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Alone in the Lone Star State: How a Lack of Centralized Public Defender Offices Fails Rural Indigent Defendants

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ALONE IN THE LONE STAR STATE: HOW A LACK OF CENTRALIZED PUBLIC DEFENDER OFFICES FAILS RURAL INDIGENT DEFENDANTS

Aiden Park*

ABSTRACT

The criminal justice system is stacked against indigent defendants. The disadvantages indigent defendants face are exacerbated when mixed with the unique qualities of rural America.

For instance, rural court-assigned attorneys are often picked through ad hoc systems by the very judges these attorneys must appear in front of, creating a judicial conflict of interest. The financial realities of rural public defense work often force counsel to manage a private practice while also balancing court-appointed cases. To the extent integral resources like investigators or experts are present in rural spaces, they are seldom used. This Note highlights the way Texas organizes its public defense system as an example of how the unique properties of rural America interact with our criminal justice system to create substandard representation. As a solution, this Note proposes that rural counties should pool together resources to create centralized, regional public defender offices that serve multiple counties. Centralized offices, rather than private attorneys selected by judges to represent indigent defendants on an ad hoc basis, would sever judicial conflicts of interest; they would allow defenders to focus on their indigent clients rather than be forced to manage a separate practice; and they would have the ability to retain in-house services like investigators. Because establishing these centralized offices requires increased state funding and political will, this Note concludes by analyzing impact litigation lawsuits in several states that successfully improved rural public defense.

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TABLE OF CONTENTS

INTRODUCTION	572
I. BACKGROUND	575
II. THE COURT-ASSIGNED MODEL HAS A DISTINCT AND DISPROPORTIONATELY NEGATIVE IMPACT ON RURAL DEFENDANTS	579
A. <i>Judicial Conflict of Interest</i>	580
B. <i>Lack of Resources</i>	586
C. <i>Inequities in Rural Communities of Color</i>	588
D. <i>Rural Invisibility</i>	591
III. THE REFORM: REGIONAL PUBLIC DEFENDER OFFICES MITIGATE THE DISADVANTAGES OF THE COURT-ASSIGNED MODEL IN RURAL AMERICA	593
A. <i>Benefits of Centralized Offices</i>	593
B. <i>The Need for Regional Offices</i>	598
C. <i>Systemic Obstacles: Funding and Political Will</i>	599
i. <i>Lack of Funding</i>	600
ii. <i>Lack of Political Will</i>	601
IV. USING IMPACT LITIGATION TO CONSENSUS BUILD AND FREE UP FUNDS	603
A. <i>Case Studies</i>	603
i. <i>Impact Litigation in New York</i>	603
ii. <i>Impact Litigation in Nevada</i>	606
iii. <i>Impact Litigation in Michigan</i>	608
B. <i>Impact Litigation in the Context of Texas' Indigent Defense Delivery System</i>	610
CONCLUSION	611

INTRODUCTION

Texas is immense: it sports deserts to its west, storm-scarred plains down its middle, and thick forests spattered along the east. But the Lone Star State's diversity encompasses more than mere topography; it hosts some of the nation's largest cities while innumerable small towns speckle its terrain.

Indigent defendants in these rural locales must often rely on the "assigned counsel" model of public defense, in which county judges ap-

point local private practice attorneys to defend indigent defendants.¹ While many of these assigned attorneys fight “valiantly under trying circumstances and manage to provide zealous, client-centered defense advocacy,”² the assigned counsel model creates negative consequences on assigned counsel’s ability to represent their indigent clients. For instance, assigned defense attorneys often lack a support network of other defenders, which creates a sense of isolation.³ Pay is often a low flat fee that disincentivizes assigned defenders from taking cases to trial and can result in lawyers encouraging their clients to “plead out their cases as quickly as possible.”⁴

These effects interact with cultural and spatial qualities typically associated with rural communities—such as expansive landscapes requiring increased travel, lower tax bases that disadvantage publicly-funded indigent defense, and a scarcity of rural lawyers—to present unique challenges for rural indigent defendants. This Note explores these disadvantages created by the court-assigned model and how features of rural living worsen them.

Because the assigned counsel model of indigent defense delivery has unique effects in rural locales, it should be analyzed separately from urban contexts.⁵ For example, one of the more dire legal issues facing rural spaces is a disturbing lack of lawyers which undermines the ability of rural residents to access justice.⁶ This problem is heightened by the fact that the court-assigned delivery system dominates rural counties in Texas and across the nation.⁷ As such, this Note presents problems that apply not just to Texas but to many rural locales across the United States.

1. TEX. INDIGENT DEF. COMM’N, PRIMER ON MANAGED ASSIGNED COUNSEL PROGRAMS 3 (2017), <http://www.tidc.texas.gov/media/8d87ba4edab9eb1/managed-assigned-counsel-primer.pdf> [<https://perma.cc/WUT7-ZCXP>] [hereinafter TIDC 2017 PRIMER].

2. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769 (2016).

3. *See id.* at 1795.

4. *Id.* at 1774–75.

5. Especially within the last two decades, legal scholars have emphasized the need to separately examine how the law interacts with rurality, outside of the context of more urban areas. *See, e.g.*, Hannah Haksgaard, *Court-Appointment Compensation and Rural Access to Justice*, 14 U. ST. THOMAS J.L. & PUB. POL’Y 88, 90 n.6 (2020) (“As legal scholarship begins to examine issues germane to rural areas, scholars are acknowledging that work about rural areas might apply outside of rural areas, but also that specific issues arise in rural areas that should be addressed separately.”).

6. *See, e.g.*, Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15, 23 (2018) (“[T]he dearth of lawyers in many rural communities—and the complete absence of them from others—are cause for alarm.”).

7. *See* Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 249–250 (2004) (stating that in the nation’s 100 most populated counties, 82% of cases were handled by a public defender agency in contrast to less populous counties where “reliance on individual assigned counsel is significantly more prevalent.”).

Legal scholars who study rural America often note the difficulty in defining “rural.”⁸ For the purposes of this Note, a “rural” county is one that has less than 100,000 people. This definition comes from the Texas Indigent Defense Commission (TIDC), which is Texas’ indigent defense oversight body.⁹ TIDC categorizes counties as “rural regional,” small, medium, and large for the purpose of analyzing grant allocation to these counties.¹⁰ Because TIDC is the regulatory authority for the state’s indigent defense, this Note has adopted its definition of “rural.”¹¹

This Note describes the systemic and structural features that enable and oftentimes compel substandard client representation. Indeed, “the difference between valiant defenders and those who are unable to provide zealous representation is not always a matter of the individual characteristics of the particular lawyers in question,”¹² but a result of their working conditions.¹³

Through interviews conducted by the author, this Note uses the personal experiences of five separate practitioners to add anecdotal evidence of systemic problems of rural legal defense delivery on the ground. These practitioners include public defenders working in rural regional offices in Central and West Texas, a regional office in northern Michigan, and a TIDC board member. Especially in the context of rural America—an already understudied area¹⁴—their voices contribute an important texture to existing legal scholarship.

8. See, e.g., Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 177 (2006); see generally Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 475–77 (2014) (describing the inherent difficulty in improving access to justice in rural areas because of the inherent variation in legal needs from any given rural community).

9. See TEX. INDIGENT DEF. COMM’N, PUBLIC DEFENDER PRIMER 17 (2020), [hereinafter TIDC 2020 PUBLIC DEFENDER PRIMER] <http://www.tidc.texas.gov/media/8d92f5948408cb1/tidc-public-defender-primer-oct-2020.pdf> [https://perma.cc/6LDT-VJ8N].

10. *Id.*

11. For context, TIDC’s rural-designated counties (those with a population of less than 100,000 people) have population densities anywhere between over 100 people per square mile to .01 people per square mile. In Texas’ most populous rural county, the population is 92,581. See *Quickfacts: Bowie County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/bowiecountytexas/PST045219> [https://perma.cc/HB9Y-3UHP]. In Texas’ least populous rural county, the population is fifty-seven. *Quickfacts: Loving County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/lovingcountytexas/PST045219> [https://perma.cc/L4A4-7HK3].

12. Brensike Primus, *supra* note 2, at 1770.

13. *Id.*

14. See, e.g., Pruitt & Showman, *supra* note 8, at 494–95 (commenting on how rural America is generally understudied, evinced by a “dearth of current and nuanced data” and overlooked by lawmakers who “rarely consider the particular challenges facing rural residents and their communities”); see also Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1367, 1372 (2021) (stating that “[c]ourts in rural and smaller-town America are understudied and often left out of the narrative surrounding the court process,” and that “[w]hile legal practitioners and scholars have increasingly acknowledged the need to focus on

This Note builds on its description of the legal defense system to argue that the court assigned model—the primary way in which Texas organizes its indigent defense system—distinctly disadvantages the state’s rural citizens. Structural change is needed to offset this model’s detrimental consequences on rural communities. Part I provides background on defense delivery throughout the nation and specifically in Texas. Part II discusses how the court-assigned model has a disparate impact on rural indigent defendants namely because it: (1) lacks protections for judicial independence; (2) warps financial incentives; (3) provides no structure for in-house litigation support services; and (4) although rural America’s demographics continue to diversify, it regularly faces invisibility due to an academic tendency to focus on urban contexts. Part III recommends creating independent, centralized regional offices in rural locales to mitigate the unique harms that rural indigent defendants face. Last, Part IV addresses counterarguments and explores examples of impact litigation that ushered in reform in rural spaces.

I. BACKGROUND

In *Gideon v. Wainwright*, the Supreme Court decided that every defendant accused of a felony is entitled to a lawyer, and if the defendant is unable to afford a lawyer, one shall be appointed to them.¹⁵ *Gideon*’s progeny expanded the Sixth Amendment’s right to counsel to cover defendants accused of misdemeanors and faced with imprisonment,¹⁶ as well as to youths in the juvenile justice system charged with delinquency.¹⁷ The Supreme Court, however, has not advised states on *how* to structure their defense delivery for indigent defendants. As a result, states distribute lawyers to indigent defendants in various ways.

For example, Colorado maintains a statewide public defender model. It has one centralized state administrative office and twenty-one regional trial offices throughout the state, which together employ 535 at-

areas outside of cities . . . that discussion has not progressed much further than” analyzing the dearth of rural lawyers generally).

15. 372 U.S. 335 (1963).

16. *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972). Texas has gone a step further by stating that anyone accused of a misdemeanor shall be appointed an attorney if they cannot afford one even if imprisonment is merely a *possibility*. See *Lewis v. State*, 501 S.W.2d 88, 90 (Tex. Crim. App. 1973) (citations omitted).

17. See *In re Gault*, 387 U.S. 1, 55 (1967).

torneys under one, unified system.¹⁸ But only twenty-four states feature these types of unified systems; the remaining twenty-six states provide either a hybrid model of joint state and local public defender service delivery, or provide “minimal” state-level oversight.¹⁹

Texas is an example of a system with minimal state-level oversight. It employs a county-based system, delegating decision-making about indigent defense delivery to its 254 counties.²⁰ The latitude that counties enjoy in how they decide to assign counsel has resulted in counties forming a variety of defense delivery methods. These methods can generally be categorized into three organizational systems: the centralized office model, the contract counsel model, and the assigned counsel model.²¹

First, some counties have formed one centralized office that serves the citizens of that county.²² These offices employ full-time attorneys to represent indigent defendants.²³ Generally, the more populated a county, the more likely that county has an organized public defender office; seven of the top ten most populated counties in Texas maintained a public defender’s office as of 2020.²⁴ Alternatively, some counties operate under a “regional” public defender’s office, which services a cluster of counties.²⁵ Thirty-seven Texas counties in 2020 were served by centralized public defender offices, including regional offices.²⁶

Second, some counties utilize the “contract counsel” model, in which individual attorneys contract with a county to handle a certain percentage of that county’s indigent defendants.²⁷ In many instances,

18. *What We Do*, OFF. OF THE COLO. STATE PUB. DEF. <http://www.coloradodefenders.us/information/what-we-do/> [https://perma.cc/3738-QYRZ].

19. See DAVID CARROLL, RIGHT TO COUNSEL SERVICES IN THE 50 STATES: AN INDIGENT DEFENSE REFERENCE GUIDE FOR POLICYMAKERS 102–03 (2017), <https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf> [https://perma.cc/CWV7-Y8RG] (noting that seven states have a hybrid system, in which certain cases, like misdemeanors, are delegated to the county level, while other cases, like felonies, are managed by the state itself. Nineteen states are considered to offer “minimal or no-state run [public defender] services”).

20. TIDC 2017 PRIMER, *supra* note 1, at 1. (“The state of Texas delegated its responsibility to provide and pay for these services to counties and local property taxpayers.”).

21. TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 6.

22. *Id.*

23. *Id.*

24. *Id.* at 12. Those seven most populated counties, from largest to smallest population, are: Harris County, Dallas County, Tarrant County, Bexar County, Travis County, Collin County, and Denton County. See *Texas Counties by Population*, TEX. DEMOGRAPHICS BY CUBIT, https://www.texas-demographics.com/counties_by_population [https://perma.cc/D8JH-PLY6] [hereinafter TEXAS DEMOGRAPHICS] (last visited Jan. 20, 2023).

25. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 13–15, 20–21.

