



# ***GIDEON AT 60:*** A SNAPSHOT OF STATE PUBLIC DEFENSE SYSTEMS AND PATHS TO SYSTEM REFORM

Marea Beeman, J.D.  
Claire Buetow, J.D.

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**U.S. Department of Justice**  
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**810 Seventh St. N.W.**  
**Washington, DC 20531**

**Nancy La Vigne, Ph.D.**

Director, National Institute of Justice

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## Abstract

In collaboration with the U.S. Department of Justice's Office for Access to Justice (ATJ), the National Institute of Justice (NIJ) sponsored a report on public defense system models in recognition of the 60th anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

*Gideon* established the Sixth Amendment's right to counsel to indigent persons charged with felonies in state courts, which was later extended to misdemeanors and delinquency proceedings in juvenile court. Researchers Marea Beeman, J.D., and Claire Buetow, J.D., conducted a national scan of the public defense (also known as indigent defense) service models currently used in U.S. state, local, and tribal adult, trial-level, criminal cases.

The report addresses the prevalence of different models, factors contributing to how jurisdictions select different models, and variations in case and other outcomes associated with each model. Findings are based on (1) a review and synthesis of publicly available material, including research reports, law review articles, government agency websites, and news accounts; and (2) interviews with 17 subject matter experts, including academics, researchers, civil rights advocates, a representative of people directly impacted by the criminal legal system, indigent defense commission staff and members, public defense program staff, a current court administrator, a former prosecutor, a former judge, and a former legislator (some stakeholders reflect multiple roles). Although findings are based on analysis of extant materials and a convenience sample of interview subjects, the report is a national and current scan of public defense models. It is intended to complement research based on more rigorous statistical surveys and program evaluations that may be dated or limited to a few jurisdictions.

Experts interviewed emphasized four foundational aspects of public defense systems: oversight, independence, access to counsel, and quality of representation. States set standards and monitor public defense service delivery primarily through oversight commissions, though two-thirds of states lack this type of full statewide oversight. Independence, or the ability of defenders to advocate for their clients without interference, is often compromised by other government officials' conflicts of interest in making defense

policy and case decisions. Performance measurement of access to and quality of counsel is challenged by a lack of reliable data. Recent reform efforts involving research, litigation, and advocacy have resulted in more states creating oversight commissions and shifting to greater use of state funds to provide access to quality counsel and independent public defense delivery methods.



Attorney General Merrick B. Garland delivers remarks at the Office of Access to Justice's Gideon Celebration.

## Executive Summary

In 1963, the Supreme Court decided in *Gideon v. Wainwright* that, for criminal cases to be fair, defense lawyers are “necessities, not luxuries.” States must ensure that people who cannot afford defense lawyers are provided with them at government expense.<sup>1</sup> The Court has clarified *Gideon*'s scope over time<sup>2</sup> but has left decisions about the administration, funding, and oversight of public defense to the states, which have created a variety of models.

In collaboration with the U.S. Department of Justice's Office for Access to Justice (ATJ), the National Institute of Justice (NIJ) sponsored this report on contemporary public defense system models in recognition of the 60th anniversary of *Gideon*. The report presents findings from a national scan of the models currently used for adult, trial-level, criminal cases in U.S. state, local, and tribal jurisdictions. Key research questions were to identify the prevalence of different models, factors contributing to how jurisdictions select different models, and variations in case and other outcomes associated with each model. Findings are based on (1) a review and synthesis of publicly available materials, including research reports, law review articles, government agency websites, and news accounts, and (2) interviews with 17 subject matter experts, including academics, researchers, civil rights advocates, a representative of people directly impacted by the criminal legal system, indigent defense commission staff and members, public defense program staff, a current court administrator, a former prosecutor, a former judge, and a former legislator (some stakeholders reflect multiple roles).

The researchers find that 60 years on, whether *Gideon* has been fulfilled is, at best, an open question in most state and local criminal courts. Highlights of the findings, which are detailed in the full report, are:

- States' service delivery models for providing attorneys vary widely, with a mixture of staff models (attorneys are employees of the government or nonprofit offices) and private



practice models (attorneys accept case-by-case appointments or work under contracts). For succinctness, this report uses two categories: public defenders, who are employees of a government or nonprofit office under the direction of a chief public defender, versus private assigned counsel, who accept indigent defense cases while working under contract arrangements or on case-by-case appointments.<sup>3</sup> All states use a mix of these delivery models, especially to provide counsel when there are legal conflicts of interest.<sup>4</sup>

- American Indians who face prosecution in tribal courts, which operate under separate mandates from those for U.S. federal, state, and local courts, have no right to counsel provided at the tribe's expense. Although some tribes have opted to create public defense systems that resemble those found in state courts, many have not.<sup>5</sup> Entry of uncounseled pleas in tribal court cases can harm American Indians in state and federal court if they face prosecution for the same or other charges.<sup>6</sup>
- Administration and funding for most states' public defense systems are a mix of state and local government responsibility. In only five states are administration and funding handled entirely by local governments. Two-thirds of states (34) do not have full statewide oversight of public defense, meaning they do not set standards or monitor whether people receive counsel in all cases where they have a right to it.
- The chief mechanism for state oversight is creation of an independent oversight commission that sets policy, often carried out by a small administrative office. Of the 33 states that have a commission, about half (17) have a commission with only limited authority — which means, for example, that it oversees only certain case types (as in Kansas, where the commission oversees felonies but not misdemeanors). In other states, such as Indiana and Georgia, limited authority stems from the fact that counties can opt out of commission oversight (and forego state funding).
- Political and financial conflicts of interest are built into many models. Quality of counsel can suffer when defense attorneys working under flat fee payment schemes balance their clients' interests against their own financial interests.<sup>7</sup> It can also suffer when attorneys balance clients' interests with those of the judges who appoint and pay them, or county commissioners who hire and fire them.<sup>8</sup> Delivery and payment methods administered by elected or independent directors, working under oversight boards and commissions whose members are appointed by different types of stakeholders, minimize such conflicts.
- Lack of oversight means few controls on quality of counsel, such as caseload limits. The Bureau of Justice Statistics (BJS) estimated that 73% of county-based and 79% of state-based public defender offices in 2007 exceeded national caseload guidelines from 1973.<sup>9</sup> Recent state-based studies have found that attorneys should handle far fewer cases than those guidelines would allow.<sup>10</sup> A 2023 national workload study reinforces these findings.<sup>11</sup> Forthcoming BJS census and survey projects will provide updated information about public defender offices nationwide.<sup>12</sup>
- Without independent defense providers and statewide oversight, some local courts deny access to counsel to people who should qualify for it. In Texas, for example, people in many small counties do not have appointed counsel for misdemeanors.<sup>13</sup>
- Nationally accepted key performance measures for public defense are lacking. Furthermore, performance measurement of access to, quality of, and effect of public

defense counsel suffers from missing or inaccurate data. A 2023 investigation found, for example, that only four of 17 western states could report on case totals by counsel type for all cases.<sup>14</sup>

- To detect and address access to counsel deficiencies, public defense system experts recommend that states collect data on something that has not been systematically tracked: the percentage of people who enter uncounseled guilty pleas, particularly those who plead guilty without assistance of counsel at their initial court appearance and those who are sentenced to jail. Also, information on defendant characteristics not limited to race and ethnicity need to be examined for equitable access to counsel.
- Failure to provide access to quality counsel tracks larger systemic inequities, disproportionately affecting people of color<sup>15</sup> and people in rural areas.<sup>16</sup>
- At least a dozen states have made noteworthy changes to their public defense system models in the past 15 years. States like New York, Nevada, and Michigan have achieved significant reform following pressure from combined litigation, research, and advocacy efforts that drove creation of state oversight agencies and new state funding for public defense. These states have begun to see improvements to oversight, independence, access to counsel, and quality of counsel.<sup>17</sup> In other states, like Georgia and Montana, reforms have been undone and state oversight has been reduced.
- Experts stressed that lack of political power, federalism, and insufficient funding pose persistent challenges to reform. Individuals directly impacted by public defense, particularly former clients and their families, have not had sufficient power to shape public defense systems but are becoming more involved in oversight, outreach, advocacy, and research roles.
- Federal support for state and local public defense already exists in the form of census and survey projects through the Bureau of Justice Statistics,<sup>18</sup> research and evaluation projects through the National Institute of Justice,<sup>19</sup> technical assistance<sup>20</sup> and program grants administered by the Bureau of Justice Assistance, litigation by the Civil Rights Division,<sup>21</sup> and broad and diverse efforts of the Office for Access to Justice.<sup>22</sup>
- Interested groups believe increased federal efforts — especially expanded congressional authorization for Department of Justice Sixth Amendment litigation and supplemental, standards-based funding — could accelerate full state compliance with constitutional requirements.<sup>23</sup>

Although findings are based on analysis of extant materials and a convenience sample of interview subjects, the report is a national and current scan of public defense models. It is intended to complement research based on more rigorous statistical surveys and program evaluations that may be dated or limited in coverage of jurisdictions.

The majority of people accused of crime in the United States are unable to afford a lawyer and so require assistance by government-paid counsel.<sup>24</sup> Guidance for structuring effective public defense systems exists, such as the American Bar Association's *Ten Principles of a Public Defense Delivery System*.<sup>25</sup> States like Michigan and New York show how transformational, standards-based reform can be achieved.<sup>26</sup> This report offers considerations for other states seeking to make similar progress.





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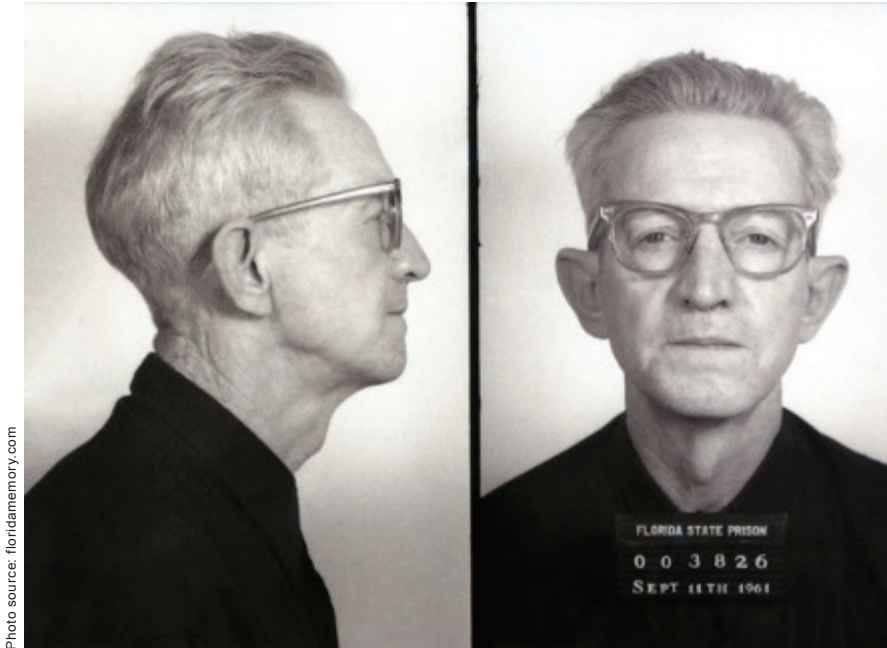


Photo source: floridamemory.com

Clarence Earl Gideon

## Introduction

### *Gideon's Legacy*

Sixty years ago, in 1963, the Supreme Court decided *Gideon v. Wainwright*.<sup>27</sup> At that time, states had to provide defense lawyers to people who were accused of capital crimes and could not afford to hire their own lawyers.<sup>28</sup> Beyond that, it was up to states to decide if a defense lawyer was needed for “fundamental fairness” in a criminal case.<sup>29</sup> Most states had decided that lawyers were needed for felonies.<sup>30</sup> In *Gideon*, the Supreme Court agreed: “In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>31</sup> It established that the U.S. Constitution’s Sixth Amendment right to counsel meant appointment of counsel is a “fundamental right, essential to a fair trial” that states must follow under the Fourteenth Amendment’s guarantee of due process under state law.<sup>32</sup>

Historically, local criminal courts relied on lawyers who were otherwise employed by private law firms to provide public defense for free, for the public good (*pro bono publico*).<sup>33</sup> In the first half of the 20th century, counties and cities experimented with paying private lawyers nominal fees and hiring salaried lawyers to take cases.<sup>34</sup> Clara Shortridge Foltz, California’s first female lawyer, pioneered the public defender concept in 1893, and Los Angeles opened the first public defender agency in 1913.<sup>35</sup>

But by 1963, almost no public defense funding or administration existed at the state level.<sup>36</sup> *Gideon* changed that by deciding public defense was a state responsibility.<sup>37</sup> Over the second half of the 20th century, *Gideon*'s scope expanded through cases that decided that for prosecution of criminal cases with a potential loss of liberty to be fair, defense lawyers are needed in misdemeanors;<sup>38</sup> in juvenile delinquency proceedings;<sup>39</sup> at all critical stages of a case;<sup>40</sup> and with adequate time, training, resources, and independence to be effective at their jobs.<sup>41</sup> These requirements motivated states to institutionalize public defense — yet with a contemporaneous sharp increase in the severity and cost of criminal prosecutions, many efforts fell short of fulfilling *Gideon*'s intent.<sup>42</sup>

Today, 60 years on from *Gideon*, public defense is still a patchwork system of protecting a core constitutional right, resulting in deep inequities. There is especially inequitable treatment of people of color, who are overrepresented in all aspects of the criminal legal system compared to their portion of the overall population,<sup>43</sup> and of rural residents, whose communities experience legal resource scarcities, including in access to public defense attorneys.<sup>44</sup>

## Scope of This Report

This report presents a scan of current public defense service models for adult, trial-level felony and misdemeanor cases in state, local, and tribal jurisdictions.<sup>45</sup> This report uses the term “public defense” (rather than “indigent defense”) to refer to all right-to-counsel services, including contract and private assigned models, except where referencing source material or for clarity. The report uses the terms “counsel,” “lawyers,” and “attorneys” interchangeably, usually following the usage of the source material.

A comprehensive statistical survey or rigorous evaluation of public defense programs is beyond the scope of this report. Rather, the report is based on information from (1) a review and synthesis of publicly available materials, including research reports, law review articles, government agency websites, and news accounts; and (2) interviews with 17 subject matter experts, including academics, researchers, civil rights advocates, a representative of people directly impacted by the criminal legal system, indigent defense commission staff and members, public defense program staff, a current court administrator, a former prosecutor, a former judge, and a former legislator (some stakeholders reflect multiple roles).<sup>46</sup> The authors are enormously grateful to these individuals for their input and assistance.

The report proceeds in three main chapters. It describes, in chapter 1, public defense service models and their prevalence; in chapter 2, performance measures of the models; and in chapter 3, paths to reforming models. A conclusion summarizes findings with a discussion of research caveats and implications for policy and practice.<sup>47</sup>



Photo source: Twitter@TIDC\_News

*A meeting of the Texas Indigent Defense Commission, the state public defense oversight agency.*

## Chapter 1. Public Defense Models

This chapter describes states' models for providing counsel in terms of three core functions (administration, funding, and oversight) and constitutional requirements for their structure. It also describes models for providing counsel in tribal courts, which have different legal requirements.

### Core Roles

Three core roles for states providing public defense are administration, funding, and oversight.<sup>48</sup> States have taken a wide variety of approaches to these roles, as this section will explore. Most states delegate at least some of the responsibility for administration and funding to counties and cities. Delegating public defense to local governments is allowable, but states must have oversight to ensure that local governments are, in fact, providing public defense; most states, however, do not have full oversight.

This section primarily relies on information from the Sixth Amendment Center, which is a nonprofit that conducts independent evaluations and national surveys of public defense system models.<sup>49</sup> That information was verified using national surveys from academic articles;<sup>50</sup> state system profiles from agency reports and websites; and data from the Bureau of Justice Statistics (BJS), which are referenced below.

### Administration

Administration of public defense involves providing lawyers (and other legal team members) to the people who have a right to them. State or local government agencies choose a delivery method, then hire or contract with the participating lawyers.<sup>51</sup>

## BJS Definitions of Public Defense Models

Prior Bureau of Justice Statistics reports have defined five public defense models:\*

- “Governmental conflict public defender office, which provides representation in cases where legal conflicts exist through a publicly operated governmental office and where staff are government employees.
- “Nongovernmental public defender office, which provides representation through written contracts between some governmental entity and a nonprofit entity. Staff are not government employees.
- “Contract system, which provides representation through contracts or other agreements between a governmental entity and one or more private attorneys or law firms that operate for-profit.
- “Assigned or appointed counsel system, which provides representation through individual attorneys or law firms. These attorneys are assigned or appointed on a case-by-case basis.”

This report groups public defense systems into two overarching models: **public defender offices** (covering BJS-defined governmental public defender offices, governmental conflict public defender offices, and nongovernmental public defender offices) and **private assigned counsel** (covering contract systems and assigned or appointed counsel systems).

\* Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics (2016): 2, <https://bjs.ojp.gov/content/pub/pdf/saids13.pdf>.

## Delivery Methods

There are various ways to characterize delivery methods, or ways of supplying lawyers to people with a right to counsel. BJS, for example, has defined five types of systems (see the sidebar “BJS Definitions of Public Defense Models”),<sup>52</sup> while other evaluators have defined three types (public defender, court-appointed, and contract).<sup>53</sup> This report uses just two categories — public defenders and private assigned counsel — on the recommendation of national experts interviewed, who concluded that use of these two model types is more succinct.<sup>54</sup> Variations within these categories (such as governmental vs. nongovernmental offices and contract vs. assigned counsel) are described below.

**Public defenders** work as employees of a government or nonprofit office, under the direction of a chief public defender, and generally work exclusively on public defense cases.<sup>55</sup> Their staff typically include attorneys, investigators, paralegals, and administrative support staff.<sup>56</sup> However, especially in rural areas, offices may employ just a few attorneys and minimal support staff,<sup>57</sup> or may employ attorneys part time.<sup>58</sup> Public defender models vary in how they are structured. For example:<sup>59</sup>

- Public defender offices are generally government agencies.<sup>60</sup> In places like West Virginia,<sup>61</sup> New Hampshire,<sup>62</sup> and Salt Lake City,<sup>63</sup> public defender offices are nonprofit organizations.
- In most places, chief public defenders are appointed by a government entity, such as a state coordinating board or county council.<sup>64</sup> In Florida, Nebraska, Tennessee, and San Francisco, however, chief public defenders are elected.<sup>65</sup>



- A public defender office may specialize in certain case types or take only a fraction of all case appointments.<sup>66</sup> Still She Rises, for example, is a nonprofit public defender office in Tulsa, Oklahoma, that aims to exclusively represent mothers.<sup>67</sup>

In 2007, the BJS Census of Public Defender Offices counted 957 public defender offices nationwide with 24,700 employees.<sup>68</sup> This amounted to roughly one office per three counties,<sup>69</sup> though multiple offices may serve one urban area<sup>70</sup> and many rural areas have none.<sup>71</sup> BJS is currently planning another Census of Public Defender Offices to be fielded in 2024.<sup>72</sup>

**Private assigned counsel** are private attorneys paid by governments to handle cases according to the time they work (hourly, daily, annually), the number of cases they take, the activities they perform (like staffing an arraignment shift), or a combination of these factors. Private assigned counsel models vary:

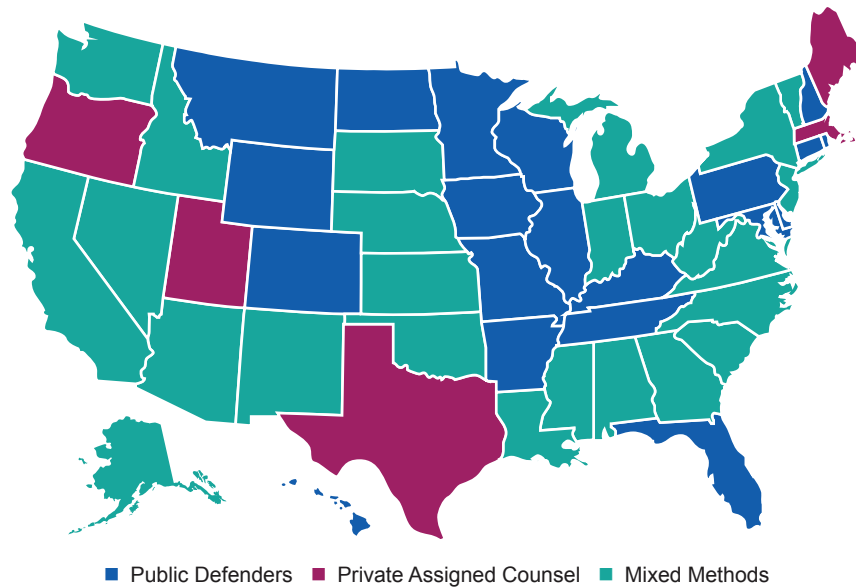
- In **contract** systems, like those in most of Utah, courts or local governments have lawyers, law firms, or nonprofit organizations on contract for an unlimited number of cases.<sup>73</sup> Contract systems sometimes lack oversight or quality controls and make no provision for support staff or investigative and expert services.<sup>74</sup>
- In **assigned counsel** systems, like those in most of Texas, courts rotate through a list of private lawyers who accept appointments as assigned.<sup>75</sup> Individual attorneys are appointed by the court and compensated on a per-case (or per-event) basis.<sup>76</sup> In many such systems, a lawyer who needs an investigator, or needs more time to resolve a complex case, must apply to the court for approval.
- In a **managed assigned counsel program**, like those in Massachusetts and parts of Texas, an independent administrator manages a list of attorneys who are certified to take case appointments, makes payments to the lawyers, provides them access to investigators and other resources, and oversees quality of representation.<sup>77</sup>

Alternatively, a contract, assigned counsel, or managed counsel system may be administered by a statewide public defender office (in a separate assigned counsel department), as in Iowa and Kentucky.<sup>78</sup>

All states use both public defenders and private assigned counsel,<sup>79</sup> particularly to accommodate inevitable legal conflict of interest cases, such as when two people charged for one crime each need their own defense, or when an alleged victim was previously represented by a defender agency. Iowa's and Kentucky's statewide public defender offices assign conflicts (as many as half of all cases) to private assigned counsel.<sup>80</sup> Other places, like Florida and some counties in California, have primary public defender offices as well as conflict case defender offices.<sup>81</sup>

Data are scant, but there are an estimated 20 states that primarily (in most trial-level cases) use public defenders, five states that primarily use private attorneys, and 25 states that use more mixed methods (see exhibit 1).<sup>82</sup>

**Exhibit 1. Primary Public Defense Delivery Method by State.**



<b>Public Defenders (20)</b>	AR, CO, CT, DE, FL, HI, IL, IA, KY, MD, MN, MO, MT, ND, NH, PA, RI, TN, WI, WY
<b>Private Assigned Counsel (5)</b>	MA, ME, OR, TX, UT
<b>Mixed Methods (25)</b>	AK, AL, AZ, CA, GA, ID, IN, KS, LA, MI, MS, NC, NE, NJ, NM, NV, NY, OH, OK, SC, SD, VA, VT, WA, WV

### State and Local Administration

Administration of public defense (that is, selecting and running the delivery method) is undertaken by both state and local governments. In 14 states, local governments handle administration; in 16 states, state governments do; and in 20 states, state and local governments both handle administration (see exhibit 2).<sup>83</sup> In Idaho, a new state public defender office will take over all administrative duties from counties in 2024.

