

STRUCTURING THE PUBLIC DEFENDER

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ABSTRACT. The public defender may be critical to protecting individual rights in the U.S. criminal process, but state governments take remarkably different approaches to distributing the services. Some organize indigent defense as a function of the *executive branch* of state governance. Others administer the services through the *judicial branch*. The remaining state governments do not place it within any branch of state government, they delegate its management to local counties. This administrative choice has important implications for the public defender's efficiency and effectiveness. It influences how the public defender will be funded and also the extent to which the public defender, as an institution, will respond to the particular interests of local communities.

So, which branch of government should oversee the public defender? Should the public defender exist under the same branch of government that oversees the prosecutor and the police – two entities that the public defender seeks to hold accountable in the criminal process? Should the provision of services be housed under the judicial branch which is ordinarily tasked with being a neutral arbiter in criminal proceedings? Perhaps a public defender who 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 this question about 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 how each state manages the public defender function and how that decision influences the institution's funding and ability to adhere to ethical and professional mandates. It goes further by concluding that the public defender should be an important executive function in this modern era of mass criminalization and articulating modifications that would improve such a state design by insulating it from pressure by other system actors.

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INTRODUCTION

In November of 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 in existence 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 responsibility from the state’s governor of appointing and advising a Chief Public Defender.³

Proponents of the ballot measure argued that 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 President of the New Mexico Criminal Defense Lawyers Association Ousama Rasheed noted, “having a

¹ STATE OF N.M. LAW OFF. OF THE PUB. DEFENDER, DEFENDING JUSTICE, 2014 ANNUAL REPORT 4 (2014), http://www.lodnm.us/pdf/2014_annl_rpt_rev9214.pdf.

² See N.M. Stat. Ann. §§ 31-15-1 to -12 (1978). This act provided either the funds necessary to pay for or the actual representation of indigent defendants in criminal courts who faced imprisonment or death. It also set forth indigency standards for courts to use in determining which defendants would be eligible for representation under the Act.

³ See BRIEF ANALYSIS AND ARGUMENTS FOR AND AGAINST THE CONSTITUTIONAL AMENDMENTS PROPOSED BY THE LEGISLATURE IN 2011, N.M. LEG. COUNCIL SERVICE 28-30 (2012) (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 Brief Analysis and Arguments for and Against the Constitutional Amendments Proposed by the Legislature in 2011, N.M. Leg. Council Service 29 (2012).

⁵ BRIEF ANALYSIS AND ARGUMENTS FOR AND AGAINST THE CONSTITUTIONAL AMENDMENTS PROPOSED BY THE LEGISLATURE IN 2011, N.M. LEG. COUNCIL SERVICE 28-30 (2012).

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 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, did not prove to be quite the solution to the state’s problems with its provision of services that was expected or hoped for. Instead, the public defender institution found itself facing formidable challenges with few avenues for redress.⁷

In late 2016, a New Mexico District Court Judge held the 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.⁸ The public defender claimed to have reached a level where the limited attorney hours available to him were insufficient to manage overwhelming caseloads.⁹ The chief defender, and his predecessor, had already made a number of requests for additional funding that had not been adequately answered.¹⁰ Instead of responding to the Chief Public

⁶ Debra Cassens Wriss, *New Mexico Ballot Measure Would Create Independent PD’s Office*, ABA Journal (Oct. 10, 2012 1:39 CDT),

http://www.abajournal.com/news/article/new_mexico_ballot_measure_would_create_independent_pds_office. 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 League of Women Voters of Los Alamos, *Voter’s Guide 2012* (2012), <https://www.lwvnm.org/VGuide2012/LWVLA-2012.pdf>. Indeed, then-governor Susana Martinez opposed the legislation, saying that she had “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.” See *Cassens Wriss*. Her arguments did not sway the voters, the majority of whom supported the change in institutional management.

⁷ See discussion *infra*.

⁸ Phaedra Haywood, *Judge Finds Cash-Strapped Chief Public Defender in Contempt*, Santa Fe New Mexican (Nov. 29, 2016), https://www.santafenewmexican.com/news/local_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article_1384bdd6-397d-5e90-9962-9bc1399b12d1.html; Fernanda Santos, *When Defendants Cannot Afford a Lawyer, Neither Can New Mexico*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/new-mexico-lawyer-shortage.html>. Andy Lyman, *Chief Public Defender Held in Contempt of Court After Turning Down Cases, Says Office Can’t Afford It*, NM POLITICAL REPORT (Dec. 2, 2016), <http://nmpoliticalreport.com/2016/12/02/chief-public-defender-held-in-contempt-after-turning-down-cases-says-office-cant-afford-it>; see also; Victoria Prieskop, *Public Defender Ramps Up Fight Against Albuquerque Judges*, COURTHOUSE NEWS SERVICE (Sept. 14, 2017), <https://www.courthousenews.com/public-defender-ramps-fight-albuquerque-judges>.

⁹ See Fernanda Santos, *When Defendants Cannot Afford a Lawyer, Neither Can New Mexico*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/new-mexico-lawyer-shortage.html>.

¹⁰ Baur’s predecessor, Jorge Alvarado, sought a budget increase of almost 44 million dollars in 2016 for the Law Office of the Public Defender. The legislature rejected this proposal and granted an increase of only about \$654,000 for fiscal year 2017, plus \$200,000 in supplemental

Defender's funding requests with additional resources, the New Mexico District Court Judge deemed the public defender's refusal to continue representing indigent clients as a violation of a court order to participate in the criminal process.¹¹ The judge then held him in contempt of court.¹² The court noted that it would remove the contempt finding once the public defender resumed the responsibility of representing all of the defendants with matters pending before the court.¹³

On its surface, the New Mexico public defender problem was a *funding* problem.¹⁴ The chief public defender was asserting that he did not have the financial resources necessary to render effective assistance of counsel to all of those defendants the process deemed eligible for his agency's assistance.¹⁵ This funding problem became a *branch assignment* problem, however, when the chief public defender had to demand additional funding, or pursue a strategy he deemed necessary for providing effective representation, from the very system actor who could then hold him in contempt of court, and indeed did, for failing to represent those same clients.¹⁶

There is an inherent conflict for public defender institutions seeking to meet constitutional and ethical mandates within a structure that is populated by other actors with related but independent goals.¹⁷ The conflict is even more pronounced

funding for the fiscal year 2016. This led to Alarado's resignation and Baur filled this role as Chief Public Defender. Phaedra Haywood, *Judge Finds Cash-Strapped Chief Public Defender in Contempt*, SANTA FE NEW MEXICAN (Nov. 29, 2016), https://www.santafenewmexican.com/news/local_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article_1384bdd6-397d-5e90-9962-9bc1399b12d1.html.

¹¹ Phaedra Haywood, *Judge Finds Cash-Strapped Chief Public Defender in Contempt*, SANTA FE NEW MEXICAN (Nov. 29, 2016), https://www.santafenewmexican.com/news/local_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article_1384bdd6-397d-5e90-9962-9bc1399b12d1.html.

¹² *Id.*

¹³ *Id.* (noting that the judge told Baur the contempt findings could be purged if Baur followed his "statutory" duties to represent defendants).

¹⁴ See Andy Lyman, *Overloaded Public Defender's Office Was Years in the Making*, NM POLITICAL REPORT (Dec. 9, 2016), <http://nmpoliticalreport.com/2016/12/09/overloaded-public-defenders-office-was-years-in-the-making>; *The Constitution Guarantees Legal Defense, New Mexico Barely Delivers: Maggie Shepard*, 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>; 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>.

¹⁵ See Phaedra Haywood, *Public Defenders Take Funds Battle to High Court*, TAOS NEWS (Apr. 1, 2017 7:08 PM), <https://www.taosnews.com/stories/public-defenders-take-funds-battle-to-high-court,39633>.

¹⁶ *Id.*

¹⁷ Although judges are tasked with ensuring a fair process, this requires concern for all court actors. For example, these judges must balance the prosecutor's institution of charges and any statutes prescribing victim's 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.

when those actors hold a supervisory or regulatory role over the 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. 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. This was because the vote effectively transferred the institution's supervisor to another governmental branch who 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.

Interestingly enough, 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 branch¹⁹, and judges, who are always housed under the judicial branch, the third major actor in the criminal court process can be housed under a different branch 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 used 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. 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. Each assignment decision provides both benefits and handicaps for a state's obligation to provide effective representation of counsel in criminal court. It requires careful consideration of which advantages a state should prioritize and which disadvantages a state must be willing to accept.

This article engages in an original and comprehensive study of how 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 I of this article details the formal language governing the provision of indigent defense services in each of the 50 states.²⁰ This part explains the methodology for assigning each jurisdiction's system for indigent defense representation to a particular branch of government, if any. Part II describes the underappreciated consequences of public

¹⁸ 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. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995).

¹⁹ Almost all states house the prosecutor under the executive branch. Tennessee is one exception. Unlike any other state, the State Attorney General in Tennessee is associated with the Judicial Branch. The prosecutors and public defenders are also under the judicial branch. Judicial Branch, TENN. SEC. OF STATE, <https://sos.tn.gov/products/civics/judicial-branch> (last visited Jan. 1, 2020).

²⁰ This survey excludes the District of Columbia as it is included in the federal criminal system.

defender oversight under either the executive or judicial branch, or of leaving the public defender branchless and instead delegating it to county management. Part III 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.

The public defender's ability to effectively function is fragile under existing management structures. Although the importance of poor people needing adequate representation in the criminal process has never been clearer than in our modern system of mass criminalization, and its divisions based on poverty, 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 fluctuations that the assignment of responsibility to the state was meant to prevent. The interventions prescribed in this paper 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.

I. STATE GOVERNMENT AND THE PUBLIC DEFENDER

The twenty-first century has witnessed significant growth and change in the structures that states use to provide criminal defense services to indigent persons. In 2003, the Georgia Indigent Defense Act established the Georgia Public Defender Standards Council.²¹ This council was tasked with overseeing an efficient and effective representative process for indigent defendants.²² Louisiana accomplished something similar to Georgia when it passed Act 307 in 2007.²³ Act 307 established a new process for public defender oversight in response to alarming information about the quality of indigent defense that arose during Hurricane Katrina.²⁴ 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.²⁵ Texas developed its own Texas Indigent Defense Commission in the same year when Governor Rick Perry signed House

²¹ Georgia Indigent Defense Act of 2003, GA. CODE ANN. § 17-12-1 (2018).

²² Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1049 (2006).

²³ Senate Bill 139 actually transferred the Georgia Public Defender Standards Council from the judicial branch of government to the executive branch of government as an independent agency.

²⁴ 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 (2008); Kelly G. Carmena, Essay, *The New Face of Louisiana's Public Defender Board: Indigent Defense and the 2016 Reform*, 44 S.U. L. REV. 75 (2016).

²⁵ The Office of Indigent Defense Services operates under the Code of Alabama 1975. *About Us*, Ala. Dept. of Finance, Off. of Indigent Defense Services, <http://oids.alabama.gov/aboutus.aspx> (last visited Mar. 26, 2019); see also John Pilati, *New System in Place for Indigent Defense*, FRANKLIN FREE PRESS (Jan. 20, 2015), <http://franklinfreepress.net/news/details.cfm?clientid=38&id=160389#.WtTWOi-ZN1M>.

Bill 1754 into law.²⁶ All of these statewide changes were welcomed, in large part, by public defender stakeholders and those who felt that the provision of services had been deficient in meeting the obligations set forth by *Gideon v. Wainwright*.²⁷ The institutional changes also presented significant points of inquiry 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.

Each of the newer institutions described in the paragraph above, formed their new public defender services under the executive branch of state government.²⁸ 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 as the umbrella organization for managing or organizing the public defender enterprise.²⁹ All of these states were motivated by different causes to change their indigent defense systems. They were also intentional and resolute about choosing a specific state assignment scheme of those available.

Indeed, the decision of where to house public defender 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.³⁰ Each branch also inspires a different public perception of their role in the criminal process, which can prove critical to achieving the duties assigned to them as the managing branch of the public defender.³¹ This

²⁶ In 2001, the Texas Legislature passed the Fair Defense Act (SB 7) which created a guide for distributing indigent defense funding. TEXAS INDIGENT DEFENSE COMMISSION, FAIR DEFENSE LAWS, xiii (2015) http://www.tidc.texas.gov/media/5922/FDACodified2013FINAL_Revised.pdf.

²⁷ *Gideon v. Wainwright*, 372 U.S. 335 (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, Essay, *Gideon's Shadow*, 122 YALE L. J. 2482 (2013) (describing the far-reaching influence of the decision).

²⁸ GA CODE OF CRIM. PROCEDURE § 17-12-1(b) ("The Georgia Public Defender Council shall be an independent agency within the executive branch of state government."); LA CODE tit. XIV § 146 ("There is hereby created and established as a state agency within the office of the governor the Louisiana Public Defender Board . . ."); see generally DEP'T OF FINANCE: OFFICER OF INDIGENT DEFENSE SERVICES; FUNCTIONAL ANALYSIS & RECORDS DISPOSITION AUTHORITY (2015) (discussing the means by which the executive branch administers the Public Defender's Office); TEX. CODE tit. 2(f) ch. 79(A).

²⁹ See GA CODE OF CRIM. PROCEDURE § 17-12-1(b); LA CODE tit. XIV § 146; AL Code Title §41 41-4-322; TEX. CODE tit. 2(f) ch. 79(A). The legislative history behind the decision to house the provision of services in a particular branch is beyond the scope of this paper but is the subject of a future project by the author.

³⁰ See generally, *Branches of Government*, USA.GOV (October 18, 2019), <https://www.usa.gov/branches-of-government>.

³¹ Megan Brenan, *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> (tracking confidence in the three federal branches of government).

Part details how individual states have chosen to govern their state institutions in general and manage their public defender services more specifically.

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.³² This is true even though the United States Constitution does not require such a separation of powers at the state level in order for the republic to exist.³³ Even further, states have adopted similar mechanisms for establishing leadership of each branch of government.³⁴ In every state, much like with the federal government, the executive branch is led by a singular executive who is elected by popular vote, a legislature comprised of duly elected representatives, and a judicial branch that counts a state supreme court as its highest court of review.³⁵

States do exhibit some differences from the federal government in their separation of governmental powers. For example, although the executive branch at the state level is led by a single executive, that executive does not exercise the same degree of control over the agencies under her purview as the single executive in the federal system.³⁶ State executives also differ from the federal executive branch in terms of the selection process for other executives necessary to complete the workload assumed by the governor.³⁷ The federal government espouses a unitary

³² This is true even in the District of Columbia which is not technically a state. *See* OFFICE OF THE CITY ADMINISTRATOR, DC GOV. ORG., <https://oca.dc.gov/page/dc-government-organization> (last visited Mar. 26, 2019).

³³ *State and Local Government*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> (last visited Jan. 5, 2020) (U.S. Constitution mandates that all states uphold a “republican form” of government but three-branch structure is not required).

³⁴ *See id.*

³⁵ *Id.*

³⁶ 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. The Department of Justice is one such executive agency whose head—attorney general—serves at the pleasure of the President. In other words, as evidenced by both the Obama and Trump administrations, the President can direct the attorney general to minimize focus on particular criminal offenses to focus on others. The president can then remove the attorney general if she does not perform satisfactorily. *See, e.g.,* Kris Olson, *Too Close for Comfort: An Insider’s View of Presidents and Their Attorneys General*, 37 YALE L. & POL’Y REV. INTER ALIA 1, 2019 (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 Beam, *Who’s the Boss: Can Governors tell Attorneys General What to Do?*, SLATE (April 2, 2010), <https://slate.com/news-and-politics/2010/04/can-governors-tell-their-attorneys-general-what-to-do.html>.

³⁷ *Selected State Administrative Officials: Methods of Selection*, Table 4.10, COUNCIL OF STATE GOVERNMENTS (2017), <http://knowledgecenter.csg.org/kc/system/files/4.10.2017.pdf> (listing how agency heads in each state are elected or appointed); *see also* *Governors’ Power and Authority*,

executive principle.³⁸ This means that 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.³⁹ These agency heads can then be subject to confirmation by the legislature but are otherwise the president's selection.⁴⁰ For example, the Attorney General of the United States is the authority primarily responsible for overseeing the citizenry's compliance with federal criminal law.⁴¹ The President of the United States may select or nominate an Attorney General in keeping with his own ideas of what should be prioritized by the agency's actors.⁴² The Attorney General is then subject to confirmation by the Senate before taking formal office.⁴³

Conversely, states differ on how their attorney generals, 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 hold a popular election to determine who will occupy the role of chief executive for the state's criminal justice enterprise.⁴⁴ The remaining seven states have the state government choose the attorney general. In five of those seven states, the governor appoints the attorney general.⁴⁵ In one state, the state legislature appoints the attorney general⁴⁶, and in the remaining state, the state supreme court chooses the attorney general.⁴⁷

NAT. GOVERNORS' ASS'N (2019), <https://www.nga.org/consulting/powers-and-authority/> (describing limits on the appointment power of governors).

³⁸ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). Scholars disagree on whether this is a more recent phenomenon.

³⁹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

⁴⁰ *The Executive Branch*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/the-executive-branch/> (last visited Nov. 5, 2019). 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 (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. Accounting Oversight Bd.*, 561 U.S. 477 (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).

⁴¹ *About the Office*, U.S. DEP. OF JUSTICE (July 17, 2019), <https://www.justice.gov/ag/about-office>.

⁴² *Id.*

⁴³ *The Executive Branch*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/the-executive-branch/> (last visited Nov. 5, 2019).

⁴⁴ *About NAG*, NAT'L ASS'N OF ATTORNEYS GENERAL, https://www.naag.org/naag/about_naag.php (last visited Mar. 27, 2019).

⁴⁵ These states are Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. Haw. Const. art. V, § 6; N.H. Const. pt. 2, arts. 46, 47, 73; N.J. Const. art. V, § IV, paras. 3, 5; Alaska Const. art. III, § 25; Wyo. Stat. Ann. § 9-1-601.

⁴⁶ Maine. Article IX, Section 11 of the Maine Constitution, <https://www.maine.gov/legis/const/>.

⁴⁷ Tennessee. *About the Office*, TN.GOV, <https://www.tn.gov/attorneygeneral/about-the-office/attorney-general-slatery.html> (last visited Nov. 8, 2019).

State judicial branches similarly follow both the fundamental structure of their federal counterparts with regards to criminal court matters but maintain some crucial differences. Each state has a tripartite structure for its judicial branch. This consists of a trial level court, an appellate court, and then a supreme (or highest) appellate court.⁴⁸ In other words, every state has a highest appellate court that reviews cases pursuant to a legislatively mandated selection scheme and issues decisions that are controlling to those courts that operate below.⁴⁹

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 trials are nominated by the head of the executive branch, confirmed by the legislative branch, and assume their positions for life.⁵⁰ The majority of state judges are not selected through a similar process and do not have lifetime appointments to the bench.⁵¹ 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.⁵² Judges in other states systems are wholly elected by the popular vote of the state's citizenry.⁵³ These different procedures for assuming and maintaining the job title of criminal court judge can affect how these judges prioritize their job responsibilities.⁵⁴

For all intents and purposes, state legislative branches are identical to their federal counterparts.⁵⁵ Every state except Nebraska has a bicameral legislature tasked with passing state statutes and distributing state funds.⁵⁶ In such states, the

⁴⁸ *Comparing State and Federal Courts*, US COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Nov. 9, 2019). New York state titles its highest trial courts the "supreme" courts but its court of last resort is actually the Court of Appeals.

⁴⁹ *Id.*

⁵⁰ *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. Instead, federal magistrate judges are appointed by majority vote of the active district judges of the court. 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*, US COURTS, <https://www.uscourts.gov/faqs-federal-judges#faq-What-are-bankruptcy-judges?-How-are-they-appointed?> (last visited Jan. 1, 2020).

⁵¹ *Comparing State and Federal Courts*, US COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Nov. 9, 2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See, e.g., ALICIA BANNON, RETHINKING JUDICIAL SELECTION IN STATE COURT, BRENNEN CENTER FOR JUSTICE 1-2 (2016) (Discussing how judges' concerns about job security and political money used to fund election campaigns can affect elected judges' decisions).

⁵⁵ See, e.g., *State Government Overview*, *New Hampshire Almanac*, NH.GOV, <https://www.nh.gov/almanac/government.htm> (last visited Jan. 19, 2020) (describing the New Hampshire state legislature as bicameral, with a state senate and house of representatives structured similarly to the federal branch).

