

Structuring the Public Defender

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ABSTRACT: While the public defender is critical to protecting individual rights in the U.S. criminal process, state governments take remarkably different approaches to distributing public defense services. Some states organize indigent defense as a function of the executive branch of state governance; others administer indigent defense through the judicial branch. The remaining state governments do not place the public defender within any branch of state government, instead delegating its management to local counties. This administrative choice has important implications for the public defender's efficiency and effectiveness. It influences how the service will be funded and the extent to which the public defender, as an institution, will respond to the particular interests of its local community.

So, which branch of government should oversee the public defender? Should the public defender exist under the same branch of government overseeing both the prosecutor and police—two entities the public defender seeks to hold accountable in the criminal process? Should the provision of services be housed under the judicial branch—although this branch is ordinarily tasked with being a neutral arbiter in criminal proceedings? Perhaps a public defender that is independent of statewide governance is ideal, even if that might render it a lesser player among the many government agencies battling at the state level for limited financial resources.

This Article answers the question of state assignment by engaging in an original examination of each state's architectural choices for the public defender. Its primary contribution is to enrich our current understanding of

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how each state manages the public defender and how that decision influences the institution's funding and ability to adhere to ethical and professional mandates. It concludes the public defender should be an important executive function in this modern era of mass criminalization and articulates modifications that would improve such a state design by insulating it from pressure by other system actors.

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I. INTRODUCTION

In November 2012, the state of New Mexico voted by a supermajority to amend the state constitution and remove the public defender institution from executive branch oversight.¹ The vote made the public defender an “independent” agency under the judicial branch after more than three decades as an agency under the executive branch.² This was a significant change, as it led to the creation of a Public Defender Commission, which, although housed under the judicial branch, would assume the responsibility previously held by the state’s governor of providing indigent defense services by appointing and advising a chief public defender.³

Proponents of the ballot measure argued moving the public defender from the executive branch would help rectify imbalance in the criminal justice system.⁴ The concern was that the public defender was beholden to the political system in the executive branch and, as a result, unable to provide an honest assessment and counter to law enforcement in the criminal justice process.⁵ New Mexico Criminal Defense Lawyers Association President, Ousama Rasheed, noted,

[h]aving a governor, a career prosecutor, appoint both the head of the Department of Public Safety and the chief public defender, deciding the budget allocations to each, giving input on how each

1. STATE OF N.M. L. OFFS. OF THE PUB. DEF., DEFENDING JUSTICE: 2014 ANNUAL REPORT 4 (2014) [hereinafter DEFENDING JUSTICE], http://www.lodnm.us/pdf/2014_annl_rpt_rev9214.pdf [<https://perma.cc/5NTK-A8GM>].

2. See N.M. STAT. ANN. §§ 31-15-1 to 31-15-12 (1978). This Act provided either the funds necessary to pay for, or the actual representation of, indigent defendants in criminal courts who face imprisonment or death. *Id.* §§ 31-15-10, 31-15-12. It also set forth indigency standards for courts to use in determining which defendants would be eligible for representation under the Act. *Id.* § 31-16-2; see also DEFENDING JUSTICE, *supra* note 1, at 4.

3. See N.M. LEGIS. COUNCIL SERV., BRIEF ANALYSIS AND ARGUMENTS FOR AND AGAINST THE CONSTITUTIONAL AMENDMENTS PROPOSED BY THE LEGISLATURE IN 2011 AND 2012, at 28–30 (2012) (stating that before the 2012 vote, the public defender was an agency that was administratively attached to the Department of Corrections with the chief position appointed by the governor).

4. See *id.* at 29.

5. See *id.* at 28–30.

department of government shall function on a regular basis is, to put it mildly, less than ideal and a conflict of interest.⁶

But what if, contrary to voter ideas in New Mexico and conventional wisdom about the folly of having competing players controlled by the same entity, the executive branch was actually the best umbrella for indigent defense oversight? Such oversight by the governor, a state's chief law enforcement officer, would seem inapposite to the purpose of the public defender institution. New Mexico's transition, however, failed to solve the state's problems with its provision of public defense services. Instead, the public defender institution found itself facing formidable challenges with few avenues for redress.

In late 2016, a New Mexico district court judge held Chief Public Defender Bennett Baur in contempt of court after Baur informed the court he could not ethically represent indigent defendants in rural New Mexico.⁷ Baur claimed the limited attorney hours available to him were insufficient to manage the overwhelming caseloads.⁸ Baur, and his predecessor, had already

6. Debra Cassens Weiss, *New Mexico Ballot Measure Would Create Independent PD's Office*, ABA J. (Oct. 10, 2012, 1:39 PM), http://www.abajournal.com/news/article/new_mexico_ballot_measure_would_create_independent_pds_office [https://perma.cc/FCS5-NRV5]. Opponents of the measure, however, argued that the system functions fine as it is and its place in the executive branch ensures that the governor advocates for departmental resources. See THE LEAGUE OF WOMEN VOTERS OF LOS ALAMOS & THE LEAGUE OF WOMEN VOTERS OF N.M., NEW MEXICO & LOS ALAMOS VOTERS GUIDE 2012, at 10 (2012), <https://www.lwnm.org/VGuide2012/LWVLA-2012.pdf> [https://perma.cc/UV3B-8X6g]. Indeed, then-Governor Susana Martinez opposed the legislation, saying she "ha[d] always supported a strong public defender system because she knows it leads to cases being heard more efficiently, with each side receiving the representation they deserve." Weiss, *supra*. Her arguments did not sway the voters, the majority of whom supported the change in institutional management. See *New Mexico Public Defender Office Amendment, Constitutional Amendment 5* (2012), BALLOTPEDIA, [https://ballotpedia.org/New_Mexico_Public_Defender_Office_Amendment,_Constitutional_Amendment_5_\(2012\)](https://ballotpedia.org/New_Mexico_Public_Defender_Office_Amendment,_Constitutional_Amendment_5_(2012)) [https://perma.cc/Y7Z3-X45U] (reflecting that the measure passed with nearly 62 percent of the vote).

7. Phaedra Haywood, *Judge Finds Cash-Strapped Chief Public Defender in Contempt*, SANTA FE NEW MEXICAN (Nov. 30, 2016), https://www.santafenewmexican.com/news/local_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article_1384bdd6-397d-5e90-9962-9bc1399b12d1.html [https://perma.cc/39M5-BPSS]; Andy Lyman, *Chief Public Defender Held in Contempt After Turning Down Cases, Says Office Can't Afford It*, N.M. POL. REP. (Dec. 2, 2016), <http://nmpoliticalreport.com/2016/12/02/chief-public-defender-held-in-contempt-after-turning-down-cases-says-office-cant-afford-it> [https://perma.cc/Z2KW-YKDN]; Fernanda Santos, *When Defendants Cannot Afford a Lawyer, and Neither Can New Mexico*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/new-mexico-lawyer-shortage.html> [https://perma.cc/A2EC-4FLg]; see also Victoria Prieskop, *Public Defender Ramps Up Fight Against Albuquerque Judges*, COURTHOUSE NEWS SERV. (Sept. 14, 2017), <https://www.courthousenews.com/public-defender-ramps-fight-albuquerque-judges> [https://perma.cc/WT86-HWLN] (describing a lawsuit filed by the New Mexico Public Defender to dismiss cases against individuals detained longer than specified in a local rule).

8. See Santos, *supra* note 7.

made a number of requests for additional funding that were not adequately addressed.⁹ Instead of responding to the chief public defender's funding requests with additional resources, the New Mexico district court judge deemed the public defender's refusal to continue representing indigent clients a violation of a court order to participate in the criminal process.¹⁰ The judge then held him in contempt of court.¹¹ The court noted it would remove the contempt finding once Baur resumed the responsibility of representing all indigent defendants with matters pending before the court.¹²

On its surface, the New Mexico public defender problem was a *funding* problem.¹³ The chief public defender asserted he did not have the financial resources necessary to render effective assistance of counsel to all of the defendants the process deemed eligible for his agency's assistance.¹⁴ This funding problem became a *branch assignment* problem, however, when the chief public defender had to demand additional funding, or pursue an alternative strategy he deemed necessary for providing effective representation to indigent defendants, from the very same actor who could then hold him in contempt of court, and indeed did, for failing to represent those same defendants.¹⁵

There is an inherent conflict for public defender institutions seeking to meet constitutional and ethical mandates within a structure populated by actors with related but independent goals. The conflict is even more pronounced when those actors hold a supervisory or regulatory role over the

9. Baur's predecessor, Jorge Alvarado, sought a budget increase of almost 44 million dollars in 2016 for the Law Office of the Public Defender. See Haywood, *supra* note 7. The legislature rejected this proposal and granted an increase of only about \$654,000 for fiscal year 2017, plus \$200,000 in supplemental funding for the fiscal year 2016. *Id.* This led to Alvarado's resignation and Baur filled this role as Chief Public Defender. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (noting that the judge told Baur the contempt findings could be purged if Baur "follow[ed] his 'statutory duties' to represent defendants").

13. See Andy Lyman, *Overloaded Public Defender's Office Was Years in the Making*, N.M. POL. REP. (Dec. 9, 2016), <http://nmpoliticalreport.com/2016/12/09/overloaded-public-defenders-office-was-years-in-the-making> [<https://perma.cc/4B9D-3JZR>]; Maggie Shepard, *The Constitution Guarantees Legal Defense, New Mexico Barely Delivers*, HERE & THERE WITH DAVE MARASH (Feb. 12, 2018), <https://davemarash.com/2018/02/12/constitution-guarantees-legal-defense-new-mexico-barely-delivers-maggie-shepard-albuquerque-journal-monday-2-12> [<https://perma.cc/C6N6-GMSV>]; Doug Mataconis, *There's a Criminal Defense Crisis in New Mexico, and Nobody Seems to Care*, OUTSIDE THE BELTWAY (Dec. 30, 2016), <https://www.outsidethebeltway.com/theres-a-criminal-defense-crisis-in-new-mexico-and-nobody-seems-to-care> [<https://perma.cc/NL6E-ME2E>].

14. See Phaedra Haywood, *Public Defenders Take Funding Battle to Supreme Court*, SANTA FE NEW MEXICAN (Mar. 31, 2017), https://www.santafenewmexican.com/news/local_news/public-defenders-take-funding-battle-to-supreme-court/article_a50d81ac-7cb2-52bc-b06a-8160989cef35.html [<https://perma.cc/3CXW-NFRY>].

15. *Id.*

public defender in the criminal justice scheme. As evidenced by the situation in New Mexico, this conflict exists even if those actors are the courts tasked with ensuring the rule of law and a fair process in the courtroom.¹⁶ In other words, similar funding and caseload problems continued for the New Mexico Public Defender, despite the citizenry's vote to remove it from executive branch oversight and transfer it to the judicial branch. The problems continued because the vote effectively transferred the institution's supervisor to another governmental branch that not only had its own objectives in the criminal court process that could collide with the public defender's goals, but also possessed the power to discipline the public defender during such a collision.¹⁷

Interestingly, the provision of indigent defense services is housed under different branches of government in different states.¹⁸ Unlike prosecutors, who are predominantly housed under the executive branch,¹⁹ and judges, who are always housed under the judicial branch, the public defender, the third major actor in the criminal court process, can be housed under different branches of state government, or none at all, depending on the relevant state legislature's decisions. This administrative decision has important implications for the public defender's efficacy and the tools that are available to ensure the institution's compliance with constitutional and ethical rules.

State governance leads to more equitable funding than county management, but county management enables a public defender to remain more sensitive to the unique needs of its specific client population.²⁰

16. Although judges are tasked with ensuring a fair judicial process, this requires concern for all court actors. For example, these judges must balance the prosecutor's institution of charges and any statutes prescribing victims' rights in the decisions they make about the court process. Some of these judges also consider the public need to have cases move in a timely manner through the criminal process.

17. Under any branch assignment, public defender offices become dependent on the very institutions they are supposed to be able to challenge. This dependence frames all other issues the public defender faces, such as lack of funding.

18. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS., no. 1, 1995, at 31, 31. Even further, some states and localities have formal public defender programs while others turn to the private bar to accept court appointments for indigent defendants. *Id.* at 32-37.

19. Almost all states house the prosecutor under the executive branch. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 761 (2001) (noting that prosecutors are functions of the executive branch); Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1538 (2012) (describing how prosecutors' growing cooperation with law enforcement made them more closely align with the executive branch). Tennessee is one exception. *See* *Judicial Branch*, TENN. SEC'Y OF ST., <https://sos.tn.gov/products/civics/judicial-branch> [<https://perma.cc/DS28-2LZ9>]. Unlike any other state, the State Attorney General in Tennessee is associated with the judicial branch. *See id.* The prosecutors and public defenders are also under the judicial branch. *Id.*

20. *See infra* Section III.A.1.

Executive oversight allows the public defender to be more aggressive in pursuing judicial remedies for resource deficiencies, but judicial management helps the public defender appear more independent of the prosecution.²¹ Each assignment decision provides both benefits and handicaps for a state's obligation to provide effective assistance of counsel in criminal court. It requires the state legislature to employ careful consideration of which advantages it should prioritize, and which disadvantages it must be willing to accept.

The problems Bennett Baur sought to address are not unique to New Mexico. Public defender offices nationwide are notably underfunded and overburdened.²² The public defender plays a vital role in protecting the citizenry from governmental intrusion by way of the criminal process. However, funding the public defender has never been politically popular, perhaps owing to public attitudes toward those accused of crimes or a lack of recognition of the fact that the criminal justice system requires adequate representation of all parties.²³ Underfunding is a symptom of a structure in which the public defender institution is dependent on other state actors who may not prioritize its needs. While it may not completely cure the inherent unpopularity and costliness of the public defender, branch assignment is a vital consideration for the public defender, as the structural design defines the landscape the public defender must work within to obtain resources, and also affects the visibility and political efficacy of the institution.

21. See *infra* Section III.A.2.

22. See, e.g., Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/CXC8-NWQK>]; *Lack of Adequate Funding Forces Missouri Public Defenders to Shortchange Constitutional Rights*, ACLU MO. (May 17, 2018, 11:00 AM), <https://www.aclu-mo.org/en/news/lack-adequate-funding-forces-missouri-public-defenders-shortchange-constitutional-rights> [<https://perma.cc/AQ6H-RJYA>].

23. In Fresno County in California,

[t]he county continues to provide twice as much funding to the district attorney's office than the public defender's office receives, and recently added 50 positions to its sheriff's department. . . . Because of this funding disparity, any claim by the county that it doesn't have money to give to the public defender's office "is just not compelling"

Elizabeth Warmerdam, *Fresno County Cuts Breaking Public Defense System*, COURTHOUSE NEWS SERV. (July 15, 2015), <https://www.courthousenews.com/fresno-county-cuts-breaking-public-defense-system> [<https://perma.cc/CFL9-NYWC>]; see also BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 1* (2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf [<https://perma.cc/YZC9-FMUT>] ("Spending tax dollars on indigent defense has long been unpopular. Shortly after the Supreme Court ruled in 1963 in *Gideon v. Wainwright* that indigent people accused of crimes are entitled to a lawyer, public sentiment for being 'tough on crime' skyrocketed and persisted well into the 1990s.")

This Article engages in an original and comprehensive study of how the assignment of the public defender to a particular branch of government affects the institution's ability to function in both a constitutional and ethical manner. Part II of this Article details the formal language governing the provision of indigent defense services in each of the 50 states.²⁴ This Part explains the methodology for assigning each jurisdiction's system for indigent defense representation to a particular branch of government, if any. Part III describes the underappreciated consequences of public defender oversight under either the executive or judicial branch, or of leaving the public defender branchless, instead delegating it to county management. Part IV uses these underappreciated consequences of branch assignment to articulate a reasoned design for the public defender institution. This proposed design maximizes the benefits of a particular branch assignment, while advancing solutions to the problems that can arise from it. Part V concludes.

The public defender's ability to function effectively is fragile under existing management structures. Although the importance of adequate representation for indigent defendants in the criminal process has become increasingly apparent in our modern system of mass criminalization, and its poverty-based divisions, the public defender institution continues to face much difficulty. This is because the current state designs for the provision of these services leave the institution vulnerable to the very concerns that assignment of responsibility to the state was meant to prevent. The interventions prescribed in this Article provide a much needed and lasting blueprint for securing the institution's essential role as the state's protector of individual rights against the state's own exercise of power.

II. STATE GOVERNMENT AND THE PUBLIC DEFENDER

The twenty-first century has witnessed significant growth and change in the structures states use to provide criminal defense services to indigent persons. In 2003, the Georgia Indigent Defense Act established the Georgia Public Defender Council.²⁵ This council was tasked with overseeing an efficient and effective representation process for indigent defendants.²⁶ Louisiana accomplished something similar to Georgia when it passed Act 307 in 2007.²⁷ Act 307 established a new process for public defender oversight in

24. This survey excludes the District of Columbia, as it is included in the federal criminal system.

25. Georgia Indigent Defense Act of 2003, GA. CODE ANN. § 17-12-1 (2019).

26. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1049 (2006).

27. Senate Bill 139 actually transferred the Georgia Public Defender Council from the judicial branch of government to the executive branch of government as an independent agency. See Vicky Eckenrode, *Bills Tackle Public Defender System*, SAVANNAH NOW (Feb. 23, 2007,

response to alarming information about the quality of indigent defense that arose during Hurricane Katrina.²⁸ In 2011, Alabama followed this reform path by creating the Office of Indigent Defense Services, which was tasked with improving and expanding defender services throughout the state.²⁹ Texas also developed its own Texas Indigent Defense Commission in 2011, when Governor Rick Perry signed House Bill 1754 into law.³⁰

All of these statewide changes were welcomed, in large part, by public defender stakeholders and those who felt the provision of services had been deficient in meeting the government obligation to provide free counsel to indigent criminal defendants that was set forth by the Supreme Court in *Gideon v. Wainwright*.³¹ The institutional changes also presented significant questions as to how the providing institution should be designed to ensure maximum efficacy. More specifically, each of these states had to consider which branch of state government, if any, should house the public defender institution as one of its managed agencies.

Most of the newer institutions described above formed their public defender services under the executive branch of state government.³²

11:32 PM), <https://www.savannahnow.com/article/20070223/NEWS/302239905> [<https://perma.cc/3MY9-KRLJ>].

28. D. Majeeda Snead, *Will Act 307 Help Louisiana Deliver Indigent Defender Services in Accordance With the 6th Amendment Right to Counsel Mandate*, 9 LOY. J. PUB. INT. L. 155, 170–75 (2008); Kelly G. Carmena, *The New Face of Louisiana’s Public Defender Board: Indigent Defense and the 2016 Reform*, 44 S.U. L. REV. 75, 77–80 (2016). For more on the structural deficiencies of Louisiana’s indigent defense system in the wake of Hurricane Katrina, see Henry Weinstein, *2,500 Arrested Before Katrina Are Still in Limbo*, L.A. TIMES (Nov. 20, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-nov-20-na-lockup20-story.html> [<https://perma.cc/7VEH-5464>] (describing thousands of pending cases involving indigent defendants in the Orleans Parish with a public defender staff of only nine lawyers).

