

# Public Defender Independence

Alex Bunin\*

*Independence is an aspiration for public defenders. It is the ability to advocate for clients without interference by government overseers. Two of the biggest obstacles to independence are a lack of funding and excessive cases. However, even when those are addressed, public defenders face scrutiny from funding authorities who may disapprove of advocacy for systemic change on behalf of clients. That disapproval can result in punishment, including termination of chief defenders. This is because such reforms cost governments money and expedience in the short term, even though they can ultimately save money and support justice. There are constitutional protections for public defenders who speak out about systemic reforms. This article explains what can be done legally and practically to protect defenders from retaliation when those political disputes arise. After surveying the current system, the article provides five case studies of chief defenders who were challenged for their actions. It lists structural, cultural, and legal remedies to protect public defenders. Those include supportive oversight, alliances with the community, engaging in politics, messaging in the media, adopting holistic practices, and litigation. The pervasive, but understudied, issue of public defenders facing retaliation for speaking out is examined in both a legal and historical context.*

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\* Chief Public Defender, Harris County Public Defender’s Office (Houston, Texas). The author established and managed federal and county public defender offices in Texas, Alabama, New York and Vermont for over 25 years. Thanks to David Patton, Brandon Garrett, Charlie Gerstein and Jonathan Rapping.

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**INTRODUCTION**

Public defenders are salaried lawyers of an organization whose mission is to zealously represent criminal defendants unable to afford counsel. In theory, public defenders are the best lawyers to represent poor defendants. They specialize in criminal defense. They work in combination with other lawyers, investigators, administrators, and social workers. Their remuneration is not dependent upon the volume of cases they handle. Like a large law firm, with many specialties and skills that support one another, a public defender office is stronger than the sum of its parts.

However, there are three reasons that public defenders are criticized as appointed lawyers. First, public defender offices are often underfunded. Second, public defenders frequently have too many cases. Third, they are not independent of political influence.

There has been much study and reporting about the underfunding and excessive cases given to public defenders.<sup>1</sup> These deficiencies have been dominant in public defense from its beginning until the present.<sup>2</sup> It is generally agreed that providing adequate funds and introducing workload limits will solve those problems.<sup>3</sup>

Achieving independence is more complicated than merely adding money and work boundaries. Anytime a chief defender considers taking a position in conflict with their organization's funding and governing authority, it creates a potentially adverse political influence that can harm the organization and cost the chief defender their job. In this context, independence means being able to speak out about those political issues without fear of retaliation.

The lack of independence among public defenders from their oversight authorities is pervasive throughout the United States, and yet there has been little recognition of the problem. As will be seen below, public defenders have constitutional protections to speak out about issues such as a lack of funding, excessive cases, and systemic issues like bail reform. Politicians, administrators, judges, and prosecutors have misunderstood these citizen speech rights, and have retaliated against chief public defenders for legitimately speaking up for their clients and employees.

Public defenders need independence because of the nature of their jobs. They represent criminal defendants. Crimes are acts which society made illegal because they are immoral or potentially harmful to other citizens. In speaking on behalf of criminal defendants and asserting their legal rights, public defenders put themselves in opposition to the governments who fund them. In an adversarial legal system, governments prefer to be seen as advocating for law enforcement and safety rather than criminal defendants and their lawyers.

## I. THE CURRENT SYSTEM

When the United States Supreme Court issued *Gideon v. Wainwright* in 1963, the justices made no effort to suggest in what form public defense should be provided. It required only that when a person is charged with a felony, the charging jurisdiction must pay for a lawyer if the defendant cannot

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<sup>1</sup> See KAREN HOUPPERT, CHASING GIDEON, THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 20–21 (New Press 2013); see also NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, NAT. RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, (2009), <https://archive.constitutionproject.org/pdf/139.pdf> [<https://perma.cc/L3U9-EMQ6>].

<sup>2</sup> Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 913–14 (2005).

<sup>3</sup> NORMAN LEFSTEIN, AM BAR ASS'N., SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 20 (2011), <https://www.in.gov/publicdefender/files/SecuringReasonable-Caseloads.Book.pdf> [<https://perma.cc/4XYD-2Z2Q>].

afford one.<sup>4</sup> The opinion left many questions about how to administer that process. Various experiments both preceded and followed *Gideon*. The public defender model has existed in many variations since the beginning of the twentieth century.<sup>5</sup>

Every state and the federal government has its own criminal laws and procedures. Within states, most public defense systems vary from county to county. In Texas, there are 254 counties, and each has a separate public defense system. Some jurisdictions appoint private attorneys on a contract basis.<sup>6</sup> Others manage private attorneys through a central administration.<sup>7</sup> Some have public defenders, but the default method throughout America is for individual judges to pick the private lawyers they appoint to defendants in their courts. In some places, those lawyers may have no other qualification than a law license.

*Gideon* did not create the concept of public defenders. Los Angeles had a public defender as early as 1914.<sup>8</sup> Travis County (Austin), Texas, home of one of America's fastest growing cities, only established a public defender office in 2020.<sup>9</sup> Those counties, and others, made the decisions to pay for public defenders. They were not legally required to; but based on research and advice they came to the conclusion that a public defender office was an appropriate response to their constitutional duty to appoint counsel. Those governments influenced how the offices were set up and staffed, and who would lead them. That power to oversee public defenders continues, especially when those offices seek an annual budget, or when the chief is reviewed.<sup>10</sup>

Most public defender offices receive government funding, either because they are government entities, or indirectly through contracts or grants. When funding is withheld from defenders, or when their positions are threatened by government action, there may be cognizable claims of retaliation.

In *Flora v. County of Luzerne*, the United States Court of Appeals for the Third Circuit found that a chief public defender could bring a lawsuit over his termination when his county-employer fired him for speaking out.<sup>11</sup> The

<sup>4</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 341–45 (1963); see also Alissa Pollitz Worden et al., *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423 (2011).

<sup>5</sup> See generally SARA MAYEUX, *FREE JUSTICE, A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* (UNC Press Books 2020).

<sup>6</sup> TEX. INDIGENT DEF. COMM'N, ANNUAL REPORT FOR FISCAL YEAR 2020 13 (2020) [http://www.tidc.texas.gov/media/8d92f48d6bbd826/tidc\\_annual\\_report\\_fy20.pdf](http://www.tidc.texas.gov/media/8d92f48d6bbd826/tidc_annual_report_fy20.pdf) [<https://perma.cc/AM9D-V5BD>].

<sup>7</sup> See e.g., *Offices of the San Mateo County Private Defender*, SAN MATEO CNTY. PRIV. DEF., <https://pdpsmcba.org/> [<https://perma.cc/FZX6-TMRB>].

<sup>8</sup> *Law Offices of the Los Angeles Public Defender*, L.A. PUB. DEF., <https://pub-def.lacounty.gov/about-us/> [<https://perma.cc/ZE7D-Y6E9>].

<sup>9</sup> Ryan Autollo, *Travis County public defender starts Monday amid uncertain times*, AUSTIN AM. STATESMAN (Apr. 19, 2020, 4:40 PM), <https://www.statesman.com/news/20200417/travis-county-public-defender-starts-monday-amid-uncertain-times> [<https://perma.cc/M8UB-S3R3>].

<sup>10</sup> LEFSTEIN, *supra* note 1, at 82–84.

<sup>11</sup> *Flora v. County of Luzerne*, 776 F.3d 169, 179–81 (3d Cir. 2015).

basis for the termination was for filing a class action lawsuit against the county. The chief alleged inadequate funding and staffing at the public defender office, and also raised the issue that the local courts had failed to process expungements ordered by the Pennsylvania Supreme Court.<sup>12</sup> He argued his firing was retaliation for speaking out.

In finding the chief defender had a cause of action, the Third Circuit distinguished a previous United States Supreme Court case, *Garcetti v. Cabellos*, holding that public employees could be fired over statements made “pursuant to official duties.”<sup>13</sup> In that case, the Supreme Court nullified the free speech rights of public employees by applying the government speech doctrine to them whenever they speak pursuant to their official duties.<sup>14</sup>

The plaintiff in *Garcetti* was an assistant district attorney who wrote a “disposition memo” about defects in a criminal case that his office refused to dismiss.<sup>15</sup> The defense later called the prosecutor as a witness. The prosecutor received position transfers he perceived as punishment for his actions.<sup>16</sup> He filed a grievance and then sued. The Supreme Court found that it was part of his official duties to write the memo, placing it outside of citizen speech, and therefore, unprotected by the First Amendment.<sup>17</sup> The case is troubling, particularly because it means a government attorney has no protection from discipline when he is trying to follow the constitutional and ethical obligations of his job.

The test in *Garcetti* has been defined in three parts: (1) if the statement was made as part of the government employee’s official duties, it is not protected; (2) if the subject matter of the statement is not a public concern, it is not protected; and (3) if the statement disrupts or interferes with the government employer’s mission, protection may be denied.<sup>18</sup>

In *Flora*, the Third Circuit found that neither filing a lawsuit nor pointing out the expungement problems were part of the chief defender’s official duties.<sup>19</sup> In other words, speaking out—although during working hours—is not necessarily part of a defender’s official duties, even if the topics involve the subject of public defense. Governments do not hire employees to publicly criticize them—which is how chief public defenders sometimes run into trouble with their employers.

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<sup>12</sup> *Id.* at 172.

<sup>13</sup> *Id.* at 178–79 (distinguishing *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006)).

<sup>14</sup> Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 BYU L. REV. 2175, 2194–95 (2010).

<sup>15</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

<sup>16</sup> *Id.* at 415.

<sup>17</sup> *Id.* at 421–22.

<sup>18</sup> Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of *Garcetti v. Ceballos**, 29 BERKELEY J. EMP. & LAB. L. 175, 199 (2008).

<sup>19</sup> *Flora v. County of Luzerne*, 776 F.3d 169, 179 (3d Cir. 2015) (citing *Lane v. Franks*, 573 U.S. 228, 236 (2014)).

Alternatively, a public defender who was fired for denigrating his clients would have no claim to a free speech defense under *Garcetti*. It meets no element of the three-part test. Keeping client confidences is part of a public defender's official duties; attorney-client relationships are not public concerns; and breaching those confidences would be highly disruptive to the functioning of a public defender office. Similarly, an assistant public defender who was fired for complaining to others at work about his transfer within the office had no claim of retaliation because the internal transfer was not a public concern.<sup>20</sup>

In another case, the United States Supreme Court held that a court-appointed lawyer does not engage in state action in their representation of appointed criminal defendants.<sup>21</sup> In *Polk County v. Dodson*, the Court stated, "[t]here can be no fair trial unless the accused receives the services of an effective and independent advocate."<sup>22</sup> The term "advocate" implies speech.<sup>23</sup> The term "independent" implies they are not government-controlled duties. Public defenders have free speech rights and governments may be liable for retaliating against them when they speak up on matters of public importance that are not part of their official duties.<sup>24</sup>

Public defenders, while paid by the government, are presumed to speak for their clients in court.<sup>25</sup> When they are speaking up for clients beyond those official duties they have citizen speech rights. Thus, "the state cannot 'buy' the public defender's speech to promote a message different from providing criminal defendants constitutionally sufficient—meaning loyal, effective, and independent—representation."<sup>26</sup>

Dividing the political obstacles to independence into categories is not to imply they are not interrelated. A lack of funds becomes a political influence when public defenders—usually through their chief public defender—petition, lobby, or sue their oversight authority for resources. The same occurs when the chief defender refuses new appointments to the office because lawyers are already overloaded and can no longer provide effective assistance of counsel.<sup>27</sup> Even when neither resources nor workloads are at issue, political influences can damage public defender offices.

In other words, when public defenders are fighting for assets merely

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<sup>20</sup> *De Ritis v. McGarrigle*, 861 F.3d 444, 455-56 (3d Cir. 2017).

<sup>21</sup> *See Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (public defenders have duties to clients that are independent from government control); *see also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

<sup>22</sup> *Dodson*, 454 U.S. at 322.

<sup>23</sup> *Advocate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/advocate> [<https://perma.cc/YT5R-BX48>].

<sup>24</sup> *See Charlie Gerstein, Dependent Counsel*, 16 STAN. J. C.R. & C.L. 147, 182 (2020).

<sup>25</sup> Dale, *supra* note 18, at 210.

<sup>26</sup> Tarkington, *supra* note 14, at 2194-95.

<sup>27</sup> *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Padilla v. Kentucky*, 559 U.S. 356, 372-73 (2010); *see also* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

to survive, other policy concerns get less attention.<sup>28</sup> If resources and workloads reach reasonable levels, the principle of independence takes on a different meaning. When public defenders have the time and money to promote systemic change there are additional challenges.

Independence is a fundamental American value. The Declaration of Independence preceded the United States Constitution by almost two decades. Independence for public defenders means being able to take policy positions that have consequences beyond representing a single client in a case. However, those positions may diverge from, or even contradict those of, funding agencies, oversight entities, or politicians.<sup>29</sup>

For instance, when a public defender office is part of government it is typically funded by the same officials who pay for prosecutors and law enforcement agencies. In responding to challenges among those priorities, public defenders can face threats of termination, potentially decreased funding, and higher caseloads. It is a relationship dependent upon the support of those who may not always share the same mission.<sup>30</sup>

It is the nature of the adversarial legal system that not only are prosecutors and police the opponents of defense lawyers and their clients in their individual cases, but they also are regarding larger policy issues. If the government overseers do not balance the needs of each, it will result in unequal and lower funding for public defense.<sup>31</sup> One reason this may have received little previous discussion, is that those inside such a system often fail to see such imbalances.<sup>32</sup>

Even nonprofit public defender organizations depend on grants and government funding to support operations. For example, the nonprofit, The Bronx Defenders, was threatened with loss of its \$20 million contract with New York City after two of its lawyers participated in a video protesting the killing of Eric Garner at the hands of police.<sup>33</sup> As a settlement for promoting the alleged “anti-police” video, the lawyers were forced to resign.<sup>34</sup>

When a public defender speaks out in favor of a lawsuit or protests

<sup>28</sup> See Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL’Y REV. 533, 542 (2007) (“Advocacy goals that a public defense office might pursue include elevating public support for criminal defense, lobbying for the legal rights of the accused, or pushing for more humane sentencing alternatives. How an office determines its mission will depend on, among other things, its needs, its resources, and its environment.”).

<sup>29</sup> See, e.g., William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1704–05 (1993) (arguing aggressive defense is merely another name for unethical behavior).

<sup>30</sup> See Gerstein, *supra* note 24, at 187–89.

<sup>31</sup> See GENEVIEVE CITRIN RAY & LILLIAN TUTTLE, AM. U. SCH. OF PUB. AFFAIRS, RIGHT TO COUNSEL NATIONAL CAMPAIGN: STAKEHOLDER ENGAGEMENT REPORT 5 (Oct. 2020) (“Public defenders provide a wealth of information, balance, and an alternative perspective to criminal justice reform conversations.”), [https://www.american.edu/spa/jpo/upload/au\\_whitepaperreport\\_final.pdf](https://www.american.edu/spa/jpo/upload/au_whitepaperreport_final.pdf) [<https://perma.cc/Y9AT-AAQ2>].

<sup>32</sup> See Bruce J. Havighurst & Peter MacDougall, *The Representations of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 582–83 (1963).

<sup>33</sup> Benjamin Mueller, *Lawyers Who Appeared in Anti-Police Video Are Forced to Resign*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/05/nyregion/lawyers-who-appeared-in-anti-police-video-are-forced-to-resign.html> [<https://perma.cc/4RA2-AFEL>].

<sup>34</sup> *Id.*

against the same government that employs or funds her, it is likely to raise questions from government officials. What is the extent of that lawyer's right to speak about an issue that will benefit her clients, but may cost the government money? What is the balance among financial concerns, expedience, and justice that will allow public defenders to work independently? This article attempts to answer those questions.<sup>35</sup> The type of political issues that can endanger chief public defenders are often systemic challenges. Bail reform or reducing fines and fees are two examples. Taking a position that ultimately benefits their clients, but can also cost their local government millions of dollars, may jeopardize public defenders' positions. Often, the chief's job is at-will, or is an appointment for a term. There may be little due process or transparency in replacing a chief public defender.