26. *Id.* at 12.

27. Catherine Burnett, *Choosing Choice: Empowering Indigent Criminal Defendants to Select Their Counsel*, 60 S. TEX. L. REV. 277, 295 (2019).

the modest fees a contract attorney makes from their indigent clients force them to practice privately in addition to their contract cases.²⁸ Although it is hard to discern the exact number of counties in Texas that rely on this model,²⁹ only about 10% of all counties within the U.S. use this contract model as a primary means of representing indigent defendants.³⁰

Third, most counties in Texas, particularly rural ones, operate under an “assigned counsel” model, where county judges appoint counsel from a pre-approved list of local, private practice attorneys. The court-assignment model is by far the dominant system in Texas; indeed, it is considered the default.³¹ There are variations within this court-assigned counsel model. For example, judges in some—particularly rural—counties assign private practice attorneys through an “ad hoc” system, where judges appoint counsel on a case-by-case basis without a prearranged list or rotation method.³² Judges in other counties utilize a selection wheel, rotating list, or some other method to ensure a random selection of attorneys instead of leaving the selection process solely to judicial discretion.³³ However, in practice, judges often deviate from this process and select attorneys who are not even listed or otherwise a part of

28. See generally Tim Young, *The Right to Counsel: An Unfulfilled Constitutional Right*, A.B.A. (Oct. 1, 2013), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/the_right_to_counsel/ [<https://perma.cc/L5ZP-G25>] (taking issue with “low-bid contract systems” because “counsel has little loyalty to the client but is incentivized to deal with the cases as quickly as possible or by making sure to keep the judicial-appointing authority satisfied”); Burnett, *supra* note 27 (“In some instances, contract attorneys maintain a substantial private practice and serve as a back-up for cases that the public defender cannot accept; in other instances, this model may serve as contract counsel’s full-time legal employment.”).

29. There is currently no comprehensive study analyzing all 254 counties in the context of contract indigent defense.

30. Burnett, *supra* note 27.

31. TIDC 2017 PRIMER, *supra* note 1, at 3.

32. Each county in Texas is required to report their plans for indigent defense delivery to TIDC, the state’s indigent defense oversight commission. An examination of these plans reveals that counties have discretion to opt for an ad hoc attorney-selection model, particularly if that county is rural. For example, rural Deaf Smith County, home to less than 20,000 people, expressly stated in its plans that because of “an insufficient number of attorneys,” the county cannot “allow for an effective random appointment procedure” See Attorney Selection Process, Deaf Smith and Oldham District Court and County Court Plan (to be codified at Tex. Loc. Gov’t Code 74.093) (proposed Oct. 21, 2019), <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=371> [<https://perma.cc/SS5B-DCCV>]. Other states also rely on a similar ad hoc model of attorney appointment. See, e.g., David P. Cullen, *Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions*, 17 OKLA. CITY U. L. REV. 311, 320 (1992) (describing the ad hoc appointment model in Oklahoma).

33. TIDC 2017 PRIMER, *supra* note 1, at 3.

the selection mechanism.³⁴ Deviating from a system designed to impartially assign attorneys creates the specter of favoritism, which undermines public confidence in the bench while also raising questions about the quality of defense representation judges are facilitating.

Although unique in some ways, Texas offers a useful case study of indigent defense delivery nationwide. The state serves as a microcosm of how many states organize their indigent defense delivery systems—all three of the defense delivery systems are present throughout the nation. Texas is also one of nineteen states that lets its counties decide how to structure its defense delivery system.³⁵ But in other respects, Texas differs greatly from its peers. It has the most counties of any state in the country,³⁶ and nearly 100 more counties than the state with the second greatest number of counties.³⁷ In a system that delegates indigent defense delivery to individual counties, Texas' extraordinarily high county count makes TIDC's job especially tough.

Over fourteen million Texans—more than the entirety of Pennsylvania, the fifth most populous state³⁸—live in a county that operates under the court-appointed attorney model.³⁹ Yet seven of the ten most populous counties in the state benefit from a centralized public defender's office.⁴⁰ In short, the majority of Texas' most populated counties benefit from defenders who enjoy institutional backing through centralized offices, while rural, less populated locales are more likely to operate under the court-assigned defense attorney system. This reflects a national trend where the court-assigned delivery system pervades rural

34. See, e.g., Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 372, 389–90 (2012) (describing how judges will simply appoint attorneys who are not listed next on the selection mechanism.).

35. CARROLL, *supra* note 19, at 103.

36. Marilyn Haigh, *Why Does Texas Have So Many Counties? A History Lesson*, TEX. TRIB. (July 3, 2018, 12:00 AM CT), <https://www.texastribune.org/2018/07/03/beto-orourke-visited-all-254-counties-texas-why-are-there-so-many/> [<https://perma.cc/BVL6-B6L5>].

37. Georgia has the second greatest number of counties. See Marilyn Haigh, *Why Does Texas Have So Many Counties? A History Lesson*, TEX. TRIB. (July 3, 2018), <https://www.texastribune.org/2018/07/03/beto-orourke-visited-all-254-counties-texas-why-are-there-so-many/>.

38. *Pennsylvania Population Hit 13 Million in 2020*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html>; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/>.

39. TIDC lists each county that operates under a public defender centralized office model. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 17. The Author calculated the population of each of these thirty-six counties and subtracted it from Texas' estimated population in 2019, using population estimates from the Census. Conversely, because Texas has 254 counties and a separate TIDC report disclosed that around 214 counties rely on the court-assigned model, and because the court-assigned model is considered the "default" in Texas, this Author inferred that any county not included in the thirty-six that have a centralized office is likely to rely on the court-assigned model. See TIDC 2017 PRIMER, *supra* note 1 at, 3.

40. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 12.

locales while urban areas are more likely to have centralized offices.⁴¹ That is significant when considering that over 4,170,000 Texans lived in a TIDC-defined “rural” area in 2016.⁴²

Having provided a brief background on defense delivery models, including how the court-appointed defender system is prevalent in rural locales, this Note now turns to how the court-appointed model disadvantages indigent defendants. These disadvantages, inflamed by many of rural America’s unique attributes, disproportionately affect rural indigent defendants.

II. THE COURT-ASSIGNED MODEL HAS A DISTINCT AND DISPROPORTIONATELY NEGATIVE IMPACT ON RURAL DEFENDANTS

The court-assigned model of indigent defense delivery is ubiquitous among rural America. It also negatively affects rural defendants’ access to justice. This Part explores four of those negative effects. First, by necessarily forcing defense counsel to rely on judicial assignments, it places counsel in a serious conflict of interest. This conflict is intensified by systems of elected state judges and conservative political views common in rural areas. Second, rural America is experiencing a shortage of lawyers, a dearth that also extends to vital auxiliary services like investigators. Third, expansive rural locales that require travel—coupled with a lack of resources—have a distinct impact on communities of color living in rural areas. Fourth, rural America’s inherent sense of invisibility causes many indigent defendants not only to suffer denials of justice, but also experience a heightened risk of their stories never being heard by reformers and scholars.

41. See, e.g., Wallace & Carroll, *supra* note 7, at 249–250; Piatt, *supra* note 34, at 385–86 (“The public-defender system is the primary method of providing indigent defense in the nation’s largest cities and counties.”).

42. Jill Cowan, *Census Data Shows Widening Divide Between Urban and Rural America*, DALL. MORNING NEWS (Dec. 7, 2016, 11:15 PM), <https://www.dallasnews.com/business/2016/12/08/census-data-shows-widening-divide-between-urban-and-rural-america/> [https://perma.cc/GU8V-4PQL] (stating that in 2016, 15% of Texas’ population lived in rural areas); see NAZRUL HOQUE & SAVANNAH L. SIPOLE, DEMOGRAPHIC TRENDS IN TEXAS, 2010-2016 (U. Hous., Hobby Sch. Of Pub. Aff. White Paper Series 2017), https://uh.edu/hobby/cpp/white-paper-series/_docs/HSPA-White-Paper-Series_No.-13.pdf.

A. Judicial Conflict of Interest

First, the court-appointed attorney model evinces a profound conflict of interest between the judiciary and criminal defense representation,⁴³ which is more pronounced in rural locales. In counties that rely on a court-appointed attorney model, the same judge who assigns counsel is also responsible for deciding “how much they are paid and whether their motions—say, to reduce bail or test DNA—have merit.”⁴⁴ As described below, judges have an interest in keeping an efficient docket, which is often at odds with a defense lawyer’s duty to provide their client a robust defense.⁴⁵ And if judges have discretion to “retaliate by appointing [these lawyers] to fewer cases or cutting their pay,” a defender may be disincentivized to provide zealous representation.⁴⁶

Further, judges at the county level in Texas are elected.⁴⁷ Most, if not all, rural counties in Texas historically vote Republican,⁴⁸ many with an overwhelming majority. Generally, those who lean right of center are more likely to agree that the criminal justice system is not tough enough.⁴⁹ Thus, a judge’s re-election may in part depend on appearing tough on crime and keeping an efficient docket if they preside over a court located in a rural county with a Republican-leaning constituency.

43. Brensike Primus, *supra* note 2, at 1789–90 (discussing why dependence on the judiciary creates a conflict of interest because, among other reasons: (1) judges may be unwilling to approve numerous requests for resources like experts in light of a heavy docket; (2) judges have discretion regarding who can serve as a court-appointed lawyer; and (3) some judges may refuse to appoint clients to lawyers who tend to take more cases to trial); *see also* A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [<https://perma.cc/5HK3-KKDM>] (noting that a lack of independence from the judiciary subjects defense counsel to “undue political pressures” affecting “efficiency and quality of services”).

44. Neena Satija, *How Judicial Conflicts of Interest Are Denying Poor Texans Their Right to an Effective Lawyer*, TEX. TRIB. (Aug. 19, 2019, 12:00 AM), <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/> [<https://perma.cc/2879-8ZMG>].

45. *Id.*

46. *Id.*

47. TEX. CONST. art. V, § 15.

48. *See* Ross Ramsey, *Analysis: The Blue Dots in Texas’ Red Political Sea*, TEX. TRIB. (Nov. 11, 2016, 12:00 AM), <https://www.texastribune.org/2016/11/11/analysis-blue-dots-texas-red-political-sea/> [<https://perma.cc/UVP6-CHGR>] (stating that President Trump won almost all of Texas’ rural counties, a trend that Republicans have relied on for several decades of national elections); *see also* David Montgomery, *The Urban-Rural Political Divide Is Growing*, BLOOMBERG (Nov. 6, 2019, 7:15 PM), <https://www.bloomberg.com/news/articles/2019-11-07/america-s-growing-urban-rural-political-divide> [<https://perma.cc/88FS-6RQQ>].

49. *See, e.g.*, Justin McCarthy, *Americans’ Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx> [<https://perma.cc/DSU8-M8P7>] (“The majority of Republicans and Republican-leaning independents say [the criminal justice system] is ‘not tough enough’ (65%) . . .”).

There is therefore little incentive for the judge to allow, much less encourage, zealous defense advocacy in such locales. Indeed, assigned attorneys are often subject to heightened pressure to move their clients through the criminal justice system as fast as possible to allow the presiding judge to keep an efficient docket.⁵⁰

This conflict of interest can have grave consequences for the quality of representation defense counsel can provide their clients. One helpful example is the story of Drew Willey, a Texas attorney newly approved to the appointment list in an assigned-counsel model county, who was accused by a Galveston County judge of “overwork[ing] cases.”⁵¹ The judge’s accusations that Willey “overwork[ed]” his cases came after Willey requested that he be reimbursed after hiring an investigator to look into inconsistent police statements.⁵² The local judge, Jack Ewing, accused Willey of being the “only” court-appointed attorney in Judge Ewing’s courtroom to routinely ask for an investigator, and the judge ultimately denied the request.⁵³ When the New York Times covered this story in 2018, Willey was suing Judge Ewing for ending Willey’s representation of certain indigent clients after telling Willey that he was spending too much time and accumulating excessive legal fees on his assigned cases.⁵⁴

The threat of such judicial reprimand results in less zealous advocacy. Appointed counsel depend on judges to be assigned indigent clients. These attorneys are thus under pressure to spend only as much time on a case as a judge deems appropriate. Assigned defenders may also be effectively unable to pay for resources like investigators. As a result, assigned counsel will be limited in their roles as advocates.

These limitations effectively force defense attorneys to breach their duty of diligence under the Model Rules of Professional Conduct. The Rules’ official comments state that a lawyer should pursue a matter for

50. Brensike Primus, *supra* note 2, at 1772 (describing judges who “impatiently [wait] for the defender to hurry up and dispose of her cases so they can clear their heavily-congested dockets,” and a judge who held a defender in contempt for indicating that he could not represent a defendant he had met only twenty minutes prior).

51. Richard A. Oppel Jr., *His Clients Weren’t Complaining. But the Judge Said This Lawyer Worked Too Hard*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html> [<https://perma.cc/G5M8-ZEE6>].

