointed attorneys "diminishes the overall quality of representation."<sup>143</sup> A report by the Public Policy Center at the University of Nebraska noted the legal profession's concern that too-low hourly rates for criminal

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<sup>140</sup> Statz & Bredeson, *supra* note 139.

<sup>141</sup> See, e.g., Telephone Interview with Phil Garland, *supra* note 7 (discussing the importance of meeting face-to-face with clients to provide the best possible representation).

<sup>142</sup> See generally Hills, *supra* note 9, at 1012 ("Numerous commentators have expressed serious concerns whether appointed attorneys providing free or undercompensated services will be able to provide the same attention normally provided a paying client, either through lack of availability of clerical or investigative services which must be paid for, or through reduced motivation of the attorney who knows that each hour he contributes to the case is failing to accrue anything toward his overhead costs.").

<sup>143</sup> Benjamin, *supra* note 78, at 6; See also Gross, *supra* note 18, at 16 ("The result is an inadequate, inexperienced, over-worked and inherently conflicted pool of attorneys accepting court appointments in our criminal courts.").

appointments “would likely encourage attorneys to spend less time on court appointed cases, and discourage more experienced attorneys from accepting court appointments in the first place, thereby reducing the overall quality of indigent defense provided in the state.”<sup>144</sup> The Iowa State Bar Association shares its concern that “[a] system that pays those who represent the poor less than one third the usual and customary rate charged those who are not indigent runs the risk of providing a lower quality of justice for the poor.”<sup>145</sup>

Simple economics suggest that lawyers who are paid a low hourly rate with the additional restriction of either a maximum dollar amount or a maximum number of billable hours will invest less time into that case.<sup>146</sup> This in turn threatens the right to counsel by decreasing the quality of legal work.<sup>147</sup> Appointed counsel may spend fewer hours than necessary on a given case or may take too many cases in order to survive financially.<sup>148</sup> The problem is even worse when fixed-rate contracts are used. If an attorney has contracted to cover a certain class of cases for a set amount of money, the attorney “may become more lax in fulfilling their duties, doing as little as possible while getting paid as much as possible under the contract.”<sup>149</sup> This is a problem: under fixed-rate contracts “it is in the lawyer’s own financial interest to spend as little time as possible to quickly earn the fixed fee, placing the lawyer in direct conflict with the indigent defendant’s interest in achieving the best possible legal outcome.”<sup>150</sup>

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<sup>144</sup> Neb. Minority Just. Comm., *supra* note 20, at 1.

<sup>145</sup> Iowa State Bar Ass’n, *supra* note 56, at 2.

<sup>146</sup> Walsh, *supra* note 77 (“Concepts of free market economics tell us that a person paid a higher rate will generally provide a higher level of service and give more attention to a case[.] A person sophisticated in free markets who looked at this situation would probably conclude that any lawyer trying to make a living will prefer to spend more time on a case paying \$100 per hour than on one paying \$40 per hour.”); *See also* Neb. Minority Just. Comm., *supra* note 20, at 21 (“[Attorneys in Nebraska] expressed concerns that because of the low rates, attorneys would not spend adequate time on the case thereby affecting the quality of work the defense receives.”).

<sup>147</sup> Benjamin, *supra* note 78, at 6 (“Low hourly wages combined with caps on fees undermine the right to counsel guaranteed by the Sixth Amendment.”).

<sup>148</sup> Gross, *supra* note 18, at 8 (“In some cases, inadequate compensation may induce attorneys to accept more clients than they can effectively represent in order to maintain their practices.”).

<sup>149</sup> Romero, *supra* note 6, at 199 (discussing prosecutors).

<sup>150</sup> Carroll & Mann, *supra* note 34 (discussing criminal defense work). *See also* Cullen, *supra* note 3, at 321–22 (noting concerns with the contract model for criminal defense work).

In counties where there are enough lawyers to fill the basic legal needs of a community, paying below-market hourly rates may entice sufficient numbers of lawyers to take court-appointed cases, but those lawyers will not necessarily have sufficient skill or experience.<sup>151</sup> Many lawyers who take court appointments are young attorneys willing to lose money in order to gain courtroom experience.<sup>152</sup> As Hunter explained in 1969, “experience” is the young lawyer’s “compensation.”<sup>153</sup> Once those new lawyers gain experience through court-appointed work, they will likely move onto other—higher paid—legal work.<sup>154</sup> Even though judges express a preference in appointing experienced lawyers in “more complex or serious cases,” that might not be possible because there simply are not enough experienced lawyers willing to take court appointments at the low hourly rates.<sup>155</sup> In an interview on this topic, one judge in Nebraska stated that court-

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<sup>151</sup> See, e.g., Neb. Minority Just. Comm., *supra* note 20, at 21 (quoting a Nebraska attorney) (“Low rates... ‘do not encourage good practitioners to remain active on appointment lists.’”); See also Anderson & Heaton, *supra* note 42, at 194 (“Interviewees, including appointed counsel, note that while some of the lawyers who are willing to take [criminal] appointments [in Philadelphia] are good, some are not.”).