⁵⁶ *State and Local Government*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> (last visited Nov. 3, 2019). The Nebraska Legislature, a unicameral legislature, is responsible for the legislative obligations of the state. *Unicam Focus*, NEB. LEG., <https://nebraskalegislature.gov/education/lesson3.php> (last visited Nov. 9, 2019).

state assembly consists of a smaller chamber called the Senate and a larger house.⁵⁷ The state Senate often has the exclusive power to confirm gubernatorial appointments and to try articles of impeachment.⁵⁸ 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 upper house.⁵⁹

Because state legislatures follow the federal system in not assuming management responsibility for individual agencies or services, they instead assign the management of public defender systems to the executive or judicial branches. Some state legislatures have chosen not to assign the delivery of public defender services to either branch and instead entrust individual counties to develop and maintain their own systems.⁶⁰ The following section details how each state designates regulatory control of the public defender institution.

B. How States Manage the Public Defender

More than fifty years ago, the Supreme Court decision in *Gideon v. Wainwright*⁶¹ affirmed the state's obligation to provide counsel for indigent defendants under the Sixth Amendment. In this decision, the Court was affirming the increasingly 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 your defense was a special circumstance requiring the appointment of free counsel.⁶² More than twenty state attorney generals submitted amicus briefs to the Court during the *Gideon* review process and a significant number of states already had systems in place for (or had contemplated a process for) the provision of services.⁶³ Four years later, the court expanded this right to counsel to juveniles in *In re Gault*.⁶⁴ Less than ten years after the *Gideon* decision prescribed counsel to those adults facing felony charges, the court extended the right to those indigent defendants facing misdemeanor charges

⁵⁷ *State and Local Government*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> (last visited Nov. 3, 2019).

⁵⁸ Some states use an Executive Council made of those members elected from large districts to confirm these appointments. See, e.g., State of New Hampshire Executive Counsel, *About Us: An Overview of the Executive Council*, NH.GOV (Nov. 9, 2019), <https://www.nh.gov/council/about-us/index.htm>.

⁵⁹ *Number of Legislators and Length of Terms in Years*, National Conference of State Legislatures, <http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx>

⁶⁰ For example, California's 58 counties are responsible for determining an appropriate method for providing public defender services to indigent defendants. See Laurence A. 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).

⁶¹ 372 U.S. 335 (1963).

⁶² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶³ See Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013) (Noting most states had already recognized as a matter of state law fundamental to a fair trial and to avoiding wrongful convictions by the time *Gideon* was argued).

⁶⁴ *Application of Gault*, 387 U.S. 1 (1967).

in *Argersinger v. Hamlin*.⁶⁵ Both *Gideon* and *Argersinger* were unanimous decisions and *In re Gault* was decided 8-1.⁶⁶

Despite the near unanimity in these landmark decisions, some public defender systems continue to struggle with unstable funding streams and frustrating management schemes.⁶⁷ This might be because neither *Gideon*, *Gault*, nor *Argersinger* provided a clear prescription for how states should meet the obligation to provide free counsel to poor defendants.⁶⁸ There may have been solid theoretical and practical grounding for these decisions but the justices refrained from telling states how they should go about formally meeting the mandate. Instead, their formal confirmation of the Sixth Amendment right to counsel even for those defendants who could not afford one, required each state to develop its own process for ensuring these individual rights were met.

Each state's eventual design for the provision of 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. In the years since the decision, some state public defender institutions have undergone several iterations in response to public concern.⁶⁹ This section details each state's designation as of December 2019 but begins with a thorough description of my study's methodology for assigning branches to each state's designation of its public defender services.

i. 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 that detailed the delivery of indigent defense services. Unsurprisingly, state statutes and constitutions rarely included a clear assignment to a particular government branch in its description of the state's indigent defense services. Even if a state did

⁶⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁶⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Application of Gault*, 387 U.S. 1 (1967); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Justice Potter Stewart was the sole dissenting opinion in *Gault*. 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. *Application of Gault*, 387 U.S. 1, 78 (1967) (Stewart, J., dissenting).

⁶⁷ See *The Issue*, GIDEON AT FIFTY, <http://gideonat50.org/the-issue/> (last visited Nov. 9, 2019).

⁶⁸ Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); see also THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 15 (2006). <https://www.ils.nv.gov/files/Kave%20Commission%20Report%202006.pdf> (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).

⁶⁹ For example, Louisiana passed the Public Defender Act in 2007, in response to concerns about the system. The legislation implemented many changes, including transferring the duties of the Louisiana Indigent Defense Assistance Board (LIDAB) to the Louisiana Public Defender Board (LPDB). *Public Defender Act*, LOUISIANA PUBLIC DEFENDER BOARD, <http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> (last visited Jan 1, 2020).

seem to include a specific branch in the text of the statute or constitutional provision, this designation could hide the true branch assignment as dictated by further provisions for the institution.⁷⁰ 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, developing standards for the line defenders in representing their clients, or proposes a budget for public defender services to a particular legislative body.⁷¹

In making this determination, I first explored whether a state statute created a public defender agency that was 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 that individual could be viewed as the individual responsible for public defenders statewide. Even in some 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. This head public defender is the one who issues reports to the government agencies that fund the provision of services and would thus have to account for any failures on the part of those line defenders, even if elected, who are providing services to indigent defendants.

The second important factor in assigning a public defender institution to a particular branch of government was to determine if 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 funneling may dispel direct control but does not completely eliminate influence or authority. The umbrella agency would still serve as an organizing and supervisory mechanism for these services.

The third factor that helped to determine public defender branch assignment was the 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 that 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 that is responsible for distributing funds associated with the actual representation, the hiring of expert witnesses or approving scientific testing of relevant evidence. In those cases, a deeper dive would convey if the separation is more about management concerns and the court process or affects the solvency of the institution in relation to the controlling distributor.

⁷⁰ For example, a state could assign the provision of indigent defense services to the judicial branch but then place the distribution of funding under the executive branch.

⁷¹ See *infra* Part I.B.ii.

The final factor in determining state branch assignment was the agency or individual(s) responsible for setting practice standards and guidelines. On some occasions, states do not have an agency or individual tasked with managing services throughout the state. Instead, they have a commission that is responsible for issuing guidelines for indigent defense representation.⁷² These commissions have various members that can be chosen through a diverse range of selection processes.⁷³ The members, however, can have similar responsibilities to the chief public defenders that are elected or appointed in other state public defender management schemes but are limited to advancing rules that receive the consent of a certain portion of the commission.⁷⁴

It is important to note that some states employ different management schemes for indigent defense services for trial-level, appellate-level, juvenile delinquency, and capital cases.⁷⁵ This article is limited to interrogating how each state designs the trial-level representation that makes up the bulk of indigent defense practice.⁷⁶ So although it does mention those states that have different management schemes for each level of representation in the larger question of this paper, it does not move beyond a discussion of how those decisions affect trial-level representation. As my study shows, the decision to exclude the provision of indigent defense trial-level services from statewide government control and render it a local concern has important implications for the practice even if the same state might provide statewide management for other levels of the criminal process.

ii. Study Findings

My exhaustive study shows that the majority of states place the public defender under the executive branch of state government. A smaller number 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. Appendices A-G afford a more detailed

⁷² See Connecticut, Georgia, Idaho, Louisiana, Michigan, Minnesota, Oregon, and Texas (detailed in Appendix B)

⁷³ See Appendix E (providing the statutory description of each board or commission)

⁷⁴ See, e.g., Idaho §19-849 (noting that the state public defender commission shall be an executive department of state government).

⁷⁵ See, e.g., California which provides statewide funding for appellate representation but leaves the management and funding of trial-level representation to its counties.

⁷⁶ 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 appeal. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L. Q. 127 (1995).

breakdown of each state's laws governing the provision of indigent defense services regardless of the branch designation.⁷⁷

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 ⁷⁸

The vast majority of states provide for the public defender's existence through a specific statute defining its structure and management.⁷⁹ The language available in state constitutions may mirror the U.S. constitution in articulating the general right to the effective assistance of counsel, but the particular methods that state actors adopt to achieve those objectives on a granular level are often detailed in a

⁷⁷ See *supra* appendix.

⁷⁸ The Virginia Public Defender is managed by a board with the majority of members appointed by the members of the legislative branch. VA Code § 19.2-163.01 (describing the establishment and duties of the Virginia Indigent Defense Commission.). The benefits and consequences of this type of structure is detailed later in this project. See *supra* Part III.B.

⁷⁹ See Appendices A-G.

separate state statute.⁸⁰ 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 offence punishable by imprisonment...”.⁸¹ The state legislature went further in Act 307, referred to as the Louisiana Public Defender Act, which established a public defender regulatory board. 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.⁸² Some, like the Louisiana act, establish a board or commission, comprised of appointed members who manage the provision of services.⁸³

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. Twelve of the states listed in the chart 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.⁸⁴ Of those twelve, five place the provision of public defender services under the judicial branch, three place it under the executive branch, and four make it branchless.⁸⁵ For example, Maryland §16-201 clearly states that the Office of the Public Defender exists in the executive branch of state government.⁸⁶ Conversely, Colorado Title 21 - §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.”⁸⁷ South Dakota §23A-40-7 notes that the board of county commissioners for each county and the governing municipality is responsible for public defender representation.⁸⁸

Five additional states designate the public defender as existing under a particular agency within state government which, in turn, falls under a specific branch of government.⁸⁹ Three of those states have the public defender under an

⁸⁰ See, e.g., LA CONST., Art. I, § 13 (1974).

⁸¹ LA CONST., Art. I, § 13 (1974).

⁸² *Public Defender Act*, LOUISIANA PUBLIC DEFENDER BOARD, <http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> (last visited Jan 1, 2020).

⁸³ See, e.g., *Public Defender Act*, LOUISIANA PUBLIC DEFENDER BOARD, <http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> (last visited Jan 1, 2020). The Louisiana board is comprised on eleven members, and is tasked with providing the supervision, administration and delivery of statewide public defender systems. LA Code XIV, § 146, <http://lpdb.la.gov/Serving%20The%20Public/Legislation/txtfiles/RS%2015-141%20et%20seq.pdf>.

⁸⁴ See Appendix B.

⁸⁵ *Id.*

⁸⁶ Maryland Code of Crim Pro. tit. 16 §16-201

⁸⁷ COLO REV. STAT. 21 - § 21-1-101.

⁸⁸ SD CODIFIED LAWS § 23A-40-7.