52. *Id.*

53. *Id.*

54. *Id.* Willey and Judge Ewing settled the lawsuit, agreeing to “abide by a rotating court appointment system through which attorneys are appointed in a fair, nondiscriminatory manner set by the Texas Fair Defense Act and by the Galveston County Indigent Defense Plan.” Amanda Robert, *Criminal Defense Attorney and Judge Settle Suit Over Alleged Retaliation Involving Recording*, A.B.A. J. (2019) (internal quotations omitted), <https://www.abajournal.com/news/article/attorney-and-judge-settle-suit-over-alleged-retaliation> [<https://perma.cc/9H32-3RPR>].

their client “despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁵⁵ As a result, indigent defendants subject to the court-appointment model may be denied the type of representation required under the Model Rules.

The pressures assigned counsel face are aggravated by warped financial incentives. Take, for example, Deaf Smith County, a rural county on the northwest border of the Texas panhandle. According to a fee report Deaf Smith County submitted to TIDC, the minimum the county compensates assigned counsel is \$250 per felony case.⁵⁶ This rate can increase, but only if the court finds defense counsel spent a “reasonable and necessary” amount of time on the case.⁵⁷ This sets up a situation ripe for discretionary abuse. As one scholar notes:

No one in this country would call a sporting event fair where the referee picked the player on one side of a match and then chose how much that player was paid after the game concluded. Yet, every day, in parts of this country, judges pick defense lawyers and then choose how much they should be paid and call it justice.⁵⁸

Such paltry pay may in turn incentivize defense attorneys to take on as many clients as possible and to dispose of each case as fast as possible just to make enough income to survive.⁵⁹

These warped financial incentives are worsened by the spatial qualities of rural America. Rural locales are frequently described as vast, and “the unavoidable challenge that every rural legal service provider must face is the expansive geography that frequently separates the

55. MODEL RULES OF PRO. CONDUCT r. 1.3, cmt. 1 (AM. BAR ASS’N 1983).

56. *Form G: Attorneys Fee Schedule*, TEX. INDIGENT DEF. COMM’N GRANT AND PLAN MGMT. WEBSITE, <http://tidc.tamu.edu/IDPlanDocuments/Deaf%20Smith/Deaf%20Smith%20Oldham%20District%20and%20County%20Court%20Attorney%20Fee%20Schedule.pdf> [https://perma.cc/743T-UMEX] (last visited Mar. 12, 2023).

57. *Id.*

58. Young, *supra* note 28.

59. See Haksgaard, *supra* note 5, at 114. Private practice attorneys in rural areas often perform services akin to that of a public interest attorney, such as representing indigent defendants. Despite this, these attorneys are unable to access programs that forgive the mountains of loans they accrue while in law school, namely the Public Service Loan Forgiveness Program. Thus, most new law graduates cannot afford to become a private practice attorney in rural areas, or alternatively, do become rural private practice attorneys with an incentive to take on an untenable amount of cases simply to stay above water. For further discussion on enacting reforms to enable and incentivize new law graduates to serve rural communities as private practice attorneys, see Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 ME. L. REV. 209 (2019) [hereinafter Haksgaard, *Rural Practice*].

lawyers and programs from their clients.”⁶⁰ Indeed, it is “a hallmark of rural living that residents must travel greater distances, at greater cost, to access all sorts of services and institutions.”⁶¹ The same is true for defenders who meet with their clients.

Texas embodies this notion of expansive rural spaces: its largest county (with a population less than 10,000 in 2010) is 6,183 square miles,⁶² which is bigger than Connecticut.⁶³ In fact, Texas has forty counties that are larger than Rhode Island.⁶⁴ These large counties tend to be rural; only one county in the top ten largest in terms of land area has a population over 100,000 people.⁶⁵ The other nine counties all have populations under 50,000 people.⁶⁶ Indeed, early in Texas’ statehood, the more the population grew in Texas’ western counties, the likelier the county would split into smaller units.⁶⁷ In other words, many rural counties remained large while more populated counties split into smaller counties.

In effect, private attorneys assigned to indigent defendants in rural counties face longer travel times to visit clients, talk to witnesses, or otherwise investigate a case than those assigned in more populated counties. Coupled with the fact that these private attorneys are incentivized to take on as many cases as possible to earn a sufficient income while also balancing their private practice, it is easy to see how remote indigent defendants get short-changed. Not to mention the fact that private attorneys often appear on appointment lists in more than one county.

Dependency on the judiciary and warped financial incentives—compounded with the sprawling nature of rural America—bends many

60. Jonathan D. Asher, Jennifer Cuesta, and Patricia Craig, *The Challenges of Serving Rural Colorado*, 46 COLO. L. 16, 16 (2017).

61. Pruitt & Showman, *supra* note 8 at 486–87.

62. *QuickFacts: Brewster County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/brewstercountytexas,TX/LND110210> [<https://perma.cc/DMA2-T7NY>] (last visited Mar. 12, 2023).

63. Connecticut’s square mileage is 5,018. *The Land*, CT.GOV, <https://portal.ct.gov/About/The-Land> [perma.cc/CCM6-BASV] (last visited Jan. 20, 2023).

64. Rhode Island covers an area of 1,214 square miles. *Fun Facts & Trivia*, RI.GOV <https://www.ri.gov/facts/trivia.php> [perma.cc/2LZ6-QUTJ] (last visited Mar. 12, 2023). For a ranking of Texas’ counties based on size, see *Texas Counties: Land Area*, TEXASCOUNTIES.NET, [hereinafter *Texas Counties: Land Area*] <http://www.texascounties.net/statistics/landarea.htm> [perma.cc/Q9CF-9KJP] (last visited Mar. 12, 2023).

65. The top ten largest Texas counties in size, in order, are: Brewster, Pecos, Hudspeth, Presidio, Culberson, Webb, Val Verde, Crockett, Reeves, and Terrell County. *Texas Counties: Land Area*, *supra* note 64. Population figures based on TEXAS DEMOGRAPHICS, *supra* note 24.

66. *See id.*

67. *See* Haigh, *supra* note 37 (“During the end of the 19th century, Texas’ larger counties in the western part of the state were split into smaller units as the population grew.”).

well-intentioned lawyers to the will of an appointing judge, often extinguishing the defense attorney's passion, and breeding complacency.⁶⁸ For example, a private practice lawyer in 2018 handled 327 court-assigned adult felony cases across a cluster of rural counties in Texas' panhandle.⁶⁹ This is more than double the amount of cases the TIDC set as a maximum for what it says a lawyer can competently manage.⁷⁰ Moreover, his indigent defendant caseload is coupled with an entirely separate private practice that he oversees. Further, in 2019, this attorney handled 123 of the 125 total adult felony cases in rural Gaines County, 55 of the 61 felony cases in rural Garza County, and 93 of the 107 felony cases in rural Dawson County.⁷¹ Despite his ubiquity among these counties, a Lubbock-based news station reported the lawyer was not communicating with clients until their court appearances.⁷² The lawyer was even reported to have incorrectly informed clients that plea deals were their only option.⁷³

This problem is not isolated. According to an interview conducted for this Note with Michelle Moore—a public defender practicing in rural central Texas—there is a judge presiding over a neighboring rural county who habitually appoints their attorney “buddies” to represent those accused of misdemeanors.⁷⁴ “There’s just something that doesn’t

68. See Brensike Primus, *supra* note 2 at 1770 (“Many defenders sincerely want to be effective advocates for their clients, or at least they had that desire at some point in their careers, but the system and its concomitant pressures beat the fight out of them.”).

69. *Indigent Defense Data for Texas: Attorney Caseload Report*, TEX. INDIGENT DEF. COMM’N, [hereinafter TIDC Caseload Data] <http://tidc.tamu.edu/Public.Net/Reports/AttorneyCaseLoad.aspx> [perma.cc/Y53M-FQ4E] (select Fiscal Year 2018, check ‘Combine Attorney Across Counties,’ and select “View Report” before navigating to sort by “Adult Felony Cases Paid”) (last visited Mar. 12, 2023).

70. TEX. INDIGENT DEF. COMM’N, GUIDELINES FOR INDIGENT DEFENSE CASELOADS xvii (2015), <http://tidc.texas.gov/media/8d85e69fd4fb841/guidelines-for-indigent-defense-caseloads-01222015.pdf> [perma.cc/L39X-W4QU] (recommending that an attorney carry an annual full-time caseload of no more than 144 third-degree felonies, 105 second-degree felonies, or 77 first-degree felonies).

71. See Haksgaard, *Rural Practice*, *supra* note 59 and accompanying text; TIDC Caseload Data, *supra* note 69.

72. Digital Staff & Shaley Sanders, *KCBD Investigates: Justice on a Budget*, KCBD 11 (Apr. 12, 2016, 2:03 PM), <https://www.kcbd.com/story/28887256/kcbd-investigates-justice-on-a-budget/> [https://perma.cc/EGH4-BP4Q].

73. *Id.*

74. Telephone interview with Michelle Moore, Chief Public Defender, Burnet County (Sept. 25, 2020) [hereinafter Moore Interview]; see also Brensike Primus, *supra* note 2 at 1790 (stating that, at least in Texas, “claims that judges routinely appoint those with whom they have personal relationships persist.”).

smell right about that,” said Moore,⁷⁵ who in 2011 helped establish a centralized public defender office in rural Burnet County.⁷⁶

Today, Moore serves as the Burnet County Office’s chief public defender. Her story illustrates the fact that even a centralized public defender office is not wholly independent from the judiciary, as she explained in an interview.⁷⁷ The county judge who initially supported the creation of the Burnet County office did not seek reelection, and in the subsequent campaign for the bench, multiple candidates decried the public defender’s office’s existence, swearing that they would abolish it.⁷⁸ Luckily, Moore said, the judge who did win the election did not oppose the public defenders’ office; nevertheless, it was a stark reminder of the office’s precariousness. “[W]hen that’s the case, how can the public defender not suck up a little?” Moore said.⁷⁹

In short, attorneys who are directly assigned to indigent clients by judges face a lack of independence from the judiciary, which causes lawyers to prioritize appeasing judges at the expense of zealous advocacy. These considerations are pronounced in rural locales; judges who preside over right-leaning, rural constituencies may feel pressure to appear tough on crime and keep an efficient docket, which stymies methodical defense representation. The paltry pay for indigent appointments incentivizes attorneys to take on as many cases as possible, and their work is made more challenging by the expansive nature of rural geography.⁸⁰

Centralized offices are still subject to political reliance on the judiciary, as Michelle Moore’s experiences demonstrate. Further, centralized offices are subject to the geographic challenges of providing services in a rural area. But as Section III will detail, attorneys in centralized offices do not rely on judges for cases (and thus, their livelihood), investigators, or pay.⁸¹ Further, a centralized office offsets the incentive to accept an overwhelming number of clients, thereby mitigating the sprawling effect rural America has on defense representation.

75. Moore Interview, *supra* note 74.

76. DailyTrib, *New Public Defender in Burnet County* | *ThePicayuneTV*, YOUTUBE (Nov. 9, 2011), https://www.youtube.com/watch?v=KN8_Erdmjo.

77. Moore Interview, *supra* note 74.

78. *Id.*

79. *Id.*

80. See discussion *supra* notes 63–70 and accompanying text.

81. See *infra* Part III.

B. *Lack of Resources*

There is a distinct disadvantage in rural areas when it comes to retaining support staff and other integral resources like investigators. First, court-assigned attorneys in rural locales often do not have the adequate infrastructure to hire many of these integral services.⁸² In rural areas, this problem is heightened as resources like investigators, paralegals, case managers or immigration specialists are particularly scarce.⁸³ Indeed, there is a growing shortage of lawyers in rural spaces altogether.⁸⁴ Second, even if an assigned defender does manage to retain some sort of support staff for a particular case, many attorneys face the added obstacle of requesting reimbursement from the very judge that appointed them to the client in the first place.⁸⁵ This additional hurdle offers another example of how a lack of judicial independence deters zealous defense.

The general scarcity of resources has a direct, negative impact on rural defendants. An illustration of this disparate impact was outlined by a class action lawsuit against the state of Nevada for its failure to provide adequate indigent representation in rural areas.⁸⁶ One of the plaintiffs in that case was an indigent defendant located in rural Nevada who was appointed an attorney.⁸⁷ She was arraigned on an arson charge in 2013, and eventually, for reasons largely unrelated to the matter at hand, the court set her trial for 2016.⁸⁸ The defendant's assigned counsel nonetheless requested a continuance because he was still searching for an arson expert, three years after the defendant's initial arraignment.⁸⁹ The complaint alleges that although the A.B.A. calls for

82. See Brensike Primus, *supra* note 2 at 1773 ("These assigned lawyers typically don't have the money for adequate support staff or investigators. Many defenders are solo practitioners who have no support staff whatsoever.")

83. See, e.g., SIXTH AMEND. CENT., THE RIGHT TO COUNSEL IN ARMSTRONG COUNTY AND POTTER COUNTY, TEXAS: EVALUATION OF ADULT TRIAL LEVEL INDIGENT DEFENSE REPRESENTATION 138 (2019) [hereinafter *Right to Counsel in Armstrong County*], https://sixthamendment.org/6AC/6AC_tx_armstrongpotterreport_2019.pdf [perma.cc/23L8-76KX] (stating that the scarcity of expert witnesses and investigators in rural locals around Amarillo, Texas makes defenders less likely to request such services)

84. See Haksgaard, *supra* note 5, at 91 (stating that over the last fifty years, "the rural lawyer shortage is becoming more pronounced.")