<sup>152</sup> Neb. Minority Just. Comm., *supra* note 20, at 24 (“[M]any new attorneys accept court appointments as a way to build experience.”); Walsh, *supra* note 77 (“However, as long as there are new lawyers willing to take these cases for the purpose of cutting their teeth in court, there will be a market for cut-rate contracts. This is an unfortunate circumstance but may be a lesson that the free market is not necessarily the best way to provide a fundamental constitutional right to indigent people.”); See also Neb. Minority Just. Comm., *supra* note 20, at 24 (quoting a Nebraska attorney) (“New attorneys take [court appointments] because it gets them into court and it is a place to learn.”).

<sup>153</sup> Hunter, *supra* note 9, at 11 (“As a result, in routine criminal cases the great majority of the court appointments are imposed upon attorneys under 45. Within limits, this appointment is welcomed by the young attorney to afford him experience. However, experience is his only compensation.”).

<sup>154</sup> Walsh, *supra* note 77 (“Private practice lawyers are thus doing this work only if they can drastically reduce their overhead number or if they have some other motive for doing the work such as ‘cutting their teeth’ in the courtroom before moving on to higher paying work.”); See also Neb. Minority Just. Comm., *supra* note 20, at 24 (quoting a Nebraska attorney) (“After five years I am considering myself ‘qualified’, however, my practice is large enough now that I am considering dropping court appointments in state court because of the low rates.”).

<sup>155</sup> Neb. Minority Just. Comm., *supra* note 20, at 11–12; See also *In re the Petition to Amend SCR 81.02*, No. 17-06, *supra* note 38, at 8 (quoting Wisconsin State Bar President Paul G. Swanson) (“The rate discourages experienced

appointed attorneys “age out” of the attorney list maintained by their county and “senior attorneys are not appointed if other attorneys are available.”<sup>156</sup> This is not the official policy in Nebraska, but it appears to be a common practice across jurisdictions.<sup>157</sup> In both urban and rural areas, removing senior, experienced attorneys from the list—either by choice of the court or because the senior lawyers simply will not participate for the low rates—“may have repercussions on the overall quality of counsel.”<sup>158</sup>

The young attorneys who are willing to take the cases for experience may slow down the court process as they learn about new areas of law.<sup>159</sup> Attorneys may also “take on more than they can handle, leading to more delays, appeals, inefficiencies, and strains on the entire court system.”<sup>160</sup> Judges in Nebraska report some dissatisfaction with the court-appointment system because “less experienced lawyers” are sometime appointed “in more serious or complex cases.”<sup>161</sup> This raises the concern that indigent clients are facing an additional access to justice challenge—even if counsel is appointed, counsel may not provide the best representation.<sup>162</sup> Similar concerns arise for both prosecutors and defense attorneys hired after a competitive bidding process because the focus is on hiring the lowest bidder, not the best-qualified bidder.<sup>163</sup>

These problems exist in both urban and rural areas. But, once again, rural areas face additional hurdles in finding qualified counsel. Even if a county seeks to appoint only experienced counsel, the low number of available attorneys may prevent counties from requiring specific

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practitioners and the general effect of this is a diminishment of the rights of individuals underrepresented or facing delays in representation, which only serves to prejudice those rights.”)

<sup>156</sup> Neb. Minority Just. Comm., *supra* note 20, at 13.

<sup>157</sup> See, e.g., Hunter, *supra* note 9, at 11 (“There is yet another way in which the burden of accepting court appointments is very unfairly distributed. The practice actually works out so that older, more experienced attorneys are rarely called upon to accept court appointment[.]”).

<sup>158</sup> Neb. Minority Just. Comm., *supra* note 20, at 13.

<sup>159</sup> Vielmetti, *supra* note 85.

<sup>160</sup> *Id.*

<sup>161</sup> Neb. Minority Just. Comm., *supra* note 20, at 13.

<sup>162</sup> See, e.g., Bischoff, *supra* note 78 (“[Appointed counsel] simply cannot provide a constitutionally sound defense at \$40 an hour.”).

<sup>163</sup> Romero, *supra* note 6, at 188 (prosecutors); Pruitt & Colgan, *supra* note 3, at 301–02 (defense attorneys).

experience.<sup>164</sup> The more likely problem in rural areas, however, is that when the more experienced lawyers opt-out of taking court appointments because of low pay,<sup>165</sup> there simply are no inexperienced lawyers to take cases. The bar is greying in rural areas—attorneys are aging out of practice and younger attorneys are simply not replacing those aging attorneys.<sup>166</sup> When those experienced attorneys decline court-appointed cases, at best there are inexperienced local attorneys to take court appointments. At worst, there are no attorneys to take court appointments.

