

Necessary Reform Options for Indigent Defense in Kentucky

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## *Introduction*

“Most people aren’t concerned about the pay and caseload of public defenders until they or one of their friends or relatives are charged with a criminal offense and must rely on the state system for help” (Vela). For those criminal defendants who rely on the state system for legal defense in the state of Kentucky, they are most likely represented by the Kentucky Public Defenders’ Office, now referred to as the Department of Public Advocacy (DPA). The DPA was established in 1972, and has the responsibility to “represent all persons in Kentucky charged with or convicted of a crime” (“History DPA”).

Though 75 percent of indigent clients are represented by public defenders, the Department of Public Advocacy is currently facing major problems that are hindering public defenders from adequately performing their duties. The DPA has had its \$40.3 million dollar budget cut by \$2.5 million for the fiscal year 2009, which has resulted in a hiring freeze and unethical caseloads for existing attorneys. Besides a lack of funding, the disparity between the prosecution and defense funds, along with a high turnover rate amongst attorneys are also problems that are becoming more frequent within the DPA. With so many problems existing in a system that affords defense to so many of the State’s citizens, it is crucial that reform begin taking place. The question that remains is what reforms are needed to provide sufficient indigent defense to criminal defendants in Kentucky?

This paper is part of a larger project in which six different reform options were studied. In the following pages the top three most recommended reform options will be analyzed thoroughly, the costs and benefits of each being weighed. They will be evaluated based on their cost effectiveness as well as political acceptability, and then ranked in order of most highly recommended.

### ***Problems facing the DPA***

For the 2009 fiscal year, Kentucky's Department of Public Advocacy will face a 2.5 million dollar loss in funds (MacDonald). Because of this shortage of funding, the DPA is on a hiring freeze and is being forced to keep nearly 100 available positions open and unfilled (Leinwand). The biggest problem with having so many unfilled positions is that the cases that would be taken on by attorneys who would regularly fill these positions are now being distributed amongst existing attorneys, causing them overwhelmingly high case numbers. Attorneys are taking on so many cases, that they are often on the verge of malpractice. For instance, the American Bar Association has set the national standard of cases at 310 cases per attorney, per year; however, the current average caseload for a Kentucky public defender is around 420 per year. In Fayette County, "a public defender juggles, on average, 696 cases a year, according to the Department of Public Advocacy" ("Justice for all"). Though the problem of excessive caseloads is one that the public defenders' office has typically always faced, the recent problem of funding shortages has exacerbated it.

Excessive caseloads often result in inadequate defense, which violates the constitutional Right to Counsel. When constitutional rights get violated, our entire system of justice becomes undermined. "Not only are the lives and liberty of some of our most vulnerable citizens at risk, but the fairness, reliability and credibility of the criminal justice process are rightly in question," stated Louisville's chief public defender, Dan Goyette (Ortiz, "Public Defenders"). Goyette added that "we can ill-afford a loss of public confidence in our adversary legal system and with it respect for the rule of law" (Ortiz, "Public Defenders").

Along with constitutional rights being violated, another major problem resulting from the shortage of funding is that attorneys are being forced to turn away cases. One problem with

public defenders refusing cases is that criminal defendants “denied counsel will not be able to be held unless the Commonwealth provides counsel to them” (“Funding”). This means that Courts may have no other option but to release indigent defendants in some cases, even if they have committed a serious offense. According to a Petition For Declaratory Judgment brought to Franklin Circuit Court,

If Kentucky's General Assembly does not appropriate sufficient funds to provide an indigent criminal defendant with competent defense counsel, or the executive branch of Kentucky's government does not provide and compensate competent defense counsel for an indigent criminal defendant, then the Commonwealth cannot prosecute, and must dismiss the charges against, that indigent criminal defendant. (Snyder 19)

A recent example of this occurred in August 2008, when a northern Kentucky judge was forced to release two suspects charged with violent felonies back out into the community because they requested a speedy and public trial, and their request was denied (“Judge”). How does this affect the rest of society? Spokesman Ed Griffith notes that being forced to release criminal defendants is “to the detriment of all the citizens” (Leinwand).

Because of the damaging effects that these problems have on our criminal justice system, some sort of reform is necessary for the Kentucky Public Defender office. Three available options for reform that should be considered for implementation in the near future are: decriminalizing possession of marijuana, fully implementing the previously piloted social worker program, and providing law student loan reimbursement. Though some reform options come more highly recommended than others, each option is not mutually exclusive, and may be implemented at the same time as another.