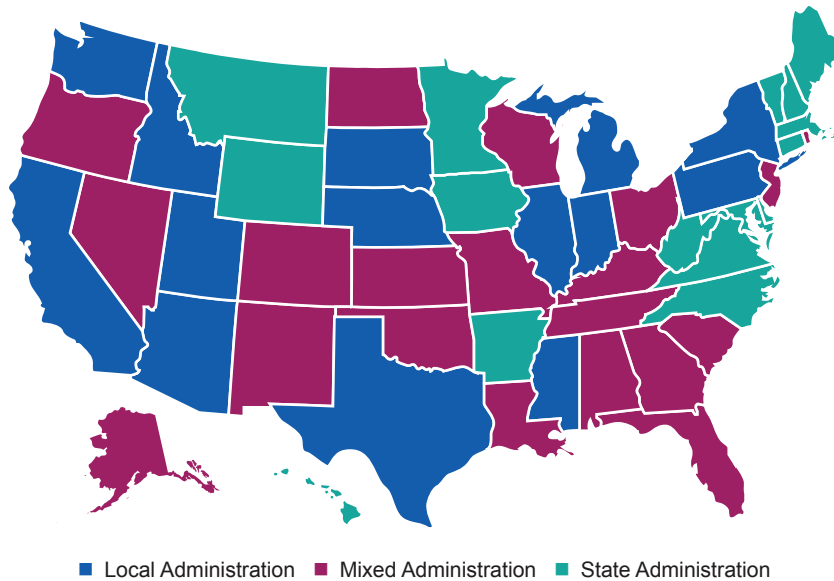
In mixed administration states, responsibility for administration primarily depends on the case or court type. For example:<sup>84</sup>

- In Kansas, the state public defender handles felonies and local governments handle misdemeanors.<sup>85</sup>
- In New Jersey, the state public defender handles all indictable offenses (felonies) in state courts, and city governments provide counsel in nonindictable misdemeanor cases.<sup>86</sup>
- In Tennessee, elected district defenders handle most cases, and local judges appoint private assigned counsel for conflict cases.<sup>87</sup>
- Kentucky and Oklahoma exclude their largest counties from state administration. In Kentucky, the state public defender administers all cases except for those in Jefferson County (the location of Louisville), which has its own public defender. In Oklahoma, the state public defense program administers cases in all counties besides Oklahoma and

Tulsa counties, which have their own public defender offices.<sup>88</sup>

- In Ohio, 11 of 88 counties have opted to contract with the state to provide trial-level public defense, and the remaining 77 counties administer public defense locally.<sup>89</sup>

**Exhibit 2. Public Defense Administration by State.**



<b>Local Administration (14)</b>	AZ, CA, ID,* IL, IN, MI, MS, NE, NY, PA, SD, TX, UT, WA
<b>Mixed Administration (20)</b>	AK, AL, CO, FL, GA, KS, KY, LA, MO, ND, NJ, NM, NV, OH, OK, OR, RI, SC, TN, WI
<b>State Administration (16)</b>	AR, CT, DE, HI, IA, MA, MD, ME, MN, MT, NC, NH, VA, VT, WV, WY*

\*Idaho will shift to state administration in 2024.

## Funding

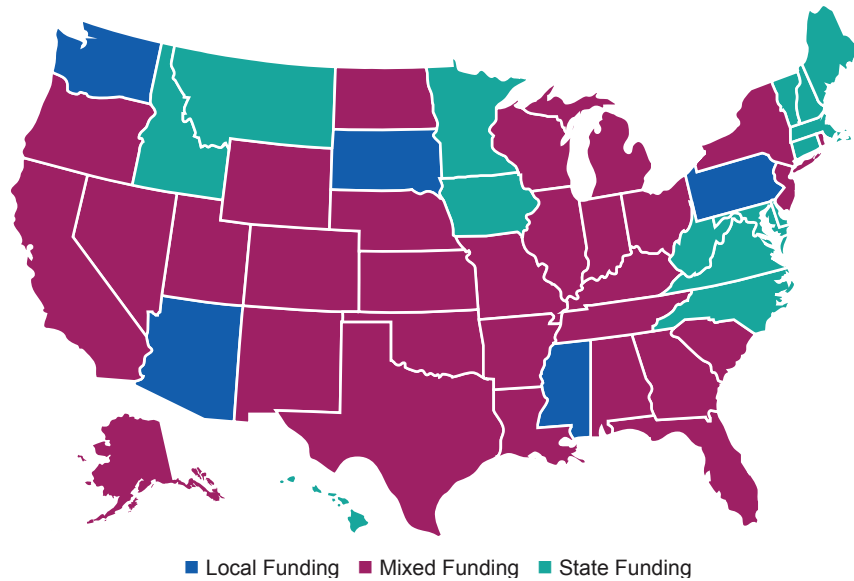
Funding of public defense involves paying for the participating lawyers, other legal team members, and administration costs. State or local governments pay for public defense either directly or through reimbursements. Revenue sources include general fund appropriations and court “user” fees.

In five states, local governments fund all trial-level, noncapital public defense services; in 15 states, the state does; and in 30 states, there is a mix of state and local government funding (see exhibit 3).

The five states that are locally funded are also locally administered (see exhibit 12; the five states are Arizona, Mississippi, Pennsylvania, South Dakota, and Washington). Almost all of the 15 states that are state-funded are also state-administered; Idaho is currently locally administered but will transition to state administration in 2024.<sup>90</sup>

Mixed funding, like mixed administration, may mean the state or local government’s

**Exhibit 3. Public Defense Funding by State.**



<b>Local Funding (5)</b>	AZ, MS, PA, SD, WA
<b>Mixed Funding (30)</b>	AK, AL, AR, CA, CO, FL, GA, IL, IN, KS, KY, LA, MI, MO, ND, NE, NJ, NM, NV, NY, OH, OK, OR, RI, SC, TN, TX, UT, WI, WY
<b>State Funding (15)</b>	CT, DE, HI, IA, ID, MA, MD, ME, MN, MT, NC, NH, VA, VT, WV

responsibility for public defense depends on the case or court type. In Alaska, the state funds a public defender program that covers representation in state court cases, but municipalities must pay for appointed counsel in cases they prosecute in which there is a right to counsel.<sup>91</sup> In Kentucky, the public defender office in the largest county is funded by a combination of state and county funds, while in Oklahoma, all but the two largest counties have state-funded public defense systems.

Alternately, mixed funding may mean that local governments pay the upfront costs for all cases, and the state reimburses some portion or types of costs. For example, in Texas, the state reimburses counties according to a formula (based on the county’s population and public defense spending)<sup>92</sup> and provides reimbursement grants for new programs,<sup>93</sup> offsetting in total about 13% of county costs.<sup>94</sup> Some states reimburse some costs for the counties that choose to meet standards (as in Indiana<sup>95</sup> and Georgia). In Wyoming, the reimbursement model is inverted: Local governments reimburse the state.<sup>96</sup>

Finally, mixed-funding states include those that are known to fund a significant portion of public defense by collecting fees from civil litigants or people charged with crimes,<sup>97</sup> including Louisiana,<sup>98</sup> Alabama,<sup>99</sup> and Texas.<sup>100</sup>

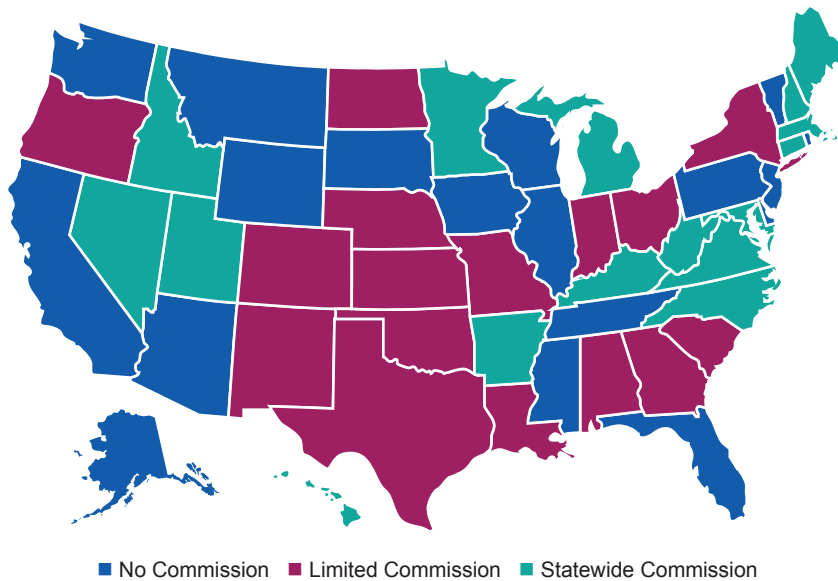
### **Oversight**

Oversight of public defense involves setting standards and monitoring delivery methods to ensure that people are receiving their constitutional right to counsel. States that pass

administration and funding roles to local governments still must ensure that people are receiving counsel, since (as *Gideon* decided) this is ultimately a state responsibility.<sup>101</sup>

States provide oversight through commissions, which are permanent oversight entities with appointed or ex officio members. Many of these commissions are served by small staffs. Seventeen states do not have a commission, 17 states have a commission with limited authority, and 16 states have a commission with full, statewide authority (see exhibit 4).

**Exhibit 4. Public Defense Oversight by State.**



<b>No Commission (17)</b>	AK, AZ, CA, DE, FL, IA, IL, MS, MT, NJ, PA, RI, SD, TN, VT, WA, WY
<b>Limited Commission (17)</b>	AL, CO, GA, IN, KS, LA, MO, ND, NE, NM, NY, OH, OK, OR, SC, TX, WI
<b>Statewide Commission (16)</b>	AR, CT, HI, ID*, KY, MA, MD, ME, MI, MN, NC, NH, NV, UT, VA, WV

\*Idaho's commission will cease operation in 2024.

Of the 33 states that do have a commission, about half (17) have a commission with only limited authority. This means that it oversees only some cases or areas, as in Kansas (where the commission oversees only felonies<sup>102</sup>); Indiana (where counties can opt out of commission oversight and funding<sup>103</sup>); and Oklahoma (which excludes public defense in its largest counties from commission oversight<sup>104</sup>). Other limited-authority commissions have limited power to enforce standards, as in Nebraska.<sup>105</sup>

Local governments may create their own oversight bodies, such as the Orange County, California, Office of Independent Review, which oversees the Office of the Public Defender among other justice agencies.<sup>106</sup> (California lacks a state public defense oversight entity.)

Exhibit 5 displays the public defense administration, funding, oversight, and primary delivery models used in all 50 states. For this information listed by state, see Appendix 1.

**Exhibit 5. Overview of State Public Defense Models: Administration, Funding, and Oversight.**

	Local Administration (14)			Mixed Administration (20)			State Administration (16)		
	Local Funding (5)	Mixed Funding (8)	State Funding (1)	Mixed Funding (20)			Mixed Funding (2)	State Funding (14)	
No Commission (17)	AZ MS PA SD WA	CA IL		AK FL NJ TN RI			WY	DE IA MT VT	
Limited Commission (17)		IN NY TX NE		AL CO GA KS LA	MO NM ND OH OK	OR SC WI			
State Commission (16)		MI UT	ID*	KY NV			AR	CT HI ME MD MA	MN NH NC VA WV

Total Local Funding (5); Total Mixed Funding (30); Total State Funding (15).  
 Primary delivery method: **Public Defenders** (20), **Private Assigned Counsel** (5); Mixed (25).  
Underlined: States with major, recent changes (12), summarized in Exhibit 6.  
 \*In 2024, Idaho will shift to state administration and no oversight commission.

## Constitutional Requirements

When creating public defense models, states must follow certain constitutional requirements. The leading source of guidance in this area is the American Bar Association’s (ABA) *Ten Principles of a Public Defense Delivery System*, which provides a concise overview of the requirements. References to the ABA *Ten Principles* in this report track the original 2002 version; an updated version was adopted in 2023, after research for this report concluded.<sup>107</sup>

### Core Standards

The ABA *Ten Principles* was created as an accessible, practical guide for policymakers and others on the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, and conflict-free legal representation. It has been foundational to the development and monitoring of public defense systems around the country.

As chapter 3 will describe, over the last decade, some states have increased state-level administration, funding, or oversight to help local governments meet these requirements. This state involvement has been especially needed in rural “legal deserts.”<sup>108</sup>

### Independence

*Gideon* decided that, for America’s adversarial justice system to work, people accused of crime must have the “guiding hand” of counsel to assist them.<sup>109</sup> In later cases, the Supreme Court made clear that “implicit in the concept of a ‘guiding hand’ is the assumption that



counsel will be free of state control,” and, therefore, “it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.”<sup>110</sup> To underscore its importance, independence is the first of the *ABA Ten Principles*.<sup>111</sup>

Oversight, funding, and administration all factor into defense system independence. For example, although Texas has an oversight commission, its authority is limited, and funding and administration are controlled at the local level. The state exemplifies how these factors can implicate independence.

At the case level, local judges in most of Texas select and pay the appointed counsel in their courts.<sup>112</sup> When attorneys depend on judges for their work, they sometimes do not request funding for extra preparation time or investigation and are wary of advocating forcefully for clients.<sup>113</sup> At the system level, most of the Texas commission members are judges, and the commission has not set legislatively mandated standards for determining eligibility for counsel or other judicial functions.<sup>114</sup> As a result, many people do not get counsel: in 2021, in 51 of 254 counties, lawyers were appointed in less than 10% of misdemeanor cases. Those who do get counsel may have a lawyer with a caseload well above Texas’ recommended guidelines, since there are no statewide caseload limits.<sup>115</sup>

At the urging of its staff, the Texas Indigent Defense Commission has enhanced the independence of local systems by helping build new public defender offices in 53 counties and managed assigned counsel programs in four counties,<sup>116</sup> and by requiring that new programs have boards with diverse sources of authority.<sup>117</sup> One study found that rural areas of Texas with these programs have higher appointment rates.<sup>118</sup>

To protect independence in accordance with national standards,<sup>119</sup> states have created agencies with independent administrators (public defender offices and managed assigned counsel programs) and boards of directors whose members come from diverse positions of authority and do not have conflicts of interest. For example:

- To ensure diverse viewpoints, the North Carolina Indigent Defense Services Commission requires appointments from groups including the chief justice, governor, speaker of the House, and bar associations (including Black and women lawyers associations), with positions reserved for nonattorney and Native American members.<sup>120</sup>
- To prevent conflicts of interest, the commission for the Colorado Public Defender has five members: three lawyers and two nonlawyers. No member can be, at any time, a judge, prosecutor, public defender, or employee of a law enforcement agency.<sup>121</sup>
- To ensure community input into policy decisions, the Travis County Public Defender Office in Austin, Texas, which opened in 2021, has a seven-member board that includes a justice-involved individual and an advocate/community activist.<sup>122</sup>

States with elected public defenders, according to one study, benefit from increased independence and stature of public defense, in terms of practitioner perception, representation in the judiciary, and resource parity with prosecution.<sup>123</sup> Just two states, Florida and Tennessee, have statewide, elected public defender systems.<sup>124</sup>

A 2020 national survey traced branch assignment of the public defense function and found that 33 states placed it in the executive branch, 11 housed it in the judicial branch, four left it branchless (with responsibility designated to local authorities), and two had a

hybrid structure.<sup>125</sup> The study concluded that among the available options, placement in the executive branch offers the most advantages but does not ensure adequate resources or independence. The role of public defense is to oppose, or at least check, government action on behalf of clients, yet it depends on government support to do so, creating an underlying tension. Because of institutional conflicts, “[p]erhaps unsurprisingly, problems arise when managing the public defender [function] through any branch of state government.”<sup>126</sup>

### ***Timely Appointment***

Although *Gideon* said that a person who is accused of a crime “requires the guiding hand of counsel at every step in the proceedings against him,”<sup>127</sup> *Gideon* did not say what those steps were. In later cases, the Supreme Court has established “critical stages” where counsel is required for proceedings to be fair.<sup>128</sup> In 2008, the Court decided that the right to counsel “attaches” (begins) at the person’s first appearance before a judicial officer.<sup>129</sup> The first appearance is where a person is advised of their rights and has their bail set, and in many states is required to occur within 48 hours of arrest<sup>130</sup> (though the hearing can be delayed for weeks in practice<sup>131</sup>). The Court did not decide whether the first appearance is a critical stage where counsel must be present,<sup>132</sup> but said a lawyer must be appointed within a “reasonable time” after first appearance and before any critical stage that follows.<sup>133</sup> Principle 3 of the ABA *Ten Principles* states that “counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.”<sup>134</sup>

A 2022 study found that 26 states require counsel at the first appearance, and 16 states set timelines for appointment of counsel.<sup>135</sup> When people do not have counsel at that stage or thereafter, their bail is set without the help of a defense lawyer, and they can wait for months without legal assistance,<sup>136</sup> suffering harm to their criminal case, livelihoods, and families.<sup>137</sup> States like Maryland, therefore, now require counsel at first appearance.<sup>138</sup> To provide counsel at first appearance for New Yorkers accused of a crime, between 2018 and 2022 the state funded 20 new centralized arraignment programs (when first appearance occurs in New York) staffed by 486 newly hired defense attorneys.<sup>139</sup> Some offices provide representation earlier than the first appearance, such as through the Cook County (Chicago), Illinois, Public Defender’s Police Station Representation Unit, which is available 24 hours a day to provide free representation to anyone who is detained at a police station or has a warrant.<sup>140</sup>

### ***Indigency Determination and Public Defense System Fees***

*Gideon* required states to provide counsel for someone “who is too poor to hire a lawyer” but did not specify how to determine that.<sup>141</sup> In most states it is the judge’s responsibility to determine eligibility for appointed counsel, yet standards to guide that determination vary widely, often resulting in inequitable decisions.<sup>142</sup> Many state and local governments use some percentage of the federal poverty guidelines and allow a “substantial hardship” inquiry.<sup>143</sup>

Most states impose fees on those who receive appointed counsel: A 2022 study found that 18 states’ statutes authorize assessment of upfront application fees for counsel, 42 authorize recoupment fees, and 17 authorize both types of fees.<sup>144</sup> The Court has allowed these public defense system fees, reasoning that the government has a legitimate interest to recoup its costs of providing public defense, and that no fee shall be required if payment would exert “manifest hardship,”<sup>145</sup> something that would be determined in an ability-to-pay proceeding.<sup>146</sup>

Innocuous-sounding fees, in concert with procedures used to enforce them, have been

documented as roadblocks for poor people in accessing counsel. In Oklahoma, for example, there are no state guidelines for eligibility determinations, so judges create their own standards and procedures and may impose both application and recoupment fees.<sup>147</sup> The application process itself can take multiple court appearances stretching over several weeks. Individuals out on bond can be told at their initial appearance to return with the names of three private practice lawyers who refused to represent the accused individual because they could not pay their fees. If applicable, they may also have to get an affidavit from a friend or loved one who supplied their bond money attesting they cannot also pay for a private lawyer. Only after that will the person be able to return to court and have counsel appointed, in direct contradiction of the ABA's call for early entry of counsel. Individuals who are detained are typically presumed to be indigent, but for some, failure to completely fill out an application for counsel can result in a court date reset and delay in appointing counsel.<sup>148</sup> And after cases are resolved, court debt from public defense system fees keeps people entangled with the justice system.<sup>149</sup>

To ensure accurate, uniform, and timely eligibility determinations that do not deter people from invoking their right to counsel, experts recommend a screening approach like that of Tarrant County (Fort Worth), Texas: an eligibility standard based on a scale like the Living Wage Calculator, rather than the federal poverty guidelines,<sup>150</sup> and screening by administrators who work for an office of indigent defense, rather than by judges themselves.<sup>151</sup> They also recommend that, like Utah, states do not allow assessment of upfront application fees for counsel.<sup>152</sup>

### **Effective Representation**

*Gideon* said that a defense lawyer is fundamental to a fair trial.<sup>153</sup> The Supreme Court later clarified: “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”<sup>154</sup> Rather, people have a right to “effective” assistance of counsel, measured against professional norms “reflected in American Bar Association standards and the like.”<sup>155</sup> It has found constitutionally deficient performance when lawyers failed to review discovery evidence,<sup>156</sup> communicate with a client about plea offers,<sup>157</sup> or advise a client on collateral immigration consequences from a guilty plea.<sup>158</sup> The ABA *Ten Principles* call for the time and space, training, and resources for defense lawyers to provide effective representation, as well as standards-based quality oversight.<sup>159</sup> In short, effective representation depends on public defense systems having lawyers who are adequately experienced and equipped to represent each and every client.<sup>160</sup> Too often that is not the case.