⁸⁹ See Appendix C.

agency that falls under the executive branch and two have it under an agency that exists under the judicial branch.⁹⁰ Alaska provides an example of this in Title 18 §18.85.010- “There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants.”⁹¹

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.⁹² This chief defender or defender manager is often appointed by a member of government who, in turn, is part of a particular branch of government. For example, in Mississippi, the governor appoints a state defender with the advice and consent of the state senate.⁹³ This places Mississippi, and the six other states who operate in a similar manner, in the grouping of states with public defender services under the executive branch.⁹⁴ This is because it is the leader of the executive branch that chooses the individual tasked with overseeing indigent defense services. Even though the legislative branch has a role to play in the final appointment of the individual who manages the services, ultimately it is the governor who makes the primary decision.⁹⁵ Conversely, the Washington state statute that creates a director of the office of public defense places that position under the judicial branch by prescribing that the Supreme Court shall appoint the director.⁹⁶

Twenty states have boards or commissions that manage public defender services.⁹⁷ Although ostensibly independent, a board or commission can still reside under a particular branch of government. This is because actors who hold various governmental responsibilities and exist 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 to develop standards for the provisions of services throughout the state.⁹⁸ 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.⁹⁹ Florida is unique in that, although services are completely state-funded

⁹⁰ *Id.*

⁹¹ ALASKA STAT. 18 § 18.85.010.

⁹² See Appendix D.

⁹³ MISS. CODE ANN. § 99-18-1 (2013).

⁹⁴ See Appendix D.

⁹⁵ In Mississippi, the State Defender is ultimately appointed by the governor, but with the advice and consent of the senate. See *supra*, note 93.

⁹⁶ WASH. REV. CODE ANN. § 2.70.010 (2008) (noting that the state supreme court appoints the director from a list of three names provided by an advisory committee).

⁹⁷ See Appendix E.

⁹⁸ *About the Commission*, PUB. DEFENDER COMM’N

<https://www.in.gov/publicdefender/2346.htm> (last visited Mar. 26, 2019).

⁹⁹ Burns Ind. Code Ann. § 33-40-5-1; 33-40-6-1.

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 staff.¹⁰⁰ 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.¹⁰¹

Some states who adopt a board are difficult to categorize because they have actors from different branches appoint members to the governing board or commission. For example, New Mexico has eleven members on its New Mexico Public Defender Commission.¹⁰² The relevant code provision articulates some limitations on the characteristics and experience that each board member must possess but it otherwise leaves the choice up to different actors in the legal system.¹⁰³ The governor appoints one member, the chief justice of the state 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 shall each appoint one member, and the president pro tempore of the senate shall appoint one member.¹⁰⁴ 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 judicial branch.¹⁰⁵ Louisiana does something similar to New Mexico although, because it does not provide for legislative appointments, its board is not so diverse.¹⁰⁶ 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 chart as hybrid/unclear. Using this hybrid distinction helps inform us 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 for the *Gideon* decision, "...our state and national constitutions and laws have laid great emphasis on

¹⁰⁰ BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012 (2014) 7, <https://www.bjs.gov/content/pub/pdf/idsus0812.pdf>.

¹⁰¹ See *supra*, appendix E.

¹⁰² NEW MEXICO STATUTES ANNOTATED, §§ 31-15-1 to 31-15-12 (public defender act).

¹⁰³ *Id.* § 31-15-2.2 (The statute indicates members should have significant experience in the legal defense of criminal or juvenile justice cases; or demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department.).

¹⁰⁴ *Id.* § 31-15-2.1.

¹⁰⁵ See *supra* Part I; see also See BRIEF ANALYSIS AND ARGUMENTS FOR AND AGAINST THE CONSTITUTIONAL AMENDMENTS PROPOSED BY THE LEGISLATURE IN 2011, N.M. LEG. COUNCIL SERVICE 28-30 (2012) (describing the reasons for shifting the public defender into a different branch).

¹⁰⁶ However, the Louisiana code indicates, "[t]o 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 (2018).

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.”¹⁰⁷ Despite that early and clear admonition, the problems associated with state public defender systems continue to occupy both national and state news cycles.¹⁰⁸ They are also fundamentally worrying for our traditional notions of justice and fairness in the criminal process. This Article aims to identify one possible cause of the institution’s instability at the state level and propose a specific solution.

II. THE CONSEQUENCES OF BRANCH OVERSIGHT

Perhaps unsurprisingly, problems arise when managing the public defender through any branch of state government. The executive branch has a clearly articulated objective of enforcing a jurisdiction’s laws.¹⁰⁹ This may run counter to protecting those very individuals who are charged with violating those laws. Even if one definition of the prosecutor allows recognition of the prosecutor and public defender sharing the twin goals of preserving the defendant’s rights, the very perception of conflict and somewhat divergent purposes is a cause for concern.¹¹⁰

Conversely, the judicial branch is tasked with serving as a neutral arbiter in judicial proceedings, interpreting the applicable laws and regulations, and making sure that opposing parties are afforded the due process of law.¹¹¹ At first glance, this neutrality seems inconsistent with dedication to the public defender since the

¹⁰⁷ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹⁰⁸ Phil McCausland, Public Defenders Nationwide Say They’re Overworked and Underfunded, NBC NEWS (Dec. 11, 2017)

<https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111> (Specifically describing 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 (Sep. 3, 2015) (Describing the New Orleans Public Defenders).

¹⁰⁹ “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).

¹¹⁰ 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 United States 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 40; *see generally*, MARSHAL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES GOVERNMENT: LAW STRUCTURE AND POLITICS (Oxford Press 2015).

¹¹¹ Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO LAW REVIEW 137 (1993).

public defender is one of the two opposing parties in criminal court proceedings.¹¹² The court's goal of preserving the integrity of the process by ensuring fair proceedings requires courts 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.¹¹³

The legislative branch operates as the branch of government with the primary responsibility for capturing the rules that dictate the ways in which citizens must interact with each other.¹¹⁴ This would include the behaviors that a society will deem criminal, and the applicable punishments.¹¹⁵ This would also include the procedural rules that various court actors must abide by in the criminal process.¹¹⁶ The legislature also dispenses a state's available funds in keeping with its most pressing objectives.¹¹⁷ Its designation as the entity responsible for distributing state funds to various state agencies makes it difficult to also assume a fair and impartial role as a managing authority for a particular state organization.

Choosing not to place the public defender service under any of these governmental branches at the state level is itself a type of branch assignment that can also prove problematic. The institution's absence from these statewide managing schemes leave it at the liberty of county officials which may foster arbitrary enforcement of the right to counsel. It can also render the type or quality of representation that indigent defendants receive a consequence of the popularity or wealth of the county these citizens reside in. This Part details the consequences of assignment to any branch of government, or 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.

A. Funding Reliability and Equity

The constitutional right to the effective assistance of counsel requires significant and reliable financial resources.¹¹⁸ Despite that obvious reality, the

¹¹² One could argue that 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).

¹¹³ "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) (citing COMM. TO REVIEW THE CRIMINAL JUSTICE ACT PROGRAM, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 50 (1993)).

¹¹⁴ *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 that the legislative branch should defense its own statutes).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See, e.g.*, Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L.J. 149 (2003) (describing the state legislature's control over spending).

¹¹⁸ In addition to the basic costs of attorney salaries, investigator salaries, and funds for expert

systemic underfunding of public defender systems has garnered widespread media attention and scholarly criticism.¹¹⁹ 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 had nearly five times the workload that would allow that to happen.¹²⁰ These overwhelming caseloads are the result of the inadequate funding for public defender offices.¹²¹ There is some debate about whether indigent defense representation is a state obligation or a local one. The relevant caselaw seems to note it clearly as a state obligation. The confusion arises in that prosecution for state crimes is sometimes funded through local city governance such as a city council.

For example, journalists in Missouri underwent 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. They concluded that the state's system was one of the worst in the country.¹²² Their report noted that Missouri ranked 49th of the 50 states in terms of the per capita

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).

¹¹⁹ See e.g., Richard A. Oppel Jr. and Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, NY TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>; *Lack Of Adequate Funding Forces Missouri Public Defenders To Shortchange Constitutional Rights*, ACLU MISSOURI (May 17, 2018) <https://www.aclu-mo.org/en/news/lack-adequate-funding-forces-missouri-public-defenders-shortchange-constitutional-rights> (Noting that “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”).

¹²⁰ See THE COLORADO PROJECT, NATIONAL ASS’N OF CRIMINAL DEFENSE LAWYERS (2017) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf; THE LOUISIANA PROJECT, NATIONAL ASS’N OF CRIMINAL DEFENSE LAWYERS (2017) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf

THE MISSOURI PROJECT, NATIONAL ASS’N OF CRIMINAL DEFENSE LAWYERS (2017) https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf

THE ROAD ISLAND PROJECT, NATIONAL ASS’N OF CRIMINAL DEFENSE LAWYERS (2017): https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf

¹²¹ *Id.* The large caseloads could also be the fault of zealous prosecutors with insufficient regard for the public defender’s duty to provide effective counsel under the Sixth Amendment and competent counsel under state ethical rules. See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, UC DAVIS L. REV. (forthcoming).

¹²² Dave Helling, *Defenseless: Missouri Justice System Violates the Constitution Every Day*, KANSAS CITY STAR (Nov. 20, 2019), <https://www.kansascity.com/opinion/article237130749.html>; Dan Margolies, *Lawsuit Says Missouri Public Defender System Faces ‘Urgent Constitutional Crisis’*, NPR (Mar. 9, 2017), <https://www.kcur.org/post/lawsuit-says-missouri-public-defender-system-faces-urgent-constitutional-crisis#stream/0>.

spending on the public defender's office.¹²³ More than 4000 defendants had their cases delayed as they awaited appointment by a public defender, translating to some clients waiting weeks or months in jail before having an attorney assigned to represent them.¹²⁴ Even after appointment, the high caseloads made it difficult for public defenders to meet with their clients.¹²⁵ The low attorney pay might also have made it difficult for attorneys to remain on the job, as the high turnover rate would suggest.

Missouri is not the only state facing significant funding problems. One study found that only 27% of county-based public defender offices and 21% of state-based public defender offices had caseloads that complied with the levels recommended to provide constitutionally effective representation.¹²⁶ 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.¹²⁷ One important reason that cannot be ignored is how the lack of adequate funding contributes to the problem.¹²⁸

Public defender systems take various approaches to funding the provision of services. Some jurisdictions use legislative appropriations at the state level to fund services. Others turn to city council appropriations to finance or supplement the financing of the institution. There are also jurisdictions who use more local resources such as fines and fees to provide necessary funds.¹²⁹ Some even look to

¹²³ Only Mississippi provided less per capita.

