

THE PUBLIC'S DEFENDER: ANALYZING THE IMPACT OF ELECTING PUBLIC DEFENDERS

Andrew Howard*

ABSTRACT

Almost every county in the United States elects its chief Prosecutor, but the chief Public Defender, if there is one, is generally an appointed position. In four states, however, some or all of the Public Defender offices have elected leaders. Although prosecutorial elections have been heavily studied and criticized, relatively little attention has been paid to the elections of their counterparts.

This Note sheds light on how Public Defender elections impact a criminal justice ecosystem. A series of interviews with elected Public Defenders reveal these elections can enhance the independence and stature of the position. Additionally, the interviews and additional research rebut the primary criticism of these elections: that voters may elect someone who wanted to work against indigent defendants. There are simply very few examples relative to the many counties that have these elections.

These qualitative findings are supported in part by further quantitative analyses. First, this Note found a correlation of increased Public Defense experience amongst the state judiciary in jurisdictions where there the chief Public Defender is elected. Second, this Note found a correlation between these elections and increased salary parity between Public Defenders and Prosecutors in the same state.

* J.D. Candidate 2020, Columbia Law School; B.A. 2015, University of California, Los Angeles. I would first like to thank my advisor, Professor Jeffrey Fagan, whose wisdom and advice made this possible. I am grateful for the entire *Columbia Human Rights Law Review* staff for their work getting this piece into publishable shape, especially my editors Ruth O'Herron and Jacob Humerick for their thoughtful feedback. I would like to thank my parents, Andy and Lisa; their support has meant everything to me. Finally, I would like to thank the Public Defenders that took the time to talk to me about their amazing work. In particular, I want to thank former San Francisco Public Defender Jeff Adachi, who passed away a few months after our interview; he was a passionate advocate for elected Public Defenders, may he rest in peace.

Accordingly, this Note argues that some counties should explore making their chief Public Defender an elected position. While far from a panacea for the many issues facing the American criminal justice system, these elections could help enhance the quality of indigent defense where implemented.

TABLE OF CONTENTS

Introduction	176
I. Public Defense and Public Defender Elections in the United States	177
II. Analyzing the Effects of Electing Public Defenders	181
A. Identifying the Potential Impact of Public Defender Elections	181
1. Elections as Vehicles for Creating Independent Public Defender Offices	182
2. Elections Serving to Enhance the Stature of Public Defender Offices	184
3. Concerns that Elections Could Result in Conflicted Representation	188
B. Quantitative Comparisons of States with and Without Elected Public Defenders	190
1. The Effect of Public Defender Elections on the Composition of State Judiciaries	191
i. Who Sits on the Bench and Why It Matters	192
ii. Hypothesis and Methodology	195
iii. Results and Analysis	198
2. Defense and Prosecution Salary Parity in Elected Public Defender Jurisdictions	200
i. Analysis of Compensation in Elected and Non-Elected Public Defender States	202
3. Conclusions and Limitations	204
III. Moving Forward: Should Jurisdictions Consider Public Defender Elections?	205
Conclusion	210
Appendix	212

INTRODUCTION

In early 2018, scores of deputy public defenders gathered in Downtown Los Angeles to protest the appointment of the county's Interim Public Defender.¹ To the shock of the nation's oldest Public Defender office, the County Board of Supervisors appointed someone who had never tried a criminal case and had previously worked on behalf of the County Sheriff—one veteran employee called it a “slap in the face.”² The outrage led to a large protest, a petition for her removal, and the production of “#notmyPD” wristbands.³

With the drama surrounding the appointment and the lack of a full time chief Public Defender since 2016, a debate started: should Los Angeles consider electing its Public Defender?⁴ California law allows each county to decide whether the Public Defender should be appointed or elected.⁵ In fact, the Public Defender was first envisioned as an elected position when the concept was first proposed at the turn

1. The county appointed Nicole Davis Tinkham, who had most recently served as senior deputy counsel to the county and before that worked in private practice. Marisa Gerber, *L.A. County Attorneys Who Represent Indigent Clients in Criminal Court Protest Their New Boss*, L.A. TIMES (Feb. 12, 2018), <http://www.latimes.com/local/lanow/la-me-ln-public-defenders-rally-20180212-story.html> [<https://perma.cc/K23C-FHUC>].

2. *Id.* While in private practice, Tinkham represented the L.A. County Sheriff's Department in a civil case involving a deputy who shot a 15-year-old who was holding a toy gun. *Id.*

3. *Id.*; Editorial Board, *Is the New Public Defender Ending or Stoking Office Turmoil?*, L.A. TIMES (Feb. 9, 2018), <http://www.latimes.com/opinion/editorials/la-ed-public-defender-20180209-story.html> (on file with the *Columbia Human Rights Law Review*). The symbolism of the protest was powerful, as employees of the oldest Public Defender office in the nation amassed outside of the Clara Shortridge Foltz Criminal Justice Center, named after the woman credited with creating and spreading the concept of a Public Defender at the turn of the century. *Id.*; see Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173, 174 (2010).

4. Editorial Board, *Why L.A. Doesn't Need an Elected Public Defender*, L.A. TIMES (Mar. 19, 2018), <http://www.latimes.com/opinion/editorials/la-ed-public-defender-20180319-story.html> (on file with the *Columbia Human Rights Law Review*) [hereinafter *Why L.A. Doesn't Need an Elected Public Defender*]. After the protests, the County Board of Supervisors eventually hired Ricardo Garcia, a former supervising attorney and trial attorney at the San Diego County Public Defender's office, whose appointment was met with praise from those who were previously against Tinkham. Nina Agrawal, *L.A. County Hasn't Had a Public Defender in 2 Years. It Just Appointed One*, L.A. TIMES (Aug. 16, 2018), <https://www.latimes.com/local/lanow/la-me-ln-public-defender-20180816-story.html> (on file with the *Columbia Human Rights Law Review*).

5. CAL. GOV. CODE § 27702 (West 2008).

of the twentieth century.⁶ However, San Francisco was the only county in California that chose to elect its Public Defender,⁷ and only three other states have Public Defender elections: Florida, Tennessee, and large parts of Nebraska.⁸

So why are elections for Public Defenders the exception to the rule, while Chief Prosecutors are elected almost everywhere in the United States?⁹ What impact do these elections have on the criminal justice system in that area? Should we stop electing Public Defenders, or should we expand the practice? This Note aims to answer these questions and argues that electing Public Defenders benefits indigent defense under the right circumstances.

Although individual stories of public defender malpractice occasionally make news, this Note looks beyond the headlines to examine the structural forces setting these lawyers up for success or failure. It is clear that management decisions have real impacts on individual clients,¹⁰ and therefore it is important to find the best way to select and support the people who will lead these offices. While elections are certainly not the determinative factor in the success of a Public Defender Office, there is evidence to suggest that electing Chief Public Defenders could benefit results in certain jurisdictions.

I. PUBLIC DEFENSE AND PUBLIC DEFENDER ELECTIONS IN THE UNITED STATES

Throughout the United States, every jurisdiction takes its own approach to Public Defense. In fact, most places do not have a full-time

6. The first movement to establish a Public Defender started in the early 1900s and was led by Clara Shortridge Foltz, an attorney, political activist, and the first woman admitted to legal practice in California. Benner, *supra* note 3, at 174; Clara Shortridge Foltz, ENCYCLOPEDIA BRITANNICA (Aug. 29, 2019), <https://www.britannica.com/biography/Clara-Shortridge-Foltz> [<https://perma.cc/BZ3Q-Z8ZR>]. Foltz believed that the chief public defender should be elected and represent not only indigent defendants but anyone who wanted the office's services. Benner, *supra* note 3, at 178–79.

7. In every other county the Public Defender is appointed by the county government. Benner, *supra* note 3, at 203.

8. Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 814 (2010).

9. *Id.* at 804.

10. James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 823 (2019) (“Holistic representation does not affect conviction rates, but it does reduce the likelihood of a custodial sentence by 16% and the expected sentence length by 24%.”).

Public Defender office, and instead use Assigned Counsel Plans¹¹ or Fixed Price Contract Providers.¹² However, over the years, more jurisdictions—and in particular more populated areas—have adopted the Public Defender model.¹³ Every Public Defender office is different, but they are defined by the creation of a jurisdictional office that employs staff attorneys to provide representation to indigent clients.¹⁴ Creating a reliable, professional staff of well-trained criminal defense attorneys generally leads to better results.¹⁵

Within the Public Defender framework, office chiefs are selected in different ways.¹⁶ The most common method is appointment by a statewide public defense policy coordinating board, generally consisting of members appointed by state officials.¹⁷ The next most

11. Assigned Counsel Plans consist of private attorneys who are paid by the hour from public funds. They often face low hourly rates for their services and many jurisdictions have a maximum number of reimbursable hours, even for capital cases. See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 304 (2002). The Assigned Counsel system, particularly ad hoc assignment, is the predominant method of providing indigent defense in the country, particularly in less populated counties. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, LAW & CONTEMP. PROBS., Winter 1995, at 31, 33.

12. In Fixed Price Contract systems, a jurisdiction enters into a contract with a group of private attorneys, firms, bar associations, or nonprofits to provide representation. Although some of the best Public Defender offices in the country operate within contract systems, many jurisdictions are drawn to this approach as a way to cut costs. Spangenberg & Beeman, *supra* note 11, at 33; see also Matthew Van Meter, *The Defenders*, AWL (Apr. 25, 2016), <https://www.theawl.com/2016/04/the-defenders> [<https://perma.cc/HBR2-CUYR>] (discussing how New York City provides indigent defense through a contract system with various non-profits, and how the Bronx Defenders and other New York City-based Public Defense non-profits are considered amongst the best in the country).

13. Spangenberg & Beeman, *supra* note 11, at 36.

14. *Id.*

15. This Note acknowledges that there is no single metric to measure the success of an indigent defense representation system, but there is quantitative and qualitative evidence to suggest that Public Defender offices generally perform better than the other systems. For example, a study found that one Public Defender office reduced overall expected time served in prison by 24% and had a conviction rate for murder cases that was 19% lower compared to appointed counsel. M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 182–88 (2012) (explaining the superior results by public defenders in Philadelphia, citing the “public defenders’ steady salaries, financial and institutional independence from judges”).

16. Wright, *supra* note 8, at 812–13.

17. *Id.* at 812. An example of a coordinating board can be found in Minnesota, where the seven-member State Board of Public Defense appoints the state public

common method is direct appointment by a governor, state official, or other local elected officials.¹⁸ There are also a few jurisdictions that rely on one or more trial judges to appoint the Public Defender.¹⁹

defender, the chief administrator, and a chief public defender for each of the state's ten judicial districts. See REBECCA PIRIUS, MINN. HOUSE OF REPRESENTATIVES, MINNESOTA'S PUBLIC DEFENDER SYSTEM (Sept. 2016), <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpds.pdf> [<https://perma.cc/KS2W-TFTT>].

18. Wright, *supra* note 8, at 813.

19. *Id.*

Finally, in San Francisco,²⁰ Florida,²¹ Tennessee,²² and Nebraska,²³ voters get to choose who runs the Public Defender office.