85. See, e.g., Oppel, *supra* note 51.

86. See First Amended Class Action Complaint for Injunctive and Declaratory Relief, *Davis v. Nevada* (Nev. Dist. Ct. Oct. 15, 2018) (No. 17oCo2271B) [hereinafter *Davis Complaint*], https://www.aclu.org/sites/default/files/field_document/davis_v._nevada_-_first_amended_complaint.pdf [perma.cc/TU4F-HNXXR].

87. *Id.* ¶¶ 10–11.

88. See *id.* ¶¶ 11–12.

89. *Id.* ¶ 40.

funding for “expert, investigative, and other litigation support services” for assigned defense counsel, Nevada has failed to uphold most of these standards in its rural locales.⁹⁰

Perhaps one of the most important resources available to a defender are investigators. In an interview with Michelle Moore, she described their importance. Before practicing in rural Central Texas, Moore worked for the public defender’s office in Dallas. But in rural Burnet County, Moore said she was shocked at how few defenders in the region had access to investigators.⁹¹ “Having an investigator, even in misdemeanor cases, makes all the difference in the world,” Moore said. “They’re crucial in getting cases dismissed ahead of time, obtaining interview witnesses and taking crime photos.”⁹² In the end, Moore said, investigators actually save the government money; because investigators are often a key part in getting a case moving, defendants spend less time locked up.⁹³ When it can take between months to even a year for a defendant to be officially indicted⁹⁴ and when Texas spends an average of over \$22,000 per inmate each year,⁹⁵ the cost to house defendants quickly adds up.

Moore’s realization that investigators are underused in rural central Texas mirrors other rural parts of the state. For example, in Armstrong County, located outside of Amarillo with an estimated population just shy of 2,000 people,⁹⁶ court-assigned counsel seldom, if ever, ask the judge to appoint investigators.⁹⁷ A report by the Sixth Amendment Center found that the primary reason stemmed from the lack of judicial independence.⁹⁸ More specifically, the report stated that assigned counsel

90. See *id.* ¶ 138.

91. Moore Interview, *supra* note 74.

92. *Id.*

93. *Id.*; see also Aaron Gottlieb & Kelsey Arnold, *Do Public Defender Resources Matter? The Effect of Public Defender and Support Staff Caseloads on the Incarceration of Felony Defendants*, 12 J. SOC’Y FOR SOC. WORK & RSCH., 569 (2021) (arguing that smaller caseloads for support staff, namely social workers and investigators, reduces the time defendants spend in pretrial detention).

94. PATRICK LIU, RYAN NUNN, & JAY SHAMBAUGH, HAMILTON PROJECT, *THE ECONOMICS OF BAIL AND PRETRIAL DETENTION* 5 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/KGY3-92NS>] (“[T]he amount of time that a person is detained if they are unable to afford bail is substantial, ranging from 50 to 200 days . . .”).

95. Fernando Ramirez, *Here’s How Much Texas Spends on the Average Inmate*, CHRON (July 26, 2017, 11:16 PM), <https://www.chron.com/news/houston-texas/texas/article/Here-s-how-much-Texas-spends-on-the-average-inmate-11439179.php> [<https://perma.cc/K9BF-3UC6>].

96. *QuickFacts: Armstrong County, Texas*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/armstrongcountytexas/AGE775219> [<https://perma.cc/K69U-LMCE>].

97. See SIXTH AMEND. CENT., *supra* note 83, at 138 (describing how judges in the county claim that their appointed counsel “never” use investigators in misdemeanor cases and seldom do in felony cases, and describing one lawyer who had hired an investigator only four times, despite being on the assignment list for ten years).

98. *Id.*

failed to contact investigators and experts because: (1) it is difficult to find competent investigators in the Amarillo area; (2) assigned counsel often fear reprisal when asking a judge to fund investigators; (3) assigned counsel worry about disclosing case-related information to a supervising judge when making an investigator request; (4) it takes substantial time to petition the court for an investigator, and oftentimes, the court will not allocate enough funding to secure an investigator; and (5) judges will sometimes provide investigator funding on the condition that the judge can select the specific investigator, interfering in the defense.⁹⁹

It is especially concerning that defenders are either unable or unwilling to hire investigators, because even in rural locales, prosecutors have ready access to such resources. There is a troubling asymmetry regarding access to resources when comparing indigent defenders and the state.¹⁰⁰ Returning to Armstrong County, a report found that the prosecutor who covers the region had access to one in-house investigator and one secretary assigned to the county.¹⁰¹ In addition to this relatively meager support staff, the county has two Texas Department of Public Safety troopers assigned to patrol the stretch of highway that crosses through the county, a county sheriff, the chief deputy, and another deputy,¹⁰² all of whom are paid by the state and work closely with the prosecutor. In contrast, Armstrong County reported that it spent zero dollars on investigation and expert expenses for indigent defense in the 2017 fiscal year.¹⁰³

C. Inequities in Rural Communities of Color.

Rural areas in Texas have seen large increases in the number of immigrants primarily of Mexican descent, a trend reflected in many

99. *Id.*

100. *See, e.g.*, Gottlieb & Arnold, *supra* note 93, at 570 (“... prosecutors tend to have far more resources than public defenders, which results in much lower caseloads.”); Satija, *supra* note 44 (describing how prosecutors at least in Travis County “have their own staff, including investigators and assistants — resources that most defense attorneys do not have.”); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 722 (2006) (describing how the government is at a distinct advantage when it comes to prosecuting Native Americans who live on remote reservations as “there may be striking asymmetry between the prosecutors who use agents relatively close to the reservation and defense attorneys who lack ‘resident agency’ offices for their investigators.”).

101. *See* SIXTH AMEND. CENT., *supra* note 83, at 71.

102. *Id.*

103. *Id.* at 72 n.323.

parts of the nation.¹⁰⁴ For underrepresented communities in rural areas, namely racial minorities who also happen to be indigent defendants, the problems posed above regarding appointed counsel are intensified in at least three ways.

First, foreign-born individuals living in rural areas are more likely to fall under the federally defined poverty level compared to peer communities living in urban areas.¹⁰⁵ Furthermore, rural immigrant populations face higher incidences of poverty than native-born rural populations.¹⁰⁶ Simply put, immigrant populations in rural spaces—a substantial and growing minority—are more likely to be considered indigent than their urban counterparts and native-born rural residents. Beyond immigrant communities, some of the most impoverished rural communities are communities of color.¹⁰⁷ Thus, coupled with disproportionate poverty rates and Texas' vast number of rural counties operating under a court-assigned defense counsel model,¹⁰⁸ recent immigrants or communities of color in rural Texas are more likely to receive a court-assigned attorney than their urban counterparts.

104. See, e.g., Gus Bova & Christopher Collins, *These Rural Panhandle Towns Should Be Shrinking. But Thanks to Immigrants, They're Booming.*, TEX. OBSERVER (Jan. 3, 2019), <https://www.texasobserver.org/these-rural-panhandle-towns-should-be-shrinking-but-thanks-to-immigrants-theyre-booming/> [<https://perma.cc/95YH-WJT5>]

(“Despite a decline in native-born residents, a belt of communities in the Panhandle . . . and several others near the Texas-Mexico border are growing. Dalhart has grown 7 percent from 1990 to 2016, even as the native-born population has dropped 9 percent. Hispanics, primarily of Mexican descent, now make up 39 percent of the town’s population.”);

SILVA MATHEMA, NICOLE PRCHAL SVAJLENKA & ANNELIESE HERMANN, CTR. FOR AM. PROGRESS, REVIVAL AND OPPORTUNITY: IMMIGRANTS IN RURAL AMERICA 5 (2018) <https://www.americanprogress.org/wp-content/uploads/2018/08/ImmigrantsInRuralAmerica-RPRT.pdf> [<https://perma.cc/X7TM-8V36>] (describing how new immigrants in rural communities contribute to rural growth).

105. See Tim Marema, *Rural Immigrants More Likely to be Working but Poor*, DAILY YONDER (Oct. 6, 2016), <https://www.dailyyonder.com/rural-immigrants-more-likely-to-be-working-but-poor/2016/10/06/> [<https://perma.cc/4QJS-EGJM>]; see also Zachery Newton, Comment, *Legal Deserts: Race & Rural America*, MICH. J. RACE & L. (Mar. 22, 2021), <https://mjr.org/2021/03/22/legal-deserts-race-rural-america/> [<https://perma.cc/GB9B-YBR7>]. (“[R]ural communities of color . . . are frequently more vulnerable to poverty and have less access to public services than their metro counterparts.”).

106. Marema, *supra* note 105 (noting that “poverty rate for foreign-born residents was 23.7 percent, nearly 6 points higher than the rate for native-born residents”).

107. See, e.g., Caitlin A. Lewis, *Texas Colonias: Injustice by Definition*, 5 BARRY U. ENV'T. & EARTH L. J. 163, 164–66 (2015) (describing Texas' “colonias,” which are tax-paying Mexican American or Mexican-origin rural communities that face abject poverty, often lacking access to running water and essential forms of infrastructure); see Newton, *supra* note 105 (“Many persistently impoverished counties with the highest poverty rates, such as the Rio Grande Valley and Mississippi Delta, are disproportionately ‘home to racial and ethnic minorities.’ Take Georgia for example, which, similar to many states in the Southeast, has a large Black population.”).

108. See discussion *supra* notes 24–27 and accompanying texts (explaining how a majority of Texas' rural counties operate under a court-assigned defense delivery model).

Second, transportation poses a significant barrier for rural residents,¹⁰⁹ an obstacle worsened by the poverty that indigent defendants face. And for some immigrants, especially for those who experience economic instability, these barriers can be aggravated by their status. For rural residents who lack legal status, traveling long distances is often infeasible because of an “inability to pass border checkpoints.”¹¹⁰ On top of this, people who lack proof of citizenship or lawful permanent residence cannot obtain driver’s licenses in Texas and many other states.¹¹¹ As mentioned above, some private-practice attorneys who are appointed indigent clients handle a majority of court-assigned cases in a cluster of counties,¹¹² thus expanding the potential area in which clients would need to travel to meet with their assigned attorney. In sum, people who are kept from reliable transportation by either their socioeconomic or immigration status (or both) may be prohibited from meeting with their assigned attorney by the vast space inherent to rural areas.

Finally, immigration attorneys are sparse in rural areas,¹¹³ which disadvantages indigent immigrant defendants in these locales. “Over the past two decades, the U.S. government has embedded harsher immigration consequences in an ever-expanding list of nonimmigration criminal offenses.”¹¹⁴ A “vast number” of these consequences include forced removal from the country.¹¹⁵ Yet, there is no statewide requirement mandating that court-assigned attorneys in Texas undergo training specific to immigration law.¹¹⁶

109. See Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 125–27 (2012) (stating that rural transportation costs exceed those in urban areas, compounded by high gas prices and large distances innate to rural living. As of 2012 at least, 1.6 million rural households did not have cars).

110. See generally Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 145 (2015) (discussing transportation barriers for immigrants in Texas seeking abortions).

111. Elvia Limón, *Can Immigrants Living in the U.S. Illegally Get a Texas Driver’s License? Curious Texas Investigates*, DALL. MORNING NEWS (July 9, 2018, 9:00 AM), <https://www.dallasnews.com/news/curious-texas/2018/07/09/can-immigrants-living-in-the-u-s-illegally-get-a-texas-driver-s-license-curious-texas-investigates/> [https://perma.cc/7U7E-XX7E] (stating that in Texas and in thirty-one other states, license applicants must submit proof of residency to obtain a driver’s license, effectively barring unauthorized immigrants).

112. See discussion *supra* Part II(A).

113. See Haksgaard, *Rural Practice*, *supra* note 59 at 212–14 (“[R]ural communities are in desperate need of lawyers in general . . . including . . . immigration attorneys . . .”).

114. Andrés Dae Keun Kwon, *Defending Criminal(ized) “Aliens” After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1043 (2016).

115. *Id.* at 1038.

116. Each county in Texas is required to report to TIDC the minimal qualifications it promulgates for attorneys to become eligible for court appointments. See *Indigent Defense Data for Texas*, TEX. INDIGENT DEF. COMM’N, <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx#D>

To be sure, the lack of immigration training is neither unique to the court-assigned attorney model in rural locales, nor is it exclusively a problem in Texas. This problem persists in established, centralized urban offices, too.¹¹⁷ Indeed, many defenders in centralized offices often lack even minimal training regarding the unique challenges in representing indigent defendants, apart from a lack of training on immigration issues.¹¹⁸ However, for many of the reasons mentioned above, rural immigrants who are assigned an attorney are particularly disadvantaged. Court-assigned defenders who lack the appropriate immigration training likely also lack support services such as investigators, and importantly here, immigration specialists. And in many rural areas, these court-assigned defenders have very few, if any, options to consult with an immigration expert in part due to the growing dearth of attorneys practicing in rural America.¹¹⁹

D. Rural Invisibility

While there have been many stories and reports on indigent defendants who are afforded substandard levels of representation in more populated areas, rural areas do not receive the same level of attention.¹²⁰ In effect, rural America becomes less visible to scholars and re-

[<https://perma.cc/CNV5-YMQ7>] (compiling each county's qualification requirements). While the Fair Defense Act in Texas requires that court-appointed attorneys complete six hours of continuing legal education courses every twelve months, there is no requirement that attorneys either receive immigration-specific training or demonstrate any baseline knowledge regarding immigration law. See Fair Defense Act § 174.1 (2001); see also *Dallam County Court Plan*, TEX. INDIGENT DEF. COMM'N GRANT AND PLAN MGMT. WEBSITE <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=261> [<https://perma.cc/LF8Y-7RE6>] (listing minimum attorney qualifications as of Oct. 28, 2015); *Armstrong, Potter and Randall District Court and County Court Plan*, TEX. INDIGENT DEF. COMM'N GRANT AND PLAN MGMT. WEBSITE <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=212> [<https://perma.cc/5N2Y-S4WJ>] (listing minimum attorney qualifications as of Dec. 28, 2021).