An example of how quickly a political issue can escalate occurred in the mid-1990s when the United States Congress cut off funding for death penalty resource centers.<sup>36</sup> These offices provided post-conviction habeas corpus litigation on behalf of defendants sentenced to death in state courts around the country. Many congressional members were upset by their success and worked together to get the offices shut down to look tough on the death penalty. In response, New York Times columnist Anthony Lewis wrote:

The right to a competent lawyer is the mark of a civilized society. I know of no action by the radical Republicans as uncivilized, as indecent as this one. It reminds me of what Joseph N. Welch said to Senator Joseph McCarthy: "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness."<sup>37</sup>

Congress seeking to disband the centers were not the only political actors attempting to overturn a portion of the public defender system. In New York City, Mayor Rudolph Giuliani terminated the city's contract with the Legal Aid Society because their lawyers staged walk outs to pressure the city government to increase their wages.<sup>38</sup> It took over a year, and the creation of alternative defender offices, to fully reestablish the city's public defender system.<sup>39</sup>

Vague claims of impropriety or mismanagement may cloud the real

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<sup>35</sup> Cf. Gerstein, *supra* note 24, at 157–69 (there are other dynamics that can make criminal defense lawyers subservient to judges and prosecutors).

<sup>36</sup> Al Schay, *The Elimination of Death Penalty Resource Centers Congress Has Opted to Close 20 Centers in the United States*, ARK. LAW., Winter 1996, at 35.

<sup>37</sup> Anthony Lewis, Opinion, *Abroad at Home: Cruel And Reckless*, N.Y. TIMES (Aug. 11, 1995), <https://www.nytimes.com/1995/08/11/opinion/abroad-at-home-cruel-and-reckless.html?searchResultPosition=1> [https://perma.cc/4HM3-9FPJ]; see also John B. Arango, *Defense Services for the Poor: Uncertain Future for Death Penalty Resource Centers*, CRIM. JUST., Winter 1996, at 36–37.

<sup>38</sup> Alison Mitchell, *Mayor Moves To Cut Role Of Legal Aid*, N.Y. TIMES (Oct. 6, 1994), <https://www.nytimes.com/1994/10/06/nyregion/mayor-moves-to-cut-role-of-legal-aid.html> [https://perma.cc/6UL5-VTC6].

<sup>39</sup> See David Firestone, *Giuliani Moves to Reduce Legal Aid Society's Role*, N.Y. TIMES (Oct. 21, 1995), <https://www.nytimes.com/1995/10/21/nyregion/giuliani-moves-to-reduce-legal-aid-society-role.html> [https://perma.cc/6AFB-WZFQ].



motives for changing a chief or punishing an organization. For example, in 2009, Maryland fired its chief defender, allegedly because she refused to implement staff changes requested by her board, which she described as “unlawful and wrong.”<sup>40</sup> This was likely part of a broader policy disagreement. In related correspondence, her board chairman stated that it was not the job of public defenders to “rehabilitate and life assist” clients.<sup>41</sup> Lacking a more public process, it was difficult to know the actual reason for her termination.

This type of political independence is parallel to, but different from, independence of individual lawyers to make decisions on behalf of each client.<sup>42</sup> Legal precedent<sup>43</sup> and rules of professional responsibility<sup>44</sup> are designed to protect criminal defense lawyers from the influence of judges and others that might inhibit zealous representation of their individual clients,<sup>45</sup> such as cutting their fees.<sup>46</sup> Although those tenets require vigilance,<sup>47</sup> at least they are documented. Most rights, even those recognized as constitutionally protected, are not self-enforcing and demand the persistence of lawyers.<sup>48</sup> Those issues of independence are typically between individual lawyers and the judges who appoint them or oversee the work they do in court.<sup>49</sup> Although they can be representative of larger policy issues, they are focused on a result in an individual case. The right and ability to argue for systemic change is not so clearly articulated.

It is difficult enough for each lawyer with individual cases to make sure the rules, laws and constitutions are enforced. Judges cannot assume that role for them. Almost 90 years ago, the United States Supreme Court

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<sup>40</sup> Julie Bykowicz & Tricia Bishop, *Top MD. Public Defender is Fired*, BALT. SUN (Aug. 22, 2009), <https://www.baltimoresun.com/news/bs-xpm-2009-08-22-0908210179-story.html#> [<https://perma.cc/XFT2-4SGQ>].

<sup>41</sup> *Id.*

<sup>42</sup> See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996) (describes the dichotomy between the roles a public defender plays in the criminal justice system as both individual advocate and institutional participant for criminal defense).

<sup>43</sup> *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981) (finding a public defender performs legal functions for clients that are independent from government control).

<sup>44</sup> See e.g., MODEL RULES OF PRO. RESP. r. 5.4 (c) (AM. BAR ASS’N 2002) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”).

<sup>45</sup> *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958) (“An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known.”).

<sup>46</sup> See Richard A. Oppel Jr., *His Clients Weren’t Complaining. But the Judge Said This Lawyer Worked Too Hard*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html> [<https://perma.cc/5TN6-R7UG>].

<sup>47</sup> See Angela Morris, *Lawyer Settles With Judge Accused of Cutting His Caseload for Criticizing Indigent Defense Appointments*, TEX. LAWYER (Apr. 24, 2019), <https://www.law.com/texaslawyer/2019/04/24/lawyer-settles-with-judge-accused-of-cutting-his-caseload-for-criticizing-indigent-defense-appointments/> [<https://perma.cc/NSL9-SGV9>]; see also *Willey v. Ewing*, No. 3:18-CV-00081, 2018 WL 7115180, at \*6 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019).

<sup>48</sup> ALEC KARAKATSAIS, *The Distribution of Legal Labor, in USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* 160, 160–61 (New Press 2019).

<sup>49</sup> See David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 338 (2017).

stated:

But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.<sup>50</sup>

Lawyer and journalist, Amy Bach, described a courtroom scene in a rural Georgia county that is emblematic of the precarious role of individual public defenders.<sup>51</sup> A single lawyer was paid by the county to represent all poor criminal defendants on a part-time basis. He was overworked, underpaid and could have been easily replaced by another lawyer. He barely had time to talk to clients the morning of their court dates and otherwise huddled with the judge and prosecutor at the bench while others in the courtroom could not hear the proceedings.<sup>52</sup>

The day she observed this, Bach was accompanied by Stephen Bright. At the time, Bright was president and senior counsel at the Southern Center for Human Rights and taught at Harvard and Yale law schools. He stood up in the gallery and in a booming voice requested that the judge speak up so all could hear. The judge either realized who he was or was at least influenced by the strength of his advocacy and appearance. The judge spoke audibly to all present for the rest of the day.<sup>53</sup> The story is instructive regarding the actions of those involved. The defense lawyer either never considered asking the judge to speak up or thought better of it. He was dependent upon the judge for his compensation and careful not to upset her. The judge was satisfied with the lack of transparency because it promoted efficiency. It was only when a strong presence came from outside the system, not beholden to the court, that the procedure changed, even if only for that day. As the United States Court of Appeals for the Fifth Circuit stated 60 years ago, "We consider undivided loyalty of appointed counsel to client as essential to due process."<sup>54</sup> Judges are regarded respect, but clients are owed loyalty.<sup>55</sup>

Journalist Radley Balko distinguished between the dilemmas faced by individual public defenders and the policy matters confronting chiefs:

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<sup>50</sup> Powell v. Alabama, 287 U.S. 45, 61 (1932).

<sup>51</sup> AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 34–37 (Metropolitan Books 2009).

<sup>52</sup> See *id.* at 12–17.

<sup>53</sup> *Id.* at 34–37.

<sup>54</sup> MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) (finding divided loyalty resulted in a lack of independence).

<sup>55</sup> See Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (supporting that clients are owed loyalty from their appointed counsel); see also Maurice Chammah, *Bad Blood: Lawyer v. Court. Guess Who Wins?*, THE MARSHALL PROJECT (Jan. 16, 2015, 4:57 PM), <https://www.themarshallproject.org/2015/01/16/bad-blood> [<https://perma.cc/5Z4B-TLEW>] (supporting that clients are due loyalty from counsel even in the face of judicial rebuke).

In fact, public advocacy is especially important for a chief public defender, because there are also strong incentives that keep defense attorneys from reporting the systemic problems they experience day to day. If you're a public defender who notices prosecutorial misconduct or if you encounter a judge who sets unusually high bail amounts, speaking out on those problems could make it a lot more difficult to do your job. If you report a prosecutor for misconduct (complaints that almost always go nowhere), that prosecutor may not offer your other clients favorable plea bargains. And of course, no lawyer wants to get on the bad side of a judge. So as the head of the office, a chief public defender can bring attention to these problems in a way that attorneys on the front lines often can't.<sup>56</sup>

This article focuses on the broader policy considerations that are in the interest of public defenders and their clients generally. Those are the issues which challenge the economic and public safety policies of their governments and controlling authorities. A lack of funding or too many cases has led to lawsuits either filed by public defenders or on their behalf by outside organizations. Less attention has been paid to political issues, beyond funding and case volume. Although the goals for policy and those for individual clients sometimes come into conflict, for the most part, a public defender office can pursue policy goals without disadvantaging individual clients.<sup>57</sup>

A lack of funding and too many cases, usually act in unison to the detriment of public defenders.<sup>58</sup> Too little money means that it is difficult to hire a sufficient number of competent lawyers and staff. That leads directly to those lawyers having more cases than they can effectively handle. Funding does not just mean compensating the lawyers, but also paying for necessary resources like experts and investigation.<sup>59</sup> Responding to these problems is both a political and legal issue. It is arguably an ethical duty.<sup>60</sup> Public defenders may request, lobby, protest, or sue for relief. Sometimes, the complaints come from outside groups who seek to hold the public defenders and their funding authorities accountable in court.<sup>61</sup>

Many reports and studies call for "full funding" of indigent defense without explaining what that means. While there are geographic and

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<sup>56</sup> Radley Balko, Opinion, *A Pennsylvania county fired its two top public defenders for doing their jobs*, WASH. POST (Mar. 2, 2020), <https://www.washingtonpost.com/opinions/2020/03/02/pennsylvania-county-fired-its-two-top-public-defenders-doing-their-jobs/> [https://perma.cc/FY2Y-JHVR].

<sup>57</sup> See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers As Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1201 (2005).

<sup>58</sup> EVE BRENSIKE PRIMUS, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121–45 (E. Luna ed., 2017), [https://repository.law.umich.edu/book\\_chapters/113](https://repository.law.umich.edu/book_chapters/113) [https://perma.cc/GPD5-YTPC].

<sup>59</sup> See *Ake v. Oklahoma*, 470 U.S. 68 (1985) (regarding funding for experts); see also *United States v. Germany*, 32 F.R.D. 421 (M.D. Ala. 1963) (regarding funding for investigators).

<sup>60</sup> See Ellen C. Yaroshesky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System is Unjust*, 44 HOFSTRA L. REV. 1207, 1214–15 (2016).

<sup>61</sup> See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1123–25 (W.D. Wash. 2013).

jurisdictional differences, the formulas for those costs are not a mystery.<sup>62</sup> Most of a public defender office's costs are for personnel. The lawyers, investigators, social workers, and administrative staff should at least be paid comparably with persons holding similar positions at the prosecutor's office. Benefits should also be the same.

Non-personnel costs are overhead, including rent, furniture, supplies, equipment, books, training and travel, Internet and related services (e.g., electronic legal research), and case costs (e.g., experts, translation, reports). Such expenses are fairly easy to calculate and to predict based upon the estimated number of cases the office will receive.

Louisiana has a poor history of adequately funding and staffing public defender offices.<sup>63</sup> Louisiana public defenders are divided by judicial districts made up of one or more parishes—the equivalent of counties.<sup>64</sup> There are districts that have only a single public defender for all their cases.<sup>65</sup> The offices are overseen by a statewide board, but much of each office's funding comes from the revenue of fines, fees, and traffic tickets in their jurisdiction.<sup>66</sup> This has created severe funding gaps.<sup>67</sup> A public defender who formerly led that board said, "It's a really unreliable and mercurial source of funding."<sup>68</sup> The context of his statement was about the New Orleans chief public defender's decision to begin refusing some cases in 2007 and again in 2012. The lack of funding corresponded to a dearth of lawyers to effectively represent all appointed clients. With a budget that is a third of the district attorney's and caseloads twice or more national standards, Orleans Public Defenders frequently struggles for adequate funding.<sup>69</sup> The Louisiana Supreme Court agreed with that analysis as far back as 1993,<sup>70</sup>

<sup>62</sup> See Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691 (2010).

<sup>63</sup> Radley Balko, Opinion, *Louisiana's indigent defense system is broken. A new bill may only make it worse*, WASH. POST (June 1, 2021, 12:10 PM), <https://www.washingtonpost.com/opinions/2021/06/01/louisianas-indigent-defense-system-is-broken-new-bill-may-only-make-it-worse/> [<https://perma.cc/4DYH-JEG4>].

<sup>64</sup> See LA. PUBLIC DEFENDER BOARD, THE STATE WE'RE IN, <http://lpdb.la.gov/About/txt-files/pdf/LPDB%20Fact%20Sheet.pdf> [<https://perma.cc/8D2S-RG7F>].

<sup>65</sup> Eli Hager, *When There's Only One Public Defender in Town*, THE MARSHALL PROJECT (Sept. 9, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/09/09/what-happens-when-there-s-only-one-public-defender> [<https://perma.cc/63AG-HY2P>].

<sup>66</sup> HOUPPERT, *supra* note 1, at 157; LA. STAT. ANN. § 15:168.

<sup>67</sup> Matt Sledge, *Orleans Public Defenders to cut services, freeze hiring in face of revenue shortfall*, NEW ORLEANS ADVOC. (May 5, 2019), [https://www.nola.com/news/courts/article\\_6e6bbaf3-2bff-5dfd-8701-91a9c7cee9fb.html](https://www.nola.com/news/courts/article_6e6bbaf3-2bff-5dfd-8701-91a9c7cee9fb.html) [<https://perma.cc/3334-JPCH>].

<sup>68</sup> Samantha Sunne, *Why Your Right To A Public Defender May Come With A Fee*, NAT'L PUB. RADIO (May 29, 2014, 10:01 AM), <https://www.npr.org/2014/05/29/316735545/> [<https://perma.cc/B8DS-9B8W>].

<sup>69</sup> Tina Peng, Opinion, *I'm a public defender. It's impossible for me to do a good job representing my clients*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.217593d44b25](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.217593d44b25) [<https://perma.cc/JSE5-P8R4>]; see generally Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008).

<sup>70</sup> See *State v. Peart*, 621 So. 2d 780, 790–91 (La. Sup. Ct. 1993).

but more recently the court has been an obstacle to reform.<sup>71</sup>

When the office began refusing cases again in 2016,<sup>72</sup> it was sued by the American Civil Liberties Union (ACLU) for violating its duty to provide effective assistance of counsel.<sup>73</sup> Although, this type of lawsuit is typically welcomed by the public defenders who are sued, it is only because they hope the result will be additional funding.<sup>74</sup> Otherwise, it merely creates more tension between defenders and their oversight authority.<sup>75</sup>

Elsewhere, the Wyoming Supreme Court held that their judges could not force public defenders to take more cases than they could handle, but other than preventing them from being held in contempt, no relief was provided for the systemic problem of unfunded mandates.<sup>76</sup> One Attorney General of the United States weighed in on the issues of underfunded and overworked public defenders in the State of Washington. In a federal court pleading, the Department of Justice urged:

First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement for a careful analysis of a public defender's workload, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties.<sup>77</sup>

Local authorities are not as vocal in supporting public defense because it gets less attention than law enforcement and other funding needs. Thus, the extent to which states and localities are succeeding in fulfilling the promise of the constitutional right to counsel "varies widely."<sup>78</sup>

Workloads, not merely case maximums, must be calculated in each jurisdiction. Some states, like Texas and Missouri, have completed workload

<sup>71</sup> *State v. Covington*, 318 So. 3d 21, 22–27 (La. Sup. Ct. 2020) (holding expert witnesses and a study were insufficient to establish that defender case volumes led to ineffective assistance of counsel).

<sup>72</sup> Ben Myers, *Orleans public defender's office to begin refusing serious felony cases Tuesday*, NEW ORLEANS ADVOC. (July 19, 2019, 9:19 AM), [https://www.nola.com/news/crime\\_police/article\\_ab6df9bc-39d3-5616-a413-baaee50bfb04.html](https://www.nola.com/news/crime_police/article_ab6df9bc-39d3-5616-a413-baaee50bfb04.html) [<https://perma.cc/TFT2-LEG6>].