29. The Office of Indigent Defense Services operates under the Code of Alabama, ALA. CODE §§ 12-19-252, 15-12-1–46 (2018). *About Us*, ALA. DEP’T OF FIN.: OFF. OF INDIGENT DEF. SERVS., <http://oids.alabama.gov/aboutus.aspx> [<https://perma.cc/2L97-LMLX>]; see also John Pilati, *New System in Place for Indigent Defense*, FRANKLIN FREE PRESS (Jan. 20, 2015, 4:45 PM), <http://franklinfreepress.net/news/details.cfm?clientid=38&id=160389#.WtTWOi-ZN1M> [<https://perma.cc/9VNP-4KHB>].

30. See TEX. INDIGENT DEF. COMM’N, FAIR DEFENSE LAWS viii (2015), http://www.tidc.texas.gov/media/5922/FDACodified2013FINAL_Revised.pdf [<https://perma.cc/4TWX-4CV3>].

31. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). Although prior Court decisions established the right to counsel in certain situations and subsequent Court decisions expanded this right, the *Gideon* decision is popularly considered the decision that affirms the state’s obligation to provide counsel to poor defendants facing state criminal charges. See, e.g., Justin F. Marceau, *Gideon’s Shadow*, 122 YALE L.J. 2482 (2013) (describing the far-reaching influence of the decision).

32. GA. CODE ANN. § 17-12-1(b) (2019) (“The Georgia Public Defender Council shall be an independent agency within the executive branch of state government.”); LA. STAT. ANN. § 15:146(A)(1) (2019) (“There is hereby created and established as a state agency within the

Although each jurisdiction differed in the formal mechanics of the delivery—with some creating standards councils, others creating public defender boards, and one appointing a chief officer to manage the finances dedicated to the provision of indigent defense services—they each chose the executive branch to manage or organize the public defender enterprise.³³ All of these states may have been motivated by different reasons to change their indigent defense systems, but they were also intentional and resolute about choosing a specific state assignment scheme that existed as an executive power as it was effectuated through the legislative process.³⁴

Indeed, the decision of where to house public defense services within state government has important consequences. Each branch of government has a different role in state management and different tools at its disposal for ensuring compliance with agency objectives.³⁵ Each branch also inspires a different public perception of its role in the criminal process, which can prove critical to achieving the duties assigned to it as the managing branch of the public defender.³⁶ This Part details how individual states have chosen to govern their state institutions in general and manage their public defense services more specifically.

office of the governor the Louisiana Public Defender Board . . .”). *See generally* DEP’T OF FIN., OFF. OF INDIGENT DEF. SERVS., FUNCTIONAL ANALYSIS & RECORDS DISPOSITION AUTHORITY (2015), https://archives.alabama.gov/officials/rdas/finance_indigent_rda.pdf [<https://perma.cc/QM6M-7A7Z>] (discussing the means by which the executive branch administers the Public Defender’s Office); TEX. GOV’T CODE ANN. § 79 (West 2019). The legislative history behind the decision to house the provision of services in a particular branch is beyond the scope of this Article but is the subject of a future project by the author.

33. *See supra* note 32 and accompanying text.

34. As noted *supra*, Louisiana made its changes in response to problems made more readily apparent by the deleterious effects of Hurricane Katrina. Georgia made its changes in 2003 more than two years before Hurricane Katrina made its landfall. GA. CODE ANN. § 17-12-1(b) (amending the original act from 2003); *see also* S. CTR. FOR HUM. RTS., A REPORT ON PRE- AND POST-KATRINA INDIGENT DEFENSE IN NEW ORLEANS (2006), <https://www.schr.org/files/post/katrina%20report.pdf> [<https://perma.cc/6EVP-DXBB>] (detailing changes to Georgia indigent defense before Hurricane Katrina). Alabama may have suffered some difficulties because of Hurricane Katrina but it created its Office of Indigent Defense Services in 2012, almost seven years after Hurricane Katrina impacted the state. Cameron Steele, *Alabama Indigent Defense Changes Spark Debate Opinions Vary on How to Deliver Quality Legal Services to Poor Defendants*, LEGALNEWS.COM (May 16, 2012), <http://legalnews.com/detroit/1326198> [<https://perma.cc/WVA5-ZQ2U>].

35. *See generally* *Branches of the U.S. Government*, USA.GOV, <https://www.usa.gov/branches-of-government> [<https://perma.cc/A36D-FCMW>] (last updated Oct. 18, 2019) (detailing the functions and agencies associated with each branch of government).

36. Megan Brennan, *Trust in U.S. Legislative Branch 40%, Highest in Nine Years*, GALLUP (Oct. 1, 2018), <https://news.gallup.com/poll/243293/trust-legislative-branch-highest-nine-years.aspx> [<https://perma.cc/VY7H-BZP9>] (tracking confidence in the three federal branches of government).

A. HOW STATES MANAGE STATE INSTITUTIONS

All state governments mimic the federal government by consisting of three separate branches of government: the executive branch, the judicial branch, and the legislative branch.³⁷ This is true even though the U.S. Constitution does not require such a separation of powers at the state level for the sake of the republic.³⁸ Further, states have adopted similar mechanisms for establishing the leadership of each branch of government.³⁹ In every state, much like in the federal government, there is an executive branch led by a singular executive who is elected by popular vote, a legislative branch comprised of duly elected representatives, and a judicial branch with a state supreme court as its highest court of review.⁴⁰

States do exhibit some differences from the federal government in their separation of governmental powers. For example, although state executive branches are led by a single executive, the state governor, this executive does not exercise the same degree of control over the agencies under his or her purview as the single executive in the federal system.⁴¹ State executive

37. This is true even in the District of Columbia, which is not technically a state. *See DC Government Organization*, DC.GOV, <https://oca.dc.gov/page/dc-government-organization> [<https://perma.cc/9CGY-4DVV>].

38. *State & Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/state-local-government> [<https://perma.cc/4AR6-C5JB>] (“The U.S. Constitution mandates that all states uphold a ‘republican form’ of government, [but] . . . three-branch structure is not required.”).

39. *See id.*

40. *Id.* The title for the highest state appellate court can differ from state to state as it does in New York. The New York Court of Appeals is the highest court of review in New York. *See* sources cited *infra* note 53.

41. Another important characteristic of the unitary executive form of government is that the President can directly authorize particular agencies to pursue and manage, or refrain from pursuing, certain objectives as he deems necessary. Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 197 (2011). The Department of Justice is one such executive agency whose head—the Attorney General—serves at the pleasure of the President. William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1206 (1999). In other words, the President can direct the Attorney General to minimize focus on particular criminal offenses to focus on others. *See* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 7 (2018) (describing the President’s authority over the Attorney General). The President can then remove the Attorney General if they do not perform satisfactorily. *See generally, e.g.,* Kris Olson, *Too Close for Comfort: An Insider’s View of Presidents and Their Attorneys General*, 2019 YALE L. & POL’Y REV. INTER ALIA 1 (describing the presidential power to appoint and dismiss the Attorney General). Because the state attorney general in the vast majority of states is not appointed by the governor, the state executive system is not a unitary executive and the governor does not hold a similar type of expansive control over the criminal justice process in the state. Instead, the attorney general occupies an independent but complementary purpose in the majority of state governments. *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1552 (2019); *see also* Christopher

branches also differ from their federal counterpart in how they select other executives necessary to assist with the workload assumed by the singular executive atop the governmental branch.⁴² The federal government espouses a unitary executive principle, meaning the duly elected head of the executive branch, the President, is permitted to select those who head the agencies he or she turns to for enforcement of the nation's laws.⁴³ These agency heads can then be subject to confirmation by the legislature but are otherwise the President's selection.⁴⁴ For example, the Attorney General of the United States is the authority primarily responsible for overseeing the citizenry's compliance with federal criminal law.⁴⁵ The President of the United States may select or nominate an attorney general in keeping with his or her own ideas of what should be prioritized by the agency's actors.⁴⁶ The Attorney General is then subject to confirmation by the Senate before formally taking office.⁴⁷

Conversely, states differ on how their attorneys general, the state entity responsible for overseeing citizenry's compliance with state criminal law, assume office. Although the attorney general exists in all 50 states, 43 states

Beam, *Who's the Boss? Can Governors Tell Attorneys General What to Do?*, SLATE (Apr. 2, 2010, 6:09 PM), <https://slate.com/news-and-politics/2010/04/can-governors-tell-their-attorneys-general-what-to-do.html> [<https://perma.cc/6KPM-6STW>].

42. COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 2017, at 189 tbl.4.10 (2017), <http://knowledgecenter.csg.org/kc/system/files/4.10.2017.pdf> [<https://perma.cc/L3KE-RNFG>] (listing how agency heads in each state are elected or appointed); see also *Governors' Powers & Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/consulting/powers-and-authority> [<https://perma.cc/5FAC-PRE8>] (describing limits on the appointment power of governors).

43. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8–9 (1994). Scholars disagree on whether this is a more recent phenomenon. See Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 612–16 (2009) (describing the careful balance unitarians must engage in to support the theory).

44. *The Executive Branch*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-executive-branch> [<https://perma.cc/BF4S-Q5MH>]. Such executive agencies are distinct from congressionally-established "independent" agencies, such as the Securities and Exchange Commission, generally comprised of multi-member bodies with heads whom the President may not remove at his own will. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16–17 (2010) ("[T]he defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause."). The constitutionality of independent agency design remains a subject of ongoing debate and litigation. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding that Congress may not deprive the President of adequate control over an executive agency through the creation of a quasi-independent sub-agency).

45. *About the Office*, U.S. DEP'T OF JUST., <https://www.justice.gov/ag/about-office> [<https://perma.cc/Q46D-KVSN>] (last updated July 17, 2018).

46. *Id.*

47. *The Executive Branch*, *supra* note 44.

hold a popular election to determine who will occupy the role of chief executive for the state's criminal justice enterprise.⁴⁸ The remaining seven states have the state government choose the attorney general.⁴⁹ In five of those seven states, the governor appoints the attorney general.⁵⁰ In one state, the state legislature appoints the attorney general,⁵¹ and in the remaining state, the state supreme court chooses the attorney general.⁵²

State judicial branches similarly follow the fundamental structure of their federal counterparts in regard to criminal court matters, but maintain some crucial differences. Each state has a tripartite structure for its judicial branch, consisting of a trial court, an appellate court, and a supreme (or highest) appellate court.⁵³ In other words, every state has a highest appellate court that reviews cases pursuant to a legislatively mandated selection scheme and issues controlling decisions for the lower courts to follow.⁵⁴

The primary difference between the judicial branch in the federal system and the judicial branch in state systems is the process by which judges assume the bench. All of the judges on the federal bench tasked with presiding over criminal court felony trials are nominated by the head of the executive branch, confirmed by the legislative branch, and assume their positions for life.⁵⁵ The majority of state judges are not selected through a similar process

48. *About NAAG*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/about_naag.php [<https://perma.cc/W59S-LWKU>].

49. *See id.*

50. These states are Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. ALASKA CONST. art. III, § 25; HAW. CONST. art. V, § 6; N.H. CONST. pt. 2, arts. 46–47, 73; N.J. CONST. art. V, § IV, paras. 3, 5; WYO. STAT. ANN. § 9-1-601 (2019).

51. This state is Maine. ME. CONST. art. IX, § 11.

52. This state is Tennessee. *Attorney General Herbert H. Slatery III*, HERBERT H. SLATERY III: ATT'Y GEN. & REP., <https://www.tn.gov/attorneygeneral/about-the-office/attorney-general-slatery.html> [<https://perma.cc/M59G-C4KZ>].

53. *Comparing Federal & State Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> [<https://perma.cc/9BZW-7UX3>]. New York state titles its highest trial courts the “supreme” courts, but its court of last resort is actually the Court of Appeals. *The Courts—General Information*, NYCOURTS.GOV, <https://www.nycourts.gov/courts/structure.shtml> [<https://perma.cc/L8VS-JRTV>] (last updated Feb. 15, 2013).

54. *Comparing Federal & State Courts*, *supra* note 53.

55. *Id.* These judges may delegate some criminal court matters, usually misdemeanor and petty offense cases, as well as hearings for felony cases, to magistrate judges who do not receive lifetime tenure. *See Magistrate Judgeships*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/magistrate-judgeships> [<https://perma.cc/5SCN-H74Q>]. Instead, federal magistrate judges are appointed by majority vote of the active district judges of the court. *Id.* Bankruptcy judges are “appointed by the majority of judges of the U.S. court of appeals to exercise jurisdiction over bankruptcy matters.” *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/8WNR-USJX>].

and do not have lifetime appointments to the bench.⁵⁶ While some state judges are appointed, others are selected through some type of merit process and face an election after being appointed by a particular government entity.⁵⁷ Further, judges in other states are wholly elected by a popular vote of the state's citizenry.⁵⁸ These different procedures for assuming and maintaining the job title of criminal court judge can affect how these judges prioritize their job responsibilities.⁵⁹

For all intents and purposes, state legislative branches are identical to their federal counterparts.⁶⁰ Every state except Nebraska has a bicameral legislature tasked with passing state statutes and distributing state funds.⁶¹ In such systems, the state assembly consists of a smaller chamber called the Senate and a more largely populated House.⁶² The state Senate often has the exclusive power to confirm gubernatorial appointments and to try articles of impeachment.⁶³ The members of the state Senate, similar to the Federal Senate, serve for longer periods of time and represent a larger constituency than state representatives in the larger house.⁶⁴

Because state legislatures follow the federal system in not assuming management responsibility for individual agencies or services, they instead assign the management of the public defender systems to the executive or judicial branches. Some state legislatures have chosen not to assign the administration of public defense services to either branch, and instead entrust individual counties to develop and maintain their own systems.⁶⁵ The

56. *Comparing Federal & State Courts*, *supra* note 53.

57. *Id.*

58. *Id.*

59. *See, e.g.*, ALICIA BANNON, BRENNAN CTR. FOR JUST., RETHINKING JUDICIAL SELECTION IN STATE COURTS 1–2 (2016) (discussing how judges' concerns about job security and political money used to fund election campaigns can affect elected judges' decisions).

60. *See, e.g.*, *State Government Overview*, *New Hampshire Almanac*, NH.GOV, <https://www.nh.gov/almanac/government.htm> [<https://perma.cc/2A3X-N566>] (describing the New Hampshire state legislature as bicameral, with a state senate and house of representatives structured similarly to the federal branch).

61. *State & Local Government*, *supra* note 38. The Nebraska Legislature, a unicameral legislature, is responsible for the legislative obligations of the state. *Unicam Focus*, NEB. LEGISLATURE, <https://nebraskalegislature.gov/education/lesson3.php> [<https://perma.cc/KU9J-6QFT>].

62. *See State & Local Government*, *supra* note 38.

63. Some states use an Executive Council made of those members elected from large districts to confirm these appointments. *See, e.g.*, *About Us*, ST. N.H. EXEC. COUNCIL., <https://www.nh.gov/council/about-us/index.htm> [<https://perma.cc/R5PY-YEQH>].

64. *Number of Legislators and Length of Terms in Years*, NCSL (Aug. 9, 2019), <https://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx> [<https://perma.cc/L9EQ-5C24>].

65. For example, California's 58 counties are responsible for determining an appropriate method for providing public defender services to indigent defendants. *See generally* Laurence A.

following Section details how each state designates regulatory control of the public defender institution.

B. HOW STATES MANAGE THE PUBLIC DEFENDER

More than 50 years ago, the Supreme Court decision in *Gideon v. Wainwright* affirmed the government's obligation to provide counsel for indigent defendants under the Sixth Amendment.⁶⁶ In this decision, the Court affirmed the dominant public sentiment that the very act of facing a felony charge levied by the government without the resources to hire an attorney to assist with the defense was a special circumstance requiring the appointment of free counsel.⁶⁷ A significant number of states already had systems in place for, or had contemplated a process for, providing indigent defense services.⁶⁸ Indeed, more than 20 state attorneys general submitted amicus briefs to the Court during the *Gideon* review process in support of the state's obligation to provide free counsel to poor defendants.⁶⁹ Four years after the *Gideon* decision, the Court expanded this right to counsel to juveniles in *In re Gault*.⁷⁰ Less than ten years after *Gideon* prescribed counsel to indigent adults facing felony charges, the Court extended this right to indigent defendants facing misdemeanor charges in *Argersinger v. Hamlin*.⁷¹ Both *Gideon* and *Argersinger* were unanimous decisions and *In re Gault* was decided 8–1.⁷²

Nevertheless, some public defender systems continue to struggle with unstable funding streams and frustrating management schemes.⁷³ This might be because neither *Gideon*, *Gault*, nor *Argersinger* provided a clear prescription

Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009) (providing an overview of how the state of California provides free counsel to its indigent population facing criminal charges).

66. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

67. *Id.* at 342, 344–45.

68. See Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2339 (2013) (noting most states had already recognized the right to counsel as a matter of state law, fundamental to a fair trial and to avoiding wrongful convictions, by the time *Gideon* was argued).

69. *Id.* at 2340.

70. *In re Gault*, 387 U.S. 1, 36, 41–42 (1967).

71. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972).

72. *Gideon*, 372 U.S. at 345, 347, 349; *In re Gault*, 387 U.S. at 59, 64, 65; *Argersinger*, 407 U.S. at 25. Justice Potter Stewart was the sole dissenting opinion in *Gault*. See *In re Gault*, 387 U.S. at 78 (Stewart, J., dissenting). Stewart argued that the protections afforded defendants in criminal proceedings should not extend to juvenile proceedings because juvenile proceedings were designed for corrections and not criminal punishment. *Id.* at 78–79.

73. See *The Issue*, GIDEON AT 50, <http://gideonat50.org/the-issue> [<https://perma.cc/4SSJ-HNHU>]; see also *infra* Part III (discussing funding concerns and problems arising from a lack of caseload management structures).

for how states should meet the obligation to provide free counsel to indigent defendants.⁷⁴ Instead, the Justices' formal confirmation of the Sixth Amendment right to counsel for indigent defendants required each state to develop its own process for ensuring these individual rights were met.

Each state's eventual design for the provision of such services necessarily included either a designation to a particular branch of government within its system of checks and balances, or assignment to individual localities for management.⁷⁵ In the years since the decision, some state public defender institutions have undergone several iterations in response to public concern.⁷⁶ This Section details each state's designation as of December 2019, beginning with a thorough description of my study's methodology for assigning branches to each state's designation of its public defense services.

1. Study Methodology

To assign state public defender management to a particular branch of government, or define it as branchless, I reviewed state statutes and constitutions detailing the delivery of indigent defense services. Unsurprisingly, the relevant state statutes and constitutions rarely included a clear assignment to a particular government branch in their description of the state's indigent defense services. Even if a state did seem to include a specific branch in the text of the statute or constitutional provision, this designation could hide further provisions dictating the true branch assignment for the institution.⁷⁷ Thus, I adopted a taxonomy that determined the "true" branch assignment as the branch that chooses or houses the officials responsible for managing any funds reserved for the public defender, develops standards for the line defenders in representing their clients, or

74. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2192–94 (2013); see also COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 5–8 (2006), <https://www.ils.ny.gov/files/Kaye%20Commission%20Report%202006.pdf> [<https://perma.cc/C3JU-LNEU>] (noting that the Supreme Court has never ruled who is to establish and fund indigent defense, and as such the duty has been met by the state, local governments, or a combination of both).