¹²⁴ Dave Helling, *Defenseless: Missouri Justice System Violates the Constitution Every Day*, KANSAS CITY STAR (Nov. 20, 2019), <https://www.kansascity.com/opinion/article237130749.html>;

¹²⁵ Dave Helling, *Defenseless: Missouri Justice System Violates the Constitution Every Day*, KANSAS CITY STAR (Nov. 20, 2019), <https://www.kansascity.com/opinion/article237130749.html>;

¹²⁶ Theodore Schoneman, *Overworked and Underpaid: America's Public Defender Crisis*, FORDHAM POL. REV. (Sep. 19, 2018), <http://fordhampoliticalreview.org/overworked-and-underpaid-americas-public-defender-crisis/>.

¹²⁷ See, e.g., Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016) (discussing the systemic problems of mass incarceration and the prosecutor's ethical duty to reduce incarceration rates for all defendants).

¹²⁸ For example, funding deficiencies for misdemeanors in the criminal justice system contributes to the cycle of mass incarceration. See generally ROBERT C. BORUCHOWITZ, MALIA N. BRINK, & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009), https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor_20090401.pdf. See also ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) and Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. AND LEE L. REV. 1089 (2013).

¹²⁹ For example, Louisiana which combines state money with local revenue derived from fines and fees. Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices are Suing—and Starting to Win*, ABA Journal (January 1, 2017), http://www.abajournal.com/magazine/article/the_gideon_revolution.

the indigent defendants themselves to pay for their court appointed counsel.¹³⁰ The following chart shows how branch assignment correlates with public defender funding according to the most recent data provided by the Bureau of Justice Statistics.

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

Much scholarly attention has been paid to the problems associated with various schemes for funding public defenders.¹³¹ In their important project on the public defender funding systems in Arizona, Lisa Pruitt and Beth Colgan showed that these funding structures were markedly different depending on the county in which they resided.¹³² A statewide appropriation could help rural counties who might not be able to take advantage of the local traffic fines or even public interest organization funding that might go to larger, more populated counties.¹³³ Unlike the scholarship on the process of funding defense counsel to poor defendants, this project explores how funding streams differ depending on the branch of government that serves as an umbrella organization for the public defender. It is important to note that even though the funding is classified as a state appropriation, the funds for the state appropriation can arise from court fines and fees.¹³⁴

Of the four states that are not managed under a particular branch of state government, only New York receives limited statewide appropriations for trial-level indigent defense.¹³⁵ This makes organizational sense as there is no statewide agency

¹³⁰ Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014); Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, ACLU (June 2019), <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf> (noting that in California, defendants are often expected to pay a fifty dollar upfront “registration fee” in order to be represented by a public defender).

¹³¹ 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 (1999); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 343 (2010).

¹³² Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010).

¹³³ *Id.* at 309.

¹³⁴ Louisiana uses court fines and fees to fund the public defender. LA. REV. STAT. ANN. § 15:168 (2015).

¹³⁵ Both California and Illinois manage appellate indigent defense at the state level and thus dedicate state appropriations for those services. 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

or body of individuals to manage receiving the state funds. Instead, the local funds can be assessed, controlled, and distributed by county officials. Pennsylvania is a clear example of such a system.¹³⁶ There is no statewide entity managing public defender services. There is also no statewide appropriation of funds. Instead, each county provides funding for its services through local systems.¹³⁷ These local systems are usually city council.¹³⁸ This means that, depending on how their local city council prioritizes public defender 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.¹³⁹ Other counties in Pennsylvania struggle to meet even the basic standards of representation because of inadequate city funding. As recently as 2016, Pennsylvania's Luzerne County filed a lawsuit alleging that the county failed to provide adequate funding for public defender services.¹⁴⁰

All of those states with public defender organizations managed under the executive branch receive statewide appropriations. Just because an organization participates in this type of funding scheme does not necessarily mean that each of the systems used to provide services that operate beneath its authority are funded in this way. Louisiana provides an example of a state which, although it receives a statewide appropriation for public defense services, does not distribute the funds equally to public defender services in each county.¹⁴¹ Instead, the Louisiana Public Defender Board, which is tasked with regulating services throughout the state, considers the needs of each county and proportion the funds accordingly.¹⁴² This means that a "parish", a term analogous to "county" in terms of the spatial area that it covers, may not receive any funds from the state legislature appropriation.

Services Fund to provide some funding to counties and full funding for children in delinquency proceedings. *NYS Office of Indigent Legal Service*, NY STATE, <https://www.ils.ny.gov/> (last visited Jan 20, 2020). Pennsylvania does not provide any state funding for trial-level indigent defense. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 54 (2009).

¹³⁶ PENN. STAT. ANN., title 16, §§ 9960.1 - 9960.13.

¹³⁷ *Pennsylvania Public Defenders*, PENN. LEGAL AID, <https://palegalaid.net/pennsylvania-public-defenders> (Jan. 5, 2019).

¹³⁸ *Id.*

¹³⁹ They also have issues with lack of funding. In the fall of 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*, PHILADELPHIA BUS. J. (Aug. 1, 2017), <https://www.bizjournals.com/philadelphia/news/2017/08/01/philly-public-defender-association-attorney-rate.html>.

¹⁴⁰ See *Kuren v. Luzerne Cty.*, 637 PA. 33, 146 A.3d 715 (2016).

¹⁴¹ See *A Review of Public Defense Funding in Louisiana*, LA. PUB. DEFENDER BOARD, <http://files.lsba.org/documents/CJC/PublicDefenderFundingPP.pdf> (last visited Nov. 9, 2019); 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).

¹⁴² See District Assistance Fund, Louisiana Public Defender Board, <http://lpdb.la.gov/Serving%20The%20Public/Programs/District%20Assistance%20Fund.php>, (last visited Nov. 9, 2019).

Instead, it might be funded via local revenue and only turn to the state appropriation when this appropriation is insufficient.¹⁴³

Similar to those 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 defender services.¹⁴⁴ This may be the case 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. It can 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 that are actually organized at the county level although this is not a common occurrence.¹⁴⁵ A state can choose to distribute funds to each county or to maintain a pool of money that individual counties or pursue as the need arises.¹⁴⁶ Such distribution schemes can be a bit difficult to administer without a representative at the state level to organize the application and approval systems.¹⁴⁷

It is not entirely difficult to discern which funding stream or process would be most beneficial to the public defender system. Public defenders need a steady stream of stable income that they can rely on in handling their caseload.¹⁴⁸ This allows them to hire a sufficient number of line attorneys and support staff to meet the needs of the client population. They also need ready access to any additional funds necessary to hire expert witnesses or conduct forensic testing for more scientifically sophisticated cases. Even office management and supervision rely on steady funding sources as more seasoned attorneys may be concerned with the type of life stability that ordinarily accompanies income stability and retirement options.¹⁴⁹

¹⁴³ See, e.g., Louisiana Public Defender Board Restriction of Services Protocol, available in NACDL report.

¹⁴⁴ See Appendix F.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ 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 budget dramatically and the necessity of employing conflict counsel also fluctuates unpredictably. See ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE, JUSTICE MGMT. INSTITUTE 11-12 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf>.

¹⁴⁹ Kathy Gurchiek, *Job Security, Company Stability Are Most Important, Generations Agree*, SOCIETY FOR HUMAN RESOURCE MGMT. (Sep. 15, 2011), <https://blog.shrm.org/workplace/job-security-company-stability-are-most-important-generations-agree> (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).

Of the funding schemes described in this section, the legislative appropriation would appear to be the most stable and reliable funding scheme. This is because state legislatures set forth their budgets at least one year in advance.¹⁵⁰ Local fines and fees ebb and flow at different times of the year and in different economic environments.¹⁵¹ Contrarily, the state budgeting scheme is determined in advance after detailed deliberation of legislators from various political groups and with different agendas. It must pass the congressional vote and, as a result, has a built-in accountability measure to ensure it has the effect of law.

Limited research shows that an assumption that state appropriations would lead to more stable and reliable funding may not actually be true, at least for the criminal process. Some studies have been conducted on states transitioning from local financing for trial courts to state financing.¹⁵² These studies may be dated but 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.¹⁵³ That study found that there was a marginal increase in the amount of state funding after the transition.¹⁵⁴ The study also showed that funding remained similarly stable after the transition to state funding.¹⁵⁵ The report noted that it could not determine if that would be the case should the state face a recession or other financial hardship.¹⁵⁶ One important conclusion from this study was its conclusion that state financing did decrease inequities in funding across localities.¹⁵⁷ 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 can assume more likelihood

¹⁵⁰ Some states (such as Louisiana) do fiscal sessions every other year which means budget appropriations could have longer timetables. See *Legislations with Limited Scope*, NAT'L CONFERENCE OF STATE LEG., <http://www.ncsl.org/research/about-state-legislatures/legislative-sessions-with-limited-scope.aspx> (last visited Jan. 1, 2020).

¹⁵¹ See IMPROVING CALIFORNIA'S FINES AND FEES SYSTEM, LEG. ANALYST'S OFF. 13 (Jan. 5, 2016), <https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf> ("The 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.").

¹⁵² See, e.g., Robert W. Tobin, Case Study of the Effects of State Financing of Trial Courts: California, NAT'L CENTER FOR STATE COURTS (1990); Robert W. Tobin, Case Study of the Effects of State Financing of Trial Courts: Oregon, NAT'L CENTER FOR STATE COURTS (1990).

¹⁵³ John K. Hudzik, The Effects of State Financing: Summary Findings From the Four State Study, NATIONAL CENTER FOR STATE COURTS (1990); see also, Robert W. Tobin, Case Study of the Effects of State Financing of Trial Courts: California, NAT'L CENTER FOR STATE COURTS (1990); Robert W. Tobin, Case Study of the Effects of State Financing of Trial Courts: Oregon, NAT'L CENTER FOR STATE COURTS (1990).

¹⁵⁴ John K. Hudzik, The Effects of State Financing: Summary Findings From the Four State Study, NAT'L CENTER FOR STATE COURTS 5 (1990).

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7-8.