### *Decriminalizing possession of marijuana*

In Argersinger v. Hamlin (1972), the U.S. Supreme Court held that “the requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution” (Argersinger v. Hamlin, 1972). Thus, a defendant who is charged with any crime for which the punishment includes a loss of liberty must be guaranteed counsel. If possession of marijuana, a Class A misdemeanor which does carry a penalty of up to one year in jail, was decriminalized, then there would be a significant reduction in the amount of drug-related cases for which attorneys are required to represent clients. By decriminalizing it, the possession of marijuana would still be an offense that carries punishment, it would only no longer be an offense that carries jail time, since then the defendant would not be guaranteed the right to counsel. Therefore, if possession of marijuana no longer carried a loss of liberty, but instead carried a fine, then the right to counsel would no longer apply to defendants, reducing the number of cases a public defender must handle.

According to one public defender, Sarah Bryant, reducing the punishment for possession of marijuana from including a loss of liberty to only a fine would not make that much of a difference in the punishments defendants actually receive, but would make a huge difference in her caseload. She stated that the number of her cases involving a defendant being charged with possession of marijuana or paraphernalia was “quite a bit, at least 25%” (Bryant). Although the maximum punishment for possession of marijuana is one year in jail, that punishment is rarely ever the one received by defendants. Bryant stated that “the [prosecution’s] offer for possession of marijuana is always a \$100 fine. They never get jail time, but we still get appointed, because it is a jail-able offense.” Since the actual punishment typically received by criminal defendants for marijuana possession is a fine anyways, implementing that as the formal maximum

punishment would significantly help public defenders by lessening their caseload, since they would no longer be required to counsel these defendants.

One potential problem with decriminalization could be that many more people will begin to plead guilty to possession of marijuana charges, including those who are not necessarily guilty, because they find it easier to pay a fine rather than having to go through the court system and possibly face jail time. For example, an innocent person who is charged with first offense marijuana possession may feel that it is not worth his time to go through all the hearings and trials of the court system to prove his innocence, when he could simply pay a fine, even though paying the fine would mean admitting guilt. Not only does this increase the number of innocent defendants being convicted, but pleading guilty to marijuana possession also carries great social costs. Unlike other misdemeanors, possession of marijuana is a drug offense that is often questioned on many applications. For instance, a student charged with possession of marijuana, even just a first offense, who pleads guilty to avoid going through the hassles of the criminal justice system would still have to admit to his future employers, schools, sports teams, and clubs that he was convicted on marijuana possession charges, which could negatively impact his chances of being accepted into any of these programs.

A solution to this problem could be to offer defendants an Alford plea when charged with possession of marijuana, first offense. An Alford plea is one “in which defendants plead guilty while simultaneously protesting their innocence” (Bibas). By accepting an Alford plea, a defendant is admitting that the prosecution has the evidence to convict him, but still claims that he is innocent. Offering defendants an Alford plea would decrease the social costs that pleading guilty to possession of marijuana have on a defendant by not requiring him to admit to future employers, student loan companies, or athletic teams that he was guilty of marijuana possession.

Stephanos Bibas explained that one benefit to the Alford plea is that while admissions of guilt may “scare off prospective employers, Alford pleas make it easier to reassure employers by denying guilt.” The Alford plea would only be offered to first time offenders and could be taken into consideration during future trials. Also, defendants who accept an Alford plea would still be required to pay the established fine.

Some may argue that another potential problem with decriminalizing possession of marijuana is that it will cause an increase in the number of people that actually do possess marijuana. However, a 1997 study by the Connecticut Law Revision Commission “examined states that had decriminalized marijuana and found any increase in marijuana usage [and therefore possession] was less than the increase in states that have not decriminalized marijuana” (Street). Additionally, a 2001 report by Robert MacCoun and Peter Reuter found that “there was no available evidence that marijuana use [and subsequently possession] would increase if marijuana were decriminalized” (Street).

### ***Social worker program***

According to the University of Kentucky’s Bureau of Justice, “it is a simple fact of the criminal justice system that a third of Kentucky inmates left untreated will reoffend. That is because 67 percent of them have an addiction and 56 percent are mentally ill” (“Program”). Along with decriminalizing possession of marijuana, another reform option could be to expand the social worker pilot program that began in October 2006. DPA officials have argued that “many of those serving time for non-violent crimes should not be in jail,” and attorney Robert Irwin stated that many defendants “could be kept out of prison if programs were available to help them” (Berry). The social worker program “uses social workers to help individuals with their specific problems, changes lives, cuts crime, saves money and reduces the jail population”

(“Program”). The program places social workers “with DPA public defenders to help non-violent defendants get job training, find drug and mental health treatment and other services that would help them turn their lives around and become productive citizens instead of repeatedly winding up behind bars” (Berry).