Local governments with limited funding often use the simplest and lowest-cost delivery method available: a low-bid, flat-fee contract with a private attorney.<sup>161</sup> As of 2013, at least 20 states used flat-fee contracts.<sup>162</sup> Attorneys are expected to pay for overhead (like office rent and equipment, legal database fees, and travel costs), paralegals, and sometimes even investigative support<sup>163</sup> out of their own pay, which makes their median effective pay rate in Indiana, for example, \$5.16 per hour.<sup>164</sup> A similar study in North Carolina found 20% of attorneys had an effective pay rate under \$10 per hour.<sup>165</sup> Low, flat fees incentivize attorneys to dispose cases with as little work as possible and forego quality for speed.<sup>166</sup> States like Idaho, South Dakota, and Washington have thus banned them, but they are still widely used in states like Mississippi, Wisconsin, and Indiana.<sup>167</sup>

Public defender offices, too, have long struggled to deliver quality representation due to high workloads.<sup>168</sup> Post-pandemic staffing shortages have exacerbated long-term trends,<sup>169</sup>

and offices have recently been experiencing record turnover. At the New York Legal Aid Society, for example, a 2022 attrition rate 80% higher than the previous year left hundreds of positions vacant.<sup>170</sup> Kentucky's state public defender, too, reported losing almost a third of its 330 attorneys in 2021.<sup>171</sup>

Low pay can discourage new graduates with significant student loan debt from taking public defense work, especially in lower-paying rural areas and in systems relying on private assigned counsel, who do not qualify for federal Public Service Loan Forgiveness.<sup>172</sup> Burnout, moral injury, stress, and vicarious trauma also impair public defense recruitment and retention.<sup>173</sup>

To address shortfalls, some states have added funding, staffing, and professional supports. For example:

- Missouri cleared a 5,800-person waitlist for counsel (which was ruled unconstitutional) by adding over \$20 million to the state public defender office's budget and hiring hundreds of new employees, both attorneys and support staff.<sup>174</sup>
- In New York, caseload relief funding has been used to hire more investigators and social workers, freeing up attorney time to communicate with clients, receive legal training, and research complex motions.<sup>175</sup>
- Nevada's recently created public defense oversight board and administrative office devise incentives to encourage law students to become defenders (such as offering them a stipend to work in a rural defender office over the summer) and provide training for defenders in underserved rural areas.<sup>176</sup>
- Maine's commission received funding to hire the state's first-ever public defenders. The five attorneys serve in a mobile unit deployed to serve primarily rural regions that do not have enough participating private appointed lawyers.<sup>177</sup>

There has also been a movement within the public defense community to redefine practice goals in terms of holistic, client-centered representation<sup>178</sup> rather than attorney-centered trial wins.<sup>179</sup> Holistic defense uses a defense team (criminal and civil attorneys, investigators, social workers, and peer support, for example) to address both the causes and effects of criminal justice system involvement for the individual client and their broader community.<sup>180</sup> The Bronx Defenders, which pioneered the model, has provided training and technical assistance (funded by the Bureau of Justice Assistance) to offices in California, Alabama, and Oklahoma, among other states.<sup>181</sup> Partly as an outgrowth of holistic defense,<sup>182</sup> defenders also have mounted more systemic challenges to issues that affect their clients, like pretrial detention and racial discrimination.<sup>183</sup>

## Tribal Courts

*Gideon* does not apply to tribal courts. Native American tribes have a unique legal and political status as sovereign nations within the United States. The U.S. Constitution gives power over American Indian affairs to Congress. The rights of people prosecuted in tribal courts are determined by tribal constitutional law, not by the Bill of Rights, and by the Indian Civil Rights

Act of 1968 (ICRA) and Violence Against Women Act (VAWA). Although it is not mandated, some tribes have created public defense systems that resemble those of states. Some tribal defender systems meet or exceed *Gideon*'s principles, and incorporate principles of holistic defense, restorative justice, and community engagement that are characteristic of traditional tribal justice systems.<sup>184</sup>

### ***Right to Counsel for Indians Prosecuted in Tribal Courts***

Under ICRA, American Indians prosecuted in tribal courts have the right to counsel, but only at their own expense. Since few of those accused of crimes can afford to hire counsel, many Native American people are left to enter uncounseled pleas in tribal courts on offenses that can be used to enhance sentencing of subsequent cases in state and federal systems. Other tribes have gone beyond ICRA's requirements to provide counsel at the tribe's expense.<sup>185</sup>

There are 574 federally recognized tribes, of which 347 are located within the contiguous 48 states.<sup>186</sup> Not all federally recognized tribes have justice systems or tribal lands. The BJS National Survey of Tribal Court Systems found 234 tribal court systems serving federally recognized tribes in the contiguous United States in 2014. Of these, 61% had a tribal public defender or defense office. Lower tribal population correlated with the likelihood of not having a public defender or defense office: 59% of tribal courts serving 999 or fewer residents did not have a public defender or defense office, compared to about 32% of tribal courts serving 1,000 to 9,999 residents and 25% of tribal courts serving 10,000 or more residents.<sup>187</sup>

Although it is not required, some tribes have opted to provide public defense to Native Americans accused of a crime. Some tribes, including the Tulalip Tribe and the Navajo Nation, provide for public defense in their tribal code.<sup>188</sup> Some tribes hire a licensed attorney to serve as full-time tribal public defender, while others contract with outside attorneys.<sup>189</sup> For example:

- Fort Peck, Pascua Yaqui, Sisseton, the Eastern Band of Cherokee Indians, and Chitimacha have hired full-time tribal public defenders.
- The Confederated Tribes of the Umatilla Indian Reservation, Tulalip, Muscogee, and Sac and Fox rely on contract arrangements with licensed attorneys.
- The Confederated Salish and Kootenai Tribes are served by a holistic, client-centered Tribal Defenders Office.

Unlike state and local courts, many tribes allow nonlawyers to serve as public defenders. Some tribes have indigency guidelines that allow more people to qualify for appointed counsel.

### ***Right to Counsel for Non-Indians Prosecuted in Tribal Courts***

Tribal courts lack jurisdiction over non-Indians who are accused of committing crimes on tribal land. These cases may be prosecuted by state or federal courts, but often are not.<sup>190</sup> In response, in VAWA, Congress granted criminal jurisdiction over non-Indians to some tribal courts for certain crimes.<sup>191</sup> As of 2022, 31 tribes had opted to implement the expanded jurisdiction, known as special tribal criminal jurisdiction (STCJ), which carries some due process protections that are not otherwise mandated in tribal court.

If a term of imprisonment is a possible outcome, non-Indians prosecuted under STCJ are entitled to effective assistance of counsel at least equal to that guaranteed to them by the U.S. Constitution. If the person is not able to hire counsel, the tribe is required to pay for a licensed defense counsel. Technically then, in these special jurisdiction cases in tribal court, non-Indians have a more expansive right to counsel than do American Indians who are prosecuted for any offense in tribal court. Tribes may seek federal grant funds to assist with the cost of providing counsel appointed to represent non-Indians prosecuted under STCJ. Tribes exercising STCJ may ensure that both American Indian and non-Indian defendants have access to counsel at the tribe's expense, and many have.





Photo source: Author's own photo

*The NLADA Defender Research Consortium meets to discuss performance measurement of public defense.*

## Chapter 2. Measuring Performance

Compared to other criminal legal system functions, public defense programs have been slower to make use of data and research to review their own effectiveness, develop best practices, and influence policy. In part this is because many lack rudimentary case management systems to track work performed. Public defense programs also lack nationally accepted key performance indicators to put this information into context.<sup>192</sup> Mere counts of the number of cases opened and closed, the cost per case, and the cost per capita do little to speak to compliance with constitutional requirements. To examine quality and cost efficiency, one needs to apply process, outcomes, and impact measures.

Guidance on what measures matter most, both in individual cases and in overall system delivery, is growing, such as through national caseload standards and quality indicators. Increased use of in-house researchers is allowing public defense systems to better assess the quality of services provided, justify resource needs, and identify patterns of practice by other system actors — such as prosecutors, police, and judges — that affect public defense clients.<sup>193</sup> Still, much remains unknown about public defense system performance nationally.

### Goals of Public Defense

Performance assessment is important for any enterprise that delivers services. Determining what to measure depends on the goals of the enterprise. Subject matter experts interviewed for this report, including researchers, academics, and advocates who specialize in public defense, were asked what they perceived as the goal, or goals, of public defense.<sup>194</sup> Their responses differed somewhat but fall into three core mandates:

- Meet constitutional right-to-counsel guarantees.
- Act as a check against government overreach and intrusion onto liberty.
- Deliver quality representation to all.

Experts were also asked what they perceived as key measures for tracking whether systems are meeting their goals. Responses centered on measures of access to counsel, quality, and the effect of public defense.

## Measuring Progress Toward Goals

Basic performance questions for public defense systems probe both system functioning and individual case performance. One expert summarized key research questions as: 1) Do eligible individuals get a lawyer at all, 2) What services does the lawyer provide, and 3) Are clients left better off at disposition? Yet data on these basic questions are difficult to produce, as they are tracked by multiple system actors, the quality of tracking is often poor, and no mechanisms exist to coordinate the different data sources.

For example, public defender and managed assigned counsel programs are best positioned to track what services are provided to clients, but often little is known about flat-fee contract defender programs or court-administered assigned counsel programs because data on the case activity and outcomes of these systems are not tracked. Courts are best positioned to produce access-to-counsel data, but there are often no standardized approaches from court to court, and data entry quality is often poor. Longer-term research on client and system outcomes can be an even greater challenge, requiring expertise that few defender systems have in-house and few jurisdictions provide.

Despite these challenges, subject matter experts urged increased emphasis into two areas of performance measurement for public defense: access to counsel and quality of counsel.

### Access vs. Quality

Problems with access to counsel are called **actual denial of counsel**. Problems with quality of counsel are called **constructive denial of counsel**.<sup>195</sup> Informally, these are called **no-body** vs. **warm-body** problems — i.e., nobody at all to represent someone, versus a lawyer who is just a warm body and lacks the experience, training, time, or needed resources to effectively represent clients.<sup>196</sup>

### Access-to-Counsel Measures

Access to counsel measures assess whether people who have a right to a lawyer get one at all, and at what stage in the case. Multiple factors contribute to the phenomenon of eligible individuals not receiving any appointed counsel, leaving them to enter uncounseled pleas that can carry serious consequences affecting their ability to advance in life and avoid repeated entanglement with the justice system.<sup>197</sup> Experts stressed that this is the performance measure that is most critical to public defense system oversight, and yet it is sorely underreported. They repeatedly recommended a key measure for national data collection: the **percentage of people pleading guilty to misdemeanors who do not have counsel** — in particular, individuals who plead guilty at their initial court appearance and individuals who are sentenced to jail.

Key to collecting these basic data is for courts to record the type of attorney — appointed, retained, or none (pro se) — in every criminal case, in addition to the case disposition. A 2011 study estimated that about 80% of people with felony cases had a government-appointed attorney — a public defender (60%) or private assigned counsel (19%) — while 20% hired a lawyer, and 2% did not have a lawyer.<sup>198</sup> This estimate was based on BJS' 2004 and 2006 State Court Processing Statistics, which took samples from the nation's most populous counties.<sup>199</sup> The study noted that a quarter of the court record dataset was completely missing information on type of counsel. And the dataset did not examine defendant characteristics (such as race or gender).<sup>200</sup>

According to available data, access to counsel tends to be worse in misdemeanor cases.<sup>201</sup> In Texas, which has particularly good data in this area, counsel was appointed in 77% of felony cases and 44% of misdemeanors in 2021.<sup>202</sup> Texas estimates that statewide, about 25% of misdemeanors have no counsel (neither appointed nor hired), and in small counties, almost 60% of misdemeanors do not.<sup>203</sup> Another recent investigation found that more than 136,000 misdemeanor cases have been closed without counsel each year since 2019 in several states where data were available (Colorado, North Dakota, South Dakota, Texas, and Utah).<sup>204</sup> Reporters for the investigation had requested data from 17 western states, but most state court administrators said they did not track attorney type.<sup>205</sup>

### The Impact of Access-to-Counsel Data

When Utah state policymakers learned from a study that 65% of misdemeanor cases were pled out without a lawyer present, they committed to creating the independent Utah Indigent Defense Commission to enforce standards throughout the state with Utah's first-ever statewide funding for public defense.<sup>206</sup> And in Potter County, Texas, when county commissioners learned that 75% of misdemeanors were resolved by pleas without counsel, they approved a complete overhaul of their public defense services.<sup>207</sup> The new system is funded with both county and state funds. A nine-person independent indigent defense commission oversees the first-ever public defender office in the county, as well as a managed assigned counsel system for conflict cases.

### Quality-of-Counsel Measures

Quality of counsel measures assess whether lawyers are doing their jobs, which can be defined as what work they do on a case, or what outcomes they (or the system) achieve.

Defenders that have case management systems can use them to track what was done (or not done) in individual cases, as proxies for the quality of service provided. For example:

- Whether a lawyer requested and received discovery evidence.
- Length and number of in-person meetings between lawyers and clients.
- Whether an investigator, social worker, or immigration expert worked on the case.<sup>208</sup>

Defenders with more robust data systems, and access to shared court and corrections data, can then measure how their work is associated with case outcomes, such as:

- Whether having a lawyer at a bail hearing reduces the bail amount or time in jail pre-trial.

- Whether defense team screenings and referrals for mental health issues result in alternatives to incarceration.
- Whether defense lawyers reduce the court fees their clients must pay.

More advanced analysis can measure public defense's impact on people's cases and lives beyond case disposition, and on overall justice system goals (like reducing recidivism or prison costs). Both qualitative and quantitative research approaches can shed light on differences in quality of counsel within or between different attorney types. Systemic concerns include compensation, effects on case preparation, retention of experienced staff, and training resources.<sup>209</sup>

Perhaps the primary proxy measure for quality is caseload, which correlates with the sufficiency of work that can be done on a case. National caseload guidelines published in 1973 recommend public defenders handle no more than 150 felonies or 400 misdemeanors per lawyer per year.<sup>210</sup> The 2007 Census of Public Defender Offices made a conservative estimate that among the census respondents, 73% of county-based offices and 79% of state-based offices exceeded these guidelines.<sup>211</sup> Public perception of public defenders is typically one of attorneys who are overburdened with excessive caseloads and therefore forced to give cursory attention to clients. Recent research supports that perception. The RAND Corporation's 2023 *National Public Defense Workload Study*, which builds off the findings of 17 state-level studies,<sup>212</sup> finds attorneys should have far fewer case appointments than the 1973 standards prescribe: at 1,850 client hours per year,<sup>213</sup> no more than 53 low-level felonies or 134 low-level misdemeanors per lawyer per year.<sup>214</sup> In practice, some attorneys handle thousands of cases per year.<sup>215</sup>

Some defender programs are measuring quality in terms of client satisfaction, reasoning that, according to lawyer ethics, clients should be setting the goals for each case. (For example, getting out of jail sooner may be a more important outcome to the client than a protracted legal challenge to their arrest.) Some client satisfaction queries probe aspects of procedural justice: Did clients feel they were treated fairly and respectfully by properly equipped advocates? Do clients represented by lawyers of their same race have different perceptions from clients represented by lawyers of other races? The work of the Bronx Defenders<sup>216</sup> and Marla Sandys<sup>217</sup> stand out among efforts to understand the perspectives that clients have of their treatment and the services delivered by defender programs.

Still, many jurisdictions cannot count how many public defense cases they have, let alone track what work is done on them or what outcomes they achieve. These measures are especially obscure in places that use flat-fee contracts and collect no information on what work is performed.

## Performance Across Models

Some research exists on the comparative effectiveness of different delivery models, and of practice innovations.

### *Outcomes by State and Local Role*

There is little evidence yet of how state support for public defense administration, funding, or oversight affects access to or quality of counsel, but New York and Michigan

are now undertaking studies of these questions. For instance, the Deason Criminal Justice Reform Center at Southern Methodist University is examining the effect of New York state infusing \$250 million annually in supplemental funding aimed at providing counsel at first appearance, implementing caseload controls, and improving the quality of defense provided by local public defense systems. The research will study whether reductions in public defense caseloads produce higher quality lawyering, and the impact of any changes on clients and their communities.

### **Outcomes by Delivery Method**

Research comparing differences in case outcomes among public defenders and private assigned counsel is limited but points to better outcomes for public defenders due to better incentives and supports:

- A 2012 study of murder cases in Philadelphia, which were randomly assigned public defenders or private assigned counsel (who worked under contracts that paid low, flat fees), found that the cases handled by public defenders saw a 19% reduction in conviction rate, a 62% reduction in the probability of a life sentence, and a 24% reduction in overall expected sentence lengths compared with cases handled by private assigned counsel.<sup>218</sup>
- A 2013 study in Harris County (Houston) looking at misdemeanor and felony cases found that clients of public defenders were more likely to have their cases dismissed, to receive deferred sentences, and to be adjudicated not guilty than were clients of private assigned counsel. Public defender cases had an acquittal rate that was three times that of private assigned counsel. And in misdemeanor cases, public defenders were five times more likely to get dismissals for clients with mental health issues.<sup>219</sup>
- A 2017 study looked at San Francisco state court cases between 2006 and 2016 in which two people were charged in connection with the same crime and one case was handled by the public defender while one or more others were handled by private assigned counsel. As in Philadelphia, assignment of these cases was made randomly to private assigned counsel or a public defender. Individuals who were represented by public defenders were 6.4% less likely to be convicted, 22% less likely to receive a prison sentence, and received prison sentences 10% shorter than those for individuals represented by private assigned counsel.<sup>220</sup>
- A 2011 study of felony cases in state courts (from the 2004 and 2006 BJS State Court Processing Statistics noted above) found that 46% of individuals represented by private assigned counsel were sentenced to prison, compared with 32% of individuals represented by public defenders. Overall, clients of private assigned counsel received sentences that were 26% longer than those of public defender clients.<sup>221</sup>

Multiple subject matter experts interviewed for this report felt strongly that, for the most part, the flat-fee contract counsel model should not be used because, as in the Philadelphia study, the set fee incentivizes attorneys to put in as little work as possible.<sup>222</sup> Contracts with proper quality controls, like those for the nonprofits operating in the boroughs of New York City, can yield better results: Those New York offices pioneered holistic defense models that reduce incarceration.<sup>223</sup>



Experts interviewed concurred that both public defender and private assigned counsel delivery methods can provide quality service, depending on the resources and operation of the individual systems. Massachusetts, for example, has a highly regarded, state-administered and state-funded model that provides both private assigned counsel and public defenders with robust oversight, training, and supports; enforces case standards; and offers starting pay that approaches parity with prosecuting attorneys. Harris County, following the study described above, started a managed assigned counsel program that now provides private assigned counsel with immigration and investigation services, resource attorneys, and social workers. Experts cautioned, however, that even with these supports, quality oversight of independent contractors is more difficult than it is for employees.

### ***Outcomes From Promising Practices***

In two areas — first appearance and holistic defense — growing bodies of evidence point to better outcomes resulting from public defense. Studies show that providing individuals with counsel at first appearance makes a difference in reducing rates of pre-trial detention.<sup>224</sup> And evidence shows that holistic defense practice can significantly reduce incarceration and save taxpayer dollars, without harming public safety.<sup>225</sup>

## **Recently Released and Forthcoming Resources**

Three important resources relating to public defense research and administration were issued after research for this report concluded. Others are forthcoming.

- An **update to the ABA *Ten Principles of a Public Defense Delivery System*** was published in August 2023.<sup>226</sup> The revised version addresses areas that were not directly covered when the *Ten Principles* were first published in 2002, but are now recognized as being of key importance to public defense systems, including data collection, eligibility screening, and cultural competency. The ABA *Ten Principles* have been foundational to the development and monitoring of public defense systems around the country.<sup>227</sup>
- The **National Public Defense Workload Study** by the ABA Standing Committee on Legal Aid and Indigent Defense, the National Center for State Courts, and the RAND Corporation was released in September 2023.<sup>228</sup> The study finds that attorneys today should far handle fewer cases than the previous national standards from 1973 recommend.
- As part of its Priority Needs Initiative, in 2023 the National Institute of Justice (NIJ) released an **indigent defense environmental scan** conducted by RTI International and the RAND Corporation that identifies research needs around the provision of public defense, discusses innovative solutions that may address those needs, and recommends priorities for NIJ and other federal agencies to further explore those solutions.<sup>229</sup> In fiscal year 2023, NIJ issued a solicitation for research and evaluation on public defense and indigent defense service delivery with the intent of awarding up to four grants totaling \$2 million.<sup>230</sup>
- BJS has two public defense studies underway that are expected in the next few years.<sup>231</sup> First, the National Opinion Research Center at the University of Chicago, the Urban Institute, the National Association for Public Defense, and Andrew Davies of the Deason Criminal Justice Reform Center are partnering with BJS to develop and administer the second **Census of Public Defender Offices** (following up on the first census from 2007).