None of this is to criticize the individual lawyers who dedicate their time and energy to taking court-appointed cases and providing access to justice to indigent clients. Rather, the preceding is focused on the failures of the system created by legislative and judicial bodies that chronically underpay lawyers: lawyers who generally do their best to provide meaningful counsel to indigent clients in the civil and criminal systems. Yet this situation is not hopeless. Although low hourly rates have led to a near-crisis in some rural areas, “there is nothing inevitable about rurality that need prevent access to counsel from being achieved.”<sup>167</sup> Accordingly, jurisdictions and localities must begin to confront this issue to increase access to justice.

### III. SOLVING THE PROBLEM

Simply increasing the hourly rate paid to court-appointed attorneys will not solve the access to justice problems associated with court-appointment cases. Not only are attorneys paid at too low of a rate, the maximum number of paid hours per case is capped, and there are simply too few attorneys willing to take the cases. Increasing the hourly rate will likely

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<sup>164</sup> See Romero, *supra* note 6, at 193 (discussing how suburban governments might be able to advertise for lawyers with five or more years of experience but advertising in that way might “narrow the field prohibitively . . . in an area with only two or three active attorneys.”).

<sup>165</sup> See, e.g., Neb. Minority Just. Comm., *supra* note 20, at 24 (quoting a Nebraska lawyer) (“There are a limited number of attorneys in the area and most established ones will not work for the rates paid.”).

<sup>166</sup> Pruitt et al., *supra* note 11, at 121 (“Our state surveys indicate that the primary reason for dwindling attorney numbers in rural areas is that lawyers there are aging and retiring, and too few new lawyers are stepping forward to take their place.”).

<sup>167</sup> Davies & Clark, *supra* note 3, at 272 (articulating this view based on research of criminal appointments in Texas).

entice more attorneys to take court-appointed cases.<sup>168</sup> However, if there are not enough lawyers in a certain geographic area—or if those lawyers are inexperienced—an increase in hourly rates cannot serve as a silver bullet<sup>169</sup> guaranteeing access to justice. Simply increasing rates to attract urban or suburban attorneys to travel to rural areas for court appointments is not a viable solution.<sup>170</sup> Relying on traveling attorneys not only increases the travel expenses born by government entities, it means that counsel will not be located near the clients being represented.

While an increase in hourly rates would benefit all communities—regardless of population size and density—special considerations must be made in designing solutions to work in rural areas.<sup>171</sup> A recent attempt by Nevada to improve indigent criminal defense work across the state serves as an example. In 2007, the Nevada Supreme Court established an Indigent Defense Commission to investigate concerns about indigent criminal defense work across Nevada.<sup>172</sup> After a number of years and a number of initiatives, the state saw an improvement in indigent criminal defense in “the state’s urban centers.”<sup>173</sup> But those same initiatives failed to fix the criminal defense problems in rural areas.

[F]ixing the “crisis” in rural Nevada has proven to be more difficult. There are a wide variety of reasons for this, including a lack of attorneys to do the work, the geographic

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<sup>168</sup> See, e.g., Vielmetti, *supra* note 85 (noting that rural lawyer Matthew Kirkpatrick “supports the higher rate — not to make more profit, he wrote to the court, but to get more lawyers to share the load and let him spend more time with client concerns, and less time on the road.”).

<sup>169</sup> Michele Statz and Jon Bredeson use the language of “silver bullet” in challenging the assumption made by many that technology alone will solve the rural access to justice crises. That language is just as applicable to any solution that is viewed as a quick fix for the crises. Statz & Bredeson, *supra* note 140.

<sup>170</sup> E-mail from Heather Scheiwe Kulp to author (Dec. 6, 2019, 9:26 AM) (on file with author) (“Hard to find attorneys willing to take those cases, especially if they have to travel to rural areas to do so (and may or may not be reimbursed mileage).”).

<sup>171</sup> Statz & Bredeson, *supra* note 140 (“Initiatives that work in an urban setting likely won’t work in a rural one. But if your initiative is successful in a rural area, it could be successful *everywhere*.”).

<sup>172</sup> Sixth Amend. Ctr., *Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future*, NEV. SUP. CT. INDIGENT DEF. COMM’N iii (Mar. 2013), [https://sixthamendment.org/6ac/nvreport\\_reclaimingjustice\\_032013.pdf](https://sixthamendment.org/6ac/nvreport_reclaimingjustice_032013.pdf).

<sup>173</sup> *Id.*

expanse of most rural counties, and limited infrastructure to train and evaluate attorneys.<sup>174</sup>

Nevada's problem and its various solutions were specific to criminal defense work and included initiatives to better support public defender's offices and court-appointed lawyers.<sup>175</sup> But the lesson remains the same when applied to criminal and civil court-appointed lawyers: solutions that work in urban areas may not work in rural areas. Or more precisely, a single policy change, such as increasing hourly rates and removing compensation caps, must be combined with other changes in rural areas in order to be effective.