<sup>73</sup> Jed Lipinski, *The trials and travails of a New Orleans public defender*, NEW ORLEANS ADVOC. (July 19, 2019, 10:35 AM), [https://www.nola.com/news/crime\\_police/article\\_cbfe2bcc-3ae9-520f-bd52-d3ba28a4fc69.html](https://www.nola.com/news/crime_police/article_cbfe2bcc-3ae9-520f-bd52-d3ba28a4fc69.html) [<https://perma.cc/Z4HD-4Z5J>].

<sup>74</sup> Eli Hager, *Why Getting Sued Could Be the Best Thing to Happen to New Orleans' Public Defenders*, THE MARSHALL PROJECT (Jan. 28, 2016), <https://www.themarshallproject.org/2016/01/28/why-getting-sued-could-be-the-best-thing-to-happen-to-new-orleans-public-defenders> [<https://perma.cc/SBD2-UUPG>]; see also Editorial, *Federal Oversight on Public Defense*, N.Y. TIMES (Sept. 7, 2013), <https://www.nytimes.com/2013/09/08/opinion/sunday/federal-oversight-on-public-defense.html> [<https://perma.cc/U6SC-PAGD>] ("The disadvantage may be nowhere more glaring than in New Orleans, where indigent people sit in jail uncharged, sometimes for months, waiting for a lawyer whose workload far exceeds any reasonable standard.").

<sup>75</sup> Hager, *supra* note 74.

<sup>76</sup> *Lozano v. Cir. Ct. of Sixth Jud. Dist.*, 2020 WY 44, ¶ 59, 460 P.3d 721, 738 (Wyo. Sup. Ct. 2020).

<sup>77</sup> Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. C11-1100RSL).

<sup>78</sup> David Carroll & Scott Wallace, *The Implementation and Impact of Indigent Defense Standards*, 31 S. U. L. REV. 245, 251 (2004).

studies.<sup>79</sup> Only workload studies can determine how much an assistant public defender can reasonably take on to ensure they are still providing effective assistance of counsel. The American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility issued a formal opinion in 2006 that stated in part:

If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation . . . . Lawyer supervisors, including heads of defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct.<sup>80</sup>

In his seminal book on the subject, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, the late Dean Norman Lefstein did the math.<sup>81</sup> He calculated that there were about 255–258 workdays a year. Assuming a defender took minimal sick leave or vacation and worked beyond a normal 40-hour week, he or she might have as many as 1850 hours per year to spend on cases. Under those circumstances, an attorney with 311 cases in a year could devote all of six hours to each client's case.<sup>82</sup> However, in the nation's largest 100 counties, an appointed lawyer handles an average of 530 cases annually.<sup>83</sup> That is only three-and-a-half hours of work per case.

Many overloaded public defenders have more than 530 serious felony cases in a year. This number also includes no time for continuing legal education, administrative tasks and assisting others on their cases. No overloaded lawyer has time to work on bail reform, reducing fines and fees, legislative work, or much else. Forcing defenders to take too many cases serves several purposes—short term cost savings, expedited case processing, and creating obstacles to reforming the system. The result is injustice. In 2002, the ABA issued its *Ten Principles of a Public Defense Delivery System*; the very first principle stated:

The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function

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<sup>79</sup> See DOTTIE CARMICHAEL ET AL., PUBLIC POLICY RESEARCH INSTITUTE, GUIDELINES FOR INDIGENT DEFENSE CASELOADS, A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION (2015), <http://www.tidc.texas.gov/media/8d85e69fd4fb841/guidelines-for-indigent-defense-caseloads-01222015.pdf> [<https://perma.cc/59L6-2WLL>]; see also RUBIN BROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), [https://www.aclu.org/sites/default/files/field\\_document/Ex007-The-Missouri-Project-2014-Public-Defender-Study.pdf](https://www.aclu.org/sites/default/files/field_document/Ex007-The-Missouri-Project-2014-Public-Defender-Study.pdf) [<https://perma.cc/X2K5-UAVJ>].

<sup>80</sup> ABA Comm. On Ethics & Pro. Resp., Formal Op. 06-441 (2006).

<sup>81</sup> See NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 16–17 (2011).

<sup>82</sup> *Id.*

<sup>83</sup> Buskey, *supra* note 28, at 533.

should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.<sup>84</sup>

This recommendation reflects unanimity among public defense providers, and those who study them, that political independence in public defense is a priority. However, the ABA has no power to enforce the principles and they are not self-enforcing. Surveys “indicated a significant ‘disconnect’ between perceptions regarding adherence to each Principle and the reality of everyday practice.”<sup>85</sup>

The National Association for Public Defense (NAPD), is the nation’s largest organization committed solely to public defense.<sup>86</sup> The NAPD’s *Principle 2: Public Defense Must Be Independent of Judicial and Political Control* is similar to ABA’s Principle One, and states in part:

The fair administration of justice requires that representation by lawyers be free from real or perceived inappropriate influence. Representation should be without political influence and subject to judicial supervision only in the same manner and to the same extent as are prosecutors and attorneys in private practice.<sup>87</sup>

The NAPD’s principle is less specific than the ABA’s but has a broader reach. By warning against even “perceived inappropriate influence,” it covers situations in which those in power—be they judges, prosecutors, or others—imply that public defenders will be rewarded or punished for doing their jobs. It is only when that implied threat is removed that there is actual independence.

Take the recommendation that judges should supervise public defense lawyers to the same extent as retained counsel. Judges sometimes simply refuse to appoint public defenders,<sup>88</sup> or to appoint any lawyers at

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<sup>84</sup> ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf). [<https://perma.cc/8LCW-PNU6>] (footnotes omitted) [hereinafter ABA TEN PRINCIPLES].

<sup>85</sup> Caroline S. Cooper, *The ABA “Ten Principles of A Public Defense Delivery System”: How Close Are We to Being Able to Put Them into Practice?*, 78 ALB. L. REV. 1193, 1201 (2015).

<sup>86</sup> NAT’L ASS’N FOR PUB. DEFENSE, JUSTICE: THERE’S NO JUSTICE WITHOUT US 4 (2018), <https://www.publicdefenders.us/files/NAPD-AnnualReport2018-WEB%20FINAL.pdf> [<https://perma.cc/2TX2-2EAZ>].

<sup>87</sup> NAT’L ASS’N FOR PUB. DEFENSE, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE FOUNDATIONAL PRINCIPLES 2 (2017), <https://www.publicdefenders.us/foundationalprinciples> [<https://perma.cc/LNM6-WXE2>].

<sup>88</sup> Andrew Cohen & Clare Sestanovich, *A Courtroom Divided*, THE MARSHALL PROJECT (Mar. 30, 2015), <https://www.themarshallproject.org/2015/03/30/a-courtroom-divided> [<https://perma.cc/DM3B-HNMQ>].

all.<sup>89</sup> Some judges are unwilling to relinquish control of both how and when court appointments are made.<sup>90</sup>

Although instances of judicial overreach affect all criminal defense lawyers,<sup>91</sup> The ABA's Principle One does not account for the fact that public defenders also deal with judges on systemic policy issues affecting defense work—issues in which judges have considerable authority to decide on their own.

For example, judges may influence policy in a manner that the ADA's Principle One clearly rejects, such as which particular assistant public defenders may practice in their courts.<sup>92</sup> In contrast, judges do not pick which retained lawyers work in their courts because a defendant's choice of retained counsel is constitutionally protected from judicial interference.<sup>93</sup> Retained private lawyers usually deal with judges only in individual cases and rarely encounter the disparity of authority in negotiating these broader policy issues.

Recently, the ABA has considered updating the Ten Principles. Slimmed down, but substantially the same, amended Principle One is proposed as follows:

Public Defense Providers and their lawyers should be independent of political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel and the prosecutor. To safeguard independence and promote effective and competent representation, a nonpartisan board should oversee the Public Defense Provider. The selection of the head of the Public Defense Provider, as well as lawyers and staff, should be made on the basis of merit and achieving diversity (*notes omitted*).<sup>94</sup>

One significant addition in the proposal, is a reminder to judges to not supervise public defenders (and other appointed counsel) differently than they would supervise prosecutors. As with retained lawyers, judges typically do not get to decide which prosecutors work in their court. This principle seeks to avoid a tendency in some courts to treat hired lawyers and prosecutors with more deference than those who are appointed by those courts to represent defendants.

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<sup>89</sup> See Timothy Williams, *Courts Sidestep the Law, and South Carolina's Poor Go to Jail*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/south-carolina-jail-no-lawyer.html> [https://perma.cc/DN89-2HGB].

<sup>90</sup> See Meagan Flynn, *Judge Accuses Harris County Public Defenders of Flouting Rules*, HOU. PRESS (Oct. 27, 2016), <https://www.houstonpress.com/news/judge-accuses-harris-county-public-defenders-of-flouting-rules-8894288ar> [https://perma.cc/W8TD-6FQB].

<sup>91</sup> See Joe Patrice, *Rather Than Accept Responsibility, Local Judge Punishes Lawyers For Pointing Out Her Mistakes*, ABOVE THE LAW (July 29, 2019, 11:17 AM), <https://abovethelaw.com/2019/07/rather-than-accept-responsibility-local-judge-punishes-lawyers-for-pointing-out-her-mistakes/> [https://perma.cc/45U2-E8QN].

<sup>92</sup> See *Burnette v. Terrell*, 232 Ill. 2d 522, 905 N.E.2d 816 (Ill. Sup. Ct. 2009) (concluding that a judge could not gratuitously remove assistant public defenders from cases).

<sup>93</sup> See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (depriving a defendant of chosen counsel was structural error and not subject to review for harmlessness).

<sup>94</sup> Draft of Amended ABA Ten Principles of a Public Defense Delivery System, A.B.A. (on file with author).



The more subservient one's role, the less independent one is likely to be viewed and treated. Judges who select, monitor, and pay lawyers can be presumed to treat those lawyers as dependent upon them—and potentially as opponents when they speak up.<sup>95</sup> Independence, however, is more likely to engender respect.

There has always been cognitive dissonance for judges overseeing court appointed lawyers. They often complain about doing the work of its administration, particularly reviewing payment vouchers of private appointed lawyers.<sup>96</sup> Yet, the same judges are loathe to relinquish that responsibility, as if it would somehow reduce their role or stature.

When judges do mistreat public defenders, they rarely face consequences. Recently, in Arkansas, a judge was censured after he implied on two different occasions to public defenders that their clients should plead guilty.<sup>97</sup> In both of these cases the defenders were women. In one instance, it was during a trial in which it was clear to all in attendance the judge was unnecessarily berating the female defender. The case ultimately resulted in an acquittal. After a short suspension and some training, the judge will return to the bench.

None of the above principles speak to the actions prosecutors take to impede defender independence. In California, a prosecutor threatened to stop a public defender from using social media to accuse prosecutors of perpetuating racism and police brutality.<sup>98</sup> Another California chief defender was condemned by her district attorney for raising the specter that there was racial disparity in prosecutions, only to be vindicated later by statistical proof.<sup>99</sup>

In New Orleans, public defenders were “threatened with criminal charges for routine work like interviewing witnesses or obtaining records.”<sup>100</sup> The rules of professional responsibility generally address these issues, but because public defenders are so vulnerable to such attacks, there should be specific admonitions against them. It does not take threats of

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<sup>95</sup> See JONATHAN RAPPING, *GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* 198–99 (2020).

<sup>96</sup> CHARLES J. OGLETREE JR. ET AL., *REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT* 44–46 (1993), <https://nyw.fd.org/cja/Report%20of%20Committee%20to%20Review%20CJA%20-%20Jan%201993.pdf> [https://perma.cc/5ZE9-XBWK].

<sup>97</sup> Max Brantley, *Judge Barry Sims agrees to recommended 30-day suspension from bench for treatment of public defenders*, *ARK. TIMES* (May 21, 2021, 1:21 PM), <https://arktimes.com/arkansas-blog/2021/05/21/judge-barry-sims-agrees-to-recommended-30-day-suspension-from-bench-for-treatment-of-public-defenders> [https://perma.cc/CA9D-L9L3].

<sup>98</sup> Radley Balko, *Opinion, California DA threatens whistleblower complaint against public defender over protest blog posts*, *WASH. POST* (June 19, 2020), <https://www.washingtonpost.com/opinions/2020/06/19/california-da-threatens-whistleblower-complaint-against-public-defender-over-protest-blog-posts/> [https://perma.cc/3DLA-TU7M].

<sup>99</sup> David Greenwald, *A Year after Attack on Public Defender, DA's Office Making Changes in Effort to Decrease Racial Disparities*, *DAVIS VANGUARD* (June 9, 2021), <https://www.davisvanguard.org/2021/06/a-year-after-attack-on-public-defender-das-office-making-changes-in-effort-to-decrease-racial-disparities/> [https://perma.cc/SAK5-GJD2].

<sup>100</sup> Aviva Shen, *New Orleans DA bullies public defenders for doing their job*, *THE APPEAL* (Oct. 18, 2017), <https://theappeal.org/new-orleans-da-bullies-public-defenders-for-doing-their-job/> [https://perma.cc/3GG4-25DY].

prosecution to make public defenders feel unguarded. A district attorney in Massachusetts, who was elected as a progressive prosecutor, derided local public defenders as privileged and uncaring.<sup>101</sup> The district attorney's claims inaccurately stereotyped public defenders. The statewide defender program defended its lawyers. The district attorney later apologized.<sup>102</sup>

Despite the premise, the ABA's Principle One, in either iteration, provides no concrete steps to remove political influences, except the buffer of a nonpartisan board.<sup>103</sup> However, that is no small point. Having a nonpartisan board—without judges, prosecutors, or law enforcement—is still not the norm.

One California county had law enforcement representatives on its hiring committee for the chief public defender. A local criminal defense lawyer said, "That's like having the New England Patriots make draft picks for the Atlanta Falcons."<sup>104</sup> Another California county put the sheriff on its hiring committee for chief public defender.<sup>105</sup> That county is enmeshed in a scandal of improperly using jailhouse informants in a facility overseen by that same sheriff.<sup>106</sup>

Partisan or not, active judges bring particular problems to a public defender board. Their board function is simply an extension of their control over individual public defenders in their courtrooms. Instead of merely making rulings and passing judgment, they influence budget and hiring decisions. Most chief defenders have had the experience of judges suggesting lawyers that they should hire. Besides applying their own agendas upon the office, judges may also not be representative of the community the office serves.<sup>107</sup>

Even a board made of members with motivations consistent with the

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<sup>101</sup> Editorial, *Rollins' attack on CPCS unfounded and unfair*, MASS. LAWS. WEEKLY (May 14, 2020), <https://masslawyersweekly.com/2020/05/14/rollins-attack-on-cpcs-unfounded-and-unfair/> [https://perma.cc/PGY8-WE6L].

<sup>102</sup> Andrea Estes, *Rachael Rollins retreats from attack on 'overwhelmingly privileged' public defenders after strong backlash*, BOS. GLOBE (May 7, 2020, 1:14 PM), <https://www.bostonglobe.com/2020/05/07/metro/rachael-rollins-retreats-attack-overwhelmingly-privileged-public-defenders-after-strong-backlash/> [https://perma.cc/V8XA-JTEU].

<sup>103</sup> See *Guidelines for Legal Defense Systems in the United States, Guideline 2.11 Functions of the Defender Commission*, NAT'L LEGAL AID AND DEF. ASS'N, <https://www.nlada.org/defender-standards/guidelines-legal-defense-systems/black-letter> [https://perma.cc/JKF3-GKJT] ("The Commission should not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases.").

<sup>104</sup> Manny Araujo, *New public defender set to start amid questions about hiring process*, HUMBOLDT TIMES-STANDARD (July 18, 2018, 6:30 AM), <https://www.times-standard.com/2017/02/18/new-public-defender-set-to-start-amid-questions-about-hiring-process/> [https://perma.cc/25JZ-99PU].

<sup>105</sup> *Orange County Supervisors Appoint New Public Defender*, MY NEWS L.A. (May 11, 2021), <https://mynews1a.com/orange-county/2021/05/11/orange-county-supervisors-appoint-new-public-defender-2/> [https://perma.cc/MDZ8-T4P5].