The study will provide updated national statistics about public defender offices and their structures, staffing, expenditures, standards and guidelines, caseloads, and attorney training opportunities, among other topics. Second, the Urban Institute is partnering with BJS on a pilot test/feasibility study for a **Survey of Public Defenders** that will collect information from public defender staff about their access to resources (like expert witnesses, investigative technologies, communication media, and continuing education opportunities), attorney and client demographics, and case outcomes.





*A meeting of New York State Defenders Association Client Advisory Board.*

## Chapter 3. Reforming Models

This chapter examines states that have implemented changes to public defense system oversight, funding, administration, or delivery methods, especially in the past decade. It highlights changes made by several states in greater detail, with additional attention to those made in Michigan. Exhibit 17 provides a brief overview of what changes were made and what factors drove the changes, especially litigation, research, and advocacy.

Accounts of reforms in this chapter are based on interviews with national and state experts (including researchers, officials, and advocates) who worked on the reforms.<sup>232</sup> Certain details were also fact-checked via email correspondence with national experts and state agency staff.

### Ingredients of Reforms

Research, litigation, and advocacy have been common, interdependent ingredients of reform in the states listed in exhibit 6. In terms of research, reports conducted by out-of-state organizations that specialize in improving public defense systems have been instrumental to significant legislative reform in multiple states. Public defense system evaluations undertaken at the state and county level by The Spangenberg Group, the Sixth Amendment Center, and National Legal Aid and Defender Association (NLADA) have led to transformative change in Georgia, Maine, Michigan, Montana, Nevada, New York, Texas, and elsewhere. Many of these reports were undertaken as part of a gubernatorial, judicial, or legislative task force investigation, or in concert with advocacy organizations.

As for litigation, some reports were springboards for pivotal class action lawsuits filed by the American Civil Liberties Union (ACLU), its state affiliates, and other civil rights organizations, such as in Maine, Michigan, Montana, Nevada, and New York. Finally, the engagement of citizen and bar associations in advocacy efforts was another key ingredient for success in Georgia, Michigan, and New Mexico. And dedicated journalism, such as reporting

**Exhibit 6. Overview of Recent Public Defense System Changes.**

State	Year	Change	Summary	Litigation	Research	Advocacy
Georgia	2003, 2015	Introduced state funding, state oversight, and public defender delivery model, then diluted oversight.	2003 legislation replaced locally funded and administered systems with a statefunded circuit public defender delivery system, overseen by a commission that set state standards. By 2015, reflecting the commission's diminished power and inadequate resources, the legislature removed "Standards" from the Georgia Public Defender Council's name. <b>(More detail below.)</b>		X	X
Idaho	2014, 2023	Increased state oversight, funding, and administration.	2014 legislation created a commission to set standards and administer state funds to support locally funded and administered systems. In 2023, the state assumed all funding for public defense. A temporary advisory board will help transition to a state-administered public defender system by October 2024.	X	X	X
Iowa	2010	Reduced state oversight.	1999 legislation created a commission to make recommendations to the legislature and the state public defender regarding hourly rates and percase fee caps for private attorneys. In 2010, the commission was sunsetted and its responsibilities shifted to the state public defender.			
Maine	2022	Changed delivery model.	2022 legislation added five state public defender employees to staff a new mobile defender unit administered by the state commission. Previously all representation was required to be provided by private assigned counsel.	X	X	X
Michigan	2013	Increased state oversight and funding, changed delivery models.	2013 legislation created a commission to set state standards and provide state funds to locally funded and administered systems. State standards and funds influenced the creation of multiple new public defender offices. <b>(More detail below.)</b>	X	X	X
Montana	2005, 2017	Increased, then reduced, state oversight. Increased state administration.	2005 legislation created both a commission and state public defender to replace locally funded and administered systems. 2017 legislation repealed the commission.	X	X	X

**Exhibit 6. Overview of Recent Public Defense System Changes (continued).**

State	Year	Change	Summary	Litigation	Research	Advocacy
Nevada	2019	Introduced state oversight and funding. Changed delivery models.	Pressure from a lawsuit challenging the constitutionality of state policies and practices of public defense in rural counties led to 2019 legislation that created a new commission to set standards. The legislation also created an administrative office to monitor county compliance in all counties, provide partial reimbursement for rural county expenditures, and offer training. With state oversight support, several local delivery models changed.	X	X	X
New Mexico	2012	Increased state oversight.	In 2012, New Mexico citizens voted to amend the state constitution to move the state public defender out of the executive branch and under the judicial branch of the state government, and to create a new public defender commission to oversee, guide, and support the public defender.			X
New York	2010, 2017	Increased state oversight and funding.	2010 legislation created a statewide public defense support office without enforcement powers. In 2014, the office began implementing improvements in five counties from a lawsuit settlement. 2017 legislation required improvements statewide and provided state funding to support them. <b>(More detail below.)</b>	X	X	X
Ohio	2023	Increased state funding.	The 2023 budget provides full state funding of public defense for the first time, up from approximately 50% state funding, though 100% state funding is not permanent.			
Texas	2011	Increased state oversight and funding. Changed delivery models.	2011 legislation created a permanent commission and provided partial state funding to locally administered and funded systems. In the past 10 years, dozens of county systems have regionalized and moved from ad hoc assigned counsel to managed assigned counsel and public defender programs.		X	
Utah	2016	Increased state oversight and funding.	2016 legislation created a commission to set standards, track data, and provide state grants and training for the locally funded and administered county systems.		X	

by Atlanta Journal-Constitution courts and legal affairs reporter Bill Rankin, who tracked decades of public defense system developments in Georgia, was another important factor.<sup>233</sup>

Most of the recent changes among the states in exhibit 6 involved increased state oversight and funding, as in New York and Nevada. But some states, like Georgia and Montana, first increased and then reduced the state's oversight role. Closer study of three states — Michigan, New York, and Georgia — shows how reforms can be achieved and lost.

### ***Michigan: Putting the Pieces Together***

Calls to reform Michigan's locally funded and administered public defense system date to the 1970s and have come from multiple sources, including state supreme court chief justices, state bar presidents, community members, and the American Bar Association Standing Committee on Legal and Indigent Defendants.<sup>234</sup> By 2013, at the 50th anniversary of *Gideon v. Wainwright*, Michigan had an adult criminal trial public defense system that wholesale failed to comply with *Gideon's* requirements. The system was locally funded and administered, with no state oversight, funding, or support, resulting in widespread failure to provide access to and quality of counsel. But that year, the Michigan Indigent Defense Commission Act was signed, launching what one key participant described as “a grand experiment”: a new hybrid state/local system that marries mandatory state standards and state funding with local administration and funding.

Since then, the state has made steady progress toward implementing a system that ensures equal access to effective representation for all Michiganders who face a criminal accusation, regardless of their wealth or location. The transformation was the culmination of multiple reform tactics, including litigation, research, and advocacy, that began in the 2000s.

#### **Litigation**

The Michigan Civil Liberties Union partnered with the ACLU in filing a 2007 class action lawsuit, *Duncan v. Granholm*, alleging that the state of Michigan had failed to provide tools needed by public defense counsel to provide constitutionally adequate defense services to clients.<sup>235</sup> The lawsuit, one of more than a dozen similar challenges the ACLU has pursued nationally,<sup>236</sup> survived years of attempts by the state to have the case dismissed, eventually signaling to the governor and legislators that the case would proceed to trial, and that odds for plaintiffs' success were high.<sup>237</sup>

#### **Research**

In 2006, the NLADA secured funds from a private foundation, Atlantic Philanthropies, to conduct a comprehensive evaluation of Michigan's public defense system. The Michigan Legislature issued a resolution signaling its support for the report and designating an advisory group (including representatives from the State Court Administrator's Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges) to select the representative sample of 10 counties that were studied. NLADA published its study, “*A Race to the Bottom, Speed and Savings Over Due Process: A Constitutional Crisis*,” in 2008, documenting widespread systemic failures.<sup>238</sup> In 2011, the ACLU published a book, *Faces of Failing Public Defense Systems: Portraits of Michigan's Constitutional Crisis*, which added to the study's findings of systemic failures by profiling their human and fiscal costs.



## Advocacy

Pressure from a broad-based community coalition, the Michigan Campaign for Justice, continued over years of state resistance. Early on, in 2002, the state bar, in partnership with the campaign, adopted 11 principles for public defense that were closely aligned with the ABA *Ten Principles*.<sup>239</sup> Meanwhile, the campaign signed on more than 70 coalition member groups from across the political spectrum, including civil rights, social justice, faith, social service provider, criminal justice advocacy, bar association, juvenile justice, and policy organizations.<sup>240</sup> Through grassroots community outreach efforts, campaign members worked to educate the public about the importance of a fair and effective public defense system. Education efforts shifted to lawmakers once legislation was introduced. Like the NLADA report and the *Duncan* litigation, the campaign received financial support from Atlantic Philanthropies.

In 2012, then-Governor Rick Snyder issued an executive order establishing a task force to recommend improvements.<sup>241</sup> Snyder appointed task force members with diverse political views and stakeholder roles who consulted with the NLADA study's lead author.<sup>242</sup> In 2012, they issued a 15-page report with findings and recommendations, which called for "an independent and permanent Indigent Defense Commission, with authority to establish and enforce minimum standards for public defense across the state."<sup>243</sup> Task force members became vocal advocates for reform.<sup>244</sup>

By 2013, Michigan had a supportive governor and a broad coalition of state and local leaders backing reform.<sup>245</sup> The combined pressure of (a) the cost and publicity of litigation, (b) research evidence, and (c) the public outcry from advocacy, all deployed in tight succession, resulted in an environment poised for major reform.<sup>246</sup> That year, the legislature passed the Michigan Indigent Defense Commission Act, creating a commission that closely followed the task force's recommendations.<sup>247</sup>

## **New York: Groundbreaking Transformation**

Changes in New York closely resemble those in Michigan, moving a system fully funded and administered by counties to one that incorporates state standards with state funds to increase access to effective services statewide. As in Michigan, reforms took decades to gain momentum.<sup>248</sup> And, as in Michigan, a study (conducted by The Spangenberg Group), high-profile task force (led by the chief judge of New York), and systemic litigation (brought by the New York Civil Liberties Union) were ultimately the primary drivers of the changes. Groups like the New York State Defenders Association, New York Chief Defenders Association, and NLADA worked in coalition and were eventually joined by counties seeking more state funding.

A class action lawsuit, *Hurrell-Harring v. New York*, filed in 2007, alleged that New York and its governor deprived the plaintiffs' right to counsel in five upstate counties, a right guaranteed to them by the United States and New York constitutions. Litigators interviewed for this report said it was necessary for a civil rights organization to bring the lawsuit, since defense lawyers who might have done so would have been implicated in claims of their own ineffectiveness. The U.S. Department of Justice's Civil Rights Division and Office for Access to Justice filed a statement of interest in the lawsuit shortly before it settled.<sup>249</sup>

For the NYCLU, a key factor for settlement of the lawsuit in 2014 was the 2010 creation of the Office of Indigent Legal Services (ILS). The mission of ILS was to improve the quality

of the delivery of legal services for indigent defendants throughout New York through standards and grants, but initially it lacked any enforcement mechanism. The settlement agreement designated ILS to implement, on behalf of the state, certain obligations in the five counties: providing counsel at first appearance, implementing caseload controls, and creating detailed plans to improve the quality of defense provided. ILS was mandated to develop eligibility standards for representation, and to collect data to monitor compliance with the settlement.

As the litigators had intended, improving quality of defense in those counties eventually made it difficult not to improve quality in neighboring counties, and then statewide. Although ILS could not coordinate with the NYCLU, their work was aligned: ILS collected data showing that the problems identified in the five counties were prevalent statewide, and it calculated how much in state funding would be needed to address them. A 2017 law extended the settlement requirements, and ILS enforcement, to all New York counties. In 2018, the state began a five-year phase-in toward contributing an annual \$250 million of state monies to supplement (not supplant) county funding for public defense improvements.

ILS worked with all 52 non-*Hurrell-Harring* counties and New York City to develop plans and budgets to make effective use of the state funding. As of October 2022, all 52 counties and New York City had plans in place and had made progress toward or completed implementing them. Some of the uses of state funding reported by ILS<sup>250</sup> include:

- To accommodate caseload controls, 624 new attorney positions and 362 nonattorney positions created and filled as of September 2022.
- To provide counsel at arraignment, 486 new attorneys hired and 20 new centralized arraignment programs created.
- In 38 counties, new independently administered assigned counsel programs, and creation of five new county public defender programs.
- Out of 624 new attorney positions, 83 positions dedicated to supervision, mentoring, and/or training, as well as 304 training events held between April 2021 and March 2022.
- A 139% increase in the use of experts and a 58% increase in the use of investigators in fiscal year 2021-2022.

As mentioned in chapter 2, the effects of these reforms are currently being studied by the Deason Criminal Justice Reform Center at Southern Methodist University.

### ***Georgia: A Step Forward, Then Backward***

In 2003, the Georgia Indigent Defense Act was passed following two evaluations undertaken by The Spangenberg Group on behalf of a state supreme court blue ribbon task force, ongoing media coverage in the state's major newspaper, and concerted pressure from community groups, including Black clergy. The act created a new statewide network of circuit public defender offices to replace an uneven system of county-run public defense programs, many of which were found unable to protect the rights of poor people accused of crime. A new agency, the Georgia Public Defender Standards Council (GPDSC),

promulgated and enforced minimum performance standards.

From its inception, GPDSC confronted political challenges. Although it was modeled on the state's circuit prosecutor system, which was funded by general revenue, lawmakers agreed to create the circuit public defender system only if no general fund revenue supported it. Instead, the system was funded with filing fees in civil cases and application fees assessed on individuals seeking appointment of a public defender. In 2005, just as new public defender offices were launched, a notorious capital murder case nearly bankrupted the system (defense counsel provided in that case, in adherence with GPDSC quality standards, cost \$2.3 million) and drew criticism of GPDSC from lawmakers. Some of the fees collected for public defense were directed to other projects.

One response was to move the agency out of the judicial branch and under the executive branch, where it remains today. The governor, rather than an independent commission, directly selects the head of the agency. An arguably fatal compromise allowing counties to opt out of the state system was seized upon by a minority of counties. Two of the largest counties opted out and became staunch opponents of the state model, in part because local private defense lawyers asserted that compliance with state standards would lower their revenues. By 2015, GPDSC was unable to meaningfully enforce caseload and other standards due to funding shortages and opt-outs.

In 2015, GPDSC itself reportedly advocated for legislative changes that better reflected its limited oversight role. In HB 238, the Georgia Legislature eliminated the agency's standards function, renaming the agency the Georgia Public Defender Council. Other proposed rollbacks, such as eliminating the requirement that circuit defenders have staff who are experienced in handling juvenile delinquency cases, were not enacted, due in large part to community pushback led by advocates, including the Southern Center for Human Rights. Observers say that public defense delivery in Georgia today is better than when it was left entirely to the state's 159 counties to fund and administer. But it is not the version advocates envisioned in 2003.

## Ingredients of Sustainability

Michigan stands apart as a state that, in the past 15 years, has transformed its public defense system and continues to sustain its progress. Interviews with Michigan stakeholders probed elements of that success, which are summarized below.

### ***Coalition-Building***

The coalition that successfully fought for passage of the Michigan Indigent Defense Commission (MIDC) Act continued to remain engaged with MIDC; some task force members became commission members. MIDC's member nomination scheme ensures that seats will be held by individuals who reflect the interests of legislators, judges, county and township officials, prosecutors, various bar associations (criminal defense, minority member, and statewide), the state budget, and the general public (currently this seat is held by a system-impacted person). Should political challenges arise, this diverse membership positions MIDC with broad-based insight and ties to allies to help overcome challenges.

Interviews with current and past commissioners and MIDC staff attested to the value of diverse perspectives in thinking through the logistics of implementation and sustaining

broad-based support for reform. They shared different motivations for their work on public defense:

- From a self-identified “conservative” former legislator, who was moved by the ACLU’s accounts of wrongful convictions due to ineffective counsel: “Before you fix roads or schools, be sure you have your justice system right so you don’t lock up people wrongfully or longer than need be.”
- From a former prosecutor, who had had to monitor defense attorneys who made reversible errors at trial: “I worked harder with incompetent defense counsel than with competent counsel. I’d rather have a strong opponent than a weaker one.”
- From a former judge and current state court administrator, who heard from fellow judges that independence of defense would hurt their campaign contributions: “I tell legislators to think of their kids in court, facing a judge with a conflict of interest.”

Some members have served on the commission for a decade, deepening their knowledge of and commitment to public defense. Members worked on sub-committees to develop the standards that set out the minimum characteristics each local system must follow.<sup>251</sup> Their diverse system expertise ensured that the standards integrate with other justice system functions.

### ***Statewide Oversight and Standards***

States like Georgia and Indiana that have allowed counties to opt out from state oversight have seen that noncompliant counties can become influential opponents. Michigan required all local governments to heed MIDC’s oversight for public defense service delivery, and early legal challenges testing that requirement failed.<sup>252</sup> Each trial court system still selects and administers its own delivery method but must submit a compliance plan,<sup>253</sup> list of appointed attorneys, financial status report, and quarterly program reports.<sup>254</sup> From this reporting, Michigan now knows that, for example, nearly three-quarters of Michiganders charged with felonies are represented by public defense lawyers.<sup>255</sup> It also knows that local systems are meeting constitutional requirements.

Local plans are developed to ensure compliance with eight MIDC standards, which address: 1) training and education of counsel, 2) the initial client interview, 3) use of investigation and experts, 4) counsel at first appearance and other critical stages, 5) independence from the judiciary, 6) defender workload limitations, 7) qualification and review of defenders, and 8) attorney compensation.<sup>256</sup> There is also a standard on determining indigency and contribution.<sup>257</sup> Discussion on the effects of these standards follows.

### **Independence**

In Michigan before the MIDC Act, trial court judges held most of the control over which lawyers were selected and what they were paid for public defense cases. A former Michigan trial judge who was interviewed for this report explained his colleagues’ varying opinions on judicial control of public defense: Some preferred to give up administrative tasks, but others wanted to maintain control of the lawyers in their courtrooms. Fellow judges nominated him to a state study task force, he said, in order to derail reform. He felt he fairly administered his court’s public defense system, and assumed all other judges did, too. That assumption shifted when, after presenting proposed independence reforms at a conference

of judges, another judge asked him with all sincerity, “If I can’t appoint lawyers, who will pay for my election campaign?” — to the general assent of the room.

Now, judges and court personnel may not select or pay lawyers; must appoint counsel at the first appearance and all critical stages; and must follow a statewide indigency standard, which sets rebuttable presumptions of indigency and prohibits assessment of an upfront fee or cost-of-counsel fee on indigent defendants. Before the implementation of standards, only eight counties had public defender offices; as of 2021, there were 32 public defender offices in Michigan covering 38 counties, and more than 70 funding units began using managed assigned counsel administrators.<sup>258</sup>

Judges can be among MIDC’s members, but no more than three of the 18 voting members who are judges—whether former or sitting—may serve at a time, limiting their oversight role.<sup>259</sup> Commission members are appointed by the governor from nominees submitted by various stakeholder groups, including people who represent minority interests and the general public.<sup>260</sup>

## Defense Resources

In 2008, 41 of 53 Michigan counties used low-bid, flat-fee contracts, while others paid rates as low as \$40 per hour, incentivizing high caseloads.<sup>261</sup> MIDC standards now require reasonable attorney compensation and workloads. The state pays for increased administration and compensation costs. The promise of higher pay (at least \$100 per hour for private lawyers, and parity between public defenders and prosecutors) and better practice environments has, according to interviews, attracted so many attorneys to public defense work that there are shortages emerging in other areas, like appointments for juvenile delinquency and dependency cases.

## Defense Quality Standards

According to an evaluation, in 2008, Michigan was providing public defense lawyers in name only: They were unqualified, unprepared, ethically compromised, and poorly resourced.<sup>262</sup> MIDC’s standards now hold them to the following quality standards:

- At least 12 hours per year of training and trial experience or the equivalent to qualify for public defense work.
- A prompt, confidential intake interview within three days for clients in jail.
- Independent investigation with the help of an investigator and experts.
- No more than 150 felony or 400 misdemeanor cases per year.

Local systems must monitor and regularly assess the quality of representation they are providing and report on performance under these standards to MIDC. Using this approach, MIDC reported a 49% increase in statewide use of expert and investigative services from 2019 to 2021.<sup>263</sup> In 2021, 96% of systems’ attorneys met with clients in jail within three business days.<sup>264</sup>

## ***Incrementalism***

The former judge characterized the state standards and local administration approach that Michigan has taken as “systemic reform built on existing reality.” Task force members reviewed existing Michigan oversight models from the Michigan Commission on Law Enforcement Standards, the Prosecuting Attorneys Coordinating Council, and the state appellate defender, as well as those for the Louisiana and Oregon public defense commissions. Because of Michigan’s strong tradition of local control, they did not aim to create a completely state-administered system in a short time. Rather, two early concepts stayed at the core of Michigan’s approach: (1) local control with state minimum standards and (2) increased costs borne by the state. Implementing those standards has taken a decade; two of the standards — one on indigent defense workloads and another on qualification and review — are still pending full implementation.