A critical part of making court-appointed lawyers more widely available in rural areas is to simply have lawyers widely available in rural areas. Increasing hourly rates should be a part of state initiatives to attract rural lawyers. But, of course, having an adequate number of rural lawyers in place will be critical to ensure local representation of indigent clients, even once rates are increased.<sup>176</sup> Adam Plotkin, Legislative Liaison at the Wisconsin State Public Defender, explains that the rate increase in Wisconsin is good and has been helpful in getting attorneys to take court appointments, but until Wisconsin has "more people who are physically located closer to rural areas, we are going to have some problems" in appointing attorneys.<sup>177</sup> Increasing hourly rates and increasing the number of rural attorneys must happen together and will feed off each other.

In addition to having more lawyers to provide court-appointment services, there are other ways to support indigent clients, perhaps in ways that *avoid* the need for appointed counsel. A single dedicated and salaried legal aid attorney in a small or rural community can make a substantial difference in access to justice.<sup>178</sup> Additional services for parents may avoid termination of parental rights petitions;<sup>179</sup> additional community-based

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Davies & Clark, *supra* note 3, at 268 ("Among rural [Texas] counties, access to counsel improves where counties have the trappings of urbanization: small towns and more attorneys living locally.").

<sup>177</sup> Zoom Interview with Adam Plotkin, *supra* note 7.

<sup>178</sup> See Nino C. Monea, *The Administrative Power: How State Courts Can Expand Access to Justice*, 53 GONZ. L. REV. 207, 254 (2017) (noting the benefits of having more full-time legal aid attorneys).

<sup>179</sup> Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 133–46

mental health services may avoid involuntary commitment proceedings; additional community services may decrease crime. Investing in rural communities cannot start or stop with increasing hourly rates for court-appointed attorneys. Yet, ensuring that the court-appointment system works is a very important piece because the use of some appointed attorneys is inevitable.

Just as having a dedicated and salaried legal aid attorney could provide critical services to a community, having a dedicated and salaried public defender might do the same. A constant thread in figuring out how best to provide counsel, as required by *Gideon v. Wainwright*,<sup>180</sup> is whether governments should use public defenders instead of appointed or contract counsel. The fact that low hourly rates increase the risk that court-appointed lawyers may provide ineffective assistance of counsel<sup>181</sup> does not necessarily mean appointed counsel should be abandoned for public defender's offices. Although some evidence exists that public defender's offices provide better representation,<sup>182</sup> the evidence is not conclusive that criminal defendants face worse outcomes when represented by appointed counsel.<sup>183</sup> But even if conclusive evidence could show that public defenders were more successful in representing clients, entirely abandoning appointed counsel for criminal work is untenable. First, public defender's offices will inevitably have conflicts requiring appointed counsel to take some cases. Second, a public defender's office does not scale to the smallest counties that cannot support even one full-time public defender.<sup>184</sup> Third, it ignores that the beneficial

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(2012) (providing recommendations for how rural areas can aid parents facing termination of the parental rights).

<sup>180</sup> 372 U.S. at 335.

<sup>181</sup> See *infra* Part II.C. Effectiveness of Counsel.

<sup>182</sup> See, e.g., Davies & Clark, *supra* note 3, at 268 (finding that for criminal appointments in Texas “counties have taken the step of forming an agency dedicated to providing defense representation, access to counsel was better.”); Anderson & Heaton, *supra* note 42, at 159 (finding that for murder appointments in Philadelphia there is a “striking” difference in outcomes between defendants represented by appointed counsel compared to public defender's offices).

<sup>183</sup> See Feeney & Jackson, *supra* note 3 (finding, after collecting and analyzing many pre-1991 studies on the different types of criminal defense systems, that outcomes were very similar for criminal defendants).

<sup>184</sup> See, e.g., Feeney & Jackson, *supra* note 3, at 369–70 (“Some of the arguments advanced in favor of assigned counsel are that such a system . . . is decentralized in nature and therefore more efficient in rural areas[.]”); Pruitt & Colgan, *supra* note 3, at 312 (“Nonmetropolitan counties across the nation face

specialization possible in large public defender's offices would be impossible in rural communities.<sup>185</sup> Fourth, it ignores that a public defender operating alone in a rural county will not have the benefit of an office filled with other criminal defense attorneys.<sup>186</sup> Finally, any solution that proposes small counties pool resources to create a shared full-time public defender's office faces concerns of travel and inaccessibility.<sup>187</sup> This is not to say appointed

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particular challenges to funding and delivering justice—challenges that stem from characteristics such as sparse populations and the related inability to achieve economies of scale in service delivery.”).