<sup>106</sup> Jordan Smith, *Anatomy of a Snitch Scandal: How Orange County Prosecutors Covered Up Rampant Misuse of Jailhouse Informants*, INTERCEPT (May 14, 2016, 8:57 AM), <https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/> [https://perma.cc/2Y59-MT2E].

<sup>107</sup> See, e.g., Bruce Rushton, *Court lacks diversity, lawyer says: resigns after passed over for public defender post*, ILL. TIMES (May 14, 2020), <https://www.illinoistimes.com/springfield/court-lacks-diversity-lawyer-says/Content?oid=12152020> [https://perma.cc/CGM9-8PT2].

office does not assure independence for the chief or the office.<sup>108</sup> Although it is generally feared that law enforcement goals and judicial expediency will compete with defender independence, board members who share the office's core mission may still have tactical disputes with the office.

There are usually many potential improvements necessary in any jurisdiction and a board's views about how to achieve them may not be consistent with the chief or the office itself. History has shown divergent views on the reasons to employ public defenders, including those who merely want expedience rather than zealous representation.<sup>109</sup>

## II. CASE STUDIES

It is difficult to know when a chief defender has been punished for speaking out. This is because the systems that regulate their appointment and conduct are often not clear. Sometimes, the only public knowledge comes from an item in the media discussing what those outside the process have surmised. When Atlanta's chief public defender was ousted from her job, local civil rights groups protested that municipal judges wanted her fired for keeping homeless persons out of jail.<sup>110</sup> Little was said by the city to refute those allegations.

Recent examples, of possible retaliation against defenders occurred in two large Midwest cities. Both involved outspoken female chief public defenders who had previously taken positions in opposition to their oversight authorities. These were in Hennepin County (Minneapolis), Minnesota<sup>111</sup> and in Cook County (Chicago), Illinois.<sup>112</sup> In each case, they were not reappointed to additional terms, without an open process or an explanation.

In other cases, defenders were driven out or were the subject of retaliation. Sometimes a jurisdiction's dispute with a chief defender is clearly political, and for reasons unrelated to funding or workloads. Two examples with different results were in Harris County (Houston), Texas

<sup>108</sup> *But see* Burnette v. Stroger, 389 Ill.App.3d 321, 905 N.E.2d 939 (Ill. App. Ct. 2009) (county official could not ignore statute giving chief defender autonomy over staff).

<sup>109</sup> See Matthew Clair, *Unequal Before the Law: How did we end up with our current system of public defenders?*, NATION (Dec. 14, 2020), <https://www.thenation.com/article/society/sara-mayeux-free-justice-public-defenders/> [https://perma.cc/H55G-XXXZ].

<sup>110</sup> Greg Land, *Rally Decries Atlanta Judges' Alleged Push to Boot Public Defender*, LAW.COM, (Oct. 13, 2017, 8:10 PM), <https://www.law.com/dailyreportonline/sites/dailyreportonline/2017/10/13/rally-decries-atlanta-judges-alleged-push-to-boot-public-defender/?back=law> [https://perma.cc/X5XD-7LS9].

<sup>111</sup> Rochelle Olson, *State Board declines reappointment of Hennepin County Public Defender Mary Moriarty*, STAR TRIB. (Sept. 30, 2020), <https://www.startribune.com/state-panel-declines-reappointment-of-hennepin-county-public-defender/572588112/> [https://perma.cc/4D9L-87MD].

<sup>112</sup> Chuck Goudie, Barb Markoff, Christine Tressel & Ross Weidner, *Former Cook County Public Defender Amy Campanelli says she has no regrets*, ABC7 (May 20, 2021), <https://abc7chicago.com/amy-campanelli-cook-county-public-defender-toni-preckwinkle-board/10669613/> [https://perma.cc/6S6H-Y9RL].

and Montgomery County, Pennsylvania. Both were largely influenced by the issue of bail reform and the chief defender's opposing stance to their employing county.

### A. Mystery in Minneapolis

Two days before Christmas in 2019, Mary Moriarty was indefinitely suspended as chief public defender for Hennepin County.<sup>113</sup> The announcement came in a text to her from the state's public defender administrator on behalf of the Minnesota Board of Public Defense. Moriarty had been chief defender since 2014 and with the office since 1990.<sup>114</sup> Aside from a meeting with a subcommittee of the board the previous week—where no suspension had been discussed—there was no notice for the action.<sup>115</sup> She was reportedly “baffled” by the decision.<sup>116</sup>

The board members were selected by the governor and chief justice of the Minnesota Supreme Court.<sup>117</sup> The board appoints, regulates, and funds the chief public defenders in each judicial district. For almost three months, the board's only statement about the suspension was, “Mary Moriarty will be on paid leave pending a review of issues that have been brought to the attention of members of the Board of Public Defense.”<sup>118</sup>

Although the board hired a public relations representative to handle the matter, no comments were issued. “I find it odd that an organization that has complained about not being sufficiently funded could afford to hire a PR firm,” said local lawyer Jordan Kushner.<sup>119</sup> Individuals and non-profit groups supporting Moriarty pointed out that she had been outspoken on public issues, including public defender salaries.<sup>120</sup> The Minnesota American Civil Liberties Union (ACLU) issued a statement that said in part:

Given all of her contributions, the State Board of Public Defense owes it to the community to explain her suspension and to ensure that there

<sup>113</sup> *A puzzling suspension with no defense*, MANKATO FREE PRESS (Jan. 8, 2020), [https://www.mankatofreepress.com/opinion/editorials/our-view-public-defender-a-puzzling-suspension-with-no-defense/article\\_fe5e4cda-3154-11ea-8308-d7bf49705ec8.html](https://www.mankatofreepress.com/opinion/editorials/our-view-public-defender-a-puzzling-suspension-with-no-defense/article_fe5e4cda-3154-11ea-8308-d7bf49705ec8.html) [https://perma.cc/8SQ2-USMB].

<sup>114</sup> Rochelle Olson, *Mary Moriarty, Hennepin, County's top public defender, surprised by suspension*, STAR TRIB. (Dec. 14, 2019), <https://www.startribune.com/mary-moriarty-hennepin-county-s-top-public-defender-surprised-by-suspension/566444432/> [https://perma.cc/XU94-GAHD].

<sup>115</sup> Olson, *supra* note 111.

<sup>116</sup> Olson, *supra* note 114.

<sup>117</sup> *See About Us*, MINN. BD. OF PUB. DEF., <https://www.pubdef.state.mn.us/about-us> [https://perma.cc/9QP6-YJLX] (last visited July 8, 2021).

<sup>118</sup> Susan-Elizabeth Littlefield, *'We Are Upset About The Suspension Of Mary Moriarty': Group Defends Hennepin County's Top Public Defender*, CBS MINN. (Jan. 6, 2020, 5:02 PM), <https://minnesota.cbslocal.com/2020/01/06/we-are-upset-about-the-suspension-of-mary-moriarty-group-defends-hennepin-countys-top-public-defender/> [https://perma.cc/98UX-MS4T].

<sup>119</sup> Mel Reeves, *Chief public defender's 'star chamber' suspension widely denounced*, MINN. SPOKESMAN RECORDER (Feb. 26, 2020), <https://spokesman-recorder.com/2020/02/26/chief-public-defenders-star-chamber-suspension-widely-denounced/> [https://perma.cc/E4Z8-3JLF].

<sup>120</sup> *See id.*

is a fair and transparent review with sufficient due process. No one should be fired for being speaking [sic] truth to power.<sup>121</sup>

Current employees of the office also responded in support of their chief.<sup>122</sup> Former United States congressman and current Minnesota Attorney General, Keith Ellison, tweeted that Moriarty is “one of the most principled people I know. I’m concerned about her treatment; it appears connected to her advocacy for racial justice.”<sup>123</sup>

The previous year, the National Center for State Courts issued a report praising the office for its service to clients.<sup>124</sup> The principle author stated in a separate letter to the Minnesota Board of Public Defense: “This is an impressive set of results. Simply said, Mary Moriarty runs one of the best public defender offices in the country.”<sup>125</sup> Three months after her suspension, the board presented Moriarty with a written reprimand and allowed her to return to work.<sup>126</sup> The reprimand listed three items requiring discipline: (1) a comment about public defender funding, (2) being “non-collaborative” with other agencies, and (3) use of social media.<sup>127</sup>

The letter stated no clear set of facts describing exactly what Moriarty did or did not do. The first item appeared to be about her response to a county commissioner’s question during her budget presentation that the county would be a better source of funding for her office than the state, something she told the board herself. The “non-collaboration” accusation seemed to be a reference to her public statements that the county prosecutor had not lived up to promises to end low-level drug prosecutions.<sup>128</sup> The social media item apparently referred to potential confusion between her private account and office accounts and discussing racial discrimination and other social issues on office accounts.

When her term as chief public defender came up for renewal later that year, the board simply voted (four to two) not to renew her and to choose

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

<sup>122</sup> See Olson, *supra* note 111.

<sup>123</sup> *Id.*; see also Ellison seeks review of public defender’s suspension, ASSOCIATED PRESS (Jan. 8, 2020), <https://minnlawyer.com/2020/01/08/ellison-seeks-review-of-public-defenders-suspension/> [<https://perma.cc/EA2W-65W3>].

<sup>124</sup> See Brian J. Ostrom & Jordan Bowman, *Examining the Effectiveness of Indigent Defense Team Services: A Multisite Evaluation of Holistic Defense in Practice*, NAT’L CTR. FOR STATE CTS. (2019), <https://www.ojp.gov/pdffiles1/nij/grants/254549.pdf> [<https://perma.cc/V8JE-DJMF>].

<sup>125</sup> Letter from Brian J. Ostrom to Minnesota Board of Public Defense (Mar. 11, 2020) (on file with author).

<sup>126</sup> Mary Moriarty, *Hennepin County’s Chief Public Defender, Reinstated After 3-Month Suspension*, CBS MINN. WCCO (Mar. 25, 2020, 11:35 PM), <https://minnesota.cbslocal.com/2020/03/25/mary-moriarty-hennepin-countys-chief-public-defender-reinstated-after-3-month-suspension/> [<https://perma.cc/HQP9-GF2C>].

<sup>127</sup> See Chao Xiong, *Hennepin County chief public defender is reprimanded over social media posts*, STAR TRIB. (Apr. 15, 2020), <https://www.startribune.com/hennepin-county-chief-public-defender-must-consult-with-supervisors-on-social-media-posts-as-part-of-discipline/569672302/> [<https://perma.cc/5AKC-KNR2>].

<sup>128</sup> David Chanen, *Hennepin County prosecutor won’t charge people caught with small amounts of marijuana*, STAR TRIB. (Mar. 15, 2019) (“Mike has to be about transparency and the understanding of what the policy is,” said Moriarty, who attended the hearing. “This is about fundamental fairness issues.”), <https://www.startribune.com/hennepin-county-attorney-won-t-prosecute-people-caught-with-small-amounts-of-marijuana/507174002/#> [<https://perma.cc/A35D-JB8B>].

a new chief. There was no formal explanation, although it was preceded by a six-hour public meeting described in part as follows:

The discussion included an hour of public testimony in support of Moriarty and touched on some of the most intractable problems in the criminal justice system, such as mass incarceration and racial disparities. In other moments, the discussion felt like a personal battle between Moriarty and the state's Chief Public Defender Bill Ward.<sup>129</sup>

If the reasons for not reappointing her were the same as for the reprimand, then they amounted to speaking out on behalf of clients and defenders, perhaps more forcefully than the board desired. The exact reasons, and how they were justified, may never be publicly known. However, about nine months after failing to reappoint her, the board settled with Moriarty over her termination for \$300,000.<sup>130</sup> The settlement did not include her reinstatement. It provided for her retirement and her agreement not to seek employment with any of Minnesota's public defender offices overseen by the board. While neither side announced the reason for the settlement, Moriarty implied the dollar amount of the agreement supported the merit of her claim. For the board, the state's public defender responded that it was a matter of weighing "the costs of settling issues versus the costs involved with protracted litigation[.]"<sup>131</sup> Once again, there was no official basis stated for anything done to Moriarty. Such a process leaves open the possibility of merely denigrating an outspoken chief defender, terminating them without a public explanation, and quietly paying for the issue to go away.

## B. The Chicago Way

In Cook County, Illinois, Amy Campanelli was seeking a second six-year term after her initial appointment in 2015. The Chicago Tribune described her as "well-known for her seemingly boundless energy and fierce advocacy of indigent clients both in and out of the courtroom."<sup>132</sup>

Cook County has an unusual line of authority over chief public defenders. In Illinois counties with a population of over 1,000,000, "a properly qualified person shall be appointed to the position by the President with the advice and consent of the Board."<sup>133</sup> This provision effectively applies only to Cook County. Smaller counties have their chief public defenders chosen

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<sup>129</sup> Olson, *supra* note 111.

<sup>130</sup> Andy Mannix, *State board agrees to pay \$300,000 to former Chief Hennepin County Public Defender*, STAR TRIB. (June 22, 2021, 3:47 PM), <https://www.startribune.com/state-board-agrees-to-pay-300-000-to-former-chief-hennepin-county-public-defender/600070882/> [<https://perma.cc/WE53-B8WW>].

<sup>131</sup> *Id.*

<sup>132</sup> Megan Crepeau, *Reform advocate Sharone Mitchell's appointment as Cook County public defender made official*, CHI. TRIB. (Mar. 18, 2021, 2:39 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-sharone-mitchell-appointed-public-defender-20210318-sz3sfc5nejgufhn3oax27wde6e-story.html> [<https://perma.cc/NJY4-TQSJ>].

<sup>133</sup> 55 ILL. COMP. STAT. 5/3-4004.1 (1991).

and removed by the judges of the circuit court.<sup>134</sup> DuPage County, Illinois's second largest, is about 80,000 inhabitants short of having its board president pick the chief defender.

Calling the process “transparent,” Cook County’s president picked the selection team. Then she picked the chief’s replacement after getting only two names from her selection committee. Neither were Campanelli. The review of the president’s decision was a vote by county commissioners without any public discussion about the current chief’s work, or alternatives to the president’s choice.<sup>135</sup>

The Tribune framed the result as “somewhat surprising” and hailed Campanelli’s strong advocacy. She had successfully sued the City of Chicago over denying phone calls to defendants, urged bail reform, promoted immigrants’ rights, and championed other public policy stances.<sup>136</sup>

She was a defendant in a lawsuit that named her and the sheriff for failure to protect female assistant public defenders from being exposed to lewd conduct by jailed clients. The county settled the lawsuit for \$14 million, a month before she was replaced.<sup>137</sup> Because of her title it made sense she was listed as a party, but it is difficult to understand what she could have done to solve the problem, absent taking punitive measures against her own clients. The county board president denied that the lawsuit affected the appointment process.<sup>138</sup>

This was an example of a chief defender being let go with neither a public process nor a public explanation. Often, in these situations, employers claim the opacity is to protect the privacy of the employee, but in none of the examples in this article did the chief defender seek that privacy. It was done for the benefit of the employer, not the employee.

### C. The “Show Me” State

Even when there has been no suggestion a chief defender was forced out, political issues can prematurely speed their exit. Michael Barrett was the chief public defender for Missouri, then one of the most poorly funded offices in the nation.<sup>139</sup> At one point, he tried to appoint the governor—his previous employer—to a case, in order to get his attention about the problem of underfunding and excessive work. It did not succeed. After four years

<sup>134</sup> 55 ILL. COMP. STAT. 5/3-4004 (1991).

<sup>135</sup> Crepeau, *supra* note 135.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Andrew Sullender, *County names new public defender — ‘progressive,’ pragmatist, ‘administrator of justice’ and ‘good guy,’* CHI. SUN-TIMES (Mar. 18, 2021, 5:35 PM), <https://chicago.suntimes.com/politics/2021/3/18/22338896/cook-county-public-defender-sharone-mitchell-preckwinkle-campanelli> [<https://perma.cc/N92K-U343>].