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 Hudzik produced a study for the Justice Management Institute (“JMI”) in September of 2008 that complicates the findings of the NCSC report from two decades earlier.¹⁵⁸ The JMI report explored trial courts and funding in New Jersey, Florida, and Washington. The report did not produce evidence of a clear overall advantage to either primary state funding or primary local funding across all four dimensions – adequate, stability, equity, or accountability.¹⁵⁹ It did however find advantages in several of the four areas.¹⁶⁰ More specifically, the study did not find that greater state funding led to more funding overall.¹⁶¹ The report did show that, in two states, primary state funding did equalize funding across trial courts and led to the adoption of more uniform trial court practices.¹⁶² Primary statewide funding led to a greater effort to collect data on workload and performance that could provide important information for measuring accountability.¹⁶³

One of the difficulties associated with increased funding was what appeared to be a lack of inattention to local issues and processes.¹⁶⁴ Greater state funding and the requirement to be accountable at the state level seemed to lead judges to adopt a more statewide view of their courtroom process.¹⁶⁵ Statewide practices could be inconsistent with the local court system as the latter is designed to deal with criminal behavior that may have occurred within its boundaries, policed by attorneys within its communities, and judged by citizens within its locality. 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 county.¹⁶⁶

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

¹⁵⁸ ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE, JUSTICE MGMT. INSTITUTE (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf>

¹⁵⁹ *Id.* at 1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1.

¹⁶² These states were New Jersey and Florida. *Id.* at 2. The report did note that the simple adoption did not guarantee compliance. *Id.* at 3.

¹⁶³ *Id.* at 3.

¹⁶⁴ 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.” The report harbors conjecture that a “grass [i]s greener” phenomenon occurred when locally funded trial courts received state funding. (“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.”) *Id.* at 8.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ They do, however judge whether behavior violates laws that apply statewide and are assessed by a majority of legislators from throughout the state.

share similar management structures. Whether these results would be apparent for a public defender that existed under the executive branch or did not exist under any branch of state government is unclear. There is reason to think it might be different under the executive branch because the executive branch has a number of agencies acting under its umbrella and may thus have a historical advantage in adopting schemes of separation that ensure they are able to perform according to their individual mandates.

With this in mind, the fact that more jurisdictions with public defender services existing under the executive branch have some component of state appropriations serving as part of their funding, is an important one. It is not entirely clear why assignment to the executive branch is more highly correlated with funding by state appropriations. This might be because state legislatures must formally distribute money to other state agencies that do not have the inherent sources of income that might exist among the courts. These state agencies are also not as easily subjected to local sources of funding since they seem more clearly aligned with state interests.

There does not seem to be any formal reason that state legislatures cannot provide funding for agencies managed at the local level. The minimal existence of such processes might also result from the degree of reporting that is necessary for state funding. There seems to be some interest in maintaining separation between local governance and state governance. This is likely because local interests and culture can be very different from statewide interests and culture.¹⁶⁷ State legislatures necessarily include representatives from different localities within the state often negotiating state interests on behalf of the local populations that 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.¹⁶⁸ These factors could explain why there are so few funding schemes where state legislatures provide funds for locally managed agencies.

This conclusion that state legislative appropriations are the best funding scheme for public defender 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

¹⁶⁷ If we can even define such a thing as “state culture”. Population differences might suggest an inherent degree of difference at the state level than the local level. Industry and urban versus rural divides may also contribute to this notion. *See also*, Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 60 (2006) (“[State] court judges might tend to see, in their constitution, only 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.”).

¹⁶⁸ There are a number of reasons for this, including the need to remain favorable standing for a reelection campaign. Maintaining separation from overall state interests can also serve that objective.

defender, in some ways, is not one of the more popular sources for funding.¹⁶⁹ It is debatable whether the general public is as understanding of the public defender's important position in our criminal justice process as they are of the role that police departments play in maintaining law and order. Even if they do, 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. 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.¹⁷⁰ Stable funding alone is not the only thing that separates an effective and ethical public defender 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 attorneys tasked with delivering services 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 Seattle University School of Law, 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.¹⁷¹ Others, such as the late Monroe Freedman of Hofstra Law School, have noted that the Sixth Amendment and legal ethics do not permit public defenders to choose between clients.¹⁷² Some jurisdictions have responded to this debate by providing a specific process for public defenders to pursue when they realize that they have reached unworkable caseloads.

In Louisiana, for example, the Louisiana Public Defender Board has developed a Restriction of Services Protocol that chief public defenders in each of the 42 districts that board supervises must follow should their resources seem insufficient

¹⁶⁹ Rhonda Covington, a public defender in Louisiana says her budget is a fraction of what prosecutors get. "Public defense is not popular, so politicians do not like it." *Public Defenders Hard To Come By In Louisiana*, NPR (March 10, 2017), <https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana>.

¹⁷⁰ See *infra*, Part I. 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*, *The Guardian* (September 7, 2016) <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

¹⁷¹ John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925 (2005).

¹⁷² Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 Val. U. L. Rev. 911 (2004-2005).

to meet client need.¹⁷³ Under this protocol, the district defender must prepare a report for the board that outlines its resource shortfall and any steps it has already taken to comply with constitutional and ethical guidelines.¹⁷⁴ The district then works with the public defender board to return, or achieve in the first place, the level of representation that is consistent with the constitution and ethical rules.¹⁷⁵

Not all states or counties have a formal scheme for notifying and addressing budget shortfalls. Some public defenders, as seen in the New Mexico example introducing this article, just refuse additional appointments and face contempt proceedings from the court.¹⁷⁶ Even in those jurisdictions with such formal schemes for seeking relief, public defenders may still face lawsuits from organizations such as the American Civil Liberties Union on behalf of clients whom the organization claims do not receive the effective assistance of counsel in their defense to state criminal charges.¹⁷⁷

According to a BJS study, 12 states and the District of Columbia have caseload limits for their attorneys.¹⁷⁸ This means that 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, Wyoming.¹⁷⁹ Of these states, three house the public defender institution under the judicial branch: Colorado, Connecticut, North Carolina. Four house the public defender under the executive branch: Louisiana, Vermont, West Virginia, and Wyoming.¹⁸⁰ These defenders may be more fortunate than defenders in other states that have not adopted caseload limits. This is because these defenders can point clearly to numbers that prove they are unable to fulfill their workload. Those

¹⁷³ GUIDE FOR DEVELOPING A DISTRICT SERVICE RESTRICTION PLAN, LOUISIANA PUBLIC DEFENDER BOARD & DISTRICT PUB. DEFENDERS' OFFICES (2012), http://lpdb.la.gov/Meetings/txtfiles/pdf/Confidential/ROS%20Guidance%20-%20FINAL_Oct%202014.pdf; see also James T. Dixon, Jr., *The Louisiana Public Defender Board at the Crossroad Ethics and Law in Public Defense*, LOUISIANA PUB. DEFENDER BOARD (2015), <http://lpdb.la.gov/Meetings/txtfiles/pdf/Confidential/White%20Paper%20on%20Restriction%20of%20Services%20-%20FINAL.pdf> (describing the Restriction of Services Protocol).

¹⁷⁴ GUIDE FOR DEVELOPING A DISTRICT SERVICE RESTRICTION PLAN, LOUISIANA PUBLIC DEFENDER BOARD & DISTRICT PUB. DEFENDERS' OFFICES (2012), http://lpdb.la.gov/Meetings/txtfiles/pdf/Confidential/ROS%20Guidance%20-%20FINAL_Oct%202014.pdf

¹⁷⁵ *Id.*

¹⁷⁶ See *supra*, Part I.

¹⁷⁷ See, e.g., *Lawsuit Challenging Grant County's Inadequate Public Defense System Granted Class-Action Status*, ACLU WASHINGTON, <https://www.aclu-wa.org/news/lawsuit-challenging-grant-county-s-inadequate-public-defense-system-granted-class-action-status> (Nov. 20, 2009).

¹⁷⁸ STATE ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 BUREAU OF JUSTICE STATISTICS 6 (May 3, 2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf>.

¹⁷⁹ STATE ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 BUREAU OF JUSTICE STATISTICS 25 (May 3, 2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf>.

¹⁸⁰ See Appendix *infra*.

defenders in other jurisdictions without caseload limits may instead have to find other ways to ensure their supervisory structure understands the reality and the significance of their inability to handle their caseload effectively.¹⁸¹

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 regards 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.¹⁸² Local politics and relationships may make it difficult for public defenders to articulate and achieve satisfactory responses to claims that their funder is not doing a sufficient job without a state level supervisory structure.

Also, it is important to consider is how supervisory and staff support plays out in systems managed under different governmental branches. Supervision is important in the criminal defense arena.¹⁸³ Although lawyers are ostensibly responsible for their own caseloads and manage their own cases, state ethical rules do place some responsibility on other attorneys to police the behaviors of other attorneys.¹⁸⁴ This is particularly important when considering that the relevant tenure for public defenders can be quite short.¹⁸⁵ This suggests that many public defenders may not have significant experience managing the large caseload of a public defender.¹⁸⁶

There are unique difficulties in representing an individual who both did not get to choose you as their representative and which you, as the attorney, did not get to screen before accepting the appointment. Additionally, indigency comes with its

¹⁸¹ 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* lawyer. The governor had repeatedly vetoed caseload caps for the office. Camila Domonoske, *Overworked And Underfunded, Mo. Public Defender Office Assigns Case — To The Governor*, NPR (August 4, 2016),

<https://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-governor>.

¹⁸² See ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE, JUSTICE MGMT. INSTITUTE (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf>.

¹⁸³ See generally, Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, EXECUTIVE SESSION ON PUBLIC DEFENSE (2001) (describing the importance in strong leadership and supervisors in the public defender context).

¹⁸⁴ See, e.g., CAL. CODE OF PROFESSIONAL CONDUCT r. 5.1 (2019) (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).

¹⁸⁵ See e.g., *Public Offices Battling Attorney Turnover Issues*, PENSACOLA NEWS J. <https://www.pnj.com/story/news/2017/01/05/public-offices-battling-attorney-turnover-issues/96204570/> (Jan 5, 2017) (describing local turnover issues for public defenders); *State Public Defenders' Turnover Rate 50 Percent, Pay Inequity to Blame*, MISSOULIAN (Feb. 6, 2013), https://missoulain.com/news/state-and-regional/state-public-defenders-turnover-rate-percent-pay-inequity-to-blame/article_213ca416-708e-11e2-9d2e-0019bb2963f4.html (same).