The staggered implementation of standards has allowed MIDC staff to gradually develop relationships and fine-tune processes with counties and townships. Staff, including six regional managers, provide extensive technical assistance to help localities think through system changes — for instance, if they want a public defender office, and what level and type of staffing are needed.

MIDC has also taken care to research and justify standards before releasing them. It deployed standards with relatively minimal fiscal or logistical impact first. For instance, MIDC’s executive director noted that the cost of requiring 12 hours per year of attorney training is relatively small, but the impact, especially when no minimum training was previously required, is great. When that standard was successfully implemented, there was greater trust for implementing more contentious and costly standards, like judicial independence and attorney compensation. Some MIDC staff and commissioners said they shared counties’ early skepticism that the state would fully cover the costs of improvements, but so far, the state has stayed true to this commitment, increasing funding each year, which has bolstered more costly reforms.

Incrementalism and compromise have potential drawbacks. First, county leaders who were wary of an unfunded mandate insisted on the compromise of not requiring any new money from counties going forward (based on their pre-MIDC three-year spending average) except cost-of-living adjustments. Those counties that had particularly substandard public defense systems before state funding was provided have therefore been rewarded with a disproportionately higher amount of state funds to comply with state standards. Second, by not creating a statewide defender office (in addition to the commission), as one commissioner would prefer, Michigan may have sacrificed efficiency in creating new regional programs. Finally, people with institutional conflicts of interest, like prosecutors, are required to be part of MIDC’s policymaking process, meaning it is not wholly independent of those perspectives, even if it has found them helpful.

## ***Research***

MIDC staff feel that research and data have been an integral part of obtaining and maintaining legislative support, and thus state funding, for public defense. MIDC’s in-house research team tracks the effects of standards and reports on them annually. MIDC has also engaged outside researcher assistance to review the impact of its first four implemented standards, to review the appropriate level of local share funding, and to document the value of its grants for expanding best practices, like having social workers on defense teams.



## **Funding**

In 2008, Michigan ranked 44 out of 50 states for annual public defense spending, and about \$120 million short of the national average.<sup>265</sup> The entire cost of public defense was borne by counties, many of which spent less than \$2 per capita.<sup>266</sup> In 2023, MIDC received \$148.9 million in general revenue, covering about 80% of public defense expenditures.

With funding built predominantly on state general revenue, which was buoyed by recent budget surpluses, Michigan's reformed public defense system has had a reliable funding stream. The same cannot be said of other states, like Georgia, that have attempted to fund major public defense reforms using revenue from court fees rather than general revenue appropriation.

## **Challenges to Reform**

Across the country, advocates for effective public defense systems often face challenges stemming from political power, lack of funding, and federalism.

### **Political Power**

Reform to any government function is never easy. And public defense, which serves low-income, disproportionately Black and brown citizens who are accused of crime, is a government function that lacks a politically influential constituent base. To better organize politically, some public defenders have joined unions.<sup>267</sup>

Other politically powerful groups resist public defense reforms. According to experts interviewed, state and local legislators, judges, prosecutors, and defense attorneys put up the most resistance, for differing reasons. Some judges — and to a lesser extent, prosecutors — fear diminution of their power and influence. Some legislators worry about expense and feel they can indefinitely sidestep investment in a service seen to benefit disenfranchised constituents. And in some states, defense lawyers resist a shift entailing greater oversight or a different delivery system, both of which can pose changes to their customary legal practice.

Experts interviewed said that, to make public defense more aligned with achieving justice instead of other political goals, decision-making about public defense systems must involve not just lawyers, who are professionally connected to each other, but also the people they are meant to serve. Too often left out from reform efforts is the voice of those who are most affected: current and former public defense clients and their loved ones.

Like other criminal legal system sectors, public defense systems historically have not received a great deal of input on system design or reform from the individuals who are most directly impacted by the criminal legal system. However, more defense system reformers are embracing the adage that “Those closest to the problem are closest to the solution”<sup>268</sup> by involving former defender clients, their families, and members of their communities in their work. Those with lived experience can help develop defense system policies that are more equitable, and they can help minimize unintentional harm or barriers to clients.

Client involvement can include leadership roles, community outreach, political organizing, and system evaluation.

## Leadership

Experts interviewed recommended board positions reserved for clients as a direct and achievable way of ensuring client input into defender systems. To receive federal funding from the Legal Services Corporation, civil legal aid offices have long been required to have at least one-third of their boards of directors be composed of eligible client members.<sup>269</sup> Some public defender offices, like that in Travis County, Texas, now also include clients as board members.<sup>270</sup> Community groups were integral to the creation and planning of the Travis County office<sup>271</sup> and have continued to partner with the office to advocate for quality representation.<sup>272</sup>

The New York State Defenders Association (NYSDA), a membership organization dedicated to improving the quality and scope of publicly supported legal representation to low-income people, has long had a client advisory board. The board participates in the design, execution, and evaluation of community programs. It assisted NYSDA in holding fact-finding hearings about public defense and promulgated NYSDA's Client-Centered Standards for Representation in 2005.<sup>273</sup> National membership organizations, like the National Legal Aid & Defender Association, also have clients as board members.<sup>274</sup>

## Outreach

The New Orleans Public Defender rebuilt itself as a client-centered office “in the wake of a complete criminal justice system failure following Hurricane Katrina.”<sup>275</sup> It now has a client services division, runs a client welfare fund, and holds events to connect with community members, including “defender dialogues” storytelling events, “know your rights” community forums, and courthouse rallies called Second Lines for Equal Justice.<sup>276</sup>

The Potter & Armstrong County Public Defender and Managed Assigned Counsel Offices, located in Amarillo, Texas, similarly grew out of a troubled defense system.<sup>277</sup> They now have a client's bill of rights to set clear expectations for attorneys and clients about how they will work together on cases.<sup>278</sup>

Client and community partners can be powerful political allies. In 2020, the Montgomery County, Pennsylvania, chief and deputy public defenders were abruptly fired by the county after they filed an amicus brief in support of a lawsuit challenging the fairness of bail setting practices in Philadelphia. Community leaders joined public defenders and national justice advocates in a public rally to demand the reinstatement of the fired public defenders.<sup>279</sup> The public outcry forced the county to reexamine its practice of vesting authority to hire and fire public defenders with the county board, rather than an independent board.<sup>280</sup>

## Research

Clients can give input into public defense system performance through feedback surveys<sup>281</sup> or as research advisors. The research currently underway by the Southern Methodist University's Deason Criminal Justice Reform Center into the effect of infusing supplemental state funding into New York's previously county-funded public defense system features two advisory boards: one of system-impacted persons, and one of public defense system subject matter experts. The project's principal investigator credits having board members with lived experience as key to keeping the project oriented on concerns that matter most to them, as opposed to, for instance, addressing only attorney-centric concerns.

## Funding

In conjunction with the 60th anniversary of *Gideon v. Wainwright* in 2023, the Sixth Amendment Center surveyed all state and local governments to estimate total national expenditures on the right to counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution.<sup>282</sup> It found that, collectively, state and local governments spend approximately \$6.5 billion on public defense services, which it notes is an increase since *Gideon's* 50th anniversary.<sup>283</sup> In comparison, the nation spends approximately \$123 billion on police and \$82 billion on corrections.<sup>284</sup> State per capita public defense spending varies widely, from a low of \$7.20 in Mississippi to \$19.82 on average nationally.<sup>285</sup>

Just like all other criminal legal system functions, it takes money to deliver effective public defense services. Three states that recently shifted to providing some funding to help counties adhere to minimum standards in public defense adult cases — Michigan, Nevada, and New York — have differing populations and caseload levels. Still, their per capita<sup>286</sup> state contributions hint at a widely varying range of state support.

In Michigan, MIDC's 2023 general revenue funding is \$148.9 million, or \$14.78 per capita, and covers an estimated 80% of public defense expenditure in the state, compared to none in 2012.<sup>287</sup> Between 2018 and 2023, New York phased in an annual state funding level of \$250 million, or \$12.36 per capita, to supplement county public defense funding.<sup>288</sup> Nevada, in contrast, appropriated \$1.9 million (\$0.61 per capita) in its first year of offering state funding to support county compliance with standards.<sup>289</sup> As seen in Georgia, standards can be created yet still amount to little over time without adequate funding and oversight authority to enforce them.

## Federalism

In the American federalism system, decisions on the administration and operation of state and local public defense are left to the states, and each state has taken a different approach. Unlike in the federal system, there is no standardization of processes.

The Sixth Amendment right to counsel in federal courts was established prior to that in state courts,<sup>290</sup> although the system that currently serves individuals accused of committing federal crimes who cannot afford to hire a lawyer was not codified until shortly after *Gideon* by the Criminal Justice Act of 1964. Federal public defender and appointed counsel systems, although not immune from criticism over judicial interference or resource constraints,<sup>291</sup> overall lack the problems that states experience with access and quality, and they adhere to enhanced oversight and standardization of processes.<sup>292</sup>

There is no federal agency that provides regular monitoring or support to ensure that state and local public defense systems meet right-to-counsel mandates. Instead, states are left to police compliance on their own. Improvements to constitutionally deficient state systems often require research, litigation, and advocacy efforts undertaken by nonprofit organizations that are funded by foundations and other donors.

The U.S. Department of Justice provides resources for public defense in criminal courts, although experts and national right-to-counsel groups believe more federal involvement in public defense could help advance state and local reform.<sup>293</sup> Suggestions include expanding

some current Department of Justice initiatives, such as funding from the Edward Byrne Memorial Justice Assistance Grant (JAG) program allocated for public defense programs and Congressional authorization for new funding streams.<sup>294</sup>

### Resources for Public Defense Provided by the U.S. Department of Justice

- The Civil Rights Division works to uphold the civil and constitutional rights of all persons in the United States by enforcing federal law (<https://www.justice.gov/crt>).
- The Office for Access to Justice works across federal agencies and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers (<https://www.justice.gov/atj>).
- The National Institute of Justice funds research, development, and evaluation primarily through independent grants including courts research to identify tools, programs, and policies that satisfy goals including public safety, cost-efficiency, and fair and equitable treatment of victims and defendants (<https://nij.ojp.gov/about-nij>).
- As the primary statistical agency of the Department, the Bureau of Justice Statistics collects, analyzes, publishes, and disseminates information on courts and other justice systems, such as findings from public defender census and survey projects (<https://bjs.ojp.gov/about>).
- The Bureau of Justice Assistance administers funds that support program grants to state, local, and tribal jurisdictions (such as through the Edward Byrne Memorial Justice Assistance Grant Program) and projects that support capacity and tool enhancement (such as the Sixth Amendment Training and Technical Assistance Initiative) (<https://bja.ojp.gov/about>).

### Research and Technical Assistance

Under the U.S. Department of Justice's Office of Justice Programs, BJS sponsors census and survey projects that examine public defender office operations, resources, and system characteristics, and the Bureau of Justice Assistance provides grants for training and technical assistance projects, like the Sixth Amendment Initiative that helps states and localities uphold right-to-counsel obligations.<sup>295</sup> NIJ also sponsors research and evaluation on public defense services.<sup>296</sup> These resources have been critical to understanding national trends and evidence-based practices in public defense.

### Litigation

The Office for Access to Justice and the Civil Rights Division have filed statements of interest that concern federal constitutional rights, including the right to counsel. And the Civil Rights Division has investigatory and enforcement authority that it has used in juvenile right to counsel matters.<sup>297</sup> This authority has not been applied to adult public defense systems; thus, some advocates call for expanding and strengthening the Justice Department's authority. In a 2015 report about widespread denial of counsel in misdemeanor cases, the Sixth Amendment Center wrote, "If the past 50 years have proved anything, it is that states are not likely going to end the denial of counsel on their own. Therefore, the federal government should authorize the U.S. Department of Justice to investigate and litigate Sixth Amendment violations."<sup>298</sup>

## Advocacy and Support

In 2023, the Office for Access to Justice has elevated attention on state and local public defense in a number of ways. In March 2023, the Office undertook a tour of public defense programs in several states and one American Indian tribe that highlighted the importance of public defense.<sup>299</sup> It launched a series of visits to law schools to encourage public defense as a career. In conjunction with the Office for Justice Programs, it issued a joint Dear Colleague letter to state administering agencies reminding them that Byrne JAG funds can be used to support public defense. And it created a position focused solely on building support for and collaboration with state and local public defense.<sup>300</sup>





Photo source: Alameda County Public Defender

The Alameda County Public Defender marches with Black Lives Matter.

## Conclusion: Takeaways for Reform

*Gideon v. Wainwright* made clear that states must provide representation to individuals accused of felonies who cannot afford to hire a lawyer. Cases that followed from *Gideon* clarified its scope, deciding that, for criminal cases to be fair, defense lawyers are needed in misdemeanors; in juvenile delinquency proceedings; at all critical stages of a case; and with adequate time, training, resources, and independence to be effective at their jobs.

The Supreme Court made no prescription of how to ensure the right to counsel is delivered in every state and local court of the country. This report presents a scan of current public defense service models for adult, trial-level felony and misdemeanor cases in state, local, and tribal jurisdictions. It also explores system performance measures, reforms to models that can improve performance, and paths to selecting and reforming models.

The report was produced from a review of publicly available data and interviews with national, state, and local subject matter experts. Although findings are based on analysis of extant materials and a convenience sample of interview subjects, the report is a national and current scan of public defense models. It is intended to complement research based on more rigorous statistical surveys and program evaluations that may be dated or limited in coverage of jurisdictions.

Due to the array of approaches states have taken to oversee and administer public defense services, delivery models defy clean categorization. Overall, a scan of current delivery models shows 16 states have a commission and/or statewide defender program that oversees all public defense services. That leaves 34 — a majority of states — where there are gaps in state oversight, whether in types of cases (e.g., misdemeanors) or areas of the state (e.g., certain cities).



The right to counsel has floundered unchecked in some places. Deficiencies in access to and quality of service stand out as chief areas of concern. Some people are left to face the power of the state all on their own, resulting in uncounseled guilty pleas. Others have attorneys who are ill-equipped to provide effective representation due to overwhelming caseloads, insufficient litigation resources, or lack of experience, training, or supervision.

The situation results from several factors. First, public defense in theory serves those who are among society's least politically powerful, but in practice usually excludes their input into how public defense is provided. Rather, people with professional conflicts of interest (even defenders' adversaries) make key policy and case decisions for the defense. The expense of providing public defense services, coupled with a lack of understanding by policymakers of what constitutes effective system design, has also played a role in failures to meet constitutional requirements. Too often, reform has waited until conditions have gotten so bad that the failure of public defense becomes a crisis affecting not just those accused of crime, but also jails, courts, prosecutors, executive officials, and other stakeholders.

Most people accused of crime require appointment of counsel due to inability to hire a lawyer. These individuals should not have to wait for concerned outsiders to file a class action lawsuit to motivate their state to remedy failures to deliver constitutional rights. Sixty years of experience provides approaches that produce more effective and equitable systems, ones that combine state oversight with at least partial, if not full, state resources.

States need a mechanism for monitoring and supporting access to quality public defense counsel. Either a state commission model or a statewide defender model can ensure that minimum standards for independence, early entry of counsel, caseload controls, supervision, and other factors found in the ABA *Ten Principles of a Public Defense Delivery System* are carried out statewide. This approach leaves room for local administration of services and local selection of the delivery model, as long as state standards are followed. State collection and analysis of data on access to, quality of, and effect of public defense counsel across all courts that hear cases carrying a right to counsel are essential. State funds are necessary because of the variability of local resources; reliance on funding by poorer counties or municipalities will result in uneven and inequitable defender services.

States also need to ensure that the people who oversee and administer public defense do not have professional conflicts of interest that undermine their ability to deliver quality representation. Finally, defender systems need meaningful input on practice and policy from people who have been represented by public defenders or have otherwise been directly impacted by the criminal justice system.

To be clear, strong public defense delivery systems exist in multiple states. And some states have made great strides in recent years toward ensuring all who are entitled to effective public defense receive it. Although there is still much work to be done, states that have long had strong systems, such as Colorado, Maryland, and Massachusetts, and states that have made recent reforms, such as Michigan and New York, offer approaches that other states can adapt. The challenge is how to spark that action.

But for the intervention of nonprofit organizations such as the ACLU or the Sixth Amendment Center, it is likely that reform of public defense systems would be even further behind. Subject matter experts believe that expanded federal supports for state and local public defense systems could accelerate these efforts.

Such federal supports already exist in the form of census and survey projects, research and evaluation projects, technical assistance, program grants, and advocacy efforts. Additional suggested supports may require congressional action, such as funding a mechanism to set standards and incentivize compliance, or to intervene when standards are not met, such as through litigation. Finally, both federal and private funds could be better coordinated to support nonprofit organizations that work to evaluate systems, recommend reforms, and help with reform implementation.



# Appendix 1: Public Defense Models by State

Delivery Method: Public Defender (PD), Private Assigned Counsel (AC), Mixed Methods (Mix.)  
Administration (Admin.) and Funding: Local (Loc.), Mixed (Mix.), State (Sta.)  
Oversight Commission (Comm.): No, Limited (Ltd.), Yes.

State	Delivery Method			Admin.			Funding			Oversight Comm.		
	PD	AC	Mix.	Loc.	Mix.	Sta.	Loc.	Mix.	Sta.	No	Ltd.	Yes
AL			X		X			X			X	
AK			X		X			X		X		
AZ			X	X			X			X		
AR	X					X		X				X
CA			X	X				X		X		
CO	X				X			X			X	
CT	X					X			X			X
DE	X					X			X	X		
FL	X				X			X		X		
GA			X		X			X			X	
HI	X					X			X			X
ID*			X	X					X			X
IL	X			X				X		X		
IN			X	X				X			X	
IA	X					X			X	X		
KS			X		X			X			X	
KY	X				X			X				X
LA			X		X			X			X	
ME		X				X			X			X
MD	X					X			X			X
MA		X				X			X			X

State	Delivery Method			Admin.			Funding			Oversight Comm.		
	PD	AC	Mix.	Loc.	Mix.	Sta.	Loc.	Mix.	Sta.	No	Ltd.	Yes
MI			X	X				X				X
MN	X					X			X			X
MS			X	X			X			X		
MO	X				X			X			X	
MT	X					X			X	X		
NE			X	X				X			X	
NV			X		X			X				X
NH	X					X			X			X
NJ			X		X			X		X		
NM			X		X			X			X	
NY			X	X				X			X	
NC			X			X			X			X
ND	X				X			X			X	
OH			X		X			X			X	
OK			X		X			X			X	
OR		X			X			X			X	
PA	X			X			X			X		
RI	X				X			X		X		
SC			X		X			X			X	
SD			X	X			X			X		
TN	X				X			X		X		
TX		X		X				X			X	
UT		X		X				X				X
VT			X			X			X	X		
VA			X			X			X			X
WA			X	X			X			X		
WV			X			X			X			X
WI	X				X			X			X	
WY	X					X		X		X		
<b>Total</b>	<b>20</b>	<b>5</b>	<b>25</b>	<b>14</b>	<b>20</b>	<b>16</b>	<b>5</b>	<b>30</b>	<b>15</b>	<b>17</b>	<b>17</b>	<b>16</b>

\*In 2024, Idaho will shift to state administration and no oversight commission.

# Appendix 2: Research Methods and Interview Protocol

## Research Methods

### *Project Description*

In collaboration with the U.S. Department of Justice's Office for Access to Justice (ATJ), the National Institute of Justice (NIJ) funded a project on public defense service models in recognition of the 60th anniversary of *Gideon v. Wainwright*, 372 U.W. 335 (1963). *Gideon* created the right for individuals who face criminal charges and cannot afford a lawyer to have the state appoint attorneys on their behalf.

Research consultants Marea Beeman and Claire Buetow conducted a national scan of the different public defense service models currently used in U.S. state, local, and tribal criminal courts. The scan resulted in a report that addresses the prevalence of different models, factors contributing to how jurisdictions select different models, and variations in case and other outcomes associated with each model. The report was produced from 1) review and synthesis of publicly available reports and materials about public defense systems and 2) open-ended interviews with public defense subject matter experts and those whose roles intersect with public defense systems, such as public defenders, judges, prosecutors, county and state legislators, advocates for individuals impacted by the criminal justice system, and community stakeholders.

The time period for the project was December 1, 2022, to July 31, 2023. In addition to producing a publicly available report on public defense system models, consultants will present and share information from the report via presentations and other dissemination beyond the task period.



## **Procedures**

The research protocol was reviewed by NIJ's Human Subjects Protection Officer who approved a Privacy Certificate and issued a memo regarding determination of exemption from Institutional Review Board review. The Privacy Certificate outlines protections concerning the confidentiality of personally identifiable information and security of information collected.

Subjects identified for interviews by referral and other means were emailed a Project Description, Interview Agreement Form, and Interview Questions (see below). These documents confirm that any material or information shared will be used solely for the research project described. They contain sufficient information about the project and its procedures to ensure confidentiality and for subjects to make a voluntary decision to participate. Participants were asked to read, sign, and return the Interview Agreement Form prior to interview. These will be kept for one year following conclusion of the project. All potential subjects contacted for interviews are 18 years or older and not part of a vulnerable population such as incarcerated persons. Interviews were conducted remotely by the researchers and scheduled at the subject's convenience, so they could find a quiet and private location for the estimated 60-minute period. No incentives or stipends were offered.