<sup>139</sup> Katie Moore, *Missouri public defender system expects funding increase to aid massive case-loads*, KAN. CITY STAR (June 23, 2021), <https://www.kansascity.com/news/state/missouri/article252281973.html> [<https://perma.cc/D38Y-M9QW>].

as chief public defender he was done.<sup>140</sup> One of the pressures Barrett faced was the attacks on his lawyers. The Missouri Supreme Court put a Columbia-based public defender on probation for a year for neglecting clients because he had too many cases.<sup>141</sup> In response Barrett said:

Last month, the Missouri Supreme Court warned public defenders that they must follow the ethics rules just like every other lawyer, and that the answer to an excessive caseload was to either quit or decline to accept more cases than can be handled ethically. Now the court tells us that we are indeed not like other lawyers and we must first get the court's permission before declining a case on ethics grounds.<sup>142</sup>

This was years after the state's highest court had clearly stated that courts could not meet their Sixth Amendment obligations merely by appointing counsel; courts instead must appoint competent counsel.<sup>143</sup> Competent counsel means a lawyer, not just unburdened by too many clients, but also free from conflicts.<sup>144</sup>

Sometimes, the way to silence a vocal chief defender is to simply ignore their efforts long enough that they just leave in frustration. Barrett, a respected public defender, with previous years of public service, was put in an impossible position—asked to ignore systemic violations of the constitutional right to effective assistance of counsel.<sup>145</sup> No ethical lawyer can put up with that.

## D. Problem in Houston

Harris County, Texas, is the third largest county in the United States,<sup>146</sup> encompassing Houston, the nation's fourth largest city.<sup>147</sup> Before 2010, the county never had a public defender of any kind.<sup>148</sup> It was known for a patronage system of criminal appointments made by partisan elected

<sup>140</sup> Dan Margolies, *Head Of Missouri's Embattled Public Defender System Resigns*, NAT'L PUB. RADIO KCUR (Oct. 3, 2019, 4:08 PM), <https://www.kcur.org/government/2019-10-03/head-of-missouris-embattled-public-defender-system-resigns> [<https://perma.cc/DM9G-7ZBJ>].

<sup>141</sup> Ian Cummings, *KC public defenders say high caseloads mean losing their licenses, going to jail, or quitting*, KAN. CITY STAR (Oct. 22, 2017) <https://www.kansascity.com/news/politics-government/article179852406.html#storylink=cpy> [<https://perma.cc/9NES-TP3R>].

<sup>142</sup> *Id.*

<sup>143</sup> *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 611–12 (Mo. Sup. Ct. 2012) (en banc).

<sup>144</sup> See *United States v. Alvarez*, 580 F.2d 1251, 1254–55 (5th Cir.1978).

<sup>145</sup> See Dave Helling, *Defenseless: Missouri justice system violates the Constitution every day*, KAN. CITY STAR (Dec. 15, 2019, 1:42 PM), <https://www.kansascity.com/opinion/article237130749.html> [<https://perma.cc/TUL2-QF9H>].

<sup>146</sup> *U.S. County Populations 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/us-counties> [<https://perma.cc/QQ55-RVPB>].

<sup>147</sup> *The 200 Largest Cities in the United States by Population 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/us-cities> [<https://perma.cc/J8T3-FMW9>].

<sup>148</sup> Editorial, Opinion, *Good first step: Tough legal veteran will launch Harris County Public Defender Office*, HOU. CHRON. (Nov. 14, 2010), <https://www.chron.com/opinion/editorials/article/Good-first-step-Tough-legal-veteran-will-launch-1613536.php> [<https://perma.cc/MSZ6-EMKB>].



judges to private lawyers—often their own campaign contributors.<sup>149</sup> A couple of lawyers even slept during portions of capital murder trials,<sup>150</sup> and others carried high-volume caseloads that were too large to be competently handled.<sup>151</sup> Elected judges frequently appointed friends to cases even when case volumes greatly exceeded accepted standards.<sup>152</sup> The majority of criminal court judges were former prosecutors, elected on law and order platforms, and satisfied that the system both convicted and punished quickly.<sup>153</sup>

The Harris County Public Defender's Office was established in 2010. It faced political opposition even before it started.<sup>154</sup> The office was later studied over time and found to provide better representation than the previous system.<sup>155</sup> It was lauded by national experts.<sup>156</sup>

In 2016, two nonprofit civil rights organizations filed a class action lawsuit in the United States District Court for the Southern District of Texas on behalf of misdemeanor defendants who had been detained in the Harris County jail due to their inability to afford cash bail.<sup>157</sup> The county, its sheriff, misdemeanor judges, and criminal law hearing officers were defendants. The plaintiffs sought alternatives to money bail. The defendants refused to concede that the system, which often kept misdemeanor defendants in jail until they pled guilty, violated due process or equal protection.<sup>158</sup>

A majority of Harris County Commissioners Court, the county's

<sup>149</sup> Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel*, 70 DUKE L. J. 775, 782 (2021).

<sup>150</sup> E.g., *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) ("Burdine's court-appointed attorney slept repeatedly throughout the guilt-innocence phase of his 1984 capital murder trial.").

<sup>151</sup> Adam Liptak, *A lawyer best known for losing capital cases*, N.Y. TIMES (May, 17, 2010), <https://www.nytimes.com/2010/05/18/us/18bar.html?searchResultPosition=1> [<https://perma.cc/74F5-HBDL>] ("An analysis in The Houston Chronicle last year found that he had represented 2,000 felony defendants in 2007 and 2008 — far above the caseload limits recommended by bar associations and other groups that take criminal defense work seriously.").

<sup>152</sup> JESSICA S. HENRY, *SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED* 121 (U. of Cal. Press 2020).

<sup>153</sup> See e.g., *The Plea: Interview with Judge Michael McSpadden*, PBS FRONTLINE (June 17, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/mcspadden.html> [<https://perma.cc/X3HW-SKHS>] ("But the great amount of cases, the burglary cases, the possession of drug cases—They're standard as far as the plea bargains. And the judge will go along with most of them.").

<sup>154</sup> See Gary Polland, *GOP Leaders Say No Way To Public Defenders System in Harris County*, TEX.

CONSERVATIVE REV., (Nov. 13, 2009), <http://www.texasconservativeireview.com/vol8n17.html> [<https://perma.cc/8AZD-9XBQ>]; cf. Editorial, *Public defender's office deserves public support*, HOU. CHRON. (May 11, 2012, 9:11 PM), <https://www.chron.com/opinion/editorials/article/Editorial-Public-defender-s-office-deserves-3552921.php> [<https://perma.cc/7G4Q-AK9K>].

<sup>155</sup> Jo DePrang, *Study Shows Why Houston's Public Defender Program is Worth the Cost*, TEX. OBSERVER (Nov. 7, 2013, 1:15 PM), <https://www.texasobserver.org/study-shows-why-houstons-public-defender-program-is-worth-the-cost/> [<https://perma.cc/D26K-H8RP>] ("Comparing results between the public defender and traditionally appointed counsel doesn't just make the former look good—it makes the latter look terrible.").

<sup>156</sup> E.g., Stephen B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 HOU. L. REV. 853, 885 (2018).

<sup>157</sup> *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1059–60 (2017).

<sup>158</sup> *Id.* at 1067–68.

legislative and executive body, voted to pay millions of dollars to outside counsel to fight the suit.<sup>159</sup> All but two of the sixteen misdemeanor judges opposed settlement. The chief public defender was an at-will employee of the commissioners court, separated only by a board whose members were all selected by the commissioners court, including judges and commissioners. In 2018, he faced termination over allegations of misconduct, the most prominent being cooperating with the plaintiffs in the lawsuit and the media concerning bail reform.<sup>160</sup>

By the morning of the commissioners court meeting at which the termination issue was on the agenda, local, state, and national bar associations had sent representatives and letters in support of the chief public defender. The NAPD, with 17,000 members and 120 organizational members, wrote in part, “An independent public defender must be able to advocate for his or her clients independent of the county or state organization that funds the public defense function,” signed by its 26-person steering committee.<sup>161</sup>

The Harris County Criminal Lawyers Association’s president told the *Houston Chronicle*, “[The commissioner] is retaliating against [the chief defender] because he aided the litigants in the bail lawsuit, which is what his job is, and he does his job well.”<sup>162</sup> Both he and the president of the Texas Criminal Defense Lawyers Association appeared and spoke on behalf of the chief defender. The National Association of Criminal Defense Lawyers sent a representative who said, “To punish [the chief defender] for doing his job would undermine the legitimacy of the entire system.”<sup>163</sup> That same morning, the *Houston Chronicle* published an editorial from its board, stating in part:

It’s bad enough that Harris County officials have wasted \$6 million in taxpayer money to defend an unconstitutional bail system that has long freed the rich and let the poor languish in jail. Now they’re wasting our time with a new kind of injustice: ridiculous allegations hurled at the

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<sup>159</sup> See Gabrielle Banks, *Democratic election gains may spark Harris County bail lawsuit settlement*, HOUS. CHRON. (Nov. 15, 2018, 8:28 AM), <https://www.chron.com/news/houston-texas/houston/article/Democratic-election-gains-may-spark-Harris-County-13389574.php> [<https://perma.cc/PP4N-Y2JK>].

<sup>160</sup> Zach Despart, *Radack accuses public defender of helping lawyers in bail lawsuit against county*, HOUS. CHRON. (June 9, 2018, 4:40 PM), <https://www.chron.com/news/houston-texas/houston/article/Radack-accuses-public-defender-of-helping-lawyers-12980050.php> [<https://perma.cc/FT28-Y6EM>]; see also RAPPING, *supra* note 95, 198–99 (2020) (“In Houston, Alex Bunin found himself threatened with termination by an angry county commissioner after he was accused by the county attorney of helping a group of criminal justice reformers in a lawsuit challenging unconstitutional bail practices in the county.”).

<sup>161</sup> Letter from NAPD Steering Committee to Harris County Attorney Vince Ryan (June 18, 2018), [https://www.publicdefenders.us/files/NAPD\\_letterhead\\_Harris%20County%20Commission\\_June%2018%202018\\_SIGNED.pdf](https://www.publicdefenders.us/files/NAPD_letterhead_Harris%20County%20Commission_June%2018%202018_SIGNED.pdf) [<https://perma.cc/U4YP-N6RF>].

<sup>162</sup> Zach Despart, *Harris County defense lawyers rally in support of public defender under investigation*, HOUS. CHRON. (June 12, 2018, 7:31 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-defense-lawyers-rally-in-support-of-12985831.php> [<https://perma.cc/7SRL-ZS73>].

<sup>163</sup> *Id.*

county's respected Chief Public Defender Alex Bunin.

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"The county cannot tell us that because they have a position in a lawsuit, that we can put that above and beyond our client's needs," Bunin said. He isn't the only county official to speak out against an unconstitutional system. He's the only one who isn't elected, which leaves him vulnerable to retaliation.<sup>164</sup>

After hearing from various speakers, including the chair of the public defender office's board, commissioners court took no action and referred the matter to the board. A few months later, the board issued an opinion exonerating the chief defender.<sup>165</sup> The commissioners court never took up the matter again.

Five months later, two members of commissioners court were voted out of office, changing its political majority.<sup>166</sup> The same happened to the misdemeanor courts, with fifteen judges replaced with members of the other party.<sup>167</sup> Soon after, the federal bail lawsuit was settled, and new local rules were adopted freeing virtually all misdemeanor defendants on unsecured bonds and requiring no cash payments—the exact position the chief public defender had urged.<sup>168</sup>

## E. Litigation in Pennsylvania

Montgomery County, Pennsylvania is just northwest of Philadelphia.<sup>169</sup> In 2020, the chief public defender of the county, Dean Beer, and the deputy chief, Keisha Hudson, were under fire for refusing to withdraw an amicus brief criticizing the county's bail policies.<sup>170</sup> In particular, they complained that the county did not provide counsel to defendants at their initial bail hearings and that the defendants' ability to pay cash bail was

<sup>164</sup> Editorial, *Attacks on Harris County's chief public defender misguided*, HOUS. CHRON. (June 12, 2018, 9:36 AM), <https://www.houstonchronicle.com/opinion/editorials/article/Attacks-on-Harris-County-s-chief-public-12985668.php> [https://perma.cc/VGN8-N297].

<sup>165</sup> Harris County Public Defender Board Report (Nov. 5, 2018) (on file with author).

<sup>166</sup> See Mihir Zaveri, *Lina Hidalgo, a 27-Year-Old Latina, Will Lead Harris County, Texas' Biggest*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/lina-hidalgo-harris-county.html> [https://perma.cc/96WH-KK5G].

<sup>167</sup> Brian Rogers, *Republican judges swept out by voters in Harris County election*, HOUS. CHRON. (Nov. 10, 2018, 4:57 PM), <https://www.chron.com/news/houston-texas/houston/article/GOP-Free-Zone-Republican-judges-swept-out-by-13376806.php> [https://perma.cc/56UX-VSYZ].

<sup>168</sup> Zach Despart, *Proposed bail lawsuit settlement includes child care, phones, rides for poor defendants*, HOUS. CHRON. (Apr. 12, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Proposed-bail-lawsuit-settlement-includes-child-13764225.php?cmid=gsa-chron-result> [https://perma.cc/EFH3-V7MQ].

<sup>169</sup> *Map of Montgomery County, PA, and surrounding counties*, MONTGOMERY CNTY., <https://www.montcopa.org/DocumentCenter/View/2318/Montgomery-County-and-neighboring-counties?bidId=> [https://perma.cc/S9RL-JUKC].

<sup>170</sup> Max Mitchell, *Montco Pushes Back Against Allegations of Wrongful Firings in Public Defender's Office*, LEGAL INTELLIGENCER (May 26, 2020), <https://www.law.com/thelegalintelligencer/2020/05/26/montco-pushes-back-against-allegations-of-wrongful-firings-in-public-defenders-office/> [https://perma.cc/BV8U-YYVF].

not considered.<sup>171</sup>

A local judge allegedly called the chief defender into his office, and the judge was “visibly upset, as he held a copy of the amicus brief.”<sup>172</sup> The judge was said to have stated he believed the brief was inaccurate and that, if the chief defender did not withdraw it, the judge would no longer abide a pretrial program the defender supported.<sup>173</sup> The judge allegedly asked the chief to publicly state the brief was “wrong” and apologize to him. The judge threatened a disciplinary complaint against the chief.<sup>174</sup>

The Montgomery County Board of Commissioners, the chief defender’s governing authority, ordered him to withdraw the brief, and he did.<sup>175</sup> Even though the brief was withdrawn, both the chief and his deputy chief were soon fired.<sup>176</sup>

About 100 supporters of the public defenders protested the firings on the courthouse steps.<sup>177</sup> The commissioners court refused to reconsider the terminations. In response, the two sued the county for retaliation and for violating a whistle blower statute. The county moved to dismiss by claiming the plaintiffs were acting pursuant to their official duties and therefore not entitled to free speech protections.

In July 2020, the Quattrone Center for Fair Administration of Justice, at the University of Pennsylvania School of Law, issued a report in response to the events in Montgomery County.<sup>178</sup> It was neither publicly released nor acknowledged by the county’s commissioners court.<sup>179</sup> Chief among the recommendations was to create a nonpartisan governing board to oversee the office, something that still does not exist.<sup>180</sup>

<sup>171</sup> Brief for the Montgomery Office of the Pub. Def. as Amicus Curiae Supporting Petitioners, *The Phila. Cmty. Bail Fund, et al. v. Arraignment Court Magistrates of the First Judicial Dist. of the Commonwealth of Pa.*, 440 F.Supp 3d 415 (E.D. Pa. 2020), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/09fa0a56-cf60-46ff-838a-e5cfbabf901e/note/6ca47933-5a75-46a6-8c29-11648464db9d.pdf#page=1> [https://perma.cc/3M2N-38H9] (no docket number available because the brief was withdrawn).

<sup>172</sup> *Id.*

<sup>173</sup> Telephone Interview with Dean Beer, Chief Pub. Defender, Montgomery Cnty., Pa. (July 23, 2021).

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

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

<sup>176</sup> Jo Ciavaglia, *Montgomery County faces suits over public defender terminations*, THE INTELLIGENCER (May 27, 2020, 10:04 AM), <https://www.the-intell.com/story/news/state/2020/05/27/montgomery-county-faces-suits-over/1143810007/> [https://perma.cc/4GXE-X99E].

<sup>177</sup> Vinny Vella, *Protesters descend on Montgomery County commissioners meeting to oppose public defenders’ firings*, PHILA. INQUIRER (Mar. 5, 2020), <https://www.inquirer.com/news/montgomery-county-public-defenders-commissioners-protest-dean-beer-keisha-hudson-20200305.html> [https://perma.cc/B2VD-MBCB].

<sup>178</sup> QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., RECOMMENDATIONS FOR MONTGOMERY COUNTY TO ACHIEVE GREATER INDEPENDENCE IN INDIGENT DEFENSE PROVISION (2020) [hereinafter QUATTRONE REPORT].