75. It is important to note that under any branch placement, the public defender relies on its source of funding for its operations.

76. For example, Louisiana passed the Public Defender Act in 2007 in response to concerns about the system. *Louisiana Public Defender Act*, LA. PUB. DEF. BD., <http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> [<https://perma.cc/4ALW-97R4>]. The legislation implemented many changes, including transferring the duties of the Louisiana Indigent Defense Assistance Board ("LIDAB") to the Louisiana Public Defender Board ("LPDB"). *Id.*

77. For example, a state could assign the provision of indigent defense services to the judicial branch but place the distribution of funding under the executive branch.

proposes a budget for public defender services to a particular legislative body.⁷⁸

In making this determination, I first explored whether a state statute created a public defender agency assigned to a specific branch of government. Occasionally, this agency was led by a chief executive or lead public defender who managed the provision of services, promulgated service guidelines, and submitted financial disclosures and requests to funding authorities. This factor was an important consideration, as the individual responsible for appointing the chief executive or lead public defender could be viewed as the individual responsible for public defenders statewide.⁷⁹ This head public defender is the one who issues reports to the government agencies that fund public defense services and thus would have to account for any failures on the part of those line defenders, even those elected, who are providing services to indigent defendants.⁸⁰

The second important factor in assigning a public defender institution to a particular branch of government was to determine if the responsibility for the delivery of services was assigned to an already-existing agency. For those states that organized the public defender in this manner, I assigned the public defender to the branch of government in which the umbrella agency resided. This classification scheme relies on the understanding that while funneling the public defender to an existing agency may dispel direct control from the umbrella agency, it does not completely eliminate the umbrella agency's influence or authority. The umbrella agency would still serve as an organizing and supervisory mechanism for these services.

The third factor that helped determine public defender branch assignment was the presence of formalized funding schemes. Even though it is the legislative branch that determines funding amounts for the provision of services, this statewide decision explains which entity or individual assumes the authority to provide the resources the public defender needs to fulfill its obligations. The branch that distributes the funds for the entire public defender entity could differ from the branch responsible for distributing funds associated with the actual representation, the hiring. Because of that possibility, I had to complete a deeper dive in state statutes to determine if a separation between funding and funding distribution was more about

78. See *infra* Section II.B.2.

79. Even in states where a local or county public defender is elected by the general public, an appointed public defender who serves as the supervisor of each of the elected heads of office could conceivably still exist.

80. Louisiana provides a clear example of this. The state public defender is appointed by the LPDB and leads a staff that is responsible for providing the reports that account for indigent defense in all 42 districts providing indigent defense services in the state. LA. STAT. ANN. § 152(B) (2019) (detailing the responsibilities of the state public defender).

management concerns and the court process, or actually affected the solvency of the institution in relation to the controlling distributor.

The final factor in determining state branch assignment was the agency or individual(s) responsible for setting practice standards and guidelines. Instead of an agency or individual tasked with managing services throughout the state, some states have a commission that is responsible for issuing guidelines for indigent defense representation.⁸¹ These commissions have various members chosen through a diverse range of selection processes.⁸² The members can have similar responsibilities as the chief public defenders that are elected or appointed in other state public defender management schemes, but the members are limited to advancing rules that receive the consent of a required portion of the commission.⁸³

It is important to note some states employ different management schemes for indigent defense services for trial-level, appellate-level, juvenile delinquency, and capital cases.⁸⁴ This Article is limited to determining how each state designs the trial-level representation that makes up the bulk of indigent defense practice.⁸⁵ Although this Article notes those states with different management schemes for each level of representation, it does not move beyond a discussion of how those decisions affect trial-level representation.⁸⁶ As my study shows, the decision to exclude the provision of indigent defense trial-level services from statewide governmental control and render it a local concern has important implications in practice, even if the

81. These include Connecticut, Georgia, Idaho, Louisiana, Michigan, Minnesota, Oregon, and Texas. *See infra* Appendix C.

82. *See infra* Appendix E (providing the statutory description of each board or commission).

83. *See, e.g.*, IDAHO CODE § 19-849 (2019) (noting that the state public defender commission shall be an executive department of state government).

84. For example, California provides statewide funding for appellate representation but leaves the management and funding of trial-level representation to its counties. *Compare* CAL. R. CT. 8.300, *and Court-Appointed Counsel Program*, CAL. CTS.: JUD. BRANCH CAL., <https://www.courts.ca.gov/4201.htm> [<https://perma.cc/KF95-DTE7>], *with* Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173, 185–87 (2010).

85. This is just a matter of the procedural rules governing the right to appeal. Although a first appeal is a matter of right, the majority of convicted defendants do not appeal their conviction. Defendants will often waive certain appellate rights pursuant to a plea agreement, and the vast majority of cases end in a plea arrangement. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 128–30 (1995).

86. Regarding appellate level representation, Daniel Epps and William Ortman imagine a position of Defender General that would more adequately represent defendants before the Supreme Court. Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 2) (on file with author). Government lawyers from the U.S. Solicitor General's office often have more credibility before the Court and are able to "act strategically to play for bigger long-term victories, while defense lawyers must zealously advocate for the interests of their clients." *Id.* (manuscript at i). The position of Defender General would help balance some of these inequities. *Id.* (manuscript at 2).

same state might provide statewide management for other levels of the criminal process.

2. Study Findings

My exhaustive study shows the majority of states place the public defender under the executive branch of state government. A smaller number of states house the public defender within the judicial branch of state management, and a handful exclude it from statewide management by delegating it to local governance. The following Table provides a quick snapshot of which states assign the public defender to the executive branch, the judicial branch, or neither. Some states entertain a more complicated branch assignment structure according to my adopted taxonomy. These states, North Dakota and Virginia, are listed under “hybrid” and are described more fully in Appendix E.⁸⁷ Appendices A–F afford a more detailed breakdown of each state’s laws governing the provision of indigent defense services regardless of the branch designation.⁸⁸

Table 1. Branch Assignment

Executive Branch (33)	Judicial Branch (11)	Branchless (4)	Hybrid (2)
Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming	Colorado, Connecticut, Indiana, Massachusetts, Minnesota, Missouri, New Mexico, North Carolina, Oregon, Texas, Washington	California, Illinois, New York, Pennsylvania	North Dakota, Virginia ⁸⁹

87. See *infra* Appendix E.

88. See *infra* Appendices A–F.

89. The Virginia Public Defender is managed by a board, with the majority of members appointed by the members of the legislative branch. VA. CODE ANN. § 19.2-163.02 (West 2019) (describing the establishment and duties of the Virginia Indigent Defense Commission). The benefits and consequences of this type of structure are detailed later in this project. See *infra* Section IV.B.

The vast majority of states provide for the public defender's existence through a specific statute defining its structure and management.⁹⁰ The language in state constitutions may mirror the U.S. Constitution in articulating the general right to the effective assistance of counsel, but the particular methods state actors adopt to achieve those objectives on a granular level are often detailed in a separate state statute.⁹¹ For example, article I, section 13 of the Louisiana State Constitution of 1974 provides that "every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."⁹² The state legislature went further in Act 307, referred to as the Louisiana Public Defender Act, by establishing a public defender regulatory board.⁹³ Statutes such as Louisiana's Act 307 usually include a definition of who qualifies for the service (defining "indigency") and the assigned mechanisms for gathering the revenue necessary to fund the provision of services.⁹⁴ Some, like the Louisiana Public Defender Act, establish a board or commission comprised of appointed members who manage the provision of services.⁹⁵

In keeping with this general similarity for public defender construction in state constitutions and statutes, the majority of states clearly place the public defender in a specific branch of government through a variety of means. Ten of the states listed in the Table above clearly articulate in their state statutes that the public defender is assigned to a particular branch of government or managed at the county level.⁹⁶ Of those ten, five place the provision of public defense services under the judicial branch, three place it under the executive branch, and two make it branchless.⁹⁷ For example, Maryland Code section 16-202 clearly states that the "Office of the Public Defender [exists] in the Executive Branch of State government."⁹⁸ Conversely, Colorado Revised Statutes title 21, section 21-1-101 provides "[t]he office of state public defender is hereby created and established as an agency of the judicial department of state government."⁹⁹ Further, South Dakota Codified Laws section 23A-40-7 notes the board of county

90. See *infra* Appendices A-F.

91. See, e.g., LA. CONST. art. I, § 13.

92. *Id.*

93. See Louisiana Public Defender Act, LA. STAT. ANN. §§ 15:142, 15:146 (2019).

94. *Id.* §§ 15:168, 15:175.

95. *Id.* The Louisiana board is comprised of 11 members and is tasked with providing the supervision, administration, and delivery of statewide public defender systems. *Id.* § 15:146.

96. See *infra* Appendix B.

97. See *supra* Table 1; see *infra* Appendix B.

98. MD. CODE ANN., CRIM. PROC. § 16-202 (West 2011).

99. COLO. REV. STAT. ANN. § 21-1-101 (West 2016).

commissioners for each county and the governing municipality is responsible for public defender representation.¹⁰⁰

Eight additional states designate the public defender to operate under a particular agency within state government that, in turn, falls under a specific *branch* of government.¹⁰¹ Six of those states have the public defender under an agency that falls under the executive branch and two have it under an agency that exists under the judicial branch.¹⁰² Alaska provides an example of this in title 18, section 18.85.010, which states: “There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants.”¹⁰³

Seven states do not provide clear language in their state statutes assigning the public defender to a particular branch of government but do describe a chief defender or defender manager.¹⁰⁴ This chief defender or defender manager is often appointed by a member of government who, in turn, is part of a specific branch of government. For example, in Mississippi, the governor appoints a state defender “with the advice and consent of the [state] Senate.”¹⁰⁵ This places Mississippi, and the six other states who operate in a similar manner, in the group of states with public defender services under the executive branch, because even though the legislative branch plays a role in the appointment of the individual tasked with overseeing indigent defense services, the leader of the executive branch ultimately chooses that individual.¹⁰⁶ Conversely, the Washington state statute creating a director of the office of public defense places that position under the judicial branch by prescribing that the Washington Supreme Court shall appoint the director.¹⁰⁷

Twenty states have boards or commissions that manage their public defense services.¹⁰⁸ Although ostensibly independent, a board or commission can still reside under a particular branch of government because actors who hold various responsibilities under a particular branch of government appoint the members of the commission. For example, the Indiana Public Defender Commission is an 11-member board that helps develop standards

100. S.D. CODIFIED LAWS § 23A-40-7 (2016).

101. See *infra* Appendix C.

102. See *infra* Appendix C.

103. ALASKA STAT. § 18.85.010 (2018).

104. See *infra* Appendix D.

105. MISS. CODE ANN. § 99-18-1 (2015).

106. See *infra* Appendix D.

107. WASH. REV. CODE ANN. § 2.70.010 (West 2017) (noting that the state supreme court appoints the director from a list of three names provided by an advisory committee).

108. See *infra* Appendix E.

for the provision of services throughout the state.¹⁰⁹ This board consists of three members appointed by the state governor, three members appointed by the chief justice of the Indiana Supreme Court, one member appointed by the Board of Trustees of the Indiana Criminal Justice Institute, two members of the state's House of Representatives who are appointed by the Speaker of the House, and two members of the state Senate who are appointed by the president pro tempore of the Senate.¹¹⁰ Florida is unique in that, although services are completely state-funded and a statewide board governs the provision of services, that board consists of each of the 20 elected public defenders in Florida plus two representatives from the assistant public defender staff and one representative each from both the public defender investigative and administrative staffs.¹¹¹ Appendix E details those states with public defender boards or commissions and includes a breakdown of how each board member assumes their position on the board.¹¹²

Some states that adopt a board are difficult to categorize because actors from different branches appoint members to the governing board or commission. For example, New Mexico has 11 members on its New Mexico Public Defender Commission.¹¹³ The relevant code provision articulates some limitations on the characteristics and experience each board member must possess, but it otherwise leaves the choice up to different actors in the legal system.¹¹⁴ The governor appoints one member, the chief justice of the New Mexico Supreme Court appoints three members, the dean of the University of New Mexico School of Law appoints three members, the speaker of the House of Representatives appoints one member, the majority floor leaders of each Chamber each appoint one member, and the president pro tempore of the Senate appoints one member.¹¹⁵ These diverse board appointments seem to be in keeping with the state's attempt to improve the public defender system by removing it from the executive branch to independence under the

109. *History*, IN.GOV, <https://www.in.gov/publicdefender/2346.htm> [<https://perma.cc/J96FJ982>].

110. IND. CODE ANN. §§ 33-40-5-1 to 33-40-5-2, 33-40-6-1 (West 2018).

111. STEPHEN D. OWENS, ELIZABETH ACCETTA, JENNIFER J. CHARLES & SAMANTHA E. SHOEMAKER, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012—UPDATED 7 (2015), <https://www.bjs.gov/content/pub/pdf/idsuso812.pdf> [<https://perma.cc/KJ5V-CMTC>].

112. *See infra* Appendix E.

113. N.M. STAT. ANN. §§ 31-15-1 to 31-15-12 (2000).

114. *Id.* § 31-15-2.2(A)(1)–(2) (indicating members should have “significant experience in the legal defense of criminal or juvenile justice cases[,] or [have] demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department”).

115. *Id.* § 31-15-2.1.

judicial branch.¹¹⁶ Louisiana does something similar to New Mexico in trying to diversify its board; although, because it does not provide for legislative appointments, its board is not as diverse.¹¹⁷ Unless the states with such varied board appointments had another state code or provision detailing the public defender's assignment to a particular branch or funding being managed through a particular branch, they were listed in the above Table as hybrid/unclear. Using this hybrid distinction helps indicate if these attempts to diversify actually do improve the provision of services, as they are still managed or organized at the state level.

As Justice Hugo Black noted in the majority opinion in *Gideon*,

our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.¹¹⁸

Despite that early and clear admonition, the problems associated with state public defender systems continue to occupy both national and state news cycles.¹¹⁹ They are also fundamentally worrying for our traditional notions of justice and fairness in the criminal process. This Article aims to identify branch assignment as one possible cause of the institution's instability at the state level and proposes a specific solution to eliminate the instability associated with this cause.

III. THE CONSEQUENCES OF BRANCH OVERSIGHT

Perhaps unsurprisingly, problems arise when managing the public defender through any branch of state government. The executive branch has

116. See *supra* Part I; see also N.M. LEGIS. COUNCIL SERV., *supra* note 3, at 28–30 (describing the reasons for shifting the public defender into a different branch).

117. However, the Louisiana Code indicates, “to the extent practicable, the board shall be comprised of members who reflect the racial and gender makeup of the general population of the state, and who are geographically representative of all portions of the state.” LA. STAT. ANN. § 15:146(A) (4) (2019).

118. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

119. Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 4:55 AM), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111> [<https://perma.cc/Q3G6-GL7X>] (describing specifically the Missouri Public Defender Office); Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients.*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [<https://perma.cc/WG39-MPEX>] (describing the New Orleans Public Defenders).

a clearly articulated objective of enforcing a jurisdiction's laws.¹²⁰ This may run counter to protecting the very individuals charged with violating those laws. Even if one definition of the prosecutor allows recognition of the prosecutor and public defender as sharing the twin goals of preserving the defendant's rights, the very perception of conflict and somewhat divergent purposes is a cause for concern.¹²¹

In comparison, the judicial branch is tasked with serving as a neutral arbiter in judicial proceedings, interpreting the applicable laws and regulations, and making sure opposing parties are afforded due process of law.¹²² At first glance, this neutrality seems inconsistent with a dedication to the public defender, since the public defender is one of the two opposing parties in criminal court proceedings.¹²³ The court's goal of preserving the integrity of the process by ensuring fair proceedings requires it to consider the needs of those actors seeking prosecution of the defendant, and not just the needs of those seeking to advance the defendant's interests.¹²⁴

The legislative branch operates as the branch of government with the primary responsibility for capturing the rules that dictate the ways citizens

120. "Congress may 'obtain[] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (alteration in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

121. There are some agencies that are independent and even those that technically lie under the executive branch can be considered independent if the ability of the decision makers within the executive branch to remove those leading these other agencies is limited to a certain degree. For example, on the federal level, the U.S. Postal Service, the Central Intelligence Agency, the Social Security Administration, the National Labor Relations Board, the Environmental Protection Agency, the Federal Election Commission, and the Securities and Exchange Commission are some of the large agencies that are independent. See Barkow, *supra* note 44 (describing some of the large independent agencies). See generally MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES GOVERNMENT: LAW, STRUCTURE, AND POLITICS* (Oxford Univ. Press ed. 2015) (same).

122. See Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 147–53 (1993).

123. One could argue this is different in the juvenile delinquency context, where the goal of the court system is corrective and rehabilitative rather than punitive. See generally Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (discussing the distinct functions of the juvenile court).

124. "The criminal justice system rests on a tripod[—]the judiciary, the prosecution and the defense. That tripod is strongest and most stable when each leg is equally and independently represented." David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 337 (2017) (alteration in original) (quoting COMM. TO REVIEW THE CRIM. JUST. ACT PROGRAM, CR-CJAREV-MAR 93, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 50 (1993), <https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20%28Jan%201993%29.pdf> [http://perma.cc/ZK6V-2S5A]).

must interact with each other.¹²⁵ This includes the behaviors a society deems criminal as well as the applicable punishments.¹²⁶ This also includes the procedural rules various court actors must abide by in the criminal process.¹²⁷ The legislature also dispenses a state's available funds according to its most pressing objectives.¹²⁸ Its designation as the entity responsible for distributing state funds to various state agencies makes it difficult for it to also assume a fair and impartial role as a managing authority for a particular state organization.

Choosing not to place the public defender under any of these state-level governmental branches is itself a type of branch assignment that can also prove problematic. The institution's absence from these statewide managing schemes leaves it at the liberty of county officials, which may foster arbitrary enforcement of the right to counsel. Such a circumstance can render the type or quality of indigent defense a consequence of the popularity or wealth of the county these citizens reside in.¹²⁹ This Part details the consequences of assignment to any specific branch of government, or of leaving the institution branchless at the state level, by detailing the funding sources under each branch and the process by which overwhelmed public defenders can seek caseload relief.

125. See generally Simon P. Hansen, Comment, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159 (2013) (arguing the legislative branch should defend its own statutes).

126. *Id.*

127. *Id.*

128. See, e.g., Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L.J. 149, 149–52 (2003) (describing the Kentucky state legislature's control over spending).