<sup>185</sup> For example, in Maricopa County—the county that includes Phoenix, Arizona, and has a population of over four million—the public defender's office includes juvenile specialists. Pruitt & Colgan, *supra* note 3, at 293 n.466. Pruitt & Colgan argue that “counties that have the resources to fund programs that allow defense attorneys to develop specialization in juvenile defense (including the trial of juveniles in adult court) have a significant advantage over counties that utilize generalists in these cases.” *Id.* In another example, in 2020 and faced with the threat state-wide budget cuts because of COVID-19, the Georgia Public Defender's Office decided to terminate its appellate division. Bill Rankin, *Georgia defender system dismantles appellate office spared from budget cut*, CHATTANOOGA TIMES FREE PRESS (June 26, 2020), <https://www.timesfreepress.com/news/breakingnews/story/2020/jun/26/georgia-defender-system-dismantles-appellate-office-spared-budget-cut/526313/>. Removing these dedicated appellate defenders means a loss of specialized appellate attorneys in the office. There is concern that replacing specialized appellate public defenders with appointed counsel will lead to worse outcomes for criminal defendants. *See* Andrew Fleischman (@ASFleischman), TWITTER (June 18, 2020, 12:55 PM), <https://twitter.com/ASFleischman/status/1273675702420803585> (“The huge downside of their loss, of course, is that the State is going to rely on contract attorneys to handle appeals instead. These lawyers are, on average, slower and less experienced. And while they are arguably cheaper, you get what you pay for.”); Andrew Fleischman (@ASFleischman), TWITTER (June 18, 2020, 12:59 PM), <https://twitter.com/ASFleischman/status/1273676743598125061> (“Georgia's appellate courts are going to notice a significant downturn in the quality of the briefing they receive.”).

<sup>186</sup> One reason that public defenders are seen as better than appointed counsel is precisely because public defenders are able to work together and share the burden of criminal representation. *See* Anderson & Heaton, *supra* note 42, at 197–98 (discussing how court-appointed criminal defense attorneys in Philadelphia tend to be solo practitioners and do not have the same support as public defenders); Davis & Clark, *supra* note 3, at 269 (noting that one benefit of a dedicated public defender's office over appointed private counsel is the “benefit from the *esprit de corps* of being a member of a public defense institution.”).

<sup>187</sup> *See supra* Part II.B. Accessibility of Lawyers (discussing particular issues with travel).

counsel is *better* than public defenders, but just to reinforce the point that appointed counsel cannot be entirely replaced.<sup>188</sup> Even if jurisdictions begin creating more public defender's offices and hiring more public defenders, there would still be court-appointed attorneys and those attorneys would still require higher hourly rates.

In addition to everything else, policymakers must keep in mind that many lawyers taking court appointments are balancing student loan payments on top of the costs of running a law practice. Increasingly, educational costs and the corresponding debt loads after graduation impact the types of jobs new law school graduates want<sup>189</sup> and can drive new graduates away from rural jobs.

Debt has had a terrifically negative impact on small town attorneys and is a main contributing factor to the decline of young lawyers locating in rural Iowa. It is extremely difficult to recruit young attorneys to a small town. It has been common for many who have started practices in smaller communities to leave their community simply because they cannot pay their student loans.<sup>190</sup>

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<sup>188</sup> See Davies & Clark, *supra* note 3, at 269 (discussing criminal appointments in Texas by noting that although institutionalized criminal defense systems provide better access to counsel “[w]e do not automatically conclude all assigned counsel systems must be failures, however. Rather, we recommend to those who choose to deliver defense services in this way that they work to establish mechanisms to assure the quality of services provided through adequate funding, oversight, and other efforts to create a culture of excellence in delivery of representation.”).

<sup>189</sup> Monea, *supra* note 178, at 219–20 (discussing increasing debt loads for law school graduates and interest in high-paying jobs). Jonathan D. Glater, *Law School, Debt, and Discrimination*, 68 J. LEGAL EDUC. 548, 548 (2019) (“While empirical evidence of the impact of indebtedness on decision-making is scarce, the data we do have suggests that more borrowing for law school correlates with a lower likelihood of seeking a career devoted to the public interest.”); *Id.* at 549 (“The more students must pay for law school, the more likely it is that they will seek more lucrative careers.”).

<sup>190</sup> Iowa State Bar Ass’n, *supra* note 56, at 2; See also Backus & Marcus, *supra* note 44, at 1061 (“In Iowa, the former president of the Iowa State Bar Association decried the use of caps in paying for indigent defense. He asserted that the system actively discouraged competent attorneys from taking appointments. Recent law school graduates can no longer seek viable employment in the area because the debt loads from law school are too much and the compensation for indigent defense appointments is too little. ‘There is no chance,’ he wrote, ‘of servicing a \$75,000 debt, let alone paying for a car, house and family, on the fees from indigent defense.’”).