No statements or quotes from interviews will be attributed to individual subjects in reports or presentations without their review and approval. Preference was made for attributing opinions or quotes to individuals by characterizing them by role (e.g., judge) rather than named individuals. No identifiable data were sought about individuals' cases, and interviewees were counseled not to share any such data. Completed forms and recordings, notes, and transcripts of interviews conducted are stored in electronic form on a Google drive dedicated to the project. Any recordings, interview notes, and transcripts were saved in files that are coded with numbers and stripped of identifying subject names and affiliations. All records and work product files will be deleted one year after the project conclusion. Archive of data work products is not a requirement for this NIJ consultant task.

## **Interview Questions for National Subject Matter Experts**

### **National Institute of Justice and Office for Access to Justice Report on Indigent Defense Service Models**

#### **NATIONAL SUBJECT MATTER EXPERTS**

At this 60th anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963), we have been tasked by the National Institute of Justice (NIJ) and the Office for Access to Justice (ATJ) to produce a report providing a scan of the different indigent defense service models currently used in the U.S., factors contributing to how jurisdictions select different methods, and variations in case and other outcomes associated with each model. The report will highlight key trends in indigent defense delivery and spotlight several state systems that have experienced significant change in the past decade. Because this is a high level report being produced in a very short timeframe, we are relying on interviews with national experts to inform the selection of particular trends and state systems to highlight.

Note: we are not seeking information about individuals' cases. Please do not share any individually identifiable case information.

## Questions

1. A goal of our report is to be a snapshot of indigent defense service (IDS) models – both delivery method and system type - that is of value to someone involved in developing or refining an indigent defense system, such as a county commissioner, state legislator, new chief defender, new indigent defense commission member, or an indigent defense system researcher.
  - a. Given that frame, how should we define successful systems? If we want to give readers some options for thinking about “effective” or “quality” systems, how would you define those terms? How does the experiences of people impacted by the justice system who interact with or are appointed representation factor into this analysis, if at all?
  - b. What are the major features or flaws of indigent defense systems to explore?  
[Prompt with state/local organization; delivery method; performance review; quality; independence; etc.]
  - c. What do you see as the most pressing issues facing indigent defense systems today?
    - i. Is that different from 10 or 20 years ago?
    - ii. What changes to the justice system, since the time *Gideon* was decided, does public defense need to adapt to? What about other changes to government, public attitudes, etc.?
    - iii. What factors do you see emerging/on the horizon?
2. Based on your experience and understanding of system structure (state or county) and delivery method (flat fee or fee-per-case/event contract, managed or ad hoc assigned counsel, institutional defender) variations:
  - a. Are any structure/oversight models definitively better or worse?
  - b. Are any delivery methods definitively better or worse?
  - c. How do we know how well public defense systems are meeting their goal(s)? I.e., what measures matter most? [Prompt with: adherence to the 10 Principles, use of national or local performance standards, client satisfaction surveys, portion of caseload that has appointed counsel, case-based outcome measures?]
  - d. What factors contribute to superior models? [Prompts: centralized oversight, centralized training, delivery method, adequacy of resources (how do you determine that? One thing defenders ask for is parity of resources with prosecution, but is that adequately grounded in need?), equitable access to quality (i.e., all eligible clients in a system have equal access to well-qualified and adequately resourced defense attorney/team, whether in an urban or rural county, and whether represented by the primary provider or a conflict provider), etc.]

- i. Are your answers similar or different for rural court systems? Tribal courts?
  - e. In places where you've worked, what factors contributed to how jurisdictions selected different models? What has caused jurisdictions to change their models? [Prompt with funding, litigation, advocacy, evaluations, politics, personnel.]
3. In your view, is state involvement with indigent defense – whether through state funding or oversight – instrumental to effective state's indigent defense systems?
  - a. Do you see a shift towards more state-level commission creation and/or standards implementation?
  - b. What are the best models for state-level involvement in indigent defense? [Prompt with state public defender, state commission, funding, standards, oversight functions?]
  - c. Are there drawbacks or limitations on their effectiveness at ensuring quality defense services?
    - i. What about when commissions have restricted enforcement authority?
4. For spotlights:
  - a. Which are the best states to spotlight that have experienced significant improvement in the past decade, and why? [Prompt with: CO, DC, MA are long-praised; we are looking for emerging models - MI, NY, TX]
  - b. What are the cautionary tales to mention, i.e., state reform projects that stalled, and why? [Prompt with GA, IN, LA, MT, OR]
    - i. Why, in your view, do some states continue to have predominantly county-based systems? [Prompt with AZ, CA, IL, IN, LA, MS, PA, TX, WA]
5. Finally, is there anything else you would like to add to our discussion about indigent defense delivery?

### ***Closing***

Thank you for taking the time to share your opinions and insight. As outlined in the Interview Agreement Form, we will compile the information from today's interview along with other interviews, reports, and other publicly available information in preparation of our report. We may contact you to follow up, such as to request your permission to quote you directly.

Please let me know if you have any immediate questions before we end the interview; otherwise, please feel free to contact me if you have any follow-up questions or notes. Contact information is in the Project Description and Interview Agreement Form.

## Interview Questions for State Indigent Defense System Staff and Other Stakeholders

### National Institute of Justice and Office for Access to Justice Report on Indigent Defense Service Models

#### STATE AND LOCAL SPOTLIGHT SITES

##### State Indigent Defense System Staff and Other Stakeholders

At this 60th anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963), we have been tasked by the National Institute of Justice (NIJ) to produce a report providing a scan of the different indigent defense service models currently used in the U.S., factors contributing to how jurisdictions select different methods, and variations in case and other outcomes associated with each model. The report will highlight key trends in indigent defense delivery and spotlight several state systems that have experienced significant change in the past decade. For the latter, we are speaking with people who are directly involved with indigent defense systems in our spotlight sites.

The report will spotlight systems in three states that have experienced active efforts of improvement in recent years: Michigan, Texas, and New York. It will also spotlight two or three states that have attempted but struggled to implement reforms. Examples are Oregon, Louisiana, and Indiana. Sharing information about all of these sites will be valuable for other states or counties seeking to improve indigent defense systems.

Note: we are not seeking information about individuals' cases. Please do not share any individually identifiable case information.

### ***Questions for Oversight Operations Staff, Including the Research Director, Implementation Director, and/or Executive Director***

1. About your program:
  - a. What motivated the creation of your system? E.g., your oversight commission would not exist, but for...?
  - b. How is your program funded and staffed?
  - c. Who are the proponents and opponents of your state organization's work?
  - d. How has indigent defense delivery changed since the program was created?
    - i. What would you attribute your successes to?
    - ii. Where has progress stalled and failed to take off? Why?
  - e. How, if at all, has input from persons impacted by the justice system been factored into changes to indigent defense in your state?

- f. What has access to more data revealed about indigent defense in your state?
  - g. How has access to/use of data helped advance indigent defense in your state?
    - i. What are still the big “unknowns” of indigent defense practice in your state?
  - h. How have other state commissions/systems influenced your work?
    - i. Have other non-indigent-defense groups or advocacy efforts shaped your work [Prompt with examples]?
2. About county providers:
- a. What elements do you look for in counties for building new systems?
    - i. What are building blocks of success, or obstacles to it?
    - ii. How do you measure performance?
  - b. How do counties decide which indigent defense model to use?
    - i. How do you influence that decision?
  - c. What feedback do you hear from counties about different indigent defense models?
3. About national practice:
- a. What else would you put in a national report on indigent defense?
4. Do you have suggestions of stakeholders who can speak to their experience collaborating with, administering, or being served by local indigent defense systems? E.g., public defender, judge, prosecutor, county or state policymakers, or community organization?
5. Finally, is there anything else you would like to add to our discussion about indigent defense delivery?

### ***Additional Questions for State and Local System Spotlight Stakeholders***

1. What is your involvement with indigent defense? How have you been involved with system changes?
  - a. What have been the features and flaws of indigent defense delivery in your jurisdiction?
2. How did your jurisdiction decide to change your indigent defense system? What motivated changes?
  - a. What was the role of the commission/commission staff in that change?
  - b. What were the elements of success or failure?
  - c. Are there any other things you'd like to see change?

3. What advice do you have for others like you who are considering changing their model?
4. Finally, is there anything else you would like to add to our discussion about indigent defense delivery?

### ***Closing***

Thank you for taking the time to share your opinions and insight. As outlined in the Interview Agreement Form, we will compile the information from today's interview along with other interviews, reports, and other publicly available information in preparation of our report. We may contact you to follow up, such as to request your permission to quote you directly.

Please let me know if you have any immediate questions before we end the interview; otherwise, please free to contact me if you have any follow-up questions or notes. Contact information is in the Project Description and Interview Agreement Form.





## Appendix 3: Michigan Campaign for Justice Coalition Members

### Criminal Justice System/Attorneys

Legal Services in Michigan — State Planning Body  
Criminal Defense Attorneys of Michigan  
National Association of Criminal Defense Lawyers  
Criminal Defense Lawyers of Washtenaw County  
Hispanic Bar Association of Michigan  
Grand Rapids Bar Association  
Kalamazoo County Bar Association  
Macomb County Bar Association  
Saginaw County Bar Association  
Shiawassee County Bar Association  
National Lawyers Guild — Detroit & Michigan Chapter  
National Conference of Black Lawyers — Detroit Chapter  
Legal Aid and Defender Association, Inc.  
Washtenaw County Office of Public Defender  
Washtenaw County Criminal Justice Collaborative Council

### Civil Rights/Social Justice

Michigan Civil Rights Commission  
American Civil Liberties Union  
ACLU of Michigan

NAACP — Michigan State Conference  
Constitution Project  
Michigan Protection and Advocacy Service, Inc.  
Brennan Center for Justice at New York University School of Law  
American-Arab Anti-Discrimination Committee of Michigan  
Race Relations Council of Southwest Michigan  
Sugar Law Center for Economic and Social Justice  
El Centro Obrero de Detroit

## **Criminal Justice Advocates**

Michigan Innocence Clinic  
Innocence Project — Cooley Law School  
Michigan Council on Crime and Delinquency  
Michigan Public Defense Task Force  
American Friends Service Committee Criminal Justice Program  
Citizens Alliance on Prisons and Public Spending — Michigan  
Humanity for Prisoners  
MOIST  
Hope 4 Healing Hearts  
Michigan Women's Justice & Clemency Project

## **Faith**

Citizens for Traditional Values  
Michigan Catholic Conference  
Prison Fellowship  
Micah Center  
Crossroad Bible Institute  
Michigan Jewish Conference  
Michigan Board of Rabbis  
Jewish Community Relations Council of Metropolitan Detroit  
Council of Islamic Organizations of Michigan  
Metropolitan Organizing Strategy Enabling Strength (MOSES)  
Michigan Unitarian Universalist Social Justice Network  
National Council of Jewish Women, Greater Detroit Section  
Troy Interfaith Group

Interfaith Council for Peace and Justice  
Brad Snavely, executive director, Michigan Family Forum  
Temple Kol Ami Social Action Committee

## Professional/Social Service Providers

Michigan Council of Private Investigators  
National Association of Legal Investigators  
Association for Children’s Mental Health  
Lansing Association of Black Social Workers  
JARC  
National Association of Social Workers — Michigan  
Michigan League for Human Services  
Michigan County Social Services Association  
Michigan Association for Children With Emotional Disorders  
The Provider Alliance  
Detroit Life Challenge  
Detroit Hispanic Development Corporation  
Mental Health Association in Michigan  
Partners in Crisis

## Public Policy

Michigan Prospect  
League of Women Voters  
American Association of University Women of Michigan  
Eastern Michigan University Student Body — 97th Student Senate  
Former Michigan Governor William Milliken

## Children’s Groups/Juvenile Justice

Michigan Juvenile Justice Collaborative  
Michigan Juvenile Detention Association  
Michigan Federation for Children and Families  
The Young People’s Project, Inc. — Michigan

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Source: Michigan Campaign for Justice, “Michigan’s Public Defense System Report Card,” 2011.



## About the Authors

**Marea Beeman, J.D.**, is a lawyer and consultant who works to make the criminal legal system fairer and more equitable through research, writing, program evaluation, policy analysis, and technical assistance. Known for her expertise in public defense system reform, Beeman's work is characterized by collaboration, data-driven insights, comparative analysis, and application of prevailing standards and best practices. Based in Somerville, Massachusetts, she has had past engagements with The Spangenberg Group, Harvard Kennedy School's Program in Criminal Justice Policy and Management, the Justice Management Institute, and the National Legal Aid & Defender Association.

**Claire Buetow, J.D.**, is a public defense policy and communications consultant based in Brooklyn, New York. Her recent work includes research and writing for the National Association for Public Defense and the Deason Criminal Justice Reform Center at Southern Methodist University Dedman School of Law. Previously, she was a senior policy analyst at the Texas Indigent Defense Commission and a staff attorney at the National Legal Aid & Defender Association. In these roles, she conducted public defense system evaluations, wrote policy guidance, and managed training and technical assistance initiatives. In 2021, Claire received the Michael K. Moore Award for Indigent Defense Research and Writing from the State Bar of Texas' Legal Services to the Poor in Criminal Matters Committee. She graduated from Oberlin College and the George Washington University Law School.





## Notes

1. 372 U.S. 335, 344 (1963).
2. The Court has, for example, found that the right to counsel applies to delinquency proceedings in juvenile court (in *In re Gault*, 387 U.S. 1 (1967) and misdemeanors (in *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972)) and attaches at the first appearance before a judicial officer (in *Rothgery v. Gillespie County*, 554 U.S. 191, 199 (2008)).
3. The Bureau of Justice Statistics has used five delivery model descriptions: governmental public defender office, governmental conflict public defender office, nongovernmental public defender office, contract system, and assigned or appointed counsel system. “Types of Indigent Defense Systems,” Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics (2016): 2, <https://bjs.ojp.gov/content/pub/pdf/saids13.pdf>.
4. Conflicts of interest can arise from the lawyer’s responsibilities to another or former client (e.g., multiple defendants or victims) or from the lawyer’s own interests, and independent judgement may be compromised; see American Bar Association Rule 1.7 Conflict of Interest: Current Clients – Comment, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients/comment\\_on\\_rule\\_1\\_7/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/).
5. Steven W. Perry, Michael B. Field, and Amy D. Lauger, “Table 7, Tribal court systems with prosecutor and public defender programs, by resident population, 2014,” *Tribal Courts in the United States, 2014 – Statistical Tables*, Bureau of Justice Statistics (2021): 9, [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st\\_0.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf).
6. Barbara L. Creel, “The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative,” *Michigan Journal of Race and Law* 18 (2013): 351, <https://repository.law.umich.edu/mjrl/vol18/iss2/4>.
7. “Defense counsel makes an enormous difference in the outcome of cases. ... We found that compared to the [public defenders], appointed counsel are impeded by conflicts of interest on the part of both the appointing judges and the appointed counsel, limited compensation, incentives created by that compensation, and relative isolation.” James Anderson and Paul Heaton, *Measuring the Effect of Defense Counsel on Homicide Case Outcomes* (2012): 3, <https://www.ojp.gov/pdffiles1/nij/grants/241158.pdf> (supported by NIJ Award Number 2009-IJ-CX-0013).
8. See Anderson and Heaton, *Measuring the Effect of Defense Counsel on Homicide Case Outcomes*; Irene Oritseweyinmi Joe, “Structuring the Public Defender,” *Iowa Law Review* Vol. 106 (2020): 135, <https://ssrn.com/abstract=3556223>; and Neena Satija, “How Judicial Conflicts of Interest are Denying Poor Texans Their Right to an Effective Lawyer,” *Texas Tribune* (August 19, 2019), <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/>.
9. Lynn Langton and Donald Farole, Jr., *Census of Public Defender Offices, 2007: County-Based and Local Public Defender Programs, 2007* (2010): 1, <https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf>; and Lynn Langton and Donald Farole, Jr., *Census of Public Defender Offices, 2007: State Public Defender Programs, 2007* (2010): 1, <https://>

[bjs.ojp.gov/content/pub/pdf/spdp07.pdf](https://bjs.ojp.gov/content/pub/pdf/spdp07.pdf).

10. For example, the 1973 standards set a limit of 400 misdemeanors per attorney per year. “Standard 13.12 Workload of Public Defenders,” *National Advisory Commission on Criminal Justice Standards and Goals* (1973), <https://www.nlada.org/defender-standards/national-advisory-commission/black-letter>. A 2022 study in Oregon found that attorneys should spend, on average, 22.3 hours on a low-level misdemeanor, translating to a caseload of 83 misdemeanors per year (assuming 1,850 client hours per year). *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards*, American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP (2022): 71, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-or-proj-rept.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf).

11. For example, the study finds that attorneys should spend, on average, 13.8 hours on a low-level misdemeanor, translating to a caseload of 134 misdemeanors per year (assuming 1,850 client hours per year). Nicholas M. Pace et al., *National Public Defense Workload Study*, RAND Corporation (2023): 100, [https://www.rand.org/pubs/research\\_reports/RRA2559-1.html](https://www.rand.org/pubs/research_reports/RRA2559-1.html).

12. A census will describe operations and structures, numbers and types of cases handled, staff size, and funding streams. “FY2022 Census of Public Defender Offices,” *Bureau of Justice Statistics*, <https://bjs.ojp.gov/funding/opportunities/o-bjs-2022-171331>. A survey will address compensation, client communication mediums, training, and access to resources. “FY2019 Survey of Public Defenders,” *Bureau of Justice Statistics*, <https://bjs.ojp.gov/funding/opportunities/bjs-2019-15744>.

13. In 2021, in Texas counties below 50,000 population, 60% of people who pleaded guilty to misdemeanors did not have counsel. *Annual Report for Fiscal Year 2021*, Texas Indigent Defense Commission (August 2022): 18, [http://www.tidc.texas.gov/media/oxmjox34/tidc-annual-report-fy21\\_final.pdf](http://www.tidc.texas.gov/media/oxmjox34/tidc-annual-report-fy21_final.pdf). A recent article cited data showing that, in 2021, 51 Texas counties had appointment rates below 10%, and quoted an expert who said, “It’s incredibly shocking to me to be able to say that in parts of Texas, there is no real right to counsel in misdemeanor court.” Rob D’Amico, “Defense Denied,” *Texas Observer* (February 22, 2023), <https://www.texasobserver.org/texas-public-defenders-defense-denied/>.

14. Emily Hamer and Caitlin Schmidt, “America’s Dirty Little Secret: Thousands of Misdemeanor Defendants Don’t Get Attorneys,” *The Daily News* (January 30, 2023), [https://tdn.com/news/national/america-s-dirty-little-secret-thousands-of-misdemeanor-defendants-don-t-get-attorneys/article\\_4d1761b9-9628-5afe-ba11-6e7345fae9bf.html](https://tdn.com/news/national/america-s-dirty-little-secret-thousands-of-misdemeanor-defendants-don-t-get-attorneys/article_4d1761b9-9628-5afe-ba11-6e7345fae9bf.html).

15. “Race and Public Defense,” National Association of Criminal Defense Lawyers (November 2022), <https://www.nacdl.org/Content/Racial-Disparity-and-Public-Defense>.

16. Pamela R. Metzger et al., *Greening the Desert: Strategies and Innovations To Recruit, Train, and Retain Criminal Law Practitioners for STAR Communities*, Deason Criminal Justice Reform Center (September 2020): 5, <https://doi.org/10.25172/dc.1>.

17. Since 2013, for example, Michigan went from 0% to 78% state funding and from three to 32 public defender offices (for 83 counties) and created a statewide commission to set and enforce standards. David Carroll and Aditi Goel, “The State of the Nation on Gideon’s 60th Anniversary,” *Pleading the Sixth Blog, Sixth Amendment Center* (March 14, 2023): <https://sixthamendment.org/the-state-of-the-nation-on-gideons-60th-anniversary/>. Due to these changes, between FY 2019 and FY 2021, local use of expert and investigative services has increased by 49% statewide in Michigan. *Annual Impact Report 2021*, Michigan Indigent Defense Commission (2022): 11, <https://michiganidc.gov/wp-content/uploads/2022/04/MIDC-2021-Impact-Report.pdf>.

18. “FY2022 Census of Public Defender Offices,” *Bureau of Justice Statistics*, <https://bjs.ojp.gov/funding/opportunities/o-bjs-2022-171331>; and “FY2019 Survey of Public Defenders,” *Bureau of Justice Statistics*, <https://bjs.ojp.gov/funding/opportunities/bjs-2019-15744>.

19. “Indigent Defense,” *National Institute of Justice*, <https://nij.ojp.gov/topics/indigent-defense>.

20. “Sixth Amendment Training and Technical Assistance Initiative,” *Bureau of Justice Assistance*, <https://bja.ojp.gov/program/sixthamendment/sixth-amendment>.

21. “Edward Byrne Memorial Justice Assistance Grant (JAG) Program,” *Bureau of Justice Assistance*, <https://bja.ojp.gov/program/jag/overview>.

22. In 2023 the Office for Access to Justice conducted a national outreach tour of defender programs and added a senior counsel position dedicated to supporting, collaborating with, and engaging the state and local public defense. “Readout of Director Rachel Rossi of the Office for Access to Justice’s Participation in the 2023 American Bar Association Public Defense Summit,” U.S. Department of Justice, Office of Public Affairs (Thursday, April 13, 2023), <https://www.justice.gov/opa/pr/readout-director-rachel-rossi-office-access-justice-s-participation-2023-american-bar>.

23. “Court Filings in Support of Access to Justice,” U.S. Department of Justice Archives, accessed May 2023, <https://www.justice.gov/archives/atj/court-filings-support-access-justice>.