The pilot program covered 17 counties and served 229 people, the majority of whom “had substance abuse problems or mental issues” (Berry). Of those 229, about 180 were “tracked for statistical purposes before and after the social worker intervention” (Berry). The program used social workers to refer 159 defendants to substance abuse treatment. Seventy two percent of those who received treatment “stayed or completed treatment programs and 93 percent reported further substance abuse abstinence afterward” (Berry). Additionally, of 165 defendants referred to mental health treatment, 67% “stayed or completed treatment” (Berry) and “after six months, 80 percent of the people referred to job training were still in the programs or had completed them” (“Program”). Overall, “only eight defendants were rearrested during the study on new charges or for violating conditions” of the program (Berry).

Having social workers work with DPA attorneys is helpful because a social worker can provide assistance to clients that their attorneys may not have time for. Attorney Sarah Bryant explained that “some of our clients need things other than legal representation. Some maybe need Comprehensive Care for therapy.<sup>1</sup> Some need to get their children back. Some need rehab. I don’t have the time or resources to do that.” Working with a social worker who does have the time and resources for these needs is one way to help clients from repeatedly being incarcerated. Social workers assisting clients also affords attorneys more time to focus on their other cases.

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<sup>1</sup> Comprehensive Care is an organization that provides mental health, mental retardation, and substance abuse services.

Rather than constantly spending their time defending repeat offenders, attorneys can focus their time and attention on new cases, or those that require more research and attention.

One problem with further implementing the social worker program, as with many other programs, is that it needs to be funded. DPA officials have requested \$2.3 million for 2009 and \$2.4 million for 2010 in funding to expand the program and “put a social worker in every DPA field office” (Berry). With recent budget cuts, funding for any state program is difficult to obtain right now. However, though it requires initial funding, the social worker program is cost effective for the criminal justice system overall. Tom Berry reported that “DPA officials released results of the agency's Social Worker Pilot Program that [...] found the project not only paid for itself but saved the state an additional \$300,000 in incarceration costs for a total of \$700,000” (Berry). The current costs of maintaining Kentucky jails and prisons, which house about 32,000 inmates, are almost \$417.6 million (Baker). The start-up costs for the pilot program were \$172,000, or \$43,000 per social worker, for four workers (Jenkins). By simply not incarcerating the social worker program participants, the state saved nearly \$300,000 (“Program”). Dawn Jenkins explained that “after accounting for the cost of the social workers and the services used by the clients, the program saved \$3.25 for every dollar invested.” It is also estimated that “if the program is expanded statewide, it could save the state more than \$3 million annually” (“Pilot”).

An additional problem with fully implementing the social worker program statewide is that another rehabilitation option already exists in Kentucky. Since 1996, “more than 2,000 people have graduated from drug courts” (Cheves). Though Kentucky Drug Courts are one option of additional reform, the social worker program is still more beneficial because it saves attorneys' time. Not only do drug courts accept defendants after they have pleaded guilty, but

they also require multiple court sessions accompanied by an attorney. The Drug Court program is set up into three phases, each of which requires a specific number of court appearances. Phase 1, which usually lasts four to six weeks, requires one court session weekly. Phase 2, which usually lasts eight months, requires one court session every other week, or about 16 sessions. Phase 3, which usually lasts three months, requires one court session every three weeks, or 3 sessions. So, for any one client participating in Drug Court, an attorney must represent him for around twelve months, and make as many as twenty five court appearances. This means that they typically already have spent a substantial amount of time with their attorneys, who are public defenders if the clients are indigent. Compared to Drug Courts, which can have a public defender spending possibly twenty-five court appearances with a client, only after much time has been spent with the client before a guilty plea was even made, the social worker program appears to be more beneficial to attorneys in regards to their time. Additionally, though drug courts do offer treatment, they “often don’t have the funds to offer residential treatment, which is more intensive” (Cheves). The social worker program, however, includes these types of funds in their budget.

So far results indicate that the social worker pilot program has been successful. The program targets the root of crimes, rather than simply punishing defendants, which is an essential quality of a program whose focus is to deter crime. It is also a cost effective program, saving hundreds of thousands of dollars in incarceration costs. Additionally, the social worker program saves attorneys much time compared to its only notable alternative, drug courts.