The negative impact of student loan payments may be particularly harsh in rural areas because of the high burden of court-appointed work done by young, rural lawyers.<sup>191</sup> If a private practice attorney earns, say, \$60 an hour for appointed work, that attorney must use the money to cover business expenses, including employment benefits. On the other hand, a full-time government attorney receives a salary on top of the government covering overhead costs and providing additional compensation through a benefits package.<sup>192</sup> For some attorneys, it is only possible to take court appointments if a spouse has good benefits at work.<sup>193</sup>

But the difference in direct benefits like health insurance or retirement accounts is not the only reason hourly wages are not comparable. Full-time public interest or government lawyers, including public defenders and prosecutors, qualify for federal student loan forgiveness under the Public Service Loan Forgiveness Program.<sup>194</sup> However, a private practice attorney—even one who does a lot of court-appointed work that serves the public good—does not qualify for this federal student loan forgiveness program.<sup>195</sup> I have written previously about the need to consider all rural lawyers as public interest lawyers for the purpose of existing loan forgiveness

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<sup>191</sup> Iowa State Bar Ass’n, *supra* note 56, at 2 (“Many of the lawyers performing indigent defense are younger attorneys who are carrying significant student debt.”).

<sup>192</sup> *See, e.g.*, Carroll & Mann, *supra* note 34 (noting that employees of the state public defender’s office in Wisconsin are “employees . . . and paid by the state, with all of their overhead needs provided by the state.”).

<sup>193</sup> *See, e.g.*, Telephone Interview with Matthew Kirkpatrick, *supra* note 101 (noting that his wife has benefits through her employment and those benefits make it possible to dedicate so much of his time to court appointments and *pro bono* work).

<sup>194</sup> Haksgaard, *supra* note 92, at 219 (“[T]he Public Service Loan Forgiveness Program (“PSLF”) . . . provides loan forgiveness to qualifying borrowers who work full-time in public service for ten years while making income-based repayments.”).

<sup>195</sup> *Id.* (“PSLF does not allow any attorney in private practice to participate, thus excluding a large number of rural lawyers whose work should be considered public interest lawyering.”). All attorneys are qualified for income-based repayment plans that forgive debt after twenty years of payment. For a discussion of income-based repayment schemes in comparison to PSLF, *see* John R. Brooks, *Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans*, 68 J. LEGAL EDUC. 521 (2019).

programs,<sup>196</sup> and I have joined others in proposing loan forgiveness programs aimed directly at rural lawyers.<sup>197</sup> The need for loan forgiveness programs may be particularly salient for rural lawyers engaged in a substantial amount of court-appointed work.

I continue to believe that all rural attorneys should qualify for federal loan forgiveness programs, but I also recognize that narrower programs could target court-appointment work. For example, a loan forgiveness program could forgive student loans if a lawyer took a certain number of court-appointed cases a year.<sup>198</sup> The program could even be limited to high-need areas, including rural counties.<sup>199</sup> A loan forgiveness program would need to be partnered with sufficient hourly rates and would be good in two ways. First, the program would encourage lawyers to take court-appointed cases and represent indigent clients in important civil and criminal matters. Second, the program would incentivize lawyers to set up their practices in high-need areas, including rural communities.

Just like the cost of student loans can be mitigated through targeted programs, so can other expensive or time-consuming tasks, such as legal research. In a 2019 article, Thomas Sneed advocated for law school libraries to provide support to rural attorneys, who frequently have fewer resources available.<sup>200</sup> Mitigating the cost of legal research—whether in time or money—would help cut the overhead costs for rural attorneys taking court-appointed cases. The Legal Practice Incubator program at the University of Arkansas at Little Rock William H. Bowen School of Law attempts to decrease overhead costs in a similar way—it “reimburses participants for \$3,000 in business expenses, and offers free legal research software, bar

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<sup>196</sup> Haksgaard, *supra* note 92, at 219 (“Because rural private practice attorneys face the same salary pressures as traditional public interest lawyers and because covering rural private practice attorneys meets the stated goals of the program, PSLF should be amended to cover rural private practice.”).

<sup>197</sup> Pruitt et al., *supra* note 11, at 144 (proposing rural practitioners receive loan forgiveness).

<sup>198</sup> The Wisconsin legislature debated such a plan in 2017, but the bill failed. The Wisconsin bill proposed student loan forgiveness for attorneys who took a certain number of criminal defense appointments in rural areas. 2017 ASSEMBLY BILL 567, S.J. Res. 1, (Wis. 2017), *available at* [https://docs.legis.wisconsin.gov/2017/related/proposals/ab567\\_](https://docs.legis.wisconsin.gov/2017/related/proposals/ab567_)

<sup>199</sup> *See, e.g., id.*

<sup>200</sup> Thomas Sneed, *The Academic Law Library's Role in Cultivating the Rural Lawyer*, 64 S.D. L. REV. 213, 230–31 (2019).

memberships and continuing legal education credits.”<sup>201</sup> States and local governments that appoint counsel can aid attorneys in comparable ways by providing funding for paralegal assistance, appointing a second attorney in complicated cases, and paying other expenses.<sup>202</sup>