¹⁸⁶ An attorney can lack this case management experience even if they have a wealth of experience in criminal law generally.

own life difficulties, in particular the transient nature of housing or tools for communication.¹⁸⁷ 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 there is a risk that funds may limit when and where they can live, jobs they can hold, and what electronic tools they can use to contact their legal representation. All of these characteristics may exist for clients with the means to afford hiring a private defense attorney of their own 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.¹⁸⁸

Supervisors in a public defender system can ensure that they provide teaching moments and advice for the attorneys that they supervise. Additionally, they can stay 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. This supervisor would ideally 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 popular notion is that the fewer attorneys for each supervisor, the better.¹⁸⁹ The following chart uses data from the Bureau of Justice Statistics to determine the average number of attorneys for each supervisor in state public defender systems.¹⁹⁰

¹⁸⁷ Several public defender offices have restructured to address some of the unique needs of their client base. The Neighborhood Defender Service of Harlem (NDS) 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, *Community Oriented Public Defense: Stronger Public Defenders*, BRENNAN CENTER FOR JUSTICE 19 (2010).

¹⁸⁸ For public defender offices with enough 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*, in *November 2012 NASW News*, Nat. Assn. of Social Workers (November 2012) <http://www.socialworkblog.org/nasw-news-article/2012/11/social-workers-key-players-in-criminal-justice-system/>.

¹⁸⁹ The ideal ratio of managers to subordinates is referred to as "span of control." 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 *PAPERS ON THE SCIENCE OF ADMINISTRATION* 1, 10 (Luther Gulick & L. Urwick eds., 1937).

¹⁹⁰ Note that this report from the Bureau of Justice Statistics was only based on 35 states. Although it does not give us a complete picture, it does provide a useful tool for examining how supervisory structures exist in public defender systems under various state management schemes. Indigent Defense Services in the United States, FY 2008-2012 *available at* <https://www.bjs.gov/content/pub/pdf/idsus0812.pdf>.

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 seek redress for overwhelming caseloads. Instead, it looks at the characteristics particular to a state in consideration of which branch of government it places in oversight of the public defender. Whether branch assignment causes these specific results is a larger 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 proposes specific changes.

III. 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.¹⁹¹ All of these states have relied on different factors in developing their new systems but each 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.¹⁹² The study provided in this article suggests that this placement decision might be best in terms of ensuring more stable funding.¹⁹³ It does, however, also require significant procedural safeguards to maintain the system's effectiveness and efficiency, particularly with regards to the institution's ability to seek tools for reform and improvement. Establishing 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 avenue for redress.¹⁹⁴

One significant change could better establish the public defender as an important and effective executive agency. That would be to imagine the public defender in the role of an inspector general, tasked with neutrally assessing when members of the executive branch have violated important constitutional principles.¹⁹⁵ The second could be to establish more diverse boards or commissions tasked with supervising the delivery of services.

¹⁹¹ See discussion *infra* of Georgia, Louisiana, Alabama, Texas, New Mexico, etc.

¹⁹² *Id.*

¹⁹³ See *infra* Part II.A.

¹⁹⁴ See *infra* Part II.

¹⁹⁵ 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. 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 40.

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 that can range from state police to state prosecutors.¹⁹⁶ It also oversees consumer protection initiatives. These can include enforcing contractual agreements between companies and their customers or ensuring that various constitutional rights are enforced.¹⁹⁷ 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 that the executive branch already manages. As the remainder of the study shows though, a number of states have chosen to forgo this “natural fit” and as discussed, *infra*, and their reasoning has some merit.

The executive branch is naturally understood to be responsible for a broad swatch of administrative activities.¹⁹⁸ Even the attorney general herself is responsible for managing compliance with both state and civil law.¹⁹⁹ This can include criminal law, contract law, torts, environmental statutes, and any other state rule that manages the inter-reliance of diverse citizenry.²⁰⁰ Because the executive branch includes the Department of Health and Human Services, the tax division, and the department of education, all agencies with disparate objectives and responsibilities, 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 stated *supra*, states differ on how they select an attorney general.²⁰¹ Despite this difference in selection proceedings, the attorney general’s mandate is remarkably similar from state to state.²⁰² The attorney general serves as the chief legal officer and counselor to the legislature and other state agencies. The attorney

¹⁹⁶ See e.g., *Organizational Chart*, OHIO LEG., <https://www.legislature.ohio.gov/publications/organizational-chart> (last visited Jan. 1, 2020) (describing the organization of the Ohio executive branch).

¹⁹⁷ See, e.g., *Executive Branch*, MICHIGAN.GOV, https://www.michigan.gov/som/0,4669,7-192-29701_29702---,00.html (last visited Jan. 5, 2020) (describing the duties of the numerous agencies within the executive branch).

¹⁹⁸ See, e.g., *Branches of Government in New York State*, NY STATE SENATE, <https://www.nysenate.gov/branches-government-new-york-state> (last visited December 31, 2019).

¹⁹⁹ *What Does an Attorney General Do?*, NATIONAL ASS’N OF ATTORNEYS GENERAL, https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Jan. 1, 2020).

²⁰⁰ *Id.*

²⁰¹ See *supra* footnote 36 **Error! Bookmark not defined.** (describing the principle of the unitary executive).

²⁰² See *What Does an Attorney General Do?*, NATIONAL ASS’N OF ATTORNEYS GENERAL, https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Jan. 1, 2020).

general is also considered the lawyer for the state citizens, responsible for litigating all matters on behalf of the citizenry that concern a violation of citizen rights or state laws.²⁰³ 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 public defender could be a type of inspector general. The inspector general, a relatively recent innovation within the nation's government management, plays an important part in any state management system.²⁰⁴ It was created by statute and, although it sits within the executive branch, it has sufficient independence it can use to fulfill its duty to investigate fraudulent and wasteful activity by executive agencies.²⁰⁵ In some ways, the inspector general model would fit well with the public defender. The public defender serves as a "check" on the government's intrusion into a citizen's life through the criminal process.

The Inspector General Act of 1978 establishes the appointment and removal process for the inspector general.²⁰⁶ The offices are usually comprised of permanent staff that audit executive agencies.²⁰⁷ Some inspector generals are chosen by the chief executive officer, on the federal level that is the president, and confirmed by the legislature, on the federal level that is the Senate.²⁰⁸

The inspector general is also viewed as sitting uncomfortably at the intersection of the separation of powers and branch assignments.²⁰⁹ This is primarily due to the

²⁰³ See *What Does an Attorney General Do?*, NATIONAL ASS'N OF ATTORNEYS GENERAL, https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Jan. 1, 2020).

²⁰³ *Id.*

²⁰⁴ *Organization, Mission, and Functions Manual: Office of the Inspector General*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-inspector-general> (last visited Jan. 1, 2020).

²⁰⁵ See Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§1-12 (2000)); 22 U.S.C. §3929 (2000) (establishing an Inspector General for the State Department and Foreign Service); 50 U.S.C. §403q (2000) (establishing an Inspector General for the CIA); Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295 (2019).

²⁰⁶ Inspector General Act of 1978, as amended through P.L. 114-317 (enacted Dec. 16, 2016), https://www.oig.dot.gov/sites/default/files/files/The%20Inspector%20General%20Act%20of%201978_thru%2012_16_2016.pdf

²⁰⁷ Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1297 (2019).

²⁰⁸ 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," Inspector General Act of 1978 §3(a), may be removed only with special notice to Congress, §3(b), are required to appoint their own assistants, §3(d), and may demand information, issue subpoenas, and inquire into matters within their jurisdiction without interference from the heads of their departments, §3(a).

²⁰⁹ Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1299 (2019) (noting the awkward positioning of inspector generals in inner branch disputes). For more information about Inspector Generals, see generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993). Describing the independence of inspector generals, see Brian Miller, *Independence of Inspectors General Should Not Be Compromised by Congress*, HILL (Aug. 13, 2018), <https://thehill.com/opinion/white-house/401491-independence-of-inspectors-general-should->

concept of executive privilege which would not necessarily exist in the public defender context. An inspector general exists for every executive agency and reports to Congress.²¹⁰ In the criminal process, the public defender chief leader that mimics the inspector general would not need to report to the legislative branch but would instead be arguing before a court, and before the citizenry in the form of a jury, about any misbehavior by representatives of the executive branch. This type of reporting, however, would not be a violation of executive privilege. Just as discovery rules require the government to turn over all exculpatory evidence to the defense in a criminal case,²¹¹ the public defender acting in a way similar to the inspector general could notify the court of any constitutional violations. In fact, the government attorney in the criminal process, unlike government attorneys subject to congressional oversight, have their own duty both ethically and constitutionally to act as ministers of justice and ensure a fair process for those defendants it seeks to punish for criminal activity.

Without ties to a branch, the inspector general possesses a high degree of independence. 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.²¹² This is also the same call that has been made for the federal defenders.²¹³ The difference in describing it as an inspector general comes from the position and authority such an agency might have in larger battles for state funding. If the public defender is viewed more accurately as a system for ensuring that “screens work” then funders might be more supportive of providing the institution with the resources and supervision it needs.²¹⁴

not-be-compromised-by-congress.

²¹⁰ *Organization, Mission, and Functions Manual: Office of the Inspector General*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-inspector-general> (last visited Jan. 1, 2020); see also Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1295-96 (2019).

²¹¹ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).

²¹² See *supra* Part I.

²¹³ David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 335 (2017) (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”).

²¹⁴ 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.” Public defender “make the screens work.” John B. Mitchell, *The Ethics of the Criminal Defense Attorney-New Answers to Old Questions*, 32 STAN. L. REV. 293, 301-02 (1980).

B. Management by Diverse Boards or Commissions

Another important question for public defense delivery service is how to appropriately construct a board or commission tasked with regulating services. These boards are important institutional players as they can develop and promulgate rules or guidelines that adapt basic constitutional and ethical guidelines to the unique circumstances of their state.²¹⁵ A closer look at the states that have public defender boards or commissions that oversee the delivery of services conveys the premium these groupings seem to place on formal guidelines. Five of the twenty states with such a construction for public defender management have formal caseload standards.²¹⁶ More interestingly, all but one of those states that turn to boards or commissions to manage the public defender under the judicial branch of government have formal caseload guidelines.²¹⁷ The American Bar Association has noted that it such caseload standards are integral to well-performing public defender service.²¹⁸ These results suggest that those boards under judicial branches recognize and have been able to adopt such standards.