### ***Law student loan reimbursement***

A third option for reform is that of a loan assistance program being provided to Kentucky law students, in an effort by the DPA to retain qualified lawyers. Dave Stengel, Commonwealth

Attorney for Jefferson, Kentucky explained, “I believe that a student loan forgiveness schedule is essential for us to attract and keep top qualified young prosecutors, just as I am sure that DPA needs such legislation to keep effective young defenders” (“Time is *Now*”). Many lawyers who want to enter public service often find that they cannot afford to do so because the salary does not allow them to pay off their loans, which for some DPA employees are up to \$130,000 (“Time is *Now*”). Or, in many cases, lawyers do enter public service, but are then forced to leave for the same reason. Attorney Valetta Brown commented that because of the pay and the loans they have acquired, “young attorneys come and stay one or two years, then go to private practice or prosecution.” In these instances, attorneys are gaining valuable training and experience during their time at the DPA, then leaving to put it to use in private practice or prosecution.

Providing law students with loan assistance programs would not only be beneficial in that it would retain attorneys, but it would increasingly attract exceptional new ones that may never have considered careers in public service before. For instance, “two counties in Arizona recently began a loan assistance program for public defenders. They report that, where a vacant position previously would have attracted a handful of applicants, they are now attracting scores or even hundreds of applicants. The quality and diversity of the applicant pool have gone up exponentially” (“Time is *Now*”).

One advantage to implementing a loan reimbursement program is that it is financially a beneficial option for the state. In the previously proposed bill, the money for loan reimbursement comes out of “a fund generated by the justice system itself” (“Time is *Now*”). The law school loan assistance bill that was proposed in 2007 explained that the program is funded by “2% of the Court Cost Distribution Fund, with an annual maximum total amount of \$1.2 million” (“Time is *Now*”). The Court Cost Distribution Fund was created to “provide a

central account into which the court costs collected by all circuit clerks, under KRS 23A.205(1) and 24A.175(1), shall be paid” (KRS 42.320). The fund is administered by the Finance and Administration Cabinet, which makes “monthly disbursements from the fund” according to a schedule in which the 2% that would go towards the loan repayment program is the second lowest amount received by any group (KRS 42.320). For instance, the general fund receives 49% of the total Court Cost Distribution Fund, while the crime victims’ compensation fund receives 3.4%, and 10.1% is paid to the county sheriff in the county from which the court cost was received.

Another advantage to the proposed plan is that it keeps qualified attorneys working for the public defender office. According to the plan, the attorney must sign a contract committing to two years of work in her current employment, and can reapply for the funds during a new two year period (“Time is *Now*”). If the attorney leaves before completing the two year period, she must repay all the money she was reimbursed during that period, plus interest (“Time is *Now*”). By reimbursing a public defender \$6,000 annually and requiring her to repay her reimbursements if she leaves too early, she may be less inclined to leave public service.

Overall, the law student loan assistance program affords many more attorneys the opportunity to work for the DPA. It is additionally cost effective for the state since the funds come from within the justice system itself.

### ***What Should Be Done?***

When deciding what reforms are most suitable for the state of Kentucky in the near future, two criteria should be examined: cost effectiveness and political acceptability. In order for a program to be cost effective, it must achieve its goals at reasonable costs. According to Charles Manski, “one policy is deemed to be more cost-effective than another [...] if it achieves

the objective at a lower cost” (14). Thus, when the costs to achieve a goal outweigh its benefits, it is no longer useful. It should be noted that a program’s costs are not limited to being measured in money, but can also be measured in resources, and even time.

Along with being cost effective, a reform should also be politically accepted in order to be efficient. When determining political acceptability, the three factors to be taken into account are public support, legislative support, and gubernatorial support. For a program to be politically accepted, it should be accepted by society and have a strong likelihood of being passed in the legislature. It should also be approved by the governor, since in Kentucky he has the power to veto legislative decisions. The more likely a reform is to be accepted by the public, legislature, and governor, the greater its chances of being implemented.

When evaluating which reforms should be more highly recommended, for this paper, cost effectiveness weighs slightly more than political acceptability, simply because no matter how politically acceptable a reform may be, if it is not cost effective, then there is no point in implementing it. Additionally, when evaluating political acceptability, a reform that is more likely to be passed by the legislature is considered to have a greater political acceptability than one that is only supported by the general public because if a reform is not likely to make it through the legislature, then regardless of how much the public approves, the reform will not work.