20. The exact reason San Francisco chose when it was first established in 1921 to elect its Public Defender, unlike every other county in the state, is unknown. However, the story passed down is that the first Public Defender, Frank J. Egan, was a young, upcoming politician and lawyer. Other political leaders were concerned he might run for the District Attorney position, so they appointed him to become the first Public Defender and established it as an elected office to raise its profile. Telephone Interview with Jeff Adachi, San Francisco Public Defender (Oct. 26, 2018) [hereinafter Adachi Interview]. The San Francisco Public Defender's Office is considered amongst the highest quality and most innovative offices in America. See SAN FRANCISCO PUBLIC DEFENDER, JUSTICE AT NINETY: 2012 CALENDAR AND ANNUAL REPORT (2011), <http://sfpublicdefender.org/wp-content/uploads/sites/2/2012/06/2012-calendar-2011-annual-report.pdf> [https://perma.cc/KJ8Y-XTT5] (providing an overview of the history of the San Francisco Public Defender's Office, including various innovations and high-profile cases).

21. Public Defense was established in Florida in response to the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The original statute established elections for the Public Defender in each judicial circuit; this was pushed by legislators from the four more urban districts that had existing Public Defender programs and did not want state officials to have appointment powers and interfere with the stability of existing operations. FLA. STAT. ANN. § 27.50 (West 1974); Wright, *supra* note 8, at 814. Although Florida's system has faced serious obstacles, including extremely high caseloads, it also has a well-organized Public Defense lobby, innovative approaches to defense and community outreach, and salary increases for assistant public defenders in recent years. Telephone Interview with Carlos Martinez, Public Defender, Miami-Dade County (Oct. 25, 2018) [hereinafter Martinez Interview]; David Ovalle, *Public Defenders May Get Raise—And Miami's State Attorney Is Not Happy About It*, MIAMI HERALD (May 1, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article-147919679.html> (on file with the *Columbia Human Rights Law Review*).

22. When *Gideon* was decided, Tennessee only had two Public Defender offices. The Davidson County (which includes Nashville) Public Defender was elected, and the legislature gradually expanded this system across the state to meet its indigent defense needs. *A Short History of the Public Defender*, NASHVILLE DEFENDERS, <http://publicdefender.nashville.gov/about-us/a-short-history-of-the-public-defender/> [https://perma.cc/M6Z5-E9BM]; TENN. CODE ANN. § 8-14-102 (West 2019).

23. In 1922, Nebraska enacted a statute authorizing counties to create Public Defender offices, followed by the creation of the Omaha Public Defender. NEB. REV. STAT. ANN. § 23-3401 (West 2019); Bennet G. Hornstein, *Effective Indigent Criminal Defense Services in Nebraska State Courts*, 7 CREIGHTON L. REV. 1, 13 (1973). The original statute provided that any county with a population over 100,000 shall establish an office of the public defender, and they shall be elected every four years. NEB. REV. STAT. ANN. § 23-3401 (West 2019). Today, 38 of the current 93 counties in the state have elected Public Defenders, and those offices oversee all of the largest population areas. *Nebraska*, GIDEON AT 50, <http://gideonat50.org/in-your-state/nebraska/#state-independence> [https://perma.cc/U4QE-WUJA].

II. ANALYZING THE EFFECTS OF ELECTING PUBLIC DEFENDERS

Although there has been public debate and scholarly research regarding Public Defender elections, there is a lack of formal analysis comparing localities that elect Public Defenders and those that do not.²⁴ The absence of this research is unfortunate but understandable; considering the innumerable factors that influence a particular region's criminal justice system, it is impossible to attribute any specific outcome to whether or not the chief officer is elected. However, this section strives to bridge the gap on what effects these elections may have.

Section II.A, using existing literature and interviews with elected Public Defenders across the country, identifies the potential impacts of these elections. Section II.B uses quantitative analyses in an attempt to support the observations of elected Public Defender jurisdictions. First, through analyzing the composition of state judiciaries, Section II.B finds that electing Public Defenders is correlated with a greater prevalence of judges with public defense experience. Second, through comparing the compensation of public defenders and prosecutors, this Section II.B further explores a correlation of increased salary parity in states with elected Public Defenders versus similar states with other means of selection. These analyses support the experiences of elected Public Defenders and suggest that some jurisdictions benefit from electing their chief Public Defender.

A. Identifying the Potential Impact of Public Defender Elections

A series of interviews with elected Public Defenders revealed three potential impacts of Public Defender elections: *independence*, *stature*, and *conflict*.²⁵

24. See Wright, *supra* note 8 (finding that elected Public Defenders are reelected at extremely high rates and often run unopposed); see also Bryan C. McCannon, Debundling Accountability: Prosecutor and Public Defender Elections in Florida 27 (Feb. 3, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204623 [<https://perma.cc/Z5QQ-7T96>] (finding that public defenders in elected jurisdictions are able to obtain plea bargains at a higher rate and secure acquittals for their clients when up for reelection).

25. Interviews were conducted with elected Public Defenders in the four jurisdictions that have them: Carlos Martinez of Miami-Dade County (Florida), Jeff Adachi of San Francisco (California), Joe Nigro of Lancaster County (Nebraska), and Mark Stephens of Knox County (Tennessee). See Martinez Interview, *supra* note 21; Adachi Interview, *supra* note 20; Telephone Interview with Joe Nigro,

1. Elections as Vehicles for Creating Independent Public Defender Offices

It is difficult to imagine a selection process that provides more independence than an election. Because elected Public Defenders do not need to answer to a board or a politician, they are free to run their offices without pressures from higher officials hampering their efforts. Independence is vital to the creation of a successful public defense system. The first principle of the American Bar Association's "Ten Principles of a Public Defense Delivery System"²⁶ requires that the "public defense function, including the selection, funding, and payment of defense counsel, is *independent*."²⁷

In interviews with elected Public Defenders in the four states that have them, they each recognized the importance of office independence and their elections as a means of protecting that independence.²⁸ One contrasted his freedoms with stories of colleagues

Lancaster County Public Defender (Oct. 26, 2018) [hereinafter Nigro Interview]; Telephone Interview with Mark Stephens, Public Defender for Knox County (Jan. 25, 2018) [hereinafter Stephens Interview]. These interviews are on file with the author. When citing assertions shared by all four Public Defenders interviewed, they are referred to hereinafter as Interviews. Sadly, Mr. Adachi passed away in February 2019; Manohar Raju succeeded him as San Francisco Public Defender. Evan Sernoffsky, *New SF Public Defender Mano Raj Intends to Build on Adachi's Legacy*, SAN FRANCISCO CHRON. (Mar. 16, 2019), <https://sfchronicle.com/crime/article/New-SF-Public-Defender-Mano-Raju-intends-to-build-13692950.php> [https://perma.cclL9MF-HNRZ].

26. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter TEN PRINCIPLES].

27. *Id.* at 1 (emphasis added). This sentiment has been echoed by our highest court: in *Polk Cty. v. Dodson*, the Supreme Court held that public defenders do not act under color of state law and that "a defense lawyer best serves the public, not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client." 454 U.S. 312, 312 (1981). Many of the original concerns regarding public defender independence stem from areas where counsel is appointed by judicial officials, but these concerns also exist in public defense systems where an office chief can be hired or fired by other political actors. See generally David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017) (explaining the constitutional, ethical, and policy problems presented by judicial control of the federal public defense system); SCOTT WALLACE & DAVID CARROLL, NAT'L LEGAL AID & DEF. ASS'N, THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS 12 (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf> [https://perma.cc/69D8-TQX9].

28. Jeff Adachi, former Public Defender of San Francisco, said, "I hear, day after day, war stories from appointed public defenders who essentially have to work

in other jurisdictions expressing worries over getting fired for being too aggressive on behalf of their clients.²⁹ From the lived experiences of these Public Defenders and other observers, elections provide a unique political independence to public defender offices.³⁰

This independence has also allowed elected Public Defenders to push back on unmanageable caseloads without the risk of being removed.³¹ This was highlighted in Florida, where the Eleventh Judicial Circuit's Public Defender challenged its caseload as excessive in court, ultimately winning when the Florida Supreme Court ruled in its favor.³² Current Miami-Dade County Public Defender, Carlos Martinez, believes that elections provided the office with an aura of public accountability necessary for the lawsuit's success in the face of the powerful opposition.³³ Although caseload lawsuits are not unique to elected Public Defender offices, in non-elected jurisdictions the lawsuits have generally not been filed by the offices themselves.³⁴

Elected Public Defenders have also shown an ability to expose police misconduct in their jurisdictions.³⁵ Due to consistent

to please the political branch of government that provides funding or oversees them." Adachi Interview, *supra* note 20.

29. Nigro Interview, *supra* note 25.

30. See WALLACE & CARROLL, *supra* note 27, at 12; Interviews, *supra* note 25.

31. San Francisco Public Defender Jeff Adachi said that his elected status allows him to better manage caseloads and even refuse cases when necessary to ensure that attorneys can spend enough time on each case. Adachi Interview, *supra* note 20.

32. The Eleventh Judicial Circuit, which encompasses Miami-Dade County, prevailed despite attempts by the Florida Legislature to ban Public Defenders from withdrawing from cases on the grounds of capacity and attempts to privatize the office. See L. Jay Jackson, *Miami-Dade's Overburdened PD's Office May Decline New Clients, Florida Court Says*, A.B.A. J. (Oct. 1, 2013), http://www.abajournal.com/magazine/article/miami-dades_overburdened_pds_office_may_decline_new_clients_florida_court_s [<https://perma.cc/Y9T8-LYQ7>]; Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261 (Fla. 2013); Fla. Stat. Ann. § 27.5303 (West 2009).

33. Martinez Interview, *supra* note 21.

34. See, e.g., Editorial, *Poor and Need a Lawyer in Missouri? The Public Defender System Is Failing Its Clients*, KAN. CITY STAR (June 29, 2018), <https://www.kansascity.com/opinion/editorials/article214001804.html> (on file with the *Columbia Human Rights Law Review*) (discussing the lawsuit brought by the American Civil Liberties Union "claiming spending for indigent defense in the state is simply too low" in the wake of complaints from local public defenders).

35. In Florida's Seventeenth Judicial Circuit, Public Defender Howard Finkelstein helped expose corruption within the Broward County Sheriff's Office. Zachary Phillips, *Why Does Florida Have Public Defender Elections?*, 26 ST.

interactions with law enforcement, Public Defender offices are in a unique position to spot inappropriate policing practices. This independence can insulate them from the potential political blowback of exposing these incidents. In contrast, Public Defenders who serve at the pleasure of other politicians or appointees may lack the job security to come forward. Independence allows elected Public Defenders to “become watchdogs against police and prosecutorial misconduct and reformers of the justice system, ensuring it works equally for everyone.”³⁶

2. Elections Serving to Enhance the Stature of Public Defender Offices

Electing chief Public Defenders can increase the stature of the position. Political science and psychology research has found “evidence that elections strengthen the perceived legitimacy of collective action.”³⁷ This Section explores the ways this enhanced stature provides real benefits to Public Defenders.