24. Recommendations for the Biden Administration,” National Association for Public Defense (2020), <https://>

[www.publicdefenders.us/files/NAPD%20-%20Presidential%20Transition%20Recommendations\\_WITH%20LOGO.pdf](http://www.publicdefenders.us/files/NAPD%20-%20Presidential%20Transition%20Recommendations_WITH%20LOGO.pdf); “Recommendations for the Biden Administration,” National Legal Aid & Defender Association (November 2020), <https://www.nlada.org/sites/default/files/NLADA%20Recommendations%20to%20the%20Biden-Harris%20Administration.pdf>; and *Actual Denial of Counsel in Misdemeanor Courts*, Sixth Amendment Center (May 2015): 13, <https://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf>.

24. Thomas H. Cohen, “Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?” (2011): 14-15, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876474](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474).

25. American Bar Association, *Ten Principles of a Public Defense Delivery System* (August 2023): [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-603-public-def-principles-2023.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-603-public-def-principles-2023.pdf). References to the ABA Ten Principles in this report track the original 2002 version of the *Ten Principles*; an updated version was adopted in 2023 after research for this report concluded. American Bar Association, *Ten Principles of a Public Defense Delivery System* (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).

26. In Michigan, for example, “the passage of the reform bill is the culmination of many, many years of hard work by many advocates and organizations. Simply put, the reform would not have been possible without each of these efforts.” David Carroll, “Michigan Passes Public Defense Reform Legislation,” *Pleading the Sixth Blog*, Sixth Amendment Center (June 19, 2013), <https://sixthamendment.org/michigan-passes-public-defense-reform-legislation/>.

27. 372 U.S. 335 (1963).

28. *Powell v. Alabama*, 287 U.S. 45 (1932). Federal courts had to provide lawyers in all cases. *Johnson vs. Zerbst*, 304 U.S. 458, 463 (1938).

29. *Betts v. Brady*, 316 U.S. 455 (1942).

30. “U.S. Supreme Court Case Law,” *Sixth Amendment Center*, accessed March 2023, <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/> (see section “The post-Betts Era in the States’ Courts”).

31. *Gideon*, 372 U.S. at 343.

32. *Gideon*, 372 U.S. at 343-344.

33. “U.S. Supreme Court Case Law,” *Sixth Amendment Center* (see section “Understanding Gideon’s Impact, Part 1: Right to Counsel Services”).

34. “U.S. Supreme Court Case Law,” *Sixth Amendment Center* (see section “Understanding Gideon’s Impact, Part 2: The Birth of the Public Defender Movement”).

35. “U.S. Supreme Court Case Law,” *Sixth Amendment Center* (see section “Understanding Gideon’s Impact, Part 2: The Birth of the Public Defender Movement”).

36. “U.S. Supreme Court Case Law,” *Sixth Amendment Center* (see section “Understanding Gideon’s Impact, Part 2: The Birth of the Public Defender Movement”).

37. “U.S. Supreme Court Case Law,” *Sixth Amendment Center* (see section “Understanding Gideon’s Impact, Part 2: The Birth of the Public Defender Movement”).

38. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

39. *In re Gault*, 387 U.S. 1, 34-42 (1967).

40. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

41. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984); *Powell v. Alabama*, 287 U.S. 45 (1932); *Polk County v. Dodson*, 454 U.S. 312 (1981).

42. “The development of most indigent defense programs in the United States coincided with the unprecedented 40-year growth of mass incarceration and ‘tough on crime’ culture. . . . In these reluctant ‘laboratories of democracy,’ many experiments were tried, most were failures.” Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center for Justice (September 2019): 5.

43. *Annual Report 2021-2022*, Center on Race, Inequality, and the Law at New York University School of Law (December 2022): 6, [https://www.law.nyu.edu/sites/default/files/2022%20Center%20on%20Race%20Inequality%20%2B%20The%20Law%20Annual%20Report%20Final\\_508-sm.pdf](https://www.law.nyu.edu/sites/default/files/2022%20Center%20on%20Race%20Inequality%20%2B%20The%20Law%20Annual%20Report%20Final_508-sm.pdf).

44. Metzger et al., *Greening the Desert*.

45. Federal, juvenile, and appellate cases are not addressed. Nor are characteristics of indigent defense systems serving citizens of the District of Columbia or U.S. territories.

46. Many other individuals shared valuable input and information by email. For more on privacy protections for

interviews, see Appendix 2: Research Methods and Interview Protocol.

47. Appended to the report are a listing of public defense models by state (Appendix 1); description of research methods, including the interview protocol (Appendix 2); and a list of coalition members of Michigan's Campaign for Justice (Appendix 3).
48. David Carroll, "Appendix: Right to Counsel Services in the 50 States," *Liberty and Justice for All: Providing Right to Counsel Services in Tennessee*, Tennessee Supreme Court Indigent Representation Task Force (April 2017): 97, <https://www.tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf>.
49. "6AC & Our Work," *Sixth Amendment Center*, accessed April 2023, <https://sixthamendment.org/about-us/>. The Sixth Amendment Center shared with the authors forthcoming research (to be published in fall 2023) that updates the information in their 2017 survey, "Right to Counsel Services in the 50 States."
50. The most current and comprehensive system profiles were found in Eve Brensike Primus, "The Problematic Structure of Indigent Defense Delivery," Forthcoming, *Michigan Law Review* 122 No. 2 (2023), <http://dx.doi.org/10.2139/ssrn.4232443>.
51. Administration does not include the process for people to request a lawyer, be screened for eligibility, and have a lawyer assigned, which is described below. See Indigency Determination and Public Defense System Fees.
52. Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics (2016): 2, <https://bjs.ojp.gov/content/pub/pdf/saids13.pdf>.
53. The National Legal Aid & Defender Association, for example, used these definitions in its 2021 evaluation of Aurora, Colorado. Marea Beeman, Rosalie Joy, and Michael Mrozinski, *Review of the Aurora, Colorado Municipal Public Defense System*, National Legal Aid & Defender Association (September 2021): 16, <https://www.nlada.org/sites/default/files/NLADA-Aurora-Public-Defender-Assessment.pdf>. See also Furst, *A Fair Fight*: 5-6.
54. The Sixth Amendment Center, for example, divides them into "salaried government attorneys" and "private attorneys." *Actual Denial of Counsel in Misdemeanor Courts*, Sixth Amendment Center (May 2015): 14, <https://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf>.
55. Public defenders may also handle collateral civil matters, or be part time and have separate private practices.
56. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics: 11, 13.
57. In Texas, for example, as of 2019, the Colorado County public defender office had two part-time attorneys and an administrative assistant, while the Dallas County office had 123 staff members, including criminal and civil attorneys, investigators, caseworkers, legal assistants, administrative assistants, and an interpreter. *Public Defender Primer*, Texas Indigent Defense Commission (October 2020): 14-15, <http://tidc.texas.gov/media/8d87ba4dc5f2348/public-defender-primer.pdf>. Staffing also varies across Wisconsin public defender offices. *Wisconsin State Public Defender Directory*, Wisconsin State Public Defender (February 2023), <https://www.wispsd.org/staff-directory>.
58. Illinois, for example, uses part-time public defenders who resemble private assigned counsel: They are paid a reduced salary, work alone, and may have to cover overhead expenses out of their own pay; they can have a retained practice in addition to their indigent defense work. *The Right to Counsel in Illinois: Evaluation of Adult Criminal Trial-Level Indigent Defense Services*, Sixth Amendment Center (June 2021): 144-5, <https://sixthamendment.org/illinois-report/>. For this report, they are considered public defenders.
59. These examples are not necessarily exhaustive. Other states or cities may have similar models.
60. A national survey of states' systems from 2017 notes just a few nonprofit offices, for example, in Louisville and Philadelphia. Carroll, "Right to Counsel Services in the 50 States," 112, 121. As of 2013, most state-administered systems (26 of 28) had a governmental public defender office, and five had nongovernmental public defender offices. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics: 23.
61. "About Public Defender Corporations," *West Virginia Public Defender Services*, accessed April 2023, <https://pds.wv.gov/about/public-defender-corporations/Pages/default.aspx>.
62. "About Us," *New Hampshire Public Defender*, accessed April 2023, <https://www.nhpd.org/about-us/>.
63. "About Us," *Salt Lake Legal Defender Association*, accessed April 2023, <https://www.sllda.com/about-us/>.
64. Andrew Howard, "The Public's Defender: Analyzing the Impact of Electing Public Defenders," *Columbia Human Rights and Law Review Online* (April 15, 2020): 178-179, <https://hrlr.law.columbia.edu/hrlr-online/the-publics-defender-analyzing-the-impact-of-electing-public-defenders/>. As of 2013, the chief of most state-administered systems, for example, was appointed by a commission or a governor, and none were elected. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics: 14-15.
65. Howard, "The Public Defender," 180.
66. In Harris County (Houston), Texas, for example, the public defender handled only 5% of cases in 2020. *Public Defender Primer*, Texas Indigent Defense Commission: 30.
67. *Still She Rises*, accessed April 2023, <https://stillsherises.org/>.



68. *Census of Public Defender Offices, 2007*, U.S. Department of Justice, Bureau of Justice Statistics (November 2009), <https://bjs.ojp.gov/content/pub/pdf/pdo07st.pdf>.
69. There were 3,141 counties in 2007. *County and City Data Book: 2007*, U.S. Census Bureau (2007), <https://www2.census.gov/library/publications/2010/compendia/ccdb07/2007ccdb.pdf>.
70. “Some percentage of those 957 offices operates within the same county as other public defender offices (e.g., Orange County, California (Santa Ana) has primary, secondary and tertiary public defender offices).” *Actual Denial of Counsel*, Sixth Amendment Center: 14.
71. Metzger et al., *Greening the Desert*: 5.
72. “Solicitation: FY 2022 Census of Public Defender Offices,” U.S. Department of Justice, Bureau of Justice Statistics, [https://bjs.ojp.gov/content/pub/pdf/cpdo22\\_sol.pdf](https://bjs.ojp.gov/content/pub/pdf/cpdo22_sol.pdf).
73. Nicholas M. Pace et al., *Provisional Caseload Standards for the Indigent Defense of Adult Criminal and Juvenile Delinquency Cases in Utah*, RAND Corporation (2021): xi-xii, <https://doi.org/10.7249/RR-A1241-1>.
74. Primus, “Problematic Structure”: 10. For more discussion on resources for different models, see Effective Representation below.
75. In 2022, in Texas, over 75% of felonies and over 66% of misdemeanors were handled by assigned counsel. “Combined Statewide Indigent Defense Expenditure Report,” *Texas Indigent Defense Commission*, accessed May 2023, <https://tidc.tamu.edu/public.net/Reports/StateFinancialReport.aspx>.
76. Beeman, *Review of Aurora*, Colorado, National Legal Aid & Defender Association: 16.
77. *Primer on Managed Assigned Counsel Programs*, Texas Indigent Defense Commission (September 2017): 3, 8, <http://tidc.texas.gov/media/8d87ba4ecdab9eb1/managed-assigned-counsel-primer.pdf> (describing Massachusetts and Texas programs).
78. “Contract Attorneys,” *Iowa Office of the State Public Defender*, accessed April 2023, <https://spd.iowa.gov/contract-attorneys>; and “Conflict Service Division,” *Kentucky Department of Public Advocacy*, accessed April 2023, <https://dpa.ky.gov/conflict-service-division/>.
79. Until 2022, Maine was the exception, providing all adult criminal trial representation through private attorneys. Carroll and Goel, “Gideon’s 60th Anniversary.”
80. Primus, “Problematic Structure”: 6, 7. For agency websites, see “Contract Attorneys,” *Iowa Office of the State Public Defender*; and “Conflict Service Division,” *Kentucky Department of Public Advocacy*.
81. Primus, “Problematic Structure”: 4. For example, see “History of the Office of Criminal Conflict and Civil Regional Counsel,” *Office Of Criminal Conflict And Civil Regional Counsel – First Region, Florida*, accessed April 2023, <https://rc1fl.com/about-us/history/>.
82. These totals largely exclude municipal-level systems that prosecute ordinance violation cases carrying the possibility of incarceration, and thus have a right to counsel. An estimated 43 states have some form of a municipal court. Municipalities provide defense representation in eligible cases primarily through private attorneys, either individual case court appointments, contract systems, or a combination. Municipal court public defender offices are rare. Some municipal court systems do not provide counsel as required at all. Beeman, *Review of Aurora*, Colorado, National Legal Aid & Defender Association: 16.
83. Carroll and Goel, “Gideon’s 60th Anniversary.”
84. These examples are not necessarily exhaustive. Other states may have similar models.
85. “Kansas’s System of Public Defense,” *The Kansas State Board of Indigents’ Defense*, accessed April 2023, <https://www.sbid.org/kansas-system-of-public-defense>.
86. “Client Information: Services,” *New Jersey Office of the Public Defender*, accessed April 2023, <https://www.nj.gov/defender/client/#1>. Past BJS census reports have not considered municipal cases, so had higher counts of state-administered systems. BJS counted 28 state-administered systems in 2013, for example, because it “did not include indigent defense provided in tribal court systems or municipal court systems.” Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics: 21. Other states where municipal misdemeanors are outside of the state system’s purview include Colorado, Florida, Missouri, North Dakota, Oklahoma, Oregon, and South Carolina. *Actual Denial of Counsel*, Sixth Amendment Center: 11.
87. Tenn. Code § 8-14-102 (elected district defenders); 8-14-105 (appointed conflict counsel).
88. “About,” *Oklahoma Indigent Defense System*, accessed April 2023, <https://www.oklahoma.gov/oids/about.html>.
89. “Trial Services Division,” *Office of the Ohio Public Defender*, accessed April 2023, <https://opd.ohio.gov/about-opd/divisions/trial/trial-services-division>.
90. Idaho H236, the State Public Defender Act, signed into law March 30, 2023, shifts a locally administered and primarily locally funded system to a state-funded public defender system. <https://trackbill.com/bill/idaho-house-bill-236-state-public-defender-act/2382809/>.

91. “When a municipality prosecutes a person who has been determined by the court to be indigent under AS 18.85.120 for a violation of a municipal ordinance that is a serious crime, the municipality shall pay for the services of the attorney appointed by the court to defend the indigent person.” Alaska Stat. § 18.85.155. “‘Serious crime’ includes ... a criminal matter in which a person is entitled to representation by an attorney under the Constitution of the State of Alaska or the United States Constitution.” Alaska Stat. § 18.85.170.

92. The formula has changed over time. For 2023, every county is eligible to receive \$15,000 plus its share of remaining funds, calculated at 50% based on the county’s percentage of state population and 50% based on the county’s percentage of statewide indigent defense spending (less certain other state funding). Counties must spend more than their baseline spending from FY 2001 and cannot receive more state formula funding than what they expended in the previous year. “FY2023 Formula Grant Program Request for Applications (RFA),” Texas Indigent Defense Commission (September 2022): 2, <http://tidc.texas.gov/media/pdihw1zf/fy23-tidc-formula-rfa-final.pdf>.

93. The amount of state reimbursement for these programs depends on the program type; for example, 80% in the first year for a four-year step-down grant, or two-thirds of costs perpetually for programs in small counties. “FY2024 Indigent Defense Improvement Grant Program Request for Applications (RFA),” Texas Indigent Defense Commission: 1-2, <http://tidc.texas.gov/media/uv4k4ac2/fy2024-tidc-improvement-grant-rfa.pdf>.

94. *Annual Report for Fiscal Year 2021*, Texas Indigent Defense Commission (August 2022): 11, [http://www.tidc.texas.gov/media/oxmjox34/tidc-annual-report-fy21\\_final.pdf](http://www.tidc.texas.gov/media/oxmjox34/tidc-annual-report-fy21_final.pdf).

95. “Indiana Public Defender Commission,” *Indiana Public Defender Commission*, accessed April 2023, <https://www.in.gov/publicdefender/>.

96. By statute, state and federal funding cover 85% of costs; for the other 15%, the state public defender invoices counties for their proportionate share. Wyo. Stat. § 7-6-113.

97. A small but not insignificant source of funding for some public defense systems is their own clients. Twenty-four states direct some or all of the revenue generated from fees assessed on low-income people for their court-appointed representation (i.e., upfront application fees and/or recoupment) to fund the public defense system. Marea Beeman et al., *At What Cost?: Findings From an Examination Into the Imposition of Public Defense System Fees*, National Legal Aid & Defender Association, (July 2022): 14, <https://www.nlada.org/public-defense-system-fees>. In Texas, for example, in FY 2021, reimbursements from defendants for their counsel accounted for 3.5% of indigent defense funding. *Annual Report FY21*, Texas Indigent Defense Commission: 11.

98. Louisiana “stands alone in the nation as the only jurisdiction with a statewide indigent defense system that relies to a large extent on locally generated, nongovernment general fund appropriations to fund the right to counsel. The majority of funding for trial-level services comes from a combination of fines and fees (e.g., bail bond revenue, criminal bond fees, revenue from forfeitures, and indigency screening fees, among others).” Carroll, “Right to Counsel Services in the 50 States”: 113.

99. “Counties do not contribute to the funding of indigent defense services. Instead, money from a filing fee in civil court matters is collected in a central fund dedicated to indigent defense services. If [the state oversight agency] exceeds the amount of dollars available in that fund, the state is statutorily responsible for funding the difference out of the state general fund.” Carroll, “Right to Counsel Services in the 50 States”: 105.

100. In 2021, state funding covered 13% of public defense costs in Texas. *Annual Report FY21*, Texas Indigent Defense Commission: 11. State funding was primarily from consolidated court costs paid by all defendants (86% of funding), surety bond dues paid by defendants, and bar dues paid by attorneys. *Annual Report FY21*, Texas Indigent Defense Commission: 32.

101. The Sixth Amendment Center argues that states must be able to evaluate whether systems are able to meet constitutional requirements. Carroll, “Right to Counsel Services in the 50 States”: 96. The U.S. Department of Justice has filed statements of interest stating that, under *Gideon*, systemic problems can cause constructive denial of counsel. “Court Filings in Support of Access to Justice,” *U.S. Department of Justice Archives*, accessed May 2023, <https://www.justice.gov/archives/atj/court-filings-support-access-justice> (2013 statement of interest in *Wilbur v. City of Mount Vernon* requesting independent monitor to remedy systematic denial of counsel; 2014 statement of interest in *Hurrell-Harring v. New York* describing when constructive denial may result from systemic problems). The Sixth Amendment Center argues similar claims can be brought under *United States v. Cronin* and that states have the burden of showing their systems are constitutionally sound. *The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services*, Sixth Amendment Center (2016): 101, [https://sixthamendment.org/6ac/6AC\\_indianareport.pdf](https://sixthamendment.org/6ac/6AC_indianareport.pdf). The Sixth Amendment Center also compares the state responsibility for providing counsel to that of running other state programs, like public education or welfare, which some courts have said states can “delegate ... not abdicate.” Carroll, “Right to Counsel Services in the 50 States”: 128.

102. Carroll, “Right to Counsel Services in the 50 States”: 112.

103. Carroll, “Right to Counsel Services in the 50 States”: 111.

104. Carroll, “Right to Counsel Services in the 50 States”: 120.

105. Carroll, “Right to Counsel Services in the 50 States”: 117.



106. *Orange County Office of Independent Review*, accessed May 2023, <https://oir.ocgov.com/>.
107. 2002 version: American Bar Association, *Ten Principles of a Public Defense Delivery System* (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). 2023 version: American Bar Association, *Ten Principles of a Public Defense Delivery System* (August 2023): [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-603-public-def-principles-2023.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-603-public-def-principles-2023.pdf).
108. Metzger et al., *Greening the Desert*: 4.
109. *Gideon*, 372 U.S. at 345 (quoting *Powell* at 68-69).
110. *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981). See also *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (“An indispensable element of the effective performance of [appointed counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation”).
111. American Bar Association, *Ten Principles*: 2.
112. Charlie Gerstein, “Dependent Counsel,” *Stanford Journal of Civil Rights & Civil Liberties* 16 (2020): 156 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3650416](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650416).
113. Gerstein, “Dependent Counsel”: 160.
114. Rob D’Amico, “Defense Denied,” *Texas Observer* (February 22, 2023), <https://www.texasobserver.org/texas-public-defenders-defense-denied/>.
115. “Though by law [the Texas Indigent Defense Commission] has the power to set maximum caseloads for lawyers across the state, it has never done so,” despite completing a caseload study and collecting data that shows some lawyers do the work of at least five lawyers, per the study’s guidelines. Satija, “How Judicial Conflicts of Interest Are Denying Poor Texans Their Right to an Effective Lawyer.” See Public Policy Research Institute, *Guidelines for Indigent Defense Caseloads A Report to the Texas Indigent Defense Commission*, 2015, <https://tidc.texas.gov/caseload-guidelines>. Although there have been improvements in some areas, in FY 2021, “517 attorneys (11% of attorneys) had appointed caseloads above the guidelines. Attorneys with caseloads above the guidelines handled appointed cases in 205 counties (81% of counties) and handled 39% of appointed cases (135,678 cases).” *Annual Report FY21*, Texas Indigent Defense Commission: 19.
116. “System Building,” *Texas Indigent Defense Commission*, accessed March 2023, <http://tidc.texas.gov/improvement/system-building/>.
117. *Public Defense Primer*, Texas Indigent Defense Commission: 25.
118. “Appointment rates were eleven points higher in counties where the defense function was institutionalized.” Andrew Davies and Alyssa Clark, “Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places,” *Maine Law Review* 71 (2019): 267.
119. American Bar Association, *Ten Principles*: 2 (“a nonpartisan board should oversee defender, assigned counsel, or contract systems”); National Association for Public Defense, *Foundational Principles* (2017), <https://www.publicdefenders.us/foundationalprinciples>. (“The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by administrators of defender, assigned-counsel or contract-for-service programs. ... [O]versight of defense programs should be vested in a commission or board of trustees selected by diverse authorities.”)
120. N.C. Gen. Stat. § 7A-498.4.
121. Located under the judiciary, the Colorado commission’s appointments are, however, all made by the state Supreme Court. Colo. Rev. Stat. § 21-1-101. For current members, see “Public Defender Commission,” Office of the Colorado State Public Defender, accessed April 2023, <https://www.coloradodefenders.us/information/pd-commission/>.
122. Andrew Weber, “Travis County’s Public Defender Office Will Have a Seven-Member Oversight Board,” KUT 90.5 (July 16, 2019), <https://www.kut.org/crime-justice/2019-07-16/travis-countys-public-defender-office-will-have-a-seven-member-oversight-board>.
123. Howard, “The Public’s Defender”: 210.
124. Howard, “The Public’s Defender”: 181.
125. Irene Oritseweyinmi Joe, “Structuring the Public Defender,” *Iowa Law Review* Vol. 106 (2020): 131, <https://ssrn.com/abstract=3556223>. The study based its designations, in part, on the placement of the state public defender or oversight agency which, as discussed in regard to public defense administration and oversight, may not cover all cases. Rhode Island, for example, is designated as an executive-branch-placement state because its chief public defender is appointed by the governor, although its supreme court administers a panel of attorneys for conflict cases. Joe, “Structuring the Public Defender”: 166; and “Know Your State: Rhode Island,” *Sixth Amendment Center*, <https://sixthamendment.org/know-your-state/rhode-island/>. Private assigned counsel is often administered by courts. Primus, “Problematic Structure”: 18.
126. Joe, “Structuring the Public Defender”: 135.