129. See, e.g., Benner, *supra* note 84, at 193; Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 223–26 (2010). For example, "California is currently one of only four states that provides no state funding for trial-level public defense services and no mechanism for any state-level training or oversight of trial-level providers." Press Release, ACLU NorCal, ACLU Settlement Agreement Secures Governor's Commitment to \$14 Million in Added Support for Public Defense Systems Throughout California and Agency Expansion (Jan. 10, 2020), <https://www.aclunc.org/news/aclu-settlement-agreement-secures-governor-s-commitment-14-million-added-support-public> [<https://perma.cc/JH3U-5SUS>] (quoting senior staff attorney Kathleen Guneratne). The fact that individual counties have to pay for their own public defender services "has created huge disparities in public defense services, with wealthy counties like San Francisco able to afford meaningful public defense, while poorer counties like Fresno struggle to ensure each and every client's constitutional rights are protected." *Id.*

A. FUNDING RELIABILITY AND EQUITY

The constitutional right to effective assistance of counsel requires significant and reliable financial resources.¹³⁰ Despite this obvious reality,¹³¹ the systemic underfunding of public defender systems has garnered widespread media attention and scholarly criticism.¹³² One recent study determined that public defenders in Colorado, Missouri, and Rhode Island have two to three times the caseload that would allow attorneys to provide an adequate defense, and attorneys in Louisiana have nearly five times the workload that would allow them to provide that same quality of defense.¹³³ These overwhelming caseloads are the result of inadequate funding for public defender offices.¹³⁴

130. In addition to the basic costs of attorney salaries, investigator salaries, and funds for expert witnesses, there are other costs needed to run an effective public defender office: “resources, so the caseloads are reasonable; . . . training, so that public defenders know the latest developments in the law and in scientific evidence, how to represent people in different kinds of cases, and information about mental health issues.” Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691 (2010).

131. It is important to note the issues affecting public defender offices are much broader than a simple issue of funding. Funding is a manifestation of the complex politics of a system in which the public defender is dependent on other system actors who have very different goals and metrics for success and failure. However, funding is a major practical consideration given the sheer scale of the public defender operation and therefore merits our attention.

132. See, e.g., Oppel & Patel, *supra* note 22; *Lack Of Adequate Funding Forces Missouri Public Defenders to Shortchange Constitutional Rights*, *supra* note 22 (“Every lawyer would have to work more than 24 hours a day, every day of the year, to meet the minimum guidelines required for their cases in Missouri.”).

133. See RUBINBROWN & THE AM. BAR ASS’N’S STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *THE COLORADO PROJECT: A STUDY OF THE COLORADO PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 20–26* (2017) [hereinafter *THE COLORADO PROJECT*], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf [<https://perma.cc/MFJ9-KqAS>]; POSTLETHWAITE & NETTERVILLE & THE AM. BAR ASS’N’S STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 1–3* (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf [<https://perma.cc/282R-3KE6>]; RUBINBROWN & THE AM. BAR ASS’N’S STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 21–26* (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf [<https://perma.cc/W2VW-H6T5>]; BLUMSHAPIRO, *THE AM. BAR ASS’N’S STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS & THE NAT’L ASS’N OF CRIMINAL DEF. LAWS., THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5–7* (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf [<https://perma.cc/GH4M-8P3Q>].

134. See *THE COLORADO PROJECT*, *supra* note 133, at 9. The large caseloads could also be the fault of zealous prosecutors with insufficient regard for the public defender’s duty to provide

For example, journalists in Missouri conducted an unprecedented and expansive review of the Missouri public defender system in the fall of 2019 to examine whether it complied with existing constitutional requirements.¹³⁵ They concluded that Missouri's system was one of the worst in the country.¹³⁶ Their report noted Missouri ranked 49th out of the 50 states in terms of per capita spending on the public defender's office.¹³⁷ More than 4,000 defendants had their cases delayed as they awaited the appointment of a public defender, translating to some clients waiting weeks or months in jail before having an attorney assigned to represent them.¹³⁸ Even after appointment, the high caseloads made it difficult for public defenders to meet with their clients.¹³⁹ The high turnover rate also suggests that low attorney pay might have made it difficult for attorneys to remain on the job.¹⁴⁰

Missouri is not the only state facing significant funding problems. One study found that only 27 percent of county-based public defender offices and 21 percent of state-based public defender offices had caseloads that complied with the levels recommended to provide constitutionally effective representation.¹⁴¹ There may be a number of reasons why public defender caseloads reach such levels. Scholarship about mass incarceration and the nation's shift to addressing a number of social problems with the criminal process, instead of other administrative regimes, provides an excellent entry into conversations seeking solutions to the system's problems.¹⁴² One important reason that cannot be ignored is the lack of adequate funding.¹⁴³

effective counsel under the Sixth Amendment and competent counsel under state ethical rules. See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1237 (2020).

135. See Dave Helling, *Defenseless: Missouri Justice System Violates the Constitution Every Day*, KAN. CITYSTAR (Dec. 15, 2019, 2:42 PM), <https://www.kansascity.com/opinion/article237130749.html>.

136. *Id.*; Dan Margolies, *Lawsuit Says Missouri Public Defender System Faces 'Urgent Constitutional Crisis'*, KCUR (Mar. 9, 2017, 4:14 AM), <https://www.kcur.org/post/lawsuit-says-missouri-public-defender-system-faces-urgent-constitutional-crisis#stream/o> [<https://perma.cc/2LBH-GF8N>].

137. Margolies, *supra* note 136. Only Mississippi provided less per capita. *Id.*

138. Helling, *supra* note 135.

139. *Id.*

140. See *infra* note 210 and accompanying text (discussing the high turnover rate for public defenders).

141. Theodore Schoneman, *Overworked and Underpaid: America's Public Defender Crisis*, FORDHAM POL. REV. (Sept. 19, 2018), <http://fordhampoliticalreview.org/overworked-and-underpaid-americas-public-defender-crisis> [<https://perma.cc/Y73E-9NGQ>].

142. See, e.g., Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1064 (2016) (discussing the systemic problems of mass incarceration and the prosecutor's ethical duty to reduce incarceration rates for all defendants).

143. For example, funding deficiencies for misdemeanors in the criminal justice system contribute to the cycle of mass incarceration. See generally ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIM. DEF. LAWS., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009), <https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/>

Public defender systems take various approaches to funding the provision of services. Some jurisdictions use legislative appropriations at the state level to fund services.¹⁴⁴ Others turn to city council appropriations to finance or supplement the financing of the institution.¹⁴⁵ There are also jurisdictions that use more local resources, such as fines and fees, to provide necessary funds.¹⁴⁶ Some even look to the indigent defendants themselves to pay for their court-appointed counsel.¹⁴⁷ The following Table shows how branch assignment correlates with public defender funding according to the most recent data provided by the Bureau of Justice Statistics.

misdemeanor_20090401.pdf [https://perma.cc/8236-T9JM] (detailing how the increase in misdemeanor cases has led to wasted resources and unfulfilled constitutional obligations). *See also* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 85 (2018) (detailing how the increase in misdemeanors affects other inequalities in American society); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093 (2013) (proposing that defenders focus their energy on contesting misdemeanors as a way to deter legislatures from creating misdemeanors and law enforcement from creating and enforcing them).

144. *See, e.g.*, ALA. CODE § 15-12-45(b) (LexisNexis 2018) (providing the operating expenses for the public defender shall be paid from funds appropriated by the legislature).

145. *See, e.g.*, 725 ILL. COMP. STAT. 105/1-11 (2018) (detailing that since each county administers its public defender program independently, there is no central agency or organization at the state level to provide it with funding).

It is also important to note there is some debate about whether indigent defense representation should be a state obligation or a local one. Russell C. Gabriel, *Public Defenders, Local Control, and Brown v. Board of Education*, 67 MERCER L. REV. 625, 639 (2016) (detailing the “Model Public Defender Act” and its recommendation that states shift from local control of indigent defense to state-wide public defender systems). The relevant caselaw seems to note it clearly as a state obligation. *See* Helling, *supra* note 135. However, confusion arises because the prosecution for state crimes is sometimes funded through local city governance, such as a city council. *See, e.g.*, Jake Clapp, *New Orleans City Council Vote Could Close Funding Gap Between Public Defenders and Prosecutors*, GAMBIT (Aug. 17, 2020, 4:10 PM), https://www.nola.com/gambit/news/the_latest/article_206bab96-e0ce-11ea-8f4f-23bbc88f1bd4.html (detailing the disproportionate funding by city council for the prosecution and the public defender).

146. Louisiana, which combines state money with local revenue derived from fines and fees, is one example. Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, ABA J. (Jan. 1, 2017, 4:10 AM), http://www.abajournal.com/magazine/article/the_gideon_revolution [https://perma.cc/4CV8-WAgY].

147. *See generally* Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014) (discussing financing court appointed counsel); DEVON PORTER, ACLU, PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES 1 (Michael Kaufman & Andrés Kwon eds., 2017), <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf> [https://perma.cc/M64A-UP2B] (noting that in California, defendants are often expected to pay a \$50 upfront “registration fee” in order to be represented by a public defender).

Table 2. Public Defender Funding

Branch Assignment	Percentage of PD Funding from State Resources	Average Cost Per Capita
Executive	80.31%	\$14.64
Judicial	79.65%	\$13.90
Unassigned	10.33%	\$15.79

Scholars have paid a significant amount of attention to the problems associated with various schemes for funding public defenders.¹⁴⁸ In their important project on the public defender funding systems in Arizona, Lisa Pruitt and Beth Colgan showed these funding structures were markedly different depending on the county.¹⁴⁹ A statewide appropriation could help rural counties that might not be able to take advantage of local traffic fines, or even public interest organization funding, which might go to larger, more populated counties.¹⁵⁰ Unlike this critical scholarship on the process of funding defense counsel for indigent defendants, this Article explores how funding streams differ depending on the branch of government housing the public defender. It is important to note, however, that even though the funding is classified as a state appropriation, the funds for the state appropriation can arise from court fines and fees.¹⁵¹

1. Funding Structures by Branch Assignment

Of the four public defender offices not managed under a particular branch of state government, only New York receives statewide appropriations, though limited, for trial-level indigent defense.¹⁵² That public defender

148. See, e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (discussing underfunding of public defenders); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (discussing the underfunding of public defenders); Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 343.

149. Pruitt & Colgan, *supra* note 129, at 250–69. The study underscores that the differing schemes of financing local governments in Arizona “create[] inequalities among counties” that “influence the funding of indigent defense services and result in significant variations.” *Id.* at 225.

150. *Id.* at 309.

151. Louisiana uses court fines and fees to fund the public defender. LA. STAT. ANN. § 15:168 (2019).

152. Both California and Illinois manage appellate indigent defense at the state level and thus dedicate state appropriations for those services. NAT'L RIGHT TO COUNSEL COMM., THE

offices structured this way do not typically receive statewide appropriations makes organizational sense, as there is no statewide agency or body of individuals to manage the state funds. Instead, the local funds are assessed, controlled, and distributed by county officials.

Pennsylvania is a clear example of a locally controlled system.¹⁵³ There is no statewide entity managing public defense services in Pennsylvania. There is also no statewide appropriation of funds. Instead, each county provides funding for its services through local government, sometimes the city council.¹⁵⁴ This means that, depending on how their local government prioritizes public defense services, some counties can be better resourced than other neighboring counties. For example, the Defender Association of Philadelphia is popularly considered a committed and stable office.¹⁵⁵ Conversely, other counties in Pennsylvania struggle to meet even the basic standards of representation because of inadequate city funding. As recently as 2016, clients of the Luzerne County Office of the Public Defender filed a lawsuit alleging the county failed to provide adequate funding for public defense services.¹⁵⁶

All states with public defender organizations managed under the executive branch receive statewide appropriations.¹⁵⁷ However, even if an organization is funded through statewide appropriations, each of the public defender systems operating beneath its authority are not necessarily funded in this way. Louisiana provides an example of a state that, although it receives a statewide appropriation for public defense services, does not distribute the funds equally to public defense services in each county.¹⁵⁸ Instead, the

CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 165 (2009) (describing California's post-conviction system). New York requires each county to assume primary responsibility for funding indigent defense services but also created an Indigent Legal Services Fund to provide some funding to counties and full funding for children in delinquency proceedings. *Home*, N.Y. ST. OFF. INDIGENT LEGAL SERVS., <https://www.ils.ny.gov> [<https://perma.cc/JU47-FELS>]. Pennsylvania does not provide any state funding for trial-level indigent defense. NAT'L RIGHT TO COUNSEL COMM., *supra*, at 54.

153. 16 PA. STAT. AND CONS. STAT. ANN. §§ 9960.1–9960.13 (West 2019).

154. *Pennsylvania Public Defenders*, PA. LEGAL AID, <https://palegalaid.net/pennsylvania-public-defenders> [<https://perma.cc/7KNR-WYJR>].

155. They also have issues with lack of funding. In fall 2017, news agencies began to report that the long-promised raise for public defenders (who had not seen a pay increase in two decades) was delayed after the city council refused to find the funds to support the raise. Bobby Allyn, *City Lacks Funding for New Rates for Court-Appointed Attorneys*, PHILA. BUS. J. (Aug. 1, 2017, 9:08 AM), <https://www.bizjournals.com/philadelphia/news/2017/08/01/philly-public-defender-association-attorney-rate.html> [<https://perma.cc/H39A-GLSU>].

156. *See* Kuren v. Luzerne County, 146 A.3d 715, 792 (Pa. 2016).

157. *See infra* Appendix G.

158. *See A Review of Public Defense Funding in Louisiana*, LA. ST. BAR ASS'N, <http://files.lsba.org/documents/CJC/PublicDefenderFundingPP.pdf> [<https://perma.cc/5DMQ-6HHU>];

Louisiana Public Defender Board, which is tasked with regulating services throughout the state, considers the needs of each county and proportions the funds accordingly.¹⁵⁹ This means a “parish,” a term analogous to a “county” in terms of the spatial area it covers, may not receive any funds from the state legislature appropriation. Instead, it might be funded via local revenue and only turn to the state appropriation when local revenue proves to be insufficient for meeting its objectives.¹⁶⁰

Similar to public defender institutions managed under the executive branch of state government, those managed under the judicial branch can also look to state appropriations to finance public defense services.¹⁶¹ This type of funding arrangement can exist regardless of whether there is a board, commission, or chief defender tasked with regulating the services and reporting results to a supervisor within the judicial branch. Funding can also still be provided as part of a statewide assessment, whether the state appropriation for the public defender function is included in an appropriation for the entire judicial branch or as a separate appropriation limited solely to indigent defense.

There can also be a state appropriation for public defender institutions organized at the county level, although this is not a common occurrence.¹⁶² A state can choose to distribute funds to each county or to maintain a pool of money individual counties can pursue as the need arises.¹⁶³ Such distribution schemes can be a bit difficult to administer, however, without a representative at the state level to organize the application and approval systems.¹⁶⁴

2. The Optimal Funding Structure

It is not difficult to discern which funding process would be most beneficial to the public defender system. Public defenders need a steady stream of stable income they can rely on in handling their caseload.¹⁶⁵ This

see also Mary Grace Richardson, “License, Registration, and State Funding, Please”: Overhauling Louisiana’s Traffic-Ticket Funding Scheme of Public Defenders, 79 LA. L. REV. 589, 596 (2018) (“The funding structure in Louisiana is collapsing under the weight of issues like the unequal distribution of funds among different districts . . .”).

159. *See The District Assistance Fund*, LA. PUB. DEF. BD., <http://lpdb.la.gov/Serving%20The%20Public/Programs/District%20Assistance%20Fund.php> [<https://perma.cc/7TBR-ETUP>].

160. *See, e.g.*, ANDREA M. MARSH, NAT’L ASS’N OF CRIM. DEF. LAWS., STATE OF CRISIS: CHRONIC NEGLECT AND UNDERFUNDING FOR LOUISIANA’S PUBLIC DEFENSE SYSTEM 14 (2017).

161. *See infra* Appendix F.

162. *See infra* Appendix G.

163. *See infra* Appendix F.

164. *See infra* Appendix F.

165. Indigent representation is also subject to unpredictable increases in costs, which can be difficult to budget for. For example, providing defense for high-profile cases can increase the

allows them to hire a sufficient number of line attorneys and support staff to meet the needs of the client population.¹⁶⁶ They also need ready access to any additional funds necessary to hire expert witnesses or conduct forensic testing for more scientifically sophisticated cases.¹⁶⁷ Even office management and supervision rely on steady funding sources, as more seasoned attorneys may desire the type of life stability that ordinarily accompanies income stability and retirement options.¹⁶⁸

Of the funding schemes described in this Section, the legislative appropriation appears to be the most stable and reliable. This is because state legislatures set forth their budgets at least one year in advance.¹⁶⁹ Local fines and fees ebb and flow at different times of the year and in different economic environments.¹⁷⁰ Conversely, the state budgeting scheme is determined in advance after detailed deliberation from legislators with various political affiliations and different agendas. Because the state budgeting scheme must pass by congressional vote, it has a built-in accountability measure to ensure it has the effect of law.

Limited research shows the assumption that state appropriations would lead to significantly more funding may not actually be true, at least for the criminal process. Some studies have been conducted on states transitioning

budget dramatically, and the necessity of employing conflict counsel also fluctuates unpredictably. See ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, JUST. MGMT. INST., ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE 11–12 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf> [<https://perma.cc/Z8KA-QSDU>].

166. See FURST, *supra* note 23, at 6 (finding that methods of funding indigent defense systems impact the quality of representation in a given jurisdiction, yet some states rely on erratic funding sources).

167. See *id.* at 9, 19 n.118 (“Providing effective representation requires adequate support resources, such as investigators, paralegals, and access to expert witnesses.”).

168. Kathy Gurchiek, *Job Security, Company Stability Are Most Important, Generations Agree*, SHRM: BLOG (Sept. 15, 2011), <https://blog.shrm.org/workplace/job-security-company-stability-are-most-important-generations-agree> [<https://perma.cc/RU2D-AAZ3>] (indicating older workers consider job stability to be the most important factor in a job and place more value on 401(k) plans than younger workers).

169. Some states (such as Louisiana) do fiscal sessions every other year, which means budget appropriations could have longer timetables. See *Legislative Sessions with Limited Scope*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/legislative-sessions-with-limited-scope.aspx> [<https://perma.cc/JF5F-DU2E>].

170. See, e.g., MAC TAYLOR, LEGIS. ANALYST’S OFF., IMPROVING CALIFORNIA’S CRIMINAL FINE AND FEE SYSTEM 13 (2016), <https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf> [<https://perma.cc/SS4C-3J5Q>] (“[T]he [State Penalty Fund] received nearly \$30 million less in 2013–14 than in 2010–11—about a 25 percent decline in revenue. The cause of such declines is unknown but could be due to a variety of factors—including the number of citations issued by law enforcement, individuals’ willingness to make payments, and the amount collected by collection programs.”).

from local to state financing for trial courts.¹⁷¹ Though dated, these studies continue to provide important insights into how the changes might affect court function. For example, the National Center for State Courts (“NCSC”) conducted a study in 1990 about the transition to state financing in Iowa, Massachusetts, Oregon, and California.¹⁷² That study found there was a marginal increase in the amount of state funding after the transition.¹⁷³ The study also showed that funding remained similarly stable after the transition to state funding.¹⁷⁴ The report noted it could not determine if that would be the case if the state faced a recession or other financial hardship.¹⁷⁵ Importantly, the study concluded state financing did decrease inequities in funding across localities.¹⁷⁶ This is not altogether surprising. Cities or counties can have different populations and industries available to support the localities’ financial coffers. For example, if a county obtains funding from traffic tickets issued for highway travel, then those with more highways within their boundaries have an increased likelihood of obtaining funds from that source. Similarly, if a county expects to receive some local funding from taxes assessed upon the travel industry, it might be subject to how willing others would be to travel to the county.