THOMAS L. REV. 322, 327 (2014). The Public Defender of San Francisco played a pivotal role in the exposure of the “Henry Hotel” scandal. There, the San Francisco Public Defender’s office orchestrated the release of video footage showing San Francisco Police Officers conducting illegal searches in residential motels, which ultimately resulted in six indictments for law enforcement officers that were involved. See Adachi Interview, *supra* note 20; see also Bob Egelko, ‘Day of Shame’: Ex-SFPD Sergeant Gets Prison in Scandal, SFGATE (Feb. 23, 2015), <https://www.sfgate.com/crime/article/Ex-SFPD-Sgt-Ian-Furminger-gets-prison-for-6096649.php> [<https://perma.cc/2T6V-A47L>]; Tamara Aparton, *New Henry Hotel Footage Further Implicates SFPD*, S.F. PUB. DEFENDER (Mar. 7, 2011), <http://sfpublicdefender.org/news/2011/03/henry-hotel-footage-implicates-sfpd> [<https://perma.cc/7EW8-GRST>].

36. Adachi Interview, *supra* note 20. Recent reported examples of Public Defenders who lost or were threatened with losing their job due to political issues can be found in Harris County, Texas and Birmingham, Alabama. See Zach Despart, *Harris County Defense Lawyers Rally in Support of Public Defender Under Investigation*, HOUS. CHRON. (June 11, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-defense-lawyers-rally-in-support-of-12985831.php> [<https://perma.cc/X4K8-LFML>] (defending the Public Defender who faced political pressure after supporting a class action against Houston’s money bail system); see also Kent Faulk, *Jefferson County Public Defender Departs: Did She Resign or Was She Fired?*, AL.COM (July 21, 2016), https://www.al.com/news/birmingham/index.ssf/2016/07/jefferson_county_public_defend.html [<https://perma.cc/VH36-UA9N>] (reporting on Public Defender who stated she was fired).

37. Wright, *supra* note 8, at 825 (citing Christopher Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Heather

First, being an elected official increases a Public Defender's political power and their ability to advocate on behalf of indigent defense issues. Since funding and policy issues are decided by other elected officials, elected Public Defenders have observed that they benefit from the deference elected officials have for one another.³⁸ In states with multiple Public Defenders, these actors have organized to effectively lobby state legislatures.³⁹ In San Francisco, the Public Defender noted the importance of having a "bully pulpit" to balance out the elected District Attorney and advocate for issues important to his office.⁴⁰

Second, these elections can shed light on issues of indigent defendants and bring them into the public discourse. The realities of the election process require candidates to create a platform that the electorate can use to make its decision. By bringing Public Defenders into the political process, there is an opportunity for issues surrounding indigent defense to enter the political discussion.⁴¹

Gerken et al. eds., 2011); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003)).

38. Mr. Martinez emphasized an unspoken "convening power"; when necessary, he has been able to assemble community stakeholders, ranging from prosecutors, police, corrections officers, and more, to come together and discuss important issues. Martinez Interview, *supra* note 21. Mr. Nigro discussed his placement on the Nebraska Supreme Court's Committee on Problem-Solving, where he has helped lead the establishment of Veterans Courts and is pushing to create Mental Health Courts in the state. Nigro Interview, *supra* note 25. Additionally, elected Public Defenders can be politically powerful figures, especially considering that sometimes the constituency of a Public Defender is significantly larger than any individual state legislator. *E.g.*, Martinez Interview, *supra* note 21 ("My position is county wide, which is 1.3 million voters, and the Senators and Representatives, a lot of their districts are a lot smaller than that.").

39. See Nigro Interview, *supra* note 25 (explaining that he works together with other Public Defenders in the state through the Nebraska Criminal Defense Attorney Association, which employs a lobbyist in private practice to advocate on various criminal justice issues in the state legislature); see also FLORIDA PUBLIC DEFENDER ASSOCIATION, <https://www.flpda.org/home> [https://perma.cc/A4JY-J58R] (homepage of non-profit association consisting of Public Defenders throughout Florida); Martinez Interview *supra* note 21 (highlighting the success of lobbying efforts to increase salaries for associate public defenders despite no other raises for other government employees); Stacey Shrader, *Public Defenders Conference Elects New Director*, TENN. B. ASS'N (Jul. 1, 2016), <https://www.tba.org/news/public-defenders-conference-elects-new-director> [https://perma.cc/39C5-3LBD] (discussing the new executive director of the Tennessee District Public Defenders Conference).

40. Adachi Interview, *supra* note 20.

41. See Wright, *supra* note 8, at 825. A look at the platform of Lancaster County Public Defender Joe Nigro reads more like that of a liberal legislator than

However, any of those benefits must be taken in the context of general engagement with local electoral politics. Research on Public Defender elections in Tennessee and Florida revealed that incumbents were reelected at an extremely high rate;⁴² this could be interpreted as a relative lack of engagement with indigent defense issues.⁴³ Additionally, voter turnout in local elections is comparatively low and one elected Public Defender has even acknowledged that most voters do not go to the polls with public defense in mind.⁴⁴

a public servant. *A Message from Joe*, JOE NIGRO FOR PUBLIC DEFENDER, <https://www.joeknowsdefense.com/> [https://perma.cc/AA2J-XTHG] (outlining his platform of 1) ending money bail, 2) establishing mental health courts and advocating for increased mental health services, and 3) working to treat addiction as a health rather than a criminal problem); *see also* Telephone interview with Joe Nigro, *supra* note 25; *Values*, JEFF ADACHI FOR PUBLIC DEFENDER 2018, <http://www.jeffadachi2018.com/values.html> (last visited Dec. 23, 2018) (highlighting Adachi's work to establish Drug and Behavioral Health Courts, as well as youth programs that help provide school supplies and other resources); *Meet Martesha*, MARTESHA JOHNSON FOR PUBLIC DEFENDER, <https://web.archive.org/web/20180822024119/http://marteshajohnson.com/meet-martesha/> [https://perma.cc/Y8FD-5NHM] (emphasizing Johnson's partnership with community addiction and mental health organizations, as well as her activism for criminal justice through DEFEND Nashville).

42. *See* Wright, *supra* note 8, at 816.

43. *Id.* (finding that Public Defenders were re-elected at rates even higher than those of prosecutors).

44. In an interview, Chief Public Defender of Knox County Mark Stephens maintained that voters do not care about the election of the Public Defender. *See* Stephens Interview, *supra* note 25; *see also* Kriston Capps, *In the U.S., Almost No One Votes in Local Elections*, CITYLAB (Nov. 1, 2016), <https://www.citylab.com/equity/2016/11/in-the-us-almost-no-one-votes-in-local-elections/505766/> [https://perma.cc/6UXP-B8M4] (finding that voter turnout in local elections is incredibly low, especially among young residents). However, observers may take solace in the increased attention to local prosecutorial elections; this trend may suggest increased interest in local criminal justice issues and elected Public Defenders may benefit from the increased attention on local prosecutors. This movement can be seen in the election of progressive Philadelphia District Attorney Larry Krasner, who has been the subject of national headlines. *See* Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> (on file with the *Columbia Human Rights Law Review*); *see also* *Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> [https://perma.cc/B73M-VJFA] ("Great strides have been made in promoting justice reforms that recognize that prior "tough on crime" and incarceration-driven practices have not always resulted in safer or healthier communities. New thinking has started to permeate criminal justice agencies and has prompted proactive and prevention-oriented strategies.").

Lastly, many elected Public Defenders have leveraged their positions to implement what is referred to as “holistic defense.”⁴⁵ Holistic defense is a model in which public defenders work in interdisciplinary teams to address the immediate needs of a defendant as well as the underlying circumstances that contribute to his or her contact with the criminal justice system.⁴⁶ Interviews with elected Public Defenders revealed longstanding practices in line with the holistic defense approach.⁴⁷ Whether it was employing social workers as a part of the public defense staff,⁴⁸ community expungement projects,⁴⁹ or efforts to expand immigration services,⁵⁰ it is clear that offices with elected Public Defenders have been able to advocate for and implement many ambitious projects.⁵¹ In reference to San Francisco’s recent creation of a new immigration unit, Public Defender Jeff Adachi asserted that there was “no question that it could not have happened if I wasn’t elected.”⁵² These stories suggest that elections

45. See *Holistic Defense, Defined*, BRONX DEFENDERS, <https://www.bronxdefenders.org/holistic-defense> [<https://perma.cc/BE2P-4UZM>].

46. See *id.* (explaining that the Bronx Defenders are a leader in holistic defense and are the creators of the Center for Holistic Defense, which seeks to expand the practice and identifies four core pillars of holistic criminal defense: 1) seamless access to services that meet legal and social support needs, 2) dynamic, interdisciplinary communication, 3) advocates with an interdisciplinary skill set, and 4) a robust understanding of, and connection to, the community served); Anderson, *supra* note 10, at 825.

47. See Interviews, *supra* note 25.

48. See Nigro Interview, *supra* note 25.

49. See Martinez Interview, *supra* note 21.

50. See Martinez Interview, *supra* note 21 (discussing the employment of immigration attorneys in his office); Nathan Falstreau, *Public Defender Launches Immigration Unit to Defend Residents at Risk of Deportation*, HOODLINE (May 23, 2017), <https://hoodline.com/2017/05/public-defender-launches-immigration-unit-to-defend-residents-at-risk-of-deportation> [<https://perma.cc/78J3-F78C>] (announcing the creation of a new legal team “tasked with defending local residents who are locked in detention and facing deportation charges,” and noting that the project was a result of “a deal brokered by District 1 Supervisor Sandra Lee Fewer and Mayor Ed Lee”).

51. This Note is not arguing that appointed Public Defenders cannot install such ambitious projects, but rather recognizes that elected Public Defenders have highlighted the importance of their elected mandate in making these initiatives possible. See Interviews, *supra* note 25. It is also important to take note of the high rate at which these elected offices have these programs, which are certainly not the norm across the country.

52. Adachi Interview, *supra* note 20. It should be noted that San Francisco is one of only a few Public Defender offices to establish an immigration program like this. Others include offices in New York City, where public defense work is contracted with a series of well-regarded non-profits, and Alameda, a California county where the Public Defender is appointed. See Ali Winston, *Alameda County*

increase the stature of chief Public Defenders, allowing them to better advocate for indigent defense issues in their localities.

3. Concerns that Elections Could Result in Conflicted Representation

The primary concern of critics of Public Defender elections is the possibility that voters would elect someone whose beliefs conflict with providing the best possible defense to their clients.⁵³ Separate from the general conflict of interest ethical issues that all Public Defender offices face, there is a worry that “tough-on-crime” voters may try to elect someone who wants to see more people accused of crimes in jail.⁵⁴ Alternatively, some worry that elections would put voters in the “perverse position of choosing the least effective defense lawyer for indigent people accused of crimes.”⁵⁵ It is easy to imagine some combination of disdain for indigent defendants on the part of a candidate or the electorate that could result in devastating effects for public defense in a region.