<sup>179</sup> Telephone interview with Marrisa Bluestine, Assistant Director, Quattrone Ctr. for the Fair Admin. of Just. (June 1, 2021).

<sup>180</sup> *See id.*

About a year later, the county settled with the plaintiffs, paying them damages of \$310,000.<sup>181</sup> The defenders were not reinstated. The settlement was not public, and there were no court findings, but the county previously admitted in its pleadings that:

[A] public employee's speech is protected by the First Amendment when: (1) the employee spoke as a citizen; (2) the statement involved a matter of public concern; and (3) the government employer did not have an "adequate justification for treating the employee differently from any other member of the general public as a result of the statement he made."<sup>182</sup>

Therefore, in settling the suit, it can be presumed the county conceded Beer and Hudson spoke as citizens in urging bail reform. The defendants later claimed that they had submitted to a study from a center associated with Temple University's law school<sup>183</sup> and allegedly promised to follow its recommendations for defender independence.<sup>184</sup>

Around the same time that the chief and deputy chief public defenders sued over their firings, the ACLU sued Montgomery County on behalf of local citizens complaining that the firings of the public defenders violated Pennsylvania's Sunshine Act—a law requiring a vote on the firings to take place at a public meeting.<sup>185</sup> That lawsuit was settled in the plaintiffs' favor in July 2021.<sup>186</sup> However, while that lawsuit was pending, the ACLU sued the county again. This time because the county's correctional facility retaliated against ACLU lawyers, preventing them from visiting clients.<sup>187</sup> It is unclear that Montgomery County learned any lessons from these unsuccessful retaliations. There is no evidence they adopted recommendations from either of the two academic reports regarding the state of public defender independence in the county.

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<sup>181</sup> Max Mitchell, *Montgomery County to Pay \$310K to Settle Claims From Former Public Defenders in Row Over Bail Policies*, LEGAL INTELLIGENCER (Mar. 19, 2021, 2:42 PM), <https://www.law.com/thelegalintelligencer/2021/03/19/montgomery-county-to-pay-310k-to-settle-claims-from-former-public-defenders-in-row-over-bail-policies/> [<https://perma.cc/AAF7-EB3C>].

<sup>182</sup> Defendant's Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 12(b)(6) and 12(b)(1) at 3, *Dean Beer v. Montgomery County et al*, (No. 2:20-cv-01486) (E.D. Pa. 2020).

<sup>183</sup> See STEPHEN AND SANDRA SHELLER CTR. FOR SOCIAL JUST. & TEMPLE U., BEASLEY SCH. OF LAW, STRENGTHENING THE OFFICE OF THE PUBLIC DEFENDER: ANALYSIS AND RECOMMENDATIONS FOR MONTGOMERY COUNTY (Apr. 2021), <https://www2.law.temple.edu/cs/publication/strengthening-the-office-of-the-public-defender-analysis-and-recommendations-for-montgomery-county/> [<https://perma.cc/BVF5-X5JH>].

<sup>184</sup> QUATTRONE REPORT, *supra* note 180.

<sup>185</sup> *ACLU of Pennsylvania files complaint alleging violations of Sunshine Act in Montgomery County public defender firings*, ACLU PA. (Mar. 23, 2020), <https://www.aclupa.org/en/press-releases/aclu-pennsylvania-files-complaint-alleging-violations-sunshine-act-montgomery-county> [<https://perma.cc/T3XL-HV8Y>].

<sup>186</sup> *Montgomery County commissioners amend public transparency policy following ACLU-PA lawsuit*, ACLU PA. (July 12, 2021), <https://www.aclupa.org/en/press-releases/montgomery-county-commissioners-amend-public-transparency-policy-following-aclu-pa> [<https://perma.cc/W396-SR9B>].

<sup>187</sup> Vinny Vella, *ACLU lawyers say they're being barred from interviews at the Montgomery County jail in retaliation for earlier investigations*, PHILA. INQUIRER (May 20, 2021), <https://www.inquirer.com/news/aclu-lawsuit-visitng-inmates-montgomery-county-jail-20210520.html> [<https://perma.cc/UYR9-D4KU>].

### III. TWO STUDIES OF INDEPENDENCE

Below are two systems that have been studied. The first, generally had a good reputation for funding, workloads, and a lack of political interference. The second, has been hampered by the conflict between its mission and the role of its oversight authority. It bears repeating that there is no single perfect system, but evaluating current practices gives guidance about what works and what does not.

#### A. A Gold Standard

Over more than 50 years, many have termed the federal public defense structure “the gold standard” for other criminal law appointment systems to aspire.<sup>188</sup> That perception was based mostly on the adequate funding and limited workloads that have existed among federal public defenders, nonprofit community defenders, and the private lawyers compensated under the Criminal Justice Act of 1964 (CJA).<sup>189</sup> Of the 94 federal districts, 91 are served by federal public defenders or community defenders.<sup>190</sup>

In recent years, there have been more questions about the independence of the CJA, which is overseen by committees of judges and managed by the Administrative Office of the United States Courts (AO).<sup>191</sup> Budget cuts and reorganization of that system in 2013 raised the intensity of the discussion about the federal defender independence.<sup>192</sup> There were calls for a freestanding agency outside the judiciary, a national board, and local boards.<sup>193</sup>

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<sup>188</sup> AD HOC COMM. TO REVIEW THE CRIM. JUST. ACT, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, EXECUTIVE SUMMARY 28, <https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf> [<https://perma.cc/4TBW-E8WC>] [hereinafter CARDONE REPORT]; cf. David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013) (arguing the federal system has not met the goals of *Gideon v. Wainwright*, *supra* note 4).

<sup>189</sup> 18 U.S.C. § 3006A.

<sup>190</sup> See *About DSO*, DEF. SERVS. OFF., <https://www.fd.org/node/96> [<https://perma.cc/6Z65-D322>] (last visited Nov. 4, 2021).

<sup>191</sup> See Norman L. Reimer, *A Fundamental Flaw in the Federal Indigent Defense System: Lack of Independence from Judicial Control*, CHAMPION (Aug. 2015) at 9.

<sup>192</sup> NAT'L ASS'N OF CRIM. DEF. LAWYERS, FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 8–10 (2015), <https://www.nacdl.org/Document/FederalIndigentDefense2015IndependenceImperative> [<https://perma.cc/UMQ5-L65W>] [hereinafter FEDERAL INDIGENT DEFENSE 2015].

<sup>193</sup> See Patton, *supra* note 49, at 338.

In 2017, a committee of federal judges, academics, federal defenders and private lawyers, chosen by United States Supreme Court Chief Justice John G. Roberts, issued a report on the state of the CJA.<sup>194</sup> The report's main conclusion about federal public defense was, "The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval."<sup>195</sup> The report made 35 interim recommendations as part of a transition from judicial oversight to an independent administration of federal public defense with its own direct funding and management. Regarding the current condition of federal public defender independence, the report stated:

Several federal public defenders testified to the Committee that the nature of the appointment cycle — a four-year term with no presumption of reappointment — creates a destabilizing environment in which they feel hamstrung as managers of their offices and, in some instances, beholden to the judiciary. Some federal defenders told the Committee they were reluctant to ask for staff increases, even when desperately needed, fearing such requests would negatively affect their prospects for reappointment. Several defenders even said they felt pressure to base hiring and budgeting decisions on the preferences of individual judges, rather than the best interests of their indigent clients, to bolster their chances of reappointment.<sup>196</sup>

The entire report was never adopted by the Judicial Conference of the United States.<sup>197</sup> Neither were its recommendations for independence embraced. A memo from the AO, issued about a year later, sent to federal defenders and private attorney representatives, stated that only nineteen of the interim recommendations from the report (some modified) had been adopted by the Judicial Conference.<sup>198</sup> The sixteen omitted recommendations included those either increasing defender independence or restricting judicial oversight. The adopted recommendations mostly covered additional training.

The following year, another memo from the AO stated the Judicial Conference adopted twenty-nine of the thirty-five interim recommendations from the *Cardone Report* (ten more).<sup>199</sup> These related to vouchers for private lawyers, CJA plans, capital appointments, and training. None of the first six recommendations creating structural change were included. The changes resulted in some increased independence for defenders, but not sweeping change. The rest, including whether there should be an independent federal agency, are still being studied.

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<sup>194</sup> CARDONE REPORT, *supra* note 189, at 28.

<sup>195</sup> *Id.* at X.

<sup>196</sup> *Id.* at XX.

<sup>197</sup> *Governance & the Judicial Conference*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> [<https://perma.cc/4CFZ-V9HT>] (last visited Nov. 4, 2021).

<sup>198</sup> Memorandum from Pamela Hamrin, Judicial Conference Addresses Criminal Justice Act Issues in Cardone Report (Sept. 13, 2018) (on file with author).

<sup>199</sup> Memorandum from James Duff, Director AO, Judicial Conference Action on Criminal Justice Act Policies (Aug. 14, 2019) (on file with author).

## B. A Dependent System

In determining optimal independence for public defenders, it is helpful to look at what clearly is not independence. The least independent public defender model is exemplified by State Counsel for Offenders (SCFO), which represents Texas prisoners charged with crimes while in the custody of the Texas Department of Criminal Justice (TDCJ).<sup>200</sup> TDCJ “manages inmates in state prisons, state jails, and private correctional facilities that contract with the TDCJ.”<sup>201</sup> SCFO reports directly to the Texas Board of Criminal Justice (TBCJ), which is “responsible for hiring the executive director of TDCJ and setting rules and policies that guide the agency.”<sup>202</sup>

In other words, the public defenders who represent Texas prisoners work for the same authorities who oversee the prisons where their clients are incarcerated. The same board that supervises them and sets their budget chooses the head of all Texas prisons. The board itself is chosen by the governor. Therefore, regardless of how SCFO actually performs, there is not even an appearance of independence. A former head of the SCFO trial division was joined by other lawyers in beseeching the TBCJ that “interference and influence from state prison officials essentially made it impossible for them to do their jobs—namely, to defend poor inmates accused of committing crimes inside Texas prisons.”<sup>203</sup>

In 2017, the State Bar of Texas Legal Services to the Poor in Criminal Matters Committee issued a report on SCFO (*SCFO Report*).<sup>204</sup> Although the report was not published by the State Bar itself, it was based upon surveys of current and former SCFO lawyers, and prosecutors from the State Prosecution Unit (SPU),<sup>205</sup> as well as published materials.<sup>206</sup> The report based its assessment on the ABA’s *Ten Principles of a Public Defense Delivery System*.<sup>207</sup>

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<sup>200</sup> *State Counsel for Offenders, What We Do*, TEX. DEP’T OF CRIM. JUST., [https://www.tdcj.texas.gov/tbcj/scfo/what\\_we\\_do.html](https://www.tdcj.texas.gov/tbcj/scfo/what_we_do.html) [<https://perma.cc/SNFB-PJR7>] (last visited June 30, 2021).

<sup>201</sup> *Inside TDCJ*, TEX. DEP’T OF CRIM. JUST., [https://www.tdcj.texas.gov/kss\\_inside.html](https://www.tdcj.texas.gov/kss_inside.html) [<https://perma.cc/EXN5-JY5W>] (last visited June 30, 2021).

<sup>202</sup> *Texas Board of Criminal Justice - Overview*, TEX. DEP’T OF CRIM. JUST., <https://www.tdcj.texas.gov/tbcj/index.html> [<https://perma.cc/L7WF-AG24>] (last visited June 30, 2021); see also TEX. CODE CRIM. PROC. ANN. art. 26.051 (West 2007).

<sup>203</sup> Michael Barajas, *Lawyers Seek to Reform ‘Ethical Minefield’ of Public Defender’s Office Controlled by Texas Prison System*, TEX. OBSERVER (Apr. 24, 2018, 2:18 PM), <https://www.texasobserver.org/lawyers-seek-to-reform-ethical-minefield-of-public-defenders-office-controlled-by-texas-prison-system/> [<https://perma.cc/Y7QR-7RJ8>].

<sup>204</sup> STATE BAR OF TEX. LEGAL SERVS. TO THE POOR IN CRIM. MATTERS COMM., REVIEW OF THE OPERATIONS OF STATE COUNSEL FOR OFFENDERS REPORT (2017), [https://www.prisonlegalnews.org/media/publications/State\\_Bar\\_of\\_Texas\\_Legal\\_Services\\_to\\_the\\_Poor\\_in\\_Criminal\\_Matters\\_Committee\\_-\\_Review\\_of\\_the\\_Operations\\_of\\_State\\_Counsel\\_for\\_Offenders\\_2017.pdf](https://www.prisonlegalnews.org/media/publications/State_Bar_of_Texas_Legal_Services_to_the_Poor_in_Criminal_Matters_Committee_-_Review_of_the_Operations_of_State_Counsel_for_Offenders_2017.pdf) [<https://perma.cc/ZW3T-Y5DB>] [hereinafter *SCFO Report*].

<sup>205</sup> See TEX. GOV’T CODE ANN. § 41.302 (West 2007).

<sup>206</sup> *SCFO Report*, *supra* note 205, at 4 (over a quarter of the currently employed SCFO lawyers completed the survey); see also Appendix A.

<sup>207</sup> See ABA TEN PRINCIPLES, *supra* note 84.



Of the thirty-one persons surveyed, nearly 84% of respondents either strongly disagreed or disagreed that SCFO was adequately independent from TDCJ management, that it had adequate control over its own budget, and that it did not need additional operational independence to effectively represent inmate clients.<sup>208</sup> Over three-quarters strongly disagreed or disagreed with the statement “SFCO’s policies and office rules do not hamper zealous representation of SFCO’s clients to the full extent permitted by law.”<sup>209</sup>

Eighty-seven percent strongly disagreed or disagreed that SCFO had adequate resources to effectively represent clients.<sup>210</sup> Over 80% strongly disagreed or disagreed SCFO lawyers were able to adequately retain expert services.<sup>211</sup> Seventy percent of respondents either strongly disagreed or disagreed with the statement that SCFO attorneys “have sufficient independent discretion to adequately represent their clients.”<sup>212</sup> Ninety percent strongly disagreed that SCFO had equal resources, compensation, and treatment as the prosecutors.<sup>213</sup>

Specific comments by respondents indicated that the director and management of SCFO were negatively influenced by their control from TDCJ and their relationship to TDCJ.<sup>214</sup> Respondents said SCFO lawyers were prevented from employing trial strategies that private lawyers might use, such as subpoenaing TDCJ officials, maintaining privileged communications with clients, or taping inside TDCJ facilities.<sup>215</sup> Restrictions on equipment and travel were also sources of complaints.<sup>216</sup> Other objections were high caseloads, high turnover, and a lack of internal training or support.<sup>217</sup>

Another indicator of SCFO’s lack of independence is a comparison to its adversary prosecuting agency, SPU. SPU has an independent board which chooses its director, and has higher salary ranges and adequate appropriations. Prosecutors can, therefore, pay more for experts and have more administrative support.

Even before the report, SCFO had been criticized for inattention to the plight of prisoners facing civil commitment, a program that detains those convicted of sexual violence indefinitely beyond their sentences.<sup>218</sup> “The situation got so bad that starting in 2014, the Texas Criminal Defense Lawyers Association began discouraging members from taking jobs with

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<sup>208</sup> *SCFO Report*, *supra* note 205, at 8.

<sup>209</sup> *Id.* at 10.

<sup>210</sup> *Id.* at 33.

<sup>211</sup> *Id.* at 32.

<sup>212</sup> *Id.* at 12.

<sup>213</sup> *SCFO Report*, *supra* note 205, at 29.

<sup>214</sup> *Id.* at 8–10.

<sup>215</sup> *Id.* at 7–12.

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

<sup>217</sup> See *SCFO Report*, *supra* note 205.

<sup>218</sup> Mike Ward, *New report: Convict attorneys shouldn’t work for prison system*, HOUS. CHRON. (Jan. 12, 2018, 11:15 AM), <https://www.chron.com/news/politics/texas/article/New-report-Convict-attorneys-shouldn-t-work-for-12493469.php> [<https://perma.cc/ALS2-ED87>].

the office.”<sup>219</sup> Although many competent lawyers have worked at SCFO, and served their clients well, it is not a structure that prizes independence or innovation.