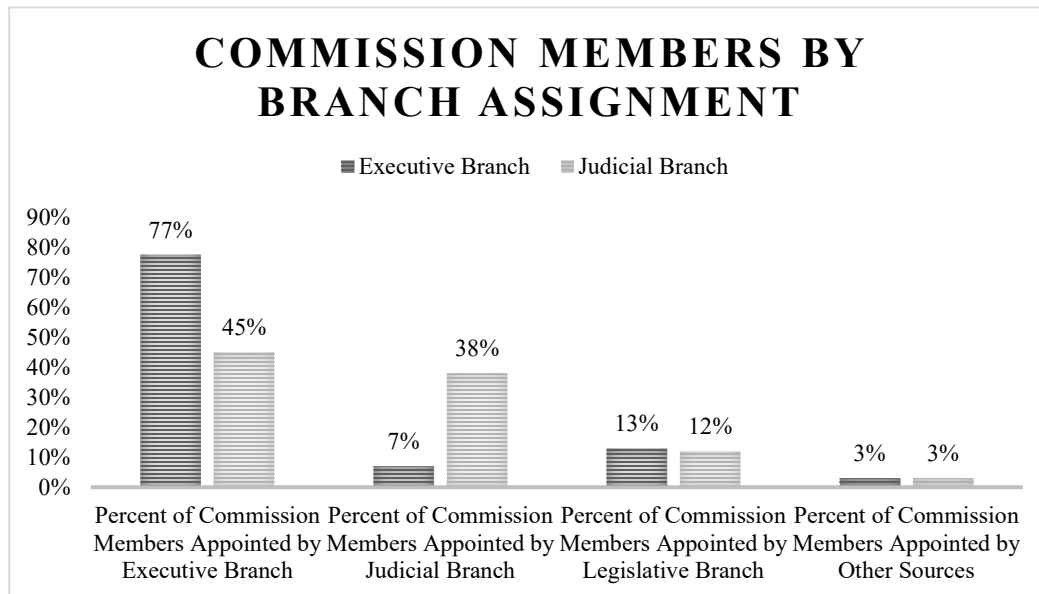
²¹⁵ See, e.g., State Board of Public Defense, MN Leg. Ref. Lib, <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1323> (last visited Jan 21, 2020). Minnesota's State Board of Public Defense appoints the state and judicial district public defenders and "approves standards for the offices of the state and district public defenders and for the conduct of all appointed counsel systems as established by the state public defender."

²¹⁶ BRYAN FURST, A FAIR FIGHT, BRENNAN CENTER FOR JUSTICE 8 (Sep. 9, 2019) lists that only 5 states have caseload limits but the source they cite lists more. These states the source lists are Washington, Arizona, Colorado, Florida, Georgia, Indiana, Massachusetts, Louisiana, Minnesota, Missouri, Oregon, and Tennessee. The difference may arise in additional states adopting caseload guidance after the completion of the Brennan Center study. All of these definitely do not have caseload limits so need to explore this further. It also notes that New York City has caseload guidelines but does not mention other counties in New York.

²¹⁷ Colorado, Massachusetts, Minnesota, and Oregon all meet these standards. The only state that is managed by a commission of board under the judicial branch and does not have a formal guidelines is New Mexico. As detailed in the introduction of this paper, New Mexico positions its public defender management under the judicial branch but specifies that the institution is independent of the branch.

²¹⁸ The ABA commissioned studies in Missouri, Louisiana, Colorado, and Rhode Island to determine state-specific workload standards. AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Chicago: ABA, 2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf; AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf; AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE COLORADO PROJECT: A STUDY OF THE COLORADO PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf; AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid

Despite the benefits of a public defender commission, the aforementioned concern of how a public defender seeking improvements would pursue avenues for such, makes the board makeup important. The board should consist of criminal justice system stakeholders, and those who are sensitive to the particulars of indigent defense work.²¹⁹ This composition, however, risks employing a board comprised of those with competing concerns. Following is a chart showing how boards are comprised in a given state, divided by its branch assignment. Because those public defender systems that do not have a statewide organization scheme would not require a statewide board or commission to manage them, those public defenders that are not assigned to a branch are excluded from this chart.



As noted in the chart above, when a board or commission exists in a public defender managed under the executive branch, approximately 77% of its members are appointed by the executive branch.²²⁰ This means that even though the commission is ostensibly created to preserve some degree of separation from the executive branch, its members primarily depend upon that branch of government in its constitution. There is more diversity in public defender institutions managed under the judicial branch, with about 45% appointed by the executive branch, 38% appointed by the judicial branch, and 15 % appointed by other sources including the legislative branch. If a state were to adopt the recommendations of this paper and place the public defender under the executive branch, it would need to establish

²¹⁹ def ri project.pdf.

²¹⁹ State statutes do not specifically require board member have affiliation with the public defenders. For example, in Minnesota, the board consists of 7 members, including 2 public members appointed by the governor; 4 attorneys and a district court judge, appointed by the supreme court. State Board of Public Defense, MN LEG. REF. LIB, <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1323> (last visited Jan 21, 2020).

²²⁰ Appendix G includes another version of this chat to provide greater clarity.

an appointment procedure that adopted the type of diverse appointment procedure that is more prevalent among judicially managed public defense offices.²²¹

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.²²² Regardless, this move should serve as an important example of what a commission or board should look like in a system aiming to ensure indigent defense delivery of services that is above constitutional and ethical reproach.

The primary advantages of having commissions or boards that are diversely populated 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.²²³ Second, it ensures that there will be a diversity of thoughts and viewpoints in terms of how to ensure that protection of the defendant's rights through the selected manner of providing representative services. Although the fundamental laws establishing the public defender and guiding ethical attorney practice may be stagnant, the appropriate method for ensuring compliance and what types of effort meet these standards is often subject to interpretation.²²⁴ A general diversity in viewpoint could facilitate compromised 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.

²²¹ This would avoid a situation where virtually all members of a board are appointed by the executive branch.

²²² "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." David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 337 (2017).

²²³ "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 (2017).

²²⁴ See, e.g., John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994), Monroe Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005), see also Strickland v. Washington, 466 U.S. 668 (1984).

Such commissions can have regulatory authority over the delivery of services. This effectual law-making authority ensures that the board can set standards that must be followed for each service delivery mechanism.²²⁵ The ability to point to these regulations can also ensure that a public defender or a 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 can set standards for the maximum amount of cases that 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.

As mentioned above, only 12 states have formal caseload guidelines, a tool that the ABA deems necessary for effective public defense representation.²²⁶ These guidelines operate to limit the amount of cases for which an individual public defender can assume responsibility.²²⁷ Both the Sixth Amendment and each state's ethical requirements for attorney practice already limit the number of cases to those in which an attorney can practice effectively and maintain loyalty to their clients but neither of those set forth specific numbers.²²⁸ In 1973, the National Legal Aid and Defender Association prescribed caseload guidelines to provide a clearer sense of when a public defender would not be acting in keeping with these constitutional and ethical requirements.²²⁹ 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.²³⁰ Of those states

²²⁵ See, e.g., State Board of Public Defense, MN Leg. Ref. Lib, <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1323> (last visited Jan 21, 2020). 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."

²²⁶ See text accompanying footnote 215, describing ABA studies on caseload guidelines.

²²⁷ However, note that "... the 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." KEEPING PUBLIC DEFENDER WORKLOADS MANAGEABLE, U.S. DEP'T OF JUSTICE, SPANGENBERG GROUP 7 (2001).

²²⁸ U.S. CONST. AMEND. XI. See, e.g., CAL. CODE OF PROFESSIONAL CONDUCT r. 1.1 (2019).

²²⁹ 1976 *Guidelines for Legal Defense Systems in the United States*, NAT'L LEGAL AID AND DEFENDER ASS'N, <http://www.nlada.org/defender-standards/guidelines-legal-defense-systems> (last visited Jan. 1, 2020). These guidelines indicated that caseload limits should reflect national standards and should take into consideration: 1) objective statistical data; 2) factors related to local practice and 3) an evaluation and comparison of the workload of experienced, competent private defense practitioners. *Id.*

²³⁰ Defined caseload limits allow for a more objective approach: "Whenever the Defender

with formal guidelines, five are in states with public defender systems managed via boards or commissions. Five are in systems with public defender services managed under the executive branch.

This Part suggests two changes to state management of public defender services that would have a significant impact on the institution's stability and effectiveness. Although inspector generals existed in the military beforehand, the Office of the Inspector General which should serve as a model for shifting the current understanding of the public defender has only existed since the late 1970s, almost two decades after the *Gideon* decision ensured the right to counsel.²³¹ It has since grown into a stabilizing and expected oversight tool of federal agencies and the actions they take.²³² 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.

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 such as 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 paper would enable the public defender to do so.

I found that, of the thirty-three states that manage the public defender under the executive branch, all of them receive the bulk of their funding from state budget appropriations.²³³ Of those in the judicial branch, all receive a slightly lower percentage of their funding from the state.²³⁴ None of the public defender services managed at the local level receive any funding from state appropriations.²³⁵ 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

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.*

²³¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Organization, Mission, and Functions Manual: Office of the Inspector General*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-office-inspector-general> (last visited Jan. 1, 2020).

²³² For background information about the attorney general, see Andrew McCause Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1295-96 (2019).

²³³ See *supra*, Part III.B.

²³⁴ *Id.*

²³⁵ *Id.*

appropriations provide more equitable funding and are better able to ensure uniform practices across a state.²³⁶ Such uniformity is critical for public defender services since they are required to meet the same constitutional standard of effectiveness in every state locality.²³⁷

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 neither should it be dispositive. Both the source and the *amount* of funding is important for the public defender's long-term stability.²³⁸ 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 important. Here, the public defender institution requires an authoritative and independent presence that is able to pursue its agenda within larger state structures. It can do so with a leader comparative 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 the *Gideon v. Wainwright*.²³⁹ Instead, it would look to 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 that 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 that served to introduce this project 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 tools to employ in fulfilling those responsibilities. 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

²³⁶ See, e.g., Alan Carlson, Kate Harrison & John K. Hudzik, Adequate, Stable, Equitable, and Responsible Trial Court Funding: Reframing the State vs. Local Debate, Justice Mgmt. Institute 5 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf> (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.

²³⁷ Local funding is subject to greater fluctuation year to year and therefore does not provide enough to cover the fixed costs of public defender offices. See *id.* at 13.

²³⁸ See *supra* Part II.A (describing the necessity of stable funding in the context of the state versus local management debate).

²³⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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 poor defendants that an appropriate system can be designed and adopted.

This paper 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 poor defendants facing criminal charges in litigation that the state itself has chosen to bring against them.