Despite these concerns, this is not a reality in most places. Research on Public Defender elections in Florida and Tennessee suggest that there is no widespread “race to the bottom” taking place in Public Defender races.⁵⁶ This sentiment was echoed in most interviews with chief Public Defenders; most Public Defenders interviewed could not recall an instance in which a Public Defender with conflicting priorities won an election.⁵⁷

Public Defender Stands Up for Immigrants, EAST BAY EXPRESS (Aug. 20, 2014), <https://www.eastbayexpress.com/oakland/alameda-county-public-defender-stands-up-for-immigrants/Content?oid=4048368> [<https://perma.cc/VR8H-VDDG>].

53. See *Why L.A. Doesn't Need an Elected Public Defender*, *supra* note 4; Phillips, *supra* note 35, at 341 (claiming that a “race to the bottom approach . . . could take hold of . . . public defender campaigns [and] could seriously impair the court system of Florida.”).

54. See Wright, *supra* note 8, at 822.

55. *Why L.A. Doesn't Need an Elected Public Defender*, *supra* note 4.

56. See Wright, *supra* note 8, at 804, 822.

57. See Adachi Interview, *supra* note 20; Nigro Interview, *supra* note 25; Martinez Interview, *supra* note 21. There were two instances in which those interviewed recalled a problematic candidate, but in both cases the person lost the election. The more recent incident involved Ron Filipkowski, a candidate for the 12th Circuit Public Defender in Florida, who advocated working with the Sheriff's department to identify undocumented clients to be deported. Filipkowski lost the Republican primary by the narrow margin of 416 votes out of about 47,000 cast. His opponent, Larry Eger, went on to win the general election against the Democratic candidate by a narrow margin (50.5% to 49.5%). Although his eventual loss may be

In many of these jurisdictions, the Public Defender has been elected for decades.⁵⁸

However, Mark Stephens, the Elected Public Defender for Knox County, Tennessee, highlighted some issues he had with public defense elections in his state.⁵⁹ While acknowledging the positive aspects of being elected, he emphasized his concerns regarding a few instances in other Tennessee counties where Assistant District Attorneys have won elections to become the chief Public Defender.⁶⁰ He believes these Assistant District Attorneys are attracted to the chief Public Defender salary and use their prosecutorial experience to get into office.⁶¹ He has advocated for the formation of an oversight board for the Tennessee Public Defender system to mitigate any negative effects of these potentially conflicted representatives.⁶² Although the exact effects of former prosecutors becoming chief Public Defenders in Tennessee are unclear, it is undoubtedly a worrisome trend.

Additional research revealed no other instances of conflicted chief Public Defenders, with the significant exception of Matt Shirk,

evidence of the election system working as intended, how close he was able to come to leading the office should rightfully scare any observers of this system. See Todd Ruger, *Public Defender Candidates Took 2 Paths in Same Office*, HERALD TRIB. (Oct. 6, 2008), <https://www.heraldtribune.com/news/20081006/public-defender-candidates-took-2-paths-in-same-office> [https://perma.cc/5MK3-3B4Q]; *November 4, 2008 General Election*, FLA. DEPT OF STATE, DIVISION OF ELECTIONS, <https://results.elections.myflorida.com> (last visited March 17, 2020) (select “2008 General” in election dropdown and then “Public Defender” in office dropdown).

58. San Francisco has elected its Public Defender since the 1920s, while Florida and Tennessee have had elections since the 1960s. See *supra* Section I.B.

59. See Stephens Interview, *supra* note 25.

60. In Hamilton County, Tennessee, incumbent Public Defender Ardena Garth lost her bid for reelection to Republican challenger Steve Smith, who was formerly an Assistant District Attorney. Smith campaigned on removing delays in the trial process; he highlighted that many indigent clients cannot make bail, and therefore delays cause them to languish in jail. He said, “[i]f a person is facing an accusation and the government wants to take away their liberty or property it must go to trial.” Steve Smith won his bid and enacted large changes to the office staff. See Todd South, *Hamilton County Public Defender Faces GOP Challenger*, TIMES FREE PRESS (Jun. 24, 2014), <https://www.timesfreepress.com/news/local/story/2014/jun/24/hamilton-public-defender-faces-gop-challenger/250523/> [https://perma.cc/D5JB-4JYX]; *Public Defender Steve Smith Puts New Staff into Place*, CHATTANOOGAN (Sep. 11, 2014), <https://www.chattanooga.com/2014/9/11/284083/Public-Defender-Steve-Smith-Puts-New.aspx> [https://perma.cc/CV3K-GAA8].

61. Stephens emphasized the popularity of tough-on-crime politics in Tennessee. Stephens Interview, *supra* note 25.

62. Stephens said that this policy proposal has made him unpopular with some of the other Public Defenders in the state. Stephens Interview, *supra* note 25.

the former Public Defender in Jacksonville, Florida. His disastrous tenure was marked by firing the office's most experienced trial attorneys, awful results for clients,⁶³ and multiple ethical and sexual harassment scandals.⁶⁴ This culminated with a grand jury calling on him to resign, but he was protected by the Florida Constitution and stayed in office until he ultimately lost his reelection campaign.⁶⁵

Although the case of Matt Shirk should not be overlooked, he may be the exception that proves the rule: there is no consistent evidence that Public Defender elections produce conflicted office chiefs.

B. Quantitative Comparisons of States with and Without Elected Public Defenders

This Section aims to use quantitative analyses to measure the experiences highlighted by elected Public Defenders in interviews. It is impossible to completely enumerate qualities like independence and stature; instead this Section looks at proxies that could provide support for the observational differences between the criminal justice ecosystems of jurisdictions that elect Public Defenders and similar

63. Shirk appointed and oversaw a head of homicide defense tasked with representing the most clients to receive the death penalty of any attorney in Florida. This included one death sentence that was ultimately reversed for ineffective assistance of counsel. Robert J. Smith, *The Worst Lawyers*, SLATE (Nov. 04, 2015), <https://slate.com/news-and-politics/2015/11/the-worst-defense-lawyers-for-death-penalty-cases-in-arizona-florida-louisiana.html> [https://perma.cc/BYH2-3NQ5]; Andrew Pantazi, *Former Judge Charlie Cofer Topples Public Defender Matt Shirk with Three Times the Vote*, JACKSONVILLE.COM (Aug. 30, 2016), <https://www.jacksonville.com/news/politics/2016-08-30/story/former-judge-charlie-cofer-topples-public-defender-matt-shirk-three> [https://perma.cc/FS3U-N6B8].

64. These scandals included taking on a new client after winning the election, knowing he would need to drop her and still billing her \$3,750, as well as rehiring a friend who had resigned after being charged with stealing from poor clients. Shirk then decided to take on a high-profile murder case, despite having never handled a homicide, and participated in a documentary about the murder in which he revealed private details the client told him. This incident resulted in a grand jury finding that Shirk violated attorney-client privilege. Outside of his legal work, he “hired three women improperly, two straight from a nightclub and at least one, he later admitted, because of her attractiveness.” He also engaged in sexual communications with women in the office, drank with them in the office, and even invited them to shower with him. Pantazi, *supra* note 63.

65. *Id.* Shirk lost the Republican primary, earning only 24.6% of the vote. *August 30, 2016 Primary Election, Republican Primary*, FLA. DEP'T OF STATE, DIVISION OF ELECTIONS, <https://results.elections.myflorida.com> (last visited March 17, 2020) (select “2016 Primary” in election dropdown and then “State Attorney / Public Defender” under Republican Primary office dropdown).

ones that do not. First, this Section measures whether elected Public Defender jurisdictions have more judges with prior criminal defense experience on the bench. Second, this Section analyzes whether election states have greater salary parity between prosecutors and public defenders. This Note employs comparative analyses between states; this required focusing on Florida and Tennessee, the only states that elect their Public Defenders statewide.⁶⁶ While there are undoubtedly limitations to any comparative analysis as it is impossible to factor for all of the differences between two states, Georgia and Arkansas were found to be the best comparison states for Florida and Tennessee respectively.⁶⁷

Although these analyses are not conclusive and limited in scope, the results support some of the positive factors associated with elected Public Defenders.

1. The Effect of Public Defender Elections on the Composition of State Judiciaries

This Section examines whether electing a chief Public Defender has a correlational effect on the composition of state judiciaries. Section 1.i asserts that former public defenders are underrepresented on the bench compared to prosecutors and highlights the negative consequences of this imbalance. Section 1.ii hypothesizes that Public Defender elections will result in more former public defenders on the bench and outlines the methodology for testing this

66. INDIGENT REPRESENTATION TASK FORCE, LIBERTY & JUSTICE FOR ALL: PROVIDING RIGHT TO COUNSEL SERVICES IN TENNESSEE 123 (2017) <http://www.tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf> [perma.cc/7AXW-MPQT]. Shelby County, Tennessee, which contains Memphis, is the only exception to otherwise statewide Public Defender elections in either state. Considering the unique size and culture of San Francisco, it would be difficult to identify one major city to adequately compare it to. Large parts of Nebraska do not have a Public Defender, and it uses merit selection for its trial-level judiciary. *Judicial Selection in Nebraska*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Nebraska [https://perma.cc/JC66-V5JR].

67. Based on research of important factors influencing criminal justice policy, comparison states were determined by finding the closest matches with regard to: state population, violent crime per 100,000 people, percentage of white residents, method of judicial selection, the composition of the state government, geographic proximity, and the model for indigent funding. See Appendix, Table A. These factors are not determinative, nor is balancing them an exact science; but for the purposes of this comparative analysis, it is clear that there are significant demographic, political, and structural consistencies between these states that will serve to reduce the degree to which non-factored variables influence the analyses.

assertion. Finally, Section 1.iii analyzes the results, finding a correlation between the Public Defender elections and more former public defenders serving as state trial court judges.

i. Who Sits on the Bench and Why It Matters

A look across the federal and state judiciaries suggests that certain career paths are more common amongst judges and can predict how they will perform when they get there. Prosecutors are well represented in the American judiciary, while there are relatively few public defenders. On the federal level, there is evidence that this bias against public defenders permeates throughout the federal judiciary.⁶⁸ An analysis of Obama-era judicial nominations for federal district and circuit court judges found that 41% of nominees had previously worked as prosecutors, while only 14% had experience working in public defense.⁶⁹

There is less aggregated information regarding the careers of state court trial judges, but available research suggests a similar trend.⁷⁰ A 2011 study of state supreme court judges found that 33% of

68. See William M. Kunstler, *Too Many Prosecutors Become Judges*, N.Y. TIMES (Oct. 23, 1986), <https://www.nytimes.com/1986/10/23/opinion/1-too-many-prosecutors-become-judges-073486.html> (on file with the *Columbia Human Rights Law Review*). For example, when news leaked that longtime public defender and sitting appeals judge Jane Kelly was on the shortlist to replace Antonin Scalia's vacant seat, a conservative group launched a video campaign attacking Kelly for representing a defendant charged with murder and possession of child pornography. Burgess Everett, *Ad Targets Potential Obama Court Pick*, POLITICO (Mar. 11, 2016), <https://www.politico.com/story/2016/03/jane-kelly-attack-ad-220649> [perma.cc/4E99-73CC]. Although not representative of the wider judiciary, the Supreme Court has three former prosecutors amongst its ranks, and no former criminal defenders. The last criminal defense attorney on the Supreme Court was Thurgood Marshall, who retired from the bench in 1991. Dara Lind, *There Hasn't Been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That's a Problem.*, VOX (Mar. 22, 2017), <https://www.vox.com/2016/3/28/11306422/supreme-court-prosecutors-career> [perma.cc/RKB8-SE4R].