These solutions focus on recruiting the *new* attorney to rural areas, but attention should also be paid to established lawyers nearing retirement who might hire an associate but are financially unable to do so. Phil Garland explains that in rural Iowa “a lot of attorneys have said they would hire an associate if there was better pay for court-appointed work.”<sup>203</sup> Higher hourly rates would encourage more new lawyers to work in rural areas and make it easier for an established attorney to hire an associate because guaranteed income from court-appointed cases is “almost like a stipend for the associate.”<sup>204</sup> Remember, Garland loses \$35 an hour when his associate attorney takes court-appointed juvenile cases, but Garland has been a long-time participant in court-appointed work and is now dedicated to facilitating his associate doing this work.<sup>205</sup> Not all established attorneys would make this sacrifice, but increasing hourly rates could encourage established lawyers to hire associates, which in turn aids law firm transitions as aging attorneys retire.

As policymakers at different levels of government—including state legislators, county and city elected officials, state-wide court administrators, and even the local judges who appoint lawyers—make decisions about how to ensure sufficient, accessible, and effective court-appointed lawyers, the attention must be on broad changes. Any change—such as increasing rates, removing hourly caps, or paying student loans—will make a difference and encourage more and better court-appointment work. However, “[a]s with solving the access-to-justice crisis itself, no one strategy or program will meet all the needs of [jurisdictions] aiming to support rural practice and rural

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<sup>201</sup> Wendy N. Davis, *No Country for Rural Lawyers: Despite incentives, small-town attorneys still find it hard to thrive*, A.B.A. J., (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/no-country-for-rural-lawyers>; See also *Rural Practice Incubator Project*, WILLIAM H. BOWEN SCH. OF L., <https://ualr.edu/law/clinical-programs/rural-practice-incubator-project/> (last visited July 14, 2020).

<sup>202</sup> See Zoom Interview with Kathy Pakes, *supra* note 7 (noting how in Wisconsin if the State Public Defender appoints counsel, it controls reimbursement for expenses which allows for costs such as paralegal assistance).

<sup>203</sup> Telephone Interview with Phil Garland, *supra* note 7.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

justice systems” through increasing court-appointment rates.<sup>206</sup> It is also true that “simply injecting funding into rural programs is not enough to generate an impact. To improve access to counsel, resources must be accompanied by careful plans for implementation and a realistic approach to bringing needed partners aboard.”<sup>207</sup> The most successful way to approach this problem will be to combine various strategies aimed at increasing hourly rates for court-appointed lawyers and employ those strategies with broader action to bring more lawyers into rural areas.

#### CONCLUSION

Increasing hourly rates will come with costs: counties may struggle to pay for the increased costs of court-appointed attorneys,<sup>208</sup> defendants required to pay back attorney’s fees will face higher financial burdens,<sup>209</sup> and counties may switch to a different fee structure—such as a low-bid contract—to avoid paying the higher costs.<sup>210</sup> The current system of low

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<sup>206</sup> Pruitt et al., *supra* note 11, at 153 (discussing how law schools will have to take various approaches).

<sup>207</sup> Davies & Clark, *supra* note 3, at 271; *See also id.* at 270 (“Reform was most successful when it had the support of the local judiciary, who had to accept the logistical demands of assuring presence of counsel; of county legislatures and executives, who had to approve and oversee the program; and of prosecutors and law enforcement, whose own roles and responsibilities would change with the introduction of new services.”).

<sup>208</sup> *See generally* Pruitt & Colgan, *supra* note 3 (discussing problems with local funding of criminal defense work).

<sup>209</sup> *See, e.g.*, Timothy W. Bjorkman, *A State in Shackles: The Effect of A Dysfunctional Childhood on Crime and Imprisonment*, 62 S.D. L. REV. 211, 247 (2017) (“South Dakota, like many other states, permits the county to take a lien against the defendant’s assets for the cost of any court-appointed attorney’s fees.”). For just one example of a state statute authorizing recoupment of attorney’s fees, *see* COLO. REV. STAT. ANN. § 21-1-106 (West 1996). States also allow for counties to recoup the cost of prosecution from convicted defendants. *See, e.g.*, IOWA CODE ANN. § 815.13 (West 1985) (allowing recoupment of some prosecution fees from criminal defendants). For just one example of the problems with recouping attorney’s fees from indigent criminal defendants, *see* Mark Walker, *In S.D., right to an attorney comes with a price*, ARGUS LEADER (Mar. 4, 2016), <https://www.argusleader.com/story/news/2016/03/04/sd-right-attorney-comes-price/81205714/> (last updated Mar. 8, 2016).