Researchers Alan Carlson, Kate Harrison, and John K. Hudzik produced a study for the Justice Management Institute (“JMI”) in September 2008 that complicates the findings of the NCSC report from two decades earlier.¹⁷⁷ The JMI report explored trial courts and funding in New Jersey, Florida, and Washington.¹⁷⁸ The report did not produce evidence of a clear overall advantage to either primary state funding or primary local funding across all

171. See generally, e.g., ROBERT W. TOBIN & BRIAN LYNCH, NAT’L CTR. FOR STATE CTS., STATE COURT EXPENDITURES AND STAFFING PROJECT: A CASE STUDY OF THE EFFECTS OF STATE FINANCING OF TRIAL COURTS: CALIFORNIA (1990) [hereinafter TOBIN & LYNCH, CASE STUDY: CALIFORNIA] (detailing the effects of the Trial Court Funding Program in California); ROBERT W. TOBIN & BRIAN LYNCH, NAT’L CTR. FOR STATE CTS., STATE COURT EXPENDITURES AND STAFFING PROJECT: A CASE STUDY OF THE EFFECTS OF STATE FINANCING OF TRIAL COURTS: OREGON (1990) [hereinafter TOBIN & LYNCH, CASE STUDY: OREGON] (detailing the effects of the transition to state funding for courts in Oregon).

172. JOHN K. HUDZIK, NAT’L CTR. FOR STATE CTS., THE EFFECTS OF STATE FINANCING: SUMMARY FINDINGS FROM THE FOUR-STATE STUDY (1990) (detailing findings regarding the transition to state funding in Iowa, Massachusetts, Oregon, and California). See also generally TOBIN & LYNCH, CASE STUDY: CALIFORNIA, *supra* note 171 (detailing the effects in California); TOBIN & LYNCH, CASE STUDY: OREGON, *supra* note 171 (detailing the effects in Oregon).

173. HUDZIK, *supra* note 172, at 5.

174. *Id.* at 7.

175. *Id.*

176. *Id.* at 7–8.

177. CARLSON ET AL., *supra* note 165.

178. *Id.* at 1.

four dimensions—adequacy, stability, equity, or accountability.¹⁷⁹ It did, however, find advantages in several of the four areas.¹⁸⁰ More specifically, the study did not find that greater state funding led to more funding overall.¹⁸¹ The report did show that in two states, primary state funding equalized funding across trial courts across counties and led to the adoption of more uniform trial court practices.¹⁸² Primary statewide funding also led to a greater effort to collect data on workload and performance, which could provide important information for measuring accountability.¹⁸³

One of the difficulties associated with increased state funding was what appeared to be a lack of attention to local issues and processes.¹⁸⁴ Greater state funding and increased accountability at the state level seemed to lead judges to adopt a more statewide view of their courtroom process.¹⁸⁵ Statewide practices could be inconsistent with the local court system, as the latter is designed to deal with criminal behavior that generally occurs within its boundaries, is policed by local law enforcement and prosecuted by attorneys within its communities.¹⁸⁶ The alleged criminal behaviors are also adjudicated by citizens within its locality.¹⁸⁷ In other words, all of the other parts of the process do not take a statewide view and are instead limited in scope to the needs of the individual county.¹⁸⁸

Both of the studies described above were about the judiciary and how state funding affects their operation.¹⁸⁹ One could extrapolate that these results would be similar for public defenders housed within the judiciary

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 2. These states were New Jersey and Florida. *Id.* The report did note that simply adopting primary state funding did not guarantee compliance. *Id.* at 3.

183. *Id.* at 3.

184. *See id.* Paradoxically, the report notes that locally-funded trial courts initially believed “the state was telling them what to do, through state mandates, but not providing the funds with which to do it.” *Id.* at 8. The report harbors conjecture that a “grass [i]s greener” phenomenon occurred when locally funded trial courts received state funding. *Id.* (“Sometimes there was a comparison to another court, usually a similarly sized court elsewhere in the state, with more generous funding, or one that had a program or service the court making the comparison did not have.”).

185. *Id.* at 2.

186. Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199, 1219 (2013) (discussing the Wickersham Commission’s failed effort to shift local control of prosecutions to state control).

187. *See generally* Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271 (2005) (describing the importance of local jurors serving on criminal trials).

188. They do, however, judge whether behavior violates laws that apply statewide and are assessed by a majority of legislators from throughout the state.

189. *See* CARLSON ET AL., *supra* note 165, at 1–3; *see also* HUDZIK, *supra* note 172, at 5.

branch, since they would share similar management structures. Whether these results would exist for a public defender housed under the executive branch, or under no branch of state government at all, is unclear. However, there is reason to think the outcome might be different under the executive branch. The executive branch has a number of agencies acting under its umbrella and thus may have a historical advantage in adopting schemes of separation to ensure agencies are able to perform according to their individual mandates.¹⁹⁰

With this in mind, the fact that more jurisdictions with public defense services existing under the executive branch have some component of state appropriations serving as part of their funding is important. It is not entirely clear why assignment to the executive branch is more highly correlated with funding by state appropriations. This might occur because state legislatures must formally distribute money to other state agencies lacking the inherent sources of income that might exist among the courts.

There do not seem to be any formal limitations preventing state legislatures from providing funding for agencies managed at the local level. The minimal existence of such processes might result from the degree of reporting that is necessary for state funding. There also seems to be some interest in maintaining separation between local governance and state governance, likely because local interests and culture can be very different from their statewide counterparts.¹⁹¹ State legislatures necessarily include representatives from different localities within the state, often negotiating state interests on behalf of the local populations they serve. Individual legislators can be very focused on the needs of their particular locality, even if it is contrary to the interests of another state locality.¹⁹² These factors could explain why there are so few funding schemes where state legislatures provide funds for locally managed agencies.

190. See generally Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677 (2017) (evaluating the institutional competence of agencies under the Obama Administration).

191. This assumes we can even define such a thing as “state culture.” Population differences might suggest an inherent degree of difference at the state level and the local level. Industry and urban versus rural divides may also contribute to this notion. See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 60 (2006) (“[State] court judges might tend to see, in their constitution, only those strands of state culture that support the social and political status quo, rather than giving voice to the constituents of state culture that include alternative paths and visions of the good society. That dialectic, between the status quo and an alternate imagined community, is a central component of democracy.”).

192. There are a number of reasons for this, including the need to remain in favorable standing for a reelection campaign. Maintaining separation from overall state interests can also serve that objective.

The conclusion that state legislative appropriations are the best funding scheme for public defense services does not ignore the reality that state appropriation amounts are subject to legislative priorities and state economies. Many different state agencies are battling for limited state funds, and the public defender is not one of the more popular sources for funding.¹⁹³ In fact, some of the examples of funding shortfalls described in the opening paragraph of this Section are from states with public defender representation assigned to the executive branch.¹⁹⁴ The general public may not be as understanding of the public defender's important position in our criminal justice process as it is of the role that police departments play in maintaining law and order. Even if the public does understand this role, a desire to ensure adequate funding for public education, public hospitals, and even public streets may occupy the ordinary citizen, and thus their corresponding legislator's mind, more than funding those accused of criminal behavior. Stable funding alone, however, is not the only thing that separates an effective and ethical public defense delivery system from an ineffective and unethical one. The following Section details another characteristic that conveys which branch assignment better supports the creation and maintenance of such a system.

B. ETHICAL AND PROFESSIONAL RESPONSES TO CASELOAD CONCERNS

Another important thing to consider in establishing the appropriate scheme for delivering indigent defense to qualifying defendants is the process by which the line public defenders can inform management that they do not have the resources necessary to meet their mandate. There has been some scholarly discussion about the best way for public defenders to respond when their caseloads reach unmanageable levels. Some scholars, such as John Mitchell of the Seattle University School of Law, have argued for public defenders to engage in a systematic triage where they determine which defendants can be represented adequately with a less than robust, pattern-style representation.¹⁹⁵ Others, such as the late Monroe Freedman of Hofstra

193. Rhonda Covington, a public defender in Louisiana, "says her budget is a fraction of what prosecutors get." Debbie Elliott, *Public Defenders Hard To Come By in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM), <https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana> [<https://perma.cc/6BEN-PXYA>]; see also *supra* note 23 and accompanying text. "Public defense is not popular . . . [s]o politicians do not like it." Elliott, *supra*.

194. See *supra* Section III.A. Examples of a governor unilaterally blocking an increase in the state's public defender funding are commonplace—as are statewide budget cuts exacerbating the public defender's caseload. See, e.g., Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, GUARDIAN (July 27, 2018), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system> [<https://perma.cc/U3VZ-NFJ3>].

195. John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925, 933–37 (2005).

University Law School, have noted the Sixth Amendment and legal ethics do not permit public defenders to choose between clients.¹⁹⁶ Some jurisdictions have responded to this debate by providing a specific process for public defenders to pursue when they realize they have reached unworkable caseloads.

In Louisiana, for example, the Louisiana Public Defender Board has developed a Restriction of Services Protocol that the chief public defenders in each of the 42 districts the Board supervises must follow if their resources are insufficient to meet client need.¹⁹⁷ Under this protocol, the district defender must prepare a report for the Board outlining its resource shortfalls and any steps it has already taken to comply with constitutional and ethical guidelines.¹⁹⁸ The district then works with the Public Defender Board to return to, or achieve in the first place, the level of representation consistent with the constitution and ethical rules.¹⁹⁹

Not all states or counties have a formal scheme for notifying and addressing budget shortfalls. Some public defenders refuse additional appointments and face contempt proceedings from the court, as seen in the New Mexico example introducing this Article.²⁰⁰ Even in jurisdictions with formal schemes for seeking relief, public defenders may still face lawsuits from organizations, like the American Civil Liberties Union, which represent former clients who claim they did not receive effective assistance of counsel in their defense to state criminal charges.²⁰¹

According to a Bureau of Justice Statistics study, “[t]welve states and the District of Columbia [have] caseload limits for their attorneys.”²⁰² This means

196. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 917-23 (2005).

197. See generally LA. PUB. DEF. BD. & DIST. PUB. DEFS.’ OFFS., GUIDE FOR DEVELOPING A DISTRICT SERVICE RESTRICTION PLAN (2012), http://lpdb.la.gov/Meetings/txtfiles/pdf/Confidential/ROS%20Guidance%20-%20FINAL_Oct%202014.pdf [<https://perma.cc/HRTg-VE4S>] (prescribing a protocol for districts with financial or caseload issues); see also generally JAMES T. DIXON, JR., LA. PUB. DEF. BD., THE LOUISIANA PUBLIC DEFENDER BOARD AT THE CROSSROADS ETHICS AND LAW IN PUBLIC DEFENSE (2015), <http://lpdb.la.gov/Meetings/txtfiles/pdf/Confidential/White%20Paper%20on%20Restriction%20of%20Services%20-%20FINAL.pdf> [<https://perma.cc/48RA-W4K9>] (describing the Restriction of Services Protocol).

198. LA. PUB. DEF. BD. & DIST. PUB. DEFS.’ OFFS., *supra* note 197, at 3.

199. *Id.* at 5-6.

200. See *supra* Part I.

201. See, e.g., *Lawsuit Challenging Grant County’s Inadequate Public Defense System Granted Class-Action Status*, ACLU WASH. (Nov. 20, 2009), <https://www.aclu-wa.org/news/lawsuit-challenging-grant-county-s-inadequate-public-defense-system-granted-class-action-status> [<https://perma.cc/JEW6-SDDW>].

202. SUZANNE M. STRONG, U.S. DEP’T OF JUST., STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 6 (2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/L3MR-3W28>].

line defenders in those jurisdictions have the ability to refuse appointment of counsel if their workload reaches what has been set, system-wide, as an unethical and unconstitutional amount. These states include Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, North Carolina, Oregon, Vermont, West Virginia, and Wyoming.²⁰³ Of these states, three house the public defender institution under the judicial branch: Colorado, Connecticut, and North Carolina.²⁰⁴ Four house the public defender under the executive branch: Louisiana, Vermont, West Virginia, and Wyoming.²⁰⁵ These defenders may be more fortunate than defenders in other states without caseload limits because they can point to numbers proving they are unable to fulfill their workload. Public defenders in jurisdictions without caseload limits may instead have to find other ways to ensure their supervisory structure understands the reality and significance of their inability to handle their caseload effectively.²⁰⁶

A commission or board for the public defender at the state level, regardless of the branch in which it exists, provides a clear advantage with regard to seeking relief for overwhelming caseloads. As was apparent in the research about state funding for trial courts, there seems to be a stronger likelihood of developing statewide standards when all of the counties within a state providing indigent defense must report or obtain money at the state level.²⁰⁷ Without a state level supervisory structure, local politics and relationships may make it difficult for public defenders to articulate and achieve satisfactory responses to their claims that their funding is insufficient. A commission or board for the public defender would lessen such political strife.

203. *Id.* at 25. While caseload limits may provide public defenders with an important avenue for relief, several of the states listed here (notably Colorado and Louisiana) have continued to struggle with overwhelming need and limited resource. *See generally* THE COLORADO PROJECT, *supra* note 133 (describing the problems faced by the Colorado indigent defense system); *see also generally* sources cited *supra* note 158 (supporting a shift in funding strategy for Louisiana public defenders). This suggests that even though the prescriptions outlined in this Article would help, more drastic measures are needed to fully cure the problems that ail the public defender institution in some states.

204. *See infra* Appendix A.

205. *See infra* Appendix A.

206. In one drastic example, the Public Defender's Office in Missouri began assigning cases to the governor, under a provision that allows the public defender to assign cases to *any* Missouri lawyer. Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case—To the Governor*, NPR (Aug. 4, 2016, 12:34 PM), <https://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-governor> [<https://perma.cc/36BK-RPCK>]. The governor had repeatedly vetoed caseload caps for the office. *Id.*

207. *See* CARLSON ET AL., *supra* note 165, at 2; *see also supra* note 185 and accompanying text.

It is also important to consider how supervisory and staff support plays out in systems managed under different governmental branches. Supervision is important in the criminal defense arena.²⁰⁸ Although lawyers are ostensibly responsible for managing their own caseloads, state ethical rules do place some responsibility on supervisory attorneys to oversee the behaviors of other attorneys.²⁰⁹ This is particularly important when considering that the relevant tenure for public defenders can be quite short,²¹⁰ as it suggests many public defenders may lack experience managing the large caseload of a public defender.²¹¹

There are unique difficulties present in indigent defense both because the client does not get to choose their representative, and because the attorney does not get to screen the client before accepting the appointment. Additionally, indigency comes with its own life difficulties, including the transient nature of housing or tools for communication.²¹² If an individual is unable to afford bail and must reside in jail pending the outcome of their court proceedings, then an attorney must schedule their visitation, and the client's contribution to their own defense, around jail visitation schedules. If an indigent client is not incarcerated during the representation, then funds may limit where they can live, what jobs they can hold, and what electronic

208. See generally Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, in PUBLIC DEFENSE PAPERS FROM THE EXECUTIVE SESSION ON PUBLIC DEFENSE (2001), <https://www.ncjrs.gov/pdffiles1/bja/187768.pdf> [<https://perma.cc/3KDX-D4NA>] (describing the importance of strong leadership and supervisors in the public defender context).

209. See, e.g., CAL. RULES OF PRO. CONDUCT r. 5.1 (2020) (noting that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with professional rules).

210. See, e.g., Emma Kennedy, *Public Offices Battling Attorney Turnover Issues*, PENSACOLA NEWS J. (Jan. 5, 2017, 9:43 PM), <https://www.pnj.com/story/news/2017/01/05/public-offices-battling-attorney-turnover-issues/96204570> [<https://perma.cc/T9ZJ-62EJ>] (describing local turnover issues for public defenders); *State Public Defenders' Turnover Rate 50 Percent; Pay Inequity to Blame*, MISSOULIAN (Feb. 19, 2013), https://missoulian.com/news/state-and-regional/state-public-defenders-turnover-rate-percent-pay-inequity-to-blame/article_213ca416-708e-11e2-9d2e-0019bb2963f4.html [<https://perma.cc/AU5E-23FM>].

211. An attorney can lack this case management experience even if they have a wealth of experience in criminal law generally.

212. Several public defender offices have restructured to address some of the unique needs of their client base. The Neighborhood Defender Service of Harlem is one of the pioneers of the client and community-oriented defender models. Among other services, the office employs the team defense model, where a team of attorneys, investigators, and social workers collectively engage with clients, defending the legal case, reviewing alternatives to incarceration, and connecting clients with education support programs and mental health and drug treatment placements, as necessary. MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. FOR JUST., COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 19–21 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Community%20Oriented%20Defense-%20Stronger%20Public%20Defenders.pdf> [<https://perma.cc/D9L4-4JAL>].

tools they can use to contact their counsel. All of these characteristics may exist for clients with the means to afford hiring a private defense attorney, but because they can be compounded in the indigent defendant population, a defense attorney tasked with representing indigent persons must develop adequate skills to manage them.²¹³

Supervisors in a public defender system can ensure they provide instruction and advice for the attorneys they supervise. Additionally, they can remain aware of any clients that might otherwise receive inadequate representation because of circumstances beyond the attorney's control, such as limited funds for support staff or expert services. Ideally, the supervisor would be separate from the administrative leader of the office, who would be primarily responsible for making sure the organization complies with any state or county level requirements. Organizational theory in other industries provides helpful data for how many attorneys each supervisor could adequately serve, but the guiding principle is the fewer attorneys per supervisor, the better.²¹⁴

Notably, this Article does not discuss the underlying reasons for the decisions a state makes about the process by which it funds its indigent defense services. Nor does it explore why a state might not adopt formal caseload guidelines or a mechanism for the public defender to address overwhelming caseloads. Instead, this Article looks at specific state characteristics reflective of their placement of public defender oversight. Whether branch assignment causes these specific results is an issue for a subsequent paper. The existing correlation does, however, give us space to consider institutional changes that might lead to substantial improvement. The next Part of this Article proposes two specific changes to facilitate such improvement, including instituting an inspector general-type figure and implementing a board or commission for oversight.

213. For public defender offices with the resources to hire social workers, these valuable staff members offer the chance to bridge a professional gap that public defense attorneys are otherwise ill-equipped to fill. As the primary contact point for clients, "social workers in public defenders' offices ensure defendants have a right to explain their story, and they promote the benefits of rehabilitation." Paul R. Pace, *Social Workers Key Players in Criminal Justice System*, SOCIALWORKBLOG.ORG, <http://www.socialworkblog.org/nasw-news-article/2012/11/social-workers-key-players-in-criminal-justice-system> [https://perma.cc/Q66S-46gT].

214. The ideal ratio of managers to subordinates is referred to as "span of control." William G. Ouchi & John B. Dowling, *Defining the Span of Control* 1 (Stanford Univ. Graduate Sch. of Bus., Research Paper No. 168, 1974). The ideal span of control depends on various factors. Luther Gulick's work is closely associated with this area of scholarship. Luther Gulick, *Notes on the Theory of Organization*, in 4 PAPERS ON THE SCIENCE OF ADMINISTRATION 1, 10-11 (Luther Gulick & L. Urwick eds., Routledge 2d ed. 2003) (1937).