117. Kwon, *supra* note 114, at 1085 (describing how “the need for an immigration practice became clear” shortly after the Bronx Defenders, a public defender organization, was founded due to “the demographics of the Bronx and the realities [Bronx Defenders] were increasingly facing”).

118. See Brensike Primus, *supra* note 2 at 1795–96; see also Piatt, *supra* note 34, at 390 (stating that “no formal training” or supervision programs exist for counties operating under the court-assigned model).

119. See generally Haksgaard, *Rural Practice*, *supra* note 59, at 212–14; see also Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 1 (2015) (“Barriers to representation were particularly severe in immigration courts located in rural areas and small cities, where almost one-third of detained cases were adjudicated.”).

120. See Lisa R. Pruitt, *The Rural Lawscape*, in *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* 190–91 (Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar eds., 2014) (“[L]egal scholars and critical geographers have largely ignored the rural end of the rural-urban continuum.”).

formers than more populated locales. This sense of erasure can cause stories of rural injustice to go unheard, while stories of urban injustices are more readily discovered.

As described in Part I, rural areas in Texas are more likely to operate under the court-appointed system while urban areas are more likely to have a centralized, county-wide office.¹²¹ Nevertheless, there are a significant number of heavily populated counties that utilize the court-assigned model.¹²² These more populated locales tend to receive considerably more media attention than their rural counterparts, which can lead to reforms. For example, an article from The Texas Tribune detailed how the court-assigned defender system constituted a conflict of interest in Travis County, home to Austin, Texas.¹²³ Shortly after this article was published, Travis County announced it would open a county-wide public defender's office in August 2020.¹²⁴

In contrast, observers have repeatedly argued that rural spaces are inherently less visible than more populated places,¹²⁵ and have even been ignored by legal scholars.¹²⁶ Thus, the plight of rural indigent defendants caught in the court-appointed system may be inherently less visible to reformers. Importantly, immigrant and racially diverse populations in rural areas face a heightened level of this erasure,¹²⁷ despite the fact that rural areas can be quite diverse.¹²⁸

121. See TIDC 2017 PRIMER, *supra* note 1, at 3, fig. 1; See also Haksgaard, *supra* note 5, at 119 n.176.

122. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 12. Tarrant County, for example, has the third-highest population in Texas but operates under a court-assigned model, the operation of which is conducted by a judge spinning a wheel to determine which attorney to assign a client. Alternatively, a judge may select an attorney ad hoc, if good cause is found for deviating from the "wheel" system. *Tarrant County Court Plan*, TEX. INDIGENT DEF. COMM'N GRANT AND PLAN MGMT. WEBSITE <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=130> [https://perma.cc/K4LE-6ATS] (describing the attorney selection process as of Oct. 18, 2021). Other highly populated counties without a centralized public defender office operate under a similar model such as Brazoria County, Collin County, Denton County, and Williamson County.

123. See Satija, *supra* note 44.

124. See Emma Freer, *Travis County Hires Inaugural Chief Public Defender*, CMTY. IMPACT NEWSPAPER (Feb. 4, 2020, 8:11 PM), <https://communityimpact.com/austin/central-austin/government/2020/02/04/travis-county-hires-inaugural-chief-public-defender/> [perma.cc/4JTB-49JV].

125. See, e.g., Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 291–92 (2003) (describing why rural residents may seem "invisible" to the larger public).

126. Pruitt, *supra* note 120, at 191.

127. See, e.g., Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prose-ctorial Lens*, 71 ME. L. REV. 227, 229 n.5 (2019) (stating that many Americans falsely assume "all of rural . . . America is uniformly White and monolithically conservative" despite the fact that people of color "constitute seventeen percent of rural America's population.").

128. See *id.*; see also Haksgaard, *supra* note 5, at 92 ("Rural areas are racially and ethnically diverse, and include substantial immigrant populations.").

In a criminal justice system that already disadvantages indigent defendants, *rural* indigent defendants are saddled with additional and unique obstacles. Assigned counsel must contend with conflicts of interest inherent to an appointment model, low pay, geographic challenges of rural spaces, and an overall lack of resources. But the establishment of regional public defender offices in rural spaces, a recent trend in states like Texas, helps mitigate these burdens.

III. THE REFORM: REGIONAL PUBLIC DEFENDER OFFICES MITIGATE THE DISADVANTAGES OF THE COURT-ASSIGNED MODEL IN RURAL AMERICA

The court-assigned model breeds complacency and pressures defense counsel to yield to judges' preference for speedy dockets.¹²⁹ These systemic issues impose distinct disadvantages on rural indigent defendants when coupled with rural America's geographic and cultural features. Part II explored how these systematic problems interacted with rural qualities. These problems are not unique to Texas. They are found in rural portions of America that rely on the court-assigned model—one of the most common models in the United States. Part III argues that centralized public defender offices should replace the court-assigned model as the “default.”¹³⁰ Centralized offices directly benefit rural indigent defendants by increasing defender independence from the judiciary, offering infrastructure for retaining in-house services like investigators, neutralizing warped financial incentives, and mitigating the rural lawyer shortage. Finally, this section argues that *regional* centralized offices are ideal for rural locales.

A. Benefits of Centralized Offices

Centralized offices offer at least four distinct advantages not offered by the court-assignment model. First, centralized offices provide a level of independence from the judiciary that is missing from a court-appointed model. This type of independence is similar to what prosecutors and privately retained counsel enjoy.¹³¹ As Part II showed, the court-appointed model's lack of independence often places private at-

129. See discussion, *supra* Part IIA.

130. Cf. TIDC 2017 PRIMER, *supra* note 1, at 3.

131. See Wallace & Carroll, *supra* note 7, at 260 (citing National Study Commission on Defense Services report that noted defenders should experience the same level of independence as prosecutors and privately retained counsel).

torneys in a Catch-22: they must pursue zealous advocacy while also striving to avoid falling out of the judge's good graces. The latter consideration often prevails. Indeed, if an attorney angers a judge, this attorney risks being removed from an appointment list or having their fees reduced.¹³² In contrast, institutional defenders do not rely on judges to remain eligible for client assignments or for setting their income in the same way as private, court-assigned attorneys.¹³³ Staff public defenders make decisions about their own clients and their own representation, independent of the courts.¹³⁴

Relatedly, a centralized public defender office provides the infrastructure to recruit and retain in-house investigators and other auxiliary services like social workers, legal aid attorneys, and immigration attorneys.¹³⁵ These resources further reduce dependency on the judiciary by eliminating the requirement that defense counsel request compensation or reimbursement for these types of services.

An organized office that has the infrastructure to retain legal support services benefits the client: hiring services like investigators "allows attorneys to focus on the legal aspects of the case and provide representation in more cases,"¹³⁶ instead of worrying about navigating administrative hurdles to secure such support services. Having ready access to services like investigators potentially saves the county and state money.¹³⁷

132. See, e.g., Oppel, *supra* note 51, *discussion supra* notes 51–53; see also Wallace & Carroll, *supra* note 7, at 260 (stating that with the court-assigned model, "the concern is with unilateral judicial power to select lawyers, and to reduce or deny the lawyer's compensation.")

133. See Piatt, *supra* note 34, at 385 (noting that the chief public defender typically assigns clients to staff attorneys, and that the office is government funded).

134. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 7.

135. See, e.g., Zachary Cloud, *The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America*, 22 B.U. PUB. INT. L.J. 403, 418 (2013) (highlighting the Bronx Defenders and the Public Defender Service for the District of Columbia's access to "well-staffed support divisions, such as social work and investigation divisions, that assist attorneys in their casework"). For an overview of Texas' public defender offices and how many investigators, social workers, and support staff each office has, see TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 14–16. For example, the Far West Texas Regional Public Defender Office, which covers some of Texas' most rural counties, has one investigator, one social worker, and one office administrator in addition to its staff attorneys. *Id.* at 15.

136. TEX. INDIGENT DEF. COMM'N, PLANNING STUDY, HILL COUNTRY PUBLIC DEFENDER, 10 (2020) [hereinafter TIDC, PLANNING STUDY], <http://www.tidc.texas.gov/media/8d87ba783a6dc15/hill-country-public-defender-planning-study.pdf> [https://perma.cc/BTH9-2NMK].

137. See *supra* notes 93–97 and accompanying text. See generally BRIAN J. OSTROM & JORDAN BOWMAN, NATIONAL CTR. FOR STATE CTS., EXAMINING THE EFFECTIVENESS OF INDIGENT DEFENSE TEAM SERVICES: A MULTISITE EVALUATION OF HOLISTIC DEFENSE IN PRACTICE, PROJECT SUMMARY 47 (2019), <https://www.ojp.gov/pdffiles1/nij/grants/254549.pdf> [https://perma.cc/6VC8-8STC] (noting that Kentucky's legislature was persuaded by the financial savings offered by the introduction of alternative sentencing workers, and subsequently allocated additional funds to increase legal staff

Second, centralized offices pay defenders enough to focus solely on their indigent clients. Expansive rural landscapes inherently require extensive travel; in this context, an adequate, steady salary better fosters focused advocacy. The disincentives that accompany the court-assigned model are intensified in the context of expansive rural spaces, as Part II explored. However, in contrast to court-assigned private attorneys, who are typically paid lower fees,¹³⁸ attorneys employed by centralized offices are usually paid a yearly salary. This allows centralized defenders to focus solely on their indigent clients instead of also balancing private practice matters.

While a centralized office model does not entirely assuage the unique challenges posed by rural America's spatial qualities, this model does offset the potential attorney incentive to take on and dispose of as many cases as possible in order to make as much money as possible. Michelle Moore said there are no warped financial incentives to "overbook yourself" for more money.¹³⁹ In fact, she said that working for a centralized office "keeps you focused on the here and the now. You know what you have to do and when to do it."¹⁴⁰

David Gemignani, the chief public defender of a rural regional office that spans some of Michigan's northernmost counties, used to work as a contract defender. When Michigan's legislature allocated significant funds toward the state's indigent defense system in 2018,¹⁴¹ Gemignani led the creation of the Tri-County Public Defender's Office in Houghton County.¹⁴² Before working in a centralized office, Gemignani needed to take on private practice matters in addition to his contract defense matters because of the "economics" of being a contract defender.¹⁴³ "It was a hell of a balance," Gemignani said in an interview.¹⁴⁴ "Twelve-hour days were nothing."¹⁴⁵ Now that Gemignani is a part of a

in the state's public defender offices); see also TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 9 (highlighting one centralized office in Fort Bend County that saved over \$2,000 in jail costs on each misdemeanor case).

138. Brensike Primus, *supra* note 2, at 1774.

139. Moore Interview, *supra* note 74.

140. *Id.*

141. See discussion *infra* 240-41 and accompany texts.

142. See Graham Jaehning, *Tri-County Defense: New Public Defenders Office Explained*, DAILY MINING GAZETTE (Oct. 26, 2017), <https://www.mininggazette.com/news/local-news/2017/10/tri-county-defense-new-public-defenders-office-explained/> [<https://perma.cc/GP3V-3E4T>]. The Tri-County Public Defender's Office includes Keweenaw County, Houghton County, and Baraga County. *Id.*

143. Telephone interview with David Gemignani, Chief Pub. Def., Tri-County Public Defender's Office (Mar. 11, 2021) [hereinafter Gemignani Interview].

144. *Id.*

145. *Id.*

centralized office, he represents only indigent clients. “It’s really a luxury to do this one thing. It’s better for the client, you get to be more effective,” Gemignani said.¹⁴⁶

Third, there is a growing lack of rural lawyers.¹⁴⁷ Although around 20% of the U.S. population lives in rural spaces, only about 2% of practicing lawyers live in rural areas.¹⁴⁸ Texas fairs slightly better, with around 17% of the state’s attorneys working in the state’s more rural locales.¹⁴⁹ Faced with a lawyer shortage, some rural areas must outsource defense counsel from the closest metro areas. For example, in central Texas’ rural Hill Country, some counties look to neighboring San Antonio to tap into the pool of court-appointed defense counsel. In an interview conducted for this Note, TIDC’s Director of Public Defense Improvement, Scott Ehlers, stated that this system negatively impacts indigent defendants whose counsel is outsourced. “These cases might be seen as being on the backburner for these attorneys,” Ehlers said.¹⁵⁰ “[These clients] are not really the priority for these attorneys . . . there’s a lot of problems with attorneys not visiting their clients in jail.”¹⁵¹ Partly in response to this problem, judges from five rural counties within the Hill Country asked TIDC to explore options for establishing a regional office.¹⁵²

A centralized office also offers incentives that attract recent law graduates to serve rural communities that a court-assigned model lacks. Although many court-assigned private practice attorneys perform “public interest” work by virtue of their representing indigent defendants, these attorneys do not typically have access to loan forgiveness programs such as the Public Service Loan Forgiveness Program (PSLF).¹⁵³ Increasing law school tuition and student loans¹⁵⁴ significantly disincentivizes recent law school graduates to enter rural private practice work, which pays private practice attorneys far below

146. *Id.*

147. Thomas Sneed, *The Academic Law Library’s Role in Cultivating the Rural Lawyer*, 64 S.D. L. REV. 213, 213 (2019) (noting that many rural attorneys are nearing the age of retirement, while the number of younger attorneys in these spaces is low and not growing).