69. Everett, *supra* note 68.

70. This lack of data is concerning as state courts hear the overwhelming majority of criminal cases; roughly 88.3% of prisoners are under state jurisdiction. E. ANN CARSON, U.S. DEPT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 5 (2016) <https://www.bjs.gov/content/pub/pdf/p16.pdf> [https://perma.cc/RN32-L7SX]. Outside of a few prominent states (such as California, Delaware, New York, and New Jersey), there is little scholarship on aggregate characteristics of state courts. See Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Court*, 39 SETON HALL L. REV. 1203, 1205–206 (2009). This has consequences; the Supreme Court routinely and explicitly defends decisions based on whether a majority of states

the judges had experience as a prosecutor, while only 15% previously worked as a public defender.⁷¹ On the trial court level, judges are generally selected through elections, and literature surrounding judicial elections suggests that careers as prosecutors would be helpful for electoral prospects while former public defenders might be penalized.⁷²

Recognizing that there is a relatively high number of prosecutors and few public defenders in our judicial system, the next question is, does this matter?⁷³ While political factors may limit the prevalence of public defenders on the bench, does that have any real effect on the criminal justice system?

First, many studies have identified judge-specific factors that strongly correlate to positive or negative results for criminal defendants.⁷⁴ In addition to racial disparities, biases manifest in

agree with it. Corinna Lain, *The Unexceptionalism of Evolving Standards*, 57 UCLA L. REV. 365, 368–69 (2009) (“[T]he Supreme Court routinely—and explicitly—bases constitutional protection on whether a majority of states agree with it”).

71. Acquaviva & Castiglione, *supra* note 70.

72. See *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states [<https://perma.cc/CM98-64TZ>]. Primarily at a state supreme court level, judicial elections have seen the rise of “soft-on-crime attack ads” that have targeted the work of former public defenders running for judicial positions. BILLY CORRIHER, CTR. FOR AM. PROGRESS, CRIMINALS AND CAMPAIGN CASH: THE IMPACT OF JUDICIAL CAMPAIGN SPENDING ON CRIMINAL DEFENDANTS 5 (2013), <https://www.americanprogress.org/wp-content/uploads/2013/10/CampaignCriminalCash-4.pdf> [<https://perma.cc/6AH3-KPC4>]. Conversely, evidence suggests that prosecutors attempt to emphasize their tough-on-crime records in judicial elections. A study in Los Angeles County found that among forty-one Deputy District Attorneys who ran to become superior court judges, only one used the ballot designation of “Deputy District Attorney.” Instead, the remaining forty opted for more colorful designations like “Hardcore Gang Prosecutor,” “Sex Crimes Prosecutor,” or “Gang Murder Prosecutor,” to list a few. Kirk H. Nakamura, *Judicial Elections: New Rules, New Judges, Old Challenges*, ORANGE COUNTY LAW., June 2018, at 28, 32.

73. The importance of trial experience for a candidate for judicial office suggests that it is a natural fit for former prosecutors to become judges, especially as the number of trials decreases more generally. AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2009) https://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary_09.authcheckdam.pdf [<https://perma.cc/P26J-AKQ7>]; Casey Tolan, *Why Public Defenders Are Less Likely to Become Judges—And Why That Matters*, SPLINTER NEWS (Mar. 16, 2018), <https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687> [<https://perma.cc/8FCH-5G2F>].

74. Evidence suggests that judges carry different forms of racial biases that impact sentencing decisions. See Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1123

sometimes surprising ways—for example, one study revealed a strong correlation between unexpected losses by the local college football team and increased sentences for otherwise similarly situated juvenile defendants.⁷⁵ This suggests even subtle differences in the judiciary can have a measurable impact.

Second, some studies have specifically identified correlations between career background and judicial results. Being a former prosecuting attorney has been found to have the most relevance to decisional differences among judges in criminal cases; they are, unsurprisingly, more likely to rule against the defense.⁷⁶ There is also evidence suggesting that former prosecutors give harsher sentences while former criminal defenders tend towards lighter ones.⁷⁷

(2009). These studies do not always play out as one might expect; for example, one investigation found a negative in-group bias in sentencing of defendants that shared the same race as the presiding judge. Briggs Depew et al., *Judges, Juveniles, and In-Group Bias*, 60 J.L. & ECON. 209, 231–33 (2017).

75. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J. APPLIED ECON. 171, 187 (2018).

76. Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 333, 336 (1962) (studying how the backgrounds of state and federal supreme court justices correlated with their decisions in criminal law cases and finding that prior prosecutorial experience was amongst the biggest decisional differences among judges in criminal cases). This difference is not directly related to whether a judge is more liberal or conservative; instead, some researchers suggest this is related to a pro-prosecutorial frame of reference that was acquired or reinforced during their work. *Id.* at 339.

77. Research found associations between prior prosecutorial experience and stricter enforcement of the Federal Sentencing Guidelines as well as prior criminal defense work with rejecting the Guidelines. The Guidelines are generally perceived as imposing more severe punishment. See Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1398 (1998); see also Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992) (“[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences.]”). Biases associated with prosecutorial backgrounds extend beyond the realm of criminal law, as some studies have found that views of defendants’ rights and prosecutorial experience correlate with views on constitutional issues. Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in CASES IN AMERICAN POLITICS 84 (Robert L. Peabody ed. 1976) (demonstrating that Justices with prosecutorial experience were more pro-prosecution in civil rights cases); see also Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67, 69 chart 1 (2005) (finding an empirically large difference in the frequency with which the Justices voted with the government in non-unanimous criminal cases; Justices who ruled against defendants in more policy related cases tended to rule more narrowly on constitutional rights issues).

Lastly, scholars and attorneys have voiced concerns regarding the career backgrounds of the judiciary. Court watchers have found that former prosecutors often view prosecutorial behavior in a favorable light.⁷⁸ Alternatively, former defense attorneys bring their own experiences, which some find particularly important with regard to evidence issues under *Brady*⁷⁹ and capital sentencing.⁸⁰ Chief Public Defenders have also advocated the need for more former defense attorneys to sit on the bench,⁸¹ stating that they bring a needed “diversity of thought, diversity of experience, and trial experience.”⁸²

There is no ideal composition of backgrounds amongst a judiciary, but it is clear that prosecutors significantly outweigh their public defense counterparts on the bench and the biases associated with this imbalance may have negative consequences. While the degree that career backgrounds impact judicial results may be debated, it is difficult to argue against the promotion of a diverse set of experiences in the judicial branch.

ii. Hypothesis and Methodology

Hypothesis

This Note hypothesizes that Public Defender elections will lead to more judges with public defense experience in the jurisdiction. This is based on two structural factors and supported by conversations with elected Public Defenders.

First, “soft on crime” political attacks have harmed former public defenders in judicial elections,⁸³ but this Note hypothesizes that

78. With regard to the Supreme Court, some worry former prosecutors take the view that all prosecutors are as scrupulous as they were. See Lind, *supra* note 68; Kunstler, *supra* note 68.

79. *Brady v. Maryland*, 373 U.S. 83 (1963).

80. Lind, *supra* note 68.

81. See Martinez Interview, *supra* note 21; Adachi Interview, *supra* note 20.

82. Martinez Interview, *supra* note 21.

83. See Carrie Johnson, *Report: Too Much Money Going to State Court Races*, NPR (Aug. 16, 2010), <https://www.npr.org/templates/story/story.php?storyId=129178835> [<https://perma.cc/7DGT-NE36>] (discussing the campaign against Louis Butler, the first incumbent Wisconsin Supreme Court judge to lose their seat in more than forty years; he was a former public defender who was targeted in an ad campaign portraying him soft on crime); KATE BERRY, BRENNAN CTR. FOR JUSTICE, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 3* (2015), http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf [<https://perma.cc/D4HX-WESU>]; JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN*

asking voters to consistently choose the local Public Defender may increase the understanding of criminal defense, mitigating those attacks and the stigmatization of defending people accused of crimes. Second, former public defenders in these jurisdictions may benefit from consistent interaction with an elected official. Former prosecutors generally work under an elected office chief; while it is impossible to measure the advantage of this relationship, it means an experienced prosecutor generally has a relationship with someone who has run for office. Since most chief Public Defenders are appointed, former assistant public defenders usually lack the natural interaction with elected officeholders. But where chief Public Defenders are elected, perhaps their employees would benefit from increased exposure to electoral politics.

This theory has some anecdotal support: former elected Public Defenders acknowledged that they have provided advice in their personal capacity to former employees that decided to run for office.⁸⁴ This was recently highlighted in San Francisco, where four veterans of the San Francisco Public Defender's office ran an "unprecedented" campaign to unseat four Republican appointed judges in the county.⁸⁵ Although they were ultimately unsuccessful, they were supported and endorsed by the elected Public Defender.⁸⁶

Accordingly, this Note asks: are there more state trial court judges with public defense experience where the chief Public Defender is elected? There are an unquantifiable number of factors that may influence a judicial election, but the presence of a statistically significant number of former public defenders on the bench in elected Public Defender jurisdictions would support the available anecdotal evidence.

AMERICA 2–4 (2012); Rachel Marshall, *The Recall of the Judge Who Sentenced Brock Turner Will End up Hurting Poor, Minority Defendants*, VOX (June 6, 2018), <https://www.vox.com/first-person/2018/6/6/17434694/persky-brock-turner-recall-california-stanford-rape-sentencing> [https://perma.cc/P86C-BWS4] (criticizing the efforts to recall California judge Aaron Persky, who was faulted for giving Brock Turner, a former Stanford swimmer, a six-month sentence for a sexual assault conviction; the recall was successful, and Persky was removed from the bench).

84. See Martinez Interview, *supra* note 21; Adachi Interview, *supra* note 20.

85. Erin Allday & Bob Egelko, *SF Public Defenders' Challenge to Republican-Appointed Judges Fails*, S.F. CHRON. (Jun. 5, 2018), <https://www.sfchronicle.com/bayarea/article/Public-defenders-challenges-to-12970921.php> [https://perma.cc/2CUC-5D7H].

86. Public Defender Jeff Adachi believed this campaign was beneficial in raising the consciousness of the electorate on various issues important to criminal defense. Adachi Interview, *supra* note 21.

Data

Because no dataset contained the career backgrounds of state court trial judges in these four states, one had to be created.⁸⁷ Resource limitations required limiting the judges analyzed in some way, and therefore only the five largest judicial districts in each state were analyzed.⁸⁸ This approach preserves the composition of the judiciary within districts, limits possible differences between urban and rural areas, and puts the focus on areas that impact the greatest number of people.⁸⁹

Methods

The goal of this research is to test whether Public Defender elections are correlated with more active judges who previously worked in public defense. Because the qualities being measured are categorical, a Pearson's chi-squared test was used to determine whether there is a relationship between these variables.⁹⁰ A Pearson's chi-squared test produces a *p*-value that measures the strength of the correlation between the categories; this experiment used a *p*-value level of .05 to mark significance. The null hypothesis of a chi-square

87. Collecting information available on state judiciary websites, Ballotpedia.org, and local newspaper coverage, a dataset noting any previous experience in public defense or prosecution was developed. Although this analysis tests the increased presence of judges with Public Defender experience, former prosecutorial experience was included in the data collection process. This data is useful in painting a more complete picture of the judiciary in any given state. In the relatively few cases where there was no available career history of a judge, they were assumed to possess neither prosecutorial nor public defense experience.