IV. INSTITUTIONAL AUTONOMY AND THE PUBLIC DEFENDER

The twenty-first century has seen a renewed interest in the shape of the public defender. Six states have already significantly restructured their provision of indigent defense services and eight more have initiated smaller scale changes.²¹⁵ All of these states have relied on different factors in developing their new systems, but most of the six states that have completed a larger transition has decided to place their newly-created or reformed public defender within the executive branch.²¹⁶ This Article suggests this placement decision might be best for ensuring more stable funding.²¹⁷ However, this placement requires significant procedural safeguards to maintain the system's effectiveness and efficiency, particularly with regard to the institution's ability to seek tools for reform and improvement.

Placing the public defender under the executive branch puts the institution at risk of being consumed by larger and more punitive state criminal justice objectives with limited avenues for redress.²¹⁸ Two significant changes could help establish the public defender as an important and effective executive agency. The first would be to imagine the lead public defender in the role of an inspector general, tasked with neutrally assessing when members of the executive branch have violated important constitutional principles.²¹⁹ The second would be to establish more diverse boards or commissions tasked with supervising the delivery of services.

A. *AN INSPECTOR GENERAL THEORY OF THE PUBLIC DEFENDER STRUCTURE*

In some ways, the public defender seems a natural fit under the executive branch. The executive branch is remarkable for its ability to manage a wide variety of state agencies under the auspices of ensuring that state affairs and obligations are met. For example, the executive branch manages law enforcement agencies, which can range from state police to state

215. See *supra* Part II (discussing Georgia, Louisiana, Alabama, Texas, New Mexico, and others).

216. See *supra* Part II (discussing Georgia, Louisiana, Alabama, Texas, New Mexico, and others).

217. See *supra* Section III.A.

218. See *supra* Part III.

219. This suggestion presupposes the establishment of an inspector general as an independent agency rather than one whose head serves at the pleasure of the head of the executive branch. The Trump Administration has shown this to not always be the case as it has come under intense criticism for firing inspectors general. See, e.g., Editorial Bd., *Mr. Trump's War on Accountability*, N.Y. TIMES: OPINION (May 4, 2020), <https://www.nytimes.com/2020/05/04/opinion/inspector-general-trump-coronavirus.html> [<https://perma.cc/THJ2-7KBB>]. Nevertheless, because chief state executives (i.e., governors) do not direct the agenda of their state's attorney general, the inter-branch tension for a gubernatorially-appointed public defender would be considerably less at the state level than at the federal level. See Barkow, *supra* note 44, at 30–31.

prosecutors.²²⁰ It also oversees consumer protection initiatives, which can include enforcing contractual agreements between companies and their customers, or ensuring various constitutional rights are enforced.²²¹ The public defender, as a necessary component of the constitutional right to the effective assistance of counsel, would fit neatly into the catalogue of state institutions and behaviors the executive branch already manages.

The executive branch is naturally understood to be responsible for a wide range of administrative activities.²²² Because the executive branch includes a range of departments with disparate objectives and responsibilities, including the Department of Health and Human Services, the Internal Revenue Service, and the Department of Education, it would follow that it might be the best home for the public defender, as it is just another agency with a disparate obligation within the larger framework of managing behavior from a diverse citizenry. As the remainder of the study shows, though, a number of states have chosen to forgo this “natural fit,” and their reasoning has some merit.²²³

As previously mentioned, states differ on how they select an attorney general.²²⁴ Despite this difference, the attorney general’s mandate is remarkably similar from state to state.²²⁵ The attorney general serves as the chief legal officer for a particular state and is responsible for managing compliance with criminal and civil law.²²⁶ The attorney general is also considered the lawyer for the states’ citizens and is responsible for litigating all matters on behalf of the citizenry that concern a violation of citizen rights or state laws.²²⁷ The continuity between states regarding the details of the attorney general’s leadership role creates nationwide recognition of its importance. The public defender’s lack of a similarly situated head of the institution has important implications for its public perception and capabilities.

In theory, the head of the public defender institution could serve a role similar to the inspector general’s. The inspector general, a relatively recent

220. See, e.g., *Organizational Chart*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/publications/organizational-chart> [https://perma.cc/CA93-P5QQ] (describing the organization of the Ohio executive branch).

221. See, e.g., *Executive Branch*, MICHIGAN.GOV, https://www.michigan.gov/som/0,4669,7-192-29701_29702--,00.html [https://perma.cc/6JJG-8ESP] (describing the numerous agencies within the executive branch).

222. See, e.g., *Branches of Government in New York State*, N.Y. ST. SENATE, <https://www.nysenate.gov/branches-government-new-york-state> [https://perma.cc/9BLW-B9SB].

223. See *infra* Section IV.B.

224. See sources cited *supra* note 41 (describing the principle of the unitary executive).

225. See *What Does an Attorney General Do?*, NAT’L ASS’N ATT’YS GEN., https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php [https://perma.cc/48PZ-MXV6].

226. *Id.*

227. *Id.*

innovation within the nation's governmental management, plays an important part in any government management system.²²⁸ It was created by statute and, although it sits within the executive branch, has sufficient independence to fulfill its duty to investigate fraudulent and wasteful activity by executive agencies.²²⁹ In some ways, the inspector general model would easily transfer to the leading public defender, as the public defender institution already serves as a "check" on the government's intrusion into a citizen's life through the criminal process.

The Inspector General Act of 1978 established the appointment and removal process for the inspector general.²³⁰ The offices are usually comprised of permanent staff who audit executive agencies.²³¹ Some inspectors general are chosen by the chief executive officer and confirmed by the legislature, which at the federal level corresponds to the President and the Senate.²³²

The inspector general is also viewed as sitting uncomfortably at the intersection of the separation of powers and branch assignments.²³³ Existing in the executive branch, an inspector general reports directly to Congress.²³⁴ In the criminal process, the leading public defender, who would mimic the inspector general, would report to the citizenry, as represented by the

228. *Organization, Mission and Functions Manual: Office of the Inspector General*, U.S. DEP'T OF JUST., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-inspector-general> [<https://perma.cc/XA8B-C5WN>].

229. See Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. §§ 1-13 (2018)); 22 U.S.C. § 3929 (establishing an Inspector General for the State Department and Foreign Service); 50 U.S.C. § 3517 (establishing an Inspector General for the Central Intelligence Agency); Andrew McCaense Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1296 (2019).

230. 5 U.S.C. app. § 3.

231. Wright, *supra* note 229, at 1297.

232. Inspectors general are presidential appointees, but they must be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability" and may be removed only with special notice to Congress. 44 U.S.C. § 3902(a)-(b). Inspectors general are also required to appoint their own assistants and may demand information, issue subpoenas, and inquire into matters within their jurisdiction without interference from the heads of their departments. *Id.* § 3903(b).

233. Wright, *supra* note 229, at 1299 (noting the problematic positioning of inspectors general in inter-branch disputes). For more information about the history and issues surrounding inspectors general, see generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993). For a perspective emphasizing the importance of the independence of inspectors general, see Brian D. Miller, *Independence of Inspectors General Should Not Be Compromised by Congress*, HILL (Aug. 13, 2018, 8:00 AM), <https://thehill.com/opinion/white-house/401491-independence-of-inspectors-general-should-not-be-compromised-by-congress> [<https://perma.cc/8PJQ-QN3T>].

234. *Organization, Mission and Functions Manual: Office of the Inspector General*, *supra* note 228; see also Wright, *supra* note 229, at 1295-96.

legislature, about any misbehavior by representatives of the executive branch. Further, just as discovery rules require the government to turn over all exculpatory evidence to the defense in a criminal case,²³⁵ the public defender, acting similarly to the inspector general, could notify the court of any constitutional violations.

Despite sitting within the executive branch, the inspector general possesses a high degree of independence.²³⁶ States like New Mexico sought to achieve this same level of independence when they made the public defender an independent part of the judicial branch.²³⁷ This is also the same decision Congress made for the federal public defenders.²³⁸ However, in describing the leading public defender as a type of inspector general, the public defender institution will attain a similar position and level of authority as an inspector general might have in larger battles for state funding. If the public defender institution is viewed as a system for ensuring that “the screens work,” then funders might be more supportive of providing the institution with the resources and supervision it needs.²³⁹

In addition to acting as an opposing entity to prosecutor’s offices, public defenders need latitude to be able to oppose some actions of the court while still acting in the best interest of their clients. Thus, the public defender office requires a structural design enabling it to take actions to ensure the court system is functioning properly without fear of reprisal. Under certain branch

235. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution’s suppression “of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”).

236. For a discussion of a different independence issue, see generally Epps & Ortman, *supra* note 86. Government lawyers who argue cases before the Supreme Court are able “act strategically to play for bigger long-term victories, while defense lawyers must zealously advocate for the interests of their clients—even when they conflict with the interests of criminal defendants as a whole.” *Id.* (manuscript at i). To address these limitations, they envision a Defender General position that has more independence than the public defender when litigating at the appellate level. *Id.*

237. See *supra* Part I.

238. Patton, *supra* note 124, at 337 (describing the inherent conflict in the fact that federal public defenders who are “funded, managed, and supervised by the very judges in front of whom defenders must vigorously defend their clients”).

239. “Making the screens work” refers to the function that public defenders serve, which protects all members of society.

The criminal justice system is itself composed of a series of “screens,” of which trial is but one. By keeping innocents out of the process and, at the same time, limiting the intrusion of the state into people’s lives, each of these screens functions to protect the values of human dignity and autonomy while enforcing our criminal laws.

John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 301–02 (1980) (citations omitted). Public defenders “make the screens work.” *Id.* at 303.

assignments, the public defender loses its ability to act antagonistically against certain entities because the institution of the public defender is dependent on these entities for funding or other institutional support.²⁴⁰ Bringing the public defender up to the state level with representation of its interests in the form of an inspector general-type figure would help to make the public defender coequal to other governmental authority, and allow the institution to challenge the powers that be without fear of retaliation that could undermine its duty to serve its clients.

B. MANAGEMENT BY DIVERSE BOARDS OR COMMISSIONS

Another important question for public defense delivery is how to appropriately construct a board or commission tasked with regulating the services provided. Public defender boards are important institutional players as they can develop and promulgate rules that adapt basic constitutional and ethical guidance to the unique circumstances of their state.²⁴¹ A closer look at the states with public defender boards or commissions overseeing the delivery of services conveys the importance these groupings seem to place on formal guidelines. Five of the 20 states with such a construction for public defender management have formal caseload standards.²⁴² More interestingly, all but one of the states that turn to boards or commissions to manage the public defender under the judicial branch of government have formal caseload guidelines.²⁴³ These results suggest boards and commissions under judicial branches recognize the importance of caseload standards.²⁴⁴

240. For example, in New Mexico, the chief public defender was held in contempt of court after he told the court that the public defender could not adequately represent the clients assigned to the office. Haywood, *supra* note 7; *see supra* Part I.

241. *See, e.g., State Board of Public Defense*, MINN. LEGIS. REF. LIB, <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1323> [<https://perma.cc/V7BT-X88F>] (last updated Jan. 10, 2020). Minnesota's State Board of Public Defense appoints the state and judicial district public defenders and "approves standards for the offices of the state and district public defenders and for the conduct of all appointed counsel systems as established by the state public defender." *Id.*

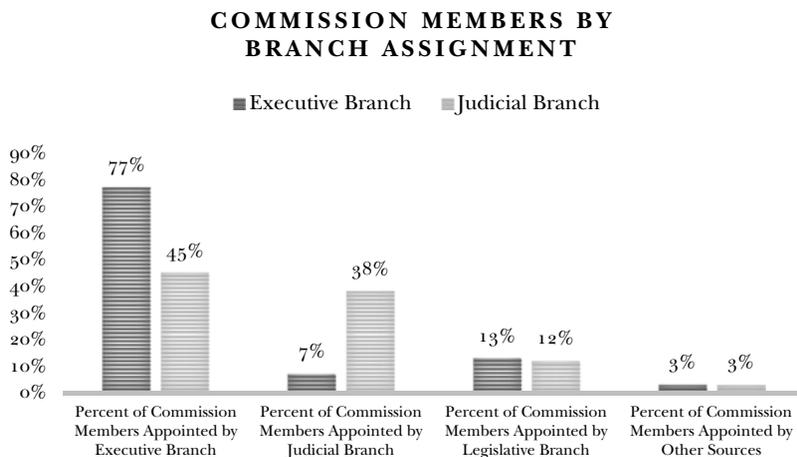
242. A Brennan Center report lists that, as of 2013, only five states had binding statewide workload standards. FURST, *supra* note 23, at 8 n.84 (citing *In Your State*, GIDEON AT 50, <http://gideonat50.org/in-your-state> [<https://perma.cc/6G64-ZEDN>] (under the "Select a Map" heading, choose "Workload Standards" for a map showing the various level of workload standards across the country)). These states are Arizona, Florida, Massachusetts, Missouri, and Oregon. *Id.*

243. Colorado, Massachusetts, Minnesota, and Oregon all meet these standards. *Id.* The only state that is managed by a commission or board under the judicial branch and does not have formal guidelines is New Mexico. *Id.* As detailed in the introduction of this Article, New Mexico positions its public defender management under the judicial branch but specifies that the institution is independent of the branch. *See supra* Part I.

244. The American Bar Association ("ABA") has noted that such caseload standards are integral to well-performing public defense services. The ABA commissioned studies in Missouri,

Despite the benefits of a public defender commission, the aforementioned concern regarding how a public defender could go about seeking improvements or addressing problems makes the board makeup important.²⁴⁵ The board should consist of criminal justice system stakeholders and those who are sensitive to the particulars of indigent defense work.²⁴⁶ This composition, however, risks employing a board comprised of individuals with competing concerns. Below is a Figure showing how boards are comprised in a given state, divided by branch assignment. Because public defender systems without a statewide organization scheme would not require a statewide board or commission to manage them, public defenders unassigned to a branch are excluded from this figure.

Figure 1. Commission Members



As noted in Figure 1 above, when a board or commission exists in a public defender managed under the executive branch, approximately 77 percent of its members are appointed by the executive branch.²⁴⁷ This shows that even though the commission is ostensibly created to preserve some degree of

Louisiana, Colorado, and Rhode Island to determine state-specific workload standards as part of its effort to improve the delivery of services. *See* sources cited *supra* note 133.

245. *See supra* Section III.B.

246. State statutes do not specifically require board member to be affiliated with the public defenders. For example, in Minnesota, the board consists of seven members, including two public members appointed by the governor; four attorneys; and a district court judge, appointed by the supreme court. *State Board of Public Defense, supra* note 241.

247. Appendix H includes another version of Figure 1 to provide greater clarity.

separation from the executive branch, its members primarily depend upon that branch of government in its constitution. However, Figure 1 also demonstrates there is more diversity in public defender institutions managed under the judicial branch, with about 45 percent appointed by the executive branch, 38 percent appointed by the judicial branch, and 15 percent appointed by other sources, including the legislative branch. If a state were to adopt the recommendations of this Article and place the public defender under the executive branch, it would need to establish an appointment procedure that adopts the diverse appointment procedure more prevalent among judicially-managed public defense offices.²⁴⁸

While there are many definitions of diversity, the diversity referred to here is the diversity of branch affiliation of individuals appointing the boards. Branch affiliation is important because different branch affiliations are accompanied by divergent perspectives, goals, connections, or metrics for measuring success, and these differences would likely be reflected in who various actors would appoint to the board. It is unclear why commissions or boards for states with public defender institutions managed under the judicial branch have more diverse appointments than those with executive branch management. Perhaps it results from a recognition that as a central part of the criminal process, the courts should not also be primarily responsible for determining which individuals should serve on a body tasked with advancing and protecting the rights afforded those defendants represented by the public defender.²⁴⁹ Regardless, this diversity should serve as an important example of what a commission or board should look like in a system aiming to ensure the delivery of indigent defense services above constitutional and ethical reproach.

The primary advantages of having diversely populated commissions or boards are twofold. First, the existence of various criminal justice stakeholders involved in the regulation of the public defender ensures the type of procedural justice that comes from the process appearing fair at first glance.²⁵⁰ Second, it ensures there will be a diversity of thoughts and

248. This would avoid a situation where virtually all members of a board are appointed by the executive branch.

249. David Patton elaborates:

The Constitution guarantees anyone charged with a crime the right to a defense attorney regardless of ability to pay, and that attorney has the ethical obligation to provide a zealous defense, free from any conflicting outside influence. And yet the system of federal public defense which provides counsel to over 80% of all federal criminal defendants, is funded, managed, and supervised by the very judges in front of whom defenders must vigorously defend their clients.

Patton, *supra* note 124, at 337 (footnotes omitted).

250. Tracey Meares explains:

viewpoints regarding how to ensure the protection of the defendant's rights through the selected manner of providing representative services. Board composition is an important consideration for the functionality of the public defender. For example, a board populated by law enforcement might have a very different vision than a board populated solely by public defenders. Although the fundamental laws establishing the public defender and guiding ethical attorney practice may be stagnant, the appropriate method for ensuring compliance with these standards is often subject to interpretation.²⁵¹ A general diversity in viewpoint could facilitate standards that more effectively enable the public defender to meet its obligations. Such diversity could also foster stalemates, but those might be preferable to the promulgation of rules that are difficult, or inappropriate, for the public defender institution to abide by.

Such commissions can have regulatory authority over the delivery of services. This effectual law-making authority ensures the board can set standards that must be followed for each service delivery mechanism.²⁵² The ability to point to these regulations can also ensure a public defender or public defender office will not be forced to comply with unconstitutional or unethical demands from local stakeholders. The Sixth Amendment and appropriate ethical rules would form the basis of the board regulations, but because those can be subject to interpretation, a public defender would benefit from clear rules set forth by their overseeing commission. For example, a commission could set standards for the maximum number of cases a public defender can be assigned, thereby allowing the public defender to refuse appointments without fear of a contempt finding from the court attempting to assign the client.²⁵³

Procedural justice posits that people are likely to comply with the law, cooperate with authorities, and engage with them when they are treated fairly, which the public tends to interpret through how they are treated as opposed to focusing on the outcomes of authorities' decisions. Research suggests that the way police treat citizens impacts how people think of themselves, especially how they think of themselves as citizens. Positive changes in procedural justice may encourage more democratic participation in government.

Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1525 (2017).

251. See generally John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994) (developing a definition relating to scarce resource allocations); Freedman, *supra* note 196 (discussing differences between ethical rules and Sixth Amendment cases); Strickland v. Washington, 466 U.S. 668 (1984) (providing general standard of constitutionally ineffective assistance of counsel).