### ***Social worker program as best option***

Because the social worker program thoroughly satisfies both criteria for effective reform, expanding the pilot program to cover the entire state of Kentucky is the number one option for reforming indigent defense. The pilot program proved to be cost effective in that it not only pays

for itself, but that it also “has the potential to save Kentucky \$3.1 million net annually if replicated state-wide” (Jenkins).

In addition to being cost effective, the program is also politically acceptable. The pilot program has already been accepted by Kentucky legislators, as the program was funded by the 2006 Kentucky Legislature (Jenkins). The 2008 Kentucky General Assembly has also already been considering the request for full program funding as part of HB 206 (Jenkins). The success of the pilot program indicates a strong likelihood that the full program will be implemented by the legislature, and not opposed by Governor Beshear. Additionally, Governor Beshear does support expanding regional drug task forces, which offer treatment and rehabilitation, so he would likely be in favor of expanding the social worker program as well (“Beshear”). Though some are skeptical of rehabilitation efforts, the program is likely to be welcomed by the majority of the public since its goal is to determine the root of a defendant’s crime, and rather than simply incarcerate him, work to prevent the crime from occurring again in the future.

***Decriminalization as second best option***

Decriminalization would be a cost effective option for reform, but a questionable one in terms of its political acceptability, making it the second best option for reform. Decriminalization is cost effective in that it saves the criminal justice system time and money not only by not having to assign public defenders to marijuana possession cases, but also by not paying incarceration costs for defendants convicted on marijuana charges. The average cost to represent a defendant in 2007 was \$254, while the average trial cases per DPA attorney totaled 436. If 25% of most attorneys’ caseloads was possession of marijuana, decriminalization could save the state approximately \$9.7 million dollars. Especially during this time of excessive caseloads and

tightened budgets, not having to represent clients whose punishments could simply be a fine would free up much time for many public defenders, as well as save the DPA money.

While decriminalization is cost effective, its political acceptability is not entirely certain. Though marijuana is Kentucky's "top cash crop" and "72% [of Americans] think people caught with marijuana for recreational use should get off with only a fine," (Grumbach) actually passing the legislation to decriminalize marijuana may be difficult in Kentucky since the state is "home to one of the nation's more intensive eradication efforts" (Kenning). Senator David Williams' secretary explained, on his behalf, that "he would be opposed to decriminalizing marijuana." Additionally, since Governor Beshear recently launched the State chapter of Partnership for a Drug Free America, in which he cited prevention strategies against marijuana use, he would also likely be opposed to decriminalization (Glass). Though it would likely save money, if Kentucky legislators do not see decriminalization as a benefit to society, it will likely be a difficult policy to implement.

### ***Loan repayment as third best option***

The law student loan repayment program is also somewhat cost effective and politically accepted as an option for reform. While the program does require funding to reimburse those students who choose to practice public service in the state of Kentucky, that funding comes from within the justice system itself. The loan repayment program is also likely to be politically accepted since the house bill that proposes the law student repayment program is already supported by the American and Kentucky Bar Associations, the Public Advocacy Commission, and Kentucky's three law schools. Additionally, graduate student loan forgiveness was included in Governor Beshear's campaign proposal, in an effort to keep graduates in the State. Thus, it is likely that he would not be opposed to implementing the program specifically for law students.

While the citizens of Kentucky would likely benefit from this program that keeps “capable professionals who are dedicated to public service,” the program could be negatively received by the general public since it is helping acquire and retain more public defenders, which are not always the most popular with the general public (“Time is *Now*”). Therefore, the loan repayment program is the third most recommended option for reform.

### ***Conclusion***

In order for the problems facing the DPA to be solved, the Kentucky Legislature should pass the proposed bill to fully implement the social worker program, within the next year. The projected amount of money the program would save if fully implemented across the state is slightly more than the amount that the 2009 DPA budget was cut by, so having that money could at least put the Public Defender’s Office back in the financial position it expected to be in. Additionally, because of the dramatic decrease in public defender caseload that decriminalizing marijuana possession could create, the Kentucky legislature should become more open to the option. While an updated bill for the law student loan repayment program should also be proposed soon, the DPA hiring freeze must first be lifted in order for jobs to be available. With the current economic situation causing tuition increases, offering loan reimbursement is a sure way to keep attorneys not only in Kentucky, but also at the DPA.

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