88. All four states analyzed divide the governance of their criminal justice system into various judicial districts. These districts are often composed of more than one county; to determine the five largest counties in each jurisdiction, publicly available population information by county was compiled to determine which five judicial districts served the largest population groups in each state. Shelby County, Tennessee was excluded from this determination since, despite being one of the five largest counties, it does not elect its Public Defender.

89. The Judicial Circuits selected for each state were as follows: Arkansas's 2d, 4th, 6th, 19th, and 20th Circuits, Florida's 6th, 9th, 11th, 15th, and 17th Circuits, Georgia's 5th, 6th, 7th, 9th, and 10th Circuits, and Tennessee's 6th, 11th, 16th, 20th, and 21st Circuits. Note that the data was collected in October 2018, so any subsequent changes in judicial composition are not reflected in the data.

90. "Pearson's chi-squared test is a statistical test applied to sets of categorical data to evaluate how likely it is that any observed difference between the sets arose by chance. Categorical data is statistical data consisting of categorical variables (a variable that can take on one of the limited possible values)." Rodion Chachura, *Statistics: Pearson's Chi-Squared Test*, MEDIUM (May 17, 2018) <https://medium.com/@geekrodion/statistics-pearsons-chi-squared-test-95fe36d74c1c> [<https://perma.cc/G5YW-8DJ2>].

analysis is that there is no relationship between the two variables, and therefore finding of a p -value less than .05 would suggest that there is a relationship between electing Public Defenders and public defense experience on the bench.

iii. Results and Analysis

Table 1: Data Summary

State	Judges Analyzed	PD Experience	% PD Experience	Prosecutor Experience	% Prosecutor Experience
FL	415	69	16.63%	155	37.35%
GA	213	2	0.94%	64	30.05%
TN	117	6	5.13%	21	17.95%
AK	79	2	2.53%	23	29.11%
Elected PD States	532	75	14.10%	176	33.08%
Non-Elected PD States	292	4	1.37%	87	29.79%
Total:	824	79	9.59%	263	31.92%

Table 2: Chi-Squared Analysis

	Pearson Chi-Squared	Degrees of Freedom	P -Value
Results	35.2331	1	0.000

The results reveal a statistically significant correlation between Public Defender elections and judges with public defense experience in state trial courts. A summary of the findings can be found in Table 1 and the chi-squared results can be found in Table 2. These tables indicate a high correlation between electing Public Defenders and the presence of state trial judges with public defense experience. Because the p -value of the chi-squared analysis is less than .05, we can reject the null hypothesis that there is no relation between the elections and public defense experience.

Analyzing the Results

There are important takeaways from the data beyond the simple correlation between elections and public defense experience. First, the common belief that relatively few former public defenders become judges is supported by the data. In states without elected Public Defenders, only 1.37% of the judges analyzed had public defense experience. Conversely, in both elected and non-elected Public Defender jurisdictions, prosecutors are well represented on the bench, with 31.92% of judges analyzed having previously worked as some type of prosecutor. These findings fall in line with previous research on federal and state supreme court judges.⁹¹

Second, the increase of former public defenders on the bench is largely driven by the results in Florida; the increase in Tennessee was much smaller. A look at this disparity may cause some to argue that Florida is an outlier and the effect of these elections is not as clear; however, a look at the structure of Tennessee's judicial selection system is more likely to explain this difference.

In Tennessee, there are two methods of selection for trial court judges: circuit court, chancery court, criminal court and probate court judges are elected in partisan elections, while general sessions court, juvenile court and municipal court judges are elected in nonpartisan elections.⁹² Table 3 reveals that no judges with public defense experience were elected in partisan elections. It is possible that the issues facing public defenders running for judicial positions are magnified when partisanship is involved; alternatively, perhaps party leaders filter out these candidates, whether out of concern for political vulnerability or a lack of party networking. However, in nonpartisan judicial positions, 8.57% of the bench had public defense experience.

Table 3: Tennessee Partisan Election Breakdown

TN Judges	Judges Analyzed	PD Experience	% PD Experience	Prosecutor Experience	% Prosecutor Experience
Partisan Election	47	0	0.00%	9	19.15%
Nonpartisan Election	70	6	8.57%	12	17.14%

91. See *supra* Section II.B.2.i.

92. *Judicial Selection in Tennessee*, Ballotpedia, https://ballotpedia.org/Judicial_selection_in_Tennessee [<https://perma.cc/H6HZ-M53R>].

Additionally, considering the relative lack of judges with prosecutorial experience in the Tennessee judiciary⁹³, one possibility is that ideology or some type of party influence trumps trial experience in Tennessee judicial elections. However, Knox County Public Defender Mark Stephens disagrees with those theories. Mr. Stephens did not believe that public defense experience or partisanship hurt the few former colleagues he knew that ran for office. Instead, he emphasized that he believed few public defenders would want to become judges.⁹⁴ Additionally, he said that most of the judges in criminal cases that he deals with are former prosecutors;⁹⁵ this analysis did not differentiate between the type of trial court, so perhaps prosecutors are concentrated on criminal matters in some Tennessee jurisdictions.

Regardless of the situation in Tennessee, it is clear that the phenomenon of public defenders on the bench in Florida is large and unique. While it is impossible to attribute this gap entirely to public defender elections, the criminal justice ecosystem in Florida has created a realistic path to the judiciary through the Public Defender's office. Combining this evidence with accounts from Miami-Dade Public Defender Carlos Martinez, there is strong evidence that Public Defender elections contribute to that phenomenon.⁹⁶

Based on this research, and supported by stories from Public Defenders, it appears that Public Defender elections are correlated with increased public defense experience amongst state trial court judges, but that this effect can be mitigated by partisanship or other factors.

2. Defense and Prosecution Salary Parity in Elected Public Defender Jurisdictions

Prosecutors tend to have higher salaries, lower caseloads, and more support services than their public defender counterparts.⁹⁷ This has led some scholars to assert that linking the funding available to public defense to the money spent on prosecution would help alleviate

93. Only 17.95% of the judiciary was found to have prosecutorial experience, as opposed to 31.92% of the total judges analyzed. *See* Table 1.

94. Stephens Interview, *supra* note 25.

95. *Id.*

96. Martinez Interview, *supra* note 21.

97. *Id.*

some of the resource issues found in public defense.⁹⁸ Additionally, judges,⁹⁹ chief Public Defenders,¹⁰⁰ the American Bar Association,¹⁰¹ and even some prosecutors¹⁰² advocate for resource parity between the two groups for the sake of the entire system.¹⁰³ Any well-constructed argument in favor of parity must account for the differences between the role, structure, and funding opportunities for prosecutors and public defenders,¹⁰⁴ but keeping those in mind, enforcing some form of resource parity can ensure adequate funding for indigent defense. With clear evidence that more resources invested in public defense produce better results,¹⁰⁵ various parity requirements could greatly benefit indigent defense systems.

98. See generally Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (exploring the idea of parity between funding for defense counsel and the prosecution).

99. See, e.g., *State v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (“[T]he most even handed approach in setting fees is to tie the hourly rate of the counsel appointed for the indigent defendant to the hourly rate of the prosecutor/district attorney and the public defenders.”).

100. Nancy Molnar, *Public Defender Gerald Latanich Seeks Salary Parity with Prosecutors*, TIMES REP. OHIO (Oct. 24, 2017), <http://www.timesreporter.com/news/20171024/public-defender-gerald-latanich-seeks-salary-parity-with-prosecutors> [<https://perma.cc/C55Z-EY5D>] (telling the story of Public Defender Gerald Latanich’s advocacy for equal pay between public defenders and prosecutors).

101. See TEN PRINCIPLES, *supra* note 26.

102. RJ Vogt, *NYC Public Defenders, District Attorneys Demand Pay Parity*, LAW 360 (Oct. 28, 2018), <https://www.law360.com/articles/1096330/nyc-public-defenders-district-attorneys-demand-pay-parity> [<https://perma.cc/M6XU-T9T4>].

103. Arguments for resource parity are generally built on assumptions that the prosecutor is adequately funded, and therefore, establishing parity in practice or as a legislative requirement will result in an adequately funded indigent defense system. See TEN PRINCIPLES, *supra* note 26.

104. First, a prosecutor’s office has the benefit of working with law enforcement; it is hard to define where the investigative work of the police stops and the prosecution begins. Kwixuan H. Maloof, *A Question of Parity?*, FOG CITY J. (Jul. 20, 2009), <http://www.fogcityjournal.com/wordpress/1348/a-question-of-parity/#more-1348> [<https://perma.cc/SH36-K8WV>]. Second, Public Defender offices do not defend all cases; but they generally cannot refuse clients and therefore their caseloads are not under their control. *Id.* Lastly, public defenders have an ethical obligation to provide adequate counsel to every client, a burden that prosecutors do not share. *Id.*

105. Results can be measured in different ways, but funding issues can result in high caseloads which do not allow public defenders to adequately prepare for each case, resulting in “meet ‘em and plead ‘em’ legal representation for the poor.” Peter A. Joy, *Unequal Assistance of Counsel*, KAN. J.L. & PUB. POL’Y, Summer 2015, at 518, 523; see also Anderson, *supra* note 10, at 193–97.

Accordingly, this Section examines whether electing Public Defenders can help jurisdictions achieve that parity by analyzing the salary disparities between public defenders and prosecutors in states with Public Defender elections and those without them. In interviews, elected Public Defenders emphasized how their electoral mandate helps them advocate for increased funding for their offices.¹⁰⁶ This Section tests whether that advocacy results in more equal pay with their prosecutorial counterparts. Legislation in Florida and Tennessee suggests that these states are making inroads on salary parity, but this Section examines how they compare to similar states.¹⁰⁷ While this correlational analysis is not conclusive, the findings reveal nearly complete salary parity in states with Public Defender elections and a large gap in states without them.

i. Analysis of Compensation in Elected and Non-Elected Public Defender States

Data and Methods

To measure resource parity between states with and without Public Defender elections, this analysis looks at average salaries for attorneys in public defender and prosecutors' offices across the state. Although resources can be deployed in forms other than attorney compensation, considering the number of variables that factor into a criminal justice budget, salary comparisons were chosen as the simplest way to evaluate parity across the same state.

The data for this analysis was compiled from publicly available data of state employee annual salaries.¹⁰⁸ While the number of total

106. See Interviews, *supra* note 25.

107. In Tennessee this is mandated by state law: "Any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense." TENN. CODE ANN. § 16-2-518 (West 2009). In Florida, a recent budget increased public defense salaries but not those of prosecutors, which started arguments between the State Attorney and Public Defender in Miami-Dade County. See Ovalle, *supra* note 21.