252. See, e.g., *State Board of Public Defense*, *supra* note 241. Minnesota's State Board of Public Defense "approves standards for the offices of the state and district public defenders and for the conduct of all appointed counsel systems as established by the state public defender." *Id.*

253. As was the difficulty in New Mexico. See *supra* Part I.

As mentioned above, only 12 states have formal caseload guidelines, a tool the ABA deems necessary for effective public defense representation.²⁵⁴ These guidelines operate to limit the number of cases for which an individual public defender can assume responsibility.²⁵⁵ Both the Sixth Amendment and each state's ethical requirements for attorney practice already limit the number of cases an attorney may have to those in which the attorney can practice effectively and maintain loyalty to their clients, but neither of those set forth specific numbers.²⁵⁶ In 1973, the National Legal Aid and Defender Association prescribed caseload guidelines to provide a clear indication of when a public defender would not be in line with constitutional and ethical requirements.²⁵⁷ These types of specific caseload limits ensure that a court or service manager will not be tasked with making its own determination of whether a public defender is overwhelmed, as those determinations could be subject to the individual or system's own desire to move cases along.²⁵⁸ Of those states with formal guidelines, two are in states with public defender systems managed via boards or commissions, three are in states designated as being under judicial management, and two are in states under executive management.²⁵⁹

254. See text accompanying note 244 (describing ABA studies on caseload guidelines).

255. However, note:

[A] caseload standard is just a beginning. Without adequate support staff, training, and supervision, a standard will not do much to alleviate case overload. Some jurisdictions, such as Florida and Indiana, have used unit staffing formulas in conjunction with attorney workload standards. In such a system, ratios of adequate support staff to attorneys are developed. For example, for every four felony attorneys there should be one paralegal, one investigator, and one secretary. The bottom line is that caseload or workload standards should be viewed as one part of an overall program to ensure that defender offices have adequate staff and resources to properly represent clients.

SPANGENBERG GRP., U.S. DEP'T OF JUST., KEEPING DEFENDER WORKLOADS MANAGEABLE 7 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf> [<https://perma.cc/V63T-RKAF>].

256. U.S. CONST. amend. XI; see, e.g., CAL. RULES OF PRO. CONDUCT r. 1.1 (2020).

257. See generally NAT'L LEGAL AID & DEF. ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976), <http://www.nlada.org/defender-standards/guidelines-legal-defense-systems> [<https://perma.cc/TgR2-JYWT>] (providing a copy of the guidelines). These guidelines indicated that caseload limits should reflect national standards and "should take into consideration the following factors: (a) objective statistical data; (b) factors related to local practice; and (c) an evaluation and comparison of the workload of experienced, competent private defense practitioners." *Id.* § 5.1.

258. Defined caseload limits allow for a more objective approach: "Whenever the Defender Director, in light of the system's established workload standards, determines that the assumption of additional cases by the system might reasonably result in inadequate representation for some or all of the system's clients, the defender system should decline any additional cases until the situation is altered." *Id.* § 5.3.

259. See *infra* Appendix A.

Accordingly, there are two changes to state management of public defense services that would have a significant impact on the institution's stability and effectiveness. First, the inspector general should serve as a model for shifting the current understanding of public defender leadership. Although inspectors general existed in the military before being introduced into governmental management, the Office of the Inspector General has only existed since the late 1970s, almost two decades after *Gideon* ensured the right to counsel.²⁶⁰ It has since grown into a stabilizing and expected oversight tool of federal agencies.²⁶¹ The inspector general version of the public defender would also be better served by responding to oversight or influence by a diverse board that articulates its parameters. These changes would not be overwhelming and could easily be adopted by the vast majority of states. The institution would need to exist under the executive branch in order to function as the evaluator of state executive power, but the addition of a board and a sole figurehead would provide grounding and influence in larger state discussions.

V. CONCLUSION

Although this Article provides a more consequentialist approach to indigent defense system design, it does not ignore some of the questions of normative ethics. It is only with a governmental check, like the public defender, that a citizenry can truly have confidence in its criminal process. Such a check, however, must maintain its efficiency and efficacy to be truly meaningful. The institutional structures recommended in this Article would enable the public defender to do so.

I found that, of the 33 states that manage the public defender under the executive branch, all of them receive the bulk of their funding from state budget appropriations.²⁶² Of those in the judicial branch, all receive a slightly lower percentage of their funding from the state.²⁶³ None of the public defense services managed at the local level receive a significant level of their funding from state appropriations.²⁶⁴ There is, as mentioned above, some scholarly debate about whether local or statewide funding is preferable for state services, but scholars have found that state budget appropriations provide more equitable funding and are better able to ensure uniform

260. *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963); *Organization, Mission and Functions Manual: Office of the Inspector General*, *supra* note 228.

261. For background information about the inspectors general, see Wright, *supra* note 229, at 1295-96.

262. See *supra* Section III.A.1.

263. See *supra* Section III.A.1.

264. See *supra* Section III.A.2.

practices across a state.²⁶⁵ Such uniformity is critical for public defense services because all public defenders are required to meet the same constitutional standard of effectiveness.²⁶⁶

My findings may suggest that assigning the public defender to a state branch, and not local governance, is the only important consideration. That would, however, be an incomplete analysis. The source of funding is not the sole issue in placing the public defender within a state governmental scheme and it should not be dispositive. Both the source and the *amount* of funding is important for the public defender's long-term stability.²⁶⁷ The institution's ability to request more resources when it deems the current amount inadequate to fulfill its obligations, without facing judicial or extrajudicial consequences for doing so, is equally as important. Here, the public defender institution requires an authoritative and independent presence that is able to pursue the institution's agenda within larger state structures. It can do so with a leader similar to an inspector general and a governing board composed of diverse state actors.

Each of the prescriptions outlined above would not require an entirely different conceptualization or reconstruction of the public defender than that described by the Warren Court in *Gideon v. Wainwright*.²⁶⁸ Instead, it would call for an open conversation about how to fit this important constitutional right into a system of state management marked by fierce competition for state resources. It would also encourage discussion about how a system should look when one system actor is tasked with assessing criminal liability to a population served by another system actor. Although such realities might suggest the very existence of a public defender is an inherent conflict, the state is not ill-equipped to combat this natural tension. It would require reimagining the public defender as something more akin to its original design, a check on the power of the government, while exploring various tools at its disposal to accomplish this objective.

As the New Mexico example conveys, the branch assignment of the public defender has important consequences. Both the executive branch and the judicial branch of state governments have important responsibilities and

265. See, e.g., CARLSON ET AL., *supra* note 165, at 5 (describing the debate). This research discusses New Jersey's shift to primary state funding of the trial courts, which led to greater uniformity of programs and business practices in the courts. *Id.* at 27.

266. Local funding is subject to greater fluctuation year to year and therefore may not provide enough to cover the fixed costs of public defender offices. *See id.* at 12–13.

267. See *supra* Section II.B (describing the necessity of stable funding in the context of the state versus local management debate).

268. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (describing the public defender).

tools to employ in fulfilling those responsibilities.²⁶⁹ A state's obligation to provide indigent defense is a similar, but still divergent responsibility to its obligation to use the criminal justice process to ensure the civil liberty of its citizenry. It is only through careful analysis of how branch assignment limits or hinders a state's ability to meet the important obligation of providing counsel to indigent defendants that an appropriate system can be designed and adopted.

This Article provides a lasting and dependable blueprint for public defender institutions struggling to clearly reflect the promises of constitutionally effective representation. It accomplishes this by both confirming the state's administrative ability to provide this representation, while also articulating necessary changes. Identifying the problems associated with branch assignment allows the appropriate decision-makers to adopt an institutional design that more fully captures the role of the public defender within the larger criminal justice framework. This is a long-delayed tool that helps to solve the puzzle of how a state can ensure a fair process for indigent defendants facing criminal charges from the state itself.

²⁶⁹. See generally Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (clarifying the different responsibilities of actors in each of the three branches of government).

APPENDIX A: OVERVIEW OF BRANCH DESIGNATIONS

Jurisdiction	Branch Assignment	States with Specific Branch Designation in PD Statutes	States with Specific Agency Designation in PD Statutes	States with Chief Defenders Assigned by Particular Branch	States with PD Services Managed by a Board or Commission
Alabama	Executive				
Alaska	Executive		✓		
Arizona	Executive				
Arkansas	Executive				✓
California	Branchless				
Colorado	Judicial	✓			✓
Connecticut	Judicial	✓			✓
Delaware	Executive			✓	
D.C.	Independent				
Florida	Executive				
Georgia	Executive	✓			
Hawaii	Executive		✓		
Idaho	Executive		✓		✓
Illinois	Branchless				
Indiana	Judicial				
Iowa	Executive				
Kansas	Executive				✓
Kentucky	Executive				
Louisiana	Executive	✓			✓
Maine	Executive				✓
Maryland	Executive	✓			✓
Massachusetts	Judicial				✓
Michigan	Executive		✓		
Minnesota	Judicial	✓			✓

Mississippi	Executive			✓	
Missouri	Judicial	✓			
Montana	Executive				
Nebraska	Executive			✓	
Nevada	Executive		✓		
New Hampshire	Executive				✓
New Jersey	Executive			✓	
New Mexico	Judicial				
New York	Branchless	✓			
North Carolina	Judicial		✓		
North Dakota	Hybrid				✓
Ohio	Executive				✓
Oklahoma	Executive				✓
Oregon	Judicial	✓			✓
Pennsylvania	Branchless	✓			
Rhode Island	Executive			✓	
South Carolina	Executive				✓
South Dakota	Executive		✓		
Tennessee	Executive				
Texas	Judicial		✓		✓
Utah	Executive				
Vermont	Executive			✓	
Virginia	Hybrid				✓
Washington	Judicial			✓	
West Virginia	Executive				✓
Wisconsin	Executive				✓
Wyoming	Executive			✓	

APPENDIX B: STATES WITH SPECIFIC BRANCH DESIGNATION IN PUBLIC DEFENDER GOVERNING STATUTES

State	Public Defender Language in Constitution/Statute	Branch Assignment
Colorado	COLO. REV. STAT. ANN. § 21-1-101 (1) (West 2016). The office of state public defender is hereby created and established as an agency of the judicial department of state government.	Judicial
Connecticut	CONN. GEN. STAT. § 51-289(l) (2016). The commission shall be an autonomous body within the Judicial Department for fiscal and budgetary purposes only.	Judicial
Georgia	GA. CODE ANN. § 17-12-1 (b) (2019). The Georgia Public Defender Council shall be an independent agency within the executive branch of state government.	Executive
Louisiana	LA. STAT. ANN. § 15:146(A) (1) (2019). There is hereby created and established as a state agency within the office of the governor the Louisiana Public Defender Board to provide for the supervision, administration, and delivery of a statewide public defender system, which shall deliver uniform public defender services in all courts in this state.	Executive
Maryland	MD. CODE ANN., CRIM. PROC. § 16-202 (West 2011). There is an Office of the Public Defender in the Executive Branch of State government.	Executive
Minnesota	MINN. STAT. § 611.215(1)(a) (West 2016). The State Board of Public Defense is a part of, but is not subject to the administrative control of, the judicial branch of government.	Judicial
Missouri	MO. REV. STAT. § 600.019(1) (2016). The “Office of State Public Defender” is hereby created and established as an independent department of the judicial branch of state government.	Judicial
New York	N.Y. COUNTY LAW §§ 716–721 (McKinney 2020). The board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties. ²⁷⁰	Branchless
Oregon	OR. REV. STAT. § 151.213(1) (2019). The Public Defense Services Commission is established in the judicial branch of state government.	Judicial
Pennsylvania	16 PA. STAT. AND CONS. STAT. ANN. §§ 9960.3–9960.4 (West 2001). In each county except the County of Philadelphia, there shall be a public defender, appointed as herein provided. . . . The public defender shall be appointed by the Board of County Commissioners.	Branchless

²⁷⁰. Indigent defense systems are primarily established and funded by counties, but the Office of Indigent Legal Services was created in 2010 to monitor, study, and make efforts to improve the quality of indigent defense services provided by the counties. N.Y. EXEC. LAW § 832 (McKinney 2020).

APPENDIX C: STATES WITH SPECIFIC AGENCY DESIGNATION IN PUBLIC DEFENDER
STATUTES

State	Public Defender Language in Constitution/Statute	Branch Assignment
Alaska	ALASKA STAT. § 18.85.010 (2018). There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants.	Executive
Hawaii	HAW. REV. STAT. § 802-8 (2014). An office of state public defender is hereby created within the department of budget and finance for administrative purposes.	Executive
Idaho	IDAHO CODE §§ 19-849(1), 67-2601(1) (2019). There is hereby created in the department of self-governing agencies the state public defense commission. The department shall . . . be an executive department of the state government.	Executive
Michigan	MICH. COMP. LAWS SERV. §§ 780.983(c), 780.985(1) (LexisNexis 2019). The Michigan Indigent Defense Commission is established within the department. “Department” means the department of licensing and regulatory affairs.	Executive
Nevada	NEV. REV. STAT. § 180.010(1) (2019). The Office of State Public Defender is hereby created within the Department of Indigent Defense Services.	Executive
North Carolina	N.C. GEN. STAT. § 7A-498.2(a) (2019). The Office of Indigent Defense Services, which is administered by the Director of Indigent Defense Services and includes the Commission on Indigent Defense Services and the Sentencing Services Program . . . is created within the Administrative Office of the Courts.	Judicial
Texas	TEX. GOV’T CODE ANN. § 79.033(a) (West 2019). The [Texas Indigent Defense] [C]ommission is administratively attached to the Office of Court Administration of the Texas Judicial System.	Judicial
South Dakota	S.D. CODIFIED LAWS § 23A-40-17 (2016). There is hereby created in the Office of the State Treasurer a court appointed attorney and public defender payment fund.	Executive

APPENDIX D: STATES WITH CHIEF DEFENDERS ASSIGNED BY A PARTICULAR
BRANCH OF GOVERNMENT

State	Public Defender Language in Constitution/Statute	Branch Assignment
Delaware	DEL. CODE ANN. tit. 29, § 4602(a) (2017). The Office of Defense Services shall be headed by the Chief Defender. The Chief Defender shall be . . . selected by the Governor.	Executive
Mississippi	MISS. CODE ANN. § 99-18-1 (1) (2019). There is hereby created the Office of State Public Defender. The Office of State Public Defender shall consist of a State Defender who shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years and staffed by any necessary personnel as determined and hired by the State Defender.	Executive
Nebraska	NEB. REV. STAT. § 29-3910 (2016). Whenever the district judge or judges determine that a public defender should be named for his, her, or their judicial district, as provided . . . the fact of such determination shall be certified to the Governor.	Executive
New Jersey	N.J. STAT. ANN. § 2A:158A-4 (West 2011). The head of the Office . . . [of] the Public Defender . . . shall be appointed by the Governor with the advice and consent of the Senate for a term of 5 years and until the appointment and qualification of his successor.	Executive
Rhode Island	12 R.I. GEN. LAWS ANN. § 12-15-2 (West 2006). The governor with the advice and consent of the senate shall appoint a member of the bar of this state who has been admitted to practice law for at least five (5) years to fill the office of the public defender.	Executive
Vermont	VT. STAT. ANN. tit. 13, §§ 5251-5252 (2018). The Office of Defender General is established. The Defender General shall be appointed by the Governor subject to the advice and consent of the Senate.	Executive
Washington	WASH. REV. CODE ANN. § 2.70.010 (West 2017). The supreme court shall appoint the director of the office of public defense from a list of three names submitted by the advisory committee The director shall serve at the pleasure of the supreme court	Judicial
Wyoming	WYO. STAT. ANN. § 7-6-103(a)-(b) (2019). There is created the office of the state public defender. The office of the state public defender shall be deemed a state agency for budgeting purposes The state public defender shall be appointed by and shall serve at the pleasure of the governor.	Executive

APPENDIX E: STATES WITH PUBLIC DEFENSE SERVICES MANAGED BY A BOARD OR COMMISSION

State	Number of Board or Commission Members	Member Appointment Process	Branch Assignment
Arkansas	7	All appointed by the Governor	Executive
Colorado	5	All appointed by the state Supreme Court	Judicial
Connecticut	7	Governor appoints chairman, Chief Justice appoints two members, legislative leaders appoint remaining four members	Executive
Idaho	9	One appointed from the Senate, one from the House, one from the chief justice of the state Supreme Court, six appointed by the governor and confirmed by the Senate	Executive
Kansas	9	All appointed by the Governor, subject to confirmation by the Senate	Executive
Louisiana	15	Governor appoints six members and designates chairman, chief justice of state Supreme Court appoints two, president of the Senate appoints one, speaker of the House of Representatives appoints one, president of state bar association appoints two members, historically black legal society appoints one member, chairman of children's code committee selects one, executive director of interfaith conference selects one. All appointments are subject to confirmation by the Senate.	Executive
Maine	9	All appointed by the Governor and confirmed by the Legislature	Executive
Massachusetts	15	Two appointed by the Governor, two appointed by the president of the Senate, two appointed by the speaker of the House of Representatives, nine appointed by the justices of the Supreme Court	Judicial
Minnesota	7	Four appointed by the state Supreme Court, three appointed by the Governor	Judicial
New Hampshire	24	The New Hampshire Public Defender is an independent nonprofit but is overseen by a Judicial Council of 24 appointed judges, lawyers and citizens in the executive branch who negotiate the public defender's contract	Executive
New Mexico	11	One by the Governor, three by the Chief Justice of the Supreme Court, three by the dean of the University of New Mexico School of Law, four by the legislative leaders	Judicial (Independent)

North Dakota	7	Two appointed by the Governor, two from the legislative assembly, two by the Chief Justice of the North Dakota Supreme Court, and one by the Board of Governors of the North Dakota State Bar Association	Hybrid
Ohio	9	Chairman appointed by the Governor with advice and consent of the Senate, four shall be appointed by the Governor, four by the Ohio Supreme Court	Executive
Oklahoma	5	All appointed by the Governor with the advice and consent of the Senate	Executive
Oregon	7	All appointed by the Chief Justice; the Chief Justice also serves as a nonvoting ex officio member	Judicial
South Carolina	13	Nine appointed by the Governor, two by the Chief Justice of the South Carolina Supreme Court, one by House Judiciary Committee, one by Senate Judiciary Committee. Chairman selected by the membership	Executive
Texas	13	Eight ex officio members (four from the legislative branch and four are current judges), the remaining five are all appointed by the Governor with the advice and consent of the Senate	Executive
Virginia	14	Two are from the House and Senate Committees for Courts of Justice, one from Virginia State Crime Commission, one from Executive Secretary of the Supreme Court, two attorneys designated by the state bar, two appointed by the Governor, three appointed by the Speaker of the House of Delegates, three appointed by the Senate Committee on Rules	Legislative
West Virginia	9	All appointed by the Governor	Executive
Wisconsin	9	All appointed by the Governor with advice and consent of the Senate	Executive

APPENDIX F: PUBLIC DEFENDER FUNDING STATUTES

State	Funding Scheme
Alabama	ALA. CODE § 15-12-45(b) (LexisNexis 2018): The operating expenses and staff salaries and benefits for the offices of the public defender shall be approved in advance by the director as part of an annual budget for the subject public defender's office and, once the budget is approved, shall be paid by the state from funds appropriated annually from the Fair Trial Tax Fund or other funds appropriated by the Legislature for this purpose. The expenses shall include, but not be limited to, the salary, benefits, and expenses of all eligible employees and positions, training and education, travel, research, equipment, and supplies.
Alaska	
Arizona	ARIZ. REV. STAT. ANN. § 11-588 (2020): The state provides a fund to the Arizona Criminal Justice Commission who then administers it. This is not the sole source of funding, though, as counties must fund defense offices in part. ARIZ. REV. STAT. ANN. § 41-2409 (2017): The funding is disbursed to each county based upon their three-year average of felony filings. The board of supervisors that supervises the funding of public defenders' offices reports to each county board of supervisors, the legislature, the joint legislative budget committee, the chief justice of the supreme court, and the attorney general. The criminal justice enhancement fund is established consisting of monies collected pursuant to § 12-116.01 and monies available from any other source. The state treasurer shall administer the fund.
Arkansas	ARK. CODE ANN. § 16-87-302 (2019): (a) The Arkansas Public Defender Commission shall be responsible for the payment of the following: (1) The salaries of public defenders; (2) The salaries of secretaries and other support staff of the public defender's office; (3) The payment of the costs of certain expenses, as authorized by § 16-87-212. (b) Each county or counties within a judicial district shall be responsible for the payment of the following: (1) (A) The cost of facilities, equipment, supplies, and other office expenses necessary to the effective and efficient operation of the public defender's office. (B) Funding for these expenditures may be from: (i) A county administration of justice fund; (ii) A county's general fund; (iii) A county's public defender fund; (iv) A county's indigent defense fund; (v) A county's public defender investigator fund; or (vi) Any other fund authorized by law for that purpose.
California	
Colorado	
Connecticut	CONN. GEN. STAT. ANN. §§ 51-289 to 51-300 (West 2016): The Public Defender Services Commission in Connecticut is responsible for policymaking, appointments of all personnel, and compensation matters. The commission is located within the judicial department for fiscal and budgetary purposes only.
Delaware	DEL. CODE ANN. tit 29, §§ 4601-4607 (2017): Indigent defense in Delaware is completely state funded and is administered by the Office of the Public Defender, a state agency.
District of Columbia	In D.C., indigent defense services are provided by the Public Defender Service (PDS), a federal program; the service is federally funded, and funds are held in the U.S. Treasury.
Florida	The Justice Administrative Commission (JAC) provides administrative services to the Offices of State Attorney, Public Defender . . .