#### IV. REMEDIES

Some very thoughtful suggestions have already been offered to protect defender independence. This portion of the article will review those suggestions. There is unlikely any single innovation that will provide complete independence to public defenders. Defenders will always rely upon a funding authority that must divide money among various agencies, often with competing interests, whether the oversight is nonpartisan, or even if the public defender is a stand-alone agency. To suggest a single fix for all jurisdictions ignores that diverse models of public defense have succeeded in different places, both government and private. However, there is reason to believe that a combination of these ideas can be effective in protecting defender autonomy.

For example, compare three public defender organizations that are each different in funding, oversight, and jurisdiction. The Public Defender Service of Washington D.C. (PDS) is a government-funded model in a city-sized jurisdiction. It is funded by the federal government and has an eleven-member board of trustees.<sup>220</sup> The National Legal Aid and Defender Association (NLADA) issued a glowing report titled: *PDS: A Model of Client-Centered Representation*.<sup>221</sup> PDS touts its independence even though it can potentially be subject to the whims of Congress.<sup>222</sup> Much of their confidence is due to strong leadership, community support, and history of success for clients.

The Bronx Defenders is a nonprofit corporation operating in one borough in New York City.<sup>223</sup> It is funded by a contract with the city, grants, and private support.<sup>224</sup> Started in 1997, it began with a mission termed “holistic defense.”<sup>225</sup> By serving the community beyond traditional criminal defense work, it developed strong support locally and spread its

<sup>219</sup> Barajas, *supra* note 204.

<sup>220</sup> *Mission & Purpose*, THE PUB. DEF. SERV. FOR THE DIST. OF COLUMBIA, <https://www.pdsdc.org/about-us/mission-purpose> [<https://perma.cc/S23A-J4PR>] (last visited July 8, 2021).

<sup>221</sup> See NAT’L LEGAL AID & DEF. ASS’N, *PDS: A MODEL OF CLIENT-CENTERED REPRESENTATION* (2008), <https://cjastudy.fid.org/sites/default/files/hearing-archives/minneapolis-minnesota/pdf/julialeightonnlada-report-pds.pdf> [<https://perma.cc/PA4D-SSR4>].

<sup>222</sup> See Radley Balko, Opinion, *The government wants to move the D.C. public defender’s office. That could be disastrous.*, WASH. POST (Dec. 12, 2019), <https://www.washingtonpost.com/opinions/2019/12/12/government-wants-move-dc-public-defenders-office-that-could-be-disastrous/> [<https://perma.cc/67UD-HWVY>].

<sup>223</sup> *About Us*, THE BRONX DEF., <https://www.bronxdefenders.org/who-we-are/> [<https://perma.cc/4F2X-X8J5>] (last visited July 8, 2021).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

message nationally.<sup>226</sup> The Office of the Colorado State Public Defender is a statewide government entity covering urban and rural counties across the entirety of Colorado.<sup>227</sup> The state has a single public defender with offices across the state.<sup>228</sup> A five-person public defender commission is appointed by the state's chief justice. The office has received national respect for its leadership, staff, and results, including in high profile capital cases.<sup>229</sup>

All three organizations are considered excellent models, which have protected their independence in various ways. Probably the most important characteristic they share is adequate funding and reasonable workloads.<sup>230</sup> As described above, the lack of these stifle defenders' ability to deal with any other issues or to argue for independence. However, when both factors exist—which helps any office regardless of the structure—then they promote independence.

## A. Structural Changes

Structural changes are needed to modify the position of the public defender office within the criminal legal system. The *Cardone* Committee recommended moving the federal public defense from the federal judiciary to become an independent federal agency.<sup>231</sup> This is an example of a dramatic change that may have substantially good or bad effects, however, there are other ideas for structural changes:

### i. Defender General

One idea is to create a national protector of public defense called a “defender general.”<sup>232</sup> The defender general could receive appropriations

<sup>226</sup> See DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 141 (2006).

<sup>227</sup> *History of the Office of the State Public Defender*, OFF. OF THE COLO. STATE PUB. DEF., <https://www.coloradodefenders.us/information/history-of-the-office-of-the-state-public-defender-2/> [https://perma.cc/F4HY-TAVL] (last visited Dec. 25, 2021).

<sup>228</sup> See *What we do*, OFF. OF THE COLO. STATE PUB. DEF., <https://www.coloradodefenders.us/information/what-we-do/> [https://perma.cc/MQ4M-QT52] (last visited Dec. 25, 2021).

<sup>229</sup> See e.g., Lauren Gambino, *Colorado shooting trial: “He tried to murder a theater full of people to make himself feel better,”* THE GUARDIAN (Apr. 27, 2015), <https://www.theguardian.com/us-news/2015/apr/27/james-holmes-trial-colorado-aurora-theater-shooting> [https://perma.cc/QZB3-YW3U].

<sup>230</sup> See PRIMUS, *supra* note 58, at 142–45.

<sup>231</sup> CARDONE REPORT, *supra* note 189, at 243–53.

<sup>232</sup> See Andrea D. Lyon, *Dean's Desk: The United States needs a defender general*, IND. LAWYER (Oct. 18, 2016), <https://www.theindianlawyer.com/articles/41749-deans-desk-the-united-states-needs-a-defender-general> [https://perma.cc/L77J-9BD2].

and authority to fund states and localities through grants.<sup>233</sup> This would not completely fund all offices in perpetuity, but with grant conditions mandating higher quality, the office could improve public defense across the country.

However, the Defender General may be more of leader with a bully pulpit than someone with actual powers to set binding policy. The power to fund is the real ability to control what defenders do and nobody has yet seriously argued that the federal government will pay for all public defense in the United States. No government has eagerly embraced this role.<sup>234</sup>

A more limited suggestion for a defender general is that they practice before the United States Supreme Court as a mirror image of a solicitor general, but only in criminal cases.<sup>235</sup> Senator Cory Booker introduced legislation to create such an office, but it was not passed.<sup>236</sup>

Since public defenders represent individual clients, it is much more difficult for any defender general to act unilaterally. An attorney general can instruct all subordinate prosecutors to adopt certain stances. A defender general cannot require defense lawyers to do anything that would conceivably disadvantage any client.<sup>237</sup> Still, it would be beneficial to have a national voice speaking up when priorities and resources for public defenders are put at risk.

## ii. Oversight Authority

Another idea is simply to move defender offices under a larger umbrella than local governments or local courts. Those locally controlled systems are subject to the agenda and control of a small group of elected officials or judges that may be unfriendly to defender independence or even the office's mission of public defense. A statewide system diffuses the reach of any local attack upon public defense, but it does not work well if the state is not committed to full funding.<sup>238</sup> The example of abolishing death penalty resource centers shows even a national program is not sheltered from politics.<sup>239</sup>

The *Cardone Report* recommended independent oversight for the federal public defense system.<sup>240</sup> Those systems already exist in some states. The statewide commission is best suited to distribute grants, set best

<sup>233</sup> *About Us*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/about> [<https://perma.cc/NG69-ZZYJ>] (last modified Sept. 16, 2021).

<sup>234</sup> See MAYEUX, *supra* note 5, at 16–17.

<sup>235</sup> Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1471–74 (2020).

<sup>236</sup> S. 330, 115th Cong. (2017–2018).

<sup>237</sup> See MODEL RULES OF PRO. CONDUCT, r. 6.3 (AM. BAR ASS'N 1983).

<sup>238</sup> See George Yubas, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 STAN. L. REV. 157, 160 (1976).

<sup>239</sup> See Schay, *supra* note 36, at 35.

<sup>240</sup> CARDONE REPORT, *supra* note 189, at 243–47.

practices and standards, such as workloads.<sup>241</sup> They can advise counties about establishing new public defense programs.

Merely moving defender programs among different branches of government is rarely a solution by itself.<sup>242</sup> One suggestion is to give chief public defenders the powers of an inspector general within the executive branch of state government.<sup>243</sup> That would give the office some leverage in the power to investigate other executive branch agencies. However, there is currently no consensus on whether this or any other structural change guarantees defender independence. At a minimum, whoever oversees chief defenders should not be able to hire and fire them without a transparent process.

### *iii. Elections*

Electing public defenders, who then seek an appropriation of funds to run their offices, is one method intended to increase independence. It removes bureaucratic and political control over them. The chief defender answers to the voters. However, as with elected judges, it is unclear that more democracy is what is needed. At least district attorneys and attorneys general have easily defined issues like “progressive reform” versus “tough on crime.” The job of public defender is often misunderstood, and the position is likely to appear somewhere low down on the ballot.

Elected public defender systems currently exist in four places: San Francisco, California; Lancaster County, Nebraska; Tennessee; and Florida.<sup>244</sup> Such a system has been far from a uniform solution. These election-based systems typically involve partisan elections in jurisdictions where one party dominates. Sometimes, that means a very qualified defender is elected even when all insiders (including the majority party), know the candidate has a different political allegiance than the majority party. In other elections, a candidate has appealed to the majority with a “law and order” campaign—effectively a platform against one’s own prospective clients.

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<sup>241</sup> See e.g., TEX. INDIGENT DEFENSE COMM’N., <http://www.tidc.texas.gov/> [<https://perma.cc/J6G5-9Y8U>]; VA. INDIGENT DEFENSE COMM’N., <http://www.vadefenders.org/> [<https://perma.cc/4VVN-ASSH>].

<sup>242</sup> See Irene Oritseweyinme Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 118 (2020) (“The problems continued because the vote effectively transferred the institution’s supervisor to another governmental branch that not only had its own objectives in the criminal court process that could collide with the public defender’s goals, but also possessed the power to discipline the public defender during such a collision.”).

<sup>243</sup> *Id.* at 157 (“Bringing the public defender up to the state level with representation of its interests in the form of an inspector general-type figure would help to make the public defender coequal to other governmental authority, and allow the institution to challenge the powers that be without fear of retaliation that could undermine its duty to serve its clients.”).

<sup>244</sup> Andrew Howard, *The Public’s Defender: Analyzing the Impact of Electing Public Defenders*, 4 COLUM. HUM. RTS. L. REV. ONLINE 173, 177, 181 (2020).

The latter situation has often ended badly. In 2008, a public defender running for the majority party was elected in Florida's Fourth Judicial Circuit on the promise that neither he nor his attorneys would accuse the police of lying.<sup>245</sup> When he was elected, the police department threw a party, which he attended.<sup>246</sup> In 2013, a series of stories in the Florida Times-Union revealed he had inappropriate relationships with women: hiring them based on their attractiveness, drinking with them in his office, inviting them to shower with him. Those stories alleged he fired those women after his wife came into the office and demanded it, and then his chief of staff deleted public records. He was later fined and suspended from the practice of law.<sup>247</sup>

Elections can help protect chief public defenders from the problem of being surreptitiously removed on manufactured claims of misconduct or poor performance when the real reasons involve citizen speech. However, elections do not assure protections from underfunding or political attacks that can make reelection difficult. Losing party support or being cast as protecting criminals are possible results for those who buck the system. In the alternative, a public defender can become not only dependent, but compliant, if the process does not value defendants.

#### *iv. Increase Offices*

Studies of public defenders (at least those not severely handicapped by lack of resources) show they get better results for their clients than private lawyers who accept court appointments in criminal cases.<sup>248</sup> There have also been studies that prove how defenders' work can be limited in order to provide both the best representation for individual clients and maximize the service they provide to their funding authorities.<sup>249</sup> Even in rural areas, counties can combine to create regional offices, maximizing their value when individual jurisdictions are financially stretched or have few

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<sup>245</sup> *Demands of city pension funds are booming*, FL. TIMES-UNION (Jan. 10, 2009, 11:01 PM), <https://www.jacksonville.com/story/news/2009/01/11/demands-of-city-pension-funds-are-booming/15999335007/> [<https://perma.cc/8LAM-8HX9>].

<sup>246</sup> *Id.*

<sup>247</sup> Andrew Pantazi, *Former public defender Matt Shirk agrees to reprimand and fine*, FL. TIMES-UNION (Apr. 6, 2017, 12:05 PM), <https://www.jacksonville.com/news/metro/2017-04-06/former-public-defender-matt-shirk-agrees-reprimand-and-fine> [<https://perma.cc/6DLR-4SMJ>].

<sup>248</sup> See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012); see also MAGGIE BAILEY, UNIV. N.C. SCH. OF GOV'T, CRIM. JUST. INNOVATION LAB, EMPIRICAL RESEARCH ON THE EFFECTIVENESS OF INDIGENT DEFENSE DELIVERY SYSTEMS 8 (2021) ("Taken together, the studies discussed here suggest that, when compared to public defenders, appointed counsel generally achieve less favorable outcomes for their defendants.").

<sup>249</sup> See, e.g., A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEF., THE INDIANA STUDY: AN ANALYSIS OF THE INDIANA PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS (July 24, 2020), <https://www.in.gov/publicdefender/files/FINAL-FINAL-FINAL-WORKLOAD-STUDY.pdf> [<https://perma.cc/RP6M-8RAA>] (following study models employed in Missouri and Texas).

criminal cases of their own.<sup>250</sup>

Creation and use of public defender offices should be a universal goal in all jurisdictions in the United States. Making defenders more prevalent gets all jurisdictions acclimated to their needs. There is also power in numbers. Defenders can then better support one another in seeking independence.

## B. Cultural Changes

Cultural changes are those which affect how defenders are perceived by those within the criminal legal system and outside of it. If public defender offices are merely insular agencies with a limited function in each case—that begins at appointment and ends at disposition—then they will have little support beyond the fact that someone must represent poor criminal defendants. Changes that seek to reduce recidivism and unite communities will enhance the work and perception of public defenders.

### i. Participatory Defense

A recent phenomena is called “participatory defense.”<sup>251</sup> This organizes persons who face criminal charges, their families, and their communities, to educate them about what they are facing and fight for systemic reform in the criminal legal system.<sup>252</sup> They usually work in coordination with public defender offices, and typically share the same goals, but have the perspective of those involuntarily subjected to the system. Because they represent many independent voices, they are able to advocate on behalf of public defenders from outside of the office.

Participatory defense is also under the umbrella of community-oriented defense, which seeks to ally public defenders with their local community to foster mutually constructive relationships.<sup>253</sup> The role of public defense is inherently a community-oriented job, because the public defense role is designed to serve local citizens.<sup>254</sup> The more support from the

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<sup>250</sup> See TEX. INDIGENT DEF. COMM’N, PUBLIC DEFENDER PRIMER, 25 (Oct. 2020), <http://www.tidc.texas.gov/media/8d87ba4dc5f2348/public-defender-primer.pdf> [<https://perma.cc/MQV8-EY2W>].

<sup>251</sup> See Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1282–83 (2015).

<sup>252</sup> MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 84–85 (Princeton Univ. Press 2020).

<sup>253</sup> MELANCA CLARK & EMILY SAVNER, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS (2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Community%20Oriented%20Defense-%20Stronger%20Public%20Defenders.pdf> [<https://perma.cc/VMU2-E944>].

<sup>254</sup> Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 404 (2001).

community, the more independence a public defender office has.

## ii. *Holistic Practices*

The Bronx Defenders defined holistic defense with four pillars: (1) “seamless access to services that meet clients’ legal and social support needs[;]” (2) “dynamic, interdisciplinary communication[;]” (3) advocates with an “interdisciplinary skill set[;]” and (4) “a robust understanding of, and connection to, the community served.”<sup>255</sup>

The term “holistic defense” covers anything that supports a client outside the traditional frame of their charged criminal cases—i.e., that beyond appointment to disposition in their criminal cases.<sup>256</sup> This includes addressing immigration consequences, health services, housing, benefits, and any other legal or social needs that will disentangle clients from the criminal legal system. The tenets include a client-centered practice, partnering with the community, addressing systemic problems, collaboration with others, and public education.<sup>257</sup>

Holistic defense has proven to be successful.<sup>258</sup> It results in lower incarceration and removes obstacles to keep defendants from succeeding once they have left the criminal legal system. Holistic defense occurs from the beginning of a case, and because it is client-centered, it is done in cooperation with clients. It is within the confidentiality of the attorney-client relationship. It has been described as a “crime prevention” strategy.<sup>259</sup>

So-called “reentry” programs are involuntary court-ordered treatment and supervision, such as out-patient drug programs. Clients may need help in ways reentry programs are not set up for—e.g., attaching benefits, addressing civil liability, housing, employment, family disputes, expunging criminal records, etc. Reentry does not honor client choice in the way holistic practices can.