108. For Arkansas, see *Employee Salaries*, ARKANSAS.GOV https://www.ark.org/dfa/transparency/employee_compensation.php [<https://perma.cc/XEX9-ERRM>]; for Tennessee, see *Search State Employee Salaries*, TRANSPARENT TENNESSEE, <https://apps.tn.gov/salary-app/search> [<https://perma.cc/49NC-W29T>]; for Florida, see *State of Florida Employee Salaries*, FLORIDA HAS THE RIGHT TO KNOW, <https://salaries.myflorida.com> [<https://perma.cc/P24J-6J9J>]; finally, for Georgia, see *Salary Travel Search*, OPEN GEORGIA <http://www.open.georgia.gov/openga/salary/Travel/index> [perma.cc/JG7C-2PMP].

salaries available suggests that there may be some attorneys that are missing from these public databases, the consistency of the salaries across the dataset implies that these numbers accurately reflect the compensation of attorneys in these states. Based on that, it is fair to assume that barring an extreme oversight by the public salary reporting in each state, the average salaries should be properly reflected in the dataset. The data was then filtered to evaluate the various assistant attorney salaries and the salaries of the office chiefs.¹⁰⁹ Once separated, a simple average of the salaries of the four groups in each state was calculated.

Results and Analysis

Table 4: Salary Parity Analysis

State	Total Asst. PD	Avg. Asst. PD Salary	Total Asst. Prosecutors	Avg. Asst. Prosecutor Salary	Chief PD Salary	Chief Prosecutor Salary
FL	1,464	\$63,463.49	1,640	\$64,039.93	\$169,554.00	\$169,554.00
GA	476	\$53,396.11	486	\$70,921.37	\$101,695.80	\$119,575.80
TN ¹¹⁰	216	\$92,269.28	464	\$89,452.68	\$156,024.00	\$156,024.00
AK	210	\$58,641.48	245	\$68,532.43	\$85,744.02	\$156,142.50

As seen in Table 4, the results of the analysis were clear: states with Public Defender elections had nearly exact parity between public defense and prosecutorial salaries, while those without elections saw a significant pay gap. In election states, the salaries of elected Public Defenders and chief prosecutors were exactly the same, while the states analyzed without elections have much higher chief prosecutor salaries. In Arkansas, chief prosecutors make nearly double the salary of chief Public Defenders. Salary parity was apparent amongst assistant attorneys in elected states as well; in Tennessee the average

109. As office chiefs are generally paid more, this mitigated the risk of inflating the salaries of states with more judicial districts and therefore more chiefs.

110. The salaries found in Tennessee are strikingly high; it is possible that these numbers are not truly reflective of the “average” salary. It is possible that some lesser paid attorneys are not listed, but it is important to note that Tennessee lists “Monthly” salaries, which were then multiplied by twelve to determine the annual amount. This assumption could be off in some way and may have resulted in the higher salary calculations. However, considering the prosecutor and defense salaries come from the same source, for parity analysis any issues here should be applied equally to both the prosecutors and public defender salaries examined.

assistant public defender actually made more than the average prosecutor and in Florida the gap was less than \$1000 over the course of a year. By contrast, in Georgia and Arkansas, the average annual salaries were \$17,525.26 and \$9890.95 higher for prosecutors respectively.

Although salary comparisons are an imperfect measure of resource parity in the administration of criminal justice in any state,¹¹¹ they are still a vital part of the parity analysis and indicative of a state's priorities in the execution of its indigent defense system. A system that pays the chief Prosecutor double the annual salary of the chief Public Defender is signaling that it does not hold the latter in as high regard. Salary parity amongst the line attorneys in each office suggest that the offices will be theoretically equal in their ability to keep talented lawyers on staff and not lose them to the private sector.¹¹²

3. Conclusions and Limitations

By compensating and providing opportunities for judicial careers at levels closer to their prosecutorial counterparts, it appears that Public Defender elections impact the criminal justice ecosystems in which they exist. This phenomenon may be a result of the relatively well-organized lobbying efforts by public defenders in Florida and Tennessee, but that itself appears to be a product of the electoral system of selection.¹¹³ There is no reason that the deficits in defense-

111. Many different factors are relevant in analyzing defense and prosecution spending. For example, in Miami-Dade County, the Public Defender has relatively less support staff compared to the State Attorney's office; because there are more attorneys in the former, the average salary is technically higher for the staff in total, but that is not indicative of complete parity. *See* Ovalle, *supra* note 21.

112. A report of public defender and prosecutor salaries in Florida revealed a high level of turnover in both offices across the state due to the relatively low salaries. "The median assistant public defender salary was \$56,246, and the median assistant state attorney salary was \$59,500, according to data from December." Andrew Pantazi, *Paying for Justice: Public Defenders and Prosecutors Flee for Better Salaries*, FLA. TIMES UNION (Feb. 23, 2018), <https://www.jacksonville.com/news/20180223/paying-for-justice-public-defenders-and-prosecutors-flee-for-better-salaries> [<https://perma.cc/K26D-SZL3>].

113. Florida and Tennessee both have Public Defense Commissions that advocate on behalf of the Public Defenders in the state, but these commissions are also found in 23 other states. *See* Geoff Burkhart, *How to Improve Your Public Defense Office*, 31 CRIM. JUST., Spring 2016, at 56, 57, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_claid_def_i

experienced judges and salary parity found in Arkansas and Georgia cannot be overcome without instituting elections, but the contrast is representative of the benefits of an electoral system over time.

That said, it is important to acknowledge the limitations of these analyses. While the results of both tests were stark, only four states were analyzed. It is possible that the differences found in Tennessee and Florida stem from issues completely disconnected from the selection process of its public defenders; just as it is possible that the shortcomings in Arkansas and Georgia are related to other issues.¹¹⁴ However, the evidence of these tests supports the qualitative evidence obtained through the research and interviews synchronized in Part II.A.

III. MOVING FORWARD: SHOULD JURISDICTIONS CONSIDER PUBLIC DEFENDER ELECTIONS?

Recognizing the complicated landscape of indigent defense in the United States and the relative utility of upending an existing, well-functioning Public Defense administration, this Note does not argue that installing Public Defender elections is an unequivocally worthwhile policy approach. However, Public Defender elections should be considered where the benefits can be maximized, the downsides mitigated, and the existing structure of public defense delivery makes it feasible.¹¹⁵

improve_your_public_defense_office.pdf [https://perma.cc/7UVQ-AA53] (discussing how “well-structured commissions can safeguard independence, increase funding, and decrease caseloads, helping to ensure ethical and constitutional defense provision”). However, the interviews and developments in each state suggest that the elected status contributes to the power of the lobbies in these states. *See* Martinez, *supra* note 25; Ovalle, *supra* note 21.

114. This is evidenced by the contrast between Florida and Tennessee in the number of judges with public defense experience. While the overall statistical evidence suggests a correlation between Public Defender elections and increased representation in the judiciary, the degree to which the effect was much stronger in Florida points to the idiosyncrasies of each state’s criminal justice apparatus.

115. This analysis is intentionally focused on jurisdictions that have some sort of Public Defense system in place, as opposed to Assigned Counsel or Fixed Price Contract systems. Because existing research that shows Public Defender systems outperform other delivery systems, establishing a Public Defender, elected or unelected, would likely produce improved results. So, whatever a jurisdiction’s reasoning for not implementing a Public Defender system, suggesting they completely overhaul their existing system as opposed to simply changing its leadership selection process is a recommendation beyond the scope of this Note. *See* Anderson, *supra* note 10 (explaining the superior results by public defenders to

What do those jurisdictions look like? The best fits are relatively urban counties within states with more decentralized public defender systems. These systems would be the most feasible candidates and have the most to gain.¹¹⁶

In states with well-structured, statewide public defense systems already performing at a high level, the benefits of establishing elections are not as high and may not be worth upending the system.¹¹⁷ Research has found that the effectiveness of indigent defense does not depend on any specific model of delivery, but that states with a unified method of delivery often find a higher presence of factors that affect quality, such as “independence, funding level, and oversight.”¹¹⁸ Considering that these are the qualities that elections are aimed at improving, states already operating with high marks on these characteristics may have less to gain from establishing elections. Additionally, state-run defense options are a better fit for more rural jurisdictions; beyond concerns of conflicted candidates in more conservative, rural areas, evidence suggests state-run delivery is better for defense services in rural counties.¹¹⁹

appointed counsel in Philadelphia and citing the “public defenders' steady salaries, financial and institutional independence from judges”).

116. Robert Spangenberg & Marea Beeman noted:

In contrast to statewide systems, other states delegate the responsibility to organize and operate an indigent defense system to the individual county . . . Fourteen states follow this pattern: Alabama, Arizona, California, Idaho, Maine, Michigan, Mississippi, Montana, New York, North Carolina, South Dakota, Texas, Utah, and Washington. Like the statewide defense systems, there are noticeable variations among states with county and regional systems.

Spangenberg & Beeman, *supra* note 11, at 40. The urban versus rural divide is based on research suggesting multi-jurisdictional organizations are better suited for rural areas. *Id.* at 36.

117. For example, establishing elections in Minnesota may not be worthwhile, since the State Board of Public Defense *appoints* the state public defender, a chief administrator, *and* the chief public defender in each of the state’s ten judicial districts. The positions are filled by two public members appointed by the governor, four attorneys, and a district court judge appointed by the State Supreme Court. Minnesota Legislative Reference Library, *State Board of Public Defense*, MINN. LEGISLATURE (last updated Feb. 6, 2019), <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1323> [perma.cc/C8CJ-E7FJ].

118. See *In Your State*, GIDEON AT 50, <http://gideonat50.org/in-your-state/#delivery-model> [perma.cc/56X8-Q45C].

119. The American Bar Association recognizes that multi-jurisdictional public defense organizations may be appropriate in rural areas, and “New Hampshire and Vermont [have decided that] it is not practical to operate staffed

A natural response may be to ask: why not focus on establishing boards instead of elections? That argument falls short on two grounds. First, even if such boards are the ideal delivery system for states starting from scratch, that solution ignores the reality of the current patchwork of indigent defense systems across the country. So long as there remain decentralized Public Defenders throughout the country, communities should explore electing Public Defenders as a means of improving indigent defense in their community. Second, there are serious concerns about centralized defense delivery,¹²⁰ and these systems would still miss out on the benefits of elected Public Defenders; just because those systems should prioritize alternate policy routes does not undermine the other evidence in favor of these elections.

Accordingly, in the many states where public defense is operated on a county-by-county level and there is a sufficiently urban environment, activists should consider pushing for elected Public Defenders. Where there is local control of indigent defense there are fewer political barriers to establishing elections, and the process of establishing Public Defender elections may be beneficial in and of itself. In fact, the movement to establish Public Defender elections could be a rallying issue for communities looking to build a political constituency around indigent defense.¹²¹

Referring back to the introduction, a county like Los Angeles would be a strong candidate to benefit from this system.

First, there are relatively few political obstacles to establishing Public Defender elections. Indigent defense in California is decentralized and state law explicitly allows each county to decide whether they wanted to appoint or elect the head of the office.¹²²

public defender offices in rural areas, so assigned counsel or contract programs have been developed for these regions." See Spangenberg & Beeman, *supra* note 11, at 36.