	<p>The Florida State Constitution states in article V, section 14:</p> <p>(a) All justices and judges shall be compensated only by state salaries fixed by general law. Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law. . . . (c) No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel or the offices of the clerks of the circuit and county courts performing court-related functions.</p> <p>FLA. STAT. ANN. § 27.61 (West 2014): The Public Defenders Revenue Trust Fund is created within the Justice Administrative Commission. This fund is used for the purpose of funding the activities of public defenders.</p>
Georgia	<p>GA. CODE ANN. § 17-12-1 (2019): The Georgia Public Defender Standards Council is an independent agency within the executive branch of the state government that is responsible for overseeing indigent defense in the state. The council acts as the fiscal officer for all circuit public defender offices and is responsible for maintaining records of all monies received from each governing authority.</p>
Hawaii	<p>HAW. REV. STAT. §§ 802-1, 802-8 to 802-9 (2014): For administrative purposes, the office is located within the state's Department of Budget and Finance. It is administered by a defender council of five members.</p>
Idaho	<p>IDAHO CODE § 19-860(1) (2019): If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender or a joint office of public defender, the board shall:</p> <p>Prescribe the qualifications of such public defender and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis.</p>
Illinois	<p>725 ILL. COMP. STAT. 105/1 to 105/11 (2018): Because each county administers programs independently, no central agency or organization at the state level provides county expenditure in a central location.</p>
Indiana	<p>IND. CODE ANN. §§ 33-40-1-6, 33-40-2-4 (West 2018): All claims for salary or other expenses authorized by this chapter shall be allowed and approved by the supreme court. There is appropriated annually out of funds of the state not otherwise appropriated a sufficient amount to pay salaries and expenses authorized by this chapter. All fees for services rendered by the state public defender or any of the state public defender's deputies under this chapter shall be paid directly to the state treasurer, to be expended for any necessary expenses of the office of the state public defender, including salaries of the necessary deputies, in addition to the state general funds otherwise appropriated by the general assembly for the payment of the expenses.</p>
Iowa	<p>IOWA CODE §§ 13B.1–13B.12 (2019): There is established in the state general fund an account . . . known as the state public defender operating account. The state public defender may bill a county for services. . . . The Office of the State Public Defender is responsible for coordinating Iowa's Indigent Defense System. Our mission is to ensure that all indigent persons in Iowa are provided high</p>

	<p>quality legal representation in criminal, juvenile, and other eligible proceedings in the most efficient and fiscally responsible manner.²⁷¹</p> <p>The position of state public defender is established within the department of inspections and appeals. The governor shall appoint the state public defender, who shall serve at the pleasure of the governor, subject to confirmation by the senate, no less frequently than once every four years, whether or not there has been a new state public defender appointed during that time, and shall establish the state public defender's salary.</p>
Kansas	
Kentucky	<p>KY. REV. STAT. ANN. § 31.185 (West 2015): Attorneys are paid by a special account which is funded by counties, local governments, etc. The attorney may use the same facilities as the prosecution.</p> <p>KY. REV. STAT. ANN. § 31.010: There is hereby established as an independent agency of state government, attached for administrative purposes to the Justice and Public Safety Cabinet, the Department for Public Advocacy, in order to provide for the establishment, maintenance, and operation of a state sponsored and controlled system for: (1) The representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement; and (2) The pursuit of legal, administrative, and other appropriate remedies to ensure the protection of the rights of persons with disabilities, independent of any agency that provides treatment, services, or rehabilitation to persons with disabilities.</p>
Louisiana	<p>LA. STAT. ANN. § 15:168 (2016): Funding for public defenders comes from a lump sum that is administered by the board to judicial districts where it is apportioned by the district public defender.</p>
Maine	
Maryland	<p>MD. CODE ANN., CRIM. PROC. § 16-402 (West 2019): Funds for carrying out this title shall be as provided in the State budget.</p>
Massachusetts	
Michigan	
Minnesota	<p>MINN. STAT. § 611.216 (West 2016): The Board of Public Defense shall establish procedures for public defense corporations based in this state to apply for funding by the legislature.</p> <p>MINN. STAT. § 611.27: In distributing funds to district public defenders, the board shall consider the geographic distribution of public defenders, the equity of compensation among the judicial districts, public defender caseloads, and the results of the weighted case load study.</p>
Mississippi	<p>MISS. CODE ANN. § 99-18-1 (2) (2015): Funding for the Office of State Public Defender . . . come[s] from funds available in the Capital Defense Counsel Fund, the Indigent Appeals Fund and the Public Defenders Education Fund as determined by the State Defender.</p>
Missouri	<p>MO. REV. STAT. § 600.040(1) (2016): The state shall pay, within the limits of the appropriation therefor, all other expenses and costs of the state public defender system authorized under this chapter.</p>

271. *Office of the State Public Defender*, IDEALIST, <https://www.idealists.org/en/nonprofit/e4175ddcbfd34a36bca7d1a91c6d2b5b-office-of-the-state-public-defender-iowa-city> [https://perma.cc/Y6RH-ZF8Z].

Montana	MONT. CODE ANN. § 47-1-104 (2019): The commission is allocated to the department of administration for administrative purposes only, as provided in 2-15-121, except that: commission and chief public defender hires own staff. Governor appoints all 11 members.
Nebraska	NEB. REV. STAT. § 29-3911 (2016): The salary and all expenses, including trial expense and expert witness fees, of the judicial district public defender shall be paid out of funds appropriated to the office of Governor for that purpose.
Nevada	NEV. REV. STAT. § 180.110(1) (2019): Each . . . year the State Public Defender may collect from the counties . . . for use of the State Public Defender's Services during that year.
New Hampshire	N.H. REV. STAT. ANN. § 604-B:4 (2001): The state of New Hampshire, by the judicial council and with the approval of governor and council, shall contract with any organization or groups of lawyers approved by the board of governors of the New Hampshire Bar Association to operate the public defender program and provide public defender representation as provided in RSA 604-B:2 and 3.
New Jersey	N.J. STAT. ANN. §§ 2A:158A-1 to 2A:158A-25 (West 2011): Deputies and assistant deputies shall be attorneys-at-law of this State, shall serve at the pleasure of the Public Defender and shall receive such salaries as he shall from time to time designate. The State of New Jersey's Office of the Public Defender is located in the executive branch of the state government and allocated within the Department of the Treasury.
New Mexico	N.M. STAT. ANN. § 31-15-5 (2000): Salaries and other expenses are paid by warrants of the secretary of finance and administration, supported by vouchers signed by the chief or the chief's authorized representative and in accordance with budgets approved by the state budget division of the department of finance and administration.
New York	N.Y. STATE FIN. LAW § 98-b (McKinney 2020): Purpose is to assist counties in providing legal representation to those who cannot afford it; to assist the state, in improving the quality of public defense services and funding representation provided by assigned counsel paid in accordance with § 35 of the judiciary law; and provide support for the operations, duties, responsibilities and expenses of the office of indigent legal services and the board.
North Carolina	N.C. GEN. STAT. § 7A-498.2(a) (2019): Establishment of Office of Indigent Defense Services: (a) The Office of Indigent Defense Services, which is administered by the Director of Indigent Defense Services and includes the Commission on Indigent Defense Services and the Sentencing Services Program established in Article 61 of this Chapter, is created within the Administrative Office of the Courts.
North Dakota	
Ohio	State: OHIO REV. CODE ANN. §§ 120.01–120.08 (LexisNexis 2019): The Ohio Public Defender Commission is responsible for supervising and establishing standards of indigent defense services in the state. Local: OHIO REV. CODE ANN. § 120.13–120.41: The office of county public defender recommends an annual operating budget, which requires approval from the county commissioners. The office of county public defender recommends an annual operating budget, which requires approval from the county commissioners. Counties may request that the state public defender reimburse 50% of a county public defender's office operating expense.
Oklahoma	OKLA. STAT. tit. 22, § 1368 (2011): Indigent Defense System Revolving Fund: There is a revolving fund for the Oklahoma Indigent Defense System in the state treasury. The monies may be budgeted and expended by the Board to defray

	expenses relating to the performance of duties imposed upon the Oklahoma Indigent Defense System by law.
Oregon	OR. REV. STAT. § 151.225 (2019): Funds come from the Public Defense Services account. The Public Defense Services Commission submits the budget of the commission and the office of public defense services to the Legislative Assembly after the budget is submitted to the commission by the director and approved by the commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall present the budget to the Legislative Assembly. OR. REV. STAT. § 151.216.
Pennsylvania	
Rhode Island	12 R.I. GEN. LAWS ANN. § 12-15-7 (West 2006): Appropriations for expenses: The general assembly shall annually appropriate any sum or sums that it may deem necessary for the payment of the salaries of any clerical assistance that may be deemed necessary and for the payment of office expenses and other actual expenses incurred by the public defender in the performance of his or her duties; and the controller is authorized and directed to draw his or her orders upon the general treasurer for the payment of the sum or sums, or as much of the sum or sums as may from time to time be required, upon receipt by him or her of proper vouchers approved by the public defender.
South Carolina	S.C. CODE ANN. §§ 17-3-80, 17-3-80 (2014): The commission will be funded by appropriations to the commission in the state General Appropriations Act including federal funds as may be available. In addition to the appropriation as provided by law, there is appropriated for the fiscal year commencing July 1, 1969, the sum of fifty thousand dollars for the establishment of the defense fund which must be administered by the Office of Indigent Defense. This fund must be used to reimburse private-appointed counsel, public defenders, and assistant public defenders for necessary expenses, not to exceed two thousand dollars for each case, actually incurred in the representation of persons pursuant to this chapter, so long as the expenses are approved by the trial judge. No reimbursement may be made for travel expenses except extraordinary travel expenses approved by the trial judge. The total state funds provided by this section may not exceed fifty thousand dollars.
South Dakota	S.D. CODIFIED LAWS §§ 23A-40-20, 7-16A-16 (2016): [M]oney[] in the court appointed attorney and public defender payment fund shall be annually distributed by the state treasurer to the counties on a pro rata basis. The board of county commissioners of each county participating in a public defender plan shall annually appropriate money from the general fund to administer the public defender.
Tennessee	TENN. CODE ANN. §§ 8-14-308, 16-2-518 (2019): Each year's budget for the operation of the office of executive director of the district public defenders conference shall be submitted to the judiciary committee of the house of representatives and the judiciary committee of the senate prior to approval of the budget by the general assembly. Any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense.
Texas	TEX. CODE CRIM. PROC. ANN. art. 26.044(g) (West 2009): A public defender is entitled to receive funds for personnel costs and expenses incurred in operating as a public defender in amounts fixed by the commissioners court and paid out of the appropriate county fund, or jointly fixed by the commissioners courts and proportionately paid out of each appropriate county fund if the public defender serves more than one county.

Utah	UTAH CODE ANN. § 77-32-801 (LexisNexis 2017): Indigent Defense Commission creation—Purpose: (1) There is created within the Commission on Criminal and Juvenile Justice the Utah Indigent Defense Commission. (2) The purpose of the commission is to assist the state in meeting the state's obligations for the provision of indigent criminal defense services, consistent with the United States Constitution, the Utah Constitution, and the Utah Code.
Vermont	VT. STAT. ANN. tit. 13, § 5239(a) (2018): All co-payments, reimbursements, and assignment fees paid by persons receiving representation from the public defender are deposited in the Public Defender Special Fund. All monies to be expended from the Fund shall be appropriated annually by the General Assembly, or allocated pursuant to the authority granted by the General Assembly to the Commissioner of Finance and Management, with regard to express receipts.
Virginia	VA. CODE ANN. § 19.2-163.01(A)(12), (14) (West 2019): The [Indigent Defense] Commission shall have the following powers and duties . . . To approve requests for appropriations and receive and expend moneys appropriated by the General Assembly of Virginia, to receive other moneys as they become available to it and expend the same in order to carry out the duties imposed upon it To report annually on or before October 1 to the Virginia State Crime Commission, the House and Senate Committees for Courts of Justice, the House Committee on Appropriations, and the Senate Committee on Finance on the state of indigent criminal defense in the Commonwealth, including Virginia's ranking amongst the 50 states in terms of pay allowed for court-appointed counsel appointed pursuant to § 19.2-159 or subdivision C 2 of § 16.1-266.
Washington	WASH. REV. CODE ANN. § 10.101.050 (West 2017): The Washington state office of public defense shall disburse appropriated funds to counties and cities for the purpose of improving the quality of public defense services. Counties may apply for up to their pro rata share as set forth in RCW 10.101.060 provided that counties conform to application procedures established by the office of public defense and improve the quality of services for both juveniles and adults. Cities may apply for moneys pursuant to the grant program set forth in RCW 10.101.080. In order to receive funds, each applying county or city must require that attorneys providing public defense services attend training approved by the office of public defense at least once per calendar year.
West Virginia	W. VA. CODE ANN. § 29-21-13(a), (c) (LexisNexis 2018): [E]ach year, each active public defender corporation shall submit to the executive director and the commission a funding application and a proposed budget for the ensuing fiscal year. The Accounting and Auditing Division shall review all funding applications and prepare recommendations for an operating plan and annual budget for each public defender corporation. Funding of public defender corporations or other programs or entities providing legal representation under the provisions of this article shall be by annual grants disbursed in such periodic allotments as the executive director deems appropriate.
Wisconsin	WIS. STAT. § 977.02(2) (2018): The board shall: Submit the budget of the state public defender to the governor after such budget is submitted to the board by the state public defender and approved by the board.
Wyoming	WYO. STAT. ANN. §§ 7-6-113(b)(i)–(iii), 7-6-103(g)(iii) (2019): Each county shall appropriate funds to supplement the state public defender budget in accordance with an equitable formula determined by the state public defender and the budget division of the department of administration and information in cooperation with the legislative service office, taking into account the following factors: The population of each county; [t]he assessed valuation of each county; and [t]he serious crime case load of each county. Each assistant public defender shall: Be compensated as determined by the Wyoming personnel division, or by the state public defender if appointed under a purchase order contract

APPENDIX G: PUBLIC DEFENDER FUNDING AMOUNTS

Fiscal Year 2012

(* = mix of appropriations and √ = actual expenditures) (in thousands)²⁷²

State	Total Expenditures	State Appropriation	County/City Contribution	Other
Alabama*	\$59,707	\$40,255		67%
Alaska√	\$40,036	\$40,856		100%
Arizona√	\$1,378	\$1,408		100%
Arkansas√	\$37,600	\$23,372		62%
California√	\$22,672		Funded by county	
Colorado√	\$100,714	\$103,706		100%
Connecticut√	\$64,002	\$64,006		100%
Delaware*	\$18,792	\$15,819		84%
District of Columbia	Federal			
Florida*	\$214,526	\$345,833		100%
Georgia√	\$69,539	\$69,535		99%
Hawaii*	\$9,275	\$9,793		100%
Idaho√	\$1,990	\$1,994		100%
Illinois√	\$20,266	\$20,268		100%
Indiana√	\$24,906	\$24,917		100%
Iowa√	\$55,726	\$58,071		100%
Kansas√	\$22,714	\$22,744		100%
Kentucky*	\$43,586	\$44,082	\$2,311	100%
Louisiana√	\$32,969	\$32,971		100%
Maine√	\$14,448	\$12,610		87%
Maryland√	\$87,952	\$87,758		99%
Massachusetts√	\$191,228	\$191,754		100%
Michigan* (2011)	\$12,750	\$15,022		100%

²⁷². See generally OWENS ET AL., *supra* note 111 (providing data on total indigent defense expenditures).

Minnesota√	\$64,509	\$66,392	Hennepin County is separate	100%*
Mississippi*	\$4,307	\$4,652		100%
Missouri√	\$35,739	\$35,847		100%
Montana√	\$23,335	\$21,870		94%
Nebraska√	\$3,533	\$3,535		100%
Nevada√	\$3,234	\$3,241		100%
New Hampshire√	\$18,038	\$18,038		100%
New Jersey√	\$117,628	\$121,862		100%
New Mexico√	\$38,519	\$38,406		99.7%
New York√	\$109,256	\$62,701		57.3%
North Carolina√	\$125,603	\$124,645		99.2%
North Dakota√	\$6,140	\$5,634		91.76%
Ohio√	\$70,413	\$70,565		100%
Oklahoma√	\$16,581	\$14,544	Oklahoma & Tulsa Counties are separate	
Oregon√ (2011)	\$108,664	\$223,519		98.59%
Pennsylvania	Funded by county	
Rhode Island√	\$13,805	\$13,809		
South Carolina*	\$21,938	\$24,010		100%
South Dakota√	...	\$624		
Tennessee√	\$74,032	\$72,013		97.27%
Texas√	\$26,981	\$29,548		100%
Utah√	...	\$108		
Vermont√	\$12,103	\$12,136		
Virginia*	\$43,257	\$42,619		98.53%
Washington√ (2011)	\$41,966	\$38,004		90.56%
West Virginia√	\$42,681	\$42,768		100%
Wisconsin*	\$90,592	\$81,691		90.17%
Wyoming (85%)	\$10,258	\$11,476	Counties fund remaining 15%	100%

APPENDIX H: PUBLIC DEFENDER COMMISSION DIVERSITY BY PERCENTAGE

Public Defender Branch Assignment	Percent of Commission Members Appointed by the Executive Branch	Percent of Commission Members Appointed by the Judicial Branch	Percent of Commission Members Appointed by the Legislative Branch	Percent of Commission Members Appointed by Other Means
Executive	77%	7%	13%	3%
Judicial	45%	38%	12%	3%