148. Newton, *supra* note 105.

149. See Pruitt & Showman, *supra* note 8, at 494–95 (reporting that 83% of attorneys who work in Texas practice in and around the largest cities).

150. Telephone interview with Scott Ehlers, Dir. of Pub. Def. Improvement, Tex. Indigent Def. Comm’n (Oct. 9, 2020) [hereinafter Ehlers Interview] (discussing why regional public defender offices are necessary).

151. *Id.*

152. TIDC, PLANNING STUDY, *supra* note 136, at 2.

153. See Haksgaard, *Rural Practice*, *supra* note 59, at 219.

154. *Id.* at 220.

the national mean salary for private attorneys.¹⁵⁵ Put simply, without access to federal loan forgiveness programs—coupled with low pay and ever-steepening law school loans—few fledgling attorneys dare venture out to rural communities to work in private practice. This in turn fuels the growing shortage of rural lawyers.

Conversely, a centralized public defender office can help mitigate the dearth of rural lawyers. As previously discussed, an institutional office allows its staff attorneys to focus only on their indigent clients and thus practice only public interest law. In turn, recent law school graduates have access to loan forgiveness programs by working in a public defender office.¹⁵⁶ Additionally, a centralized office has the ability to recruit and retain legal talent that an untethered, nebulous court-assigned model does not.¹⁵⁷ In effect, an organized office has the mechanisms to excite and enlist budding legal talent, while also offering incentives, like loan forgiveness programs, to attract lawyers to rural areas. Scott Ehlers likened rural centralized offices to a “magnet” that offer incentives to get people to practice in rural parts of the state.¹⁵⁸

Finally, centralized offices provide the opportunity and framework for periodic training,¹⁵⁹ which aids attorneys in handling the hostile environment innate to defense work.¹⁶⁰ The benefits of providing recurring training are enhanced due to the ability of centralized offices to employ co-attorneys with whom defenders can bounce ideas, conduct round-table discussions, and build “emotional support and motivation.”¹⁶¹ Further, centralized offices provide their attorneys with a sense of “political power that comes from the strength of their combined impact.”¹⁶² This sort of power allows centralized defenders to push back against untenable caseloads as well as gain leverage when negotiating with prosecutors.¹⁶³ And when an office’s existence in part depends on stakeholders like judges—which public defender Michelle Moore stated

155. *Id.* at 218–19.

156. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 10 (listing loan repayment assistance and forgiveness as one benefit for new lawyers working in a public defender’s office).

157. TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 10–11 (stating that “public defender offices can help recruit new attorneys” and highlighting anecdotes from the work lives of public defenders who work in rural offices).

158. Ehlers Interview, *supra* note 150.

159. See, e.g., Wallace & Carroll, *supra* note 7, at 320 (noting that public defenders staffed in Massachusetts offices go through four-week training when first hired, receive additional weeks of training some months thereafter, and eventually attend annual trainings).

160. See Brensike Primus, *supra* note 2, at 1797.

161. See *id.* at 1791–93.

162. See *id.* at 1791.

163. See *id.* at 1791–92.

causes defenders to “suck up to the judge a little”¹⁶⁴—a centralized office’s political power potentially strengthens the office’s viability. In contrast, independent, freelance-like assigned counsel face isolation.¹⁶⁵

While not all public defender offices universally embody all of these advantages, this Note suggests that the way organized offices are structured allows for these types of benefits to exist, regardless of whether further reform is also needed for centralized offices.

B. *The Need for Regional Offices*

In light of many rural counties’ financial reality, a centralized office may not be feasible. Rather, an office that spans multiple counties, where the costs are split between each covered county, may be more attainable. In those cases, counties in rural areas should work together to create regional offices, which can promote the same benefits a traditional centralized office possesses.

Perhaps one of the most pressing issues in improving indigent defense is the lack of funding. Some scholars have remarked that “[i]nadequate funding is the root cause of the indigent defense crisis.”¹⁶⁶ In Texas, where each county must foot the vast majority of the bill itself regarding indigent defense costs,¹⁶⁷ rural counties may be at a noticeable disadvantage: a smaller population results in a smaller tax base.¹⁶⁸ In effect, many rural counties lack the financial resources to establish, or meaningfully sustain, a centralized public defender office.¹⁶⁹

As a solution, Texas permits counties to enter into agreements and facilitate a regional office that spans multiple counties.¹⁷⁰ These regional offices allow multiple, neighboring counties to pool together both fi-

164. See discussion *supra* 80–82 and accompany texts.

165. See Brensike Primus, *supra* note 2, at 1794–95.

166. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 429 (2009).

167. TEX. ASS’N CNTYS., LEGISLATIVE BRIEF: INDIGENT DEFENSE 1 (2021) <https://www.county.org/TAC/media/TACMedia/Legislative/Legislative-Brief/2021/Legislative-BriefIndigent-Defense-Brief-Feb2021.pdf> [<https://perma.cc/UF8R-Q9RX>] (“In fiscal year 2019, the state funded only about \$28.5 million of the total statewide indigent defense costs, while counties contributed approximately \$271.4 million (about 90% of the total costs).”).

168. See Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 222 (2010).

169. See *id.* at 227–28.

170. TEX. CODE CRIM. PROC. art. 26.044(b) (LEXIS through 2021 Regular Session of the 87th legislature, 2021 1st Called Session, 2021 2nd Called Session, 2021 3rd Called Session, and the 2021 & 2022 ballot propositions).

nancial and legal resources.¹⁷¹ TIDC offers competitive grants for regional offices, funding up to two-thirds of the office's budget indefinitely.¹⁷² In fact, TIDC has already helped establish at least three regional offices in Texas, serving around twenty-four counties.¹⁷³

For example, the Far West Texas Public Defender serves five counties in rural west Texas. That office employs three attorneys, one investigator, one social worker, and one officer administrator.¹⁷⁴ Since its inception in 2018, TIDC has awarded the office over half a million dollars in grants.¹⁷⁵ The office's chief defender, James McDermott, attests that a sign of the office's success is the fact it has largely displaced the field of what was once a mix of contract attorneys and ad hoc court-assigned lawyers.¹⁷⁶ He recounted prominent community members' families being arrested, and how they "don't try and scrounge the money together for a private attorney, they're better off getting a PD—that's a sign that our efforts have been successful."¹⁷⁷

Yet several barriers exist that prohibit a proliferation of regional offices in rural spaces. First, funding remains an issue, notwithstanding counties' ability to join together. Second, rural counties may simply lack political will to expand protections for the accused by establishing offices. Section C explores these issues in turn, while Part IV offers potential solutions to these problems.

C. Systemic Obstacles: Funding and Political Will

Two large, interwoven obstacles regularly prohibit the creation of regional public defender offices: a lack of funding and a lack of political will. Even if rural counties pool together their resources, many will be unlikely to dole out enough funds to support offices without additional financial assistance. Although TIDC currently helps finance various public defender offices by supplementing state and county funds, this funding is limited and, as described below, is fragile due to COVID-19.

171. See TEX. INDIGENT DEF. COMM'N, STARR COUNTY REGIONAL PUBLIC DEFENDER: GRANT EVALUATION 7 (Nov. 2020), <http://www.tidc.texas.gov/media/8d8a2eb9a6a7cob/starr-county-regional-public-defender-grant-evaluation.pdf> [<https://perma.cc/6HKD-DGWW>] (discussing how one regional office in Texas splits the cost of an office).

172. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 27.

173. *Id.* at 12.

174. *Id.* at 15.

175. *Id.*

176. Zoom Interview with James McDermott Jr., Far W. Tex. Reg'l Pub. Def., Chief Pub. Def. (Feb. 1, 2021) [hereinafter McDermott Interview].

177. *Id.*

Further, counties—particularly rural counties—may be politically unwilling to fund the offices, even if they somehow obtained enough funds.

This section explores how these problems hinder efforts to create and sustain regional public defender offices and how impact litigation may be a promising solution.

i. Lack of Funding

Texas funds approximately 10% of the cost to provide indigent defense for each county while each county is required to fund the remaining 90%.¹⁷⁸ As previously indicated, TIDC supplements many office budgets with grants. For regional offices that serve rural counties, TIDC offers the Rural Regional Sustainability Grant, which promises to pay up to two-thirds of each rural regional office's budget indefinitely.¹⁷⁹ The remainder of a regional office's budget is then split amongst the counties where the office provides services.¹⁸⁰ However, there are only a limited number of offices to which TIDC can award grants.¹⁸¹

Only about 15% of Texas' counties fall under a centralized public defender office's purview: thirty-six out of Texas' 254 counties are covered by some sort of a centralized office, twenty-four of which by a regional office.¹⁸² Stated in the inverse, about 85% of Texas' counties do not benefit from any centralized office; rather, indigent defense in these counties depends on a different system such as court-assigned counsel or a contract-based system.

Importantly, TIDC's funding does not directly come from the state's budget, it primarily comes from court costs paid by criminal defendants.¹⁸³ But this funding scheme is fragile. TIDC's Scott Ehlers stated that in the wake of the COVID-19 pandemic, TIDC "took a big hit be-

178. TEX. ASS'N CNTYS, *supra* note 167.

179. TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 15.

180. See TEX. INDIGENT DEF. COMM'N, STARR COUNTY REGIONAL PUBLIC DEFENDER: GRANT EVALUATION 7 (Nov. 2020), <http://www.tidc.texas.gov/media/8d8a2eb9a6a7cob/starr-county-regional-public-defender-grant-evaluation.pdf> [<https://perma.cc/6HKD-DGWW>] (discussing how one regional office in Texas splits the cost of an office).

181. See TIDC 2020 PUBLIC DEFENDER PRIMER, *supra* note 9, at 27.

182. See *id.* at 12.

183. *How TIDC Is Funded*, TEX. INDIGENT DEF. COMM'N, <http://www.tidc.texas.gov/about-us/tidc-at-the-legislature/how-tidc-is-funded/> [<https://perma.cc/24NX-YHUN>].

cause there were a lot less cases,¹⁸⁴ and thus, less funding generated by court costs that went toward TIDC's coffers.¹⁸⁵

The existence of Texas' regional public defender offices heavily depends on TIDC's funding. James McDermott, chief defender at the Far West Texas Regional Public Defender's Office, stated that, without TIDC's funding, the five rural counties over which his regional office covers "would close in a second. I mean in a second. Without hesitation."¹⁸⁶ Thus, Texas' regional public defender offices need a steady and guaranteed stream of funding to ensure their continued existence. As argued below, states that faced a similar financial insecurity greatly benefited from the pressure that impact litigation applied to those states' legislatures, a strategy that could similarly benefit Texas.

Forcing each county to pay for the overwhelming majority of its indigent defense costs invariably results in the system Texas experiences today: outsourcing private practice attorneys to expediently dispose of cases in around 85% of counties. Although TIDC supports certain rural counties' regional public defender offices, these funds are limited and, as the COVID-19 pandemic showed, fragile.

ii. Lack of Political Will

Lack of funding and political will are, in many ways, interconnected. In the context of rural counties, a small population results in a small tax base. When counties foot most of the costs associated with indigent defense services, then these services "compete for the limited funds in local public coffers with discretionary services that residents value and desire," and as a result "indigent defense and other justice system functions may be short-changed."¹⁸⁷

The political will of a county may also be inordinately consolidated into one stakeholder. For example, Michelle Moore stated that her of-

184. Ehlers Interview, *supra* note 150.

185. DAVID SLAYTON, OFF. OF CT. ADMIN., LEGISLATIVE APPROPRIATIONS REQUEST FOR FISCAL YEARS 2022 AND 2023 5 (2020) <https://www.txcourts.gov/media/1449943/oca-legislative-appropriations-request-fy2022-2023.pdf> [<https://perma.cc/2GF5-84G2>] (stating that TIDC's total funding fell 20 percent, or about \$9.4 million in the 2020 fiscal year). TIDC's funding scheme is not unique. The Orleans Public Defender (OPD), which heavily relies on traffic ticket and court fee revenue to fund its services, announced it would begin furloughing employees after it suffered a \$800,000 "budget shortfall stemming from loss of revenue that comes from court fees and traffic tickets" in the wake of COVID-19. See Nick Chrastil, *Orleans Public Defenders Announce Furloughs in Face of Decreased Revenue Due to Coronavirus*, LENS (Apr. 20, 2020), <https://thelensnola.org/2020/04/20/orleans-public-defenders-announce-furloughs-in-face-of-decreased-revenue-due-to-coronavirus/> [<https://perma.cc/4CZS-M4BS>].