<sup>210</sup> *See* Neb. Minority Just. Comm., *supra* note 20, at 1 (noting concerns of the legislative committee who commissioned the report). It seems unlikely that the smallest counties will ever switch to a public defender model because of scale; *See also* Feeney & Jackson, *supra* note 3, at 405 (“This study found that public

hourly compensation rates, however, has created a system where lawyers are insufficient in number, inaccessible geographically, and pushed towards being ineffective. This is a particular problem in rural areas where access to justice deficiencies are already widespread.<sup>211</sup>

State-specific and national studies show that low hourly rates are harmful in all types of communities. This article adds to the conversation on court-appointed attorneys a focus on rural areas and particular issues inherent to those communities. It also adds to the conversation on solving the rural lawyer shortage by proposing that increased hourly rates for court-appointed attorneys is a critical aspect of recruiting new attorneys to rural areas. The battle for increased hourly rates will likely never end. As the lowest paying states in the nation increase their hourly rates, new states become the bottom and must battle the same issues.<sup>212</sup>

Wisconsin is the most recent state to substantially increase hourly rates—on January 1, 2020, the rate increased from \$40 to \$70 for criminal appointments made by the public defender’s office. This change was effective on January 1, 2020, but the increased hourly rates applied only to appointments that *started* after January 1, 2020. Unsurprisingly, lawyers in Wisconsin were turning down appointments in November and December knowing that they would be working under the old, lower rate, even after the new rate became effective in January.<sup>213</sup> Since January of 2020, Wisconsin attorney Matthew Kirkpatrick has noticed “a little less urgency” behind the requests for counsel.<sup>214</sup> Kathy Pakes, the Assigned Counsel Division Director at the Wisconsin State Public Defender, has observed several changes in how court appointments are operating: she has observed an increased number of attorneys who are on the appointment list, the attorneys on the list are taking

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defender costs were lower in the large jurisdictions (400,000 or more) but higher in the smaller jurisdictions.”) (citing L. Silverstein, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT (1965)).

<sup>211</sup> See generally Pruitt, et al., *supra* note 11 (establishing there is a rural lawyer shortage and discussing its implications); Davies & Clark, *supra* note 3, at 268 (studying criminal defense appointments and arguing that “rural areas impose logistical barriers to providing defense services at all.”).

<sup>212</sup> For a law and economics analysis of how the low payment for criminal defense systems is endemic to the monopsony that exists in the court-appointed system and therefore difficult to change, see Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2274 (2014).

<sup>213</sup> Telephone Interview with Matthew Kirkpatrick, *supra* note 101; See also Zoom Interview with Kathy Pakes, *supra* note 7.

<sup>214</sup> Telephone Interview with Matthew Kirkpatrick, *supra* note 101.

more cases, and the backlog of appointments is cleared in almost every county.<sup>215</sup> Pakes believes clearing the backlog of cases is “absolutely due to the rate change,” but also recognizes that understanding the full impact of the rate change is complicated because of COVID-19.<sup>216</sup> The total number of appointed criminal cases is down in Wisconsin, probably due to COVID-19, and some attorneys may only be taking court-appointed cases to ensure some guaranteed income while the economy is halted due to the pandemic.<sup>217</sup> At this point, there is no way to know how much of the change in Wisconsin has been driven by the rate change and how much has been driven by systemic issues created by COVID-19.<sup>218</sup>

Iowa increased its rate by a mere \$3 an hour on July 1, 2019. Iowa attorney Phil Garland observed this increase “hasn’t made a nickel’s worth of difference” in attorneys taking cases.<sup>219</sup> The original goal in Iowa was to do a three-year increase in rates for a total increase of \$10 an hour.<sup>220</sup> Along with other financial hits in Iowa, COVID-19 meant that the second increase did not happen in the 2020 legislative session.<sup>221</sup> It is unclear when Iowa will provide additional increases.

What is clear is that increasing hourly rates to keep pace with the rate of inflation and the increasing overhead costs of running law offices is critical to having attorneys take court-appointed cases. Paying a fair rate to court-appointed attorneys is one step to increasing access to justice for indigent Americans and dealing with the rural lawyer shortage. There is some evidence that criminal defendants in rural areas have worse outcomes than those in urban areas because of the difference in available resources.<sup>222</sup> This is concerning and shows that changes must be made. Not only do hourly rates need to be increased, but the rural lawyer shortage must be addressed. Ultimately, hourly rate increases will be necessary to attract sufficient numbers of lawyers to take court appointments that are both accessible and effective. But, in addition to fee increases, states need to take other steps, such as loan repayment for rural court-appointed attorneys or removing

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<sup>215</sup> Zoom Interview with Kathy Pakes, *supra* note 7.

<sup>216</sup> *Id.*

<sup>217</sup> Zoom Interview with Adam Plotkin, *supra* note 7.

<sup>218</sup> Telephone Interview with Matthew Kirkpatrick, *supra* note 101.

<sup>219</sup> Telephone Interview with Phil Garland, *supra* note 7.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Braunstein & Schweinle, *supra* note 73, at 449 (explaining the disparate outcomes between criminal defendants in urban and rural areas as based on resource availability).

hourly caps on court appointments. It is only with system-wide changes, including an increase in hourly rates, that access to justice concerns in rural America can be addressed.