120. Continuing with Minnesota as an example, the state's centralized public defender system has been criticized for a lack of accountability and community collaboration. See Randall J. Slieter & Elizabeth M. Randa, *The Minnesota Public Defender System: A Change of Governance Should Occur for the State to Effectively Fulfill Its Constitutional Obligation*, 37 WM. MITCHELL L. REV. 599 (2011).

121. Elected Public Defenders have been able to incorporate general criminal justice issues beyond the powers of their position as a part of their election platforms. See *supra* note 41.

121. See Wright, *supra* note 8, at 816.

122. CAL GOV'T CODE § 27702 (West 2019); see also Spangenberg & Beeman, *supra* note 11, at 40 ("[T]here is little or no programmatic oversight at the state

Additionally, considering indigent defense is primarily funded on a county level and San Francisco elects their Public Defender, it is unlikely that the state government would overrule the County.¹²³

Second, Los Angeles could greatly benefit from enhancing the stature and independence of the office. Although the county recently appointed a new Public Defender,¹²⁴ the office previously had no full-time chief for two years.¹²⁵ Elections would ensure the office does not face another leadership drought and can attract more candidates. Enhanced independence could also allow the Public Defender to serve as a political force against police misconduct. The Los Angeles Public Defender office has previously helped expose extreme instances of police corruption,¹²⁶ but with more independence they could be a political force to counteract a Sheriff's Department¹²⁷ and Police

level"). Los Angeles County is governed by five Supervisors who could choose to implement these elections at any time. *About Board of Supervisors*, BOARD OF SUPERVISORS: CTY. OF L.A., <http://bos.lacounty.gov/About-Us/Board-of-Supervisors> [<https://perma.cc/4B6Q-3FDH>].

123. See Spangenberg & Beeman, *supra* note 11, at 40.

124. It should be noted that Ricardo Garcia, former staff attorney with the San Diego County Public Defender, was selected as a full-time chief in late 2018; his appointment was met with positive reviews from those who launched the protest against the interim appointment. See Agrawal, *supra* note 4.

125. One potential candidate reportedly declined the position due to the lack of independence. Phil Matier, *Jeff Adachi to L.A.? He Says No*, S.F. CHRON. (May 24, 2017), <https://www.sfchronicle.com/bayarea/article/Jeff-Adachi-to-L-A-He-says-no-11168375.php> [<https://perma.cc/67GX-MVR9>].

126. See, e.g., Lou Cannon, *One Bad Cop*, N.Y. TIMES (Oct. 1, 2000), <https://www.nytimes.com/2000/10/01/magazine/one-bad-cop.html> (on file with the *Columbia Human Rights Law Review*) (describing the discovery of the L.A.P.D.'s famous mid-1990s "Rampart Scandal" and detailing the role of the public defender who took a case to trial when he was suspicious of police misconduct, serving to help expose the scandal). *But see* Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRAC. 121, 130 (2000) (asserting that in light of the Rampart scandal, the Public Defender Office is one of many organizations that needs to be scrutinized to see how it "can better serve to check police abuse and improve the criminal justice system").

127. The Los Angeles County Sheriff's Department has a decades-long history of suspicious cliques that bond over aggressive, violent police work, have been accused of "running a 'neo-Nazi, white supremacist gang,'" and have been implicated in many controversial civilian shootings. Maya Lau & Joel Rubin, *After Decades of Problems, New Allegations Surface of a Secret Clique Within L.A. County Sheriff's Department*, L.A. TIMES (Jul. 10, 2018), <https://www.latimes.com/local/lanow/la-me-compton-sheriff-shooting-20180710-story.html> [<https://perma.cc/2TKC-SZEN>].

Department¹²⁸ ripe with scandals. Enhanced stature could potentially lead to more ambitious projects like bail reform¹²⁹ and immigration defense.¹³⁰ And, as an elected official, the Public Defender could add a voice to the city's criminal justice debates,¹³¹ potentially change the tough on crime rhetoric of judicial elections,¹³² and help lobby for funds to address the office's training and staffing issues.¹³³

Lastly, there is little risk of Los Angeles electing a conflicted Public Defender. Critics of implementing Public Defender elections in Los Angeles suggest that the county's periods of "tough on crime" politics make it too risky to hold these elections; in comparison to San Francisco, Los Angeles has a history of being less liberal on these issues.¹³⁴ However, there is simply a lack of evidence that voters ever want to elect a conflicted public defender. If critics want to compare the partisanship in Los Angeles and San Francisco, they should also compare Los Angeles to the more conservative counties that

128. See Cannon, *supra* note 126; *Mayor Eric Garcetti Orders Elite LAPD Unit to Cut Down on Traffic Stops*, CBS LA (Feb. 7, 2019), <https://losangeles.cbslocal.com/2019/02/07/garcetti-orders-lapd-traffic-stops-cut/> (highlighting the mayor's response to a report "found officers pulled over a disproportionate number of African Americans").

129. See Michael Barba, *SF Public Defender Seeks Order Forcing California Courts to Follow Bail Reform Decision*, S.F. EXAMINER (Jun. 26, 2018), <http://www.sfexaminer.com/sf-public-defender-seeks-order-forcing-california-courts-follow-bail-reform-decision> [<https://perma.cc/YB95-E7YZ>].

130. "Unlike other California public defender offices, such as those in Alameda and San Francisco counties, LACPD does not provide direct immigration representation." ANDRÉS DAE KEUN KWON, ACLU OF S. CAL., DEFEND L.A.: TRANSFORMING PUBLIC DEFENSE IN THE ERA OF MASS DEPORTATION 55 (May 2018), https://www.aclusocal.org/sites/default/files/aclu_socal_defend_la.pdf [perma.cc/KN5L-9L6G].

131. Debates regarding bail reform, prison development, and other matters are at the forefront of county politics. See Maya Lau, *In Landmark Move, L.A. County Will Replace Men's Central Jail with Mental Health Hospital for Inmates*, L.A. TIMES (Feb. 13, 2019), <https://www.latimes.com/local/lanow/la-me-jail-construction-20190212-story.html> [<https://perma.cc/V3DV-MGUA>]; Elizabeth Marcellino, *LA County Seeks Best Models for Bail Reform*, NBC4 (Feb. 6, 2019), <https://www.nbctv.com/news/local/LA-County-Bail-Reform-505405321.html> [<https://perma.cc/A8GM-QGGB>]; Matt Stiles, *Dysfunction at Juvenile Detention Centers Is Bigger than Pepper Spray, L.A. County Report Says*, L.A. TIMES (Feb. 11, 2019), <https://www.latimes.com/local/lanow/la-me-county-juvenile-detention-reform-20190211-story.html> [<https://perma.cc/ZCK7-QTYC>].

132. See Nakamura, *supra* note 72.

133. Nancy Albert-Goldberg, *Los Angeles County Public Defender Office in Perspective*, 45 CAL. W. L. REV. 445, 472 (2009).

134. See *Why L.A. Doesn't Need an Elected Public Defender*, *supra* note 4.

consistently elect quality public defenders.¹³⁵ The relative lack of conflicted elected Public Defenders national combined with the successful records of elected Public Defenders in more urban areas suggest there would be very little risk in implementing this system.

The oldest and largest Public Defender office in the nation deserves better.¹³⁶ By establishing elections for its chief Public Defender, Los Angeles County could improve its indigent defense delivery and positively impact the criminal justice system in the county.

CONCLUSION

Electing the office chief has allowed for some of the best Public Defender offices in the country to thrive. There is also strong evidence to suggest that this has positive effects beyond the immediate needs of indigent clients. Electing our nation's Public Defenders is not a panacea for the problems facing indigent defense in the United States, but critics have generally overstated the risks and underestimated the benefits of this selection system. Elections have heightened the independence and stature of Public Defenders across the diverse set of places where these elections exist. While concerns surrounding the potential risks of these elections are valid, they often fail to appreciate the history of Public Defender elections and the relative lack of problematic office chiefs under this system. On balance, it appears that the positive effects of elections outweigh the risks in most places. Especially when comparing these elected chiefs to their counterparts that lack independence, one could make the case that the voters get it right more often than the various appointment bodies.

The history of these elections confirms that counties using them should generally continue the practice, and other jurisdictions

135. For reference, in the 2016 Presidential Election, Los Angeles voted over 70% in favor of Hillary Clinton over Donald Trump, while in Lancaster County, Nebraska, home to progressive, elected Public Defender Joe Nigro, the county preferred Clinton by only 0.2% of the vote (45.4% of the county went for Clinton, 45.2% for Trump, and 5.2% for Libertarian candidate Gary Johnson). See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/president> (on file with the *Columbia Human Rights Law Review*).

136. Los Angeles is the oldest and largest Public Defender office in the country. Jennifer McNulty, *LA County's New Public Defender Is Guided by 'Presumption of Innocence'*, U.C. SANTA CRUZ NEWSCENTER (Sep. 28, 2018), <https://news.ucsc.edu/2018/09/garcia-profile.html> [<https://perma.cc/X8SY-89A7>].

should explore establishing Public Defender elections of their own. So long as many states have relatively decentralized indigent defense systems, counties could benefit from establishing elections. Doing so can attract innovative public defense practices, heighten the stature and respect for indigent defense, and serve as a vehicle to rally political forces striving to improve the criminal justice system. Although activists may have legitimate reasons for focusing on other issues facing their local criminal justice administration, this Note makes the case that Public Defender elections should be more widely considered by those looking to improve criminal justice across the country.

APPENDIX

Table A: State Comparison Data

State	Pop. ¹³⁷	% of White Pop. ¹³⁸	Violent Crime Per 100k ¹³⁹	Trial Court Judicial Selection ¹⁴⁰	State Government Composition	Indigent Funding Method ¹⁴¹
FL	20,984,400	55%	408	Non-Partisan Elections	Republican trifecta since 2011	100% State Funded
GA	10,429,379	52%	357.2	Non-Partisan Elections	Republican trifecta since 2005	> 50% County Funded
TN	6,715,984	73%	651.5	Partisan Elections	Republican trifecta since 2011	99%-85% State Funded
AK	3,004,279	72%	554.9	Non-Partisan Elections	Republican trifecta since 2015	100% State Funded

137. *2018 National and State Population Estimates*, U.S. CENSUS BUREAU (Dec. 19, 2018), <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html> [perma.cc/SWA4-MHRE].

138. *Population Distribution by Race/Ethnicity*, HENRY J. KAISER FAMILY FOUND. (2017), <https://www.kff.org/other/state-indicator/distribution-by-race-ethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22%3A%22White%22%2C%22sort%22%3A%22desc%22%7D> [https://perma.cc/HN58-8HCL].

139. *Reported Violent Crime Rate in the U.S. in 2017, by State*, STATISTA (2017), <https://www.statista.com/statistics/200445/reported-violent-crime-rate-in-the-us-states> [https://perma.cc/LY6L-BMQQ].

140. See BALLOTPEDIA, <https://ballotpedia.org> (last visited Dec. 23, 2018).

141. HOLLY R. STEVENS ET AL., THE SPANGENBERG PROJECT, CTR. FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 (2010).