186. McDermott Interview, *supra* note 176.

187. Pruitt & Colgan, *supra* note 168, at 222.

office in rural Central Texas was originally meant to be a regional office until the surrounding counties began pulling out. “The region itself is pretty conservative,” Moore said.¹⁸⁸ According to Moore, Burnet County’s judge was very supportive of the office’s creation; without her, Moore does not think the office would have ever come to fruition.¹⁸⁹

James McDermott echoed Moore, stating that the “political fortune” of his West Texas office “is tied to one person.”¹⁹⁰ McDermott stated that his oversight board is partly composed of judges for the counties covered by his regional office; the region’s district court judge sits as the chair of the board.¹⁹¹ McDermott further explained:

The creation and continued existence of this office is a political question. There are these stakeholders ... if they turn against you, they will torpedo the program. My district court judge is fairly strong-handed in these communities. He is the chair of my oversight board. He can railroad through those meetings and [the other board members] will do what he says. That’s great for me right now. He happens to care about the rights of criminal defendants, he happens to care deeply about the law. But there’s no guarantee he’ll be on the bench at any time . . . someone else might not have that opinion.¹⁹²

Thus, at least in some regions, county or district judges have outsized roles in the establishment and continued existence of public defender offices. In other counties, similarly-positioned stakeholders may prohibit the creation of new regional offices. Thus, a lack of funding is only one piece of the puzzle, and political will—sometimes inordinately consolidated into one stakeholder—comprises another looming obstacle.¹⁹³

In sum, many rural indigent defendants suffer when they are relegated to a court-appointed attorney who does not enjoy the benefits of a

188. Moore Interview, *supra* note 74.

189. *Id.*

190. McDermott Interview, *supra* note 176.

191. *Id.* It is important to note that, in addition to county courts, Texas has district courts. Each county must fall under the jurisdiction of at least one district court. In more sparsely populated counties, multiple counties may share one district court. In more populated counties, there may be many district courts within one county. See TEX. JUD BRANCH, *About Texas Courts*, <https://www.txcourts.gov/about-texas-courts/trial-courts.aspx> [https://perma.cc/4Y7N-YSWZ] (last visited Mar. 13, 2023).

192. McDermott Interview, *supra* note 176.

193. See *id.*; discussion *supra* 81–83 and accompanying text (Michelle Moore discussing how a few county judges who ran for office promised to abolish Burnet County’s public defender office if they won).

centralized office. A centralized county public defender office offers distinct benefits. For rural counties, shouldering an office alone may not be plausible. A tenable solution includes regional offices, made possible by pooling together resources from a cluster of counties. However, obstacles—namely a lack of funding and political will—remain. As explored below, impact litigation can help incite political will and direct funds toward criminal justice reform.

IV. USING IMPACT LITIGATION TO CONSENSUS BUILD AND FREE UP FUNDS

It was not until the twenty-first century that impact litigation proved to be a viable route for reforming a state's indigent defense services. Between 1980 and 2000, "no more than ten [law]suits" aimed at seeking structural change regarding indigent defense were filed, all of which were largely unsuccessful.¹⁹⁴ Yet in the twenty-first century, litigants have seen increasing success by using the courts to overhaul a state's indigent defense delivery systems, securing state-level funding, and using litigation as cover to incite political support.

A. Case Studies

In the context of impact litigation, this section broadly defines "success" to include lawsuits that resulted in favorable settlements or those that otherwise catalyzed legislative action. Specifically, this section focuses on three lawsuits filed against different states—New York, Nevada, and Michigan—which resulted either in settlements or legislation aimed at reforming the respective state's indigent defense system.

i. Impact Litigation in New York

In the 2008 case *Hurrell-Harring v. State*, the New York Civil Liberties Union filed a civil complaint against five counties in New York as well as the state itself, alleging that indigent defendants in these counties were denied meaningful and effective assistance of counsel.¹⁹⁵ The

194. Drinan, *supra* note 166, at 431.

195. Amended Class Action Complaint at 1, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07), [hereinafter *Hurrell-Harring* Complaint] <https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0002.pdf> [<https://perma.cc/SVL3-B5X4>].

suit was brought under 42 U.S.C. §1983 for violations of the Sixth and the Fourteenth Amendments to the U.S. Constitution as well as the state's constitution on behalf of twenty criminal defendants.¹⁹⁶ In explaining how New York failed to fulfill the guarantees of the Sixth Amendment, the lawsuit underscored the patchwork of defense delivery systems that have spawned across the state as a result of New York allowing each county to “establish, fund and administer their own public defense programs, with little or no fiscal and administrative oversight or funding from the State.”¹⁹⁷ As an illustration, one plaintiff alleged that no attorney was present during her arraignment, a critical stage during which defendants are entitled to counsel under New York law.¹⁹⁸ When she was finally appointed an attorney, counsel failed to advocate for a plea deal,¹⁹⁹ despite the fact that she had no prior criminal history and New York precedent held that the offense for which she was charged should have been downgraded to a lower-level offense.²⁰⁰

Through this and similar examples, the complaint alleged the state lacked meaningful oversight, offered inadequate attorney training, provided little investigation and expert resources for defense counsel, prohibited defense counsel independence from the judiciary, and provided inadequate compensation for defenders.²⁰¹ These allegations against New York echo the issues found in rural Texas.

New York's highest court eventually held that the plaintiffs in *Hurrell-Harring* established a cognizable claim because the complaint alleged a “basic denial of the right to counsel under *Gideon*.”²⁰² The court took issue primarily with the allegation that indigent defendants were regularly denied counsel during their first appearances and subsequent bail hearings²⁰³ and that the assigned attorneys “ultimately appeared to

196. Blase Kearney, Gabriela Hybel & Chris Pollack, *Case: Hurrell-Harring v. State of New York, Case Summary*, C.R. LITIG. CLEARINGHOUSE (2019), <https://clearinghouse.net/case/11198/>.

197. *Hurrell-Harring* Complaint, *supra* note 195, at 4.

198. See *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010). A “critical stage” is a point in a criminal legal proceeding in which a defendant is entitled to counsel. See *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

199. *Hurrell-Harring* Complaint, *supra* note 195, at 13.

200. *Id.*

201. *Id.* at 4.

202. *Hurrell-Harring*, 930 N.E.2d at 222–24. It is important to note that the opinion distinguishes between a class action brought on the basis of a denial of *Gideon* right to counsel and a class action brought on the basis of *Strickland v. Washington*, 466 U.S. 668 (1984), the landmark U.S. Supreme Court case that established the standard for ineffective assistance of counsel. The majority in *Hurrell-Harring* indicates that the allegations in the present suit alleged a constructive denial of counsel, which amounts to a violation of *Gideon*, and thus established a cognizable claim. *Id.* at 226. If the plaintiffs had alleged only an ineffective assistance of counsel claim on a system-wide level, this would not have been a cognizable claim. *Id.*

203. *Hurrell-Harring*, 930 N.E.2d at 223.

do little more on their behalf than act as conduits for plea offers, some of which were purportedly highly unfavorable.”²⁰⁴

In the wake of the Court of Appeals of New York ruling that the plaintiffs established a cognizable claim in *Hurrell-Harring*, the state entered into a settlement agreement with the plaintiffs that established indigent defense representation standards.²⁰⁵ This included “ensur[ing] adequate conditions for attorneys including supervision, training, manageable caseloads and access to investigators”²⁰⁶ Following the settlement, the state allocated around \$250 million to “bring its counties’ indigent defense services” up to these standards.²⁰⁷ The legislature also passed a bill mandating that the state compensate counties for indigent defense delivery.²⁰⁸

New York’s standards should be commonplace among all states. As outlined in the previous sections, establishing centralized defender offices help achieve these standards. Public defender offices have the potential to attract and retain in-house support services like investigators and budding legal talent, allow for structured training absent from individual private counsel, and garner the political power needed to advocate for acceptable caseloads. New York’s legislative action in the wake of *Hurrell-Harring*, which placed the onus on the state itself to fund indigent defense, should also be the norm.

While the complaint in *Hurrell-Harring* did not consider how rurality could contribute to widespread, deficient indigent defense services, the reforms stemming from the lawsuit could still blunt these problems that are only exacerbated in a rural context, as previous sections argue.

It is nonetheless important to consider that the crux of *Hurrell-Harring*’s allegations do not carry the same salience in the context of Texas’ indigent defense system. New York’s highest court chastised the state for allegedly denying indigent defendants counsel during bail determinations,²⁰⁹ which the state categorized as a “critical stage” such

^{204.} *Id.* at 222.

^{205.} *Hurrell-Harring et al. v. State of New York (Challenging New York State’s Failure To Provide Adequate Public Defense Services)*, NYCLU, <https://www.nyclu.org/en/node/270/print> [<https://perma.cc/9XEW-79XS>] (last visited Mar. 13, 2023).

^{206.} Kearney, Hybel & Pollack, *supra* note 196.

^{207.} Lorelei Laird, *For the First Time, New York Will Provide Some State Funding for Indigent Defense*, A.B.A. J. (Apr. 14, 2017), https://www.abajournal.com/news/article/for_the_first_time_new_york_will_provide_some_state_funding_for_indigent_de [<https://perma.cc/PAG6-QLMA>].

^{208.} Kearney, Hybel & Pollack, *supra* note 196.

^{209.} *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (“This complaint contains numerous plain allegations that . . . counsel simply was not provided at critical stages of the proceedings. . . . These allegations state a claim . . . for basic denial of the right to counsel under *Gideon*.”).

that a defendant has a right to counsel.²¹⁰ For certain phases in the criminal justice system, such as bail determinations, whether these stages count as “critical stages” is up to the state.²¹¹ Texas does not consider bail determinations a critical stage,²¹² and thus, a claim that indigent defendants are not appointed counsel during bail determinations—such as the allegations in *Hurrell-Harring*—would likely be a non-starter in Texas. Still, the success of *Hurrell-Harring* indicates that impact litigation provides a tangible route for reform in this arena, as highlighted by the next case study in Nevada.

ii. Impact Litigation in Nevada

In *Davis v. State*, the ACLU filed a lawsuit against Nevada on behalf of four criminal defendants over its indigent defense delivery system specifically in the state’s rural areas.²¹³ Nevada law mandates that counties with 100,000 or more residents establish a centralized county office.²¹⁴ Counties with less than 100,000 inhabitants are left to decide which defense delivery system to use; most opt for the contract model where private attorneys contract with the county to represent indigent defendants.²¹⁵ The complaint accused the state of “abandon[ing]” its duties by leaving the rural counties to “their own devices” without “sufficient resources, standards or oversight”²¹⁶

210. *Id.* at 223 (“There is no question that ‘a bail hearing is a critical stage of the State’s criminal process’”).

211. *See, e.g.*, Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013) (“[T]here is no federal right to appointed counsel for indigent defendants at bail hearings, and most states do not appoint counsel at all in such hearings.”).

212. *See generally* *Green v. State*, 872 S.W.2d 717, 722 (Tex. Crim. App. 1994) (indicating that even if the court had made a bond determination at the defendant’s initial appearance, which is not a critical stage according to state law, the making of such a determination would not have been enough to convert the initial appearance into a critical stage).

213. First Amended Class Action Complaint, *Davis v. State* (1st Jud. Dist. Ct. of Nev., 2019) (No.17oCo2271B), <https://www.aclu.org/legal-document/davis-v-nevada-first-amended-complaint> [<https://perma.cc/3Q8K-3YBS>]; *see also* First Amended Class Action Complaint for Injunctive and Declaratory Relief at 3, *Davis v. State* (Nev. Dist. Ct. 2018) (No. 17oCo2271B) [hereinafter *Davis Complaint*], https://www.aclu.org/sites/default/files/field_document/davis_v_nevada_-_first_amended_complaint.pdf [<https://perma.cc/838C-NNSM>] (“[T]he system of publicly-appointed defense attorneys in Nevada’s rural counties is plagued with serious structural deficiencies that have created a patchwork approach to indigent representation and rendered access to justice a function of geography.”).

214. NEV. REV. STAT. § 260.010(1) (LexisNexis 2021).

215. *See* Mike Shoro, *ACLU Sues Nevada Over Indigent Defense in Rural Counties*, L.V. REV. J. (Nov. 2, 2017), <https://www.reviewjournal.com/news/politics-and-government/nevada/aclu-sues-nevada-over-indigent-defense-in-rural-counties/> [<https://perma.cc/FTM6-FS8P>].

216. *Davis Complaint*, *supra* note 213, at 4.