127. *Gideon*, 372 U.S. at 345.
128. Critical stages include custodial interrogations (*Massiah v. United States*, 377 U.S. 201 (1964)); some preliminary hearings (*Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970)); some line-ups (*United States v. Wade*, 388 U.S. 218, 236-38 (1967)); arraignments (*Hamilton v. Alabama*, 368 U.S. 52 (1961)); plea negotiations (*Lafler v. Cooper*, 562 U.S. 1127 (2011)); trials (*Alabama v. Shelton*, 535 U.S. 654, 662 (2002)); sentencing (*Wiggins v. Smith*, 539 U.S. 510, 538 (2003)); direct appeals as of right (*Douglas v. California*, 372 U.S. 353, 357 (1963)); and some probation and parole revocation hearings (*Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)). See also *Early Appointment of Counsel: The Law, Implementation, and Benefits*, Sixth Amendment Center and Pretrial Justice Institute (2014): 5-6. A person can waive the right to counsel at these stages, if the person makes the waiver “knowingly and intelligently.” *Faretta v. California*, 422 U.S. 806, 835 (1975).
129. *Rothgery v. Gillespie County*, 554 U.S. 191, 199 (2008).
130. National Center for State Courts, “Brief: When Does a ‘First Appearance’ Take Place in Your State” (2023), <https://www.ncsl.org/civil-and-criminal-justice/when-does-a-first-appearance-take-place-in-your-state>.
131. Pamela R. Metzger, Janet C. Hoeffel, Kristin M. Meeks, and Sandra Sidi, *Ending Injustice: Solving the Initial Appearance Crisis*, Deason Criminal Justice Reform Center (September 2022): 8, <https://doi.org/10.25172/dc.3>.
132. *Rothgery*, 554 U.S. at 212.
133. *Rothgery*, 554 U.S. at 212.
134. American Bar Association, *Ten Principles*: 2
135. Malia N. Brink, Jiacheng Yu, and Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center (October 2022): 65, <https://doi.org/10.25172/dc.9>.
136. Brink et al., *Grading Injustice*: 4.
137. Metzger, *Ending Injustice*: 3.
138. *Dewolfe v. Richmond*, No. 34 at 29 (Md. Jan. 4, 2012).
139. Data reported by New York Office of Indigent Legal Services to report authors.
140. “Our Divisions and Units,” *Law Office of the Cook County Public Defender*, accessed April 2023, <https://www.cookcountypublicdefender.org/About/our-divisions-units>.
141. *Gideon*, 372 U.S. at 344.
142. In 37 states the court determines whether an individual qualifies for court-appointed counsel, in nine states the public defender decides, and in four states the process varies. Beeman, *At What Cost?*: 14.
143. *Gideon at 50: Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, National Association of Criminal Defense Lawyers (2014): 22-23, <https://www.nacdl.org/Document/GideonII-RedefiningIndigenceEligibilityGuidelines>.
144. Beeman, *At What Cost?*: 5. Delaware has since repealed its upfront \$100 public defense system administrative fee.
145. *Fuller v. Oregon*, 417 U.S. 40, 53 (1974).
146. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (court must inquire whether a person “willfully” refused to pay fines or restitution before revoking probation for that reason).
147. Beeman, *At What Cost?*: 30-31.
148. Beeman, *At What Cost?*: 34.
149. Beeman, *At What Cost?*: 40.
150. Andrew L.B. Davies et al., *Getting Gideon Right: Eligibility for Appointed Counsel in Texas Misdemeanor Cases*, Deason Criminal Justice Reform Center (April 2022): 30, <https://doi.org/10.25172/dc.8>; and Beeman, *At What Cost?*: 80.
151. *Effective Indigence Screening*, Texas Indigent Defense Commission (Sept. 2015): 3, <http://www.tidc.texas.gov/media/8d908c72681520f/effective-indigence-screening.pdf>.
152. Beeman, *At What Cost?*: 77.
153. *Gideon*, 372 U.S. at 345.
154. *Strickland*, 466 U.S. at 685. See also *United States v. Cronin*, 466 U.S. 648, 654 (1984). See Carroll, “Right to Counsel Services in the 50 States”: 111, on how state systems can arguably render counsel ineffective systemically.
155. *Strickland*, 466 U.S. at 688.
156. *Kimmelman v. Morrison*, 477 U.S. 365, 387 (1986).
157. *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

158. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).
159. American Bar Association, *Ten Principles*: 2-3 (references to adequate time and space are in Principles 4 and 5; training in Principles 6 and 9; resources in Principle 8; and oversight in Principle 10).
160. See note 106, Carroll, “Right to Counsel Services in the 50 States”: 111.
161. Primus, “Problematic Structure”: 7-8.
162. Primus, “Problematic Structure”: 8 (citing National Association of Criminal Defense Lawyers, *Gideon At 50: A Three-Part Examination Of Indigent Defense In America, Part I— Rationing Justice: The Underfunding of Assigned Counsel Systems* (March 2013): 14, <https://www.nacdl.org/Document/GideonI-RationingJusticeUnderfundedAssignedCounsel>).
163. Some contractors in Illinois counties, for example, are expected to pay for all case-related expenses, including investigators, out of their own pay. *Right to Counsel in Illinois*, Sixth Amendment Center: 147-148.
164. Primus, “Problematic Structure”: 8-10 (citing *Indiana Public Defense Overhead Costs: Statewide Survey Results & Findings*, *Indiana Public Defender Commission* (2020): 5, <https://www.in.gov/publicdefender/files/Overhead-Survey-Results.pdf>).
165. Margaret A. Gressens, *FY19 Private Appointed Counsel (PAC) Effective Pay Rate Study: Public Defense Attorney Overhead Rates and Access to Benefits*, North Carolina Office of Indigent Defense Services (2019): 2, <https://www.ncids.org/wp-content/uploads/2021/03/FY19-Effective-Pay-Rate-Overhead-Report.pdf>.
166. “In 2012, when South Carolina started using flat-fee contracts instead of paying attorneys by the hour ... the same lawyers reported working 50% fewer hours. When North Carolina made a similar shift in 2008, attorneys ... were 36% more likely to dispose of a case on the same day they met the client.” Primus, “Problematic Structure”: 17-18 (citing Benjamin Schwall, “More Bang for Your Buck: How To Improve the Incentive Structure for Indigent Defense Counsel,” *Ohio State Criminal Law Journal* 14 (2017): 577; and Andrew J. Lee, “Flat Fee Compensation, Lawyer Incentives, and Case Outcomes in Indigent Criminal Defense” (Nov. 23, 2021): 4, [https://andrewlee543.github.io/files/AndrewLee\\_JMP.pdf](https://andrewlee543.github.io/files/AndrewLee_JMP.pdf)).
167. Primus, “Problematic Structure”: 16-17.
168. Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* (2011): 2, <https://justicepolicy.org/research/system-overload-the-costs-of-under-resourcing-public-defense/>.
169. Erika Bolstad, “Public Defenders Were Scarce Before COVID. It’s Much Worse Now,” *The Pew Charitable Trusts Stateline* (June 21, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/21/public-defenders-were-scarce-before-covid-its-much-worse-now>.
170. Nia Prater, “106 Cases, Three Jobs, One Lawyer: The City’s Public Defenders Are Struggling,” *New York Magazine: Intelligencer* (Mar. 7, 2023), <https://nymag.com/intelligencer/2023/03/nyc-public-defenders-face-a-funding-crisis.html>.
171. *Annual Report 2021*, Kentucky Department of Public Advocacy (2022): 8, <https://dpa.ky.gov/wp-content/uploads/2022/03/2021-Annual-Report-FINAL.pdf>.
172. Pamela R. Metzger et al., *Policy Brief: Greening Criminal Legal Deserts in Rural Texas*, Deason Criminal Justice Reform Center (October 2022): 10, 12, <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1009&context=deasoncenter>. A 2017 survey of public defenders and civil legal aid attorneys found that “81 percent of respondents who were aware of PSLF [Public Service Loan Forgiveness] at the time they took their current job reported having been significantly influenced by the program’s promise, with 51 percent indicating they were not likely or certain not to have taken their positions had PSLF not existed.” *Public Service Loan Forgiveness and the Justice System*, National Legal Aid & Defender Association (2018): 5, <https://www.nlada.org/pslf-and-justice>.
173. “Working with clients whose lives sit in the balance can be personally and professionally challenging, and that challenge is exacerbated when the systems operate against our clients’ liberty interests or separate them from their families. The emotional toll of feeling responsible for system challenges that impact our clients is real and can have a tremendous impact on defense team members, sometimes resulting in compassion fatigue and burnout.” *10 Principles for Creating Sustainability in Public Defense*, National Association for Public Defense (2021): 1, <https://www.publicdefenders.us/files/Principles%20for%20Creating%20Sustainability%20in%20Public%20Defense%20Offices%20-%20FINAL.pdf>.
174. Rudi Keller, “Missouri Judge Orders Steps To Avoid Waiting Lists for Public Defenders,” *Missouri Independent* (Feb. 10, 2023), <https://missouriindependent.com/2023/02/10/missouri-judge-orders-steps-to-avoid-waiting-lists-for-public-defenders/>; and Jack Suntrup, “Missouri Public Defenders in ‘Much Better Place’ After Years of Budget Stress, Director Says,” *St. Louis Post-Dispatch* (June 6, 2022), [https://www.stltoday.com/news/local/crime-and-courts/missouri-public-defenders-in-much-better-place-after-years-of-budget-stress-director-says/article\\_c0d117ba-b258-59d7-8bc6-63e96972ce1a.html](https://www.stltoday.com/news/local/crime-and-courts/missouri-public-defenders-in-much-better-place-after-years-of-budget-stress-director-says/article_c0d117ba-b258-59d7-8bc6-63e96972ce1a.html).
175. New York Office of Indigent Legal Services, “Clients are Benefiting From Caseload Relief” (Jan. 2019),

<https://www.ils.ny.gov/files/Hurrell-Harring%20Implementation%20Highlights%202019%20January.pdf>.

176. “Annual Report,” Nevada Department of Indigent Defense Services (July 2022): 12, [https://dids.nv.gov/uploadedFiles/didsnv.gov/content/Annual\\_Report/060322%20updated%20Annual%20Report%202022.pdf](https://dids.nv.gov/uploadedFiles/didsnv.gov/content/Annual_Report/060322%20updated%20Annual%20Report%202022.pdf).

177. Dennis Hoey, “Legislature Votes To Approve Rural Public Defender Office,” *Portland Press Herald* (April 25, 2022), <https://news.yahoo.com/legislature-votes-approve-rural-public-080200437.html>.

178. Robin Steinberg, “Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm,” *Washington & Lee Law Review* 70 (2013): 974, <https://scholarlycommons.law.wlu.edu/wluir/vol70/iss2/6/>.

179. In part this is because trials are exceedingly rare, with 97% of cases resolved by guilty pleas. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How To Save It*, National Association of Criminal Defense Lawyers (2017): 5, <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

180. Steinberg, “Heeding Gideon’s Call”: 987-988.

181. See, for example, “The Center for Holistic Defense Announces 2013 Grant Awardees,” *The Bronx Defenders* (March 21, 2013), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/holisticdefensepr\\_03-13.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/holisticdefensepr_03-13.pdf) (“The following offices will receive training in the holistic defense model: The Alameda County Public Defender Office in Oakland, CA; The Arch City Defenders in St. Louis, MO; the Jefferson County Public Defender in Birmingham, AL; the Office of the Public Defender in Atlanta, GA; the Santa Clara County Public Defender in San Jose, CA; and the Shelby County Public Defender Office in Memphis, TN.”). Still She Rises, a holistic public defender office in Tulsa, Oklahoma, that serves mothers, was founded by Bronx Defenders founder Robin Steinberg. “Our Team,” *Still She Rises Tulsa*, accessed April 2023, <https://stillsherises.org/our-team>.

182. Steinberg, “Heeding Gideon’s Call”: 998.

183. See, for example, Meerah Powell, “Portland Area Public Defenders Say the Cash Bail System Is Broken. They’re Working to Change It.” *Oregon Public Broadcasting* (Nov 4., 2019), <https://www.opb.org/news/article/oregon-cash-bail-system-portland-metro-public-defenders/>; “Decarceration Project,” *The Legal Aid Society*, <https://legalaidnyc.org/programs-projects-units/decarceration-project/>; and “Racial Justice,” *Contra Costa Public Defenders*, <https://www.cocopublicdefenders.org/racial-justice>.

184. Ann M. Miller and Pete Wogsland, “Holistic Defense: An Innovative Model for Public Defender Services” (2018): 2, <https://www.tribal-institute.org/2018/D8Handout2.pdf>.

185. “The absence of a right to free defense counsel in tribal court harms the Indian in state and federal court. The Indian defendant suffers dual investigation and double jeopardy punishment, uncounseled guilty pleas, and waiver of his ICRA [Indian Civil Rights Act] rights in tribal court only to face extensive collateral consequences and direct use of his prior uncounseled convictions by the state and federal court systems that allegedly uphold the right to counsel as fundamental.” Barbara L. Creel, “The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative,” *Michigan Journal of Race and Law* 18 (2013): 351, <https://repository.law.umich.edu/mjrl/vol18/iss2/4>.

186. *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, Department of the Interior, Bureau of Indian Affairs, Federal Register Vol. 88, No. 8 (January 12, 2023), <https://www.federalregister.gov/documents/2019/02/01/2019-00897/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of>.

187. Steven W. Perry, Michael B. Field, and Amy D. Lauger, “Table 7, Tribal Court Systems With Prosecutor and Public Defender Programs, by Resident Population, 2014,” *Tribal Courts in the United States, 2014 – Statistical Tables, Bureau of Justice Statistics* (2021): 9, [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st\\_0.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/tcus14st_0.pdf).

188. Creel, “The Right to Counsel for Indians Accused of Crime,” footnote 248.

189. See Samuel Macomber, “Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to Expansion of Tribal Court Criminal Jurisdiction,” *Cornell Law Review* 106 No. 1 (2020): 294, <https://www.cornelllawreview.org/2020/12/01/disparate-defense-in-tribal-courts-the-unequal-rights-to-counsel-as-a-barrier-to-expansion-of-tribal-court-criminal-jurisdiction/>.

190. See Macomber, “Disparate Defense in Tribal Courts,” 277.

191. The Violence Against Women Reauthorization Act (VAWA) of 2013 expanded tribes’ inherent criminal jurisdiction over non-Indians to crimes involving domestic violence, dating violence, and violations of protection orders. A 2022 VAWA amendment extended that jurisdiction to include crimes involving child violence, sexual violence, stalking, sex trafficking, assaults of tribal justice personnel, and obstruction of justice, effective October 2022. Both VAWA 2013 and 2022 are amendments to the Indian Civil Rights Act, which can be found at 25 U.S.C. § 1304. “VAWA 2022: Special Tribal Criminal Jurisdiction,” National Congress of American Indians (2022), <https://www.ncai.org/tribal-vawa>.



192. For example, a September 2022 report by the California Legislative Analyst's Office found that the state lacks comprehensive and consistent data to measure the effectiveness or quality of indigent defense across the state. It recommended that the Legislature (1) statutorily define appropriate metrics to more directly measure the quality of indigent defense; (2) require counties to collect and report data to the state's Office of the State Public Defender; and (3) use the data to determine future legislative action, such as identifying what resources are needed to ensure effective indigent defense and how such resources could be targeted to maximize their impact. Gabriel Petek, *Assessing the Provision of Criminal Indigent Defense*, California Legislative Analyst's Office (2022): 1, <https://lao.ca.gov/reports/2022/4623/indigent-defense-092222.pdf>.

193. For example, the New York Legal Aid Society's Cop Accountability Project, which "maintains the most comprehensive public database on law enforcement misconduct records in New York City to date." "The Cop Accountability Project," *The Legal Aid Society*, accessed March 2023, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/>.

194. See Appendix 2, Interview Questions for National Subject Matter Experts.

195. For example: "The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether." *Strickland v. Washington*, 466 U.S. 668, 683 (1984); "Counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice." *Strickland* at 704 n.2 (Brennan, concurring).

196. For example: "The guarantees of the 6th Amendment are not met by simply providing the defendant a warm body with a bar card. An accused is in need of and entitled to a zealous, capable advocate who can provide effective assistance consistent with prevailing professional norms." "Caseloads," National Association for Criminal Defense Lawyers (February 28, 2023), <https://www.nacdl.org/Content/Caseloads>.

197. *Actual Denial of Counsel*, Sixth Amendment Center: 12.

198. Percentages do not sum to 100% due to rounding. Thomas H. Cohen, "Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?" (2011): 14-15, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876474](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474).

199. Cohen, "Who's Better at Defending?": 11.

200. Cohen, "Who's Better at Defending?": 12.

201. *Actual Denial of Counsel*, Sixth Amendment Center: 7; and *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, National Association of Criminal Defense Lawyers (2009): 14-15, <https://www.nacdl.org/Document/MinorCrimesMassiveWasteTolofMisdemeanorCourts>.

202. *Annual Report FY21*, Texas Indigent Defense Commission: 18.

203. *Annual Report FY21*, Texas Indigent Defense Commission: 18.

204. Hamer and Schmidt, "America's Dirty Little Secret."

205. Hamer and Schmidt, "America's Dirty Little Secret."

206. The Right to Counsel in Utah, Sixth Amendment Center; and Carroll and Goel, "Gideon's 60th Anniversary."

207. Sixth Amendment Center, *The Right to Counsel in Armstrong County & Potter County, Texas: Evaluation of Adult Trial Level Indigent Defense Representation* (2019); and Carroll and Goel, "Gideon's 60th Anniversary."

208. *Measuring Justice: Defining and Evaluating Quality for Criminal Legal Aid Providers*, International Legal Foundation (2016): 30-33, <https://www.theilf.org/Items/Measuring-Justice>; and *National Indicators of Quality Indigent Defense*, National Legal Aid and Defender Association (2018): 15-19, <https://www.nlada.org/sites/default/files/pictures/2018-03-08%20Quality%20Indicators%20Project%20covered.pdf>.

209. See, for example, James Anderson and Paul Heaton, *Measuring the Effect of Defense Counsel on Homicide Case Outcomes* (2012), <https://www.ojp.gov/pdffiles1/nij/grants/241158.pdf> (supported by NIJ Award Number 2009-IJ-CX-0013).

210. "Standard 13.12 Workload of Public Defenders," *National Advisory Commission on Criminal Justice Standards and Goals* (1973), <https://www.nlada.org/defender-standards/national-advisory-commission/black-letter>.

211. Langton and Farole, *Census of Public Defender Offices, 2007: County-Based and Local Public Defender Programs, 2007*; and Langton and Farole, *Census of Public Defender Offices, 2007: State Public Defender Programs, 2007*.

212. See, for example, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards*, American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP (2022): [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-or-proj-rept.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf).

213. Assumed number of hours available each year for defender casework from Lefstein, *Securing Reasonable Caseloads*: 16, [https://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.pdf](https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.pdf).

214. Nicholas M. Pace et al., *National Public Defense Workload Study*, RAND Corporation (2023): 100, [https://www.rand.org/pubs/research\\_reports/RRA2559-1.html](https://www.rand.org/pubs/research_reports/RRA2559-1.html).
215. *Minor Crimes, Massive Waste*, National Association of Criminal Defense Lawyers: 21-22.
216. The Bronx Defenders has been doing client experience surveys for years and continues to hone and update its research instrument and method. “Client Experience Survey,” *Bronx Defenders*, accessed March 2023, <https://www.bronxdefenders.org/client-experience-survey/>.
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- Public Defender Systems,” *ACLU* (March 8, 2023), <https://www.aclu.org/news/criminal-law-reform/if-you-care-about-freedom-you-should-be-asking-why-we-dont-fund-our-public-defender-systems>.
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265. *Race to the Bottom*, National Legal Aid & Defender Association: ii.
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