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<sup>255</sup> Robin Steinberg, *Heeding Gideon’s Call in the Twenty-first Century: Holistic Defense and the New public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963–64 (2013).

<sup>256</sup> See Cynthia G. Lee et al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216–18 (2015).

<sup>257</sup> See *Community Oriented Defense*, NAT’L LEGAL AID & DEF. ASS’N, <https://www.nlada.org/community-oriented-defender-network> [<https://perma.cc/GR75-JFX4>].

<sup>258</sup> James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 865 (2019) (holistic defense has statistically significant effect on punishment severity for defendants).

<sup>259</sup> Thomas H. Reed, *Can Public Defenders be Reformers?*, CRIME REP. (Jan. 14, 2019), <https://thecrimereport.org/2019/01/14/can-public-defenders-be-reformers/> [<https://perma.cc/LS9V-TA8B>].



*iii. Alliances*

An idea that has always existed, but should be recognized as a tactic for public defender independence, is unity with private appointed lawyers. Private appointed lawyers typically welcome the assistance and support of public defenders with their own cases. In turn, they can support public defenders when they are under attack on policy grounds.<sup>260</sup>

Local private lawyers have come to the aid of a besieged chief defender because they respect the work of the office and they benefit by support the office provides the bar generally.<sup>261</sup> Public defender offices often provide continuing legal education, trial clothing for defendants, and research support. Private lawyers belong to local, state, and national criminal defense lawyer associations that have strike forces that often respond to attacks on defense lawyers quickly and effectively.<sup>262</sup>

*iv. Internal Changes*

As stated in the aforementioned ABA principles, every public defender office should have a nonpartisan board as a buffer between the office and its funding source.<sup>263</sup> However, the term “nonpartisan” is insufficient. Simply being unaffiliated with a political party does not assure neutrality.

Boards should reserve spots for those who support the concept of fully funded public defense but have no favoritism for or against the particular office. Therefore, although active law enforcement, prosecutors, and judges should clearly not be involved with supervising the office, neither should private lawyers who accept criminal court appointments. They may share some criminal legal goals, but they are competing for work.

Regardless of which branch of government funds public defenders, there should be an oversight board that is not only nonpartisan but diverse and supportive. “Diverse” means a broad section of the community that is affected by the criminal legal system. “Supportive” describes those who agree with the general aims of public defense but have no conflict with the specific organization.

Ideally, each public defender office would have an oversight board and each jurisdiction would also have a board or commission.<sup>264</sup> Local boards recommend the hiring or firing of a chief defender to local government. The chief should also report to the local board on a regular basis, at least quarterly.

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<sup>260</sup> See Despart, *supra* note 166.

<sup>261</sup> See FEDERAL INDIGENT DEFENSE 2015, *supra* note 193.

<sup>262</sup> *Lawyers' Assistance Strike Force*, NAT'L LEGAL AID & DEF. ASS'N (June 5, 2021), <https://www.nacdl.org/Content/Lawyer-Assistance-Strike-Force> [<https://perma.cc/762M-RWFA>].

<sup>263</sup> ABA TEN PRINCIPLES, *supra* note 84.

<sup>264</sup> See LEFSTEIN *supra* note 1, at 185–88.

Representatives from local bar associations with criminal defense experience, but that do not personally accept court appointed cases, are good potential board members. Professors of law or criminal justice, unelected community leaders such as clergy, or those who work at nonprofit organizations are appropriate. The board should also represent the racial, ethnic, and gender diversity of those in that system. Among the bar associations and nonprofits, special attention to communities or groups without a strong voice in the criminal legal system should be considered (e.g., a nonprofit for immigrants' rights).

A broad coalition is important: not only because they will support the public defense mission from different perspectives but because it gives the office a larger voice in the community. Conservative political philosopher Ernst van den Haag described the genius of American democracy as "institutionalized mutual mistrust."<sup>265</sup> Therefore, even positions that may seem at first glance appear to be in opposition to that mission can be appropriate. For example, a director of a domestic violence clinic serves persons who may alternatively be victims and defendants.

#### *v. Data*

Beyond the data needed to set reasonable workloads for lawyers, data are an essential tool for the modern public defender.<sup>266</sup> Gone are the days when anecdotes alone could justify a budget increase or new initiative.<sup>267</sup> Defenders have long been behind on advances in technology.<sup>268</sup>

Virtually all public defender offices have adopted electronic case management systems, though some offices are still deficient.<sup>269</sup> These are essential, not only for internal reporting, but also to gather data for systemic change, including litigation.<sup>270</sup> Statistical reports can be powerful tools to convince courts of when a problem exists and how to solve it.<sup>271</sup>

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<sup>265</sup> MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 39 (LexisNexis 3rd Ed. 2004).

<sup>266</sup> Buskey, *supra* note 28, at 543.

<sup>267</sup> Nadine Frederique et al., *What is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317, 1317–18 (2015) ("Advocates for the right to counsel often lament that there is a crisis in indigent defense in the United States. Social science research on the right to counsel provision and indigent defense can play a significant role in ameliorating this crisis.").

<sup>268</sup> Kashmir Hill, *Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone.*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html> [<https://perma.cc/QTN6-7GYQ>].

<sup>269</sup> Telephone interview with Stephen Hanlon, project director of public defender workload studies in several states (Dec. 28, 2021).

<sup>270</sup> See Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89 (2018).

<sup>271</sup> See e.g., *O'Donnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1106 (2017) (relying upon Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017)).

Funders and overseers have demanded performance measures to assure defenders are both efficient and cost-effective. Data are needed to support those measures.<sup>272</sup> This can require timekeeping by task to make sure certain essential work is done, and adequate time is being allocated for that work. Setting the type of workload standards described above requires tracking data to create the workloads and more tracking to apply them.<sup>273</sup>

When defenders have control of their data, they are better able to address discussions about the effectiveness of their work.<sup>274</sup> It allows defenders to show when they are doing well and to seek resources when they are hindered by underfunding and overwork.<sup>275</sup> Increased knowledge is a means to independence and a goal by itself.

## vi. Media

Traditionally, public defenders were only mentioned in the media in relation to their clients' cases or occasionally about underfunding issues. Today, public defenders are regularly sought for their opinions on policy and law.<sup>276</sup> Even when reporters do not reach out to them, defenders are more proactive in holding press conferences and media events. This does not even cover defender use of social media and websites to get their messages out to the public directly. An organization was started just for this purpose.<sup>277</sup>

Defenders also rely on others with a broader media presence, like celebrities, to get their messages out.<sup>278</sup> Public defenders in Philadelphia

<sup>272</sup> See MAREA BEEMAN, JUSTICE MANAGEMENT INST., USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS (2012), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_sustaining\\_and\\_improving\\_public\\_defense.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf) [https://perma.cc/JCF4-4AEB].

<sup>273</sup> See MAREA BEEMAN, NAT'L LEGAL AID & DEF. ASS'N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK (2014), <https://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf> [https://perma.cc/5UES-X5QZ].

<sup>274</sup> See STEPHEN F. HANLON, MALIA N. BRINK, & NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEF., USE OF DELPHI METHOD IN ABA SCLAIID PUBLIC DEFENSE WORKLOAD STUDIES: A REPORT ON LESSONS LEARNED (2021), [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/ls-sclaid-indef-delphi-method-lessons.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/ls-sclaid-indef-delphi-method-lessons.pdf) [https://perma.cc/9K9Y-9UEK].

<sup>275</sup> See Andrew Lucas Blaize Davies, *How Do We "Do Data" in Public Defense?*, 78 ALB. L. REV. 1179, 1179–83 (2015).

<sup>276</sup> See e.g., David Ovalle, *Police body-cam recording of defense attorney causes stir in Miami-Dade*, MIA. HERALD (Mar. 27, 2016, 9:14 PM) ("You have a constitutional issue here. You cannot prepare to go to trial," [Chief Public Defender] Martinez said. "You cannot adequately advise your client. It's outrageous.").

<sup>277</sup> *Zealous*, <https://zealo.us/#mission> [https://perma.cc/D7XY-KVE9] (last visited July 18, 2021) ("Zealous activates, trains, and supports public defenders, in partnership with local organizations and the people and communities they serve, to move their advocacy outside of court. Our goal is to end mass criminalization.").

<sup>278</sup> See e.g., Dara Kam, *South Florida public defenders testify in felon voting case that most can't pay costs*, MIA. HERALD (Apr. 28, 2020, 6:33 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article242356451.html> [https://perma.cc/E9TK-LUFV].

worked with members of the NFL's Eagles on the issue of bail reform.<sup>279</sup> Sometimes an athlete or musician will get public attention to issues that public defenders cannot do alone.

### *vii. Politics*

After having previously warned that political issues threaten defenders, it seems incongruous to argue that public defenders should consider politics as one of the remedies to seek independence. However, even the majority of public defenders, who do not run in partisan elections, are unavoidably enmeshed into the politics of their jurisdiction. They ignore them at their peril.

Politics are remedial when the defender is allied with political forces who share the mission of defenders and can assist them. This is not always limited to aligning with progressives. Conservative judges and politicians often believe that there is great value in making sure good lawyers are properly given resources in order to competently prepare and try cases, both for reasons of fairness and to reduce appeals and post-conviction litigation later. There can be a point of agreement from both ends of the political spectrum when all can be educated on how holistic and client-centered practices reach common aims.

Politics are also divisively partisan, and this can be a trap for careless chiefs. Aligning oneself with a political party may be required for elected public defenders, but it can be an unnecessary distraction for those ultimately appointed and reviewed by partisan politicians. Whichever party is in control will affect how well the chief defender is perceived and how well they can negotiate.

The best approach may be to keep one's alliances to their nonbusiness hours and make decisions based only upon principles that best enhance public defense. Liberals may support services that can lead to lower recidivism. Conservatives may advocate reducing or eliminating unnecessary criminal laws. Each may have different reasons to support public defense and there is no reason to discourage well-intentioned support unless it comes with strings attached.

## **C. Legal Changes**

Legal changes are actual changes in the law or the criminal legal system itself. It takes independence simply for public defenders to become

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<sup>279</sup> Tim McManus, *Jenkins, Long lead Players Coalition group pushing bail reform*, ESPN.COM (June 8, 2018), [https://www.espn.com/blog/philadelphia-eagles/post/\\_/id/25453/jenkins-long-mcleod-boost-public-defenders-push-bail-reform](https://www.espn.com/blog/philadelphia-eagles/post/_/id/25453/jenkins-long-mcleod-boost-public-defenders-push-bail-reform) [<https://perma.cc/FAC8-VDCR>].

involved in these processes. Defenders urge legislation that contradicts the demands of law enforcement and prosecutors. Engaging in litigation about systemic reform is always controversial. Both can provoke government overseers to pick a side, often the side of law enforcement and prosecutors.

### *i. Legislation*

Defenders can take an active role in that process. In 2015, in reaction to a judge's refusal to appoint public defenders in post-conviction cases, the Harris County Public Defender's Office drafted language for SB 669, which was signed into law as TEX. CODE CRIM. PROC. ART. 11.074.<sup>280</sup> The statute requires Texas judges to appoint counsel in post-conviction writs of habeas corpus when the prosecution agrees relief is justified.<sup>281</sup> The change was particularly important in a large urban jurisdiction like Harris County, where systemic errors, such as flawed forensic testing, can result in mass exonerations, but only by filing petitions for writs of habeas corpus, pursuant to Texas law.<sup>282</sup>

### *ii. Lawsuits*

Lawsuits by outside groups can force governments to address systemic injustices without putting the public defenders in the cross hairs. Even when it is clear the public defenders support a lawsuit, keeping them out of the innumerable skirmishes that come up during litigation lowers animosity towards them. Similarly, media reports of injustice are less likely to provoke retaliation against public defenders than protests made directly by defenders themselves. Those outside the relationship between defenders and their oversight authorities can be a valuable buffer.

Governments are unlikely to allow defenders to use taxpayer dollars to sue them. Therefore, it is almost always outside nonprofit organizations who bring lawsuits regarding underfunding and overworking public defenders, resulting in detriment to their clients. Those situations are typically well known and do not require defenders to seek the litigation. Defenders and criminal reform nonprofits are often in regular contact and support each other on various policy issues. Stepping in to sue on behalf of defenders is usually a result of those relationships.

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<sup>280</sup> Tex. Crim. Proc. Code Ann. Art. 11.074 (West 2015).

<sup>281</sup> *Id.*

<sup>282</sup> Ryan Gabrielson & Topher Sanders, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), <https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?hpw&rref=magazine&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well&r=0#> [<https://perma.cc/LX3S-HJHA>] (explaining requirement that a Texas defendant must file a writ in order to be considered for post-conviction relief).

Litigation is sometimes about issues that support the interests of public defenders' clients and their cases. For instance, a class action lawsuit was brought in New York City to end the police policy of stopping and frisking citizens without reasonable suspicion of a crime.<sup>283</sup> In Galveston, Texas, the ACLU took the county to federal court over failing to provide counsel to defendants at their initial bail hearings.<sup>284</sup> In New Orleans, the Civil Rights Corps sued the county for impoverishing defendants by an endless cycle of court costs, fines, and fees.<sup>285</sup> On other occasions, the federal government should step in.<sup>286</sup>

### iii. Judges

In the past, most judges did not have experience as public defenders. This was due to a lack of public defender offices and the fact that the position was not seen as a path to the judiciary. President Joe Biden is the first United States president to actively seek candidates for the federal bench with previous tenures as public defenders.<sup>287</sup> Additionally, many public defenders have recently been elected to state judgeships in partisan races.<sup>288</sup>

No current or former public defender has ever been appointed to the United States Supreme Court. Justice Thurgood Marshall, who retired in 1991, was the last justice with criminal defense experience. Six of the current justices have worked at the Department of Justice, mostly as prosecutors.<sup>289</sup> It will be a sign of respect and recognition when the first public defender ascends to the Court. That lawyer will likely come from an office that is known for its independence.

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<sup>283</sup> Katherine E. Kinsey, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 220 (2014).

<sup>284</sup> *Booth v. Galveston County*, No. 3:18-CV-00104, 2019 WL 3714455, at \*1 (S.D. Tex. Aug. 7, 2019), *report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019).

<sup>285</sup> Campbell Robertson, *Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), <https://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html?act=https://perma.cc/2X26-5PCX>.

<sup>286</sup> Matt Apuzzo & John Eligon, *Department of Justice Reaches Agreement With Ferguson*, N.Y. TIMES (Jan. 28, 2016), <https://www.nytimes.com/2016/01/28/us/departments-of-justice-reaches-agreement-with-ferguson.html> [https://perma.cc/SJ3N-5M2N].

<sup>287</sup> President Biden Announces Third Slate of Judicial Nominees, 2021 DAILY COMP. PRES. DOC. (May 12, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/12/president-biden-announces-third-slate-of-judicial-nominees/> [https://perma.cc/45BQ-TYR6].

<sup>288</sup> Sam Mellins, *How Public Defenders Rocked Las Vegas Judge Elections*, THE APPEAL (Dec. 21, 2020), <https://theappeal.org/politicalreport/public-defenders-las-vegas-judge-elections/> [https://perma.cc/VBZ2-MFFU]; Katie Jane Fernelius, *Two New Orleans Public Defenders Elected Judge in a Push to "Flip the Bench"*, THE APPEAL (Nov. 4, 2020), <https://theappeal.org/politicalreport/new-orleans-public-defenders-elected-judge/> [https://perma.cc/6ATV-CTKU].

<sup>289</sup> Adam Liptak, *A Proposal to Offset Prosecutors' Power: The 'Defender General'*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/a-proposal-to-offset-prosecutors-power-the-defender-general.html> [https://perma.cc/K5PH-Z7HA].

## CONCLUSION

Independence for public defenders is an important but elusive goal. The first step is to assure adequate funding and reasonable workloads. The lack of both promotes a system in which defenders are reluctant to push for their clients' rights for fear of punishment by termination, overwork, and insufficient compensation. Acquiescence will not suffice when protecting criminal defendants' most cherished constitutional rights. The price of that freedom is eternal vigilance.

However, even when reasonable funding and workloads are obtained, there need to be a variety of protections in place to assure the transparency and due process needed for public defenders to seek systemic changes. Structural, cultural, and legal devices should be employed to avoid attacks on public defenders. There are constitutional protections when they speak out. Defenders should not fear for their jobs if they want to be heard on issues that benefit their clients, even those that inconvenience the governments who fund their work.