The complaint also alleged that the state's complete lack of assistance forced its rural counties to contract-out private attorneys in rural regions to represent indigent defendants.²¹⁷ This model, similar to that found in Texas,²¹⁸ is problematic for many of the same reasons found in the court-assigned defender model. First, contract attorneys are paid a flat fee regardless of the level of defense they provide.²¹⁹ Second, they are not compensated for additional expenses such as travel, a necessity in Nevada's expansive rural swatches.²²⁰ Third, contract attorneys are required to obtain court orders before paying investigators or expert witnesses,²²¹ which often acts as a barrier to actually obtaining these resources. And last, contract attorneys are highly dependent on the judiciary.²²²

The complaint used the story of Jason Enox to illustrate how Nevada failed its rural indigent defendants. Enox's appointed attorney contracted with the county for client appointments.²²³ Through this contract system, the attorney was paid a flat fee for each case they took on.²²⁴ According to the complaint, the court raised various concerns with the lawyer's quality of representation, even "openly chastis[ing] the attorney . . . and order[ing] the attorney to personally meet with Enox" in light of the attorney's failure to do so.²²⁵ Further, Enox's attorney never hired an investigator, despite the court's approval of \$1,500 for this specific purpose.²²⁶ Finally, during Enox's sentencing hearing, his counsel acknowledged that, "due to his case load," counsel had failed to meet with Enox prior to sentencing "except for a brief meeting immediately before the hearing."²²⁷

Davis in part prompted Nevada's legislature to create an independent oversight committee to uphold sufficient public defense standards throughout the state.²²⁸ In 2020, the ACLU entered into a settlement

217. *Id.*

218. *See supra* Part II.

219. *See Davis Complaint, supra* note 213, at 4. The complaint alleges that such flat fee "disincentivizes [private contracted attorneys] from devoting sufficient time to investigating or litigating their cases." *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 15.

224. *Id.*

225. *Id.*

226. *Id.* at 16.

227. *Id.* at 16–17.

228. *See* Mark Hernandez, *New Board on Indigent Defense Services Aims to Improve the Quality of Legal Defense for People Who Can't Afford a Lawyer*, NEV. INDEP. (Dec. 30, 2019, 2:00 AM), <https://thenevadaindependent.com/article/new-board-on-indigent-defense-services-aims-to->

agreement with Nevada's governing indigent defense delivery body, which established caseload limits, hired more attorneys in locales that cannot meet these limits, and eliminated flat fees that may incentivize taking cases and disposing of them as fast as possible.²²⁹

iii. Impact Litigation in Michigan

As *Davis* and *Hurrell-Harring* illustrate, legal challenges can give state legislatures the necessary "cover" to implement reforms that would otherwise be politically unpopular.²³⁰ A class action filed against the state of Michigan similarly impacted the state's response to indigent delivery. In 2007, the ACLU sued Michigan on behalf of five criminal defendants over its indigent defense delivery in *Duncan v. State*,²³¹ the outcome of this lawsuit arguably had an even clearer impact on legislative change than the lawsuits in New York and Nevada.²³²

After a county court and the Michigan Court of Appeals held that the ACLU should be given a chance to present the merits of *Duncan*, then-Governor Rick Snyder issued an executive order establishing a committee to promulgate methods to improve the state's indigent defense system.²³³ This committee issued a report that likened the state's indigent defense system to "an uncoordinated, 83-county patchwork quilt,"²³⁴ with only three out of the fifty-seven circuit courts in the state funding indigent defense at or above the national average.²³⁵ Following

improve-the-quality-of-legal-defense-for-people-who-cant-afford-a-lawyer [https://perma.cc/5Q52-H2XN].

229. Stipulated Consent Judgment at 11–13, 17, *Davis v. State* (Nev. Dist. Ct. Aug. 11, 2020) (No. 170C002271), <https://www.aclu.org/legal-document/settlement-consent-judgement> [https://perma.cc/Y5ZD-DSS7].

230. See Drinan, *supra* note 166, at 446.

231. *Reforming the Broken Indigent Defense System: Duncan v. Granholm*, ACLU MICH., [hereinafter *Reforming the Broken Indigent Defense System*] <https://www.aclumich.org/en/cases/duncan-v-granholm> [https://perma.cc/3L5G-FCFZ] (note that the name of the lawsuit eventually changed to "*Duncan v. State*") (last visited Mar. 13, 2023).

232. See Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1953 (2014) (stating that *Duncan* "served as a catalyst for legislative change.").

233. *Id.* at 1973–74.

234. MICH. ADVISORY COMM'N ON INDIGENT DEF., REPORT OF THE MICHIGAN ADVISORY COMMISSION ON INDIGENT DEFENSE 5–6 (2012), https://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf [https://perma.cc/2YAL-5F3U].

235. Elisabeth S. Moore, *Passed & Future: Critique of Michigan Indigent Defense Commission & the Successful Implementation of Their Minimum Standards*, 20 J.L. SOC'Y 191, 196 (2020).

this damning report, the state's Republican-led legislature²³⁶ enacted laws “to implement statewide reform that the ACLU and its coalition partners had been advocating for years.”²³⁷ These reforms included: (1) requiring defense counsel to take continuing legal education courses specific to representing indigent clients; (2) requiring defense counsel to conduct initial interviews with clients; (3) requiring defense counsel to retain experts if the defense theory requires such; and (4) assigning indigent defendants counsel no later than initial arraignments and requiring the presence of counsel at critical stages thereafter.²³⁸

Michigan's legislature then allocated \$84 million in the state's 2019 budget to support counties in meeting these standards.²³⁹ According to the Executive Director of the Michigan Indigent Defense Commission, Loren Khogali, the increased funding led to new defender offices, particularly in rural northern Michigan where counties have joined together to open regional offices.²⁴⁰

This allocation demonstrates that increased funding is necessary for the creation of regional defender offices that benefit rural portions of the state. In Michigan, investing in indigent defense also raised the quality of defense representation. Erin Van Campen, an attorney within Michigan's State Appellate Defender Office, said in an interview that the state's increased funding has allowed trial counsel wider latitude in utilizing “basic defense tools” such as consulting with experts.²⁴¹ This increased funding coincided with a Michigan Supreme Court case that held trial counsel can be considered ineffective if they fail to consult experts in appropriate cases.²⁴² “Increased expectations of defense coun-

236. 2013 *State and Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/documents/statevote/LegisControl_2013.pdf [https://perma.cc/SV7X-PSNR] (last visited Mar. 13, 2023).

237. *Reforming the Broken Indigent Defense System*, *supra* note 231.

238. *See Moore*, *supra* note 235, at 201–02. A fifth standard was recently enacted by the state government, requiring complete independence between defenders and the judiciary, including independence of the assignment of attorneys to defendants and payment for services. *Standards*, MICH. INDIGENT DEF. COMM'N, <https://michiganidc.gov/standards/#tab-id-5> [https://perma.cc/NL9J-DS5P] (last visited Mar. 13, 2023).

239. Justin A. Hinkley, *Michigan Lawmakers Approve \$84M to Give the Poor a Fair Fight in Court*, LANSING STATE J. (June 19, 2018, 10:13 AM), <https://www.lansingstatejournal.com/story/news/local/capitol/2018/06/19/michigan-approves-84-m-reform-public-defender-systems/706394002/> [https://perma.cc/4T47-YYXQ].

240. Stateside Staff, *Michigan Budgets \$84 Million in Legal Help for Poor Defendants. How Will it Be Used?*, MICH. RADIO, at 3:12 (June 28, 2018 at 4:05 PM), <https://www.michiganradio.org/law/2018-06-28/michigan-budgets-84-million-in-legal-help-for-poor-defendants-how-will-it-be-used> [https://perma.cc/L6QS-595T].

241. Zoom interview with Erin Van Campen, attorney at Mich. State App. Def. Office, (Mar. 11, 2021) [hereinafter Van Campen Interview].

242. *See People v. Ackley*, 870 N.W.2d 858, 859 (2015).

sel has come together with increased funding in a beautiful way for Michigan. . . . It's all dovetailed beautifully to enact change," Van Campen said.²⁴³

In sum, as *Hurrell-Harring*, *Davis*, and *Duncan* show that wide-scale, class action impact litigation can be an invaluable tool for reforming a state's indigent defense system, even if only to apply pressure on state political processes. All three of these lawsuits have one thing in common: they challenge states for leaving counties to their own devices in executing indigent defense delivery.²⁴⁴ As Part II of this Note and *Davis* underscore, this "patchwork approach" has particularly "plagued" rural counties with deficient indigent defense representation "and rendered access to justice a function of geography."²⁴⁵ The three complaints all alleged deficiencies such as: (1) inadequate training resources for defense counsel; (2) barriers court-assigned or contract defense counsel face in securing resources like investigators and experts because counsel must ask courts to compensate them; and (3) lack of judicial independence.²⁴⁶

B. Impact Litigation in the Context of Texas' Indigent Defense Delivery System

Scholars have already written about what makes impact litigation successful in reforming a state's indigent defense delivery system.²⁴⁷ The specifics of this success is outside the scope of this Note. Nevertheless, there are elements found in Texas' indigent defense delivery system, previously discussed in Part II, that should be highlighted in any potential future lawsuit.

There are structural shortcomings that *Hurrell-Harring*, *Davis*, and *Duncan* included as a part of their complaints that are also found in Texas, as discussed in Parts II and III. While TIDC does provide state-

243. Van Campen Interview, *supra* note 241.

244. See *Hurrell-Harring* Complaint, *supra* note 195, at 4. ("[New York] has abdicated its responsibility . . . and has left each of its sixty-two counties to establish, fund and administer their own public defense programs . . ."); *Davis* Complaint, *supra* note 213, at 4 ("Having abdicated its constitutional responsibility to provide defense of the poor, Nevada has left its rural counties to their own devices."); Complaint at 3, *Duncan v. Michigan* (Mich. Cir. Ct. Feb. 22, 2007) (No. 07-000242-CZ) [hereinafter *Duncan* Complaint], <https://www.aclu.org/legal-document/duncan-et-al-v-state-michigan-complaint> [<https://perma.cc/FQJ8-AGEB>] ("Michigan has abdicated its obligation . . . by . . . delegating to each of Michigan's 83 counties the responsibility for funding and administering trial-level indigent defense services within their borders, with little or no funding or fiscal or administrative oversight from the State.").

245. *Davis* Complaint, *supra* note 213, at 3.

246. See *id.* at 4, *Hurrell-Harring* Complaint, *supra* note 195, at 4; *Duncan* Complaint, *supra* note 244, at 4.

247. See Drinan, *supra* note 166, at 427.

wide oversight and funding to a spattering of offices, many rural counties in Texas fall through the cracks. Accordingly, impact litigation aimed at reforming Texas' indigent defense system—particularly in its rural counties—can still be productive. Such productivity requires that the legal claims highlight the themes also found in *Hurrell-Harring*, *Davis*, and *Duncan*: a lack of independence from the judiciary, lack of support services like investigators, warped financial incentives, and so on.

Even though TIDC exists, the issues born from Texas' "patchwork approach" to indigent defense delivery persist and are often exacerbated in the rural context. The private practice lawyer who only met with his indigent clients during open court and who falsely told his clients that plea deals were their only option is one symptom of a failed indigent defense system.²⁴⁸ Drew Willey, the attorney who was berated and stripped of his clients for "overwork[ing] cases," is another.²⁴⁹ Even in locales that have centralized offices, stakeholders such as local judges are allowed to occupy positions that dictate the offices' futures, as chief public defenders Michelle Moore and James McDermott articulated.²⁵⁰

Thus, any lawsuit filed in Texas—or similar states—can use these manifest structural deficiencies to demonstrate that the supervisory power and funding TIDC possesses is simply not enough. Potential lawsuits (and their potential settlements) should require that oversight boards of centralized offices be completely independent from local judges or any elected local citizens. They should empower TIDC to organize offices among counties or clusters of counties instead of allowing local elected officials to block or lobby against an office. Necessarily, any challenges to the state indigent defense systems should also strive for increased funding.

CONCLUSION

The court-assigned indigent defense model carries disadvantages that interact with spatial and cultural qualities of rural America to create distinctly negative effects on indigent defendants. Although innumerable zealous defense attorneys doubtlessly operate under the court-assigned model, this model's vast and weighty disincentives apply needless pressure on any well-meaning defender. In a rural context, the disincentives are often magnified. For example, the court-assigned model's dependency on the judiciary is worsened by a largely homogenous political makeup,

248. See discussion *supra* notes 63–68 and accompanying text.

249. See discussion *supra* notes 49–51 and accompanying text.

250. See discussion *supra* notes 180–85 and accompanying text.

which often focuses on appearing tough on crime. Rural locales' expansive nature negatively interacts with assigned attorneys' warped financial incentive to take on an overwhelming number of clients. Additionally, assigned attorneys are often discouraged from utilizing vital support services like investigators, who are already sparse in rural America.

To mitigate these disadvantages, states should allocate financial and political resources toward the establishment of rural regional public defender offices. Regional offices strengthen defender independence from judges, can infuse and excite legal talent in rural spaces which can help counteract the steady decline of lawyers in less populated locales, can attract integral in-house services such as investigators, and can foster a sense of community that freelance defenders sorely miss. Regional offices create a culture entirely absent from that of an assigned-counsel model, "such that public defenders are better able to provide zealous representation even in the face of the serious headwinds that blow in the faces of all lawyers who represent indigent defendants."²⁵¹

Residents of rural areas deserve the right to enjoy quality defense representation, which regional defender offices help achieve. Just as *Gideon* stands for the proposition that a quality defense should not be dependent on someone's wealth, zealous advocacy should not be dependent on someone's geography.

251. Brensike Primus, *supra* note 2, at 1775.